

**A VISION OR A WAKING DREAM: REVISING THE
MIGRATORY BIRD TREATY ACT TO EMPOWER CITIZENS
AND ADDRESS MODERN THREATS TO AVIAN
POPULATIONS**

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*Well I didn't tell anyone, but a bird flew by
Saw what I'd done, he set up a nest outside
And he sang about what I'd become.¹*

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INTRODUCTION

The populations of North American bird species are in precipitous decline.² This decline is not the natural ebb and flow of avian populations but is instead attributable to a series of threats that have their genesis in human activity, including climate change, widespread habitat loss, and the

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1. FLORENCE AND THE MACHINE, *Bird Song, on LUNGS* (Island Records, 2009).

2. Mel White, *North American Birds Declining as Threats Mount*, NAT'L GEOGRAPHIC (June 21, 2013), <http://news.nationalgeographic.com/news/2013/06/130621-threats-against-birds-cats-wind-turbines-climate-change-habitat-loss-science-united-states/>.

production of wind energy.³ However, little action has been taken to prevent further decline in the number of birds. Federal protection of North American migratory bird species is derived solely from the Migratory Bird Treaty Act (MBTA).⁴ Enacted shortly after the turn of the twentieth century, MBTA has ceased to be an effective tool by which to protect its listed species because the operative mechanisms of the statute reflect the threats facing birds at the time it was enacted, rather than the modern threats posed by human activity and industrial production. This note, therefore, proposes several ways in which MBTA could be Congressionally amended in order to increase its efficacy and more adroitly address modern threats to bird populations, while arguing that MBTA's current obsolescence is a warning of what could soon become of the other major environmental statutes.

I. BACKGROUND

Congress enacted MBTA in 1918 to deal primarily with the threat posed to migratory bird populations by unregulated hunting and the hunting of birds for market sale.⁵ As previous attempts to protect migratory birds under the Commerce Clause were constitutionally challenged,⁶ MBTA served as a legislative enactment of a treaty for the protection of migratory bird species between the United States and Great Britain.⁷ As its operative mechanism, MBTA makes it a misdemeanor for any person to “pursue, hunt, take, capture, kill, attempt to take, capture, or kill” any listed migratory bird species without a permit from the United States Fish & Wildlife Service.⁸

In the almost 100 years since its enactment, MBTA has proved to be an effective piece of legislation in combatting those activities in which the

3. *Id.*

4. 16 U.S.C. §§ 703–09 (2006).

5. Scott Finet, *Habitat Protection and the Migratory Bird Treaty Act*, 10 TUL. ENVTL. L.J. 1, 7–8 (1996).

6. Several federal district courts found MBTA's predecessor, the Weeks-McLean Act, to be an impermissible exercise of Congressional power under the Commerce Clause. *See United States v. Shauver*, 214 F. 154 (E.D. Ark. 1914).

7. Andrew L. Askew, *Interpreting the Migratory Bird Treaty Act and its Prohibition Against the “Taking” of Protected Birds*, 88 N.D. L. REV. 843, 848 (2012). Subsequent parties to the treaty include Mexico, Japan, and the Soviet Union (now the Russian Federation).

8. 16 U.S.C. § 703. Species protected by MBTA are listed at 50 C.F.R. § 10.13 (2012). The list contains 836 species of birds, meaning that essentially every North American bird species is protected under MBTA. Only four species of birds are unlisted, due to their invasive/nuisance nature: the European Starling (*Sturnus vulgaris*), the Eurasian Tree Sparrow (*Passer montanus*), the Rock Dove (*Columba livia*), and the Monk Parakeet (*Myiopsitta monachus*).

intent to kill birds is clear.⁹ Thus, MBTA has soundly dealt with the threats posed to bird populations by illegal hunting, trapping, and baiting. Historically, the vast majority of criminal prosecutions under MBTA have involved unlicensed hunting and trapping or the possession of birds taken without a permit. However, as the environmental movement gained popular and legislative support during the 1970s, the scope of prosecutions under MBTA began to change.¹⁰ The federal courts and prosecutors began to expand the scope of liability under MBTA, holding parties criminally liable for *unintentional* bird deaths caused as a byproduct of agricultural and industrial processes.¹¹ Due to the lack of intent in these cases, the courts relied on the “take” provision of MBTA in order to hold defendants criminally liable.¹²

However, as the scope of criminal liability under MBTA began to increase, so did many of the federal courts’ unease with it. By its very nature, MBTA is a strict liability statute in that it requires no requisite *mens rea* element to establish liability. Some courts feared that criminal liability under MBTA could reach the point of absurdity by holding parties liable for bird deaths that were truly beyond their control.¹³ Most of the controversy in the courts focused on the elusive “take” provision. Unlike the Endangered Species Act (ESA), which provides a clear statutory definition of “take,” the language of MBTA offers no guidance as to what constitutes a “take” under the statute.¹⁴ Furthermore, the Supreme Court has never dealt with the issue of liability under MBTA, leaving the lower federal courts with little guidance on how to decide MBTA cases.¹⁵ Due to vying

9. See Benjamin Means, *Prohibiting Conduct, Not Consequences: The Limited Reach of the Migratory Bird Treaty Act*, 97 MICH. L. REV. 823, 839 (1998) (discussing the effectiveness of MBTA in combatting “intent crimes” within the framework of federal wildlife law).

10. Askew, *supra* note 7, at 851.

11. See generally *United States v. FMC Corp.*, 572 F.2d 902 (2d Cir. 1978) (holding defendant corporation liable for bird deaths caused as a byproduct of chemicals production); *United States v. Corbin Farm Serv.*, 444 F. Supp. 510 (E.D. Cal. 1978) (finding defendant liable for bird deaths caused by pesticide application).

12. 16 U.S.C. § 703.

13. The Second Circuit recognized this possibility early on, noting that at its most extreme, MBTA could impose liability on individuals for birds that die from flying into windows or airplanes. The court determined, however, that such liability could be avoided by sound prosecutorial discretion. *FMC Corp.*, 572 F.2d at 905.

14. See 16 U.S.C. § 1532(19) (2006) (defining “take” under the Endangered Species Act as “to harass, harm, pursue, hunt, shoot, wound, trap, capture, or collect, or to attempt to engage in any such conduct”).

15. See Kalyani Robbins, *Paved with Good Intentions: The Fate of Strict Liability Under the Migratory Bird Treaty Act*, 42 ENVTL. L. 579, 598 (2012) (noting that a lack of guidance by the Supreme Court has left the federal district courts to essentially fend for themselves in regard to liability issues under MBTA).

interpretations of the take provision, the scope of criminal liability under MBTA varies wildly between the various federal circuits.

Some of the circuits, notably the Eighth and the Ninth, adhere to a narrow, more traditional definition of liability under MBTA.¹⁶ Representative of this narrow interpretation is the recent decision in *United States v. Brigham Oil & Gas, L.P.*, in which a federal district court refused to impose liability on an oil company for the incidental death of birds in its oil reserve pits.¹⁷ The district court interpreted “take” to refer only to deliberate conduct directed intentionally at birds rather than incidental bird deaths that are the byproduct of otherwise lawful commercial activity.¹⁸ The court reasoned that if the take provision were to be expanded beyond its plain meaning, MBTA would criminalize many otherwise benign, everyday activities.¹⁹ Thus, in the circuits that have adopted a narrow reading of the statute, only those activities historically covered by MBTA—hunting, trapping, baiting, and the possession of illegally obtained birds—fall within its scope of liability.

Other circuits have adopted a more broad interpretation of MBTA’s take provision due to the strict liability nature of the statute.²⁰ It is under this interpretation of the take provision that defendants have been held criminally liable for incidental bird deaths. However, the various federal courts have followed different lines of reasoning to arrive at the conclusion that MBTA applies to incidental takes as well as intentional bird deaths. Some courts have focused simply on the fact that MBTA imposes strict liability for the death of birds, and that to make a distinction between direct and indirect conduct is to defeat the purpose of the statute.²¹ Concerned by a possible erosion of due process rights, other courts have imposed a “proximate cause” test on the statute that requires the defendant to know that the bird deaths could happen but do nothing to prevent them.²²

16. See generally *Newton Cnty. Wildlife Ass’n v. U.S. Forest Serv.*, 113 F.3d 110 (8th Cir. 1997) (holding that habitat destruction from timber harvests do not constitute a take under MBTA); *Seattle Audubon Soc’y v. Evans*, 952 F.2d 297 (9th Cir. 1991) (holding that logging in the habitat of a listed bird species does not constitute a violation of MBTA).

17. 840 F. Supp. 2d 1202, 1203 (D. N.D. 2012).

18. *Id.* at 1209.

19. *Id.* at 1212.

20. See *United States v. Apollo Energies, Inc.*, 611 F.3d 679, 685 (10th Cir. 2010) (providing a summary of how the different circuit courts have treated strict liability under MBTA).

21. See generally *United States v. Moon Lake Electric Ass’n*, 45 F. Supp. 2d 1070 (D. Colo. 1999) (holding defendant strictly liable for the death of birds that were electrocuted by perching on power lines).

22. See generally *Apollo Energies*, 611 F.3d 679 (holding defendant liable for bird deaths in oil machinery after USFWS informed defendant that such deaths were possible and easily avoidable, yet defendant took no action to prevent them); *United States v. CITGO Petroleum Corp.*, 893 F. Supp.

However, the so-called “proximate cause” requirement is a judicial creation and is not expressed or even implied in the actual language of MBTA. This test is an important facet of the broad interpretation of “take” under MBTA, as it prevents liability under the statute from reaching the point of absurdity, as feared by the courts that have chosen to read the statute narrowly.²³ Though strict liability poses a problem in the case of incidental takes, it is worth noting that some argue that without strict liability, MBTA would be practically unenforceable.²⁴

Vying interpretations of a statutory provision is not necessarily problematic. However, in the case of MBTA, the debate over a broad or narrow interpretation of “take” actually threatens to defeat the statute’s purpose of protecting listed bird species. When Congress passed MBTA in 1918, the dominant threat to North American bird populations was unregulated hunting and trapping.²⁵ Not surprisingly, the threats to bird populations have changed dramatically in the almost 100 years since MBTA’s enactment and MBTA itself runs the risk of becoming a legislative antique no longer capable of protecting North America’s birds.²⁶ This is because most of the modern threats to bird populations fall soundly within the definition of “incidental take” that has been so debated in the federal courts. Current United States Fish & Wildlife Service estimates place the total number of breeding birds in the United States at somewhere between ten and twenty billion.²⁷ The vast majority of listed species have large numbers of individuals killed accidentally by human activity.²⁸ In a given year, communication towers kill between four and five million birds, electrical transmission lines kill around 174 million, wind turbines kill 33 thousand, agricultural pesticide applications kill around 72 million, oil extraction pits kill roughly two million, window and building collisions kill a staggering 900 million, and housecats alone account for 39 million

2d 841 (S.D. Tex. 2012) (holding defendant liable for bird deaths in uncovered oil tanks as such tanks, were supposed to be covered pursuant to Clean Air Act regulations).

23. See Larry Martin Corcoran, *Migratory Bird Treaty Act: Strict Liability for Non-Hunting, Human Caused Bird Deaths*, 77 DENV. U.L. REV. 315, 333–40 (1999) (discussing how courts have imposed a proximate cause test on MBTA in an attempt to temper the potentially harsh results of strict liability while attempting to avoid results unintended by Congress).

24. See Finet, *supra*, note 5 at 17–18 (arguing that strict liability is the only way in which a statute such as MBTA can be effective).

25. *Id.* at 7–8.

26. See Collette L. Adkins Giese, *Spreading Its Wings: Using the Migratory Bird Treaty Act to Protect Habitat*, 36 WM. MITCHELL L. REV. 1157, 1158 (2010) (noting that the historical scope of MBTA no longer adequately serves a modern function due to changing threats to migratory birds).

27. U.S. FISH & WILDLIFE SERV., MIGRATORY BIRD MORTALITY (2002), available at <http://www.fws.gov/migratorybirds/NewReportsPublications/FactSheets/Mortality-Fact-Sheet.pdf>.

28. *Id.*

deaths.²⁹ Thus, vast numbers of listed birds are killed every year. While some federal courts refuse to include the very activity that is killing the birds within MBTA's scope of liability, other federal courts quibble over where exactly to draw the line on the inclusion of such activity. The modern threats facing migratory bird species could not have possibly been contemplated by Congress when MBTA was passed in 1918, due to the extreme advances in technological and industrial development that have since occurred. The statute needs to be reexamined in the context of these modern threats in order to prevent it from becoming a mere nullity or legislative antique.

The remainder of this note will focus on the necessity of revising MBTA in order to resolve the varying interpretations of the take provision in the federal courts and bolster the statute to more effectively protect listed species from modern population threats. The first part examines the possibility of including civil penalties in MBTA in order to deal with incidental and unavoidable bird casualties. The second part argues that the inclusion of a citizen suit provision in MBTA would allow more effective enforcement against those parties that cause incidental takes. Finally, the note concludes with a policy discussion on the United States' increasingly outdated environmental statutes and how to prevent their growing obsolescence.

II. PROPOSED AMENDMENTS TO MBTA

The most certain way to resolve the dispute in the federal courts over the correct interpretation of MBTA's take provision—and to ensure more robust protection of listed bird species from modern threats—is for Congress to amend the statute accordingly. Though Congress has amended MBTA in the past, the majority of these amendments have been technical, rather than substantive alterations to the statute.³⁰ In order to ensure the continued protection of North America's migratory bird species, MBTA must be substantively amended with particular focus on the take provision.³¹ Specifically, MBTA should be amended to (1) provide for civil penalties in the case of foreseeable incidental takes and (2) include a citizen

29. *Id.*

30. Most of the amendments to MBTA consist of the addition of subsequent parties to the original Migratory Bird Treaty between the United States and Great Britain. However, the only major substantive changes have concerned strict liability, albeit not under the take provision. *See Giese, supra* note 26, at 1162–63 (providing a history of Congressional amendments to MBTA).

31. *See Meredith Blaydes Lilley & Jeremy Firestone, Wind Power, Wildlife, and the Migratory Bird Treaty Act: A Way Forward*, 38 ENVTL. L. 1167, 1177 (2008) (noting that the modern relevance of MBTA is due to incidental takes rather than deliberate activity).

suit provision to empower citizens and non-governmental organizations (NGOs) to enforce the civil provisions against corporations and the government.

A. *Resolving Strict Liability Concerns: The Inclusion of Civil Penalties in MBTA for Incidental and Foreseeable Takes*

Holding defendants criminally liable under MBTA's take provision for bird deaths that they did not deliberately and affirmatively cause is the issue that has so perplexed the federal courts. Whereas some courts have adopted the "proximate cause" test to find liability, others have simply refused to impose strict liability under the take provision, consequently leaving some of the most destructive threats to bird populations unchecked.³² This problem is magnified by the fact that the Fish & Wildlife Service issues no permits to allow incidental takes, yet when they do occur, some federal courts refuse to enforce MBTA's provisions against guilty parties.³³ Regardless, it is the interplay between MBTA's strict criminal liability nature and its take provision that is preventing the statute from achieving its full potency.

The question is not whether MBTA should be amended.³⁴ Rather the question is how MBTA should be amended. Previously suggested amendments have included a sweeping exception for incidental takes,³⁵ a specific accounting of the type of bird deaths that constitute a violation of the statute,³⁶ revision to ensure uniform enforcement under the statute,³⁷ and the increase in fines for violations.³⁸ It has even been suggested that bird deaths that likely violate MBTA can be addressed via regulatory

32. See Corcoran, *supra* note 23, at 316 (discussing how various causes of bird deaths are prosecuted under MBTA).

33. See Lilley & Firestone, *supra* note 31, at 1181 (exploring the interplay between incidental takes, FWS permitting, enforcement by the federal courts and the problems posed by this situation).

34. See Scott W. Brunner, *The Prosecutor's Vulture: Inconsistent MBTA Prosecutions, Its Clash with Wind Farms, and How to Fix It*, 3 SEATTLE J. ENVTL. L. 1, 5 (2013) (noting that Congressional amendment of MBTA is necessary to resolve its vying interpretations in the federal courts).

35. *Id.* at 29–30 (arguing for a broad liability exemption in the case of incidental takes); see also Conrad A. Fjetland, *Possibilities for the Expansion of the Migratory Bird Treaty Act for the Protection of Migratory Birds*, 40 NAT. RESOURCES J. 47, 64 (2000) (suggesting that 16 U.S.C. § 703 should be amended to exempt accidental bird deaths from liability).

36. Corcoran, *supra* note 23, at 357.

37. See Askew, *supra* note 7, at 860 (noting that Congressional revision is needed to ensure uniform enforcement); see also Robbins, *supra* note 15, at 604–05 (arguing that a uniform prosecutorial framework must be implemented under MBTA).

38. See Fjetland, *supra* note 35, at 64 (arguing for increased fines under MBTA).

mechanisms outside of the scope of statute.³⁹ However, none of these proposed amendments would resolve the quandary over strict liability for incidental takes while simultaneously protecting migratory bird populations from the threats posed by modern society.

The proper way in which MBTA should be amended is to adopt a provision allowing for the imposition of civil penalties for incidental—but foreseeable—takes of migratory birds under section 703. An amendment in this vein would ameliorate the conflict in the federal courts over imposing criminal liability on parties for unintentional conduct, as well as allow Congress or the Fish & Wildlife Service to define those activities which constitute an incidental take under the statute. If Congress or the Fish & Wildlife Service were able to define precisely what activity constitutes an incidental take under MBTA, the scope of liability under the statute could be exactly defined and remove any ambiguity over whether a particular class of bird deaths constitutes a violation of the statute. An ideal civil penalty amendment would resolve the strict liability-incidental take quandary, impose a foreseeability test on judicial analyses of incidental takes, and incentivize industry and agriculture to avoid needless bird deaths. The amendment would also contain a limited number of specific exemptions in which neither civil nor criminal liability would be imposed on parties for those bird deaths which are truly unavoidable.

The first step in drafting an effective civil penalty amendment would be to precisely define the term “take” within the meaning of the statute, as much of the controversy over the take provision has arisen due to the fact that Congress left the term undefined. The most efficient and uniform way to define take for the purposes of MBTA would be to adopt a modified version of the definition of “take” articulated by Congress in the ESA.⁴⁰ Under the ESA, “take” means to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in such conduct.”⁴¹ Proponents of a narrow interpretation of “take” under MBTA have argued that the lack of definition in MBTA bespeaks a Congressionally intended difference between MBTA and the ESA; that Congress could have amended MBTA following the enactment of the ESA in order to align the meaning of “take” under the two statutes.⁴² However, this is not so, as most

39. See Blake M. Mensing, *Putting Aeolus to Work Without the Death Toll: Federal Wind Farm Siting Guidelines can Mitigate Avian and Chiropteran Mortality*, 27 J. ENVTL. L. & LITIG. 41, 98–99 (2012) (arguing that the Department of the Interior should adopt regulations to prevent wind farms from being sited in bird flyways and to require preventative technology to be utilized in wind turbine design).

40. See 16 U.S.C. § 1532(19).

41. *Id.*

42. Means, *supra* note 9, at 828–33.

of what is defined as a “take” in the ESA is already designated as an explicit violation under MBTA.⁴³ Thus, it is the “harass” and “harm” language of ESA’s take definition that needs to be incorporated into MBTA’s definition in order to bring incidental takes soundly within the scope of the statute. A potential definition of “take” under MBTA could read: *any activity, whether incidental or intentional, that may foreseeably result in death due to harassment or harm.* Such a definition would resolve potential ambiguity under the take provision as well as bring MBTA into accordance with more recent federal wildlife laws such as the ESA. In regard to the physical amendment of the statute itself, the new definition of take could be included within the existing language of section 703 of MBTA.

The second step in imposing effective civil penalties under MBTA would be to precisely define the penalties that result from civil violations of the statute. An ideal civil penalty under MBTA would take the form of a monetary fine imposed for each violation of the statute. Current criminal misdemeanor violations of MBTA can result in a fine of up to \$15,000 and no more than six months in prison.⁴⁴ In order to ensure consistency under the statute, civil fines should reflect the amounts imposed for criminal violations. Thus, a civil violation would result in a monetary penalty of the same amount but without the added risk of imprisonment that accompanies a criminal conviction under MBTA.⁴⁵

Furthermore, there would be an ideological difference between the criminal and civil fines under MBTA. Normally, a criminal fine serves to deter the criminal conduct at which it is aimed.⁴⁶ However, in the case of incidental takes, a criminal fine cannot work to deter bird deaths that the perpetrator did not even intend to commit in the first place. Therefore, a civil penalty would work to compensate society for the ill caused by incidental bird deaths that could have been foreseeably prevented. Ideally, the revenue from civil penalties under MBTA could be channeled directly into the Fish & Wildlife Service to be used for the management of migratory birds and the National Wildlife Refuge System.

Though civil penalties under MBTA would not be designed to expressly deter incidental takes, the penalties would inadvertently do just that due to the strong economic incentive that the possibility of such fines would create. The threat of constant fines due to the death of birds as an

43. 16 U.S.C. § 703.

44. 16 U.S.C. § 707.

45. *Id.*

46. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 15 (5th ed. 2009) (discussing deterrence theory in the criminal law context).

externality of production would incentivize many firms to take into account birds when conducting their operations in order to avoid accruing additional costs of operation. These firms could avoid civil penalties by altering production processes and taking into account the migratory flyways and nesting habits of local birds. The use of economic incentives to further environmental goals is not a foreign mechanism in the field of environmental law, the most prominent example of it appearing in Congress' 1990 amendments to the Clean Air Act.⁴⁷ Since many bird deaths are foreseeable, most firms would likely respond to the civil penalties as an incentive to take measures against accidental bird deaths. Of course, it is also eminently possible that large firms will simply ignore the economic incentives and absorb the civil penalties as just another cost of conducting business. However, should such a situation arise, these firms would still be subject to prosecution under MBTA's criminal provisions. Thus, the civil and criminal penalties under MBTA can work together to a greater effect.

Though civil penalties under MBTA would substantially further the goals of the statute by affording extra protection to North America's migratory bird populations, it is essential that the incidental takes that trigger civil penalties be only deaths that are *foreseeable*. Indeed, those courts that have imposed criminal liability under MBTA have been most willing to do so in those cases where the incidental takes were reasonably foreseeable. In *United States v. Apollo Energies*, the Tenth Circuit found that the incidental bird deaths were foreseeable since the Fish & Wildlife Service had warned defendants that their machinery could kill birds, offered suggestions on how to prevent the machinery from killing birds, and provided a "grace period" in which defendants could address the problem.⁴⁸ Likewise, in *United States v. CITGO Petroleum Corporation*, the court found that the incidental death of birds was foreseeable since the oil tanks in which the birds died were supposed to be covered pursuant to federal and state law and that employees had previously reported the presence of dead birds in the tanks to management.⁴⁹ Therefore, a civil penalty provision with a foreseeability requirement would operate most justly by only fining those that realized incidental bird deaths were possible, yet did nothing to reasonably prevent them from occurring.

Most importantly, however, the inclusion of a foreseeability requirement in the civil penalties provision would prevent civil liability

47. See 42 U.S.C. § 7651 (2006) (establishing a system of transferrable allowances in order to incentivize the abatement of sulfur dioxide emissions).

48. 611 F.3d at 691.

49. 893 F. Supp. 2d at 847–48.

from expanding beyond its envisioned scope.⁵⁰ A foreseeability requirement would prevent firms and individuals from being fined for bird deaths that were truly beyond their control and could not have been anticipated or prevented. Since unavoidable incidental takes are a reality of modern society, the civil penalties provision should also include certain enumerated exemptions in which civil liability would not be imposed upon those parties “responsible” for the deaths. There are certain causes of incidental deaths that would be near-impossible for any person to address, such as the birds killed by window collisions, airplanes, and roaming housecats.⁵¹ Therefore, the civil penalties provision should exempt those incidental takes which are unavoidably caused by citizens simply going about their daily business with no intent to kill birds.

A potential civil penalty provision could resemble the following: *Any person, association, partnership, or corporation who shall violate this subchapter by committing an incidental take of a listed migratory bird species that was foreseeable and could have been reasonably prevented shall be civilly liable for such takes and shall be fined not more than \$15,000. Those incidental takes caused by window or building strikes, motor vehicle and aircraft collisions, and the natural behavior of domesticated animals shall not expose any person, association, partnership, or corporation to criminal or civil liability under this subsection.* In regard to the actual physical amendment of the statute, the civil penalties provision could be placed within the existing provision outlining criminal violations and penalties.⁵²

B. Enforcing Civil Penalties and Avoiding Selective Enforcement: The Need for a Citizen Suit Provision in MBTA

Most of the major environmental statutes of the 1970s contain citizen suit provisions that permit private citizens, citizen groups, and NGOs to file suit against entities for violating an environmental statute and against the government for failing to act pursuant to an environmental statute. Among the major statutes that contain a citizen suit provision are the Clean Water Act,⁵³ the Clean Air Act,⁵⁴ the ESA,⁵⁵ and the Resource Conservation and

50. See *FMC Corp.*, 572 F.2d at 905 (describing the potential for large swaths of commonplace activity to fall within the scope of liability created by MBTA).

51. See U.S. FISH & WILDLIFE SERV., *supra* note 27 (providing figures for the number of birds killed by window collisions and housecats).

52. 16 U.S.C. § 707.

53. 33 U.S.C. § 1365 (2006).

54. 42 U.S.C. § 7604 (2006).

55. 16 U.S.C. § 1540(g) (2006).

Recovery Act.⁵⁶ MBTA, enacted more than a half-century before the major environmental statutes, is notably lacking a citizen suit provision by which groups could privately enforce the statute against violators. In order to fully modernize MBTA and give full effect to any potential civil penalty provision, the statute must be further amended to contain an effective citizen suit provision.

The citizen suit provisions present in other environmental laws have been extremely effective in ensuring compliance and agency accountability due to their use by citizen groups and NGOs.⁵⁷ Congress' intent in including citizen suit provisions in the environmental statutes was to encourage better enforcement by the federal agencies and to allow citizens to privately enforce the laws where the government cannot.⁵⁸ Congress' policy behind citizen suits has been successful overall, as citizen suits have been shown to encourage both compliance and greater enforcement by the government.⁵⁹ Indeed, the citizen suit has been wildly popular as a form of advocacy, due perhaps to declining trust in the government to enforce environmental laws on behalf of citizens.⁶⁰ Across the breadth of federal law, the vast majority of citizen suits are filed under the environmental statutes.⁶¹ It is estimated that a new environmental citizen suit is filed every two business days—a rate that far surpasses both the Environmental Protection Agency and the Department of Justice.⁶² Seventy-five percent of all environmental lawsuits are citizen suits, which means that most environmental jurisprudence is directly attributable to them.⁶³ Therefore, groups that bring citizen suits have the unique ability to help define national environmental policies.⁶⁴ Finally, the popularity of citizen suits is due also to the significant incentives that exist for groups to bring suit. All of the environmental statutes that authorize citizen suits also provide for the recovery of attorney fees by the initiating parties.⁶⁵ Furthermore, it has been noted that the existence of civil penalties in a statute serve as a significant

56. 42 U.S.C. § 6972 (2006).

57. James R. May, *Now More Than Ever: Trends in Environmental Citizen Suits* at 30, 10 WIDENER L. REV. 1, 8 (2003).

58. Stephen Fotis, *Private Enforcement of the Clean Air Act and the Clean Water Act*, 35 AM. U.L. REV. 127, 136 (1985).

59. May, *supra* note 57, at 22.

60. Jeannette L. Austin, *The Rise of Citizen-Suit Enforcement in Environmental Law: Reconciling Private and Public Attorneys General*, 81 NW. U.L. REV. 220, 233 (1987).

61. May, *supra* note 57, at 15.

62. *Id.* at 4–5.

63. *Id.* at 8.

64. Austin, *supra* note 60, at 260.

65. *Id.* at 231.

inducement for parties to bring citizen suits against those violating environmental laws.⁶⁶

As previously noted, MBTA contains no provisions allowing citizen suits to be brought under the statute. The lack of a citizen suit provision in MBTA severely limits the enforcement of MBTA when compared to other environmental laws while simultaneously increasing the chances of selective enforcement by the Department of Justice.⁶⁷ Thus, the only way in which citizens can become involved in the enforcement of MBTA is to file suit challenging agency actions pertinent to MBTA under the Administrative Procedure Act.⁶⁸

However, filing suit under the Administrative Procedure Act to enforce MBTA has been met with overwhelming failure by those citizens and NGOs that have attempted to do so. In *Mahler v. United States Forest Service*, the plaintiff used the Administrative Procedure Act to challenge the agency's decision to clear cut sections of a national forest that provided bird habitat.⁶⁹ Specifically, the plaintiff alleged that the agency's actions would constitute a take under section 703 of MBTA.⁷⁰ The court noted that MBTA contains no citizen suit provision and further found that the agency's timber harvesting did not constitute a take.⁷¹ In *Seattle Audubon Society v. Evans*, the Audubon Society challenged a logging plan for the same reasons as in *Mahler*.⁷² Again, the court refused to find a take under section 703.⁷³ Other lawsuits brought by citizens under the Administrative Procedure Act to enforce MBTA have ended similarly.⁷⁴ One notable success, however, occurred in *Humane Society of the United States v. Glickman*, in which the plaintiff challenged a Fish & Wildlife Service regulation that allowed federal agencies to kill or take birds protected by MBTA without a permit from the Department of the Interior.⁷⁵ Here the court held that MBTA contains no distinctions and that it applies equally to federal agencies and individuals.⁷⁶ However, the Humane Society's victory in *Glickman* is the exception. Suits brought under the Administrative

66. Fotis, *supra* note 58, at 172.

67. Brunner, *supra* note 34, at 10–11.

68. De Anna Hill, *Combating Animal Cruelty with Environmental Law Tactics*, 4 J. ANIMAL L. 19, 34 (2008).

69. 927 F. Supp. 1559, 1561 (S.D. Ind. 1996).

70. *Id.* at 1573.

71. *Id.*

72. 952 F.2d 297, 298 (9th Cir. 1991).

73. *Id.* at 303.

74. See generally *City of Sausalito v. O'Neill*, 386 F.3d 1186 (9th Cir. 2004) (holding that plaintiff's Administrative Procedure Act challenge to National Park Service plan to clear cut trees did not amount to a take under MBTA).

75. 217 F.3d 882, 884 (D.C. Cir. 2000).

76. *Id.* at 886–87.

Procedure Act to enforce MBTA are necessarily constrained and limited in their scope. Thus, they cannot work to affect the broad trends needed to secure greater enforcement of the statute.

Perhaps the most unsettling consequence of MBTA's lack of a citizen suit provision is the possibility of unchecked, selective enforcement of the statute by the Department of Justice. In this case, the mere possibility of selective enforcement has likely become a reality. While the Obama administration has prosecuted many oil and gas companies for violations of MBTA, it was only very recently that the Department of Justice prosecuted the first wind energy firm, despite the voluminous number of birds killed by that industry.⁷⁷ In fact, it was only this past year that the first wind farm even attempted to seek a permit from the Fish & Wildlife Service to take birds under MBTA, revealing how widespread the lack of prosecutions in the wind industry truly is.⁷⁸ Thus, the wind industry is being indirectly subsidized by the current administration as it is a "favored" industry.⁷⁹ Typically, "disfavored" industries—oil, gas, pesticides, chemicals—are those which are most regularly prosecuted for bird deaths under MBTA.⁸⁰ The reticence of the Department of Justice to prosecute the wind industry under MBTA poses serious threats to the integrity of the statute due to selective enforcement.⁸¹ This is particularly alarming given the fact that one of the commonly proffered solutions to MBTA's current problems is to simply rely on the sound prosecutorial discretion of the Department of Justice.⁸² However, as current experience demonstrates, MBTA is highly vulnerable to selective prosecution and simply deferring to the discretion of the Department of Justice is unlikely to resolve this issue.⁸³ It could be argued that environmental NGOs will be just as selective as the Department

77. The Associated Press, *Wind farms get pass on eagle deaths*, FUELFIX (May 14, 2013), <http://fuelfix.com/blog/2013/05/14/wind-farms-gets-pass-on-eagle-deaths/>; see Emma G. Fitzsimmons, *Wind Energy Company to Pay \$1 Million in Bird Deaths*, N.Y. TIMES (Nov. 22, 2013), http://www.nytimes.com/2013/11/23/us/wind-energy-company-to-pay-1-million-in-bird-deaths.html?_r=0.

78. Phil Taylor, *Minn. Wind Farm Seeks First Eagle-Kill Permit*, GREENWIRE (Jan. 18, 2013), <http://www.eenews.net/greenwire/stories/1059975022/search?keyword=%22Migratory+Bird+Treaty+Act%22>.

79. James Conca, *Wind Energy Gets Away With Murder*, FORBES (Sept. 22, 2013), <http://www.forbes.com/sites/jamesconca/2013/09/22/wind-energy-gets-away-with-murder/>.

80. Brunner, *supra* note 34, at 13.

81. *Id.* at 4; see also Corcoran, *supra* note 23, at 316 (noting that the most destructive causes of bird deaths are left unprosecuted under MBTA).

82. See Means, *supra* note 9, at 835–36 (arguing that prosecutorial discretion is a solution to MBTA's current problems); see also Robbins, *supra* note 15, at 606 (arguing that the implementation of a uniform prosecutorial framework under MBTA would resolve many of the statute's inefficiencies).

83. See Brunner, *supra* note 34, at 21–24 (providing an excellent overview of current trends in prosecutorial discretion under MBTA).

of Justice in their filing of citizen suits to further other environmental interests, such as the propagation of green energy. However, the existence of NGOs committed solely to protecting birds and other wildlife—such as the National Audubon Society or Defenders of Wildlife—makes the threat of such a possibility negligible at best. Therefore, by allowing citizens and NGOs to privately enforce civil violations under MBTA via a citizen suit provision, the problem of selective enforcement would be effectively tempered.

It must be noted that some have argued that a citizen suit provision in MBTA is completely impractical and such an amendment would never be passed by Congress.⁸⁴ However, the proposed citizen suit provision deemed impossible by commentators contained a provision in which personal liability could be imposed upon government officials for allowing violations of MBTA to occur unhindered.⁸⁵ The citizen suit provision proposed by this note contains no such imposition of personal liability for government officials technically responsible for MBTA violations. This avoids the flaw that some commentators saw as fatal to a MBTA amendment being adopted by Congress.

A citizen suit provision in MBTA would ideally model those citizen suit provisions present in the Clean Water Act and the ESA. Furthermore, should a civil penalties provision also be adopted, the success of citizen suits under MBTA would likely resemble the resounding success of those brought under the Clean Water Act.⁸⁶ A civil penalties provision is essential to vesting a citizen suit provision under MBTA with any real power.⁸⁷ Thus, the proposed civil penalties amendment is necessary to vesting a citizen suit provision with any real power and vice versa.

The citizen suit provision under MBTA would contain two avenues by which citizen groups or NGOs could file suit for violations of the statute. The first avenue would permit parties to file suit in order to enforce civil penalties against those parties that are violating MBTA due to foreseeable incidental takes. Civil suits could be filed against corporations, industries, other business associations, and government agencies that are violating the statute. Individuals would not be exposed to civil liability under the citizen suit provision except in those cases where a court finds it appropriate to

84. See Fjetland, *supra* note 35, at 63 (arguing that an amendment to MBTA providing for citizen suits is an impossibility given the current state of Congress).

85. *Id.*

86. See Fotis, *supra* note 58, at 158–59 (noting that citizen suits brought under the Clean Water Act are far more successful than those brought under the Clean Air Act due to the clear imposition of civil liability and penalties in the former statute).

87. See *id.* at 156 (noting that the lack of opportunity for courts to assess civil penalties under the Clean Air Act has essentially turned that statute's citizen suit provision into a nullity).

pierce the corporate veil. Again, these suits would be restricted to enforcement of the civil penalties imposed for incidental takes that could have been reasonably foreseen and prevented. Criminal enforcement of the statute would remain the duty of the Department of Justice.

The second avenue by which parties could file a citizen suit under the proposed MBTA amendment would be against the Department of the Interior or Fish & Wildlife Service for failure to carry out its statutorily mandated duties under MBTA. For example, should the Fish & Wildlife Service fail to enforce the statute or neglect to promulgate a regulation, parties could file an “agency-forcing” action under the citizen suit provision. Through this avenue citizens would be able to ensure that the responsible federal agencies are earnestly carrying out their duties under the statute. These types of suits could possibly help to counter selective enforcement of MBTA by the agencies. Furthermore, since the accountability of federal agencies affects all parties—rather than just environmental NGOs or citizen groups—it is likely that many “non-traditional” interests such as industries and corporations will file suit pursuant to this avenue in order to demand agency action and clarification.⁸⁸ Finally, by allowing citizens to challenge agency actions pursuant to MBTA under MBTA itself, the use of the narrow and unwieldy Administrative Procedure Act can be avoided as a means of redress.

The proposed citizen suit provision could resemble the following: *Any citizen may commence a civil action on his own behalf against (1) any association, partnership, or corporation (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of (A) the civil penalty provision of section 707 of this subchapter or (B) an order issued by the Fish & Wildlife Service with respect to section 707 of this subchapter, or (2) against the relevant federal agency where there is an alleged failure of the agency to perform any act or duty under this subchapter. The court may award costs of litigation to any prevailing party in actions brought pursuant to this section whenever the court determines such an award is appropriate.* In regard to the physical amendment of the statute, the citizen suit provision could be placed within MBTA’s omitted section 709.

88. See May, *supra* note 57, at 3 (noting that citizen suits under the other environmental statutes are brought by a wide array of interests for varying reasons and not just environmental NGOs for strictly environmental reasons).

C. MBTA as an Example: Growing Obsolescence of the United States' Environmental Statutes and the Need to Revise to Reflect Modern Circumstances

Though the above proposed amendments would work to make MBTA more effective in the face of modern environmental concerns and issues, the revision of MBTA alone is but one necessary drop in the troubled ocean of environmental law. The current controversy surrounding MBTA is merely representative of the reality that the United States' major environmental laws are quickly growing dangerously outdated. Although the hundred-year-old MBTA is the most extreme example, the same reality holds true for the relatively recent environmental statutes of the 1970s. The issue is that environmental statutes—MBTA being a prime example—have the ability to become frozen in the age in which they were enacted and not provide ways to address modern environmental threats that could not have possibly been foreseen when enacted. It is well noted that the major environmental statutes have failed to adapt to new environmental issues and take into account the developments in scientific understanding of these same issues.⁸⁹ Thus, the revision of MBTA is but one revision of the environmental laws that needs to occur in order to ensure their continued efficacy and relevance.

The reality is that attempting to use out of date statutes to combat uniquely modern environmental problems does not work. This is most apparent when examining attempts to curtail climate change—inarguably the most pressing environmental issue of our time—using existing environmental laws.⁹⁰ The paramount example is the United States Supreme Court's 5-4 decision in *Massachusetts v. Environmental Protection Agency* where the Court held that the agency did indeed have authority under the Clean Air Act to regulate greenhouse gases emitted from motor vehicles.⁹¹ In that case, a coalition of states sued the Environmental Protection Agency when it asserted that it lacked authority under the Clean Air Act to regulate climate change since it believed that greenhouse gases could not be considered "pollutants" under section 202(a)

89. See Mary Jane Angelo, *Harnessing the Power of Science in Environmental Law: Why We Should, Why We Don't, and How We Can*, 86 TEX. L. REV. 1527, 1529 (2008) (noting a number of factors that have prevented environmental laws from adapting to changes in scientific understanding of environmental concerns).

90. See generally Jody Freeman & Andrew Guzman, *Climate Change and U.S. Interests*, 41 ENVTL. L. REP. NEWS & ANALYSIS 10695, 10698, 10702-07, 10709 (2011) (highlighting the global and economic impact of climate change).

91. 549 U.S. 497, 528 (2007).

of the statute.⁹² The agency additionally asserted that for it to act on climate change, Congress needed to have specifically mentioned the issue in the statute.⁹³ Ultimately, the Court disagreed with the Environmental Protection Agency, finding that carbon dioxide and other greenhouse gases are air pollutants that can damage the public health and welfare, and therefore, are within the scope of the Clean Air Act.⁹⁴ The Court came to this conclusion by noting that the definition of “pollution” in the statute includes “physical and chemical substances” and that greenhouse gases fall within such a definition.⁹⁵

However, in coming to its decision the Court noted that Congress could not possibly have known enough about the underlying science of climate change at the time of its enactment of the Clean Air Act to include climate change within the scope of the statute.⁹⁶ Indeed, the federal government did not begin to devote any significant attention to climate change until years after the passage of the Clean Air Act.⁹⁷ To justify its holding, the Court noted that Congress *must* have recognized that the Clean Air Act would require flexible interpretation in order to be continually relevant in the years following its enactment.⁹⁸

It would seem that the Supreme Court did precisely what was needed: it interpreted an environmental statute in such a way to combat a modern problem not yet understood at the time Congress enacted the statute. However, the “living environmental statute” method of interpretation—similar to Justice Oliver Wendell Holmes’ famous “living Constitution”—poses serious problems in actually combatting environmental issues.⁹⁹ As the Environmental Protection Agency readily acknowledged, any regulatory power it had to combat climate change under the Clean Air Act provided a piecemeal approach to the problem instead of the cohesive strategy needed to adequately address the problem.¹⁰⁰ Essentially, what the Supreme Court did in *Massachusetts v. Environmental Protection Agency* is no different from what the various federal district courts have done in holding defendants liable for incidental takes under MBTA: it broadly construed the language of an outdated statute to address a modern problem unimagined

92. *Id.* at 513.

93. *Id.* at 512.

94. *Id.* at 528.

95. *Id.* at 529 (citing 42 U.S.C. § 7602(g)).

96. *Id.* at 532.

97. *Id.* at 507–08.

98. *Id.* at 532.

99. Coincidentally, Justice Holmes first articulated his idea of a “living Constitution” in the same case that upheld the Constitutionality of MBTA. *See Missouri v. Holland*, 252 U.S. 416, 433 (1920).

100. 549 U.S. at 524–25.

by Congress when enacted. Furthermore, such a “living environmental statute” approach is grossly unstable, as the potential for new “living” interpretations provides no consistency upon which affected parties can base their operations and make informed decisions. Depending on the decisions of the various federal courts, interpretations of the environmental statutes would be subject to constant, radical change and reinterpretation. This method of “modernizing” the nation’s environmental laws is severely limited as it cannot provide the unified front that is necessary to address today’s environmental issues and their multifaceted natures.

Instead, it is the statutes themselves that need to be revised and updated in order to address the environmental concerns of the Twenty-First Century and not those of the bygone Twentieth. For example, it is absurd to believe that the Environmental Protection Agency can combat the United States’ contribution to climate change by relying solely on some broad language in a statute enacted to address the air pollution concerns of the early 1970s. To follow such a course would slowly and inexorably push the nation’s environmental statutes far beyond the scope of their enactment while decreasing their effectiveness in addressing contemporary environmental concerns. Thus, the existing language of the Clean Air Act should not be the basis for regulatory authority to combat climate change. Rather, the statute should be amended to include specific language to that effect or a separate law to address climate change should be passed by Congress. This approach should be followed by Congress when working to address other contemporary environmental problems.

Of course, the unfortunate reality is that the current Congress is hopelessly gridlocked on seemingly every major issue, including environmental concerns.¹⁰¹ Short of a miraculous *détente* in the current entrenched partisanship or another Cuyahoga River or Love Canal, it is unlikely that Congress will act to amend MBTA or any other of the federal environmental statutes, let alone pass new, comprehensive environmental statutes.¹⁰² Unfortunately, that means that there will likely be little increased federal action to protect migratory bird species under MBTA in the future. However, this provides an excellent opportunity for the states to take the lead on pressing environmental issues, as some states already have in regard to climate change.¹⁰³ Partisan lines often become blurred at the

101. Robert B. Reich, *The Real Price of Congress's Gridlock*, N.Y. TIMES (Aug. 13, 2013) http://www.nytimes.com/2013/08/14/opinion/the-real-price-of-congresss-gridlock.html?_r=0.

102. See generally Jonathan H. Alder, *Fables of the Cuyahoga: Reconstructing a History of Environmental Protection*, 14 FORDHAM ENVTL. L.J. 89 (providing an overview of the 1969 Cuyahoga River fire and federal reaction to the incident).

103. See Hillary M. Hoffmann & Andrew Minikowski, *Pacific Coast Action Plan on Climate and Energy*, VERMONT LAW TOP 10 ENVIRONMENTAL WATCH LIST 2014, available at

state and local levels where the concerns of constituents are likely to exert more pressure on elected representatives. Thus, the states are one level of government where substantive strides in the protection of migratory bird species could be implemented. MBTA itself explicitly permits states to develop and enforce laws and regulations “not inconsistent” with the federal statute.¹⁰⁴ Therefore, while advocating for Congressional amendment of MBTA, the state legislatures and agencies can take action in the interim to protect migratory birds in ways consistent with MBTA and the ideas proposed in this note. Furthermore, if prominent environmental NGOs and citizen action groups were to make Congressional amendment of MBTA a flagship issue of their advocacy, it would certainly put some pressure on Congress due to increased publicity and citizen concern. Ultimately, as long as Congress remains gridlocked and deaf to their constituents and pressing necessity, it will be the role of citizens, NGOs, and state governments and agencies to take measures to bolster the protection of migratory birds and advocate for the amendment of MBTA.

CONCLUSION

This note has stressed the need for Congressional amendment of MBTA in order to resolve vying interpretations of the statute by the federal courts and allow for greater protection of listed migratory bird species from the threats posed by modern industrial production and human society. An ideal amendment to MBTA would contain a civil penalty provision as well as a provision authorizing citizen suits. The civil penalty provision would impose civil liability on parties in the form a fine for incidental—but foreseeable—takes of listed migratory bird species. The citizen suit provision would authorize citizens and NGOs to file suit against the government and third parties to enforce the statute’s civil provision against them. Amendment of MBTA is imperative as migratory bird populations in North America—and worldwide—are in a general decline, due in part to the multitudinous threats posed to them by human production, industry, and agriculture. The current obsolescence of MBTA is but a harbinger of the growing inability of the major federal environmental statutes of the 1970s to address modern environmental concerns. The need to amend MBTA and the process of doing so is therefore representative of the type of legislative controversy that will spring up around the United States’ other major environmental laws. Though the revision of MBTA may be stymied by the

<http://vjel.vermontlaw.edu/topten/pacific-coast-action-plan-climate-energy/> (Sept. 10, 2014) (describing a regional plan entered into by Western states to take action against climate change).

104. 16 U.S.C. § 708.

current gridlock in Congress, state legislatures can take action to further protect migratory bird species within their respective jurisdictions and work with environmental NGOs and concerned citizens to advocate for Congressional amendment of MBTA.



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