

**AGENCIES IN LIMBO:
MIGRATORY BIRDS AND INCIDENTAL TAKE BY
FEDERAL AGENCIES**

JULIE LURMAN¹

I.	INTRODUCTION.....	39
II.	FISH AND WILDLIFE SERVICE.....	41
	<i>A. The Problem of Unprotected Federal Agencies</i>	41
	<i>B. Ad Hoc Guidance Unheeded</i>	43
III.	THE FEDERAL COURTS.....	46
	<i>A. Intent is Not a Requirement of the MBTA</i>	47
	<i>B. The MBTA Does Not Differentiate Between Direct and Indirect Deaths</i>	48
	<i>C. Habitat Destruction Does Result in Direct Bird Deaths</i>	54
IV.	CONGRESS.....	57
V.	A PERMANENT SOLUTION.....	58
VI.	CONCLUSION.....	59

I. INTRODUCTION

In Alaska, federal land is often cleared for a myriad of reasons including private mining claims, logging enterprises, road building, trail building, oil and gas exploration and drilling, pipeline construction and maintenance, and so on. The list is long and varied. One issue that ties all of these disparate activities together is the presence of migratory birds. According to the U.S. Fish and Wildlife Service (FWS), migratory birds “are found in all terrestrial habitats that occur in Alaska.”²

Alaska is home to 470 species of birds.³ All native birds found

1. Assistant Professor of Resources Law and Policy, School of Natural Resources and Agricultural Sciences, Department of Resources Management, University of Alaska Fairbanks. J.D. 2003, Georgetown University Law Center; M.E.S. 1999, Yale School of Forestry and Environmental Studies; B.S. 1997, Cook College, Rutgers University. This work is funded in part by the USDA Cooperative State Research, Education, and Extension Service, Hatch Project #0209760 and MultiState Research Project W1192. SNRAS Pub. No. 2007-007. My thanks to Nell Fuller (Division of Federal Assistance, U.S. Fish and Wildlife Service Region 1) and Kyle Joly (Wildlife Biologist, Central Yukon Field Office, Bureau of Land Management) for comments that substantially improved the quality of this manuscript, any errors or omissions are my own.

2. U.S. Fish & Wildlife Serv. - Alaska, Migratory Bird Management Landbirds/Raptors, <http://alaska.fws.gov/mbmp/mbm/landbirds/landbirds.htm> (last visited Oct. 17, 2007).

3. U.S. Fish & Wildlife Serv. - Alaska, Migratory Bird Management Overview, <http://alaska.fws.gov/mbmp/mbm/introduction.htm> (last visited Oct. 17, 2007). The website

in Alaska, with the exception of ptarmigan and grouse, are protected by the Migratory Bird Treaty Act (MBTA).⁴ Most birds are present in Alaska primarily during the summer months for breeding, nesting, and rearing of young. Coincidentally, those same months tend to be the time when most land clearance takes place. The federal agencies carrying out or permitting these land clearance activities, primarily the Bureau of Land Management (BLM) and the Forest Service (FS), due to those agencies' multiple use mandates,⁵ are aware that migratory birds will be present in the areas affected.⁶

The MBTA prohibits the "take" of migratory birds, their nests, or their eggs, except as permitted by regulation.⁷ Land clearance activities during the nesting season "take" migratory birds (mostly fledglings), eggs, and nests. These takes are not intentional, but rather incidental (meaning that the purpose of the activity was not to harm birds). While the MBTA obviously addresses the intentional taking of migratory birds, the act also prohibits the incidental taking of migratory birds. The statute's prohibition states that taking is unlawful "at any time, by any means or in any manner."⁸ However, if the prohibition against incidentally taking migratory birds was uniformly and strictly enforced, development activity in Alaska would likely grind to a halt. But, that has not happened.

The reason that this result has not occurred is that the courts have not recognized the problem of migratory bird deaths presented by land clearance activities, and the FWS has not used its authority to provide regulatory guidance that would help agencies abide by the Act and avert lawsuits. Therefore, while agencies like the BLM and the FS may not be prosecuted by the FWS for their incidental bird-taking, those agencies are still vulnerable to citizen

also states that "birds from Alaska pass through virtually every other state in the Union (even Hawaii) on the way to their wintering grounds. Maintaining migratory birds and their habitats in Alaska is clearly a matter of national and international significance." *Id.*

4. See U.S. Fish & Wildlife Serv., Advisory: Recommended Time Periods for Avoiding Vegetation Clearing in Alaska in Order to Protect Migratory Birds, http://alaska.fws.gov/fisheries/fieldoffice/anchorage/pdf/vegetation_clearing.pdf (last visited Oct. 17, 2007) [hereinafter FWS Advisory].

5. The Federal Land Policy and Management Act of 1976 directed the Secretary of the Interior to administer BLM lands using the multiple use sustained yield principle. 43 U.S.C. §§ 1701-1782 (1976). The Multiple Use Sustained Yield Act of 1960 instructed the Secretary of Agriculture to administer Forest Service lands under the multiple use sustained yield principle. 16 U.S.C. § 528 (1960).

6. See FWS Advisory, *supra* note 4, which was distributed to all federal agencies in Alaska. The advisory divides Alaska into regions and delineates when migratory birds are likely to be nesting in each area.

7. 16 U.S.C. § 703 (2000). "Take" is defined by the MBTA as: "pursue, hunt, shoot, capture, collect, kill, or attempt to pursue, hunt, shoot, capture, collect, or kill." 16 U.S.C. § 715(n) (2000).

8. 16 U.S.C. § 703(a).

suits seeking to enforce the no take requirements of the MBTA using the citizen suit provisions of the Administrative Procedure Act (APA).⁹ Federal agencies in Alaska continue to incidentally take birds in the course of land clearing, while operating under a false sense of security that such outcomes are legal. Such an outcome is wrought by the FWS's failure to promulgate regulations that better guide agency decision making, the courts' misinterpretation of the statute, and Congress' failure to amend the Act to correct for these problems.

This Article reviews the confusion surrounding the term "take" under the MBTA and how that confusion has led to inappropriate federal activity that illegally harms birds. Additionally, this Article seeks to explain why the courts' failure to interpret the act correctly continues to result in a great number of migratory bird deaths due to federal land clearance activities. Finally, the Article provides suggestions as to how the FWS could improve the current situation by developing incidental take regulations aimed at federal action.

II. FISH AND WILDLIFE SERVICE

A. *The Problem of Unprotected Federal Agencies*

In *Center for Biological Diversity v. Pirie*,¹⁰ an environmental group sued the U.S. Navy in order to prevent the use of live fire training exercises on one of the Northern Marianas Islands, because these exercises would harm several species of migratory birds without a permit. The environmental group claimed that this action was "not in accordance with law" within the meaning of the APA¹¹ under which they sued. The purpose of the training exercise was not to kill birds; therefore, while the bird deaths were uncontroverted,¹² they were unintentional. The Navy had actually ap-

9. 5 U.S.C. §§ 702-706 (2000).

10. 191 F. Supp. 2d 161 (D.D.C. 2002), *vacated*, *Ctr. for Biological Diversity v. England*, No. 02-5163, 2003 U.S. App. LEXIS 1110 (D.C. Cir. Jan. 23, 2003).

11. *Id.* at 175 (citing to 5 U.S.C. § 706(2)(A), which states that "[t]he reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be – (A) arbitrary, capricious, an abuse of discretion, or otherwise *not in accordance with law.*" (emphasis added)).

12. "It is uncontested that defendants' military training activities on [the Northern Marianas Islands] will kill birds covered by the MBTA." *Id.* at 166. The court also refers to the following statement by defendants: "On several occasions we observed boobies nesting very close to unexploded ordinance [sic]. While the unexploded ordinance [sic] may not provide an immediate threat to the birds, it does indicate that bombs do fall in active nesting areas." *Id.*

plied to the FWS for an incidental take permit for these activities¹³ but was denied because “[t]here are no provisions for the Service to issue permits authorizing UNINTENDED conduct on the part of a permittee.”¹⁴ The FWS also stated that “it has long employed ‘enforcement discretion’ for activities that may be prosecuted pursuant to the MBTA but are not covered by the MBTA permitting regulations, that in this case it would ‘exercise its discretion not to take enforcement action’ against the Navy.”¹⁵ The exercise of this discretion, however, did not protect the Navy from a citizen suit under the APA for its violations of the MBTA. The court had no trouble finding that the Navy’s activities did indeed violate the MBTA, regardless of the fact that the bird deaths were unintentional. As the court stated, “the MBTA prohibits both intentional and unintentional killing.”¹⁶

This case was appealed in *Center for Biological Diversity v. England*, where the court of appeal issued an unpublished opinion vacating the case and remanding it for dismissal as moot.¹⁷ In the intervening time between the two cases, the Navy appealed to the Congress for help out of a situation that was untenable. The lower court had found the Navy’s activities to be unlawful without a permit, and the FWS refused to consider permitting the activity because their regulations did not provide for incidental take permits. Congress responded with an amendment to the MBTA in § 315 of the Bob Stump National Defense Authorization Act.¹⁸ This section, entitled “Incidental Taking of Migratory Birds During Military Readiness Activities,” required the FWS to develop regulations that would permit the Department of Defense to incidentally take migratory birds in the course of military readiness activities.¹⁹

13. *Id.*

14. *Id.* at 167 (quoting a Letter from J. Bradley Bortner, Chief, Migratory Birds and Habitat Programs, FWS, to Daniel Moriarty, Natural Resources Management Specialist, Pacific Division, United States Navy (Aug. 5, 1996)).

15. *Pirie*, 191 F. Supp. 2d at 168.

16. *Id.* at 174.

17. No. 02-5163, 2003 U.S. App. LEXIS 1110 (D.C. Cir. Jan. 23, 2003) (unpublished decision).

18. Pub. L. No. 107-314, § 315, 116 Stat. 2458 (2003).

19. *Id.* § 315(d).

The Migratory Bird Treaty Act is an important environmental statute that was enacted in 1918 to control the mass slaughter of birds for commercial purposes. Under the statute, a federal agency can obtain a permit to ‘take’ migratory birds intentionally, such as clearing large flocks of Canadian Geese from a landing field or golf course. However, a federal court recently ruled that the Navy had violated the Migratory Bird Treaty Act by accidentally taking migratory birds while conducting training at one of its facilities in Guam without a permit to take migratory birds. The court recognized a paradox in that the statute prohibits

In February 2007, the FWS finally issued the regulations required under the National Defense Authorization Act. Those regulations mandate that the military assess the effects of military readiness activities on migratory birds and, in conjunction with the FWS, develop and implement appropriate conservation measures if a proposed action may have a significant adverse effect on a migratory bird population.²⁰ Assuming the Department of Defense meets these requirements, it is protected from further MBTA related lawsuits, at least regarding military readiness activities, because the Department will be in compliance with the MBTA. The MBTA, after all, states that it is unlawful to kill migratory birds “except as permitted by regulations”²¹ which the Department can now follow. This regulatory change has therefore cleared up the problem for the Department of Defense (with regard to training exercises), but has still left other agencies in the same limbo of being required to violate the MBTA in order to accomplish other statutory goals, but with no recourse to or regulatory guidance from FWS.

B. Ad Hoc Guidance Unheeded

While the problem has yet to be resolved, there have been attempts made to improve federal agency compliance with the MBTA, particularly in Alaska. First, in 2001 President Clinton issued an Executive Order which was intended to more clearly outline the responsibilities of federal agencies with regard to the MBTA.²² Second, the FWS Alaska Regional Office issued an advisory to federal agencies in Alaska that was intended to guide agency decision making regarding land clearance activity that would impact migratory birds. Unfortunately, neither of these efforts has yielded much in the way of changed federal agency behavior.

the issuance of a permit to authorize unintentional takings during military readiness activity. The committee recommends a provision that would amend the Migratory Bird Treaty Act to correct this paradox.

H.R. REP. NO. 107-436, at 286 (2002). “This section would amend section 704 of title 16, United States Code, to give the Department of Defense statutory authority under the Migratory Bird Treaty Act, P.L. 93-300, to obtain a permit for incidental taking of birds during authorized military readiness activity.” H.R. REP. NO. 107-436, at 294, § 311 (2002).

20. Migratory Bird Permits; Take of Migratory Birds by the Armed Forces, 72 Fed. Reg. 8931 (Feb. 28, 2007) (to be codified at 50 C.F.R. pt. 21). *See also* News Release, U.S. Fish & Wildlife Serv., Service Finalizes Rule Allowing Incidental Take of Migratory Birds for Military Readiness (Feb. 28, 2007), <http://www.fws.gov/news/NewsReleases/showNews.cfm?newsId=0986AD30-D07F-A091-E9573BBF893E2716> (last visited Oct. 19, 2007).

21. 16 U.S.C. § 703(a) (2000).

22. Exec. Order No. 13,186, 66 Fed. Reg. 3853 (Jan. 10, 2001).

The Executive Order accomplishes three main goals: it defines certain terms, outlines federal agency responsibility, and establishes a Council for the Conservation of Migratory Birds. Of the terms it defines, perhaps the most important is the word “take,” which the Executive Order defines as including “both ‘intentional’ and ‘unintentional’ take.”²³ This is a clear attempt to rectify some of the inconsistencies in various interpretations of the MBTA that will be discussed in the next section of this paper. The major requirement laid out by the Executive Order is the development of a Memorandum of Understanding (MOU) between “[e]ach Federal agency taking actions that have, or are likely to have, a measurable negative effect on migratory bird populations.”²⁴ The MOUs were supposed to have been completed within two years of the date of the Executive Order, which was signed in 2001. To date, only two MOUs have been completed.²⁵

The purpose of the MOUs is, in part, to “support the conservation intent of the migratory bird conventions by integrating bird conservation principles, measures, and practices into agency activities and *by avoiding or minimizing, to the extent practicable, adverse impacts on migratory bird resources when conducting agency actions.*”²⁶ The MOUs are also intended to

[I]dentify where unintentional take reasonably attributable to agency actions is having, or is likely to have, a measurable negative effect on migratory bird populations . . . [and] [w]ith respect to those actions so identified, the 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 [FWS].²⁷

Therefore, at the heart of the MOU requirement is an attempt to avoid federal incidental take violations by providing a framework in which to evaluate and mitigate them, and provide the FWS seal-of-approval of sorts.

Most federal agencies do not seem to have acted upon the Executive Order as of yet. The major tangible requirement of develop-

23. *Id.* at 3853, § 1(a).

24. *Id.* at 3854, § 3(a).

25. See U.S. Fish & Wildlife Serv., Division of Migratory Bird Management, <http://www.fws.gov/migratorybirds/> (last visited Oct. 19, 2007), where the Department of Defense and Department of Energy’s MOUs are available.

26. Exec. Order No. 13,186, 66 Fed. Reg. at 3854, § 3(e)(1) (emphasis added).

27. *Id.* at 3855, § 3(e)(9) (emphasis added).

ing MOUs with FWS has been observed only by the Department of Defense and the Department of Energy, the only two agencies where the work, or the work of its constituents, has been markedly affected by negative court cases over migratory birds.²⁸ Additionally, failure to abide by the Executive Order is not justiciable,²⁹ so citizens cannot use the courts to force agencies to abide by it.

Separately, the FWS has tried other means to improve federal compliance with the MBTA. For example, the FWS Alaska Regional Office has issued an advisory to all federal agencies operating in Alaska, stating that “[v]egetation clearing, site preparation, or other construction activities that may result in the destruction of active bird nests or nestlings would violate the MBTA.”³⁰ The advisory then provides very specific timing guidelines to help agencies comply with the MBTA by avoiding construction activities during nesting season.³¹ Following this advisory would obviously help agencies meet the goals of the Executive Order, by decreasing their unintentional take, and help the goals of the MBTA, by decreasing the likelihood of taking migratory birds at all. However, there is no indication that agencies in Alaska have taken this advice to heart, and land clearance activities during nesting seasons seem to have continued unabated. After all, the advisory is merely a recommendation, not a requirement.³² Nesting season in Alaska, as previously stated, tends to coincide with the prime construction season, and nearly all lands in Alaska are home to some migratory bird population. Therefore, nearly all development work would likely have to cease in order to fully comply with the advisory.

Finally, while both the Executive Order and the FWS advisory might help agencies avoid litigation by avoiding a violation of the MBTA, neither is enforceable, and thus perhaps not compelling, for agencies who still believe that incidental take by federal agencies is not a violation of the MBTA, particularly if that take is a

28. See, e.g., *Ctr. for Biological Diversity v. Pirie*, 191 F. Supp. 2d 161 (D.D.C. 2002) (finding the Navy in violation of the MBTA for failing to get a permit from the FWS before incidentally taking migratory birds through training exercises); *United States v. Moon Lake Elec. Ass’n, Inc.*, 45 F. Supp. 2d 1070 (D. Colo. 1999) (holding electric utility guilty of violating the MBTA by incidentally electrocuting birds that roosted on their power poles).

29. See Exec. Order No. 13,186, 66 Fed. Reg. at 3856, § 5(b), which states that [t]his Order is intended only to improve the internal management of the executive branch and does not create any right or benefit, substantive or procedural, separately enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

Id.

30. FWS Advisory, *supra* note 4.

31. *Id.*

32. *Id.* (“The . . . timing guidelines are not regulations, but are intended as recommendations to help [agencies] comply with MBTA.”).

result of habitat destruction.

III. THE FEDERAL COURTS

As I have stated, federal agencies are operating under a false sense of security, supported by the fact that the FWS does not address the issue of incidental take in regulation. Compounding this problem are several poorly reasoned federal court cases that suggest that incidental take, particularly through habitat destruction, is not a violation of the MBTA.³³ For example, in an Interior Board of Land Appeals opinion, both the Administrative Law Judge and the BLM rely on *Seattle Audubon Society v. Robertson*³⁴ for their position that certain timber lease sales in Oregon are legal, even though migratory bird habitat will be destroyed.³⁵ The Department of the Interior is relying on an opinion that, first, does not properly interpret the MBTA, which will be highlighted in Part B below, and second, does not acknowledge all of the relevant facts, which will be highlighted in Part C below. The result is that the BLM's (and other agencies') reliance is misplaced, and may leave these agencies open to law suits which they could lose.

The courts that have rejected the idea that habitat destruction is an incidental take or, in the alternative, courts that found that incidental take falls within the meaning of take under the MBTA at all have relied on several central arguments to bolster their position. I will analyze the most pervasive of these arguments here. The first argument is that only intentional takes are regulated by the MBTA, and therefore unintentional or incidental takes are not a violation of the statute. The second argument is that the taking must be "direct," and perhaps even only includes those takings associated with hunting and poaching;³⁶ implicit in this argument is the idea that habitat destruction does not result in direct bird deaths, particularly when caused by federally permitted logging.³⁷

33. See, e.g., *City of Sausalito v. O'Neill*, 386 F.3d 1186 (9th Cir. 2004); *Seattle Audubon Soc'y v. Evans*, 952 F.2d 297 (9th Cir. 1991); *Mahler v. U.S. Forest Serv.*, 927 F. Supp. 1559 (S.D. Ind. 1996); *Portland Audubon Soc'y v. Lujan*, No. 87-1160-FR, 1991 U.S. Dist. LEXIS 6224 (D. Or. May 8, 1991).

34. No. C89-160WD, 1991 U.S. Dist. LEXIS 10131 (W.D. Wash. March 7, 1991). The MBTA related portions of this opinion were later affirmed by *Evans*, which will be discussed in detail later in this paper.

35. *In re Bar First Go Round Salvage Sale*, 121 IBLA 347, 351 (1991). See also *Or. Natural Res. Council*, 116 IBLA 355 (1990).

36. See *City of Sausalito*, 386 F.3d at 1225; *Evans*, 952 F.2d at 303; *Mahler*, 927 F. Supp. at 1579.

37. A third argument, that the MBTA could not apply to federal actions at all, has since been so thoroughly repudiated by the courts, the Executive Order, and the FWS, that it does not bear discussing here. See, e.g., *Humane Soc'y v. Glickman*, 217 F.3d 882 (D.C. Cir. 2000) (finding that the MBTA does constrain federal agency action as well as private ac-

A. Intent Is Not a Requirement of the MBTA

Several courts have stated that logging and other types of habitat destruction cannot be violations of the MBTA because the Act requires intent to kill or take birds in order to rise to the level of a violation.³⁸ For instance, the district court in *Mahler v. United States Forest Service* found that habitat destruction was not a violation of the MBTA in part because “[t]he better reading of the statute is to find that the prohibitions apply only to activity that is *intended* to kill or capture birds.”³⁹

The language of the statute, however, belies this interpretation. The statute provides for two penalties for violating its precepts; the first is a misdemeanor using a strict liability standard,⁴⁰ and the second is a felony conviction, which requires intent.⁴¹ Therefore, the statute itself provides that proof of intent is only required when the government is pursuing a felony conviction. Several courts, following this interpretation, have assigned liability to public and private entities for accidental or unintentional migratory bird deaths.⁴²

The federal government has also recognized the applicability of the MBTA to unintentional take fact patterns. “At least in the criminal prosecutions in *FMC Corp.* and *Corbin Farm Service*, the United States government has taken . . . the position . . . that the MBTA applies to unintended deaths of migratory birds caused by human action (and even inaction).”⁴³ The FWS has also stated ex-

tion). This case is especially relevant since the D.C. Circuit is the forum where most actions against federal agencies are lodged.

38. See, e.g., *Mahler*, 927 F. Supp. 1559.

39. *Id.* at 1583 (emphasis added). See also *United States v. Delahoussaye*, 573 F.2d 910, 913 (5th Cir. 1978) (holding that violations of the MBTA require proof of scienter).

40. See 16 U.S.C. § 707(a) (2000):

Except as otherwise provided in this section, any person, association, partnership, or corporation who shall violate any provisions of said conventions or of this subchapter, or who shall violate or fail to comply with any regulation made pursuant to this subchapter shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than \$15,000 or be imprisoned not more than six months, or both.

41. See 16 U.S.C. § 707(b):

Whoever, in violation of this subchapter, shall knowingly—

(1) take by any manner whatsoever any migratory bird with intent to sell, offer to sell, barter or offer to barter such bird, or

(2) sell, offer for sale, barter or offer to barter, any migratory bird shall be guilty of a felony and shall be fined not more than \$2,000 or imprisoned not more than two years, or both.

42. See, e.g., *United States v. Corrow*, 119 F.3d 796, 805 (10th Cir. 1997); *United States v. Manning*, 787 F.2d 431, 435 (8th Cir. 1986); *Ctr. for Biological Diversity v. Pirie*, 191 F. Supp. 2d 161, 174 (D.D.C. 2002); *United States v. Moon Lake Elec. Ass’n, Inc.*, 45 F. Supp. 2d 1070, 1073-74 (D. Colo. 1999).

43. *Mahler*, 927 F. Supp. at 1577 (referring to cases in which the federal government

plicitly that both intentional and unintentional bird deaths are violations of the MBTA.⁴⁴ This seems to be the opinion of the entire executive branch, as the Executive Order, described above, asserts.⁴⁵

Furthermore, Congress itself has recognized and accepted the use of strict liability by the courts to enforce the statute: “[n]othing in this amendment is intended to alter the ‘strict liability’ standard for misdemeanor prosecutions under 16 U.S.C. [§] 707(a), a standard which has been upheld in many Federal court decisions.”⁴⁶ Since Congress, not to mention the controlling agency, and much of the federal court system, seems to ratify the strict liability approach, there should be no doubt that intent is not a required element.

B. The MBTA Does Not Differentiate Between Direct and Indirect Deaths

The second common argument against including habitat destruction among the activities banned by the MBTA is that habitat destruction only harms birds indirectly, while the Act only contemplates “direct” bird deaths.⁴⁷ Some courts have even further limited the statute’s applicability by claiming that, not only do the bird deaths have to be a direct result of the action taken, but the initial action has to be hunting/poaching-related in order to be relevant.⁴⁸ There are two cases that best demonstrate this point of view: *Seattle Audubon Society v. Evans*⁴⁹ and *Mahler v.*

successfully prosecuted private entities under the MBTA for accidentally poisoning birds in the first case through toxic materials released into a pond and in the second case through the application of agricultural pesticides). See *United States v. FMC Corp.*, 572 F.2d 902 (2d Cir. 1978); *United States v. Corbin Farm Serv.*, 444 F. Supp. 510 (E.D. Cal. 1978).

44. See FWS Advisory, *supra* note 4; 72 Fed. Reg. 8931 (Feb. 28, 2007) (to be codified at 50 C.F.R. pt. 21).

45. Exec. Order No. 13,186, 66 Fed. Reg. 3853, 3853, § 2(a) (Jan. 10, 2001) (defining “take” as both intentional and unintentional).

46. S. REP. NO. 99-445 at 16 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6113, 6128 (1986).

47. See, e.g., *Seattle Audubon Soc’y v. Evans*, 952 F.2d 297, 303 (9th Cir. 1991) (agreeing with other cases in which unintended bird deaths were found to be violations of the MBTA because those deaths were a *direct* result of the action taken, but argues that since habitat destruction leads only indirectly to bird deaths, if at all, it is not a taking).

48. See, e.g., *City of Sausalito v. O’Neill*, 386 F.3d 1186, 1225 (9th Cir. 2004) (finding that even habitat destruction which led indirectly to bird deaths was not an unlawful taking under the MBTA, because MBTA “describes physical conduct” (quoting *Evans*, 952 F.2d at 302)); *Newton County Wildlife Ass’n v. U.S. Forest Serv.*, 113 F.3d 110, 115 (8th Cir. 1997) (agreeing with *Evans* that only hunters and poachers were the intended targets of the MBTA prohibitions); *Citizens Interested in Bull Run, Inc. v. Edrington*, 781 F. Supp. 1502, 1510 (D. Or. 1991).

49. 952 F.2d 297 (9th Cir. 1991).

U. S. Forest Service.⁵⁰ In *Evans*, the environmental group challenged Forest Service plans to log old growth in national forests, claiming that the logging would violate several statutes, including the MBTA.⁵¹ In *Mahler*, the agency was initially sued for violations under the National Forest Management Act, the MBTA, and the National Environmental Policy Act in relation to a proposed salvage timber sale in the Hoosier National Forest.⁵² When these legal challenges failed, the plaintiff filed a motion for reconsideration, arguing that the harvest, which was to coincide with the nesting season of migratory songbirds, would violate the MBTA because it would result in “direct takings.”⁵³

In *Evans*, the court compares the MBTA’s language to the language of the Endangered Species Act (ESA).⁵⁴ Because the ESA defines “take” by using, among other words, the word “harm,” but the MBTA does not include the word “harm” in its definition of “take,” the *Evans* court found that “take” under the MBTA could not include habitat destruction, and could only encompass direct bird deaths.⁵⁵

This same issue was subsequently parsed by the Supreme Court in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*.⁵⁶ In *Babbitt*, the Supreme Court stated that “[s]everal of the words that accompany ‘harm’ in the [ESA’s] definition of ‘take,’ especially ‘harass,’ ‘pursue,’ ‘wound,’ and ‘kill,’ refer to actions or effects that do not require direct applications of force.”⁵⁷ The Supreme Court made this statement to counter the opinion of the lower court, which found that “harm” could not refer to an activity that indirectly hurts wildlife, in part because the other verbs surrounding “harm” all required direct application of force; therefore, the lower court reasoned that “harm” ought to be similarly understood.⁵⁸

Because the Supreme Court determined that words such as “pursue,” “wound,” and “kill” do not require a direct application of force under the ESA, there is no reason to believe that those words, which are also used to define “take” under the MBTA, ought to be understood any differently under the MBTA. Ulti-

50. 927 F. Supp. 1559 (S.D. Ind. 1996).

51. Other statutes used as grounds for the lawsuit include the National Forest Management Act and the Endangered Species Act. See *Evans*, 952 F.2d at 298.

52. 927 F. Supp. at 1561.

53. *Id.* at 1574.

54. 16 U.S.C. §§ 1531-1544 (1973).

55. *Seattle Audubon Soc’y v. Evans*, 952 F.2d 297, 302-03 (9th Cir. 1991).

56. *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687 (1995).

57. 515 U.S. at 701 (emphasis added).

58. *Id.*

mately, the Supreme Court's opinion in *Babbitt* proves that "harm" encompasses habitat destruction, but it does not prove that *only* "harm" encompasses habitat destruction. "As noted in *Babbitt*, but not by the Ninth Circuit in [*Evans*], the contemporaneous definitions of 'kill' and 'take' do not include the word 'directly' or suggest in any way that only direct applications of force constitute 'killing' or 'taking.'"⁵⁹ The court in *United States v. Moon Lake Electric Association* sums this up succinctly by stating:

pursuing, killing wounding, collecting, possessing . . .
 . all constitute acts that may be performed without
 exhibiting the physical conduct normally
 associated with hunting and poaching.

By prohibiting the act of "killing" in addition to the acts of hunting, capturing, shooting, and trapping, the MBTA's language and regulations suggest that Congress intended to prohibit conduct beyond that normally exhibited by hunters and poachers. *Indeed, the MBTA does not seem overly concerned with how captivity, injury, or death occurs.*⁶⁰

The *Evans* court's emphasis on the presence or absence of different verbs in the definitions of "take" is even odder given the fact that the opinion cited cases such as *United States v. FMC Corp.* and *United States v. Corbin Farm Service* with approval.⁶¹ In both of these cases it was determined that incidentally *poisoning* migratory birds was a "take" within the meaning of the MBTA.⁶² Moreover, Bean and Rowland, in their book *The Evolution of National Wildlife Law*, point out that while "harm" is not listed under the MBTA as it is under the ESA, neither is "poison," though it is listed under the Bald and Golden Eagle Protection Act as part of that statute's definition of "take."⁶³ Yet, the *Corbin Farm* and *FMC Corp.* courts both easily found that "poison" could be a derivative of

59. *United States v. Moon Lake Elec. Ass'n, Inc.*, 45 F. Supp. 2d 1070, 1078 (D. Colo. 1999).

60. *Id.* at 1074 (where the United States prosecuted the utility company for violating the MBTA and the Bald and Golden Eagle Protection Act because the power poles used by the company were not fitted with equipment that might have prevented bird deaths due to perching and roosting on those poles) (emphasis added).

61. *See Evans*, 952 F.2d at 303.

62. *United States v. FMC Corp.*, 572 F.2d 902, 907-08 (2d Cir. 1978); *United States v. Corbin Farm Serv.*, 444 F. Supp. 510, 531-32 (E.D. Cal. 1978).

63. MICHAEL J. BEAN & MELANIE J. ROWLAND, *THE EVOLUTION OF NATIONAL WILDLIFE LAW* 80 (3d ed. 1997).

“take.”⁶⁴ It is strange that the *Evans* court is so literal on the one hand, and so expansive on the other. A better and more consistent approach would have been to follow the lead of *Andrus v. Allard*, where the Supreme Court stated that “[r]elated statutes may sometimes shed light upon a previous enactment.”⁶⁵

The court in *Mahler* takes a different approach to arguing that only actions that directly lead to deaths are applicable. The *Mahler* court is straightforward in its recognition of the plain language of the statute, stating that the plaintiff’s

argument for broad application of the MBTA admittedly draws substantial support from the statutory language and from case law developed in criminal cases brought by agencies of the United States government other than the Forest Service. The statutory language says, after all, that it is “unlawful at any time, *by any means or in any manner*, to . . . kill . . . any migratory bird.”⁶⁶

The court however still refused to give effect to that plain language, and instead turned to the legislative history for support of an alternative theory that MBTA violations are confined to hunting/poaching related activities.⁶⁷ This is a mistaken approach, however, since where statutory language is “plain and unambiguous it must be given effect.”⁶⁸

Furthermore, the *Mahler* court’s reliance on legislative history is misguided for another reason. The *Mahler* court relies on the theory that the legislative history surrounding the Act does not suggest that such a broad interpretation of the statute, one which would include the incidental taking of birds through habitat destruction, was intended by Congress. Instead, the *Mahler* court argues that the 1918 Congress only intended the MBTA to focus on hunting, trapping, and commercial trafficking in migratory birds,⁶⁹ even though many of the bird species protected by the statute have never been the targets of any of these activities.⁷⁰

64. *FMC Corp.*, 572 F.2d at 907-08; *Corbin Farm Serv.*, 444 F. Supp. at 531-32.

65. 444 U.S. 51, 62 (1979) (finding that certain prohibitions found in the ESA could be attributed to the MBTA as well).

66. *Mahler v. U.S. Forest Serv.*, 927 F. Supp. 1559, 1576 (S.D. Ind. 1996) (quoting 16 U.S.C. § 703).

67. *Id.* at 1580-81.

68. *See generally*, Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401-05 (1950).

69. *See Mahler*, 927 F. Supp. at 1580.

70. *See United States v. Moon Lake Elec. Ass’n, Inc.*, 45 F. Supp. 2d 1070, 1081 (D.

The court in *Moon Lake* points out that there are several examples in the statute's legislative history which prove that Congress did contemplate the fact that the MBTA would apply to a very broad range of activities.⁷¹ As the *Moon Lake* court states: "there is no clearly expressed legislative intent that the MBTA regulates only physical conduct associated with hunting or poaching."⁷² Furthermore, several of the congressmen involved in the initial passage of the MBTA clearly stated that they felt that the prohibitions of the MBTA would apply to habitat as well.⁷³

Several courts also argue that habitat destruction could not

Colo. 1999) (quoting 56 CONG. REC. 7453 (June 6, 1918) (statement of Rep. Green: "What are the enemies of insectivorous birds? Not anybody in my State or elsewhere hunts insectivorous birds.")). The *Moon Lake* court also refers to 50 C.F.R. § 10.13 "listing approximately 925 protected bird species, many of which are not game birds and have not been hunted, traditionally, by humans." *Id.* at 1082.

71. *Moon Lake*, 45 F. Supp. 2d at 1080-82. See the following selection of congressional statements cited by the *Moon Lake* court:

"Nobody is trying to do anything here except to keep pothunters from killing game out of season, ruining the eggs of nesting birds, and ruining the country by it." 55 CONG. REC. 4816 (July 9, 1917) (statement of Sen. Smith). Senator Smith clearly was concerned with protecting eggs and nests, as well as with regulating hunting and poaching.

"[T]he extension of agriculture, and particularly the draining on a large scale of swamps and meadows, together with improved firearms and a vast increase in the number of sportsmen, have so altered conditions that comparatively few migratory game birds nest within our limits." H.R. NO. 65-243, at 2 (1918) (letter from Secretary of State Robert Lansing to the President). This statement clearly demonstrates concern over habitat destruction as well as hunting.

"If we are going to have a treaty about migratory birds, let us have some place where they can come and remain safely and be a pleasure and companions." 56 CONG. REC. 7458 (June 6, 1918) (statement of Rep. Smith).

If the Secretary . . . does not want you to do so, *you will never kill another duck or any bird protected by this bill*, whether it is a game bird or not. Therefore, it seems to me that we ought not to adopt the bill. *It is too far reaching* . . . [T]he bill provides that it shall be unlawful to take any bird or have in possession any part of a bird except in accordance with regulations adopted by the Secretary . . .

56 CONG. REC. 7364 (June 14, 1918[sic]) (statement of Rep. Huddleston) (emphasis added). Clearly Congress contemplated the very breadth that the *Mahler* court and others find absurd. Yet it is not for the court to strike down a statute for "absurdity," especially where that absurdity does not offend the Constitution, if Congress finds the rationale to be reasonable.

Senator Reed described the MBTA as "absolutely prohibiting the killing of game anywhere *under any circumstances*." 55 CONG. REC. 4399 (June 28, 1917) (statement of Sen. Reed) (emphasis added).

72. *Moon Lake*, 45 F. Supp. 2d at 1082.

73. *Id.* at 1080-82. See the following selection of congressional statements cited by the *Moon Lake* court:

"[T]he extension of agriculture, and particularly the draining on a large scale of swamps and meadows, together with improved firearms and a vast increase in the number of sportsmen, have so altered conditions that comparatively few migratory game birds nest within our limits." H.R. NO. 65-243, at 2 (1918) (letter from Secretary of State Robert Lansing to the President) (emphasis added). This statement clearly demonstrates concern over habitat destruction as well as hunting.

"If we are going to have a treaty about migratory birds, *let us have some place where they can come and remain safely* and be a pleasure and companions." 56 CONG. REC. 7458 (June 6, 1918) (statement of Rep. Smith) (emphasis added).

have been intended as a violation of the MBTA because such an interpretation would hamper the statutory goals set out for the Forest Service.⁷⁴ According to the *Mahler* court, “[m]any other statutes enacted in the intervening years also counsel against reading the MBTA to prohibit any and all migratory bird deaths resulting from logging activities in national forests.”⁷⁵ Similarly, in *Sierra Club v. Martin*, the court stated,

In 1897, Congress established the National Forest System “[t]o conserve the water flows, and to furnish a continuous supply of timber for the people.” In light of that purpose, it is difficult to imagine that Congress enacted the MBTA barely twenty years later intending to prohibit the Forest Service from taking or killing a single migratory bird or nest “by any means or in any manner” given that the Forest Service’s authorization of logging on federal lands inevitably results in the deaths of individual birds and destruction of nests.⁷⁶

Yet the court in *Pirie* found that the Navy’s incidental take was a violation of the statute, and the FWS agreed, though the agency decided not to prosecute. The legislation animating the Department of Defense undoubtedly contemplates the notion that the Department would need to conduct all manner of training exercises. Yet, the court, the FWS, the Navy (which did try to apply for a permit), and Congress⁷⁷ all agreed that the MBTA’s rules extended to the incidental take of birds even during activities that form part of the core mission of the government. Why should Forest Service legislation protect that agency from compliance with the MBTA when such an argument could not work for other federal agencies undertaking critical services to this country? Such a result would be absurd and should be avoided.

In *Robertson v. Seattle Audubon Society*,⁷⁸ the Supreme Court, in dictum, stated that the Forest Service only had two options to

74. See *Mahler*, 927 F. Supp. at 1581-82 (explaining that finding for plaintiff here would “upset the balance established by these other laws by giving absolute priority to the life of a single bird. That would effectively eliminate the Forest Service’s ability to provide timber resources for production, at least for several months of every year.”).

75. *Id.* at 1581.

76. *Sierra Club v. Martin*, 110 F.3d 1551, 1555-56 (11th Cir. 1997) (citation omitted).

77. After all, Congress felt there was a need to pass a new law forcing the FWS to create regulations on incidental take in order to facilitate the Navy’s training. Congress could just as easily have instead inserted a new clause into the MBTA explicitly stating that the federal government could not violate the MBTA through incidental take.

78. 503 U.S. 429 (1991).

satisfy its obligations under the MBTA in relation to the logging operation in question. The agency could comply with section 318 of the Department of the Interior and Related Agencies Appropriations Act of 1990,⁷⁹ the legitimacy of which was in question, or the agency could ensure that it managed its lands so that no migratory birds were killed or taken “within the meaning of § 2” of the MBTA.⁸⁰ While the court says nothing about what would and would not violate section 2, this statement at least leaves open the possibility that the Forest Service’s logging operation might in fact violate the act. The line between direct and indirect deaths, as drawn by the courts to discount activities that destroy habitat, is ultimately arbitrary and bears no relationship to the language, history, or purposes of the MBTA.

Finally, the *Evans* court stated that the other non-intentional bird death cases (i.e., *United States v. FMC Corp.*, *United States v. Corbin Farm Serv.*, etc.) were “inapposite” to the logging case before them because “[t]hese cases do not suggest that habitat destruction, leading indirectly to bird deaths, amounts to the ‘taking’ of migratory birds within the meaning of the Migratory Bird Treaty Act.”⁸¹ The *Evans* court however did not examine the high likelihood of *direct* bird deaths and egg and nest destruction that would result from the Forest Service’s planned operations. Therefore, perhaps the *Evans* court was correct, and indirect bird deaths are not a violation of the MBTA (though many would disagree). However, that does not prevent logging and other land clearing practices from being covered by the language of the MBTA.

C. Habitat Destruction Does Result in Direct Bird Deaths

Even if we accept the division between direct and indirect bird deaths as a legitimate part of the MBTA, the courts making this distinction still failed to properly enforce the statute. Some of the most relevant consequences of logging and land clearing during nesting season are the *direct* deaths and woundings of adult and fledgling birds and the destruction of eggs and nests. Several litigants have tried to raise this point in various cases,⁸² but courts,

79. Pub. L. No. 101-121, 103 Stat. 701 (1990) (stating that meeting the requirements of section 318 was adequate for the agency to meet its obligations under the MBTA and other environmental statutes for certain lands in Oregon and Washington).

80. *Robertson*, 503 U.S. at 438.

81. *Seattle Audubon Soc’y v. Evans*, 952 F.2d 297, 303 (9th Cir. 1991).

82. *See, e.g., City of Sausalito v. O’Neill*, 386 F.3d 1186 1225 (9th Cir. 2004) (“Sausalito asserts that implementation of the Fort Baker Plan will violate the MBTA because migratory birds’ nesting trees will be cut down, thereby disturbing both birds and their nests.”). But the court examined this solely as a problem of habitat destruction which might

for the most part, have overlooked this aspect of the claims, and have simply failed to address it.

Mahler is the only case which deals with this issue directly. The *Mahler* court, however, avoided finding an MBTA violation by relying on several of the arguments already discredited above.⁸³ In general, the courts have been overbroad when eliminating all logging and other land alteration practices from MBTA review because those activities only “indirectly” cause bird deaths. It is true that in a broad sense habitat destruction would indirectly harm birds by decreasing available breeding, feeding, and nesting areas. But upon closer inspection we see that logging, road building, land clearance, and other habitat alteration activities also directly kill many migratory birds. Fledglings, eggs, and nests, all protected by the statute, are the most obvious victims; but adult birds may also be injured and killed during major habitat destruction activities.

The exception the courts have created (that habitat destruction is not covered by the statute) is so large and vague, that it swallows the rule. The courts do not consider the fact that habitat destruction, such as removal of trees or the grading of land, when nests are present, means that nests will be destroyed and fledglings will die just as assuredly as they would have if a federal employee plucked them out of the nest and euthanized them. Furthermore, there is nothing to stop enterprising agency officials from recasting every activity as “habitat destruction.” For instance, the court has told the Department of Defense that live-fire training exercises without a FWS permit violate the MBTA.⁸⁴ But, if the training were re-classified as major re-landscaping, would a court no longer require the permit because this was merely habitat destruction?

Common sense should tell you that if you fell a tree that con-

eventually lead “indirectly to bird deaths.” Additionally, in *Martin*, “Sierra Club asserted that the Forest Service’s timber contracts violate the MBTA because they allowed timber cutting during the migratory bird nesting season and that tree cutting during nesting season would directly kill at least 2,000 to 9,000 neotropical migratory birds.” *Sierra Club v. Martin*, 110 F.3d 1551, 1553 (11th Cir. 1997). The court, however, focused its analysis on whether the MBTA subjects the federal government to its prohibitions. In *Newton County Wildlife Ass’n v. United States Forest Service*, “the Wildlife Association allege[d], and the Forest Service concede[d], that logging under the timber sales [would] disrupt nesting migratory birds, killing some.” 113 F.3d 110, 115 (8th Cir. 1997). The court, however, focused on whether strict liability could be applied under the MBTA, and whether the MBTA could be applied in this manner to the federal government.

83. *Mahler v. U.S. Forest Serv.*, 927 F. Supp. 1559, 1573-83 (S.D. Ind. 1996) (finding, for example, that unintentional take is not a violation of the statute, that Congress could not have meant to include the Forest Service’s activities within the actions that might be violations, and that the MBTA did not intend to control activities that affect birds beyond hunting and poaching).

84. *See Ctr. for Biological Diversity v. Pirie*, 191 F. Supp. 2d 161, 174 (D.D.C. 2002).

tains a nest full of eggs, both the eggs and the nest will likely be destroyed.⁸⁵ The same logic would tell you that driving heavy machinery and land graders over an area used by ground-nesting birds, during nesting season, will kill fledglings in those ground nests, as well as destroy the nests and eggs.⁸⁶ These are direct bird deaths, not displacement or projected future declines due to habitat loss. This is birds, nests, and eggs (all protected by the MBTA) being crushed.⁸⁷ The courts, with the exception of *Mahler*, have refused to acknowledge this truth, and the *Mahler* court avoids acting upon it by stretching the understanding of the MBTA beyond reason.

As stated above, it is telling that only the Department of Defense and the Department of Energy have so far completed an MOU with FWS under the Executive Order. Other agencies have not yet had their activities, or the activities of their major constituents, seriously affected by the loss of a major court case, and therefore, may not feel the same pressure to comply strictly with the MBTA. But as time progresses, and federal land clearance during nesting season continues, it becomes more and more likely that other agencies will be similarly targeted by lawsuits. This could lead to greater compliance both with the Act and with the Executive Order. However, it would be far more efficient if more proactive measures were taken instead.

While the government's reliance on cases like *Evans* may be understandable, it is important for agencies to recognize that their positions are not secure, but rather that they are violating the MBTA and may be in jeopardy from citizen lawsuits, as the Navy was. To ensure that other agencies are meeting the requirements of the statute, and to ensure that the courts interpret the statute appropriately, FWS must provide regulatory guidance. Part of that guidance ought to incorporate the recommendation made by the plaintiff in the *Mahler* case: "harvesting trees during nesting sea-

85. *Martin*, 110 F.3d at 1553 (noting that "[t]he Forest Service did not dispute that cutting down a tree with an active nest directly killed migratory birds").

86. The MBTA uses the term "to kill" as part of the definition of "take." "Kill" in turn means "to destroy or ruin." See *United States v. Moon Lake Elec. Ass'n, Inc.*, 45 F. Supp. 2d 1070, 1078 (D. Colo. 1999) (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1185 (1st ed. 1920)). The court notes that this was part of the definition of "kill" at the time the MBTA was passed.

87. A Forest Service memorandum noted that tree cutting during nesting season would kill migratory birds: "The loss of individual nests and or birds is an un-avoidable cost of any type of land management activity, whether it be agricultural plowing, mowing, road maintenance, lawn maintenance, clearing land for construction, or cutting trees."

Martin, 110 F.3d at 1553 n.7.

son would cause ‘direct takings’ of migratory [bird] in violation of the MBTA . . . [t]o comply with the MBTA, the Forest Service has only to avoid cutting the sale while migratory birds are nesting.”⁸⁸ This argument would work for any federal agency occupied in any type of land clearance during the nesting season.

IV. CONGRESS

The fact that Congress has never amended the statute to deal with this problem, even though Congress has amended the MBTA several times over the years for other purposes, does not support the position of either side, though that fact has been used by both sides.⁸⁹ For instance, the *Mahler* court spends a great deal of time enumerating all the instances in which Congress amended the MBTA but never included an explicit prohibition against incidentally killing migratory birds.⁹⁰ To counter this argument, the *Moon Lake* court notes that in all the time since the passage of the statute, Congress has also not amended the MBTA to exclude the possibility that incidental take⁹¹ was a violation of the statute, though Congress surely knew that such interpretations were being made by certain courts.⁹² Congress has surely been aware of the fact that the incidental taking of birds by federal agencies has been found to be a violation of the MBTA by some courts, and not by others. The fact that Congress has failed to endorse either interpretation continues to be Congress’s failure. One is bound to come to the conclusion that Congress has abandoned its responsibility in this matter.

88. *Mahler*, 927 F. Supp. at 1575 (citation omitted).

89. *See, e.g., Mahler*, 927 F. Supp. at 1580-81; *Portland Audubon Soc’y v. Lujan*, No. 87-1160-FR, 1991 U.S. Dist. LEXIS 6224 (D. Or. May 8, 1991); *In re Bar First Go Round Salvage Sale*, 121 IBLA 347, 351-52 (1991) (citing cases that rely on the principle that although the MBTA has been amended several times over its history, “habitat destruction,” or terminology that implies that idea, has never been added to the list of definition of “take,” and hence Congress could not have intended that outcome); *see also Moon Lake*, 45 F. Supp. 2d at 1077 (relying on the principle that since the MBTA has been amended several times over its history, but Congress has never repudiated the cases which find violations due to incidental takes including habitat destruction, such as reduced water quality, then Congress must have intended such a result).

90. *Mahler*, 927 F. Supp. at 1580-81. Several other courts have made similar arguments. *See, e.g., Portland Audubon Soc’y v. Lujan*, No. 87-1160-FR, 1991 U.S. Dist. LEXIS 6224, at *17-18 (D. Or. May 8, 1991).

91. *Moon Lake*, 45 F. Supp. 2d at 1077. Or for that matter, bird deaths beyond those caused by hunters and poachers.

92. “Just as ‘Congress is presumed to enact legislation with knowledge of the law’ . . . such that ‘absent a clear manifestation of contrary intent, a newly-enacted or revised statute is presumed to be harmonious with existing law and its judicial construction.’” *United States v. Boynton*, 63 F.3d 337, 343 (4th Cir. 1995) (quoting *United States v. Langley*, 62 F.3d 602 (4th Cir. 1995)). *See also Moon Lake*, 45 F. Supp. 2d at 1075.

V. A PERMANENT SOLUTION

The FWS is currently working on a regulatory solution to this problem, though it is not clear what form those regulations will take.⁹³ Demanding that the FWS require a permit for every federal activity which might incidentally take birds would be impractical; such an approach would overburden an already overextended agency and would not likely lead to the desired conservation benefits. At the other end of the spectrum, a blanket authorization allowing land clearance without oversight would allow federal agencies to continue to negatively impact migratory bird populations, violating the treaties upon which the MBTA stands. A middle-of-the-road approach is required here. I offer the following regulatory recommendations to the FWS that would meet the nation's obligations under the treaties, protect migratory bird populations, and meet the development needs of the various agencies and their constituencies, without overburdening the FWS.

First, the FWS ought to develop regulations that outright ban land disturbance activities during nesting season in areas that are known to, or are likely to, contain active nests.⁹⁴ These regulations should be established by region, as there are likely to be large variations nationwide. Incidental take, while not currently strictly enforced by the FWS, is already a violation of the statute, so such a regulation would really just be highlighting when such a violation is most likely to occur. It would not be a tightening of restrictions as many might claim, but rather regulatory guidance on how best to realize the intent of the MBTA. Additionally, if activity does need to take place during nesting season, as may reasonably be the case in Alaska, a process similar to the one suggested in the Executive Order⁹⁵ would be appropriate.

Second, the FWS should require that each agency evaluate the likely effects of its own activities—something agencies are required to do under the National Environmental Policy Act already. If the proposed action will have, “or [is] likely to have, a measurable negative effect on migratory bird populations,”⁹⁶ then that agency should have to consult with the FWS before moving forward. The FWS could help the agency to alter its plans and/or develop miti-

93. Interview with Marie Strassburger, Branch Chief of Bird Conservation Branch, Div. of Migratory Bird Mgmt., FWS (May 21, 2007).

94. Such an approach has been proposed by the Navy and by the FWS. See *Ctr. for Biological Diversity v. Pirie*, 191 F. Supp. 2d 161, 166 (D.D.C. 2002); FWS Advisory, *supra* note 4.

95. See Exec. Order No. 13,186, 66 Fed. Reg. 3853 (Jan. 10, 2001).

96. *Id.* at 3854, § 3(a).

gation measures to alleviate that result.⁹⁷ If mitigation is not possible, and the FWS feels that the effects would be too severe on the bird population in question, then the FWS could refuse to permit the activity. If the agency goes forward with the activity anyway, that agency would be in violation of the MBTA.⁹⁸ If the proposed action is not anticipated to have a measurable negative effect⁹⁹ on migratory bird populations then the action agency may simply go forward as planned, but must notify the FWS of its plans and the conclusions of its analysis. In this way, the FWS may be able to detect flaws in the analyses and prevent measurable harm. More importantly, in this way the FWS can be kept abreast of which bird populations are being impacted, when, to what extent, and by what types of activities. This would allow the FWS to do cumulative impact analyses which might reveal larger effects on bird populations than may be revealed by a narrower focus on a single project. In this way, there is some flexibility built-in for agency action, but birds, nests, and eggs are largely protected, and the FWS is able to play an active supervisory/advisory role as was intended by the MBTA.

VI. CONCLUSION

My intention here is not to prevent logging, land clearing, or other construction and development activities. Even if such were my intention it would not be feasible. The point of this exercise is

97. The Executive Order states that “[w]ith respect to those actions . . . identified [as likely to have measurable negative effects], the 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 [Fish and Wildlife] Service.” *Id.* at 3855, § 3(e)(9).

98. “Unless and except as permitted by regulations . . . it shall be unlawful at any time, by any means or in any manner, to . . . take . . . any migratory bird” 16 U.S.C. § 703(a).

99. The phrase “measurable negative effect” is employed, but never defined, by the Executive Order. *See* Exec. Order No. 13,186, 66 Fed. Reg. at 3854, § 3(a). An alternative standard to apply might be “significant adverse effect” which is used in the FWS regulations for authorization of take incidental to military readiness activities. 50 C.F.R. § 21.15(a)(1) (2007). This phrase is defined by FWS as:

Significant adverse effect on a population, as used in § 21.15, means an effect that could, within a reasonable period of time, diminish the capacity of a population of migratory bird species to sustain itself at a biologically viable level. A population is “biologically viable” when its ability to maintain its genetic diversity, to reproduce, and to function effectively in its native ecosystem is not significantly harmed. This effect may be characterized by increased risk to the population from actions that cause direct mortality or a reduction in fecundity.

50 C.F.R. § 21.3 (2007). Obviously the criteria chosen and the definitions used will have a great deal of impact on the outcome of the success of this program. While suggested criteria were provided here, the final criteria applied ought to be determined by wildlife biologists.

to demonstrate that the agencies are currently leaning on a thin reed. Federal agencies must truly take the precepts of the MBTA to heart. It is clear that Congress recognized the breadth of the actions that might be prohibited by the language of the statute.¹⁰⁰ Since the passage of the statute, much has changed as far as our environmental awareness and scientific understanding of the effects that previously acceptable practices could have on bird populations. If Congress now wishes to limit the broad language so that it does not encompass such actions Congress needs to amend the statute, but it has not yet done so. The FWS must recognize the fact that it is the gatekeeper for proper implementation of the statute. Incidental taking by land clearance must not be allowed to continue unchecked and unmonitored. Migratory birds are its trust, and FWS' regulatory efforts today could help preserve these species for the future, as well as maintain our international responsibilities.

100. *See supra* note 71.