

Dec. 3, 2021

BY ELECTRONIC SUBMISSION

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Attn: FWS–HQ–MB–2021-0105
U.S. Fish and Wildlife Service
MS: PRB/3W
5275 Leesburg Pike
Falls Church, VA 22041-3803

**Re: Docket No. FWS–HQ–MB–2021-0105; Migratory Bird Permits; Authorizing the
Incidental Take of Migratory Birds**

Please accept the following comments submitted by the Southern Environmental Law Center (“SELC”) on behalf of the 35 undersigned organizations, which work to protect and restore the natural environment in the Southeast. We write in response to the Fish and Wildlife Service’s (“Service” or “FWS”) advance notice of proposed rulemaking (“ANPR”) and intent to prepare a National Environmental Policy Act (“NEPA”) document regarding incidental take under the Migratory Bird Treaty Act (“MBTA”). *See* 86 Fed. Reg. 54,667 (Oct. 4, 2021).

Over the past year and a half, SELC submitted several sets of comments on behalf of broad coalitions of Southeastern conservation organizations opposing the previous administration’s codification of an illegal interpretation of the MBTA that allowed incidental take of migratory birds.¹ Specifically, SELC submitted comments on the Service’s 2020 scoping notice and proposed rule removing protections against incidental take of migratory birds,² the Service’s subsequent Draft Environmental Impact Statement,³ and the Service’s Final Environmental Impact Statement.⁴ SELC additionally submitted comments in response to the Service’s February 9, 2021, notice delaying the effective date of the final January 7, 2021, rule,⁵

¹ Regulations Governing Take of Migratory Birds, 86 Fed. Reg. 1134 (Jan. 7, 2021) [hereinafter “January 7 rule”].

² Letter from SELC to FWS (Mar. 19, 2020), provided as Attachment 1 and available with all corresponding attachments at <https://www.regulations.gov/document?D=FWS-HQ-MB-2018-0090-8210> [hereinafter “Scoping Comments”].

³ Letter from SELC to FWS (July 20, 2020), provided as Attachment 2 and available with all corresponding attachments at <https://www.regulations.gov/document?D=FWS-HQ-MB-2018-0090-14170> [hereinafter “DEIS Comments”].

⁴ Letter from SELC to FWS (Dec. 28, 2020), provided as Attachment 3 (with corresponding attachments on file with FWS) [hereinafter “FEIS Comments”].

⁵ Letter from SELC to FWS (Mar. 1, 2021), provided as Attachment 4 and available with all corresponding attachments at <https://www.regulations.gov/comment/FWS-HQ-MB-2018-0090-18798>.

and the Service’s May 7, 2021, proposed revocation of the rule.⁶ We attach and incorporate those comments by reference here.

As explained in those previous comments, and as the Service recognizes in its ANPR and final revocation of the January 7 rule,⁷ the interpretation codified under that rule was arbitrary and capricious and contrary to the statutory text of the MBTA. The January 7 rule also suffered from a wide range of legal infirmities, including conflicts with U.S. treaty obligations and violations of NEPA and the Endangered Species Act (“ESA”). The rule also posed serious threats to migratory birds and their ecosystems in the South and elsewhere.

We applaud FWS’s return to its long-held and legally supported understanding that the MBTA does in fact prohibit incidental take. As we detail below, this interpretation of the MBTA is supported by law and essential to the conservation of migratory bird species, particularly as they face accelerating threats in the Southeast and worldwide. We welcome this opportunity to support the Service’s restoration of incidental take prohibitions, as well as the opportunity to provide input to guide the Service’s consideration of an incidental take permitting program that will comply with the conservation purposes of the MBTA. Our comments emphasize the following key points:

- Southeastern migratory birds and their habitats are suffering increasing threats in the face of the twin crises posed by climate change and a mass extinction.
- The MBTA prohibits incidental take and authorizes FWS to implement the proposed permitting program.
- An effective incidental take permitting program must prioritize migratory bird protection, account for overlap with other statutes, provide for robust public participation, and incorporate the best available technology.
- Individual permits should be prioritized for areas known to be particularly valuable to migrating birds, for birds of conservation concern, and for activities known to pose especially grave or complex threats.
- Mitigation and fee-in-lieu compensation may only be appropriate once all other protective measures have been exhausted or determined to be unavailable.
- FWS must prepare a full environmental impact statement (“EIS”) under NEPA to comprehensively assess and disclose the full scope of environmental impacts associated with the alternatives considered.

I. Migratory Birds and Their Southeastern Habitats Are at Risk.

The Southeast boasts an astounding level of species and habitat diversity. In 2016, the Southeast was recognized as one of only two Global Biodiversity Hotspots in the United States,⁸

⁶ Letter from SELC to FWS (June 7, 2021), provided as Attachment 5 and available with all corresponding attachments at <https://www.regulations.gov/comment/FWS-HQ-MB-2018-0090-19156>.

⁷ Migratory Bird Permits; Authorizing the Incidental Take of Migratory Birds, 86 Fed. Reg. 54,667 (Oct. 4, 2021); Regulations Governing Take of Migratory Birds; Revocation of Provisions, 86 Fed. Reg. 54,642 (Oct. 4, 2021).

⁸ Reed F. Noss, *Announcing the World’s 36th Biodiversity Hotspot: The North American Coastal Plain*, CRITICAL ECOSYSTEM PARTNERSHIP FUND (Feb. 18, 2016), <https://www.cepf.net/stories/announcing-worlds-36th-biodiversity-hotspot-north-american-coastal-plain>.

defined as areas with over 1,500 endemic plant species and having lost at least 70 percent of its natural habitat.⁹ The Southeast hosts 1,800 endemic plant species, and 85.5 percent of its natural habitat has been “highly altered or converted to anthropogenic land cover.”¹⁰ Still, the Southeast’s diverse and complex landscape contains the few remaining blocks of un-fragmented forest on the East Coast and has more wetlands remaining than anywhere else in the continental United States.¹¹

Ensuring durable protections for migratory birds is critical. The Southeast is home to a multitude of bird species protected by the MBTA; across the region, there are currently 247 species that receive MBTA protections.¹² These species range from the iconic red knot (*Calidris canutus*) and bald eagle (*Haliaeetus leucocephalus*) to lesser-known songbirds that provide important ecosystem services and support the outdoor recreation economy in our six-state region.¹³ North Carolina leads the Southeast region in number of MBTA species with 228, followed by Georgia with 220, South Carolina with 218, Alabama with 217, Virginia with 216, and Tennessee with 171. The Appalachian region, an area known for its mature forests and biodiversity, also supports “very high densities of forest breeding birds,” including neotropical songbirds.¹⁴ Our past comments explained how incidental take protections benefit these species, and makes recovery of already declining species cheaper, less burdensome, and more likely to succeed.¹⁵

A. Migratory Birds are Facing an Extinction Crisis.

The Southeast’s migratory bird populations and their habitats are as imperiled as they are diverse. As one of the fastest growing areas of the country,¹⁶ the Southeast currently faces many threats from human activities—including development, logging, agriculture, pollution, and poor land management, among others—and the impacts of human presence on habitats in the Southeast are increasingly being felt. As cities expand, urban sprawl is contributing significantly to the fragmentation and destruction of natural habitats in the region.¹⁷ Habitat fragmentation introduces a host of threats to species and their habitats, such as diminished water quality, interruption of predator-prey relationships, decreased availability of foraging habitat, and

⁹ *Id.*

¹⁰ *Id.*

¹¹ Nat. Res. Conservation Serv., *The Status and Recent Trends of Wetlands in the United States*, U.S. DEP’T OF AGRIC. (N.d.), www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb1262239.pdf (last visited Dec. 2, 2021).

¹² U.S. Fish & Wildlife Serv. (FWS), *Migratory Bird Treaty Act Protected Species (10.13 List)* (last updated Apr. 2020), <https://www.fws.gov/birds/management/managed-species/migratory-bird-treaty-act-protected-species.php>.

¹³ “The Southeast” is defined in this section to include the states of Virginia, North Carolina, South Carolina, Georgia, Alabama, and Tennessee.

¹⁴ Mark Anderson et al., *Southern Blue Ridge: An Analysis of Matrix Forests*, THE NATURE CONSERVANCY (Apr. 2012), https://www.conservationgateway.org/Files/Documents/FINAL_SBR_Forest_Block_Report_May2013.pdf, at 1.

¹⁵ See Scoping Comments, *supra* note 2, at 25.

¹⁶ See U.S. Census Bureau, Press Release, *Southern and Western Regions Experienced Rapid Growth This Decade*, U.S. DEP’T OF COMMERCE (May 21, 2020), <https://www.census.gov/newsroom/press-releases/2020/south-west-fastest-growing.html>.

¹⁷ Adam J. Terando et al., *The southern megalopolis: Using the past to predict the future of urban sprawl in the Southeast U.S.*, PLOS ONE (July 23, 2014).

decreased resilience from natural disasters.¹⁸ Densely developed areas may also facilitate the expansion of invasive species.¹⁹ This development often has an outsized impact in the Southeast due to the region's diverse and complex environmental resources.

Habitat destruction and alteration are driving the extinction of many species in the Southeast and worldwide.²⁰ In fact, the current global extinction rate is tens to hundreds of times higher than the background rate of extinction.²¹ This extinction crisis holds true for migratory birds. North American populations have plummeted by *three billion* birds in recent decades and are increasingly facing the real possibility of extirpation.²² For example, neotropical migrant bird species that depend on intact mature forests for breeding and those that utilize wetland and riparian environments in their life cycles are facing existential threats.²³ Forest loss and fragmentation pose serious threats to biodiversity and are contributing to population declines of forest birds.²⁴ Scientists have sounded the alarm about the “urgent need to address threats to avert future avifaunal collapse and associated loss of ecosystem integrity, function, and services.”²⁵ Current data suggest that avian declines will likely continue without immediate and targeted conservation action.²⁶

¹⁸ *Id.*

¹⁹ Sean B. Menke et al., *Urban areas may serve as habitat and corridors for dry-adapted, heat tolerant species; An example from ants*, URBAN ECOSYSTEMS (Sept. 9, 2010).

²⁰ NAT'L RSCH. COUNCIL, SCIENCE AND THE ENDANGERED SPECIES ACT 72 (1995) (“[T]here is no disagreement in the ecological literature about one fundamental relationship: sufficient loss of habitat will lead to species extinction”); . See, e.g., Stuart L. Pimm et al., *The biodiversity of species and their rates of extinction, distribution, and protection*, SCI. (May 30, 2014); David S. Wilcove et al., *Quantifying threats to imperiled species in the United States: Assessing the relative importance of habitat destruction, alien species, pollution, overexploitation, and disease*, BIOSCIENCE (Aug. 1998).

²¹ INTERGOVERNMENTAL SCI.-POLICY PLATFORM ON BIODIVERSITY & ECOSYSTEM SERV., SUMMARY FOR POLICYMAKERS OF THE GLOBAL ASSESSMENT REPORT ON BIODIVERSITY AND ECOSYSTEM SERVICES (Sandra Díaz et al. eds., 2019), https://ipbes.net/sites/default/files/2020-02/ipbes_global_assessment_report_summary_for_policymakers_en.pdf.

²² E.g., Elizabeth Pennisi, *Three billion North American birds have vanished since 1970, surveys show*, SCI. (Sept. 19, 2019), <https://www.sciencemag.org/news/2019/09/three-billion-north-american-birds-have-vanished-1970-surveys-show>; Kenneth V. Rosenberg et al., *Decline of the North American avifauna*, SCI. (Oct. 4, 2019).

²³ See Mark Anderson et al., *supra* note 14; see also Heather A. Lumpkin & Scott M. Pearson, *Effects of exurban development and temperature on bird species in the Southern Appalachians*, CONSERVATION BIOLOGY (2013) (finding that as exurban development expands in the southern Appalachians, interior forest species and neotropical migrants are likely to decline).

²⁴ See, e.g., Stuart L. Pimm & Robert A. Askins, *Forest losses predict bird extinctions in Eastern North America*, PROCEEDINGS NAT'L ACAD. SCI. (Sept. 26, 1995); Sharon K. Collinge, *Ecological consequences of habitat fragmentation: Implications for landscape architecture and planning*, LANDSCAPE & URBAN PLANNING (Oct. 1996); Kurt H. Riitters et al., *Fragmentation of continental United States forests*, ECOSYSTEMS (Dec. 2002); Robert A. Askins, *Open corridors in a heavily forested landscape: Impact on shrubland and forest-interior birds*, WILDLIFE SOC'Y BULLETIN (1994); Scott K. Robinson et al., *Regional forest fragmentation and the nesting success of migratory birds*, SCI. (Mar. 31, 1995); Thierry Boulinier et al., *Forest fragmentation and bird community dynamics: Inference at regional scales*, ECOLOGY (Apr. 1, 2001).

²⁵ Rosenberg et al., *supra* note 22, at 1.

²⁶ *Id.*

Of particular concern are species that FWS has already listed as threatened or endangered under the ESA or has included in its list of Birds of Conservation Concern.²⁷ In the Southeast, close to 40 percent of migratory bird species (98 of 247) are listed as Birds of Conservation Concern, and nine of those are listed as threatened or endangered under the ESA.²⁸ For example, the Cerulean warbler, a Bird of Conservation Concern with core breeding habitat in the Cumberland Mountains of Tennessee and Kentucky, is threatened by fracking activity and has been experiencing increased population declines in recent years.²⁹

B. Climate Change Will Increase Threats to Migratory Birds and Their Habitats.

To further complicate these issues, scientists predict that climate change will significantly transform habitats throughout the Southeast in the near future, introducing additional threats to migratory birds in the region.³⁰ The Intergovernmental Panel on Climate Change reports that human activities are estimated to have already caused approximately 1.0°C (1.8°F) of global warming above pre-industrial levels, and that global warming is likely to reach 1.5°C (2.7°F) between 2030 and 2052 if warming continues at the current rate.³¹ Approximately 5 percent of global terrestrial land area may be expected to completely change ecosystem types (e.g., from temperate forest to arid savanna) at this level of warming.³² Development and urban sprawl in the Southeast will almost certainly hamper the ability of migratory bird populations to move in response to these threats.³³

Climate change will lead to habitat degradation and loss in myriad ways, including: higher temperatures, extreme precipitation, increased drought, more frequent and intense wildfires, rising sea levels, increased flooding, higher invasive species prevalence, shifting ocean currents, and increased storm frequency and intensity.³⁴ The Southeast will likely see high levels of biodiversity loss and large shifts in species' ranges as a result of these threats.³⁵

Migratory bird population declines from these climate change-driven threats are of significant concern. Studies have indicated that birds will be particularly affected by the

²⁷ Birds of Conservation Concern are species of “migratory nongame birds that without additional conservation actions are likely to become candidates for listing under the [ESA].” U.S. FWS, BIRDS OF CONSERVATION CONCERN (2021), <https://www.fws.gov/migratorybirds/pdf/management/birds-of-conservation-concern-2021.pdf>.

²⁸ This information was compiled by cross-referencing FWS’s Birds of Conservation Concern list, *id.*, with the full list of MBTA species, *supra* note 12. The full list of overlapping species is available upon request.

²⁹ See Scoping Comments at 17.

³⁰ Jennifer Costanza et al., *Assessing climate-sensitive ecosystems in the southeastern United States*, U.S. GEOLOGICAL SURVEY (2016), <https://pubs.er.usgs.gov/publication/ofr20161073>.

³¹ Intergovernmental Panel on Climate Change, *2018: Summary for Policymakers*, in SPECIAL REPORT: GLOBAL WARMING OF 1.5°C (Valérie Masson-Delmotte et al. eds., 2018), <https://www.ipcc.ch/sr15/chapter/spm/>.

³² *Id.* at 10.

³³ Lee Hannah, *Climate change, connectivity, and conservation success*, CONSERVATION BIOLOGY (Dec. 2011).

³⁴ See Scoping Comments at 28 (detailing threats from climate change in the Southeast).

³⁵ See, e.g., Lynne Carter et al., *Southeast*, in IMPACTS, RISKS, & ADAPTATION IN THE UNITED STATES: FOURTH NATIONAL CLIMATE ASSESSMENT, VOL. II, 743–808 (David Reidmiller et al. eds., 2018); Emma P. Gómez-Ruiz & Thomas E. Lacher, Jr., *Climate change, range shifts, and the disruption of a pollinator-plant complex*, SCI. REPORTS (Oct. 1, 2019).

changing climate.³⁶ Scientists predict that 56 percent of the roughly 250 Southeastern migratory bird species are moderately or highly vulnerable to climate change.³⁷ Of these, over 100 will lose more than half of their range under a worst-case warming scenario.³⁸ These changes may be felt disproportionately in certain regions, as climate change impacts interact with one another and with other threats. For example, in coastal regions of the Southeast, between 16 and 60 percent of all current nesting beach habitat for shorebirds is projected to be more vulnerable to erosion due to sea level rise by 2030.³⁹ Additionally, upward elevational shifts in bird distributions in the Appalachian region, in response to warming climates,⁴⁰ is likely to increase competition for already rare habitat.⁴¹

C. Declines in Migratory Bird Populations Threaten Important Ecosystem Services

The costs of habitat loss and climate change will impact not only migratory birds themselves, but also the ecosystems, economies, and communities that depend on a healthy environment. Thriving migratory bird populations are essential to healthy and functioning ecosystems. Significant losses in avian populations have repercussions across ecosystems: “Declines in abundance can degrade ecosystem integrity, reducing vital ecological, evolutionary, economic, and social services that organisms provide to their environment.”⁴²

Migratory birds perform important ecosystem services, which in turn have impacts on air and water quality, as well as soils and floodplains.⁴³ For example, healthy bird populations facilitate pest control, seed dispersal, pollination, and other processes that benefit ecosystems. In addition, many bird species are relatively easy to study and serve as important indicators of overall environmental health. Recreational activities associated with birds, including hunting and ecotourism, also provide significant economic benefits.⁴⁴

In sum, migratory bird populations are in steep decline from multiple stressors, and many are already at risk of extirpation and face an uphill road to recovery—concerns that in turn threaten ecosystem integrity. The Service’s proposal presents an important opportunity to mitigate these threats and potentially slow or reverse the decline of certain migratory bird species, providing the much-needed broad protections envisioned by the MBTA.

³⁶ Michela Pacifici et al., *Species’ traits influenced their response to recent climate change*, NATURE CLIMATE CHANGE (Feb. 13, 2017).

³⁷ See Chad B. Wilsey et al., *Survival by degrees: 389 bird species on the brink*, AUDUBON (2019), <https://www.audubon.org/sites/default/files/climatereport-2019-english-lowres.pdf>.

³⁸ *Id.*

³⁹ Betsy von Holle et al., *Effects of future sea level rise on coastal habitat*, J. WILDLIFE MGMT. (Feb. 3, 2019).

⁴⁰ Timothy R. Duclos et al., *Direct and indirect effects of climate on bird abundance along elevation gradients in the Northern Appalachian mountains*, BIODIVERSITY RSCH. (July 25, 2019); Jeremy J. Kirchman & Allison E. Van Keuren, *Altitudinal range shifts of birds at the southern periphery of the boreal forest: 40 years of change in the Adirondack Mountains*, WILSON J. ORNITHOLOGY (Dec. 1, 2017).

⁴¹ See Lumpkin & Pearson, *supra* note 23 (finding that the negative effects of forest loss may be exacerbated in higher elevation habitats, where climate sensitive species—including forest interior obligate species—are more common).

⁴² Rosenberg et al., *supra* note 22, at 1 (citations omitted).

⁴³ See Scoping Comments, *supra* note 2, at 28 (detailing ecosystem services performed by birds).

⁴⁴ See *id.* at 27 (cataloging economic impact of birders and hunters).

II. Incidental Take is Prohibited by the MBTA.

The Migratory Bird Treaty Act makes it “unlawful at any time, by any means or in any manner, to . . . take, capture, [or] kill . . . any migratory bird, any part, nest, or egg of any such bird.” 16 U.S.C. § 703(a). It is a “conservation statute[] designed to prevent the destruction of certain species of birds.” *Andrus v. Allard*, 444 U.S. 51, 52 (1979). As discussed below and explained in greater detail in past comments, the plain text of the Act, its legislative history, and subsequent bilateral treaties make clear that “take” prohibited under the statute includes incidental take. It is also clear that incidental take poses a severe threat to the law’s core conservation purposes.⁴⁵

A. The Plain Wording of the MBTA Prohibits Incidental Take.

On its face, the MBTA prohibits take of protected birds “at any time, by any means or in any manner.” 16 U.S.C. § 703(a) (emphasis added). This language is “unqualified.” *Humane Soc. of the U.S. v. Glickman*, 217 F.3d 882, 885 (D.C. Cir. 2000) (finding USDA’s failure to obtain a permit before killing protected birds violated the MBTA). Consequently, courts have found that a violation of § 703 does not require specific intent. *See United States v. Corrow*, 119 F.3d 796, 805 (10th Cir. 1997) (listing cases). The plain language of the statute unambiguously encompasses incidental as well as intentional takes, captures, and kills. *Nat. Res. Def. Council, Inc. v. U.S. Dep’t of the Interior*, 478 F. Supp. 3d 469, 485 (S.D.N.Y. 2020) (finding the prohibition on incidental take unambiguous).

B. Congressional Intent Confirms the MBTA Prohibits Incidental Take of Covered Birds.

The MBTA implements several treaties between the U.S. and partner nations negotiated and signed over many decades. As such, the statute’s meaning can be further ascertained from how Congress chose to amend (or not amend) the law as it was implemented under these treaties. In the century since the MBTA’s enactment, each time Congress has revisited the MBTA, it has confirmed that the Act’s plain text means what it says: the MBTA prohibits take “at any time, by any means or in any manner.”⁴⁶ 16 U.S.C. § 703(a).

Congress first amended the prohibition on take in 1936 by moving the phrases “at any time” and “in any manner” to the front of the list of proscribed acts, and adding the phrase “by any means.” *NRDC, Inc. v. U.S. Dep’t of Int.*, 478 F. Supp. 3d 469, 472 (S.D.N.Y. 2020) (citing Pub. L. No. 74-728, § 3, 49 Stat. 1555, 1556). This amendment emphasized that the statute prohibited any manner of taking or killing migratory birds by any means. *Id.* In 1986 and 1998, Congress also amended other parts of the MBTA to require proof of subjective intent by the alleged violator in limited instances, namely for prosecutions under the Act’s felony provisions

⁴⁵ Recent Fish & Wildlife Service estimates reflect that about four times as many birds are killed by industrial activities as by intentional take. *See* Government of Canada Response to Request for Public Comments on Regulations Governing Take of Migratory Birds; Delay of Effective Date (Feb. 26, 2021) [hereinafter “Canada Comments”], at 3 (citing EIS table 3.2), available at <https://www.regulations.gov/comment/FWS-HQ-MB-2018-0090-17877>.

⁴⁶ *See* Scoping Comments, *supra* note 2, at 4–5.

and enforcement related to baiting—requirements that would be meaningless if liability for take already required subjective intent.⁴⁷ Tellingly, Congress did not make a similar update to § 703(a) at either of those times; nor has it ever modified that section to require any level of purposeful intent for prosecution under the MBTA. In addition, Congress amended the statute on multiple occasions to reflect updated treaty obligations, and it did not use any of those opportunities to restrict the scope of its prohibitions.⁴⁸

In 2002, Congress again amended the MBTA to temporarily relieve certain military readiness activities from liability for incidental take under the MBTA. Pub. L. No. 107-314 § 315(a). This, too, would have been superfluous if the MBTA were not already understood to generally prohibit incidental take of protected migratory birds. Any contrary reading of this or the 1986 or 1998 amendments would thus violate “one of the most basic interpretive canons, that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.” *Corley v. U.S.*, 556 U.S. 303, 315 (2009) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)) (internal marks omitted).

For decades, the Department of the Interior publicly interpreted the Act to prohibit incidental take and imposed sizable penalties on certain actors whose activities led to the deaths of protected birds.⁴⁹ Against a backdrop in which both the judicial⁵⁰ and executive branches of the federal government have interpreted the MBTA to prohibit incidental take, Congress has had ample opportunity to correct any interpretations contrary to its intent. Instead, Congress’s subsequent amendments to the MBTA only further confirm that the statute means what it says: take is prohibited “at any time, by any means or in any manner.”

C. The Treaties Implemented by the MBTA Prohibit Incidental Take.

U.S. treaty partners have long indicated that they understand the treaties underlying the MBTA to prohibit incidental take. The views of U.S. treaty partners as to the treaty’s requirements are viewed as probative of the implementing statute’s scope. *See Abbott v. Abbott*, 560 U.S. 1, 16 (2010). And in resolving ambiguities, the Supreme Court has said that the interests of reciprocity and comity tip the balance in favor of following our treaty partners and adopting the “more liberal construction” of our treaty obligations. *Factor v. Laubenheimer*, 290 U.S. 276, 293–94 (1933).⁵¹ In response to the Trump administration’s attempts to roll back the

⁴⁷ *Id.* at 4.

⁴⁸ *Id.* at 5–6; *Id.* at 6 n.22 (describing amendments to Canada and Mexico conventions).

⁴⁹ *See, e.g.*, Solicitor’s Opinion M-37041 (Jan. 10, 2017), 12–14 (discussing past enforcement and development of practices to reduce incidental take).

⁵⁰ *See, e.g.*, *Protect Our Cmty’s Found. v. Jewell*, 825 F.3d 571, 585–87 (9th Cir. 2016); *Turtle Island Restoration Network v. Dep’t of Commerce*, 878 F.3d 725, 733–35 (9th Cir. 2017) (analyzing MBTA incidental take permit).

⁵¹ The *Factor* Court expanded on this principle as follows: “In choosing between conflicting interpretations of a treaty obligation, a narrow and restricted construction is to be avoided as not consonant with the principles deemed controlling in the interpretation of international agreements. Considerations which should govern the diplomatic relations between nations, and the good faith of treaties, as well, require that their obligations should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them. For that reason if a treaty fairly admits of two constructions, one restricting the rights which may be claimed under it, and the other enlarging it, the more liberal construction is to be preferred.” 290 U.S. at 293–94.

MBTA’s incidental take protections, Canada affirmed its view⁵² that “efforts to mitigate incidental take mortality [are] at the core of the MBTA Convention signed by both countries.”⁵³ Canada’s Minister of Natural Resources released a public statement to the same effect.⁵⁴

Treaty amendments and subsequent treaties with Japan⁵⁵ and Russia,⁵⁶ implemented as amendments to the MBTA,⁵⁷ likewise sought to address threats to migratory birds, including those posed by incidental take, through measures that would be nonsensical or inoperative if they were limited to addressing intentional take.⁵⁸ These measures seek to protect migratory birds by, for instance, preventing “damage [to birds] resulting from pollution of the seas,” Japan Convention Art. VI(a), prohibiting “the disturbance of nesting colonies,” and “undertak[ing] measures necessary to protect and enhance the environment of migratory birds and to prevent and abate the pollution or detrimental alteration of that environment.” Russia Convention Art. IV, Section 1. These provisions likewise reflect a shared understanding that the treaties underlying the MBTA are intended to also address incidental take.

D. Multiple Courts Have Confirmed that the MBTA Prohibits Incidental Take.

The majority of courts to confront the issue have affirmed that the Act’s prohibitions extend to incidental take.⁵⁹ Most recently, in *Nat Res. Def. Council, Inc. v. U.S. Dep’t of Int.*, 478 F. Supp. 3d 469 (S.D.N.Y. 2020), conservation groups and eight state attorneys general⁶⁰ successfully challenged the Trump administration’s attempt to exclude incidental take from the MBTA. Recognizing the Trump interpretation as “a recent departure from the agency’s prior

⁵² The MBTA first implemented the United States’ obligations under a 1916 treaty with Canada. Convention Between the United States and Great Britain for the Protection of Migratory Birds, U.S.–Gr. Brit., Aug. 16, 1916, 39 Stat. 1702 (ratified Dec. 7, 1916). That treaty was not amended until 1995. Protocol between the Government of the United States and the Government of Canada Amending the 1916 Convention between the United Kingdom and the United States of America for the protection of Migratory Birds, Sen. Treaty Doc. 104-28 (Dec. 14, 1995) (“Canada Protocol”). When, as in this instance, treaty parties have had ample time and opportunity to observe each other’s conduct, presumably any fundamental misunderstanding of the treaty’s reach would have long since been corrected, or at least objected to.

⁵³ U.S. Fish & Wildlife Serv., Record of Decision, Regulations Governing Take of Migratory Birds, Final Environmental Impact Statement (Dec. 31, 2020), at 7 (paraphrasing Canada Comments, *supra* note 45).

⁵⁴ Statement of Jonathan Wilkinson, Minister of Environment and Climate Change (Dec. 18, 2020), “Minister Wilkinson expresses concern over proposed regulatory changes to the United States’ Migratory Bird Treaty Act,” <https://www.canada.ca/en/environment-climate-change/news/2020/12/minister-wilkinson-expresses-concern-over-proposed-regulatory-changes-to-the-united-states-migratory-bird-treaty-act.html> [hereinafter “Wilkinson Statement”].

⁵⁵ Convention between the Government of the United States and the Government of Japan for the Protection of Migratory birds and Birds in Danger of Extinction, and their Environment, 25 U.S.T. 3329, T.I.A.S. No. 7990 (Mar. 4, 1972) (“Japan Convention”).

⁵⁶ Convention between the United States of America and the Union of Soviet Socialist Republics Concerning the Conservation of Migratory Birds and their Environment, T.I.A.S. No. 9073 (Nov. 19, 1976) (“Russia Convention”).

⁵⁷ Pub. L. No. 93-300, § 1, 88 Stat. 190 (1974); Pub. L. No. 101-233, § 15, 103 Stat. 1977 (1989).

⁵⁸ Scoping Comments, *supra* note 2, at 5–7.

⁵⁹ *Id.* at 2–3 n.6 (explaining how a “circuit split” was manufactured by conflating holdings declining to punish *indirect* take under certain circumstances with the proposition that they also prohibited *incidental* take).

⁶⁰ Lawsuits filed by other groups, including the Audubon Society and a coalition of eight state attorneys general, were consolidated into *NRDC* by the Southern District of New York. *Nat. Res. Def. Council, Inc. et al v. U.S. Dep’t of Interior et al*, No. 18-cv-04596, ECF No. 53 (S.D.N.Y. July 31, 2019).

longstanding position and enforcement practices,” the court rejected it as “an unpersuasive interpretation of the MBTA’s unambiguous prohibition on killing protected birds.” *NRDC*, 478 F. Supp. 3d at 489, 480.

The Fifth Circuit is the only federal court of appeals to conclude that incidental take is not prohibited by the MBTA. *United States v. Citgo Petrol. Corp.*, 801 F.3d 477 (5th Cir. 2015). As set forth in our response to the Trump administration’s adoption of this view, the court misread the statute and its history.⁶¹ Moreover, in purporting to “agree with the Eighth and Ninth circuits that a ‘taking’ is limited to deliberate acts done directly *and intentionally* to migratory birds,” the Fifth Circuit appears to have misread those circuits’ cases, which contain no such holding. *Id.* at 488–89 (emphasis added). Both cases that the Fifth Circuit cites deal only with the directness of take, not whether it is intentional versus incidental. In fact, neither case so much as mentions “incidental take.” The Ninth Circuit case, *Seattle Audubon Soc’y v. Evans*, 952 F.2d 297 (9th Cir. 1991), dealt with *indirect* taking that occurs when habitat is destroyed, not *incidental* takes—which may be direct or indirect—writ large. *Id.* at 303 (holding that “taking” under the MBTA, unlike the ESA, does not include habitat destruction). The Eighth Circuit case simply cites *Seattle Audubon* in deciding not to apply the MBTA to hold actors strictly liable for “conduct, such as timber harvesting, that indirectly results in the death of migratory birds.” *Newton County Wildlife Ass’n v. U.S. Forest Serv.*, 113 F.3d 110, 115 (8th Cir. 1997). Thus, contrary to the Fifth Circuit’s characterization, neither case addressed incidental takes.

E. FWS Should Reaffirm that Only Proximately Caused Incidental Take is Prohibited Under the MBTA.

While the broad language of the MBTA prohibits all direct take—incidental or intentional—the concept of proximate cause limits the reach of the Act. *United States v. Apollo Energies, Inc.*, 611 F.3d 679, 690 (finding that “take” as defined in the MBTA only extends to proximately caused take). Proximate cause generally requires that a cognizable “injury be one which might be reasonably anticipated or foreseen.” *Id.* (quoting Black’s Law Dictionary); *see also Babbitt v. Sweet Home Chapter of Cmty for a Great Or.*, 515 U.S. 687, 713 (1995) (O’Connor, J., concurring) (“Proximate causation depends to a great extent on considerations of the fairness of imposing liability for remote consequences.”). The doctrine supposes that actors should only be liable for those consequences of their actions that were reasonably foreseeable, if not necessarily expected, such that they would inform how actors structure their behavior. Restatement 2d of Torts § 281, cmt. g. Limiting incidental take by the concept of proximate cause thus limits liability to, as Canada put it, only those activities that result in “the unintentional but predictable killing of birds or destruction of their nests or eggs.”⁶²

In the rulemaking, FWS should provide additional clarity regarding which actions may be “predictable” causes of incidental take as opposed to those which would not be considered as

⁶¹ *See* Scoping Comments, *supra* note 2, at 3. FWS has recognized many of these shortcomings. *See* 86 Fed. Reg. at 54,642, 54,644-45.

⁶² Wilkinson Statement, *supra* note 54.

proximate, “predictable” causes—for instance, incidental take that may occur when driving an automobile.⁶³

III. Recommendations for Structuring a Framework for Regulating Incidental Take.

FWS has identified two objectives for its rulemaking: to “better protect migratory bird populations and provide more certainty for the regulated public.” 86 Fed. Reg. at 54,667. While we agree that regulatory certainty is desirable, any incidental take authorizing program must first and foremost be designed to achieve the core purpose of the MBTA, which is exclusively the conservation of migratory birds. *See Andrus v. Allard*, 444 U.S. 51, 52 (1979). To that end and as described in greater detail below, any permit program should be based on the best available scientific and technological standards and incorporate maximally protective mitigation measures. It is also critical that FWS evaluate the effectiveness of such measures at regular intervals, based on the achievement of certain, measurable outcomes⁶⁴ for covered species—whether in terms of population stability or recovery—to ensure that the permit process does not become an exercise in “box-checking.”

We understand that FWS hopes to leverage the proposed general permit process to make optimal use of the agency’s limited capacity, “reserv[ing] the use of specific permits to limited situations where case-by-case evaluation and customization is necessary and appropriate.” 86 Fed. Reg. at 54,669. FWS will have to make trade-offs between site-specific review and achieving sufficient breadth of permit coverage to protect migratory birds at the population level. But that balance point must tip firmly in favor of protecting migratory birds.

The Service also requests public input “on whether it should consider a compensatory mitigation approach, where mitigation is developed and implemented specific to a given project or activity,” or, “a general conservation fee structure, where fees go to a specific dedicated fund.” 86 Fed. Reg. at 54,670. FWS must ensure such compensatory mitigation does not allow for the avoidable incidental taking of birds in exchange for a fee or purchasing off-site habitat.

As an initial matter, we recommend FWS follow the stepwise mitigation hierarchy approach, which first *avoids*, and then *minimizes* and *mitigates* negative impacts where avoidance is not possible. This approach is broadly viewed as the best practice for balancing conservation needs and development priorities. Careful consideration of infrastructure siting and or seasonal restrictions on operations is essential to avoid impacts to the maximum extent possible. This hierarchy advises that an entity first work to avoid exposure to impacts; thereafter minimize and mitigate impacts where avoidance is not possible; then, as a last resort, restore and offset negative impacts that remain.⁶⁵

⁶³ Here, we distinguish between the act of driving and construction and operation of roads and highways. Take of migratory birds is foreseeable in the latter instance.

⁶⁴ In instances when it may be too difficult to disaggregate impacts as a result of a permittee’s actions from other causes of population change, FWS could consider using “take reduction” as the standard for assessing compliance or progress toward it (perhaps akin to the Marine Mammal Protection Act § 118, 16 U.S.C. § 1387, which, in addition to setting population-level conservation targets, provides for “take reduction plans” and “take reduction teams”).

⁶⁵ Cross-Sector Biodiversity Initiative, *Framework for Guidance on Operationalizing the Biodiversity Mitigation Hierarchy* (Dec. 2013), <http://www.csbi.org.uk/wp-content/uploads/2017/10/Mitigation-Hierarchy-Executive-summary-and-Overview.pdf>.

With this in mind, any compensatory mitigation or fee structure approach should be in addition to, and not in lieu of, avoidance and best management practice measures to reduce incidental take in the first instance. FWS should not issue an incidental take permit where the recipient merely offsets expected impacts to birds through mitigation *unless* the recipient has taken all reasonable measures to reduce those impacts in the first instance. Mitigation in the form of habitat protection, for example, would have limited utility if the permitted project or activity results in the killing of birds that would benefit from such habitat. Additionally, any such potential compensatory mitigation would need to have appropriate monitoring safeguards to ensure that the set-aside habitat would be appropriately maintained and protected for its intended purpose.

In general, we support the concept of authorizing some activities through general permits and others through individual permits. The following subsections discuss recommendations that are applicable to both permitting schemes.

A. Any Permitting Program Should Cover the Full Suite of Activities Prohibited Under the MBTA.

As noted above, the MBTA makes unlawful not only the take of “any migratory bird” but also the direct take of any “nest, or egg of any such bird.” 16 U.S.C. § 703(a). Any permitting program designed by FWS should cover take of birds, nests, and eggs. This requires the inclusion in permitting decisions of some activities reasonably certain to take nests and eggs—such as commercial forest clearing—even if those actions may not lead to individual bird deaths or takes. To be clear, we understand that FWS may not require incidental take permits for activities that only *indirectly* take migratory birds, such as habitat destruction, *see Newton Cty. Wildlife Ass’n v. U.S. Forest Serv.*, 113 F.3d 110, 115 (8th Cir. 1997), but FWS should require a permit when that activity is reasonably certain to also cause direct take of birds, nests, or eggs.

B. The Permitting Program Should Facilitate Public and Agency Involvement.

At minimum, FWS and the public should be involved at three relevant stages during the permitting process: issuance of individual permits, issuance of general permits, and applications for coverage under general permits. Issuance of general and individual permits should be accompanied by NEPA analysis and formal public comment periods. As noted below, it seems likely that the analysis and comment period for many individual permits can be collapsed into similar processes that are otherwise required.

Public involvement is critical at these stages because the public is often best equipped to assess site-specific impacts to migratory birds. Regional conservation groups and bird enthusiasts often have detailed knowledge about when and where to expect certain migratory species, and they can help guide the agency and permit applicants with respect to site- and region-specific solutions that may not otherwise have been apparent. The agency should solicit and use this input to tailor conditions as necessary.

We oppose the suggestion in the ANPR that general permits universally “would be effective upon submission of the [coverage] request and would not require Service staff review prior to being effective.” 86 Fed. Reg. at 54,669. General permits for activities that may result

in take in excess of a specified threshold should be reviewed by agency staff to ensure compliance with permit terms. The public and agency should be notified when an applicant seeks coverage under a general permit, and all applications for general permit coverage should be made publicly available online to facilitate public review, even if no project-specific comment period is offered. These notifications will help keep FWS accountable to the public in determining whether a proposed activity actually qualifies for the permit and can meet its conditions. And they will help ensure the permitting process yields true “permits” rather than merely functioning as a registry.

Although the MBTA does not permit citizen suits,⁶⁶ FWS should also consider adding an administrative appeal provision to its permitting program to enable members of the public to challenge a permit decision if they believe FWS has improperly granted, extended, or failed to rescind a permit. In any event, the Service should affirm in its rulemaking that project-specific use of a general permit—whether implicitly or explicitly granted—is a final agency action subject to review under the Administrative Procedure Act. Assuming that most permit applicants will abide by the terms of the permit and requirements of the MBTA, these tools, while necessary, will be seldom used. But they are important: Public review and accountability is particularly critical if FWS intends to forego review of applications for coverage under general permits. Decisions to authorize by individual permit an activity that potentially qualifies for a general permit should be left to agency discretion.

C. The Permitting Program Should Incorporate A Best Available Technology Requirement for Operational Best Management Practices.

One of the key pieces of information FWS solicits in its ANPR is “input on what beneficial practices might be appropriate to require for different authorization types.” 86 Fed. Reg. at 54,699. Proper project siting will often be the most effective way to minimize incidental take of migratory birds. Besides siting considerations, FWS should incorporate in both general and individual permits a “best available technology” requirement for operational Best Management Practices (“BMPs”) to ensure that permittees implement the most effective technologies available to avoid or minimize take and to account for technological improvements. To that end, FWS should consider routinely surveying and publishing a list of best practices for specific industries, similar to the voluntary guidelines it already publishes.⁶⁷ This process could be similar to the “best available technology” requirements under the Clean Water Act, 33 U.S.C. § 1311(b)(2)(A), and the Clean Air Act, 42 U.S.C. § 7479(3).⁶⁸ The list of best practices would form the baseline expectation for general permits and could be added to or altered based on site-specific conditions in individual permits.

We recommend that FWS commit to revisiting the list of best practices for the general permitting program at regular intervals to coincide with the reissuance of general permits.⁶⁹ FWS could also consider convening a standing committee to evaluate these practices. The

⁶⁶ *Contra* Clean Water Act, 33 U.S.C. § 1365; Clean Air Act, 42 U.S.C. § 7604.

⁶⁷ *See infra* notes 82–90, listing activities for which FWS already publishes guidelines to reduce take.

⁶⁸ Similarly, FWS could also look to the “best available science” standard the agency is held to for decisions under the ESA. *See* 16 U.S.C. §§ 1533(b)(1)(A), (b)(2), (b)(3); *id.* at § 1536(a)(2). The key is to ensure the agency is regularly reviewing “best available” means of reducing incidental take of migratory birds.

⁶⁹ Below we propose that general permits be renewed every five years.

committee could consist of members from government agencies, regulated industries, environmental nonprofits, and academia. Such a committee would make “best practice” recommendations for FWS’s approval and thus potentially alleviate some of the burden on FWS. Regardless of who compiles it, we recommend that any such list of “best practices” be published at least two years in advance of general permit renewals to allow sufficient time for incorporation in the general permit reissuance process. Any advances in technologies that occur between the renewal of general permits and the formal identification of best practices could still be considered in individual permits.

If FWS decides that “best available technology” should be defined in terms of cost-justification rather than by whatever technology avoids the most take,⁷⁰ any cost-benefit analysis undertaken to set best available technology standards should thoroughly account for the cost benefits of preserving migratory birds, which provide valuable ecosystem services and direct economic impacts in the form of money spent by birders and hunters.⁷¹

D. Permitting Requirements Should be Integrated into Environmental Analysis Processes Required Under Other Statutes.

In its 2015 notice of intent to undertake a programmatic EIS for incidental take permitting, FWS suggested that it hoped to “combin[e] environmental reviews for [MBTA] permits with reviews being conducted for other Federal permits or authorizations.” 80 Fed. Reg. at 30,035. Notably, Executive Order 13,186 already directs “that environmental analyses of Federal actions required by NEPA or other established environmental review processes evaluate the effects of actions and agency plans on migratory birds.”⁷² We agree that FWS should seek to integrate MBTA permit conditions into existing environmental analysis processes wherever possible. Active FWS involvement in any such NEPA analysis will be important to assure that migratory bird impacts are adequately considered. Integrating these processes will not only save agency time and effort—it will also improve the quality of the resulting analyses.

In many cases, applicants for an incidental take permit under the MBTA may also seek authorization for incidental take under Sections 7 or 10 of the ESA, 16 U.S.C. §§ 1536 (applying to federal agencies), 1539 (applying to private applicants). This will likely result in one or more of the following scenarios:

- Project requires a general MBTA permit and site-specific ESA approval: Where the project qualifies for a general permit under the MBTA, the MBTA and ESA processes should stay on separate tracks because there is no general permit under the ESA and, presumably, general permits under the MBTA will require reduced levels of federal involvement.

⁷⁰ Cf. *Entergy v. Riverkeeper*, 556 U.S. 208, 226 (2009) (concluding cost-benefit analysis could be appropriately used to set standards for “best” technology under the Clean Water Act).

⁷¹ See Scoping Comments, *supra* note 2, at 27 (citing Fish & Wildlife Serv. and U.S. Census Bureau, National Survey of Fishing, Hunting, and Wildlife-Associated Recreation, FHW/16-NAT, 38 (April 2018), https://www.fws.gov/wsfrprograms/Subpages/NationalSurvey/nat_survey2016.pdf).

⁷² Exec. Order No. 13,186, *Responsibilities of Federal Agencies To Protect Migratory Birds* (Jan. 10, 2001), § 3(e)(6).

- Project requires an individual MBTA permit and site-specific ESA approval for the same species: Where a project impacts species that are protected by both the MBTA and ESA, the more rigorous requirements under the ESA should generally satisfy the requirements of the MBTA for that particular species.
- Project requires an individual MBTA permit and site-specific ESA approval for different species: Where the MBTA protects species that are not protected under the ESA, FWS may be able to show that ESA-required mitigations sufficiently protect against incidental take of MBTA-only listed species. If not, additional MBTA-specific protections may be required. For efficiency, in this context we suggest combining MBTA and ESA analyses to the extent feasible.

In this latter instance, FWS should consider incorporating MBTA requirements into the development of Habitat Conservation Plans (“HCP”) and incidental take statements, while keeping in mind that take is defined differently for the purposes of each statute. *Compare* 16 U.S.C. § 703(a) and 50 C.F.R. § 10.12 with 16 U.S.C. § 1542(b). HCPs in particular must, among other things, comply with FWS’s “Five Points Policy” by including biological goals and outcomes for each covered species, an adaptive management plan accounting for uncertainty in those impacts and outcomes, monitoring requirements, a set permit duration, and public participation in the HCP development under NEPA.⁷³ Applicants for individual permits under the MBTA could be required to develop something similar (some have suggested an “Avian Conservation Plan”⁷⁴), perhaps in conjunction with applicants’ HCP obligations, and thereby satisfy conservation planning requirements under both statutes.

E. Permittees Should Be Required to Monitor and Publicly Report Incidental Take as a Permit Condition.

In the ANPR, FWS indicates it does not plan to “require extensive monitoring requirements in the permit conditions.” 86 Fed. Reg. at 54,669. But key to evaluating the success of particular permits and the program itself will be a requirement that permittees actively monitor their activities for incidental take and report their findings at regular intervals to FWS and the public. For general permits, FWS should “review all of the data entered by general permittees as well as any monitoring data collected by the Service to assess the effects of the general permit program on migratory bird populations,” as it has said it plans to do. *Id.* Take from individually permitted projects should be likewise evaluated. FWS’s permitting program cannot meet the MBTA’s statutory purposes if it does not provide for some way of knowing whether permit conditions are being met and whether those conditions are working. Moreover, implementation of best management practices serves no purpose if they are not reducing incidental take—which requires monitoring data to confirm.

Monitoring data are especially crucial in the first few years of the permitting program to provide a sense of what is working and what is not. These data will be invaluable to achieving a protective but efficient permitting program in the long term that benefits permittees, the agency, the public, and, most importantly, birds. Indeed, the Service “intends to update [its] regulations

⁷³ Fact Sheet, *Habitat Conservation Plans Under the Endangered Species Act*, U.S. FWS (Apr. 2011), <https://www.fws.gov/endangered/esa-library/pdf/hcp.pdf>.

⁷⁴ Andrew Ogden, *Dying for a Solution: Incidental Taking Under the Migratory Bird Treaty Act*, 38 WM. & MARY ENVTL. L. & POL’Y REV. 1, 69 (2013).

... based on updated information regarding effects to migratory birds,” which requires reliable monitoring data—not just data reflecting bird population changes in the aggregate, but the success of particular measures in reducing take from the status quo. *See* 86 Fed. Reg. at 54,670. Monitoring data should also be publicly reported to increase transparency and understanding regarding the permitting program.

We are sympathetic to the difficulties of monitoring the deaths or takes of numerous different bird species. While ensuring its permittee monitoring program is robust, FWS could evaluate alleviating this burden by considering the following measures:

- Focusing monitoring efforts on Birds of Conservation Concern⁷⁵ as a substitute for all birds protected under the MBTA;
- Requiring monitoring in conjunction with other activities, such as routine maintenance;
- Linking monitoring to the occurrence of specific events known to increase risks to birds, such as specific weather events;
- Only requiring monitoring in specifically delineated areas of a permitted project; and
- Using fees generated through the permitting program to fund monitoring efforts.

There may be differences in the monitoring requirements for general versus individual permits, but accurate monitoring will be a cornerstone to any successful MBTA permitting program. It must be required in *all* permits.

F. The Service Should Randomly Inspect Permittees to Ensure Compliance with Best Management Practices.

Related to monitoring, FWS should not only require self-reported monitoring but also perform random inspections of permittees under both the general and individual permitting programs to confirm compliance with permit terms. FWS will not have the resources to inspect most permittees in most years, but random inspections should provide an overall sense of whether permittees are adhering to permit terms. The Service should also have the discretion to fine out-of-compliance permittees. Ideally, the threat of inspection will help ensure compliance with permit terms. FWS may choose to spend most of its inspection resources on activities with the highest likelihood of taking migratory birds, but it should not exclusively focus on those activities.

Regarding enforcement, FWS should consider explaining that once a permitting program is in place it will prioritize enforcement for: 1) incidental take that is the result of an otherwise illegal activity, 2) incidental take that occurs due to a permit violation or exceedance of its terms, and 3) incidental take that is foreseeable and results from an action where the actor was aware of the obligation to seek permit coverage but failed to do so.

⁷⁵ U.S. FWS, Birds of Conservation Concern, *supra* note 27.

IV. Recommendations Related to General Permits.

A. Activities to Consider for General Permits.

We support establishing general permits for specific industries that are known to cause bird mortality and reevaluating at the next general permit renewal whether other industries should be included (or removed from the general permit list). The Army Corps has implemented a similar process for years under Section 404 of the Clean Water Act, evaluating at specific timeframes whether additional activities should be added to its general permitting program.⁷⁶ More specifically, the Service has proposed developing general permits for ten categories of activities. 86 Fed. Reg. at 54,699. We generally support further evaluation of all except one of the categories for general permits. The category of “government agency activities” is too varied to qualify for a general permit, though many of those activities may potentially be approved using other general permits.

We also suggest that the Service consider three additional activities for general permits—commercial forest clearing, airports, and use of mining claim markers—while recognizing that its analysis may conclude that these activities are more appropriate for individual permits in all or certain circumstances.

A Canadian study estimates that industrial logging in that country results in the loss of between 616,000 and 2 million migratory bird nests annually.⁷⁷ We have been unable to locate a comparable study of the United States, but approvals for individual projects that involve logging have found that when clearing occurs “during the nesting season, adults and nests with eggs or chicks may be destroyed.”⁷⁸ A forest-clearing general permit would authorize actions that incidentally but directly take birds, nests and eggs. This permit could be available to private forest owners as well as federal forest managers such as the Forest Service and Bureau of Land Management. The permit could also be used by projects where forest clearing that kills or takes migratory birds is necessary but is not the primary motivation for the project, such as natural gas and oil pipeline construction, or largescale commercial development.

⁷⁶ The Army Corps’ experience is both insightful and cautionary. The Corps has pushed its general permitting program far beyond its legal bounds and authorizes many activities with general permits that do not qualify. *See generally* Congressional Research Service, The Army Corps of Engineers’ Nationwide Permits Program: Issues and Regulatory Developments, available at <https://www.everycrsreport.com/reports/97-223.html> (noting that over 97% of the Corps’ regulatory workload is processed through general permits). This violates the Clean Water Act. *See, e.g., Coal. to Protect Puget Sound Habitat v. U.S. Army Corps of Engineers*, 417 F. Supp. 3d 1354, 1367 (W.D. Wash. 2019) (subsequent history omitted) (invalidating a general permit called Nationwide Permit 48). The Service should be careful to avoid similar pitfalls.

⁷⁷ Keith A. Hobson et al., *An Estimate of Nest Loss in Canada Due to Industrial Forestry Operations*, AVIAN CONSERVATION & ECOLOGY (2013).

⁷⁸ FED. ENERGY REGUL. COMM’N, ATLANTIC COAST PIPELINE AND SUPPLY HEADER PROJECT FINAL ENVIRONMENTAL IMPACT STATEMENT (July 2017), https://www.ferc.gov/sites/default/files/2020-05/volume-I_9.pdf, at 4-181.

Operation of commercial airports is also a foreseeable source of bird mortality.⁷⁹ An airport general permit could authorize incidental take of migratory birds at airports and require implementation of best management practices. Avoidance of bird collisions at airports is particularly important due to human safety concerns.

Mining claim markers have been estimated to result in at least 1 million bird deaths a year.⁸⁰ Many of these deaths can be avoided by simply requiring the mine markers to be capped or replaced by a wildlife-friendly substitute which could be required under a general permit program.⁸¹

B. General Permit Conditions Should Be Informed by Current Best Management Practices.

For all general permit categories, the Service's evaluation of best available technologies to include in permits should start by evaluating current guidelines and best management practices. These include Service-recommended practices for communication towers,⁸² electric utility lines,⁸³ the oil and gas industry,⁸⁴ wind energy,⁸⁵ airports,⁸⁶ mining claim markers,⁸⁷ and fluid mineral practices.⁸⁸ Best management practices for transportation projects⁸⁹ and vegetation management projects⁹⁰ are under development and could potentially be completed alongside the agency's rulemaking. If not otherwise required, the Service should consider using time-of-year restrictions on forest clearing during nesting season as a best management practice for vegetation management activities. Best management practices identified in the Service's Final Regulatory Flexibility Analysis for Regulations Governing Take of Migratory Birds (September 2021)⁹¹ for solar generation facilities and marine fishing operations (both of which have been identified for

⁷⁹ U.S. FWS, *Threats to Birds: Aircraft Collisions* (last visited Dec. 1, 2021), <https://www.fws.gov/birds/bird-enthusiasts/threats-to-birds/collisions/aircrafts.php>.

⁸⁰ Laura Zuckerman, *Mining claim markers killing millions of birds in U.S. West*, REUTERS (June 30, 2012), <https://www.reuters.com/article/us-usa-birds-mining/mining-claim-markers-killing-millions-of-birds-in-u-s-west-idUSBRE85T0JJ20120630>.

⁸¹ Fact Sheet, *Request to Mining Claimants on Federal Land Help Eliminate Hazards to Birds and Other Wildlife*, BUREAU OF LAND MGMT. (BLM) (N.d.), https://eplanning.blm.gov/public_projects/nepa/1502845/20010269/250013246/Mining_monument_mitigation.pdf.

⁸² U.S. FWS, *Threats to Birds: Aircraft Collisions*, *supra* note 79.

⁸³ U.S. FWS, *Best Practices: Electric Utility Line*, <https://www.fws.gov/birds/management/project-assessment-tools-and-guidance/guidance-documents/electric-utility-lines.php> (last visited Dec. 1, 2021).

⁸⁴ U.S. FWS, *Best Practices: Oil & Gas*, <https://www.fws.gov/birds/management/project-assessment-tools-and-guidance/guidance-documents/oil-and-gas.php> (last visited Dec. 1, 2021).

⁸⁵ U.S. FWS, *Best Practices: Wind Energy*, <https://www.fws.gov/birds/management/project-assessment-tools-and-guidance/guidance-documents/wind-energy.php> (last visited Dec. 1, 2021); *see also Bird-Smart Wind Energy: Solutions for Sustainable Wind Energy Development*, AM. BIRD CONSERVANCY (May 2019), <https://abcbirds.org/wp-content/uploads/2019/05/bird-smart-wind-energy.pdf>.

⁸⁶ U.S. FWS, *Threats to Birds: Aircraft Collisions*, *supra* note 79.

⁸⁷ BLM, *supra* note 81.

⁸⁸ U.S. FWS, *Conservation Measures: Fluid Mineral Practices*, <https://www.fws.gov/birds/management/project-assessment-tools-and-guidance/conservation-measures/fluid-minerals.php> (last visited Dec. 1, 2021).

⁸⁹ U.S. FWS, *Conservation Measures: Transportation*, <https://www.fws.gov/birds/management/project-assessment-tools-and-guidance/conservation-measures/transportation.php> (last visited Dec. 1, 2021).

⁹⁰ U.S. FWS, *Conservation Measures: Vegetation Management*, <https://www.fws.gov/birds/management/project-assessment-tools-and-guidance/conservation-measures/vegetation-management.php> (last visited Dec. 1, 2021).

⁹¹ Available at <https://www.regulations.gov/document/FWS-HQ-MB-2018-0090-19192>.

potential general permits) should also be considered. Finally, several states regulate incidental take of migratory birds. Those programs should also be reviewed for effective best management practices that could otherwise be incorporated into the Service's own general permits.

Ultimately, the Service's evaluation of "beneficial practices [that] might be appropriate to require for different activities" should start with consideration of best management practices recommended or in practice right now. 86 Fed. Reg. at 54,699. The NEPA analysis accompanying this rulemaking should consider the effectiveness of those practices and recommend incorporating some or all of them as requirements for general permits and baseline expectations for individual permits. Regional FWS offices should be allowed to add additional best management practices to national-level permit requirements based on regional concerns.

C. General Permit Conditions Should be Monitored and Reassessed.

General permits should be renewed and reassessed at regular intervals. Five years is an appropriate default period for reevaluation of general permits. Periodic assessment will allow FWS, permittees, and the public to consider the effectiveness of mitigation and avoidance measures in light of the latest data reflecting species distribution, population growth or depletion, climatic changes, and advances in technologies that could better help permittees avoid incidental take.

FWS will need to develop a mechanism to determine when take exceeds thresholds identified in general permits, or when an entity is not complying with a permit's terms. If a permittee exceeds the level of take authorized by the general permit, they should be required to apply for an individual permit, which may necessitate operational design changes.

FWS should also use the rulemaking to explain how it will regulate existing structures that would be subject to general permits if they were being constructed post-regulation. We oppose simply grandfathering these facilities into the regulatory scheme. That approach also seems unlikely to provide the regulatory certainty industries have requested. Instead, existing structures could be brought into compliance by adding any missing operational BMPs (assuming those are required by the general permit). FWS would need to establish a trigger for mandating incorporation of the BMPs. Ideally, structure owners would take this step voluntarily, but FWS could consider requiring it when a structure undergoes a specific level of maintenance or modification, somewhat similar to the "major modification" triggers under the Clean Air Act, *e.g.* 42 U.S.C. § 7411; 40 C.F.R. § 52.21(b)(2).

V. **Recommendations Related to Individual Permits.**

With the "best practices" requirement of general permits serving as a baseline, FWS should consider requiring individual permits for projects based on at least three factors: location, threat to Birds of Conservation Concern, and whether BMPs have been shown to reliably reduce incidental take for the specific type of activity. Projects that trigger these factors should undergo thorough, project-specific review. As part of the individual permit process, mitigation should include not only operational BMPs but also site-specific design.

First, the most important factor in avoiding incidental take of migratory birds is project location. Projects constructed in key migratory bird habitats or travel corridors have some of the

highest potential to incidentally take migratory birds in significant numbers and therefore should receive project-specific review even if they would otherwise qualify for a general permit. FWS could consider using proximity to Important Bird Areas as one way to trigger the individual permit requirement.⁹² FWS should also solicit feedback from the Flyway Councils regarding the most important habitats in their regions. This process could culminate in publication of a map putting permittees on notice of the requirement to obtain an individual permit if their projects cross one of the designated areas.

Second, FWS is charged with “identifying species, subspecies and populations . . . of all migratory nongame birds that without additional conservation action are likely to become candidates for listing under the Endangered Species Act.”⁹³ These “Birds of Conservation Concern” stand to suffer some of the worst losses from incidental take. The agency should evaluate requiring an individual permit when a project threatens to take or kill these species above a certain threshold.

Third, BMPs will simply be inefficient at reducing takes or kills of migratory birds for some activities. These activities should not qualify for a general permit and therefore will have to obtain an individual permit.

FWS should also use the NEPA process in this rulemaking to consider other factors that would trigger the need for an individual permit.

VI. Recommendations Regarding the Use of “Exceptions.”

FWS is considering “using regulatory authorizations to except certain activities from requiring a permit.” 86 Fed. Reg. at 54,669. As explained below, we support this general concept in certain circumstances but emphasize that these exceptions should be limited.⁹⁴ Specifically, we support analyzing an exception for “noncommercial activities, including most activities by individuals (e.g., homeowner activities that take birds).” 86 Fed. Reg. 54,669. FWS should consider providing a definition of “noncommercial” in the context of the MBTA. We suggest starting with the concept that noncommercial activities are not intended to generate profit. We oppose excepting commercial activities.

It is unclear exactly what FWS means when it suggests that “certain activities where activity-specific beneficial practices or technologies sufficiently avoid and minimize incidental take” may also be suitable for exceptions; those activities would seem to be ideal candidates for

⁹² *Important Bird Areas*, AM. AUDUBON SOC’Y, <https://www.audubon.org/important-bird-areas> (last visited Dec. 1, 2021).

⁹³ U.S. FWS, *Birds of Conservation Concern*, *supra* note 27.

⁹⁴ FWS should consider whether “exceptions” are the best way to accomplish this objective. The MBTA’s prohibition on incidental take is unambiguous. *Nat. Res. Def. Council, Inc. v. U.S. Dep’t of Interior*, 478 F. Supp. 3d 469, 485 (S.D.N.Y. 2020). Agencies do not have the “power to revise clear statutory terms.” *Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302, 327 (2014). Accordingly, FWS should consider whether it has authority to except wide categories of actions from the reach of the statute. Of course, FWS can except actions from its permitting program, but that may not provide sufficient regulatory certainty—presumably those excepted activities could legally still be subject to enforcement actions. One option may be to develop a “deemed permitted” scheme, clarifying that all incidental take is prohibited but that FWS views certain limited categories of actions as “permitted” even without going through a formal permitting process.

general permits, not exceptions. *See* 86 Fed. Reg. at 54,669. FWS would seemingly have minimal ability to ensure beneficial practices are employed if the activity is wholly excepted from the permitting program—rather than approved through a general permit—thereby defeating the purpose of authorizing those activities based on their beneficial practices.

FWS should continue to publish guidelines intended to avoid migratory bird deaths and encourage use of best management practices even for activities that are excepted. Relatedly, the Service should not except from its permitting program “[f]ederal agencies with a current, signed Memorandum of Understanding (MOU) with the Service for the conservation of migratory birds,” for at least three reasons. 86 Fed. Reg. at 54,669. First, the Service has been clear that the MOUs and its proposed rulemaking serve different purposes. For example, in finalizing its interpretation of the MBTA that excluded incidental take, the Service clarified that “each agency with an MOU should continue to carry out that MOU, including any conservation measures that reduce incidental take.”⁹⁵ Now that the Service has reversed its earlier interpretation, it continues to maintain that the “various interagency MOUs . . . are not contingent on any rulemaking interpreting whether the MBTA prohibits or excludes incidental take.” 86 Fed. Reg. at 54,651. Because the MOUs and Service’s rulemaking efforts serve different purposes, one cannot substitute for the other.

Second, the MOUs are less effective at protecting migratory birds than requiring agency participation in a permitting program. For example, FWS’s memorandum with the Forest Service requires that the Service only “[c]onsider approaches, to the extent practicable, for identifying and minimizing take that is incidental to otherwise lawful activities,”⁹⁶ whereas a permitting program under the MBTA would *prohibit* incidental take without sufficient safeguards in place. MOU implementation is also limited by “the availability of appropriations and . . . Administration budgetary limits;” presumably a permitting program would not be so closely tied to budgetary fluctuation.⁹⁷ Thus, the more effective approach from a bird conservation perspective is to require federal agencies to engage in the permitting program.

Third, relying only on the MOUs risks unnecessarily complicating implementation of the MBTA in some instances where federal agencies are involved. Many federal agencies authorize private actors to take certain actions on federal lands that may incidentally take birds or nests—for example, loggers on federal forest lands. Our understanding is the Service’s proposal would except those loggers from MBTA permitting requirements for Forest Service-approved activities. But it is unclear how the MOUs alone could provide those third parties with sufficient regulatory certainty regarding their MBTA liability. The Forest Service MOU explicitly “does not authorize the take of migratory birds.”⁹⁸ Subjecting agency-authorized actions to the permitting program, rather than relying solely on MOUs, therefore not only furthers migratory bird conservation but also provides better assurance regarding MBTA liability.

⁹⁵ 86 Fed. Reg. at 1155.

⁹⁶ MEMORANDUM OF UNDERSTANDING BETWEEN THE U.S. DEPARTMENT OF AGRICULTURE FOREST SERVICE AND THE U.S. FISH & WILDLIFE SERVICE TO PROMOTE THE CONSERVATION OF MIGRATORY BIRDS (2008), at 7 (emphasis added), <https://www.fws.gov/migratorybirds/pdf/management/moufs.pdf>.

⁹⁷ *Id.* at 11.

⁹⁸ *Id.* at 1.

VII. FWS Must Complete A Comprehensive Environmental Impact Statement.

NEPA compels preparation of an EIS for major federal actions that may have significant impacts on the human environment. 42 U.S.C. § 4332(2)(C). An EIS must analyze the likely environmental effects of the proposed action, any unavoidable adverse effects, and potential alternatives to the action. *See id.* NEPA commands consideration of effects and alternatives to the “fullest extent possible.” *See* 42 U.S.C. § 4332. An EIS must also include a statement of the purpose and need for an action, which in turn defines the scope and nature of the alternatives that must be considered. *See, e.g., Little Traverse Lake Prop. Owners’ Ass’n v. Nat’l Park Serv.*, 883 F.3d 644, 655 (6th Cir. 2018) (“Alternative actions . . . are measured against the Purpose and Need Statement.” (internal quotation and alteration omitted)); *Protect Our Communities Found. v. LaCounte*, 939 F.3d 1029, 1038 (9th Cir. 2019) (“The stated goal of a project necessarily dictates the range of ‘reasonable’ alternatives.”).

Here, FWS must thoroughly evaluate a reasonable range of alternatives, based on the purpose of the proposed action, and fully assess the environmental impacts associated with each alternative.

A. FWS Must Consider a Reasonable Range of Alternatives.

In considering the establishment of an incidental take permitting program, FWS must ground its analysis of alternatives in a statement of purpose and need that is appropriately tied to the conservation purposes of the MBTA. In other words, FWS’s purpose and need statement must be firmly based in migratory bird conservation,⁹⁹ and, in turn, the range of alternatives that FWS considers, must meet that purpose. FWS must also consider a “no action” alternative.

Defining the appropriate baseline, or “no action” alternative, is essential to an adequate comparison of competing alternatives. *Friends of Back Bay v. U.S. Army Corps of Eng’rs*, 681 F.3d 581, 588 (4th Cir. 2012). (“A material misapprehension of the baseline conditions existing in advance of an agency action can lay the groundwork for an arbitrary and capricious decision.”). Here, with the revocation of the January 7 rule and the underlying Solicitor’s M-Opinion 37050, the baseline is once again firmly established as the MBTA’s prohibiti[on] [of] incidental take and [the] appl[ication] [of] enforcement discretion, consistent with judicial precedent and longstanding agency practice prior to 2017.” 86 Fed. Reg. at 54,668; *see also* DEIS Comments at 18 (discussing appropriate baseline).

B. FWS Must Thoroughly Assess Environmental Impacts.

FWS must fully analyze the environmental impacts of its proposed incidental take permitting proposal, including “any adverse environmental effects which cannot be avoided.” 42 U.S.C. § 4332(C)(i), (ii). This analysis ensures that (1) the agency carefully will consider the effects of its actions on the environment, and (2) the public and other agencies will be able to analyze and comment meaningfully on the proposal and its impacts. *Nat’l Audubon Soc’y*, 422 F.3d at 184. An incomplete analysis of environmental effects “undermine[s] the ‘action-forcing’

⁹⁹ We note that in striving to achieve regulatory certainty, the conservation purpose of the MBTA—to provide “meaningful bird conservation,” *see* 86 Fed. Reg. at 54,669—and the United States’ treaty obligations must remain paramount.

function of NEPA,” because “neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse effects.” *Robertson*, 490 U.S. at 352.

FWS’s analysis of impacts must also evaluate the cumulative impacts of any permitting proposal, including in the broader context of the accelerating threats posed by climate change and habitat loss. As explained in Section I above, climate change is already harming migratory birds and is expected to have even more significant effects in the future. At the same time, especially here in the Southeast, baseline habitat degradation and loss are likely to increase with development demands, putting further pressures on migratory bird habitats.

The Service must also evaluate any permitting proposal in the light of the numerous benefits associated with incidental take protections for migratory birds.¹⁰⁰ These benefits of protecting birds through a permitting system extend beyond the birds themselves; our previous comments detailed how birds perform important ecosystem services, which in turn affect air and water quality, and even the health of soils and floodplains.¹⁰¹ Similarly, important economic sectors are supported by healthy migratory bird populations, primarily through birdwatching and bird hunting activities.¹⁰²

The number of birds in the Southeastern region that are already imperiled further necessitates FWS giving specific attention to particularly at-risk species, both to satisfy NEPA and its obligations under the ESA. First, FWS’s EIS should consider the impacts of its proposal on ESA-listed birds, as well as its list of Birds of Conservation Concern. Second, FWS’s proposal to create a permitting framework for incidental take will certainly have impacts on these ESA-protected species, in turn triggering the requirements to engage in consultation under the ESA. *See* 16 U.S.C. 1536(a)(2); 50 C.F.R. § 402.14(a). Federal agencies—including FWS when it is an “action agency”—must “review [their] actions at the earliest possible time to determine whether any action may affect listed species or critical habitat.” 50 C.F.R. § 402.14(a). If a federal action “may affect” a listed species, formal Section 7 consultation is required—unless informal consultation or a biological assessment determines that the proposed action is “not likely to adversely affect any listed species or critical habitat.” *Id.* § 402.14(b), § 402.13(c). At a minimum, FWS must initiate informal consultation here.

VIII. Conclusion

We applaud the Service for working toward an effective and durable solution to the problem of incidental take of migratory birds. All who care for birds the Service is charged with protecting are grateful for this opportunity to help the agency rise to the important challenge set for it by the MBTA. We look forward to continuing to work with FWS to develop a regulatory framework for permitting incidental take, ensuring that migratory birds are protected for generations to come.

We appreciate the opportunity to submit these comments.

¹⁰⁰ *See supra* Part I (describing ecosystem and economic benefits migratory birds provide).

¹⁰¹ Scoping Comments, *supra* note 2, at 25–26 (and literature cited and attached therein).

¹⁰² *Id.* at 26; DEIS Comments, *supra* note 3, at 16.

Sincerely,



Ramona H. McGee
Wildlife Program Leader

Deborah M. Murray
Patrick Hunter
Henry Gargan
Attorneys

Melissa Whaling
Science and Policy Associate

Southern Environmental Law Center

With:

Alabama Rivers Alliance

Jack West
Policy and Advocacy Director

Allegheny-Blue Ridge Alliance

Lewis Freeman
Executive Director

Animal Welfare Institute

Johanna Hamburger
Terrestrial Wildlife Program Director and Senior Staff Attorney

Audubon Society, Cape Henry Chapter

Pat Quinn
President

Audubon Society, New Hope Chapter

Barbara Driscoll
President

Audubon Society, Northern Virginia Chapter

Tom Blackburn
President

Audubon Society, Richmond Chapter

Mary Elfner
President

Cape Fear River Watch

Kemp Burdette
Cape Fear Riverkeeper

Carolina Wetlands Association

Rick Savage
Executive Director

Chattooga Conservancy

Nicole Hayler
Director

Coalition to Protect America's National Parks

Phil Francis
Chair

Coastal Conservation League

Laura Cantral
Executive Director

Coastal Plain Conservation Group

Andy Wood
Director

Coosa Riverkeeper

Chad Hoffman
Program Director

Cowpasture River Preservation Association

Elizabeth M. Dudley
President

Endangered Species Coalition

Tara Thornton
Deputy Director

MountainTrue

Bob Gale
Ecologist & Public Lands Director

National Parks Conservation Association

Rachel Kenigsberg
Associate General Counsel

North Carolina Conservation Network

Brian Buzby
Executive Director

North Carolina League of Conservation Voters

Carrie Clark
Executive Director

One Hundred Miles

Megan Desrosiers
President/CEO

Potomac Riverkeeper Network

Phillip Musegaas
Vice President - Programs and Litigation

Protect Jekyll Island

Mindy Egan
Treasurer

RedTailed Hawk Collective

Donna Chavis
Founder

Savannah Riverkeeper

Tonya Bonitatibus
Executive Director

South Carolina Wildlife Federation

Sara Green
Executive Director

Southern Forests Conservation Coalition

Pauline Endo
Planning Committee Leader

Spruill Farm Conservation Project

Jack Spruill
Director

St. Marys EarthKeepers

Alex Kearns
Chair

Tennessee Riverkeeper

David Whiteside
Executive Director

Virginia Conservation Network

Patrick L. Calvert
Senior Policy & Campaign Manager

Virginia Society of Ornithology

Patti Reum
Conservation chair

Virginia Wilderness Committee

Mark Miller
Executive Director

Waterkeeper Alliance

Kelly Hunter Foster
Senior Attorney

Wild Virginia

David Sligh
Conservation Director