

December 28, 2020

Lesley Kordella
Attention: FWS-HQ-MB-2018-0090
U.S. Fish and Wildlife Service

Re: Regulations Governing Take of Migratory Birds FEIS (Docket No. FWS–HQ–MB–2018–0090; EIS No. 20200240)

Submitted electronically to: lesley_kordella@fws.gov

On behalf of the Natural Resources Defense Council, National Audubon Society, Defenders of Wildlife, American Bird Conservancy and our millions of members and online activists, please accept and fully consider these comments on the U.S. Fish and Wildlife Service’s (Service) final environmental impact statement (FEIS) and proposed rule for regulations governing take of migratory birds under the Migratory Bird Treaty Act (MBTA), Docket No. FWS–HQ–MB–2018–0090; EIS No. 20200240.

Our organizations strongly oppose any regulatory action that limits the scope of the MBTA’s prohibitions “only to actions directed at migratory birds, their nests, or their eggs.” Our legal, scientific and policy explanations for opposing this action are well documented, and we incorporate by reference our previously submitted comments here.¹ The FEIS, released on November 27, 2020, fails to address our comments and remains wholly insufficient in its analysis to form a reasoned basis on which the Service can justify its action.

The cursory changes throughout the FEIS – as compared to the draft released on June 5, 2020 – demonstrate not only a severe lack of regard to abide by applicable laws, but also a complete unwillingness to consider the overwhelming majority² of public comments submitted in opposition to this proposed rule. In addition to hundreds of thousands of public comments, unresolved objections by more than 25 states, 30 tribes, three flyway councils, our treaty partner, Canada, and more remain on the record. Simply put, the Service has not taken a “hard look” at the proposed action.³

¹ Natural Resources Defense Council et al., *Comments on the U.S. Fish and Wildlife Service’s proposed rule to redefine the scope of the Migratory Bird Treaty Act*, Docket No. FWS–HQ–MB–2018–0090 (March 19, 2020); *Comments on the U.S. Fish and Wildlife Service’s Proposed Rule and Notice of Intent to Prepare an Environmental Impact Statement to redefine the scope of the Migratory Bird Treaty Act*, Docket No. FWS–HQ–MB–2018–0090 (March 19, 2020); National Audubon Society et al., *Comments on the U.S. Fish and Wildlife Service’s Draft Environmental Impact Statement for regulations governing take of migratory birds*, Docket No. FWS–HQ–MB–2018–0090, EIS No. 20200117 (July 20, 2020).

² See USFWS Information Memorandum, *Status Update of the Proposed Rule for Codifying the M-Opinion and Associated NEPA* (Sept. 24, 2020) (attached).

³ NEPA’s “action-forcing” procedures “implement that statute’s sweeping policy goals by ensuring that agencies will take a ‘hard look’ at environmental consequences and by guaranteeing broad public dissemination of relevant information, it is well settled that NEPA itself does not impose substantive duties mandating particular results, but simply prescribes the necessary process for preventing uninformed—rather than unwise—agency action.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 333 (1989). We recognize that the administration announced a major revision of the Council on Environmental Quality’s regulations implementing NEPA. 85 Fed. Reg. 43304 (July 16, 2020). We note that those revisions are being challenged and were not in effect until September 2020, and therefore were not applicable for the majority of the rulemaking.

As detailed in the attached comment letter submitted on September 3, 2020, we urge the Service to withdraw the proposed regulation defining the scope of the MBTA and to reopen the public comment and rulemaking to consider a full range of alternatives, including an incidental take permitting program. The central legal basis for the Service's preferred alternative, M-Opinion 37050 or the Jorjani Opinion, was declared unlawful and vacated by the U.S. District Court for the Southern District of New York.⁴ The Court explained that the "statute's unambiguous text" is in "direct conflict with the Jorjani Opinion."⁵

The Court went on to reject the very same policy arguments that the proposed rule sets forth and to conclude that the "Jorjani Opinion's interpretation runs counter to the purpose of the MBTA to protect migratory birds."⁶ Because the Service's current rulemaking presents no new science, legal rationale or policy justification beyond what was presented in the Jorjani Opinion, the proposed rule is similarly unlawful and contrary to the plain language and conservation intent of the MBTA.⁷

Counterintuitively, rather than taking a step back to heed the court ruling and overwhelming public opposition, the rulemaking was accelerated to force finalization of an unlawful statutory interpretation and associated rule before the close of the Trump administration.⁸ At a minimum, the Service must go back to the drawing board on the FEIS and rulemaking and/or issue a supplementary environmental review to address the "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts,"⁹ which is clearly presented by the August 2020 court decision. Instead, we are now witnessing the culmination of yet another politically driven, wholesale abdication of governmental responsibilities.¹⁰

The recent review under Executive Order 12866 has further underscored consistency concerns with multiple states' laws, inconsistent application and confusion among federal agencies, and major concerns from tribal entities and treaty partners.¹¹ Just one of these issues would necessitate a meaningful pause and transparent resolution before finalizing the rule, and in this case all three have yet

⁴ *Natural Resources Def. Council v. U.S. Dep't of the Interior*, No. 18-CV-4596, 2020 U.S. Dist. LEXIS 143920 (S.D.N.Y. Aug. 11, 2020) (attached).

⁵ 2020 U.S. Dist. LEXIS 143920, at *43 (quoting *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 1750 (2020), which postdates the proposed rule and DEIS).

⁶ *Id.* at **23-25.

⁷ *Natural Resources Defense Council et al., Comments on the U.S. Fish and Wildlife Service's proposed rule to redefine the scope of the Migratory Bird Treaty Act*, Docket No. FWS-HQ-MB-2018-0090 (March 19, 2020); *NRDC v. U.S. Dep't of the Interior*, No. 18-CV-4596 (VEC) (S.D.N.Y.); *Nat'l Audubon Soc'y v. U.S. Dep't of the Interior*, No. 18-CV-4601 (VEC) (S.D.N.Y.); *State of New York v. U.S. Dep't of the Interior*, No. 18-CV-8084 (VEC) (S.D.N.Y.).

⁸ See U.S. Fish and Wildlife Service MBTA timeline updates and memo (attached) – documents released through a Freedom of Information Act request demonstrate that the agency continued to be pressed, in the midst of a global pandemic, to expedite completion of the rulemaking and deleted references to difficulty in meeting such unreasonable deadlines.

⁹ 40 C.F.R. § 1502.9(c)(1)(ii).

¹⁰ See Chris D'Angelo and Alexander C. Kaufman, *Trump Admin Ignored Internal Concerns When Clipping Bird Protections, Documents Show*, Huffington Post (11/25/2020) available at: https://www.huffpost.com/entry/trump-rush-migratory-bird-rule-public-records_n_5fbd85e2c5b66bb88c622331.

¹¹ See e.g. Environment and Climate Change Canada statement, *Minister Wilkinson expresses concern over proposed regulatory changes to the United States' Migratory Bird Treaty Act* (December 18, 2020) available at: <https://www.canada.ca/en/environment-climate-change/news/2020/12/minister-wilkinson-expresses-concern-over-proposed-regulatory-changes-to-the-united-states-migratory-bird-treaty-act.html>.

to be addressed. The rule also continues to rely on an unlawful baseline for analysis¹² and broad generalities for the cost-benefit and economic impacts analyses. The failure to provide critical information, including an analysis of consistency with all four migratory bird treaties as well as a review of the 2015 MBTA rulemaking that considered an incidental take permit approach, remains a fatal flaw for both the FEIS and rule.

Especially considering that the FEIS acknowledges the rule's expected increase in harm to birds, the Trump administration cannot credibly rely on a vacated legal opinion and a handful of qualitative statements to justify a complete overhaul of one of the oldest and most expansive statutory protections for over 1000 bird species. Scientific reports have demonstrated that North America's bird populations are at risk,¹³ and studies in recent weeks add to the troubling trends of declining populations and increasing threats facing bird species.¹⁴

We again urge the Service to reverse course by initiating a rulemaking that is consistent with the MBTA's statutory mandate, and all other applicable laws. Setting forth a science-based conservation framework and regulatory standard for permitting incidental take under the MBTA is critically important to preserving our cherished bird populations.

NRDC, Audubon, Defenders of Wildlife and ABC are committed to working with the Service, industries and other stakeholders to identify and incorporate a collaborative, legally sound and scientifically credible authorization framework that provides meaningful benefits to birds. Please do not hesitate to contact us for any additional information.

Thank you for your consideration of these comments.

Sincerely,

Katie Umekubo
Senior Attorney, Nature Program
Natural Resources Defense Council

Jason Rylander
Senior Endangered Species Counsel
Defenders of Wildlife

Sarah Greenberger
Interim Chief Conservation Officer
Senior Vice President, Conservation Policy
National Audubon Society

Steve Holmer
Vice President of Policy
American Bird Conservancy

CC: David Bernhardt, Secretary of the Interior; Aurelia Skipwith, Director of the U.S. Fish and Wildlife Service; Jerome Ford, Migratory Birds Assistant Director; Noah Matson, Migratory Birds Deputy Assistant Director

¹² The no action alternative assumes the continuance of the very action being proposed instead of analyzing the decades long practice of enforcing against egregious industrial harms to birds.

¹³ Rosenberg, K. V. et al. 2019. Decline of the North American Avifauna. *Science* 365(6461). doi: 10.1126/science.aaw1313, and Wilsey, C, B Bateman, L Taylor, JX Wu, G LeBaron, R Shepherd, C Koseff, S Friedman, R Stone. *Survival by Degrees: 389 Bird Species on the Brink*. National Audubon Society: New York.

¹⁴ According to a December 2020 analysis, the 2019 Christmas Bird Count documented six million fewer birds than in 2018 (available at: <https://www.audubon.org/news/120th-christmas-bird-count-summary>).



USFWS INFORMATION MEMORANDUM

DATE: September 24, 2020

TO: Aurelia Skipwith, Director, U. S. Fish and Wildlife Service

FROM: Jerome Ford, Assistant Director for Migratory Birds, U. S. Fish and Wildlife Service

SUBJECT: Status Update of the Proposed Rule for Codifying the M-Opinion and Associated NEPA

I. STATEMENT OF ISSUE/KEY FACTS

This memo provide an update on the status of the proposed rule to codify the M-Opinion on the MBTA and associated Environmental Impact Statement.

II. BACKGROUND AND FWS POSITION

In conjunction with the Department, the U.S. Fish and Wildlife Service (Service) drafted a proposed rule for regulatory change. The proposal is to adopt a regulation that defines the scope of the MBTA as it applies to conduct resulting in the injury or death of migratory birds protected by the MBTA. This proposed rule is consistent with Solicitor's Opinion M-37050 (M-Opinion), which concludes the MBTA's prohibitions on pursuing, hunting, taking, capturing, killing, or attempting to do the same, applies only to affirmative actions that have as their purpose the taking or killing of migratory birds, their nests, or their eggs. In addition, the FWS is developing an environmental impact statement (EIS) to review the environment effects of the rule.

Key considerations in the rulemaking and NEPA compliance timeline include the following:

- 40 CFR 1501.7 requires the publication of a notice of intent to prepare an environmental impact statement in the Federal Register. <https://www.law.cornell.edu/cfr/text/40/1501.7>
- 40 CFR 1506.10 describes minimum time periods for the EIS process, including a minimum 45 day comment period, and 30 day waiting period required before an agency can take an action after publication of the final EIS. <https://www.law.cornell.edu/cfr/text/40/1506.10>
- Executive Order 12866 Section 6.a.4. requires submission of significant rules to OMB Office of Information and Regulatory Affairs (OIRA) which may take up to 90 days to complete its review. <https://www.archives.gov/files/federal-register/executive-orders/pdf/12866.pdf>

III. POSITION OF AFFECTED PARTIES/PUBLIC LANDS AFFECTED

The proposal, if finalized, will affect federal agencies, states, local and tribal governments, as well as industry and the general public. Many stakeholders in the environmental community and states are opposed to the M-Opinion, while some industries are in favor of the change.

IV. STATUS UPDATE

The following provides the status of the EIS process associated with the rulemaking:

The comment period on the proposed MBTA M-Opinion regulations and notice of intent (NOI) to prepare an environmental impact statement closed March 19, 2020. As of March 23, 2020, we have received 46,872 comments. We anticipate the majority of substantive comments (e.g. longer letters from conservation groups, industry, and states) were submitted March 19. As of March 20, contractors have randomly sampled nearly 2,000 comments for review and categorization. Over 99% of those comments express opposition to the proposal. Commenters express a variety of reasons for their opposition including a desire to hold individuals and companies that take birds accountable (60%), concern over declining populations of birds (57%), and assertions that the MBTA requires actions to avoid take which is preventable (19%). Approximately 5% of sampled comments include information that is responsive to the specific requests for information in the proposed rule and NOI to help the FWS prepare and analyze the economic and environmental effects of the rule.

The Migratory Bird Program (MBP) has assembled a team to rapidly review and analyze comments and finalize the draft environmental impact statement (DEIS) associated with the rulemaking.

The core team includes:

- Noah Matson, acting Deputy Assistant Director for Migratory Birds
- Ken Richkus, Chief, Division of Migratory Bird Management
- Eric Kershner, Chief, Branch of Conservation, Permits and Regulations
- Jo Anna Lutmerding, Wildlife Biologist
- John Ossanna, Course Leader, NCTC
- Philip Kline, Solicitor

Support staff and technical experts include:

- D.J. Case and Associates, contractors (public engagement and comment summary assistance)
- Erin Carver, Senior Economist
- James Caudill, Chief, Economics Branch
- Jennifer Miller, regional Permit Biologist
- Larry Harrison, regional Permit Biologist
- Scott Blackburn, National NEPA Coordinator
- Susan Wilkinson, Senior Regulatory Analyst
- Madonna Baucum, Regulations and Policy Chief and Information Collection Clearance Officer
- Anissa Craighead, Senior Regulatory Analyst

Migratory Bird Program staff have already assembled core elements of the DEIS, including a description of the purpose and need, description of the alternatives, and the affected environment. The anticipated remaining DEIS development process is as follows:

- 3/12-3/19. MBP staff is reviewing and summarizing substantive public comments received to date. *March 19, 2020 postmarked land mail delivery may not arrive until a week after the comment period closing date.
- 3/20-3/25. DJ Case and Associates uses its comment-review software and staff to rapidly summarize and characterize public comments and provide FWS staff with a list and attachments of substantive comments. Core Team, on a rolling basis as substantive comments are identified, analyze and summarize substantive public comments.
- 3/26. Draft combined comment summary table for Director's and SOL review
- 3/27. Director and SOL return edits on combined comment summary table.

DELIBERATIVE-DRAFT-DO NOT DISCLOSE

- 3/30. Draft combined comment summary table for FWP review.
- 3/31. FWP return edits on combined comment summary table.
- 4/02. Draft comment summary table for combined MBTA/DEIS submitted to IOS, copy given to DO, SOL FWP and draft DEIS circulated to DO, FWP, IOS for simultaneous review (2 days).
- 4/06. IOS return comments/edits on summary table for MBTA/DEIS to DO, FWP, SOL
- 4/07. MBP resolves any comments/edits received and **completes** the DEIS
- 4/08. FWS hosts “surnaming party” to clear DEIS for publication.
- 4/09. DEIS sent to EPA for publication of a notice of availability in the Federal Register. Projected publication date of 4/17/2020 for a 45 day public comment period.

V. POTENTIAL ISSUES

- Given that the proposed rule and notice of intent for the EIS asked the public for specific information to inform the rule and EIS, if there is a substantial number of substantive comments and information provided, the internal drafting process may require additional time to adequately address the comments.

VI. TIMELINE/NEXT STEPS

- See attached.

Prepared by: Jerome Ford, Assistant Director for Migratory Birds

FYI or **Requested by:** Aurelia Skipwith, Director

Prepared for a meeting:

U.S. Fish and Wildlife Service

MBTA Regulations

Due Date	Milestone	Status
FY20 Q4Q3		
4/2/2020	DEIS submitted for surname	DEIS entered into surname 4/2. 5/1 resolved comments from SOL per SIO direction on alternatives and reentered surname. 5/6 cleared SOL 5/7 cleared D 5/8 cleared FWP 5/27 DEIS cleared for publication.
4/7/2020 06/05/2020	DEIS submitted to EPA for publication	DEIS will publish via FR notice 6/5
6/4/2020 07/20/2020	Public comment period closes	The 45 day comment period for all the documents above will close 7/20/20 .
FY20 Q4		
6/14/2020 7/20/2020 +2114 days = 08/1003/2020	Public comments reviewed and addressed. Final rule and FEIS submitted for <u>SOL</u> surname	Note: For the final rule and EIS, FWS has to prepare formal responses to comments, in addition <u>to</u> making any changes to the documents based on comments. <u>This timeline provides only 14 days for this process which will be difficult to achieve.</u>
08/17/2020	<u>SOL Completes surname, submitted for D surname</u>	
08/19/2020	<u>D completes surname, submitted for ASFWP surname</u>	
08/21/2020	<u>ASFWP completes surname, submitted for Exec Sec publication clearance</u>	
08/24/2020	<u>Exec Sec Clears publication</u>	
6/20/2020 08/25/2020	Final rule submitted to OMB for interagency review	Note: <u>This timeline assumes 5 days of surname total (all parties) which may be difficult to achieve.</u> OMB has up to 90 days to review significant rules. <u>The Department may choose to negotiated this down.</u>
FY21 Q1		
9/18/2020 11/25/2020	Address and conclude OMB interagency review	
9/18/2020 11/25/2020	FEIS submitted to EPA for publication and 30-day waiting period. <u>Publishes in Federal Register 12/04/2020</u>	Note: EPA only publishes on Fridays, so once clears DOI, it will publish on the following Friday, and that date starts the 30-day waiting period.

Formatted: Strikethrough

Formatted: Underline, Strikethrough

Formatted: Not Strikethrough

Formatted: Strikethrough

Formatted: Not Strikethrough

Formatted: Not Strikethrough

Formatted: Not Strikethrough

Formatted: Not Strikethrough

Formatted: Strikethrough

Formatted: Font: Bold

Formatted: Centered

Formatted: Strikethrough

Formatted: Not Strikethrough

Formatted: Not Strikethrough

Formatted: Strikethrough

Formatted: Not Strikethrough

Formatted: Not Strikethrough

10/30/2020	Final rule sent to Federal Register for publication	
01/12/0420/2020		

Formatted: Strikethrough

Formatted: Not Strikethrough

Formatted: Not Strikethrough

Summary to M-Opinion Rulemaking and NEPA Process Timeline

- The attached timeline for completing the NEPA and Rulemaking process has built in constraints that cannot be avoided
- **NEPA Constraints**
 - NEPA requires federal agencies to evaluate their action's impact on the environment
 - When there is potential for significant impacts or when the action is controversial, an Environmental Impact Statement (EIS) is the most appropriate level of review
 - For the M-Opinion Rulemaking – we have been directed to complete an EIS, which comes with a required public scoping process
 - The public scoping process for this action ends on Thursday March 19th, 2020
 - This scoping process has included a Notice of Intent seeking public input on the proposed action and five public and one Tribal webinars.
 - These webinars provided the Service the opportunity to explain the purpose and need of this action, discuss the no action and three action alternatives, and
 - Allowed the Service to ask the public for specific information related to the proposed action that will allow for the required economic cost/benefit analysis
 - The information gathered as part of public participation will be used to complete an analysis of all alternatives of the proposed action and their effects on the environment
 - The Draft EIS cannot be completed until after the public scoping period ends and public comments are reviewed and evaluated
 - While general public input regarding support or opposition are relatively easy to review and respond too, it is unknown whether we will receive information that can be used in the economic cost/benefit analysis
 - The best-case scenario is that we receive comments from industry sectors providing information related to the seven questions posed in the NOI and Proposed Rule – this would allow the Service to complete a quantitative economic analysis. However, this analysis would take time, as it is complex and would require the dedicated attention of both Service and Department Economists. We have allotted 10 days to complete this task once public scoping closes on March 19.
 - A less than ideal scenario is if we get little or no additional industry information. This would prevent a more rigorous economic analysis of the cost/benefits of this proposed action. Under this scenario, we would have to rely on the Regulatory Impact Analysis and Regulatory Flexibility Analysis previously completed. This is less than ideal as the previous analyses were qualitative in nature with greater uncertainty surrounding the actual costs/benefits and potential affects to industry or bird populations.

RESOURCES NEEDED: To complete the economic analyses – the Migratory Bird Program requires 100% of Erin Carver (Division of Economics) and Ben Simon (DOI Economics) time from March 20 until March 30

- **Rulemaking Constraints**
 - As part of the rulemaking the proposed action must be evaluated by NEPA
 - Thus, a Final Rule cannot be completed until the environmental analysis is complete (see NEPA constraints above)
 - In addition to the constraints on time due to the NEPA process, additional regulatory review constraint factor into the timeline

- Under Executive Order 12866: Regulatory Planning and Review (EO), the Office of Information and Regulatory Affairs (OIRA) shall provide meaningful guidance and oversight of federal regulatory actions
 - Under this EO, OIRA may review actions that are identified as significant regulatory actions
 - Section 6(b)(2)(B) states that OIRA may take up to 90 days for review of these proposed actions
 - Furthermore, section 6(b)(2)(C) states that OIRA may file for one 30 day extension if deemed necessary
- Current Timeline – current state with constraints

Stage	# Days to Complete	Estimated Date
Proposed Rule Public Comment Period	45	3/19/20
EIS Public Scoping	45	3/19/20
Draft EIS Complete ¹	10	3/31/20
Surname ²	1	4/1/20
To Federal Register and Publication ³	5	4/6/20
EIS Public Comment Period ⁴	45	5/21/20
Final Rule and Final EIS Complete ⁵	10	5/31/20
Surname ⁶	1	6/1/20
OIRA Review ⁷	90	8/30/20
To Federal Register and Publication ⁸	5	9/4/20

¹ Cannot be completed until after the close of the proposed rule comment period and EIS scoping period

² Surname from the Division to the Office of the Secretary must be completed in 1 day

³ This is out of our control. Typically it takes 7-10 business days to receive, review and schedule a publication

⁴ A 45-day comment period is required for any draft EIS per 40 CFR 1506.10

⁵ Cannot be completed until after the close of public comment on the draft EIS

⁶ Surname from the Division to the Office of the Secretary must be completed in 1 day

⁷ Per EO 12866

⁸ This is out of our control. Typically it takes 7-10 business days to receive, review and schedule a publication



September 3, 2020

By Electronic Mail

David Bernhardt
Secretary, U.S. Department of the Interior
exsec@ios.doi.gov

Aurelia Skipwith, Director,
U.S. Fish and Wildlife Service
Aurelia_Skipwith@fws.gov

Jerome Ford, Assistant Director,
U.S. Fish and Wildlife Service
Jerome_Ford@fws.gov

Re: Proposed Regulation and Draft Environmental Impact Statement Regarding
Regulations Governing Take of Migratory Birds, FWS-HQ-MB-2018-0090

Dear Secretary Bernhardt, Director Skipwith, and Assistant Director Ford:

The Center for Biological Diversity, Natural Resources Defense Council, National Audubon Society, American Bird Conservancy, Defenders of Wildlife, and National Wildlife Federation respectfully request that you withdraw the proposed regulation defining the scope of the Migratory Bird Treaty Act (“MBTA”) as applying only to actions specifically directed at migratory birds. *See* 85 Fed. Reg. 5915 (Feb. 3, 2020). As you know, the central legal foundation for the proposal was recently declared unlawful and vacated by the U.S. District Court for the Southern District of New York. *Natural Resources Def. Council v. U.S. Dep’t of the Interior*, No. 18-CV-4596, 2020 U.S. Dist. LEXIS 143920 (S.D.N.Y. Aug. 11, 2020).

At the very least, the Department of the Interior (“DOI”) and Fish and Wildlife Service (“FWS”) must reopen the public comment period on the proposed regulation and accompanying draft Environmental Impact Statement (“DEIS”) because the Court’s ruling constitutes important new information bearing on the proposal that the public should have an opportunity to address.

The proposed regulation seeks to “codify M-37050,” commonly known as the “Jorjani Opinion.” 85 Fed. Reg. at 5916; *see also id.* at 5923 (similar); *id.* at 5924 (similar). The central justification for the proposal is that FWS is obligated to conform its MBTA interpretation and enforcement practices to that opinion. *See, e.g., id.* at 5915 (asserting that the “proposed rule is consistent with the Solicitor’s Opinion, M-37050”); *id.* at 5916 (explaining that the “Office of the Solicitor performs the legal work for the Department of the Interior, including the [FWS]”). Accordingly, the proposal sets forth a legal analysis of the language, purpose, and history of the MBTA that mirrors the Jorjani Opinion. *Id.* at 5916-22. Likewise, the DEIS reiterates that the proposed rule aims to “codify” the Jorjani Opinion. DEIS at 8, 15, 50.



The federal Court vacated the Jorjani Opinion as unlawful because it violates the MBTA. The Court explained that the “statute’s unambiguous text” is in “direct conflict with the Jorjani Opinion” and that the “extratextual materials on which Interior relies may only be used to ‘clear up ambiguity, not create it.’” 2020 U.S. Dist. LEXIS 143920, at *43 (quoting *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 1750 (2020), which postdates the proposed rule and DEIS). The Court further ruled that the “Jorjani Opinion’s interpretation runs counter to the purpose of the MBTA to protect migratory birds,” and “[u]ltimately . . . [the Opinion] is simply an unpersuasive interpretation of the MBTA’s unambiguous prohibition on killing protected birds.” *Id.* at **23-25.¹

In view of the Court’s ruling and vacatur of the Jorjani Opinion, DOI and FWS should withdraw the proposed regulation. DOI and FWS cannot lawfully “codify” an Opinion that has been held unlawful and is now a legal nullity. The central justification for the proposed rule—to conform to a Solicitor’s Opinion that is no longer extant—has evaporated and the proposed rule should be withdrawn.

Alternatively, and at the very least, the comment periods on the proposed rule and on the DEIS must be reopened. DOI and FWS cannot promulgate the rule as proposed without dramatically modifying its purported justification, and any such revised rationale must be subject to advance public comment. *See, e.g., National Black Media Coalition v. FCC*, 791 F.2d 1016, 1022 (2d Cir. 1986).

Likewise, if DOI and FWS insist on going forward, the Court’s ruling and vacatur of the Jorjani Opinion at least necessitate issuance of a supplement to the DEIS for public comment. The CEQ’s NEPA implementing regulations require FWS to supplement its draft EIS if there are “significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” 40 C.F.R. § 1502.9(c)(1)(ii). The Court’s opinion and vacatur satisfy this standard. They obviously “bear on the proposed action[,]” and the Court’s ruling that the result the proposed rule seeks to codify flouts the language and conservation purpose of the MBTA is likewise “relevant to environmental concerns.” This is especially so

¹ The Court also rejected the policy arguments in the Jorjani Opinion that the proposed rule repeats. For example, in response to the assertion that the Jorjani Opinion is necessary to bring[] uniformity” to “contradictory judicial decisions,” the Court held that this is “unpersuasive both because the Opinion itself is “riddled with ambiguities made only more apparent by the incoherent guidance FWS subsequently issued” and because “Interior’s argument vastly overstates circuit disagreement and blurs the actual boundaries that have been drawn.” 2020 U.S. Dist. LEXIS 143920, at *24. As for the Opinion’s assertion that enforcement against incidental take is susceptible to “arbitrary enforcement,” the Court ruled that “FWS’s history of enforcing the MBTA against high-risk commercial activities that most threaten bird populations belie Interior’s concerns” and, in any event, that FWS “has the ability to issue regulations precisely delineating exceptions to the prohibited conduct.” *Id.* at **39, 41-42.



given that the DEIS concedes that a rule codifying the now-vacated Jorjani Opinion would be detrimental to migratory bird populations. DEIS at 8.

In sum, the Court's invalidation of the Jorjani Opinion necessitates withdrawal of the pending proposal or, at minimum, reopening of the public comment period on the proposal and on a supplement to the DEIS. Please let us know as soon as practicable how you plan to proceed.

We also respectfully request that you post this supplemental comment to the rulemaking docket and include it in the rulemaking record.

Sincerely,

/s/Ian Fein
Ian Fein

On behalf of Natural Resources Defense Council
and National Wildlife Federation

/s/Eric Glitzenstein
Eric Glitzenstein

On behalf of Center for Biological
Diversity, American Bird Conservancy,
Defenders of Wildlife, and National
Audubon Society

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 8/11/2020

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

NATURAL RESOURCES DEFENSE COUNCIL, :
INC.; NATIONAL WILDLIFE FEDERATION, :

Plaintiffs, :

-against- :

U.S. DEPARTMENT OF THE INTERIOR; U.S. :
FISH AND WILDLIFE SERVICE; DANIEL :
JORJANI, in his official capacity as the person :
exercising authority of the Solicitor of the Interior, :

Defendants. :

-----X

-----X

NATIONAL AUDUBON SOCIETY; AMERICAN :
BIRD CONSERVANCY; CENTER FOR :
BIOLOGICAL DIVERSITY; DEFENDERS OF :
WILDLIFE, :

Plaintiffs, :

-against- :

U.S. DEPARTMENT OF THE INTERIOR; U.S. :
FISH AND WILDLIFE SERVICE; DANIEL :
JORJANI, :

Defendants. :

-----X

-----X

STATE OF NEW YORK; STATE OF :
CALIFORNIA; STATE OF ILLINOIS; STATE :
OF MARYLAND; COMMONWEALTH OF :
MASSACHUSETTS; STATE OF NEW JERSEY; :
STATE OF NEW MEXICO; STATE OF :
OREGON, :

Plaintiffs, :

-against- :

18-CV-4596 (VEC)

OPINION AND ORDER

18-CV-4601 (VEC)

18-CV-8084 (VEC)

701 *et seq.*, or upheld as a valid exercise of agency authority. For the following reasons, Plaintiffs’ motions are GRANTED, and Interior’s motion is DENIED.

BACKGROUND²

In 1916 the United States and the United Kingdom, acting on behalf of Canada, entered into the Convention Between the United States and Great Britain for the Protection of Migratory Birds (“Convention”). U.S.-Gr. Brit., Aug. 16, 1916, 39 Stat. 1702 (ratified Dec. 7, 1916). The Convention had the stated purpose of “saving from indiscriminate slaughter and of insuring the preservation of such migratory birds as are either useful to man or are harmless.” *Id.*

Soon after, Congress implemented the Convention by passing the Migratory Bird Treaty Act. Pub. L. No. 65-186, 40 Stat. 755 (1918). Section 2 of the MBTA, as originally enacted, stated in relevant part:

unless and except as permitted by regulations . . . it shall be unlawful to hunt, take, capture, kill, attempt to take, capture or kill . . . by any means whatever . . . at any time or in any manner, any migratory bird, included in the terms of the convention between the United States and Great Britain for the protection of migratory birds

In 1936 Congress amended the MBTA by, *inter alia*, moving the phrases “at any time” and “in any manner” to the beginning of the list of prohibited actions, adding the phrase “by any means,” and adding “pursue.” Pub. L. No. 74-728, § 3, 49 Stat. 1555, 1556.

Section 2 has not been substantially amended since. Today, it provides:

[u]nless and except as permitted by regulations . . . it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill . . . any migratory bird, any part, nest, or egg of any such bird . . . included in the terms of the conventions

² “AR” references are citations to the Administrative Record (Dkt. 88).

16 U.S.C. § 703(a).³ Any violation of the MBTA is a misdemeanor punishable by a fine of up to \$15,000 and imprisonment for up to six months. *Id.* § 707(a). Further, any knowing “take” of any migratory bird “by any manner whatsoever” with intent to sell is a felony punishable by a fine of up to \$2,000 and imprisonment for up to two years. *Id.* § 707(b).

Throughout the twentieth century, the United States entered into similar treaties with Mexico, Japan, and the Soviet Union. *See* Convention Between the United States of America and the Union of Soviet Socialist Republics Concerning the Conservation of Migratory Birds and Their Environment, U.S.-U.S.S.R., Nov. 19, 1976, 29 U.S.T. 4647; Convention Between the Government of the United States of America and the Government of Japan for the Protection of Migratory Birds and Birds in Danger of Extinction, and Their Environment, Japan-U.S., Mar. 4, 1972, 25 U.S.T. 3329; Convention Between the United States of America and Mexico for the Protection of Migratory Birds and Game Mammals, Mex.-U.S., Feb. 7, 1936, 50 Stat. 1311.

From the early 1970s until 2017, Interior interpreted the MBTA to prohibit incidental takes and kills, imposing liability for activities and hazards that led to the deaths of protected birds, irrespective of whether the activities targeted birds or were intended to take or kill birds.

AR 900. After industrial activities emerged as the most significant threat to bird populations in

³ The entire provision reads as follows:

Unless and except as permitted by regulations made as hereinafter provided in this subchapter, it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird, any part, nest, or egg of any such bird, or any product, whether or not manufactured, which consists, or is composed in whole or part, of any such bird or any part, nest, or egg thereof, included in the terms of the conventions between the United States and Great Britain for the protection of migratory birds concluded August 16, 1916 (39 Stat. 1702), the United States and the United Mexican States for the protection of migratory birds and game mammals concluded February 7, 1936, the United States and the Government of Japan for the protection of migratory birds and birds in danger of extinction, and their environment concluded March 4, 1972, and the convention between the United States and the Union of Soviet Socialist Republics for the conservation of migratory birds and their environments concluded November 19, 1976.

the latter half of the century, the Fish and Wildlife Service (“FWS”)—the agency within the DOI charged with administering and enforcing the MBTA—regularly investigated causes of incidental takes and kills; among them oil pits, power-lines, contaminated waste pools, oil spills, commercial fishing lines and nets, and wind turbines. *See* AR 34, 55, 615; Mowad Decl. (Dkt. 68-2) ¶¶ 8–22; *see also* Brief of *Amici Curiae* (Dkt. 70-1) (“*Amicus*”) at 12 (“According to the FWS, tens of millions of birds every year are killed by human-caused threats, including communication towers, wind turbines, and oil spills.”).

To conserve migratory birds and ensure compliance with the MBTA’s prohibition on “incidental take,” FWS used a range of strategies. It sent companies notice of the risks their facilities and equipment posed to migratory birds, issued industry guidance, informally negotiated remediation, and issued permits authorizing takes. *See* AR 38 n.205, 56, 97; Manville Decl. (Dkt. 68-3) ¶¶ 16–18; *see also* AR 199 (“Avian Protection Plan (APP) Guidelines” for power lines); AR 289 (“Land-Based Wind Energy Guidelines”). The agency prioritized a cooperative approach with industry over enforcement actions. *See* AR 901. Its enforcement efforts were aimed first at achieving voluntary compliance; when those strategies broke down, FWS pursued fines and prosecution of recalcitrant companies. *See* AR 38 n.205, 97; Mowad Decl. ¶ 27; Manville Decl. ¶¶ 19–22; *see also* AR 901 (“FWS and DOJ have been careful to bring enforcement actions only in limited circumstances, such as when an entity has been repeatedly warned of the take, and has refused to take available measures to minimize it, or when large numbers of birds are killed (*e.g.*, Exxon Valdez.”); *Amicus* at 15–17 (discussing examples). In 2015 FWS also announced its intent to begin a formal, comprehensive rulemaking process for regulating incidental take. Migratory Bird Permits; Programmatic Environmental Impact Statement, 80 Fed. Reg. 30,032 (May 26, 2015).

In early January 2017 DOI's Solicitor—the Department's chief lawyer and the DOI official charged with issuing opinions setting forth DOI's interpretation of federal statutes—issued a memorandum that reaffirmed DOI's “long-standing interpretation that the MBTA prohibits incidental take.” AR 43–44. That memorandum, officially known as M-37041, will be referred to as the “Tompkins Opinion” after the DOI Solicitor who issued it.

Following a change in administrations and Mr. Tompkins's departure, in December 2017 DOI's then-Principal Deputy Solicitor, Daniel Jorjani, issued a new memorandum—M-37050—permanently withdrawing and replacing the Tompkins Opinion.⁴ AR 1. This new memorandum will be referred to as the “Jorjani Opinion” or the “Opinion.”

Following the Jorjani Opinion, on April 11, 2018, the Principal Deputy Director of FWS issued a memorandum and an FAQ document to “clarify what constitutes prohibited take” under the MBTA. AR 80. That memorandum notes that FWS “is modifying some policies and practices” to “ensure consistency with the recently issued” Jorjani Opinion and directs FWS personnel to “ensure that [the agency's] comments, recommendations, or requirements are not based on, nor imply, authority under the MBTA to regulate incidental take of migratory birds.” AR 80–81. It also provides that FWS “will not withhold a permit, request, or require mitigation based upon incidental take concerns under the MBTA.” AR 81. The FAQ sets out specific examples of activities that will trigger MBTA liability and others that will not. AR 82–86.

In May 2018 environmental Plaintiffs—Natural Resources Defense Council and the National Audubon Society with others—filed lawsuits challenging the Jorjani Opinion. In September 2018 eight States filed a similar lawsuit. All three actions assert that the Jorjani

⁴ He did so exercising the authority of the DOI Solicitor in the absence of a confirmed appointee to that office. AR 1. Jorjani has since been confirmed by the United States Senate to the position of Solicitor of the DOI. *See* Press Release, U.S. DOI (Sept. 24, 2019), <https://www.doi.gov/pressreleases/us-senate-confirms-daniel-jorjani-solicitor-department-interior>.

Opinion’s interpretation of the MBTA is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” in violation of the APA, 5 U.S.C. § 706(2)(A), and seek vacatur of the Opinion and subsequent agency guidance. On July 31, 2019, the Court mostly denied Interior’s motion to dismiss, holding, *inter alia*, that Plaintiffs had adequately alleged Article III standing,⁵ the Jorjani Opinion was a “final agency action” under Section 704, and the case was ripe for judicial review.⁶ *Nat. Res. Def. Council, Inc. v. U.S. Dep’t of the Interior* (“*NRDC I*”), 397 F. Supp. 3d 430, 443, 446, 450, 452 (S.D.N.Y. 2019).

DISCUSSION

I. Standard of Review

Summary judgment is appropriate when “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). When courts review agency action under the APA, “the question presented is a legal one which the district court can resolve . . . on a motion for summary judgment.” *City Club of N.Y. v. U.S. Army Corps of Eng’rs*, 246 F. Supp. 3d 860, 864 (S.D.N.Y. 2017) (quotation omitted). Under the APA, agency decisions may be set aside if they are “arbitrary, capricious, an abuse of discretion, or otherwise

⁵ There is no dispute in the motions for summary judgment that Plaintiffs have standing to sue. The Court finds that Plaintiffs have met their burdens of establishing standing. *See* Env’l Pls.’ Mem. of Law (Dkt. 68-1) at 14–17; States’ Mem. of Law (Dkt. 69-1) at 13–16; *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 411–12 (2013) (“The party invoking federal jurisdiction bears the burden of establishing’ standing—and, at the summary judgment stage, such a party ‘can no longer rest on . . . mere allegations, but must set forth by affidavit or other evidence specific facts.’” (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992))).

⁶ The Audubon Complaint also contends that the Opinion was issued without notice and opportunity for comment in violation of 5 U.S.C. § 553 and without compliance with the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4332(C). 18-CV-4601 (Dkt. 1) (“Audubon Compl.”) ¶¶ 80–87. The Court granted Interior’s motion to dismiss the notice-and-comment claim. 397 F. Supp. 3d at 453. Because the Court now finds that the Jorjani Opinion was contrary to law it does not reach the NEPA claim.

The Audubon Complaint also requests that the Court “[r]einstat[e] Defendants’ prior interpretation and policy regarding MBTA coverage and implementation.” Audubon Compl. at 34. Plaintiffs no longer request that relief in their motions for summary judgment.

not in accordance with law.” 5 U.S.C. § 706(2)(A); *Nat. Res. Def. Council v. Nat’l Highway Traffic Safety Admin.*, 894 F.3d 95, 107 (2d Cir. 2018).

II. The Jorjani Opinion

The parties present two different takes on the Jorjani Opinion. At the risk of walking into a conceptual minefield, the Court must first decide which one to adopt. The Opinion “analyzes whether the [MBTA] prohibits the accidental or ‘incidental’ taking or killing of migratory birds” and concludes that it does not. AR 1–2. But what that means requires some unpacking. Plaintiffs argue that the Jorjani Opinion has inserted a *mens rea* (or mental culpability) requirement into the MBTA; in their reading, the Opinion means that only intentional or purposeful takings and killings are prohibited by the MBTA’s misdemeanor provision. Interior, by contrast, argues that the Jorjani Opinion interprets only the *actus reus* of the MBTA (those acts or behaviors that the statute prohibits and that can result in criminal penalties) by limiting its coverage to activities that are “directed at” birds.

This is not a distinction without a difference. Accepting Plaintiffs’ reading of the Jorjani Opinion would bring this case to a swift end. The parties agree—and the Jorjani Opinion itself assumes—that persons are strictly liable for misdemeanor violations under the MBTA. *See* Defs.’ Mem. of Law (Dkt. 79) at 6, 22; AR 22–24. Moreover, Second Circuit precedent would control the case. *See United States v. FMC Corp.*, 572 F.2d 902, 908 (2d Cir. 1978) (holding that Section 2 of the MBTA is a strict liability provision). The Jorjani Opinion, if read as Interior argues, does not disturb the undisputed fact of strict liability; instead, it draws new limits around the range of activities covered by the MBTA. Another way of understanding the difference between Plaintiffs’ and Interior’s positions is to ask whether an activity can simultaneously target a bird and kill the bird without the person having an intent to kill the bird. Surely yes—a child throwing rocks at birds in a pond to see them fly does just that when one of those rocks

strikes and kills a bird. There is, of course, an element of intent to any activity directed at birds—one must intend to interact with the bird in some way—but that is not an intent to “take” or “kill” in the legal sense.

Peering closely, parts of the Opinion suggest that Jorjani had Interior’s present reading of the Opinion in mind (and those are the parts that Interior highlights in its memoranda of law). The Opinion states, for example, that “[t]he key [to the MBTA] remains that the actor was engaged in an activity the object of which was to render an animal subject to human control.” AR 22. It likewise states that “the range of actions prohibited under the MBTA [are] activities akin to hunting and trapping.” AR 24.

But the Jorjani Opinion also equivocates. The “range of [impermissible] actions,” it states, “exclude[s] more attenuated conduct, such as lawful commercial activity that unintentionally and indirectly results in the death of migratory birds.” AR 24. The Opinion “conclude[s] that the MBTA’s prohibition on pursuing, hunting, taking, capturing, killing, or attempting to do the same applies only to direct and affirmative purposeful actions that reduce migratory birds, their eggs, or their nests, by killing or capturing, to human control.” AR 41. While that seems to limit the types of activities covered by the MBTA, it also inserts a mental-state requirement (in the form of intent or purpose) and a proximate cause requirement (in the form of direct-ness). See *Seattle Audubon Soc’y v. Evans*, 952 F.2d 297, 303 (9th Cir. 1991) (contrasting strict liability with indirect activity not covered by the MBTA); *Newton Cty. Wildlife Ass’n v. U.S. Forest Serv.*, 113 F.3d 110, 115 (8th Cir. 1997) (same); *United States v. Moon Lake Elec. Ass’n, Inc.*, 45 F. Supp. 2d 1070, 1077 (D. Colo. 1999) (discussing proximate cause in the context of the MBTA); cf. *Hemi Grp., LLC v. City of New York*, 559 U.S. 1, 9 (2010) (describing proximate cause in the RICO context as requiring “some direct relation between the injury

asserted and the injurious conduct alleged” because “a link that is . . . indirect is insufficient.” (quotation omitted).⁷

Notwithstanding Interior’s insistence, a plain reading of the Jorjani Opinion and subsequent communications and guidance strongly suggest that it imposes a *mens rea* requirement on the MBTA’s misdemeanor provision. A few more representative sentences supporting Plaintiffs’ take on the Jorjani Opinion follow:

The relevant acts prohibited by the MBTA are purposeful and voluntary affirmative acts directed at reducing an animal to human control, such as when a hunter shoots a protected bird causing its death. AR 22.

[T]he statute’s prohibitions on pursuing, hunting, taking, capturing, killing, or attempting to do the same apply only to affirmative actions that have as their purpose the taking or killing of migratory birds, their nests, or their eggs. AR 2.

The [Jorjani] Opinion returns the MBTA to its original intention—focusing enforcement on deliberate killing, injury and commercialization of migratory birds. AR 73.

[A]n individual or entity may destroy an active nest while conducting any activity where the intent of the action is not to kill migratory birds or destroy their nests or contents. AR 88.

Only take where the purpose or intent is taking and/or killing. No exceptions. AR 906.

The opinion is pretty cut and dry. MBTA only covers take that is with specific intent to kill or take migratory bird species. AR 907.

Examples from the FAQ issued by FWS are even more telling. The FAQ clarifies that demolishing a barn containing owl nests (thus killing the owls) is not a misdemeanor violation because “[r]emoving or destroying the structure would rarely if ever be an act that has killing owl nestlings as its purpose.” AR 83. The FAQ elaborates that “the purpose of the activity

⁷ It is also worth noting that Interior’s memoranda of law contain similar ambiguities despite insisting that the scope of the Jorjani Opinion is limited to defining what is a covered activity. *See, e.g.*, Defs.’ Mem. of Law at 27 (“The proper reading of Section 2 of the MBTA is still that it prohibits only affirmative acts directed immediately and intentionally against migratory birds.”).

determines whether this is an MBTA violation,” and “[u]nless the purpose of removing the structure was in fact to kill the owls, their deaths would be incidental to the activity of removing the barn.” AR 83. As if that did not make the point clearly enough, the FAQ goes on to exclude lesser mental states than purpose: “[t]he landowner’s knowledge . . . that destroying the barn would kill the owls is not relevant.” AR 83. The only line separating innocent from culpable activity in this example is whether the landowner intended to kill the owls when he or she demolished the barn. *See also* AR 82 (describing two more comparable examples—lighting a fire in a fireplace that kills birds nesting in the chimney and pressure washing bird nests off a bridge—where the statute is violated only if the intent is to kill the birds).

That said, the Jorjani Opinion relies heavily on two judicial decisions that slice the MBTA along more pure *actus reus* lines. *See* AR 22–24 (“Interpreting Strict Liability as Dispositive Conflates *Mens Rea* and *Actus Rea*”).

In *United States v. CITGO Petroleum Corp.*, 801 F.3d 477 (5th Cir. 2015), CITGO appealed its conviction for violating the MBTA. Factually, birds had died when they landed in oily liquid stored in uncovered tanks at CITGO’s refinery. *Id.* at 480. CITGO was charged with, *inter alia*, multiple counts of taking birds in violation of the MBTA. *Id.* at 480–81. The Fifth Circuit held that “the MBTA’s ban on ‘takings’ only prohibits intentional acts (not omissions) that directly (not indirectly or accidentally) kill migratory birds.” *Id.* at 494. While its holding contains similar ambiguities, the court contrasted several informative examples. According to the Fifth Circuit, “[p]oisoning a field to deter birds, and ‘taking’ migratory birds in the process” violates the MBTA. *Id.* at 493 n.14. But accidentally colliding with a bird in your car or putting up electrical lines that birds run into do not. *Id.* at 493. Birds are the object of the action in the former scenario, but not in the latter. The court was also focused on a (disputed) common law definition of “take” that limits the term to activities like hunting or poaching that “reduce . . .

animals . . . to human control.” *Id.* at 489 (quotation omitted). The court noted that “[o]ne does not reduce an animal to human control accidentally or by omission.” *Id.*

The Jorjani Opinion also discusses *Mahler v. United States Forest Service*, 927 F. Supp. 1559 (S.D. Ind. 1996), at length. Like *CITGO*, the district court in *Mahler* held that the MBTA “applies to activities that are intended to harm birds or to exploit harm to birds, such as hunting and trapping, and trafficking in birds and bird parts.” *Id.* at 1579.

With the benefit of *CITGO*, *Mahler*, and Interior’s present view in its briefs, and because the Jorjani Opinion is less than precise, the Court will accept Interior’s formulation of the Opinion for the purpose of deciding the motions for summary judgment. The Court will thus assume going forward that the Jorjani Opinion only limits the MBTA to actions “directed at” birds in the sense that hunting birds, poaching birds, throwing rocks at birds, pressure washing bird nests off a bridge, or setting poison traps for birds are activities “directed at” birds.⁸ Defs.’ Mem. of Law at 1–2, 12, 16, 18–19, 22, 24, 29, 33, 39; *see, e.g.*, AR 41, 82.

III. Deference Is Not Warranted

Interior does not assert that the Jorjani Opinion is entitled to *Chevron* deference, only the lesser *Skidmore* deference. Defs.’ Mem. of Law at 16. Under *Skidmore*, the Court must defer to the Opinion to the extent that it has the “power to persuade.” *In re Bernard L. Madoff Inv. Sec. LLC*, 779 F.3d 74, 82 (2d Cir. 2015) (quoting *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000)); *see also United States v. Mead Corp.*, 533 U.S. 218, 234–35 (2001); *Skidmore v. Swift & Co.*, 323 U.S. 134, 139–40 (1944). Factors to consider include “the agency’s expertise, the care it took in reaching its conclusions, the formality with which it promulgates its

⁸ One other reading of the “directed at” limitation is that the MBTA only covers activities that *typically* or *historically* have been associated with taking or killing birds: “activities akin to hunting.” AR 24. But that reading would contradict much of the Jorjani Opinion and Interior’s positions. *See, e.g.*, AR 82 (discussing liability for pressure washing bird nests off a bridge during a painting project).

interpretations, the consistency of its views over time, and the ultimate persuasiveness of its arguments.” *Cnty. Health Ctr. v. Wilson-Coker*, 311 F.3d 132, 138 (2d Cir. 2002) (citing *Mead*, 533 U.S. at 228, 234–35).

The *Skidmore/Mead* factors disfavor affording the Jorjani Opinion any deference. The Opinion is a recent and sudden departure from long-held agency positions backed by over forty years of consistent enforcement practices. The Opinion is also an informal pronouncement lacking notice-and-comment or other protective rulemaking procedures.⁹ In addition, the Jorjani Opinion’s claim to agency expertise is at best questionable. There is no evidence of input from the agency actually tasked with implementing the statute: FWS. Interior thus provides no reason to believe that the Opinion benefits from “knowledge gained through practical experience [or the agency’s] familiarity with the interpretive demands of administrative need.” *Cty. of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1474 (2020).

Interior argues that the Jorjani Opinion brings uniformity to a “patchwork of legal standards created over a period of decades by contradictory judicial decisions.” Defs.’ Reply (Dkt. 87) at 1. That is unpersuasive on two fronts. First, the Opinion is riddled with ambiguities made only more apparent by the incoherent guidance FWS subsequently issued. Second, Interior’s argument vastly overstates circuit disagreement and blurs the actual boundaries that have been drawn. Interior characterizes the Fifth, Eighth, and Ninth Circuits as having held that incidental take is excluded from coverage under the MBTA and contrasts their positions with the Second and Tenth Circuits, which Interior argues have held the opposite. *Id.* at 7–11. Tensions between the circuits certainly exist, but they are not of the magnitude or kind Interior presents.

⁹ FWS is currently in the process of a formal notice-and-comment rulemaking based on the interpretation of the MBTA presented in the Jorjani Opinion. See Regulations Governing Take of Migratory Birds, 85 Fed. Reg. 5915 (Feb. 3, 2020); see also Defs.’ Mem. of Law at 13–14.

The Second Circuit in *FMC* held that the MBTA imposes strict liability for misdemeanor violations and affirmed a company's conviction for bird deaths caused by its uncovered toxic wastewater pond. 572 F.2d at 904, 908. Since *FMC* was decided in 1978, no circuit has held that the MBTA requires the government to prove a guilty state of mind, but circuits have opined on other limitations on liability. The Tenth Circuit held that the MBTA applies to activities that incidentally kill birds when those activities directly and foreseeably lead to (or proximately cause) their deaths. See *United States v. Apollo Energies, Inc.*, 611 F.3d 679, 684–90 (10th Cir. 2010) (affirming MBTA liability after FWS inspectors found dead bird remains in unprotected oil field equipment that birds were known to enter).

Interior argues that the Eighth and Ninth Circuits reached a different conclusion. But that is not accurate. Those circuits held only that “habitat destruction, leading indirectly to bird deaths,” does not amount to the “‘taking’ of migratory birds within the meaning of the [MBTA].” *Seattle Audubon*, 952 F.2d at 303; see *Newton Cty.*, 113 F.3d at 115 (agreeing with *Seattle Audubon* that the MBTA does not impose “an absolute criminal prohibition on conduct, such as timber harvesting, that *indirectly* results in the death of migratory birds”).¹⁰ The Ninth Circuit distinguished “direct, though unintended, bird poisoning from toxic substances,” which is covered by the MBTA, from habitat destruction that indirectly leads to bird deaths, which is not. *Seattle Audubon*, 952 F.2d at 303. That is a holding about the length of the causal chain between

¹⁰ Part of the Eighth Circuit's decision suggests that, like the Fifth Circuit in *CITGO*, the court was limiting the sorts of activities covered by the MBTA. The Eighth Circuit stated, “we agree with the Ninth Circuit that the ambiguous terms ‘take’ and ‘kill’ in 16 U.S.C. § 703 mean ‘physical conduct of the sort engaged in by hunters and poachers, conduct which was undoubtedly a concern at the time of the statute’s enactment in 1918.’” See *Newton Cty.*, 113 F.3d at 115 (quoting *Seattle Audubon*, 952 F.2d at 302). But that statement gives little support to the existence of contradictory judicial guidance. It quotes *Seattle Audubon* for the statutory definitions of “take” and “kill,” but the Ninth Circuit had, in fact, only opined on the regulatory definition of “take.” 952 F.2d at 302. In addition, *Newton County*, like *Seattle Audubon*, is primarily concerned with the directness *vel non* of birds killed by or as a result of timber harvesting. 113 F.3d at 115. And it makes clear that its “conclusions about the apparent scope of MBTA are necessarily tentative because we lack the views of the Fish and Wildlife Service.” *Id.*

the defendant's activity and ultimate bird death, not whether the MBTA reaches particular kinds of activities.

In truth, Interior's dramatized representation of "decades [of] contradictory judicial decisions" reflects only the Fifth Circuit's 2015 decision in *CITGO* and the District Court for the Southern District of Indiana's 1996 decision in *Mahler*. Defs.' Reply at 1. As discussed in the previous section, the Fifth Circuit held that the defendant's failure to cover its waste tanks, which "unintentionally and indirectly" caused migratory birds to land in the oily liquid in the uncovered tanks and die, was not a "taking" under the MBTA. 801 F.3d at 480, 488, 494. Notably, the Fifth Circuit interpreted only the term "take"; the case "did not present an opportunity to interpret 'kill'" because the indictment charged only illegal taking. *Id.* at 489 n.10. The Fifth and Tenth Circuits are thus at odds with respect to activities falling under the statutory umbrella of "take," but that is all. The Second, Eighth, and Ninth Circuits (and the remaining seven) have yet to take a position on that issue. Moreover, there is no divergent opinion yet on the meaning of "kill."¹¹

To the extent *CITGO* recently disrupted circuit uniformity, the DOI took prompt action with the Tompkins Opinion to reaffirm that its longstanding position remained unchanged notwithstanding the Fifth Circuit's decision. *See* AR 67–72.

Further, the Jorjani Opinion's interpretation runs counter to the purpose of the MBTA to protect migratory bird populations. Despite strong textual support for that purpose, the Opinion freezes the MBTA in time as a hunting-regulation statute, preventing it from addressing modern threats to migrating bird populations. *See Haw. Wildlife Fund*, 140 S. Ct. at 1474; *see also*

¹¹ That is true notwithstanding dicta in *CITGO*. *See* 801 F.3d at 489 n.10 ("Although this case does not present an opportunity to interpret "kill," there is reason to think it too is limited to intentional acts aimed at migratory birds.").

Patrick G. Maroun, *More Than Birds: Developing a New Environmental Jurisprudence Through the Migratory Bird Treaty Act*, 117 Mich. L. Rev. 789, 804 (2019) (“If the Act’s purpose is to protect migratory birds from existential crises driven by commercial pressures, then construing the Act to apply almost exclusively to hunters simply because hunting was the primary commercial threat to migratory birds at the time of enactment is to betray its essential character.”). Interior has previously acknowledged that it has a “legal responsibility under the MBTA and the treaties the Act implements to promote the conservation of migratory bird populations.” 80 Fed. Reg. at 30,034. Despite that acknowledged responsibility, the record shows that the Opinion substantially removes prior incentives for commercial actors to take precautions to avoid threats to migrating birds. *See* Mowad Decl. ¶¶ 23–48; Rylander Decl. (Dkt. 68-24) Ex. A at 3, Ex. B at 2; Manville Decl. ¶¶ 24–25; *see also* AR 615 (former DOI employees describing cooperative conservation efforts with industry); AR 901 (“Over time . . . investigations involving the unlawful take of migratory birds has resulted in compliance and implementation of best management practices.”).¹²

Ultimately, though, the Jorjani Opinion is simply an unpersuasive interpretation of the MBTA’s unambiguous prohibition on killing protected birds.

IV. The Jorjani Opinion Is Contrary to Law

The Court notes at the outset that *FMC* does not control this case. Having understood the Jorjani Opinion as interpreting the set of actions covered by the MBTA, not as inserting a mental-state requirement, *FMC* is of far less help than Plaintiffs urge. Although the defendant in *FMC* killed birds through conduct that the Jorjani Opinion would now exempt from the MBTA’s

¹² The impact of the Opinion is clear. FWS recently declined even to investigate an oil spill in Great Harbor, Massachusetts, that led to the death of 29 birds because the deaths were “incidental take” from the spill. *Amicus* at 19–20.

reach—polluting a pond with toxic chemicals that accidentally killed birds—the issue before the Second Circuit was not whether that conduct fell within the set of statutorily proscribed activities. *See* 572 F.2d at 905. The court ruled only on whether “the statute require[d] that the violation be intentional or in other words, where a crime is involved and a criminal penalty imposed for the violation thereof, must the violator have a *mens rea*.” *Id.* at 904.

While *FMC* does not control this case, the statute’s unambiguous text does. A court must normally assess a statute according to the ordinary meaning of its language at the time the statute was passed. *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1738 (2020); *see also New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019) (“It’s a fundamental canon of statutory construction that words generally should be interpreted as taking their ordinary meaning at the time Congress enacted the statute.” (quotation omitted)). “[W]hen the meaning of the statute’s terms is plain, [the court’s] job is at an end.” *Bostock*, 140 S. Ct. at 1749.

Section 2’s clear language making it unlawful “at any time, by any means or in any manner, to . . . kill . . . any migratory bird” protected by the conventions is in direct conflict with the *Jorjani* Opinion. 16 U.S.C. § 703(a). Interior does not dispute the breadth of the term “kill” as ordinarily understood. According to contemporaneous dictionary definitions, to “kill” is “to deprive of life; to put to death; to slay.” Webster’s New Int’l Dictionary of the English Language 1185 & 2107 (1st ed. 1920); AR 50 n.47 (quoting Webster’s Imperial Dictionary 1697–98 (1915)). Under common law, too, kill referred to “depriving of life” regardless of whether the predicate act was directed at the victim. *See, e.g.*, 4 William Blackstone, Commentaries 182 (discussing homicide *per infortunium*, “where a man, doing a lawful act, without any intention of hurt, unfortunately kills another: as where a man is at work with a hatchet, and the head thereof flies off and kills a bystander”). The term “kill” has been

consistent in its breadth for the past century, including when the MBTA was amended in 1936.¹³ See AR 19 n.121 (quoting Webster’s Second New Int’l Dictionary 1362 (1934)).

The Supreme Court’s decision in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), also supports a broad, ordinary reading of “kill.” In *Sweet Home* the Supreme Court effectively rejected the argument Interior is making here in the context of interpreting the definition of “take” in the Endangered Species Act of 1973 (“ESA”). The ESA makes it unlawful to “take any [protected] species within the United States or the territorial sea of the United States” and defines the term “take” to mean “to harass, harm, pursue, hunt, shoot, wound, *kill*, trap, capture, or collect, or to attempt to engage in any such conduct.” *Id.* at 690–91 (emphasis added); 16 U.S.C. §§ 1538(a)(1), 1532(19). The majority faulted the dissent’s “novel construction” of the statute that would have shielded from liability a hypothetical developer who drains a pond knowing that it will kill an endangered species of turtle. *Sweet Home*, 515 U.S. at 701 n.15. On the dissent’s view, “unless the developer was motivated by a desire ‘to get at a turtle,’ no statutory taking could occur.” *Id.* (citation omitted). The dissent reasoned that the statute is limited to liability for “affirmative conduct intentionally directed against a particular animal or animals”—the exact limitation the Jorjani Opinion attempts to impose on Section 2 of the MBTA. *Id.* Without commenting on “take” per se, the majority

¹³ See, e.g., *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 135 (2000) (“[T]obacco alone kills more people each year in the United States than acquired immunodeficiency syndrome (AIDS), car accidents, alcohol, homicides, illegal drugs, suicides, and fires, combined.” (quoting 61 Fed. Reg. 44,412, 44,399 (1996))); *Lee v. United States*, 112 F.2d 46, 48 (D.C. Cir. 1940) (“In interpreting [the statutory language ‘[w]hoever . . . kills another, is guilty of murder. . .’] this court has held that . . . accidental or unintentional killing will constitute murder in the second degree if it is accompanied by malice.”); *United States v. Parks*, 411 F. Supp. 2d 846, 856 (S.D. Ohio 2005), *aff’d*, 583 F.3d 923 (6th Cir. 2009) (“[T]he Sixth Circuit has held that [‘kills’ in] § 2113(e) applies when bank robbers accidentally kill someone . . . regardless of a lack of criminal intent to kill”); Kill, Black’s Law Dictionary (11th ed. 2019) (“To end life; to cause physical death”); Paul H. Robinson, *Legality and Discretion in the Distribution of Criminal Sanctions*, 25 Harv. J. on Legis. 393, 438 (1988) (identifying “extreme indifference to the value of human life” where “the actor is very drunk and is repeatedly warned not to drive but nonetheless drives, loses control of his car, and kills a pedestrian”); Gerardo Sachs, *Blood Feud*, 36 Jewish Bible Q. 261, 261 (2008) (interpreting “[t]hou shalt not kill” to prohibit “unintentional, accidental death or manslaughter”).

reasoned that the words “kill” and “harm” in the statutory definition of “take” could still “apply to such deliberate conduct.”¹⁴ *Id.*

Section 2 also contains the equally expansive phrase—“by any means or in any manner”—to modify the verb “kill.” 16 U.S.C. § 703(a). That phrase denotes how a person must kill a bird to trigger the statute. Namely, it does not matter how. But Interior takes the opposite position: only “means” and “manner[s]” directed at birds are included. Interior argues that the phrase “by any means or in any manner” does not affect which activities are covered; it merely makes clear that the prohibition extends to all manners of hunting, such as with a crossbow, a rifle, or snare traps. Defs.’ Mem. of Law at 21–22; *see also CITGO*, 801 F.3d at 490 (advancing the same argument). That may be so with respect to the verb “hunt,” but it ignores the phrase’s modifying effect on “kill.” Section 2 states that any means of killing is a violation, which plainly includes dumping oil waste, building wind turbines, or pressure washing bridges,

¹⁴ For that reason too, *Sweet Home* undermines Interior’s argument that FWS regulations applicable to the MBTA defining “take” to mean “to pursue, hunt, shoot, wound, kill, trap, capture, or collect,” 50 C.F.R. § 10.12, support the Jorjani Opinion’s reading of “kill.” *See* Defs.’ Mem. of Law at 20. Moreover, Interior has long understood its definition of “take” to encompass “both ‘intentional’ and ‘unintentional’ take,” including “take that results from, but is not the purpose of, the activity in question.” Exec. Order No. 13,186, 66 Fed. Reg. 3853 (Jan. 10, 2001).

Although the Fifth Circuit suggested that *Sweet Home* supports a narrow interpretation of “kill,” that observation was based on a misreading of the case. *See CITGO*, 801 F.3d at 489 n.10. The Fifth Circuit described *Sweet Home* as concluding that “the terms pursue, hunt, shoot, wound, kill, trap, capture, and collect, generally refer to deliberate actions.” *Id.* (citing *Sweet Home*, 515 U.S. at 698 n.11). But *Sweet Home* did not suggest that all of those terms refer to deliberate actions, only that they are more frequently used to refer to direct action than harm is. 515 U.S. at 698 n.11. And it did so to contrast those terms with “the sense of indirect causation that ‘harm’ adds to [the ESA]” so that it covers habitat modification. *Id.* Whether “kill” in the MBTA covers habitat modification or, more generally, conduct that is causally distant from bird deaths is not an issue in this case.

Interior’s argument that the MBTA does not prohibit habitat destruction as evidenced by passage of the Migratory Bird Conservation Act of 1929 is similarly a red herring. *See* Defs.’ Mem. of Law at 25. A statute preserving bird habitats is entirely consistent with a statute prohibiting accidental bird killings. At best, Interior’s argument lends support to *Seattle Audubon*’s holding that the MBTA does not prohibit habitat destruction that indirectly kills birds, 952 F.2d at 303, but, as discussed, that reasoning does not limit the MBTA to activities targeting birds.

irrespective of whether those activities are specifically directed at wildlife.¹⁵ *See Haw. Wildlife Fund*, 140 S. Ct. at 1473–74 (finding an agency interpretation “difficult to reconcile” with an environmental statute’s references to “any addition” of a pollutant into navigable waters “from any point source”). Had Interior not taken the position that the Opinion only carves out covered activities, and had the Jorjani Opinion instead found a mental-state requirement in the MBTA, Interior’s argument would have more purchase; but Interior cannot have it both ways.

Interior does not dispute that Section 2’s language is unambiguous as ordinarily understood. Like the Jorjani Opinion, Interior contrasts the “many definitions” of “take” with a single definition of “kill.” Defs.’ Mem. of Law at 19; AR 19 n.121. To be sure, Interior distinguishes between an “active” sense of “kill” as in “to deprive of life” and a purportedly more “passive” sense of “kill” as the “general term for depriving of life.” Defs.’ Mem. of Law at 19; AR 19 n.121. But that is nonsensical; there is no meaningful difference between “depriving of life” and “to deprive of life” beyond their grammatical construction. Both imply activity.

In any event, Interior does not explain why the fact that the verb “kill” is associated with activity means that the phrase “by any means or in any manner” should be rewritten to state “by any means or in any manner of activity that is specifically directed at birds.” Killing a bird by firing a gun, setting a trap, dumping oil waste, or pressure washing nests from a bridge all fit within Interior’s active sense of “kill,” and yet the Jorjani Opinion concludes that the first two are prohibited by the MBTA while the latter two are not.

Where, then, does Interior find its “directed at” limitation on the MBTA’s scope? First, Interior argues that when “kill” is read according to its surrounding words (known as the *noscitur*

¹⁵ One could say the imagination is the limit. But to be clear, that does not mean any strange and improbable bird killing will expose a person to criminal liability. Proximate cause requirements can limit broad statutes like the MBTA. *See, e.g., Apollo Energies*, 611 F.3d at 690.

a sociis canon), the term adopts a narrower meaning. According to Interior, because “pursue,” “hunt,” and “capture” reference activities directed at birds, “kill” must also. But that use of *noscitur* is improper; it restricts the meaning of “kill” to “one of its many possible applications.” Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 195 (2012). The *noscitur* canon is a tool for resolving ambiguity, not creating it where there is none. *Yates v. United States*, 574 U.S. 528, 564 (2015) (Kagan, J., dissenting); see *Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111, 120 (2d Cir. 2007) (“[N]oscitur *a sociis* does not resolve textual ambiguity where language plausibly supports both narrow and expansive reading.” (citation omitted)); *Maracich v. Spears*, 570 U.S. 48, 62–63 (2013) (applying *noscitur* where the phrases were “capable of many meanings”). “Kill” is broad but not at all ambiguous. To kill a bird in the ordinary sense can be accidental; the action that kills does not have to be directed at birds in the same sense as hunting birds. It would be error to use the *noscitur* canon to “rob” the term “kill” of its “independent and ordinary significance.”¹⁶ *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 288 (2010).

Interior’s use of *noscitur* also risks depriving “kill” of independent meaning. The canon against surplusage favors “giv[ing] effect to all of a statute’s provisions ‘so that no part will be inoperative or superfluous, void or insignificant.’” *United States v. Harris*, 838 F.3d 98, 106 (2d Cir. 2016) (quoting *Corley v. United States*, 556 U.S. 303, 314 (2009)). “Hunt” and “take” in Section 2 also have broad meanings, and one is hard-pressed to find an activity where “kill”

¹⁶ Even assuming *noscitur* were properly to apply, any meaning that the surrounding words would impart to “kill” would be far more general than what Interior urges. “The common quality suggested by a listing should be its most general quality . . . relevant to the context.” Scalia & Garner at 196. Synthesizing the definitions of “pursue, hunt, and capture,” Interior argues that “each requires a deliberate action specifically directed at achieving a goal.” Defs.’ Mem. of Law at 19; AR 19. To the extent that quality is shared with “kill,” it remains a leap to infer that the terms therefore share the quality of being “directed immediately and intentionally against migratory birds” rather than some non-bird-related goal. Defs.’ Mem. of Law at 19. Accidentally knocking bird nests off a bridge while cleaning it, for example, is a deliberate action directed at achieving a goal, to wit, a clean bridge.

applies but “hunt” or “take” do not on Interior’s interpretation. Interior argues that a person can “kill” a bird without “taking” it, defining “take” as “reducing the migratory bird to man’s dominion and making it the object of profit” according to a common law-derived definition from Justice Scalia’s dissenting opinion in *Sweet Home*. Defs.’ Reply at 4–5; AR 22; *see* 515 U.S. at 717–18. Interior describes the scenario of a rancher shooting protected birds on his property without collecting them; the rancher kills them, Interior argues, but does not take them. Defs.’ Reply at 4–5; *see* AR 83.

First, Interior’s definition of “take” is based on a misreading of Justice Scalia’s dissent. Justice Scalia found that the common law definition of “take” is to “reduce [wild] animals, by killing or capturing, to human control.”¹⁷ *Sweet Home*, 515 U.S. at 717 (citations omitted). Justice Scalia’s definition is far broader than what Interior puts forth. The dissent’s reference to animals being “made the object of profit” was to the regulatory plan of the ESA, not to “take.” *Id.* at 718. Interior’s opening brief appropriately acknowledges as much. *See* Defs.’ Mem. of Law at 20.

Even accepting *arguendo* Interior’s definition of “take,” the Court does not agree that shooting birds and leaving them to rot where they fall (or to become food for carrion eaters) does not “reduce the bird to man’s dominion and make it the object of profit.” Shooting the bird definitely reduces the bird “by killing . . . to human control.” *Sweet Home*, 515 U.S. at 717 (Scalia, J., dissenting). The rancher also profits from his action whether he kills the bird to protect his crops, to improve his marksmanship, or simply for the satisfaction of knocking the bird from the sky. His profit might be economic, from a larger crop yield, personal, from better

¹⁷ This Court takes no view on whether that common law definition correctly defines “take” as used in MBTA.

shooting skills, or psychic, from the satisfaction of successfully downing the bird. *See id.* (“Every man . . . has an equal right of pursuing and taking to his *own use* all such creatures as are *ferae naturae*.” (quoting 2 William Blackstone, Commentaries 411 (emphasis added))).

“Kill” as defined by Interior is also plainly redundant with “hunt” or “pursue” in its rancher scenario. Congress presumably included “kill” to capture activities other than hunting and its kin. While the odd example might exist where “kill” would capture conduct that the other terms do not, the Jorjani Opinion has effectively neutered the term. *See Sweet Home*, 515 U.S. at 698 n.11, 702 (rejecting use of *noscitur* that gave the term “‘harm’ [in the ESA] essentially the same function as other words in the definition, thereby denying it independent meaning.”).

Interior also argues that the constitutional avoidance canon supports its interpretation because otherwise “kill” risks being unconstitutionally vague. There are at least two versions of constitutional avoidance: the more traditional mandate that, if possible, courts should interpret ambiguous statutes to avoid rendering them unconstitutional, and the more modern and questionable practice of construing ambiguous statutes to “avoid the need even to address serious questions about their constitutionality.” *United States v. Davis*, 139 S. Ct. 2319, 2332 n.6 (2019) (citation omitted). Under either version, Interior’s use of the canon is unpersuasive.

First, because the statute is unambiguous, using avoidance to create ambiguity or to distort the plain text is improper. *See id.* at 2332 (“[W]hen presented with two ‘fair alternatives,’ this Court has sometimes adopted the narrower construction of a criminal statute to avoid having to hold it unconstitutional if it were construed more broadly.”); *McFadden v. United States*, 576 U.S. 186, 197 (2015) (“[Constitutional avoidance] is a tool for choosing between competing plausible interpretations of a provision. It has no application in the interpretation of an unambiguous statute” (quotation omitted)); *United States v. Culbert*, 435 U.S. 371, 379 (1978) (finding statute clear and refusing to “manufacture ambiguity where none exists”).

Second, Interior’s application of constitutional avoidance relies on an unpersuasive predicate application of the void-for-vagueness doctrine. That doctrine “requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.” *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). Although Section 2 is broad, it is not vague. A law is vague if “it is unclear as to what fact must be proved.” *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). Due process requires that “laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.” *Id.* Far from statutory language that criminalizes “contemptuously” treating the flag,¹⁸ “obscene, indecent, or profane language,”¹⁹ or “conduct that presents a serious risk of physical injury to another,”²⁰ Section 2 gives persons fair notice of what exactly is criminal—it is unlawful to kill migratory birds by any means. *See United States v. Smith*, 29 F.3d 270, 273 (7th Cir. 1994) (“We are quite confident that ordinary people can understand [Section 2]’s clear and precise language. That language tells ‘ordinary people’ this: if you possess any part of a migratory bird, you break the law.”); *cf. United States v. Zak*, 486 F. Supp. 2d 208, 215 (D. Mass. 2007) (“Whatever vagueness might be hypothesized at the fringe of the MBTA’s reach, Defendant’s action fell in the clear and unambiguous center of the statute’s prohibition. The Act was not unconstitutionally vague as applied to the facts of this case.”). No one, in other words, is “forced to speculate.” *Dunn v. United States*, 442 U.S. 100, 112 (1979).

¹⁸ *Smith v. Goguen*, 415 U.S. 566, 568 (1974).

¹⁹ *Fox Television Stations*, 567 U.S. at 243.

²⁰ *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018).

In addition, Section 2 is “subject to regulatory exception,” mitigating concerns about arbitrary enforcement. *Andrus v. Allard*, 444 U.S. 51, 60 n.12 (1979); *see also* 72 Fed. Reg. 8931, 8934 (Feb. 28, 2007) (explaining that “[t]he MBTA regulates, rather than absolutely forbids, take of migratory birds”). FWS has an array of enforcement techniques at its disposal other than criminal prosecution. In fact, the record shows that FWS has historically turned to those techniques first. It also shows that FWS has the ability to issue regulations precisely delineating exceptions to the prohibited conduct. *See, e.g.*, 50 C.F.R. § 21.15 (2007); 50 C.F.R. § 21.27 (2001); 80 Fed. Reg. 30,032; AR 55–56, 79, 369–70. That cuts strongly against redrawing the boundaries of the MBTA to avoid Interior’s theoretical concerns about arbitrary enforcement, particularly when a basic proximate cause element can mandate a close relationship between the act and the bird death. *See Haw. Wildlife Fund*, 140 S. Ct. at 1477 (“EPA and the States also have tools to mitigate those harms, should they arise, by (for example) developing general permits for recurring situations or by issuing permits based on best practices where appropriate.”); *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 504 (1982) (“The village may adopt administrative regulations that will sufficiently narrow potentially vague or arbitrary interpretations of the ordinance. In economic regulation especially, such administrative regulation will often suffice to clarify a standard with an otherwise uncertain scope.”); *see, e.g., Apollo Energies*, 611 F.3d at 690 (imposing proximate cause requirement); *Moon Lake*, 45 F. Supp. 2d at 1085 (same).

Third, with the exception of First Amendment and pre-enforcement vagueness challenges, constitutional avoidance should be applied in concrete cases, not in the abstract. *See United States v. Mazurie*, 419 U.S. 544, 550 (1975) (“[V]agueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand.”); *United States v. Blaszcak*, 947 F.3d 19, 40 (2d Cir. 2019) (“Where, as here, we are

not dealing with defendants’ exercise of a first amendment freedom, we should not search for statutory vagueness that did not exist for the defendants themselves.” (quotation omitted)); *see also United States v. Farhane*, 634 F.3d 127, 139 (2d Cir. 2011) (“In practice, the *Hoffman Estates/Salerno* rule warrants hypothetical analysis of ‘all applications’ only in cases of pre-enforcement facial vagueness challenges.”); *United States v. Rybicki*, 354 F.3d 124, 129–30 (2d Cir. 2003) (“Panel opinions of this Court have repeatedly held that when, as in the case before us, the interpretation of a statute does not implicate First Amendment rights, it is assessed for vagueness only as applied, i.e., in light of the specific facts of the case at hand and not with regard to the statute’s facial validity.” (quotation omitted)). Criminal defendants have brought as-applied challenges to the MBTA, and will likely continue to do so. *See, e.g., United States v. Rollins*, 706 F. Supp. 742, 744–45 (D. Idaho 1989) (holding that the MBTA was unconstitutionally vague as applied to a farmer who used due care in applying pesticides that subsequently killed migratory birds). “While the MBTA’s scope, like any statute, can test the far reaches in application,” *Apollo Energies*, 611 F.3d at 686, that case is not before this Court, and Interior cites no authority for using constitutional avoidance to categorically rewrite a statute simply because one can conceive of unreasonable applications.²¹

Interior similarly argues that the MBTA must be read narrowly to avoid the absurd outcome of criminalizing broad swaths of innocent activity. Although distinct from constitutional avoidance, Interior’s use of the so-called “absurd results” canon is unpersuasive for similar reasons. “The ‘absurd results’ canon . . . is a rule of statutory construction that serves to help resolve . . . ambiguity” pursuant to which courts should “construe statutes so as to avoid

²¹ To the extent that Interior implies that the MBTA is vulnerable to facial challenge, it would have to show “that the law is impermissibly vague in all of its applications.” *Farhane*, 634 F.3d at 139. Interior has not tried to do so, and that would, of course, contradict the Jorjani Opinion’s position that the statute is constitutional when it makes unlawful some migratory bird killings.

results glaringly absurd.” *United States v. Venturella*, 391 F.3d 120, 126–27 (2d Cir. 2004) (quotations omitted). Setting to one side the familiar hitching point of ambiguity (which is lacking in this case), there is nothing absurd about an interpretation of the MBTA that broadly criminalizes killing migratory birds as a misdemeanor, subject to reasonable agency regulation and case-by-case adjudication. That has, after all, been the law of the land for decades. Moreover, FWS’s history of enforcing the MBTA against high-risk commercial activities that most threaten bird populations belie Interior’s concerns and further suggest that the Jorjani Opinion is a solution in search of a problem. In short, Interior’s complaint that without the Jorjani Opinion the MBTA raises the specter of criminal liability any time someone allows his or her cat to go outside falls flat. *See* Defs.’ Mem. of Law at 22–23; AR 22–23.

Interior finally argues that the Jorjani Opinion should be upheld because legislative and pre-enactment history show that the MBTA was meant to reign in excessive hunting and similar activities that targeted birds and led to their deaths or capture. But that history gives at best mixed signals of Congress’s intent, as *Moon Lake* persuasively explores. *See* 45 F. Supp. 2d at 1080–82. And Interior’s historical narrative conflicts with the text of the MBTA and its underlying conventions, which reflect a broad purpose to conserve bird populations. The MBTA states that the statute is “for the protection of migratory birds,” 16 U.S.C. § 703(a), and the conventions stipulate that migratory birds may only be killed under “extraordinary conditions” where birds have “become seriously injurious to the agricultural or other interests in any particular community.” *Turtle Island Restoration Network v. U.S. Dep’t of Commerce*, 878 F.3d 725, 734 (9th Cir. 2017) (quotation omitted). The 1916 Convention proclaimed the purpose of “saving from indiscriminate slaughter and of insuring the preservation of such migratory birds as are either useful to man or are harmless.” 39 Stat. 1702; *see also* 16 U.S.C. § 703(a) (referencing the conventions); *id.* § 704(a) (referencing the purposes of the conventions). Interior’s

characterization of the MBTA as a hunting-regulation statute falls flat, not least because if that had been Congress's purpose, the plain text of the statute would look far different than the MBTA's broadly worded prohibition.

In any event, the legislative history and extratextual materials on which Interior relies may only be used to "clear up ambiguity, not create it." *Bostock*, 140 S. Ct. at 1750 (quoting *Milner v. Dep't of Navy*, 562 U.S. 562, 574 (2011)); see also *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2468 (2020) ("[I]f during the course of our work an ambiguous statutory term or phrase emerges, we will sometimes consult contemporaneous usages, customs, and practices to the extent they shed light on the meaning of the language in question at the time of enactment."). "The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration." *Bostock*, 140 S. Ct. at 1749.

Interior's statute would have been easy to draft, but that is not the statute Congress drafted. There is nothing in the text of the MBTA that suggests that in order to fall within its prohibition, activity must be directed specifically at birds. Nor does the statute prohibit only intentionally killing migratory birds. And it certainly does not say that only "some" kills are prohibited. "It is a fundamental principle of statutory interpretation that absent provisions cannot be supplied by the courts." *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2381 (2020) (quotation omitted); see also *Lamie v. U.S. Tr.*, 540 U.S. 526, 538 (declining to "read an absent word into the statute" when there was "a plain, non-absurd meaning in view"). Instead of including Interior's purported limits in the text of the statute, "Congress chose statutory language broad enough to meet" new threats to migratory bird populations as they emerged in the ensuing decades. *DePierre v. United States*, 564 U.S. 70, 85 (2011).

Even if Congress did not foresee that modern industrial activity would one day threaten protected migratory bird populations, that does not justify disregarding the statute's

unambiguous language. The MBTA’s impressive scope “reflects an intentional effort to confer the flexibility necessary to forestall [its] obsolescence.” *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007). Although Congress *may* have been principally concerned about over-hunting as the chief threat to bird populations in 1918,²² “the fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.” *Pa. Dep’t of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998) (quotation omitted); *cf.* Scalia & Garner at 86 (“Broad language can encompass the onward march of science and technology.”). “[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.” *Oncala v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998). “[U]nexpected applications of broad language reflect only Congress’s ‘presumed point [to] produce general coverage—not to leave room for courts to recognize ad hoc exceptions.’” *Bostock*, 140 S. Ct. at 1749 (quoting Scalia & Garner at 101). Congress could have, but chose not to, limit the MBTA to activities like hunting that are directed at birds, but there is no basis to insert that extratextual limitation.

V. Vacatur Is the Appropriate Remedy

When an agency action is held unlawful under the APA, the “usual” remedy is vacatur and remand. *Guertin v. United States*, 743 F.3d 382, 388 (2d Cir. 2014). Vacatur, in particular, “has long been held to be the appropriate remedy when . . . an agency acts contrary to law, or agency action is found to be arbitrary and capricious.” *New York v. U.S. Dep’t of Commerce*, 351 F. Supp. 3d 502, 673 (S.D.N.Y. 2019) (citations omitted), *aff’d in part, rev’d in part and remanded*, 139 S. Ct. 2551 (2019), *appeal dismissed*, No. 19-212, 2019 WL 7668098 (2d Cir.

²² That fact is not clear from the MBTA’s history. It is just as plausible that Congress wished broadly to prevent persons from killing birds to give the statute staying power as a conservation effort, and secondarily included hunting to ensure that the then-primary cause of bird killings would be covered by the statute.

Aug. 7, 2019). Interior nonetheless contends that consideration of potential remedies should be deferred until after the parties separately brief the issue of remedy, or, alternatively, that the Jorjani Opinion should be remanded without vacatur. Defs.’ Reply at 20.

Further briefing is unnecessary.²³ The parties “had ample opportunity to prepare their [memoranda] in this action” and have already made arguments regarding whether vacatur is warranted. *California v. U.S. Dep’t of the Interior*, 381 F. Supp. 3d 1153, 1179 (N.D. Cal. 2019). Additional briefing would only delay relief in this case.

This is not one of the “rare circumstances in which a court should deviate from the general rule that vacatur is the appropriate remedy.” *City Club of N.Y.*, 246 F. Supp. 3d at 872 (quotation omitted). “Courts authorizing remand without vacatur have done so where the agency shows ‘at least a serious possibility that [it] will be able to substantiate its decision on remand’ and that ‘the consequences of vacating may be quite disruptive.’” *New York*, 351 F. Supp. 3d at 673–74 (quoting *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm’n*, 988 F.2d 146, 151 (D.C. Cir. 1993)). As a starting point, the Jorjani Opinion is contrary to the plain meaning of the MBTA and therefore must be vacated. *See Nat. Res. Def. Council v. EPA*, 489 F.3d 1250, 1261 (D.C. Cir. 2007); *see also Otay Mesa Prop., L.P. v. U.S. Dep’t of the Interior*, 344 F. Supp. 3d 355, 378 (D.D.C. 2018) (“Courts regularly decline to [remand without vacatur] where an agency has committed substantive errors, as opposed to procedural ones.”). Tipping the balance further, Interior presents no indication that vacating the Opinion will disrupt enforcement or other agency

²³ The Court’s July 31, 2019, decision on the motion to dismiss notes that “in conducting the Article III standing inquiry, the Court must assume that Plaintiffs will succeed on the merits of their claims This is without prejudice, of course, to Defendants’ litigating the appropriate remedy should Plaintiffs prevail on the merits.” *NRDC I*, 397 F. Supp. 3d at 442 n.10. Interior incorrectly assumed that this statement meant that the Court would provide a separate opportunity to brief the issue of remedy after summary judgment; Interior did not, however, seek confirmation from the Court before proceeding on that erroneous assumption. The Court meant by that language only that Plaintiffs have standing given the remedy they sought (vacatur of the Jorjani Opinion) but recognizing that Defendants remained free to advocate that a different remedy was appropriate.

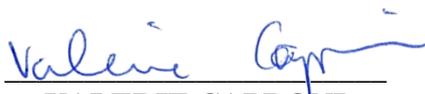
efforts or create disruptive uncertainty. Vacating the Opinion simply undoes a recent departure from the agency's prior longstanding position and enforcement practices.

CONCLUSION

For the foregoing reasons, Plaintiffs' motions for summary judgment are GRANTED, and Defendants' motion for summary judgment is DENIED. The Court VACATES the Jorjani Opinion (M-37050) and REMANDS to the agency for further proceedings.

SO ORDERED.

Date: August 11, 2020
New York, New York



VALERIE CAPRONI
United States District Judge