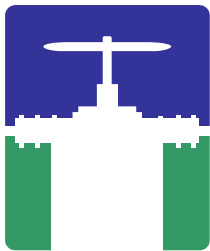


Development of a Permit Program for Incidental Take of Migratory Birds

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Executive Summary

The Migratory Bird Treaty Act (“MBTA” or “Act”) is a federal law administered by the United States Fish and Wildlife Service (“FWS” or “Service”) that protects migratory birds. The Act carries out the United States’ commitment to four international conventions with Canada, Japan, Mexico, and Russia, respectively, which protect birds that migrate across international borders. The MBTA makes it unlawful to “take” individuals, nests, or eggs of the migratory bird species named in these international treaties, unless expressly permitted by federal regulations or authorized under a valid permit. Although permits may be obtained to import migratory birds, collect such birds for scientific purposes, or destroy depredating migratory birds, permits are not generally available under the Act for incidental take of migratory birds caused by industrial operations, such as interstate natural gas pipeline development.

The primary purpose of the MBTA is the prevention of unregulated hunting of migratory birds. When the MBTA was enacted over 90 years ago, at a time when commercial trade in birds and their feathers was popular, the Act offered much-needed protection to many bird species. However, over the last 30 years the statute has been applied to industrial operations that inadvertently harm migratory birds. A majority of courts opining on the issue have held that a violation of the MBTA is a strict liability crime, and thus “take” need not be intentional. Indirect killings of migratory birds through such acts as dumping waste water, misapplying pesticides, or failing to prevent birds from being electrocuted by power lines have been held to violate the MBTA.

The MBTA applies to any person, business, organization, institution, and any local, state or federal agency. Unlike the Endangered Species Act (“ESA”), the MBTA does not require federal agencies to consult with the FWS before undertaking an action that may result in unintended bird deaths. However, federal agencies have an obligation to ensure that their own actions do not result in violations of the MBTA. The MBTA’s take prohibitions and criminal penalties for prohibited take are enforced by the FWS and can have serious implications for industry and federal agencies which engage in activities in migratory bird habitat.

The Issues

Perhaps the most significant issue for the natural gas pipeline industry is the degree to which land clearance activities during nesting season, and other pipeline development, maintenance, and operation activities may give rise to prohibited “take” of migratory birds, eggs, and nests. This “take” is not intentional, but rather “incidental” take—take that is not the intended purpose of otherwise lawful activities. While the principal purpose of the MBTA was to prohibit the intentional taking of migratory birds, the Act has been construed likewise to prohibit this “incidental” taking of migratory birds. Strict enforcement of the prohibition against incidental take of migratory birds could have significant ramifications on natural gas pipeline development activity.

The FWS, through the United States Department of Justice (“DOJ”), has not historically pursued enforcement actions for migratory bird deaths presented by land clearance activities. Recently, however, the agency has increased its focus on implementation and enforcement of the MBTA. Under Executive Order 13186, 66 Fed. Reg. 3853 (Jan. 17, 2001), which directs executive departments and agencies to take actions to protect and conserve migratory birds, the FWS has entered into agreements with the Department of Defense; Department of Energy; Forest Service; and Minerals Management Service, which address the responsibilities of these federal agencies under the MBTA. However, the FWS has not yet entered into an agreement with the Federal Energy Regulatory Commission (“FERC”) to address the FERC’s responsibilities under the MBTA.

In 2009, enforcement actions for violations of the MBTA resulted in multi-million dollar penalties for a large electrical transmission company and a major oil and gas production company. Of significant concern for the interstate natural gas pipeline industry, efforts of natural gas pipeline companies to comply with the MBTA have recently resulted in significant migratory bird mitigation requirements on natural gas pipeline projects or preclusion of pipeline activities during migratory bird nesting periods. Application of the MBTA has varied among projects and between regions, and has often resulted in significant costs and delay for natural gas pipeline companies. The profile of the MBTA, and its application to the natural gas pipeline industry and other habitat-disturbing activities is increasing.

The recent focus on MBTA compliance and enforcement actions brings with it an increasing likelihood that natural gas pipeline companies face potential prosecution for incidental take of migratory birds. Further, while it may be unlikely that the DOJ would bring enforcement actions against federal agencies like the FERC and the Bureau of Land Management (“BLM”), those agencies are still vulnerable to citizen suits brought pursuant to the Administrative Procedure Act (“APA”) seeking to enjoin an agency action based on violations of the take prohibition of the MBTA. Such lawsuits could create significant costs and delay for natural gas pipeline projects. In the absence of any permit mechanism to allow the incidental take of migratory birds as a result of otherwise lawful activities, pipeline companies have no mechanism to avoid take liability and minimize the risk of lawsuits associated with normal operational activities including pipeline construction and maintenance. Equally important, pipeline companies must choose between deferring pipeline construction or maintenance activities during period of the year when migratory birds may be present along the pipeline right-of-way, or facing potential prosecution for illegal take under the MBTA.

To date, the FWS has not used its authority to provide regulatory or policy guidance that would help federal agencies and industry comply with the MBTA. Similarly, Congress has not amended the MBTA to afford any relief from the Act’s strict liability for incidental take of migratory birds. Thus, both federal agencies and industry remain vulnerable to enforcement actions and litigation for incidental take of migratory birds.

This Report

The status quo serves neither the natural gas pipeline industry nor migratory bird conservation efforts. Absent congressional legislation relaxing the constraints erected by the MBTA’s take provisions, which is very unlikely to occur, the obvious remedy for the MBTA’s

strict liability scheme would be the development of a permitting program that would authorize incidental take. The purpose of this report is to help facilitate such action by evaluating legal issues associated with, and identifying potential approaches for, developing a permit program for incidental take of migratory birds under the MBTA.

This report reviews the MBTA and associated regulations and policy; assesses the feasibility of promulgating regulations under the MBTA for an incidental take permit program; and offers suggestions concerning the nature and format of a desirable permit program. Based on the analysis in this report and considering the authority under the MBTA, the report concludes that so long as the FWS promulgates regulations for an incidental take permit program that are compatible with the terms of the treaties with Canada, Japan, Mexico, and Russia, such a program is feasible. These treaties require that a permit program maintain or enhance migratory bird habitat and provide protection for populations of migratory birds that are depleted or in danger of extinction.

This report is intended to be used by the natural gas pipeline industry to work with the FWS and other appropriate entities to establish a permitting mechanism under the MBTA. The permitting vehicle must be one that can be implemented efficiently in light of the scope of the MBTA, interstate natural gas pipeline project permitting and construction timelines, and agency budget concerns. It must both protect migratory birds and provide a workable permit mechanism to allow the incidental take of migratory birds as a result of natural gas pipeline construction activities.

With these considerations in mind, this report suggests a “permit-by-rule” approach for developing a permit program for incidental take of migratory birds. An example of an existing permit-by-rule program is the Army Corps of Engineers’ Nationwide permit program under the Clean Water Act for placement of dredged or fill material into waters of the United States. Under an MBTA permit-by-rule program, the FWS could promulgate regulations providing for a general permit program authorizing incidental take of migratory birds for a broad scope of activities, including natural gas pipeline development, operation, and maintenance. To reduce the administrative burden, the program could be based on an applicant’s compliance with established best management practices. Projects that do not fit the contours of the general permit program could be subject to an individual permit program, subject to more rigorous application and review by the FWS. For ease of administration and to account for different biological characteristics of birds across the United States, this report suggests administration of the permit program according to already established regional flyways. Eventually, the permit program for incidental take could be incorporated into the FERC’s interstate natural gas pipeline certification process, with continued involvement by the FWS consistent with its statutory obligations to enforce the MBTA, so that the interstate natural gas pipeline industry and federal agencies can ensure compliance with the MBTA as part of the certification process.

Development and implementation of a permit mechanism to allow the incidental take of migratory birds as a result of natural gas pipeline construction, operation, and maintenance activities would minimize project delays, improve efficiency, and reduce the risk of take liability, while ensuring that the United States meets its treaty obligations to conserve migratory birds. It would also help to achieve consistent application of the MBTA from project to project, and from region to region. Additionally, more uniform adherence to appropriate best management

practices during pipeline construction activities and reasonable mitigation requirements should result in permitted actions meeting treaty obligations to maintain or enhance migratory bird habitat and provide protection for populations of migratory birds that are depleted or in danger of extinction, which is essential to establishment of a permit program. The details of these best management practices and reasonable mitigation measures will be an important focus during the permit program development process.

This report represents the first step in achieving a viable permit program by discussing and analyzing the MBTA authorities allowing the FWS to promulgate regulations for such a permit program, and suggesting the nature and format of a desirable permit program. To implement these suggestions and continue work towards such a permit program, it is recommended that the interstate natural gas pipeline industry develop a consensus for the preferred nature and format of a desirable permit program, then engage the FWS and other key stakeholders to encourage implementation of an incidental take program, as well as assist the FWS in promulgating regulations for its implementation.

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I. Introduction

A. Report Purpose and Need

The Migratory Bird Treaty Act (“MBTA” or “Act”) is a federal law administered by the United States Fish and Wildlife Service (“FWS” or “Service”). The Act was adopted over 90 years ago to protect migratory birds from unregulated hunting, spurred on by the extinction of the passenger pigeon through market hunting. At a time when commercial trade in birds and their feathers was popular, the Act offered much-needed protection to many bird species.

The MBTA’s design was simple: prohibit the unlicensed “take” of migratory birds by making such take a strict liability, federal criminal offense. At the time the Act was passed, Congress undoubtedly did not consider the breadth of the adopted legislative language, or that in the years to come it would be applied to prohibit “incidental” take, i.e., take that is not the intended purpose of otherwise lawful activities.

Over the years, the scope of the Act has expanded significantly. The MBTA has been applied to industrial operations that inadvertently harm migratory birds. A majority of federal courts have held that a violation of the Act is a strict liability crime, and thus “take” need not be intentional. Indirect killings of migratory birds through such acts as dumping waste water, misapplying pesticides, or failing to prevent birds from being electrocuted have been held to violate the MBTA.

Significantly, in 2001, President William Clinton executed Executive Order 13186, 66 Fed. Reg. 3853 (Jan. 17, 2001), which addressed the responsibilities of federal agencies to protect migratory birds under the Act. The Executive Order directs executive departments and agencies to take actions to protect and conserve migratory birds. The Order resulted in memorandums of understanding (“MOUs”) between certain federal agencies and the FWS, which memorialize actions that each party will take to fulfill their respective responsibilities under the Act.

Recent application of the Act to impose mitigation requirements on natural gas pipeline projects, and the absence of any permit mechanism to allow the incidental take of migratory birds as a result of natural gas pipeline construction activities, are a significant concern for the natural gas pipeline industry. *See* Attachment A (“Rex-East MOU”). Strict enforcement of the MBTA could have significant ramifications on natural gas pipeline development activity as land clearance activities during nesting season, and other natural gas pipeline development, maintenance and operation activities, may “take” migratory birds, eggs, and nests in violation of the MBTA.

Natural gas pipeline companies face the chance of prosecution by the FWS, through the U.S. Department of Justice (“DOJ”), for incidental take of migratory birds, and federal agencies are vulnerable to citizen suits brought pursuant to the Administrative Procedure Act (“APA”) seeking to enjoin an agency action based on violations of the take prohibition of the MBTA. Such lawsuits could create significant costs and delay for pipeline projects. To reduce the chance of prosecution, natural gas pipeline companies are spending substantial amounts of time

and money and are facing delay to comply with often inconsistent migratory bird mitigation requirements imposed by the FWS.

The MBTA imposes significant penalties on violators of the Act. Under the general misdemeanor provision of the MBTA, a violator may be fined up to \$15,000 and/or imprisoned for up to six months for an unauthorized take of a protected bird, regardless of intent. In 2009, some of the largest-ever penalties were paid by violators. Charges against a large electric utility in the West for violations of the MBTA resulted in the utility's sentence to pay a \$510,000 criminal fine; pay an additional \$900,000 in restitution; spend five years on probation; and spend \$9.1 million to repair or replace equipment to protect migratory birds.¹ Also in 2009, a large oil and gas company was charged with violations of the MBTA resulting in fines and community service payments totaling \$600,000 and requiring the company to implement a multi-million dollar environmental compliance plan aimed at preventing bird deaths at the company's facilities.²

Although actions under the MBTA have not historically been brought against developers of natural gas pipeline projects, without any permit mechanism to allow the incidental take of migratory birds as a result of natural gas pipeline construction activities, pipeline companies have no assurance they can abide by the Act and avert lawsuits. With recent studies showing widespread declines in bird populations in the United States,³ increased prosecution for violations of the MBTA is more likely than not as the FWS carries out its mission to protect migratory birds. Fortunately, recent studies also demonstrate the success of habitat restoration and conservation in reversing population declines.⁴

The development of a permit program for incidental take of migratory birds could provide assurance to natural gas pipeline companies that they can abide by the MBTA and avert lawsuits, by permitting otherwise unlawful incidental take. Such a program could also provide for consistent application of the MBTA among projects and between regions. At the same time,

¹ See Department of Justice, "Press Release," July 10, 2009, available at <http://www.fws.gov/home/feature/2009/pdf/PacificCorpPressRelease.pdf> (last visited May 20, 2010) (charges for electrocution of eagles and other large birds of prey by electrical distribution and transmission facilities owned and operated by PacifiCorp).

² See Department of Justice, "Exxon-Mobil Pleads Guilty to Killing Migratory Birds in Five States," Aug. 13, 2009, available at <http://www.usdoj.gov/opa/pr/2009/August/09-enrd-795.html> (last visited May 20, 2010) (charges for deaths of approximately 85 protected birds, including waterfowl, hawks and owls, resulting from exposure to hydrocarbons in uncovered natural gas well reserve pits and waste water storage facilities at Exxon-Mobil sites).

³ See, for example, North American Bird Conservation Initiative, The State of the Birds—2009 News Release, "Secretary Salazar Releases Study Showing Widespread Declines in Bird Populations, Highlights Role of Partnerships in Conservation," Mar. 19, 2009, available at <http://www.stateofthebirds.org/2009/news-release> (last visited May 20, 2010) ("... nearly a third of the nation's 800 bird species are endangered, threatened, or in significant decline due to habitat loss, invasive species, and other threats."); North American Bird Conservation Initiative, "The State of the Birds, United States of America, 2009," 2009, available at http://www.stateofthebirds.org/pdf_files/State_of_the_Birds_2009.pdf (last visited May 20, 2010).

⁴ See *supra*, footnote 3.

a permit program could be designed to result in contributions to habitat restoration and conservation of migratory birds, thereby avoiding a negative effect on migratory bird populations, and providing potential benefits to migratory bird populations and habitat. Considering the increasing focus on impacts to migratory birds from pipeline construction activities; the potential liability for pipeline companies; and the decline in certain populations of migratory birds, and the Service's responsibility to protect such birds, it is timely for both natural gas pipeline companies and the FWS to develop a permit program for incidental take of migratory birds.

B. Report Objective

The objective of this report is to support a petition to the FWS to develop a permit program for incidental take of migratory birds under the MBTA. Development and implementation of a permit mechanism to allow the incidental take of migratory birds as a result of natural gas pipeline construction, operation, and maintenance activities could minimize project delays, improve efficiency, and reduce the risk of liability for incidental take of migratory birds.

The ultimate objective of implementation of an incidental take permit program under the MBTA is planned to be accomplished in two phases. Phase I concludes with this report that reviews the MBTA and associated regulations and policy; assesses the feasibility of promulgating regulations under the MBTA for an incidental take permit program; and offers suggestions concerning the nature and format of a desirable permit program. This report does not address development and implementation efforts (Phase II), which could include contacting the FWS and other Department of Interior personnel, FERC personnel, interested non-governmental organizations, the Department of State, congressional interests, and other key stakeholders to encourage implementation of an incidental take program, as well as assisting the FWS in promulgating regulations for implementation of such a program.

This report is intended to be used by the natural gas pipeline industry to work with the FWS and other appropriate entities to establish a permitting mechanism under the MBTA. The permitting vehicle must be one that can be implemented efficiently in light of the scope of the MBTA, interstate natural gas pipeline project permitting and construction timelines, and agency budget concerns. It must both protect migratory birds and provide a workable permit mechanism to allow the incidental take of migratory birds as a result of natural gas pipeline construction, operation, and maintenance activities.

II. Overview of the MBTA

The MBTA is a federal wildlife protection statute that may affect development and operation of interstate natural gas pipelines. *See* 16 U.S.C. §§ 703-711. This statute applies to species of migratory birds that are specifically identified in four international treaties. *Id.* § 703(a). Protected species include, for example, the American crow, killdeer, western meadowlark, mallard duck, numerous species of geese, and the bald eagle. 50 C.F.R. § 10.13. The MBTA makes it unlawful to “pursue, hunt, take, capture, kill, attempt to take, capture or kill, [or] possess . . . any migratory bird or any part, nest, or egg of any such bird,” named in the

four international treaties, unless expressly permitted by federal regulations. *See* 16 U.S.C. § 703(a).

Currently, permits may be obtained to import migratory birds, collect migratory birds for scientific purposes, or destroy depredating (i.e., predatory or destructive) migratory birds. *See* 50 C.F.R. Part 21. In addition, “special purpose” permits may be obtained for activities related to migratory birds, parts, nests, or eggs when there is “a sufficient showing of benefit to the migratory bird resource, important research reasons, reasons of human concern for individual birds, or other compelling justification.” *Id.* § 21.27. However, permits are not generally available for incidental take of migratory birds during otherwise lawful activities, such as construction and operation of interstate natural gas pipelines.

Although the primary purpose of the MBTA is the prevention of unregulated hunting of migratory birds, *see United States v. Olson*, 41 F. Supp. 433 (W.D. Ky. 1941), the statute has been applied to industrial operations that inadvertently harm migratory birds. A majority of federal judicial circuits have held that a violation of the MBTA is a strict liability crime, and thus take need not be intentional. *United States v. FMC Corp.*, 572 F.2d 902, 908 (2nd Cir. 1978); *see also United States v. Moon Lake Electric Ass’n*, 45 F. Supp. 2d 1070, 1073-74 (D. Colo. 1999) (court concluded that a violation occurs when the death of a protected bird is a probable consequence of the activity, whether that activity is intentional or unintentional) (citing *United States v. Corrow*, 119 F.3d 796, 805 (10th Cir. 1997)). Indirect killings of migratory birds through such acts as dumping waste water, misapplying pesticides, or failing to prevent birds from being electrocuted by power lines have been found to violate the MBTA. *See FMC Corp.*, 572 F.2d at 907 (contaminated wastewater pond); *United States v. Corbin Farm Serv.*, 444 F. Supp. 510 (E.D. Cal.), *aff’d on other grounds*, 578 F.2d 259 (9th Cir. 1978) (agricultural use of pesticides); *Moon Lake*, 45 F. Supp. 2d at 1074-75, 79 (electrocution).

The MBTA imposes criminal sanctions through a “strict liability” standard, so that the MBTA can be violated without knowingly intending to do so. *See, e.g., United States v. Corrow*, 199 F.3d at 805. The MBTA generally does not create a private right of action to enjoin activities that might violate its provisions, *see Defenders of Wildlife v. EPA*, 882 F.2d 1294 (8th Cir. 1989), although citizen plaintiffs may be able to sue the federal government for its failure to comply with the MBTA in federal land management or project permitting activities. *See Mahler v. U.S. Forest Service*, 927 F. Supp. 1559, 1579 (S.D. Ind. 1996); *Sierra Club v. Martin*, 933 F. Supp. 1559, 1556-69 (N.D. Ga. 1996); *see also Humane Society v. Glickman*, 217 F.3d 882 (D.C. Cir. 2002) (citizens can sue a federal agency for violations of the MBTA by asserting a claim against a federal agency under the APA); *Fund for Animals v. Norton*, 281 F.Supp.2d 209 (D.D.C. 2003) (same). The MBTA’s take prohibitions and criminal penalties for prohibited take are enforced by the FWS through criminal prosecution by the U.S. Department of Justice (“DOJ”) in federal court.

While the MBTA creates liability for unintended bird deaths, the MBTA does not require public or private entities to engage in planning or to undertake mitigation measures to minimize the potential for unintended bird deaths. Further, the MBTA neither directs nor requires consultation between the FWS and other federal agencies or third parties before such entities undertake an action that may result in unintended harm to migratory birds. Instead, FWS responsibilities under the MBTA are limited to:

[A]dministering, overseeing, and enforcing the conservation provisions of the MBTA, which includes population management (e.g. monitoring and assessment), habitat protection (e.g. acquisition, enhancement, and modification), international coordination, development and enforcement of regulations, and development and implementation of permit policy.

FWS, Fish and Wildlife Service Manual, *Policies and Responsibilities of the Migratory Bird Program*, 720 FW 1 (Aug. 9, 2004).

Although the MBTA does not require consultation with the FWS before undertaking an action that may result in unintended bird deaths, federal agencies may have an obligation to ensure that their own actions do not result in violations of the MBTA. *See Mahler v. U.S. Forest Service*, 927 F. Supp. at 1573 (MBTA found applicable to federal agency action); *Humane Soc. of the U.S. v. Glickman*, 217 F.3d 882, 885 (D.C. Cir. 2000) (same); *Robertson v. Seattle Audubon Soc.*, 503 U.S. 429, 438-39 (1992) (addressing the question of a federal agency's obligations under the MBTA). *See also* Exec. Order No. 13186, Responsibilities of Federal Agencies to Protect Migratory Birds, 66 Fed. Reg. 3853 (Jan. 17, 2001) (directing all federal agencies whose actions have a measurable impact on migratory bird populations to develop a Memorandum of Understanding with the FWS, in addition to calling on federal agencies to take steps to promote migratory bird conservation).

III. Review of Authority under the MBTA Allowing for the Development of an Incidental Take Permit Program

This section of the report summarizes the MBTA and implementing regulations, the four MBTA treaties, Executive Order 13186 and its associated memoranda of understanding, FWS policy statements, and the limited, existing MBTA permit scheme. This section then evaluates the ability of the FWS to develop a permit program for incidental take of migratory birds under these existing authorities.

A. Statutory Authority

The MBTA provides that “[u]nless 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, [or] possess . . . any migratory bird, any part, nest, or egg of any such bird” named in treaties between the United States and Great Britain (for Canada), the United States and Mexico, the United States and Japan, and the United States and Russia. 16 U.S.C. § 703(a) (emphasis added). Thus, activities that are otherwise prohibited by the MBTA may be lawful if “permitted by regulations” issued in accordance with the Act. *Id.*

The MBTA further provides that

Subject to the provisions and in order to carry out the purposes of the conventions, referred to in section 703 of this title, *the Secretary of the Interior is authorized and directed*, from time to time, having due regard to the zones of temperature and to the

distribution, abundance, economic value, breeding habits, and times and lines of migratory flight of such birds, *to determine when, to what extent, if at all, and by what means, it is compatible with the terms of the conventions to allow hunting, taking, capture, killing, [or] possession . . . of any such bird, or any part, nest, or egg thereof, and to adopt suitable regulations permitting and governing the same*, in accordance with such determinations, which regulations shall become effective when approved by the President.

Id. § 704(a) (emphasis added). Therefore, the Secretary of the Interior (“Secretary”) is authorized to promulgate regulations permitting “hunting, taking, capture, killing, [or] possession” of migratory birds, so long as those regulations are compatible with the terms of the treaties with Great Britain (for Canada, hereinafter “Canada Treaty”), Mexico, Japan and Russia.

Furthermore, the Secretary of the Interior is “authorized to issue such regulations as may be necessary to implement the provisions of the conventions” between the United States and Canada, the United States and Mexico, the United States and Japan, and the United States and Russia. *Id.* § 712(2). Thus, for purposes of the development of a permit program for the incidental take of migratory birds, any regulations promulgated by the Secretary to implement such program must be compatible with the terms of these treaties. Further, the MBTA establishes that the Secretary of the Interior is the sole authority enabled to promulgate regulations and implement the Act.

B. Regulatory Authority

Under 50 C.F.R. Part 21, the FWS has established regulations with respect to permits for the taking, possession, transportation, sale, purchase, barter, importation, exportation, and banding or marking of migratory birds.⁵ 50 C.F.R. § 21.1. The regulations also provide certain exceptions to permit requirements for public, scientific, or educational institutions and establish depredation orders that provide limited exceptions to the MBTA. *Id.*

Reiterating the general prohibitions under the MBTA, the regulations provide that “[n]o person may take [or] possess . . . any migratory bird, or the parts, nests, or eggs of such bird except as may be permitted under the terms of a valid permit issued pursuant to the provisions of this part ” or authorized through other processes not relevant to this report.⁶ *Id.* § 21.11. Thus, to lawfully “take or possess” any migratory bird, one must generally obtain a valid permit to do so pursuant to the regulations at 50 C.F.R. Part 21.

⁵ Regulations were originally promulgated in 1974, *see* 39 Fed. Reg. 1178 (Jan. 4, 1974), but have been amended numerous times since then. *See, e.g.*, 46 Fed. Reg. 42680 (Aug. 24, 1981); 68 Fed. Reg. 61137 (Oct. 27, 2003); 73 Fed. Reg. 59465 (Oct. 8, 2008).

⁶ The other processes include exemptions from MBTA take liability described in 50 C.F.R. Part 21 (discussed further below), migratory game bird hunting authorized in 50 C.F.R. Part 20, and migratory bird subsistence harvest in Alaska authorized in 50 C.F.R. Part 92.

1. Permit Exceptions

The regulations at Part 21 provide certain exceptions to permit requirements for the following persons or entities in limited, enumerated circumstances:

- Employees of the Department of the Interior, in performing their official duties.
- Employees of certain public and private institutions, including game parks, zoos, public scientific or educational institutions, wildlife and land management agencies, public health agencies, and other similar entities.
- Licensed veterinarians.
- General public, to remove a migratory bird from the interior of a building under certain conditions.

Id. § 21.12. Additional permit exceptions are provided for persons involved with captive-reared mallard ducks and captive-reared migratory waterfowl other than mallard ducks. *Id.* §§ 21.13-.14.

2. Permits

The Service's regulations provide for a number of permits to authorize otherwise prohibited actions under the MBTA. *See* 50 C.F.R. Part 21, subparts C and D. The following permits are available under the regulations:

- Import and export permits. 50 C.F.R. § 21.21.
- Banding or marking permits. *Id.* § 21.22.
- Scientific collecting permits. *Id.* § 21.23.
- Taxidermist permits. *Id.* § 21.24.
- Waterfowl sale and disposal permits. *Id.* § 21.25.
- Special Canada goose permit. *Id.* § 21.26.
- Special purpose permits. *Id.* § 21.27.
- Falconry permits. *Id.* § 21.28.
- Raptor propagation permits. *Id.* § 21.30.
- Rehabilitation permits. *Id.* § 21.31.
- Depredation permits. *Id.* § 21.41.

With the exception of “special purpose permits,” these permits authorize specific actions otherwise prohibited under the MBTA, but do not permit incidental take of migratory birds.

The “special purpose permit” regulation provides that “[p]ermits may be issued for special purpose activities related to migratory birds, their parts, nests, or eggs, which are otherwise outside the scope of the standard form permits of this part.” *Id.* § 21.27. Such a permit is required before any person may lawfully “take . . . or possess migratory birds, their parts, nests, or eggs for any purpose not covered by the standard form permits of this part.” *Id.* § 21.27(a). A “special purpose permit” for migratory bird related activities may be issued if the applicant “makes a sufficient showing of *benefit to the migratory bird resource*, important research reasons, reasons of human concern for individual birds, or *other compelling justification.*” *Id.* § 21.27.

What constitutes a sufficient showing “of benefit to the migratory bird resource” is not explained by the regulations. Whether the regulations allow the FWS to issue a “special purpose permit” for a project that impacts the migratory bird resource, but provides an overall benefit to the resource as a result of mitigation and conservation is also unclear. Similarly, it is unclear what constitutes “other compelling justification” and whether one may obtain a permit for incidental take of migratory birds based on “compelling justification.”

3. Authorization of Incidental Take

The FWS already permits incidental take of migratory birds in the specific context of military readiness activities. *Id.* § 21.15; *see also* 72 Fed. Reg. 8949 (Feb. 28, 2007). This regulation provides that

the Armed Forces may take migratory birds incidental to military readiness activities provided that, for those ongoing or proposed activities that the Armed Forces determines may result in a significant adverse effect on a population of a migratory bird species, the Armed Forces must confer and cooperate with the Service to develop and implement appropriate conservation measures to minimize or mitigate such significant adverse effects.

Id. § 21.15(a).

However, if the Secretary of the Interior, after consulting with the Secretary of Defense and Secretary of State, determines that incidental take of migratory birds during a specific military readiness activity likely “would not be compatible with one or more of the migratory bird treaties, the Secretary will suspend authorization of the take associated with that activity.” *Id.* § 21.15(b)(1). Further, in certain circumstances, the Secretary of the Interior may also withdraw authorization for incidental take if “the Secretary determines that a proposed military readiness activity is likely to result in a significant adverse effect on the population of a migratory bird species.” *Id.* § 21.15(b)(2).

C. Authority under Treaties with Canada, Japan, Mexico, and Russia

1. Canada Treaty

As affirmed and implemented by the MBTA, the United States entered into a convention on December 8, 1916, with Great Britain (for Canada) for the protection of migratory birds in the United States and Canada. *See* 39 Stat. 1702 (1916). This convention was amended in 1995 by a protocol (“1995 Protocol,” collectively “Canada Treaty”) for the protection of migratory birds in Canada and the United States, signed by the United States and Canadian governments. *See* Protocol Amending the 1916 Convention for the Protection of Migratory Birds, S. Treaty Doc. No. 104-28, 1995 WL 877199 (the protocol was formally implemented in 1999.). The 1995 Protocol replaced most of the provisions of the original convention.

The 1995 Protocol states that the United States and Canada are committed “to the long-term conservation of shared species of migratory birds . . . that involves working together to cooperatively manage their populations, *regulate their take*, protects the lands and waters on which they depend, and share research and survey information.” 1995 Protocol at Preamble (emphasis added; “migratory birds” subject to the treaty are listed in the 1995 Protocol at Article I). Thus, the protocol specifically contemplates the regulation of take of migratory birds. Further, the 1995 Protocol provides general authority for the regulation and management of migratory birds by the Government of the United States and the Government of Canada, by specifying that the means to pursuing long-term conservation of migratory birds may include, but are not limited to: (1) “[m]onitoring, regulation, enforcement and compliance;” and (2) “[m]anagement of migratory birds on a population basis.” *Id.* at Article II.

Concerning take, the 1995 Protocol states:

Subject to laws, decrees or regulations to be specified by the proper authorities, *the taking of migratory birds may be allowed* at any time of the year for scientific, educational, propagative, or *other specific purposes consistent with the conservation principles of this Convention.*

Id. at Article II.3 (emphasis added). As further stated in the protocol,

[t]he taking of nests or eggs of migratory game or insectivorous or nongame birds shall be prohibited, except for scientific, educational, propagating or other specific purposes consistent with the principles of this Convention under such laws or regulations as [the United States and Canada] may severally deem appropriate. . . .

Id. at Article V.

Thus, the 1995 Protocol provides for take of migratory birds, and take of nests or eggs of migratory birds, for “specific purposes” consistent with the conservation principles of the Canada Treaty and further specifies that such take shall be subject to such regulations as deemed appropriate by the United States. The protocol does not define the term “specific purposes” and

it is unclear from the protocol for what purposes take may be authorized. But it is clear that those purposes must be consistent with the conservation principles of the Canada Treaty.

The conservation principles listed in the 1995 Protocol include the following:

- To manage migratory birds internationally;
- To ensure a variety of sustainable uses;
- To sustain healthy migratory bird populations for harvesting needs;
- To provide for and protect habitat necessary for the conservation of migratory birds; and
- To restore depleted populations of migratory birds.

Id. at Article II. Thus, to be consistent with the protocol, authorized take must generally preserve or contribute to migratory bird habitat necessary for the conservation of migratory birds, and must not contribute to the further decline of depleted populations of migratory birds. The protocol does not prohibit any take for purposes consistent with the conservation principles of the Canada Treaty.

Besides the obligation to regulate take consistent with these principles, the 1995 Protocol requires both the United States and Canada to “use [their] authority to take appropriate measures to preserve and enhance the environment of migratory birds” and to, in particular: “seek means to prevent damage to such birds and their environments, including damage resulting from pollution” and “pursue cooperative agreements to conserve habitat essential to migratory bird populations.” *Id.* at Article IV. These requirements may place further constraints on a proposed permit program for incidental take of migratory birds. *See* discussion *infra* Section IV.

2. Japan Treaty

A “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” was signed on March 4, 1972, and entered into force on December 19, 1974 (hereinafter “Japan Treaty”). *See* T.I.A.S. No. 7990, 25 U.S.T. 3329, 1974 WL 166630 (U.S. Treaty) (1974). The Japan Treaty was entered into based on the following considerations: (1) birds are a resource of great value and this value can be increased with proper management; (2) many birds migrate between the United States and Japan; (3) some species of birds have been exterminated, and some other species of birds are in danger of extinction; and (4) the United States and Japan desire “to cooperate in taking measures for the management, protection, and prevention of the extinction of certain birds.” Japan Treaty at Preamble (“migratory birds” subject to the Japan Treaty are defined in Article II.1., and are listed in the Annex to the convention).

The Japan Treaty states that “[t]he taking of the migratory birds or their eggs shall be prohibited.” *Id.* at Article III.1. However, “[e]xceptions to the prohibition of taking *may be permitted in accordance with the laws and regulations*” of the United States and Japan “[f]or

scientific, educational, propagative *or other specific purposes* not inconsistent with the objectives of this Convention.” *Id.* (emphasis added). The treaty does not define the phrase “other specific purposes,” but does provide that these “other specific purposes” must not be inconsistent with the objectives of the Japan Treaty.

The Japan Treaty does not specifically define its “objectives,” but the term may refer to the “desire” of the United States and Japan to manage, protect, and prevent the extinction of certain migratory birds. *See id.* at Preamble. In such case, to be consistent with the treaty, authorized take must protect migratory birds and prevent their extinction. The treaty does not prohibit any take for purposes consistent with the objectives of the Japan Treaty.

Further, under the treaty, the United States and Japan agree that “special protection is desirable for the preservation of species or subspecies of birds which are in danger of extinction” and each party will inform the other when it determines that a species is in danger of extinction. *Id.* at Article IV.1., 2. Further, the Japan Treaty provides that both the United States and Japan “shall endeavor to take appropriate measures to preserve and enhance the environment of [migratory birds],” and, in particular, it shall “[s]eek means to prevent damage to such birds and their environment, including, especially, damage resulting from pollution of the seas.” *Id.* at Article VI(a). These requirements may place further constraints on a proposed permit program for incidental take of migratory birds. *See* discussion *infra* Section IV.

3. Mexico Treaty

On March 15, 1937, a “Convention between the United States of America and Mexico for the protection of migratory birds and game animals” was proclaimed (hereinafter “Mexico Treaty”). *See* 50 Stat. 1311, T.S. No. 912 (1937). The stated purpose of the treaty was “for the protection of migratory birds and game mammals.” Mexico Treaty at Preamble. With regard to migratory birds, the Mexico Treaty states that “it is right and proper to protect the said migratory birds . . . in order that the species may not be exterminated.” *Id.* (“said migratory birds” are those that move between the United States and Mexico, as listed in the Mexico Treaty at Article IV). And “for this purpose it is necessary to employ adequate measures which will permit a *rational utilization of migratory birds for the purpose of sport as well as for food, commerce and industry.*” *Id.* (emphasis added); *see also id.* Article I.

Pursuant to the Mexico Treaty, the United States and Mexico agree to “establish laws, regulations and provisions to satisfy the need set forth in the [treaty], including:”

- A) The establishment of close seasons, which will prohibit in certain periods of the year the taking of migratory birds, their nests or eggs, as well as their transportation or sale, alive or dead, their products or parts, except when proceeding, with appropriate authorization, from private game farms or when used for scientific purposes, for propagation or for museums.
- B) The establishment of refuge zones in which the taking of such birds will be prohibited.

...

- E) The prohibition of the killing of migratory insectivorous birds

Id. at Article II. Importantly, the Mexico Treaty does not contain any language limiting the ability of the United States or Mexico to establish laws, regulations and provisions beyond these stated prohibitions, so long as such laws, regulations and provisions satisfy the need set forth in the convention. *See id.* at Article II. The need set forth in the convention is merely to prevent the “extermination” of the migratory bird species listed under the convention. *See id.*; *id.* at Article IV.

4. Russia Treaty

The “Convention between the United States of America and the Union of Soviet Socialist Republics Concerning the Conservation of Migratory Birds and Their Environment” was signed on November 19, 1976, and became effective on October 13, 1978 (hereinafter “Russia Treaty”). *See* T.I.A.S. No. 9073, 29 U.S.T. 4647, 1978 WL 182150 (U.S. Treaty) (1978). The Russia Treaty was entered into based on the following considerations: (1) the great value of migratory birds can be increased under proper management; (2) many migratory birds have habitat which should be protected; (3) international cooperation can provide significant assistance to protection of migratory birds and their environment; (4) certain species of migratory birds “are endangered and in need of particular protective measures;” and (5) the United States and U.S.S.R. desire “to cooperate in implementing measures for the conservation of migratory birds and their environment and other birds of mutual interest.” Russia Treaty at Preamble (“migratory birds” subject to the Russia Treaty are defined in Article I, and listed in the Appendix to the convention).

The Russia Treaty states that each the United States and U.S.S.R. “shall prohibit the taking of migratory birds, the collection of their nests and eggs and the disturbance of nesting colonies.” *Id.* at Article II.1. But “[e]xception to these prohibitions may be made *on the basis of laws, decrees or regulations*” of the United States or U.S.S.R. for “scientific, educational, propagative, *or other specific purposes* not inconsistent with the principles of this Convention[.]” *Id.* (emphasis added). The convention does not define the phrase “other specific purposes,” but does provide that these “other specific purposes” must not be inconsistent with the principles of the Russia Treaty.

The Russia Treaty does not specifically define its “principles,” but the term may refer to the “desire” of the United States and U.S.S.R. to implement measures for the conservation of migratory birds and their environment. *See id.* at Preamble. In such case, to be consistent with the treaty, authorized take must contribute to the conservation of migratory birds and their environment. The treaty does not prohibit any take for purposes consistent with the principles of the Russia Treaty.

Additionally, the Russia Treaty provides:

[w]ith regard to a particular species of migratory bird, if the need arises, the competent authorities of the [United States and U.S.S.R.] may conclude special agreements on the conservation of

these species and on the regulation of their taking. Such agreements shall not be inconsistent with the principles of this Convention.

Id.

The treaty requires the United States and U.S.S.R. to “undertake measures necessary to protect and enhance the environment of migratory birds and to prevent and abate the pollution or detrimental alteration of the environment.” *Id.* at Article IV.1. Further, the treaty provides that the United States and U.S.S.R. shall “[p]rovide warning to the other “in case of substantial anticipated or existing damage to significant numbers of migratory birds or the pollution or destruction of their environment” and “[i]dentify areas of breeding, wintering, feeding, and moulting which are of special importance to the conservation of migratory birds within the areas under its jurisdiction.” *Id.* at Article IV.2.

The United States and U.S.S.R. also agreed that “for the conservation of those species and subspecies of migratory birds which are in danger of extinction, special protective measures are necessary and should be taken.” *Id.* Article V.1. Measures to protect these species established by the United States or U.S.S.R. shall be taken into consideration by the other when managing for the conservation of migratory birds. *See id.* at Article V.2., 3. These requirements may place further constraints on a proposed permit program for incidental take of migratory birds. *See discussion infra* Section IV.

D. Authority under Executive Order 13186

1. Executive Order 13186

In addition to the prohibitions imposed on federal agencies by the MBTA and its regulations, President William J. Clinton signed Executive Order 13186, “Responsibilities of Federal Agencies to Protect Migratory Birds” on January 10, 2001. The order directs executive departments and agencies to take actions to protect and conserve migratory birds. *See* Executive Order 13186, 66 Fed. Reg. 3853 (Jan. 17, 2001); *see also Humane Society v. Glickman*, 217 F.3d at 885 (affirming that federal agencies are subject to prohibitions under the MBTA, including restrictions on “take” of migratory birds); Service Director’s Order 131 (clarifying Service’s position that federal agencies are subject to the permit requirements of the MBTA).

Under the order, each federal agency is required to enter into a Memorandum of Understanding (“MOU”) with the Service, outlining how the agency will promote conservation of migratory birds. 66 Fed. Reg. at 3854-55. Other activities called for in the Executive Order include support of various conservation planning efforts, such as the Partners-in-Flight initiative and North American Waterfowl Management Plan; incorporating bird conservation considerations into agency planning, including National Environmental Policy Act (“NEPA”) analyses; reporting annually on the level of take of migratory birds; and generally promoting the conservation of migratory birds without compromising the agency mission. *See id.* at 3854-56;

see also Service, Executive Order for the Conservation of Migratory Birds, Questions and Answers (“Executive Order Q&A”), at 2.⁷

The Executive Order does not discuss the authority of the Secretary of the Interior to promulgate regulations concerning incidental take of migratory birds. The order is only intended to “further implement the [MBTA]” and does not create any substantive or procedural rights or benefits for federal or non-federal entities. *See* 66 Fed. Reg. at 3853, 3856. The Executive Order does not apply to non-federal entities. *Id.* at 3853-54; *see also* Executive Order Q&A at 1-2. And, for federal entities,

[the] order is intended only to improve the internal management of the executive branch and does not create any right or benefit, substantive or procedural, separately enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

66 Fed. Reg. at 3856. Thus, the Executive Order is not enforceable against the Service or any other federal agency and any regulations developed to implement a permit program for incidental take would not be subject to judicial review for their compatibility with Executive Order 13186.

2. MOUs Entered Pursuant to Executive Order 13186

Under Executive Order 13186 the FWS has entered into MOUs with the Department of Defense; Department of Energy; U.S. Forest Service; and Minerals Management Service, which each address the responsibilities of these federal agencies under the MBTA. The FWS has not yet entered into an MOU with the FERC, so the FERC’s responsibilities under the MBTA have not been addressed in accordance with Executive Order 13186.

a. DOE and DOD MOUs

Pursuant to Executive Order 13186, both the United States Department of Energy (“DOE”) and the United States Department of Defense (“DOD”) have entered into MOUs with the Service. *See* MOU Between the United States Department of Energy and the United States Fish and Wildlife Service Regarding Implementation of Executive Order 13186 “Responsibilities of Federal Agencies to Protect Migratory Birds,” (“DOE MOU”), 2006;⁸ MOU Between the U.S. Department of Defense and the U.S. Fish and Wildlife Service to Promote the Conservation of Migratory Birds (“DOD MOU”), 2006.⁹ Both MOUs identify “specific areas in which cooperation between the Parties will substantially contribute to the conservation and management of migratory birds and their habitats.” DOE MOU at 1; *see* DOD MOU at 1 (similar).

⁷ Available at <http://www.fws.gov/migratorybirds/Partnerships/ExecutiveOrder.html> (last visited May 20, 2010).

⁸ Available at <http://www.fws.gov/migratorybirds/Partnerships/DoDMOUfinalSignature.pdf> (last visited May 20, 2010).

⁹ Available at <http://www.fws.gov/migratorybirds/Partnerships/DOEMOUfinalsignature.pdf> (last visited May 20, 2010).

Neither MOU authorizes take of migratory birds or otherwise abrogates the DOD's or DOE's legal requirements under the MBTA. *See* DOE MOU at 1; DOD MOU at 1. Under the DOE MOU, "[t]o the extent allowed by law . . . and in harmony with DOE and FWS missions and capabilities," both the DOE and the FWS agree to:

Protect, restore, enhance and manage habitats of migratory birds to the fullest extent practicable. This includes:

- a. Implementing management practices that minimize or avoid adverse impact on migratory birds populations, and their nesting, migration, or over-wintering habitats.
- b. Working collaboratively with Federal and State agencies to identify, protect, restore, enhance, monitor and manage important migratory bird areas.
- c. Preventing or abating the pollution or detrimental alteration of the environment of migratory birds.

DOE MOU at 3; *see also* DOE MOU at 4-7 (providing similar separate obligations for DOE and FWS).

Similarly, under the DOD MOU, "to the extent permitted by law and in harmony with agency missions," both the DOD and the FWS agree to:

Strive to protect, restore, enhance, and manage habitat of migratory birds, and prevent or minimize the loss or degradation of habitats on DoD-managed lands by:

- (1) Identifying and avoiding management actions that have the potential to adversely affect migratory bird populations, including breeding, migration, or wintering habitats; and by developing and implementing, as appropriate, conservation measures that would avoid or minimize the take of migratory birds or enhance the quality of the habitat used by migratory birds;
- (2) Working with partners to identify, conserve, and manage . . . bird conservation sites that occur on DoD-managed lands;
- (3) Preventing or abating the pollution or detrimental alteration of the habitats used by migratory birds;

. . . .

DOD MOU at 4; *see also* DOD MOU at 6-9 (providing similar separate obligations for DOD and FWS).

Both the DOE MOU and DOD MOU provide that each department must still follow the migratory bird permitting requirements at 50 C.F.R. Part 21, and otherwise adhere to the requirements of the MBTA and associated regulations. DOE MOU at 1, 5, 7; DOD MOU at 1, 6, 9-10. Further, consistent with Executive Order 13186, both MOUs are intended to improve the internal management of the executive branch and do not create any enforceable rights or benefits, substantive or procedural. DOE MOU at 9; DOD MOU at 10. And neither MOU creates a binding contract or “obligation document.” DOE MOU at 8; DOD MOU at 10. Specifically, the DOD MOU provides that “[t]his MOU does not address incidental take during military readiness activities, which is being addressed in a rulemaking in accordance with section 315 of the National Defense Authorization Act for Fiscal Year 2003 (Pub. L. 107-314, 116 Stat. 2458). DOD MOU at 1; *see also* 50 C.F.R. § 21.15 (rule on incidental take during military readiness activities). Both MOUs are terminable at the election of either party to the respective MOUs. DOE MOU at 7; DOD MOU at 10.

Consistent with Executive Order 13186, the DOE and DOD MOUs are not enforceable against the Service or the DOE and DOD, respectively. Any regulations developed to implement a permit program for incidental take would not be subject to judicial review for their compatibility with the DOE or DOD MOUs. Further, the MOUs specifically provide that they remain subject to the Service’s migratory bird permitting requirements and thus, would be subject to Service regulations permitting incidental take of migratory birds.

b. Forest Service MOU

The United States Department of Agriculture, Forest Service (“Forest Service”), also entered into an MOU with the FWS pursuant to Executive Order 13186. *See* MOU Between the U.S. Department of Agriculture Forest Service and the U.S. Fish and Wildlife Service to Promote the Conservation of Migratory Birds (“Forest Service MOU”), Sept. 23, 2008.¹⁰ Similar to the DOD and DOE MOUs, the Forest Service MOU “outlines a collaborative approach to promote the conservation and reduce the take of migratory birds,” and “identifies specific activities where cooperation between Parties will contribute to the conservation of migratory birds and their habitats.” Forest Service MOU at 1.

The Forest Service MOU provides “[t]his MOU does not remove the Parties’ legal requirements under the MBTA, BGEPA [Bald and Golden Eagle Protection Act], or other statutes and does not authorize the take of migratory birds.” *Id.* Thus, the Forest Service MOU does not authorize take of migratory birds or otherwise abrogate the Forest Service’s legal requirements under the MBTA.

Under the Forest Service MOU, “to the extent permitted by law and in harmony with agency missions,” both the Forest Service and the FWS agree to:

1. Protect, restore, and conserve habitat of migratory birds, addressing the responsibilities in Executive Order 13186.

¹⁰ Available at <http://www.fws.gov/migratorybirds/Partnerships/MOU%20USFSFinal.pdf> (last visited May 20, 2010).

2. Emphasize an interdisciplinary, collaborative approach to migratory bird conservation in cooperative with foreign governments, State and Federal agencies, Tribal governments, non-federal partners and willing private landowners within the North American Bird Conservation Initiative (NABCI) framework, including the following actions:
 - a. Work collaboratively with partners to identify, restore, and conserve Important Bird Areas, Western Hemisphere Shorebird Reserve Network sites, and other significant bird sites.

...
3. Promote collaborative inventory, monitoring, management studies, research, and information exchange, at the appropriate scale, related to the conservation of migratory birds and management of their habitats.

...
8. Increase awareness of the information contained within comprehensive planning efforts for migratory birds to facilitate integration of conservation measures into land management and project planning

Id. at 4-5.

In addition, the Forest Service MOU provides that the Forest Service shall “[a]ddress the conservation of migratory bird habitat and populations when developing, amending, or revising management plans for national forests and grasslands, consistent with NFMA [National Forest Management Act], ESA, and other authorities” *Id.* at 6. Under the MOU, the Forest Service shall also evaluate the effects of agency actions on migratory birds with in the NEPA process, and to the extent practicable:

- a. Evaluate and balance long-term benefits of projects against any short- or long-term adverse effects when analyzing, disclosing, and mitigating effects of actions.
- b. Pursue opportunities to restore or enhance the composition, structure, and juxtaposition of migratory bird habitats in the project area.
- c. Consider approaches, to the extent practicable, for identifying and minimizing take that is incidental to otherwise lawful activities

...

- d. Coordinate with the appropriate FWS Ecological Services office when planning projects that are likely to have a negative effect on migratory bird populations. Cooperate in developing approaches to minimize negative impacts and maximize benefits to migratory birds.

Id. at 7.

The Forest Service MOU provides that the Forest Service must still follow the migratory bird permitting requirements at 50 C.F.R. part 21, and otherwise adhere to the requirements of the MBTA and associated regulations. *Id.* at 1, 4, 8. Further, consistent with Executive Order 13186, the Forest Service MOU is not intended to, “and does not create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity, by a party against the United States, its agencies, its officers, or any person.” *Id.* at 12. Thus, the Forest Service MOU does not create any enforceable rights or benefits, substantive or procedural. *Id.* Further, the Forest Service MOU is terminable at the election of either the Forest Service or the FWS. *Id.*

c. MMS MOU

The United States Minerals Management Service (“MMS”) recently entered into an MOU with the Service pursuant to Executive Order 13186. *See* MOU Between the United States Minerals Management Service and the United States Fish and Wildlife Service Regarding Implementation of Executive Order 13186 “Responsibilities of Federal Agencies to Protect Migratory Birds” (“MMS MOU”), June 4, 2009.¹¹ Similar to the DOD, DOE and Forest Service MOUs, the MMS MOU identifies “specific areas in which cooperation between the Parties will substantially contribute to the conservation and management of migratory birds and their habitats.” MMS MOU at 1.

The MMS MOU does not authorize take of migratory birds or otherwise abrogate the MMS’s legal requirements under the MBTA. *See id.* at 1. Under the MMS MOU, “[t]o the extent allowed by law . . . and in harmony with MMS and FWS missions and capabilities,” both the MMS and FWS agree to:

Protect, restore, and enhance habitat of migratory birds to the extent practicable during the MMS’s management of resource development and extraction. This includes:

- a. Collaborating on developing and implementing management practices that minimize or avoid adverse negative impacts on migratory bird populations and/or their migration, nesting, foraging, staging, or wintering habitats.

¹¹ Available at http://www.fws.gov/migratorybirds/Partnerships/MMS-FWS_MBTA_MOU_6-4-09.pdf (last visited May 20, 2010).

- b. Working collaboratively with other Federal and State agencies and other partners in their efforts to identify, protect, restore, enhance, monitor and manage important migratory bird areas potentially affected by agency actions, focusing efforts in areas of current or projected project activities. This includes recognizing Marine Protected Area and Marine Important Bird Area designations.
- c. Preventing or abating the pollution detrimental to migratory birds and their habitats.
- d. Preventing or abating detrimental alteration of migratory bird habitats.

Id. at 4.

The MMS MOU provides that the MMS must still follow the migratory bird permitting requirements at 50 C.F.R. Part 21, and otherwise adhere to the requirements of the MBTA and associated regulations. *Id.* at 1, 6, 12. Further, consistent with Executive Order 13186, the MMS MOU is intended to improve the internal management of the executive branch and does not create any enforceable rights or benefits, substantive or procedural. *Id.* at 13. The MMS MOU is terminable at the election of either the MMS or the Service. *Id.* at 12.

3. Service Guidance Implementing Executive Order 13186

In response to Executive Order 13186, the Service developed guidance for Service employees about the management and conservation of migratory birds. *See* 720 FW 2 (Dec. 21, 2006) (“Service Responsibilities to Protect Migratory Birds”). To implement the requirements in Executive Order 13186, when starting new actions, the guidance directs Service employees to, as appropriate:

- A. Support the conservation intent of the migratory bird conventions by:
 - (1) Integrating migratory bird conservation measures into our activities, and
 - (2) Avoiding or minimizing adverse impacts on migratory bird resources.
- B. Restore and enhance the habitat of migratory birds.
- C. Prevent or abate the pollution or detrimental alteration of the environment for the benefit of migratory birds.
- ...
- K. In conjunction with other Federal agencies, work to develop reasonable and effective conservation measures for

key management actions that affect migratory birds and their natural habitats with emphasis on species of concern.

...

- O. Strengthen partnerships with non-governmental entities to further migratory bird conservation.

Id. at 2.6. The guidance also directs the Division of Migratory Bird Management staff to “[a]dminister [] the migratory bird permit program consistent with the intent of this policy.” *Id.* at 2.7.

E. Service Policy Concerning Incidental Take of Migratory Birds

The Service has not developed a permit program for incidental take of migratory birds from otherwise lawful activities of non-federal entities, but it has affirmatively recognized its ability to do so through the following mechanisms: (1) exercise of enforcement discretion in prosecuting incidental take of migratory birds, (2) use of existing MBTA permit provisions to allow for incidental take of migratory birds, and (3) promulgation of regulations to implement a permit program for incidental take of migratory birds by the Armed Forces.

1. Use of Enforcement Discretion and Existing MBTA Permit Provisions

The Service has used both its enforcement discretion and existing MBTA permit provisions to allow the incidental take of migratory birds that are also listed under the Endangered Species Act (“ESA”). Prior to 1996, the Service struggled with its “apparent inability to grant incidental take under the MBTA or BGEPA” of ESA-listed migratory birds. *See* Memorandum from Director, to Regional Directors, Regions 1, 2, 3, 4, 5, 6, and 7, “Incidental Take of Migratory Birds and Bald Eagles” (“1996 Guidance”), dated Feb. 9, 1996.¹² This issue was addressed in the Service’s 1996 Guidance on “Incidental Take of Migratory Birds and Bald Eagles.” *See id.*

As the Service recognized in the 1996 Guidance, the ESA authorizes the Service to grant a permit (under ESA Section 10) or issue a statement (under ESA Section 7) that allows the incidental take of threatened or endangered species listed under that statute. *Id.* at 1; *see also* 16 U.S.C. § 1536 (providing for an ESA Section 7 “incidental take statement”); *id.* § 1539 (providing for an ESA Section 10 “incidental take permit”). However, some ESA-listed species are also protected under the MBTA, and the MBTA prohibits the take of migratory birds, without exception for species also listed under the ESA. 1996 Guidance at 1; *see* 16 U.S.C. § 703. Further, unlike the ESA, none of the regulations promulgated under the MBTA expressly provides for permits for incidental take. *See* 1996 Guidance at 1; *see generally* 50 C.F.R. Part 21. As the 1996 Guidance discusses, the Service was authorized to allow incidental take of ESA-listed migratory birds when such take was judged permissible under the ESA, but such take was still subject to prosecution under the MBTA. 1996 Guidance at 1. Thus, applicants and permittees for incidental take statements and permits, respectively, were not provided with assurance that they would not be prosecuted under the MBTA.

¹² Available at <http://www.fws.gov/endangered/pdfs/HCP/HCPAPP5.PDF> (last visited May 20, 2010).

To resolve this issue, the Service sought advice from the United States Department of the Interior, Office of the Solicitor (“Solicitor”). Specifically, the Service asked:

[w]hether an incidental take statement, under § 7 of the Endangered Species Act (ESA), 16 U.S.C. § 1536, or an incidental take permit, under § 10 of the ESA, 16 U.S.C. § 1539, (collectively, incidental take documents) can be used to provide and applicant or permittee with some assurance that the applicant or permittee will not be prosecuted under either the Migratory Bird Treaty Act (MBTA) or the Bald and Golden Eagle Protection Act (BGEPA) for that take expressly allowed under the ESA document.

See Memorandum from Pete Raynor, Assistant Solicitor, Fish and Wildlife Branch, to John Rogers, Deputy Director, U.S. Fish and Wildlife Service, “Permitted Incidental Take of Migratory Birds Listing Under the Endangered Species Act” (“1996 Solicitor’s Opinion”), dated Feb. 5, 1996, at 1.¹³ The Solicitor concluded that “the Service currently has the authority to do so, using a combination of permitting provisions under the Service’s discretion in the enforcement of these statutes.” *Id.*

The Solicitor recommended the Service adopt a two-fold approach to give the maximum assurance of freedom from prosecution under the MBTA and BGEPA for the take of ESA-listed species consistent with ESA incidental take authorizations. *See* 1996 Solicitor’s Opinion at 4. First, the Solicitor recognized that “50 C.F.R. § 21.27 provides for the availability of ‘special purpose permits’ for activities outside the scope of the standard [MBTA] permits.” *Id.* at 1. Although 50 C.F.R. § 21.27 had not traditionally been used to provide permits for unintentional take, the Solicitor found that this section was “broad enough to encompass the permitting of unintentional take for the purposes of the MBTA,” and that “the use of § 21.27 to permit take in conjunction with an ESA § 10 permit is an acceptable approach.” *Id.* at 3.

However, the Solicitor recognized several “legal hurdles” with this approach. To start, the Solicitor noted that Section 21.27 “is not narrowly focused on incidental take.” *Id.* Further, the Solicitor acknowledged that MBTA special purpose permits are limited to the “activities related to migratory birds.” *Id.* at 2. The Solicitor reasoned that this limitation could be overcome by arguing that an activity that causes bird mortality can be considered an “activity related to migratory birds.” *Id.* Additionally, the Solicitor recognized that “[a]n applicant for a permit under § 21.27 must demonstrate ‘a sufficient showing of benefit to the migratory bird resource, important research reasons, reasons of human concern for individual birds, or other compelling justifications.’” *Id.* To overcome the limitations of this provision the Solicitor provided that “most applications for a permit for take under the MBTA to be used in conjunction with an ESA incidental take document would require either a compelling justification or perhaps sufficient mitigation to show a positive benefit to the migratory bird resource.” *Id.* at 2-3. Considering these hurdles, the Solicitor stated that “[a] regulatory permitting program specifically geared to the problems of incidental take may be advisable.” *Id.* at 3.

¹³ Available at <http://www.fws.gov/endangered/pdfs/HCP/HCPAPP5.PDF> (last visited May 20, 2010).

The second part of the Solicitor's recommended two-fold approach addressed MBTA liability in the context of ESA Section 7 consultation and associated incidental take statements. *Id.* at 3. Because incidental take statements are not considered to be permits and because adapting such statements to the permit-granting process would be problematic, the Solicitor determined that a special purpose permit issued under 50 C.F.R. § 21.27 would not provide authority for incidental take in the ESA Section 7 context. *Id.* at 2. Thus, the Solicitor recommended the Service "include in ESA incidental take documents a statement of enforcement policy to the effect that the Service would not refer the beneficiary of the document for prosecution under the MBTA or BGEPA for the take of the ESA-listed migratory birds covered by the document, provided that such take was consistent with the terms and conditions of the document." *Id.* at 3 (citing authority to support the argument that such an announcement of enforcement policy under the MBTA is not subject to judicial review). However, the Solicitor recognized that "[a]n announcement of enforcement policy may not be as satisfactory as an applicable permit to those seeking safe haven from prosecution under the MBTA and BGEPA, but it will certainly provide a short-term solution pending development of a regulatory approach." *Id.*

Although this approach and the analysis in the 1996 Solicitor's Opinion may apply more generally, the Solicitor specifically limited its analysis and recommendations to apply only to migratory birds that are also listed as threatened or endangered under the ESA. *Id.* at 5. Consequently, the Solicitor's provided, "[t]he Service should take steps to address the questions of how to handle the incidental take of non-ESA-listed migratory birds." *Id.*

In the 1996 Guidance, the Service adopted the approach recommended by the Solicitor in the 1996 Solicitor's Opinion. *See* 1996 Guidance at 1. The Service subsequently incorporated this approach into both its ESA Section 7 Consultation Handbook ("Consultation Handbook") and its Habitat Conservation Planning Handbook ("HCP Handbook"). *See* U.S. Fish and Wildlife Service and National Marine Fisheries Service, *Endangered Species Consultation Handbook*, March 1998, at 4-56, -57;¹⁴ U.S. Fish and Wildlife Service and National Marine Fisheries Service, *Habitat Conservation Planning And Incidental Take Permit Processing Handbook*, Nov. 4, 1996, at 3-39, -40.¹⁵

The Consultation Handbook provides that incidental take for migratory birds listed as threatened or endangered under the ESA "can be granted under the [ESA], but neither the [MBTA] nor the [BGEPA] have explicit provisions that address incidental take." Consultation Handbook at 4-56. It further provides that:

FWS may use its powers of prosecutorial discretion to determine that if incidental take of listed migratory birds . . . occurs, and if the requirements of the consultation have been met, the FWS would choose not to prosecute the incidental take under the MBTA or the BGEPA.

¹⁴ Available at <http://www.fws.gov/endangered/pdfs/Sec7/handbook/CH4.PDF> (last visited May 20, 2010).

¹⁵ Available at <http://www.fws.gov/endangered/pdfs/HCP/HCPBK3.PDF> (last visited May 20, 2010).

Id. 4-56.

In addition, the Consultation Handbook states that, when appropriate, the Service should include the following language into any Section 7 incidental take statements concluding that take of listed migratory birds will result from the actions under consultation:

The Fish and Wildlife Service will not refer the incidental take of any migratory bird or bald eagle for prosecution under the Migratory Bird Treaty Act of 1918, as amended (16 U.S.C. §§ 703-712), or the Bald and Golden Eagle Protection Act of 1940, as amended (16 U.S.C. §§ 668-668d), if such take is in compliance with the terms and conditions (including amount and/or number) specified herein.

Id. at 4-57.

The HCP Handbook provides:

The FWS has concluded that under certain conditions, a section 10 permit for listed migratory birds is sufficient to relieve an HCP permittee from liability under the MBTA and BGEPA for those species covered by the HCP permit. For the MBTA, this is accomplished by having the HCP permit double as a Special Purpose Permit authorized under 50 CFR § 21.27.

...

The Service believes that this approach is warranted because the permittee already would have agreed to a package of mitigation measures designed to minimize and mitigate the take of the listed species of migratory birds to the maximum extent practicable.

HCP Handbook at 3-40. It further provides that the Service shall include the following language concerning MBTA-protected species in the terms and conditions of an ESA Section 10 permit when applicable:

This permit also constitutes a Special Purpose Permit under 50 CFR § 21.27 for the take of *[provide species' common and scientific names; species must be ESA-listed . . .]* in the amount and/or number and subject to the terms and conditions specified herein. Any such take will not be in violation of the Migratory Bird Treaty Act of 1918, as amended (16 U.S.C. §§ 703-712).

Id.

As demonstrated in the context of Section 7 and Section 10 take authorization under the ESA, the Service has found authority to allow for incidental take of migratory birds from otherwise lawful activities of non-federal entities. This authority was confirmed by the Office of

the Solicitor, including the Service's ability to use "special purpose permits" under 50 C.F.R. § 21.27 and the Service's enforcement discretion to allow for incidental take. However, the Office of the Solicitor found shortcomings with both of these authorities and recommended that the Service develop a specific permitting program to address incidental take of migratory birds. The Solicitor's Office did not discuss any impediments to the Service's ability to develop a permit program for incidental take according to its existing authority under the MBTA.

2. Promulgation of Regulations for Incidental Take of Migratory Birds by the Armed Forces

The Service recently recognized and asserted its authority to promulgate regulations to implement a migratory bird incidental take permit program in the final rule on "Take of Migratory Birds by the Armed Forces." *See* 72 Fed. Reg. 8931 (Feb. 28, 2007) (codified at 50 C.F.R. §§ 21.3, 21.15). This rule authorizes "take incidental to military readiness activities." 50 C.F.R. § 21.15. The Service's development of this permit program demonstrates that it has the authority to develop and implement a permit program for incidental take of migratory birds due to otherwise lawful activities of a federal entity. This program also lays the foundation for permit program for non-federal entities because it shows that Congress and the Service believe that certain incidental take is consistent with the United States' treaty obligations.

The need for this permit program arose, in part, from a 2002 federal district court ruling that held that military training exercises of the Department of the Navy that resulted in incidental take of migratory birds without a permit violated the MBTA. *See Center for Biological Diversity v. Pirie*, 191 F. Supp. 2d 161 (D.D.C. 2002); 72 Fed. Reg. at 8931, 8933. As a result of this ruling, the Center for Biological Diversity obtained an preliminary injunction in May 2002 prohibiting live-fire military training exercises by the Department of the Navy that killed migratory birds on the island of Farallon de Medinilla in the Pacific Ocean. *Center for Biological Diversity v. Pirie*, 201 F.Supp.2d 113 (D.D.C. 2002); *see also* U.S. Fish and Wildlife Service, *Armed Forces Authorization under the Migratory Bird Treaty Act: Questions and Answers* ("Armed Forces Q&A"), at 2.¹⁶ In December 2002, Congress authorized an interim period during which the prohibitions on incidental take of migratory birds would not apply to otherwise authorized military activities. *See* 2003 National Defense Authorization Act ("Authorization Act"), 16 U.S.C. § 703 note, Pub. L. 107-314 (Dec. 2, 2002); *see* 72 Fed. Reg. at 8933; Armed Forces Q&A at 2. The purpose for the interim period was to provide the Secretary of the Interior time to prescribe regulations authorizing the Armed Forces to incidentally take migratory birds. 16 U.S.C. § 703 note; 72 Fed. Reg. at 8933; Armed Forces Q&A.

Section 315 of the Authorization Act provides that, not later than one year after its enactment, the Secretary of the Interior shall exercise his/her authority under Section 704(a) of the MBTA to prescribe regulations to exempt the Armed Forces for the incidental taking of migratory birds during military readiness activities authorized by the Secretary of Defense or the Secretary of the military department concerned. 16 U.S.C. § 703 note; 72 Fed. Reg. at 8931-32, 33. The Secretary delegated this task to the Service, and the final rule, which became effective

¹⁶ On file with the authors; *see also* <http://www.fws.gov/mountain-prairie/pressrel/dc%20408.htm> (last visited May 20, 2010) (similar).

on March 30, 2007, was the Secretary's fulfillment of its obligation to prescribe regulations under the Authorization Act. 72 Fed. Reg. at 8932.

The preamble to the final rule on take of migratory birds by the Armed Forces and the Service's responses to comments on the proposed rule provide useful analysis of the Service's authority under the MBTA. *See id.* at 8931-40.¹⁷ Specifically, the Service expressly concluded that the rule is consistent with the MBTA. *Id.* at 8946.

As an initial matter, the Service recognized broad authority under the MBTA to promulgate regulations allowing for the take of migratory birds when compatible with the terms of the migratory bird treaties. *Id.* (citing 16 U.S.C. §§ 704, 712(2)). The Service also noted Congress's recognition of this broad authority:

Congress itself by passing the Authorization Act determined that such regulations are consistent with the MBTA and the underlying treaties by requiring us to promulgate such regulations.

Id.; *see also id.* at 8932, 8933. The Authorization Act conference report notes specifically that Congress found the authorization for incidental take to be consistent with the underlying treaty obligations of the United States. *See* H.R. Rep. No. 107-722, at 624 (2002) ("The conferees believe this provision to be entirely consistent with the underlying terms of all treaty obligations of the United States"); Armed Forces Q&A at 3.

Even in the absence of the Authorization Act, the Service concluded that "regulations authorizing take incidental to military readiness activities are compatible with the terms of the treaties, and therefore authorized by the MBTA." 72 Fed. Reg. at 8946. With respect to the Japan and Russia treaties, the Service explained that "those treaties allow the implementing legislation [called for in the treaties] to include exceptions to the take prohibitions [in the treaties]." *Id.* Specifically, the treaties also contemplate authorizing takings "for specific purposes not inconsistent with the objectives [or principles]' of the treaties." *Id.* (quoting treaties). Similarly, the Service recognized that the Canada Treaty, since adoption of the 1995 Protocol, includes similar language: "the taking of migratory birds may be allowed . . . for . . . specific purposes consistent with the conservation principles of this Convention." *Id.* (quoting protocol); *see also id.* at 8934.

Based on this broad language of the exceptions in the Japan, Russia, and Canada treaties, the Service concluded that the treaties "clearly indicate that the intent of the parties was not to prohibit all take of migratory birds." *Id.* at 8946. The Service further concluded that "[j]ust as clearly, the take of large absolute numbers of birds . . . is allowable under the treaties, so long as that take is ultimately limited in a way that is consistent with the conservation principles and objective of the treaties." *Id.* Consequently, the Service decided that "allowing for take incidental to military readiness activities is, as a general matter, consistent with the conservation principles and objectives of all three of these treaties." *Id.*; *see also* Armed Forces Q&A at 4.

¹⁷ The proposed rule on "Take of Migratory Birds by Department of Defense" is available at 69 Fed. Reg. 31074 (June 2, 2004).

The Service's analysis of the Mexico Treaty was not as straightforward because the Mexico Treaty does not specifically discuss exceptions to or prohibitions on take. Rather, as the Service noted, the Mexico Treaty is more clearly focused on stopping the indiscriminate killing of migratory birds by hunting. 72 Fed. Reg. at 8946; Armed Forces Q&A at 4. However, the treaty does provide that regulation prohibiting certain activities with respect to migratory birds is subject to the objective "to satisfy the need set forth in . . . Article [I]." 72 Fed. Reg. at 8946 (quoting treaty). The Service explained that Article I provides: "In order that the species may not be exterminated, the high contracting parties declare that it is right and proper to protect birds denominated as migratory . . . by means of adequate methods which will permit, in so far as the respective high contracting parties may see fit, the utilization of said birds rationally for purposes of sport, food, commerce and industry." *Id.* (quoting treaty).

Based on this analysis, the Service concluded in the final rule:

Therefore, to the extent that the Mexico treaty is interpreted to have application to take beyond hunting and the like, that treaty must also be interpreted to allow the parties to authorize take that is consistent with the needs set forth in Article I.

...

The Mexico treaty does not require the parties to prohibit incidental take and therefore allowing take incidental to military readiness activities cannot conflict with the terms of that treaty. And even if that treaty was read to apply more broadly, it is clear that the parties intended it only to require the rational regulation of take, not an absolute prohibition. Allowing take incidental to military readiness activities is consistent with the needs set forth in Article I. More broadly, we conclude that any incidental take allowed under the broad exceptions of the other three treaties is consistent with the Mexico treaty.

Id.

Finally, because the authorization of incidental take in the final rule incorporates safeguards against unlimited take of migratory birds, the Service concluded that the rule "provides for compliance with the requirements of the treaties" and therefore the MBTA. *Id.* As the Service explained, the authorization is limited in that the rule (1) only allows take that results from military readiness activities, (2) expressly requires the Armed Forces to develop conservation measures to minimize or mitigate impacts where such impacts may have a significant adverse effect on a population of migratory bird species, and (3) requires the Secretary to suspend the take authorization if he/she concludes that specific military readiness activity likely would not be compatible with the migratory bird treaties and may withdraw the authorization if he/she is unable to obtain from Armed Forces the information needed to assure compliance. *Id.*

Although the Service acknowledged that it is unclear what level of effect on a migratory bird population would be required to constitute a violation of the treaties, it concluded that “there is no reasonable chance that a violation of the treaties will occur under this rule.” *Id.* at 8946-47. Therefore, “the take that would be authorized by this rule is thus compatible with the terms of the treaties and consistent with the purposes of those treaties.” *Id.* at 8947.

As demonstrated by the Service’s development and implementation of a permit program for take incidental to military readiness activities, the Service believes it has general authority to develop permit programs for incidental take of migratory birds. Further, such authority was confirmed by Congress in passing the Authorization Act. Whether the Service’s regulations implementing the program for incidental take by the Armed Forces are consistent with the Canada, Japan, Mexico, and Russia treaties was not tested in court and can no longer be challenged, but the Service believes them to be consistent. *See* 16 U.S.C. § 703 note (providing that judicial review of the regulations or the manner of their promulgation must be filed no later than 120 days after the date which the regulations are published in the Federal Register).

Additionally, the Service discussed its compliance with Executive Order 13186 in the final rule. *See* 72 Fed. Reg. at 8933. With regard to the MOUs developed in accordance with Executive Order 13186, the Service noted: “[u]pon completion of the MOUs with additional Federal agencies, and in keeping with the intent of the Executive Order for Federal agencies to promote the conservation of migratory bird populations, the Service may issue incidental take authorization to address specific actions identified in the MOUs.” *Id.* Thus, the Service recognizes a general authority to issue incidental take authorization in many circumstances.

The Secretary’s ability to suspend authorization of the take associated with a specific military readiness activity may only be made “after seeking the views of the Secretary of Defense and consulting with the Secretary of State.” *See* 50 C.F.R. § 21.15(b)(1). The Service explains that this provision was promulgated because the views of the Armed Forces “are appropriate given the possible impacts that suspension of the take authorization could have on national security.” 72 Fed. Reg. at 8937; *see also* Armed Forces Q&A at 4. And “consulting with the State Department on issues of treaty interpretation is appropriate because of the State Department’s expertise and authority in this area as well as its responsibility for maintaining the relationship of the United States with its treaty partners.” *Id.* It is unclear whether another permit program for incidental take of migratory birds would require consultation with the Secretary of State to ensure consistency with the obligations of the Canada, Japan, Mexico, and Russia treaties.

IV. Assessment of the Feasibility of Promulgating Regulations Under the MBTA for an Incidental Take Permit Program

This section of the report analyzes and proposes solutions to issues identified in the review of the existing authority under the MBTA that may allow for the development of a permit program for incidental take of migratory birds. Based on this analysis and considering the authority under the MBTA, this section of the report concludes that so long as the FWS promulgates regulations for an incidental take permit program that are compatible with the terms of the treaties with Canada, Japan, Mexico, and Russia, such a program is feasible.

A. Regulations Must be Compatible with the Terms of the Canada, Japan, Mexico and Russia Treaties

As noted above, the MBTA authorizes the Secretary of the Interior to adopt regulations permitting the taking or killing of migratory birds protected under the MBTA, so long as those regulations are compatible with the terms of, and carry out the purposes of, the Canada, Japan, Mexico and Russia treaties. 16 U.S.C. § 704(a); *see also* 16 U.S.C. § 712(2) (authorizing Secretary to issue regulations to implement provisions of treaties). Each of these treaties provides different constraints on an incidental take permit program developed by the Secretary.

1. Canada Treaty

Under the Canada Treaty, a permit program for incidental take of migratory birds may only allow take for “specific purposes” that are consistent with the conservation principles of the Canada Treaty. 1995 Protocol at Article II.3, II.7, V. The treaty does not define what those “specific purposes” are and provides no limitations on what they may be. If the term is interpreted broadly, it can be deemed to encompass specific activities of non-federal entities, such as pipeline development. Thus, considering that the Canada Treaty provides broad authority for the United States to promulgate regulations for take as it deems appropriate, a permit program for incidental take of migratory birds from otherwise lawful activities of non-federal entities is likely to fit within the Canada Treaty’s exception to prohibited take. *Id.* at Article V.

Under the Canada Treaty, though, a permit program must be consistent with the conservation principles of the treaty. To be consistent with the Canada Treaty, authorized take must generally preserve or contribute to migratory bird habitat necessary for the conservation of migratory birds, and must not contribute to the further decline of depleted populations of migratory birds. *Id.* at Article II. Thus, the permit program proposed in this report must generally maintain, enhance, or add to migratory bird habitat and must not contribute to the further decline of depleted migratory bird populations.

2. Japan Treaty

Under the Japan Treaty, a permit program for incidental take of migratory birds may only allow take for “specific purposes” that are consistent with the objectives of the Japan Treaty. Japan Treaty at Article III.1. Similar to the Canada Treaty, the term “specific purposes” can be interpreted to exempt from the Japan Treaty’s take prohibition incidental take of migratory birds from otherwise lawful activities of non-federal entities. However, as with the Canada Treaty, a permit program must be consistent with the objectives of the Japan Treaty, which include protection of migratory birds and prevention of their extinction. *Id.* Further, under the treaty, the United States is to provide special protection for birds in danger of extinction and is to generally maintain and enhance migratory bird habitat. *Id.* at Article IV.1., IV.2, IV.5, VI(a). Thus, similar to the constraints imposed by the Canada Treaty, under the Japan Treaty, the permit program proposed in this report must generally maintain, or enhance migratory bird habitat and must provide protection for birds in danger of extinction.

3. Russia Treaty

Under the Russia Treaty, a permit program for incidental take of migratory birds may only allow take for “specific purposes” that are consistent with the conservation principles of the Russia Treaty. Russia Treaty at Article II.1. Similar to the Canada and Japan treaties, the term “specific purposes” is not defined and can be broadly interpreted to exempt from the treaty’s take prohibition incidental take of migratory birds from otherwise lawful activities of non-federal entities. However, as with the Canada and Japan treaties, a permit program must be consistent with the objectives of the Russia Treaty, which include contribution to the conservation of migratory birds and their environment. Additionally, pursuant to the Russia Treaty, a permit program must seek to protect the environment of migratory birds and, if the program is anticipated to cause damage to significant numbers of migratory birds, the United States must warn Russia about the program. *Id.* at Articles IV-V. Thus, under the Russia Treaty, the permit program proposed in this report must generally contribute to the conservation of migratory birds and their habitat, and provide warning to Russia if the program will cause substantial damage to significant numbers of migratory birds or their habitat.

4. Mexico Treaty

Unlike the other three treaties, the Mexico Treaty does not specifically contemplate permitted take of migratory birds. However, it does contemplate that the United States will “establish laws, regulations, and provisions” to satisfy the need set forth in Article I of the treaty, which is to prevent the extermination of the migratory bird species listed under the treaty. *See* Mexico Treaty at Article II. While these laws, regulations, and provisions are to include, among other things, the establishment of close seasons for taking of migratory birds and a prohibition on killing migratory insectivorous birds, *id.* at Article II, the treaty also provides the United States with discretion regarding the establishment of measures for rational utilization of migratory birds for sport, food, commerce, and industry. *Id.* at Article I (“In order that the species may not be exterminated, the high contracting parties declare that it is right and proper to protect birds denominated migratory . . . by means of adequate methods *which will permit, in so far as the respective high contracting parties may see fit, the utilization of said birds rationally for purposes of sport, food, commerce and industry*”) (emphasis added).

Whether the Mexico Treaty requires strict close seasons or a strict prohibition on killing of migratory insectivorous birds is subject to interpretation. However, the Service does not interpret the Mexico Treaty as prohibiting incidental take, particularly with regard to military readiness activities, but also more broadly. *See* 72 Fed. Reg. at 8946 (“Take of Migratory Birds by the Armed Forces”). The Service has stated, “it is clear that the parties [to the Mexico Treaty] intended it only to require rational regulation of take, not an absolute prohibition.” *Id.* Further, the Service has noted that, “to the extent that the Mexico Treaty is interpreted to have application to take beyond hunting and the like, that treaty must also be interpreted to allow the parties [to the Mexico Treaty] to authorize take that is consistent with the needs set forth in Article I.” *Id.* Thus, the Service has determined, at least in the context of military readiness activities, that incidental take consistent with the needs set forth in Article I is allowed under the Mexico Treaty. *Id.* This determination could be extended to provide for incidental take in other contexts, such as the permit program contemplated in this report.

B. Existing Incidental Take Regulations for Military Activities Provides Support for a Broader Program

As noted above, the Service's authorization of incidental take of migratory birds as a result of military readiness activities lays the foundation for a permit program for non-federal entities because it shows that Congress and the Service believe that certain incidental take is consistent with the United States' treaty obligations. However, the Service's consistency determination was based in part on the incorporation of safeguards against unlimited take of migratory birds in the permit program for take incidental to military readiness activities.

Thus, for the Service to find another permit program consistent with the migratory bird treaties, that program similarly would need to incorporate safeguards against unlimited take. If safeguards for the permit program proposed in this report are modeled after those contained in the permit program for take incidental to military readiness activities, they could include: (1) only allowing take that results from certain limited activities, (2) expressly requiring development of conservation measures to minimize or mitigate impacts where such impacts may have a significant adverse effect on a population of migratory bird species, and (3) requiring the Secretary to suspend the take authorization if he/she concludes that a specific activity would not likely be compatible with the migratory bird treaties and allowing the Secretary to withdraw the authorization if he/she is unable to obtain from the regulated entity the information needed to assure compliance. Incorporating these, or similar safeguards, in a proposed permit program would provide another mechanism to ensure the program's compatibility with the migratory bird treaties, and might provide acceptable Service oversight for the program similar to what it has previously approved.

C. The Existing "Special Purpose Permit" is Unlikely to Provide a Viable Mechanism to Permit Incidental Take of Migratory Birds

As described above, the Service's existing regulations provide for "special purpose permits" authorizing otherwise prohibited actions under the MBTA. *See* 50 C.F.R. § 21.27. While the Solicitor has recognized the potential use of special purpose permits to authorize incidental take under the MBTA for ESA-listed species, he recognized its limitations and recommended against its use in addressing incidental take of non-ESA-listed migratory birds. The narrow focus of Section 21.27 and its requirement for permit applicants to demonstrate "compelling justification" could constrain the development of a permit program for incidental take of migratory birds from otherwise lawful activities of non-federal entities. Further, fitting a broad permit program under the limited "special purpose permit" provisions also would not likely be a preferred Service approach because of the program's possible inconsistencies with Section 21.27 and the risk of litigation resulting from those potential inconsistencies.

Thus, although there is some potential for the existing "special purpose permit" program to provide a mechanism for permitted incidental take of migratory birds, the existing program is limited in scope, would constrain the development of the incidental take permit program proposed in this report, and might subject such a permit program to litigation risk for being inconsistent with Section 21.27. As a result, the use of the existing "special purpose permit" as a means to develop the permit program for incidental take of migratory birds proposed in this report is not a preferred mechanism.

D. Consistency with Executive Order 13186, Memoranda of Understanding, and Service Guidance

Executive Order 13186, the four MOUs with other federal agencies, and Service guidance implementing the Executive Order do not discuss, or place any constraints on, the authority of the Secretary of the Interior to promulgate regulations concerning incidental take of migratory birds. The Executive Order and associated MOUs are only intended to improve internal management of the executive branch and do not create any enforceable rights or benefits, substantive or procedural. *See* 66 Fed. Reg. at 3853, 3856; DOE MOU at 9; DOD MOU at 10; Forest Service MOU at 12; MMS MOU at 13. Thus, the order and MOUs are not enforceable against the Service or any other federal agency and any regulations developed by the Service to implement a permit program for incidental take would not be subject to judicial review for their compatibility with Executive Order 13186 or the MOUs. Further, neither Executive Order 13186 nor the MOUs were intended to abrogate the existing authority of the Secretary to promulgate regulations under the MBTA. *See* 66 Fed. Reg. at 3853, 3856; DOE MOU at 1, 5, 7; DOD MOU at 1, 6, 9-10; Forest Service MOU at 1, 4, 8; MMS MOU at 1, 6, 12.

Similar to Executive Order 13186 and the MOUs, the Service Guidance implementing Executive Order 13186 at 720 FW 2 is not enforceable against the Service and does not abrogate the existing authority of the Secretary to promulgate regulations under the MBTA. The Fish and Wildlife Service Manual and its particular provisions do not carry the independent force and effect of law such that a court can force an agency to comply with its provisions. *McCraile & Rowley, Inc. v. Babbitt*, 986 F. Supp. 1386, 1393-94 (S.D. Fla. 1997); *see also Western Radio Services Co., Inc. v. Espy*, 79 F.3d 896 (9th Cir. 1996) (reviewing Forest Service permitting decision only under binding regulations but not Forest Service Manual as Manual does not have force and effect of law). “[T]he Manual states FWS policy and provides guidance . . . but is not binding on FWS.” *McCraile & Rowley*, 986 F. Supp. at 1394.

In fact, Part 720 of the Fish and Wildlife Service Manual covering “Migratory Bird Management” provides that the purpose of “Chapter 2 Service Responsibilities to Protect Migratory Birds” is to provide “information to all Service employees about the management and conservation of migratory birds.” 720 FW 2, 2.1. Chapter 2 is only intended to provide “information” to Service employees and is not a substantive rule. Courts have held that a provision in an agency manual that is neither a substantive rule nor promulgated in conformance with the notice and comment rulemaking procedures specified in the APA is not binding. *McCraile & Rowley*, 986 F. Supp. at 1393-94. Thus, Service guidance should not add additional legal constraints to the Secretary’s development of a permit program for incidental take of migratory birds.

Nonetheless, even if consistency with these authorities were required, a proposed permit program would not necessarily be inconsistent with their purpose or terms. Executive Order 13186 requires federal agencies to promote conservation of migratory birds. 66 Fed. Reg. at 3854-55. The MOUs provide areas in which the DOD, DOE, Forest Service, and MMS, respectively, can promote conservation of migratory birds. These areas include protection, restoration, enhancement, and management of migratory bird habitat, to the extent allowed by law and in harmony with DOD, DOE, Forest Service, MMS, and FWS missions. The Service Guidance provides similar direction to Service employees to conserve migratory birds and their

habitat. A permit program allowed by law, conducted in harmony with Service authority, and which aims to conserve migratory birds and their habitat, as required by the Canada, Japan, and Russia treaties, would not on its face conflict with Executive Order 13186, the MOUs, or Service Guidance. Thus, a permit program could be consistent with these directives.

Additionally, the Service discussed its compliance with Executive Order 13186 in the final rule on take of migratory birds by the Armed Forces. *See* 72 Fed. Reg. at 8933. With regard to MOUs developed in accordance with Executive Order 13186, the Services provided: “[u]pon completion of the MOUs with additional Federal agencies, and in keeping with the intent of the Executive Order for Federal agencies to promote the conservation of migratory bird populations, the Service may issue incidental take authorization to address specific actions identified in the MOUs.” *Id.* Thus, the Service recognizes a general authority to issue incidental take authorization in many circumstances. Further, the Service did not find the permit program for take incidental to military readiness activities to be inconsistent with Executive Order 13186. This lends support to the conclusion that the Service has the authority to issue incidental take authorization for otherwise lawful activities of non-federal entities and that the Service would not find the permit program proposed in this report to be inconsistent with Executive Order 13186.

E. Review by the State Department

One of the safeguards included in the Armed Forces incidental take program requires the Secretary to suspend the take authorization if he concludes that a specific military readiness activity likely would not be compatible with the migratory bird treaties. *See* 50 C.F.R. § 21.15(b)(1). The Secretary may withdraw the authorization if he is unable to obtain from Armed Forces the information needed to ensure compliance. *Id.* § 21.15(b)(2). However, the Secretary’s decision to suspend authorization of the take associated with a specific military readiness activity may only be made “after seeking the views of the Secretary of Defense and consulting with the Secretary of State.” *See id.* § 21.15(b)(1). The Service explains that this provision was promulgated because the views of the Armed Forces “are appropriate given the possible impacts that suspension of the take authorization could have on national security.” 72 Fed. Reg. at 8937; *see also* Armed Forces Q&A at 4. In addition, “consulting with the State Department on issues of treaty interpretation is appropriate because of the State Department’s expertise and authority in this area as well as its responsibility for maintaining the relationship of the United States with its treaty partners.” *Id.*

A non-federal incidental take permit program would not involve issues of national security, so there would be no need to override or otherwise review any decision by the Secretary to suspend authorization of the take associated with otherwise lawful activities of non-federal entities. Furthermore, the permit program proposed in this report would be designed to be consistent with the Canada, Japan, Mexico, and Russia treaties, so as to preclude any continuing need for the State Department to interpret the migratory bird treaties while the permit program is being implemented.

However, because development of a permit program for incidental take of migratory birds would initially involve interpretation of the four MBTA treaties, early consultation with the State Department concerning the program will be important. To make use of the State

Department's expertise and authority concerning treaty interpretation, and to ensure that a new permit program is consistent with the MBTA treaties, the State Department should be involved early in the permit program development process. State Department involvement may also be important in communicating with Canada and Mexico, and Japan and Russia as necessary, to disclose the details of the new permit program and to discuss its consistency with the respective migratory bird treaties with those countries.

F. Permit Program Feasibility

Based on the analysis above, nothing in the four migratory bird treaties, the MBTA, its regulations, Executive Order 13186, the MOUs, or Service guidance should preclude development and implementation of a migratory bird incidental take permit program. Furthermore, the promulgation of new regulations, versus use of the existing "special purpose permits" described at 50 C.F.R. § 21.27, is a more preferable mechanism for implementing the incidental take permit program. The remainder of this report describes general options for such a permit program.

V. MBTA Permit Program Options

For the development of a permit program for incidental take of migratory birds through the promulgation of new regulations, several permit program options were analyzed, with input from representative of the interstate natural gas pipeline industry.¹⁸ At the outset, the primary issue was the scope of the proposed permit program. The pros and cons of a program of limited scope versus a program of broader scope were analyzed. Specifically, the following program options of different scope were evaluated: (1) natural gas pipelines only; (2) linear facilities only; (3) all energy facilities; (4) universal permit program; and (4A) universal permit program focused on impacts from the clearing of habitat. The perceived advantages and disadvantages of each of these permit program options are listed below.

A. Option 1: Natural Gas Pipelines Only

1. Advantages

- The pipeline-only permit program could be tailored to address specific concerns of interstate natural gas pipeline companies.
- A blanket-type authorization would likely be more manageable than other types of permit programs.
- Impacts to migratory birds from pipeline projects are generally less significant than wholly aboveground facilities, so the overall impact to the species from a

¹⁸ Holland & Hart LLP received input from the representatives of the interstate natural gas pipeline industry who were on the steering committee for this report. Meetings with these representatives occurred throughout the development of this report, including meetings on May 5, 2009, June 15, 2009, July 17, 2009, January 29, 2010, and February 10, 2010.

pipeline-only permit program would likely be less than for a broader permit program covering more than natural gas pipelines.

- A program with a narrow focus may result in fewer concerns from non-governmental organizations (“NGOs”) and fewer possible conflicts with the MBTA Treaties.

2. Disadvantages

- It may be more difficult to promote a narrowly focused permit program to the Service. On the other hand, the Service may be hesitant to create a larger permit program that would increase its workload and potentially increase the impacts to migratory birds. Thus, it was determined that Service input on the scope of the permit program would be very useful.
- A natural gas pipeline-only program would not address the lack of an incidental take permit program for other industries. To address this major deficiency in the MBTA, the Service would still need to devote time to dealing with unpermitted take from other activities.

B. Option 2: Linear Facilities Only

1. Advantages

- A program of broader scope could be easier to promote to the Service. However, absent Service input, it is unclear whether the Service would be hesitant to embrace a permit program with a higher level of administrative burden on the agency.
- Linear facilities face different MBTA challenges than single-site projects (such as residential developments), so a permit program that addresses linear facilities would have inherent logic.
- Including all linear facilities would address many of the projects on which the Service spends a large portion of time addressing MBTA concerns, such as electrical transmission projects and pipeline projects.
- A number of pipeline companies also have transmission facilities, so a permit program covering linear facilities would address a more comprehensive range of those companies’ migratory bird issues.

2. Disadvantages

- Linear facilities include electric transmission lines, which have very different migratory bird impacts than natural gas pipelines.

- The proposed permit program would have to be more generic than that for just natural gas pipelines. It could be more difficult to create a blanket-type permit program for all linear facility projects.
- Pulling in other industry types would make the rulemaking process more cumbersome and could lessen the likelihood of a unified approach from industry. On the other hand, the electric transmission industry could provide additional support to get a permit program established.

C. Option 3: All Energy Facilities

1. Advantages

- The major focus of the Service's MBTA efforts have been directed at transmission lines, oil field waste disposal facilities, wind farms, and pipelines. Including all of these facilities in the permit program would address the vast majority of the Service's current MBTA concerns.
- Adding the wind power industry could provide additional support for the permit program, especially considering the recent focus on the need for streamlined approvals of renewable energy facilities.

2. Disadvantages

- A permit program of this scope may be unwieldy from both a development and implementation standpoint.
- The various energy facilities covered by the proposed permit program would have significantly different impacts, which would make the permit program more complex and less likely to be tailored to address the concerns of the interstate natural gas pipeline industry.
- The greater the scope of activities covered by the proposed permit program, the greater the possible impacts on migratory birds and the greater the likelihood of opposition by NGOs.

D. Option 4: Universal Permit Program

1. Advantages

- A universal permit program may have the greatest appeal to the Service, if it is seeking to address the lack of an incidental take program through a single rulemaking. On the other hand, the Service may be concerned that such a program would overwhelm agency staff during implementation.
- A permit program of broad scope would solve a major problem with the MBTA, and would likely receive support from multiple industries.

- The interstate natural gas pipeline industry would not look like it is requesting special treatment by advocating for a universal permit program.
- The ESA provides a ready model for this type of program.

2. Disadvantages

- A universal permit program would likely be the most difficult program to create because it would have to encompass any type of project that could result in incidental take.
- A blanket-type program that covers every conceivable take would be difficult to establish.
- A permit program of broader scope would be less tailored to address specific concerns of interstate natural gas pipeline companies.
- The more inclusive the permit program, the greater the risk of inconsistency with the United States' treaty obligations and the greater the likelihood of treaty partner or NGO opposition.

E. Option 4A: Universal Permit Program Focused on Impact from the Clearing of Habitat

1. Advantages

- Rather than focusing on the type of underlying project that would result in take, this permit program would focus on the effect on migratory birds from clearing of migratory bird habitat regardless of the project for which that habitat is being cleared, which would give the program cross-industry appeal.
- The permit program would still be sufficiently focused that blanket-type authority could be possible.
- The proposed permit program would be tailored to address concerns of interstate natural gas pipeline companies, since habitat clearing is the main MBTA issue for natural gas pipeline construction.

2. Disadvantages

- The proposed permit program would not address some of the other significant take issues the Service is facing under the MBTA, such as those associated with wind turbines, transmission lines, and oil fields.
- There does not appear to be a logical reason to permit incidental take due to clearing of habitat, but not permit incidental take due to other causes. Thus, it may be more difficult to justify such a permit program.

VI. Development of an MBTA Permit Program

After the permit program options listed in the previous section were developed, the FWS was contacted to determine the agency's position regarding an MBTA incidental take permit program.¹⁹ Based on discussions with representatives from the interstate natural gas pipeline industry and the Service, the following criteria were found to be the most important to include in a proposed permit program.²⁰

- The program must have a broad scope and be applicable to different activities from different industries.

Reasoning: In order to address a range of Service concerns regarding impacts to migratory birds and their habitats from different activities, and different industries, the program would have to be broad in scope. Such a program would likely have more buy-in from other industries and the Service. Furthermore, promulgation of general regulations widely applicable to different activities, and different industries, would reduce the burden on the Service of promulgating numerous industry- or activity-specific regulations.

- The program must be easy to implement and enforce to minimize the costs and workload borne by the Service.

Reasoning: Because of limited funding and already overextended staff, the Service is unlikely to support a permit program that would be costly and time-consuming to administer and enforce.

- The program must provide conservation benefits to, and protect, migratory birds.

Reasoning: The Service has a responsibility to protect migratory birds under the MBTA. To meet this responsibility, regulations implementing a permit program must protect migratory birds. Furthermore, to be consistent with the MBTA Treaties, a permit program must maintain or enhance migratory bird habitat and provide protection for populations of birds that are depleted or in danger of extinction.

To meet these criteria, a permit program for incidental take of migratory birds could utilize a permit-by-rule approach. An example of this approach is the Army Corps of Engineers ("Corps") nationwide permit ("NWP") program for placement of dredged or fill material into waters of the United States. The NWP program has proven an effective means for the Corps to protect waters of the United States, while at the same time minimizing costs and workload for the Corps. A proposed MBTA permit program could achieve similar permitting efficiencies,

¹⁹ Holland & Hart LLP communicated with senior personnel at the Service's Division of Migratory Bird Management in July 2009 to discuss development of an MBTA incidental take permit program.

²⁰ To develop these criteria, Holland & Hart LLP communicated with the representatives from the interstate natural gas pipeline industry who were on the steering committee for this report. Meetings occurred throughout the development of this report, including meetings on May 5, 2009, June 15, 2009, July 17, 2009, January 29, 2010, and February 10, 2010.

while ensuring the continued conservation of migratory birds. An overview of the NWP program is provided below.

A. Army Corps of Engineers Nationwide Permit Program

The Clean Water Act (“CWA”) prohibits the discharge of any pollutant, which includes dredged or fill material, into waters of the United States. 33 U.S.C. §§ 1311(a), 1362(6). Under Section 404 of the CWA, the Corps can issue permits for the discharge of dredged or fill material into waters of the United States. *Id.* § 1344.

There are a number of types of Section 404 permits available, including individual, regional, and nationwide. Nationwide permits are a type of general permit issued by the Chief of Engineers and are designed to regulate with little, if any, delay or paperwork certain activities having minimal environmental impacts. 33 C.F.R. § 330.1(b). An activity is authorized under a NWP only if the activity and the permittee satisfy all of the NWP’s terms and conditions. *Id.* § 330.1(c). Currently there are 49 NWPs covering a broad range of activities such as surveying, utility line activities, hydropower projects, surface coal mining activities, residential developments and agricultural activities. *See* 72 Fed. Reg. 11092 (Mar. 12, 2007) (final notice of Corps reissuance of 43 existing NWPs, and issuance of six new NWPs).²¹

Activities that do not satisfy the requirements for an NWP require authorization by an individual or regional permit. *Id.* Additionally, the Corps can require an activity that satisfies the requirements of an NWP to obtain individual or regional permit authorization if the agency determines the activity will have more than minimal individual or cumulative net adverse effects on the environment. *Id.* § 330.1(d).

Unless a pre-construction notice (“PCN”) is required, a party may undertake an activity covered by an NWP without notification to or approval from the Corps. 72 Fed. Reg. 11092, 11183, 11194 (Mar. 12, 2007); 33 C.F.R. § 330.1(e). If a PCN is required, the District Engineer must determine within 30 days if the notification is complete and can request information to make it complete only once. 72 Fed. Reg. at 11194. After submitting a PCN, the prospective permittee cannot begin the proposed activity (1) until notified by the District Engineer that the activity may proceed, with any special conditions imposed by the District or Division Engineer; (2) if notified by the District Engineer that an individual permit is required; or (3) until 45 days have lapsed since submittal of complete PCN and the permittee has not received any notice from the District Engineer. *Id.*

If a project does not satisfy the requirements of any of the NWPs, or if the Corps determines the environmental impacts will be more than minimal, the project proponent will need to obtain an individual permit for any discharges of dredged or fill material into waters of the United States.¹⁷ Upon receipt of an application for an individual permit, the Corps must make a completeness determination within 15 days. 33 C.F.R. § 325.2(a)(2). Public notice and comment on the application will be required for 15 to 30 days. *Id.* §§ 325.2(a)(3), (d)(2). The District Engineer will also evaluate whether to hold a public hearing, which depends on whether

²¹ *See*, generally, U.S. Army Corps of Engineers, Nationwide Permits, available at <http://www.swl.usace.army.mil/regulatory/allnwps.html> (last visited May 20, 2010).

such hearing is requested or is required to make a decision on the permit application. *See id.* §§ 325.2(a)(5); 327.4.

In evaluating an individual permit application, the Corps must comply with NEPA, the National Historic Preservation Act (“NHPA”), and the ESA. *Id.* §§ 325.2(a)(4), (b)(4), (b)(5). The Corps’ regulations require a decision on an application within 60 days, except where compliance with other laws, such as the ESA, NEPA, and NHPA, precludes a decision within this timeframe. *Id.* § 325.2(d)(3). The Corps has noted that individual permits generally take 60 to 120 days to process, unless a public hearing is held or an environmental impact statement is required.²²

B. Proposed MBTA Permit Program Model

A permit-by-rule program for incidental take of migratory birds under the MBTA could include a series of general permits issued by the FWS that are designed to regulate with little delay or paperwork activities that have minimal impact on migratory birds. Similar to the NWP program, different general permits could apply to different activities. Thus, one general permit could address interstate natural gas pipeline construction activities, while other general permits could separately cover electric transmission lines, wind projects, and other development projects. Such activities could be authorized under the program if the activity and the permittee satisfy designated terms and conditions of the applicable general permit.

Terms and conditions could be developed for each general permit by using existing best management practices as a starting point. For example, the BLM has existing best management practices for activities occurring in migratory bird habitat and the FWS recently executed an agreement regarding measures to reduce migratory bird impacts in connection with an interstate natural gas pipeline project, both of which are discussed further below. Other existing migratory bird guidance could provide a starting point for terms and conditions applicable to other activities, such as electric transmission and wind projects.

For example, the FWS has developed the “Avian Protection Plan (APP) Guidelines,” which are voluntary guidelines intended to reduce the operational and avian risks that result from avian interactions with electric utility facilities.²³ These guidelines provide examples of practices that electric utilities can implement to avoid and reduce risks to birds from electric utility facilities. The FWS has also issued “Service Interim Guidance on Avoiding and Minimizing Wildlife Impacts from Wind Turbines,” which is intended to assist FWS staff in providing technical assistance to the wind energy industry to avoid or minimize impacts to wildlife and their habitats, including migratory birds.²⁴ This guidance provides

²² *See* <http://www.swl.usace.army.mil/regulatory/> (last visited May 20, 2010).

²³ *See* The Edison Electric Institute’s Avian Power Line Interaction Committee (APLIC) and U.S. Fish and Wildlife Service (USFWS), Avian Protection Plan (APP) Guidelines, April 2005, available at <http://www.fws.gov/migratorybirds/CurrentBirdIssues/Hazards/APP/AVIAN%20PROTECTION%20PLAN%20FINAL%204%2019%2005.pdf> (last visited May 20, 2010).

²⁴ *See* Memorandum from Deputy Director, U.S. Fish and Wildlife Service, to Regional Directors, Regions 1-7, U.S. Fish and Wildlife Service, on “Service Interim Guidance on Avoiding and Minimizing

recommendations for studying potential impacts to birds, locating turbines and associated structures, and designing and operating turbines. The Service's "National Bald Eagle Management Guidelines" also provide an example of terms and conditions that could be incorporated into a general permit program.²⁵ These guidelines provide general and activity-specific recommendations for avoiding disturbance to bald eagles.

Because a general permit program for incidental take of migratory birds under the MBTA could apply to different activities from different industries, it would address a range of Service concerns and would reduce the burden on the Service of promulgating numerous industry- or activity-specific regulations. Additionally, a general MBTA permit-by-rule program would be easy to implement and enforce, minimizing the costs and workload borne by the FWS. A party could undertake an activity in compliance with the general permit terms and conditions without notification to or approval from the FWS, thereby limiting the time and cost burdens on the FWS.

Activities that do not satisfy the general permit terms and conditions for the MBTA permit program, or other designated activities with greater impact on migratory birds, could require authorization by an individual permit issued by the FWS. In this way, the FWS could specifically consider whether to authorize those activities that will have more than minimal individual or cumulative net adverse impacts on migratory birds. To ensure an efficient approval process for individual incidental take permits for migratory birds, FWS could establish specific application procedures and permit timelines.

Consistent with the Service's responsibility to protect migratory birds under the MBTA, the terms and conditions for a general permit for incidental take of migratory birds could include avoidance, minimization, and mitigation measures sufficient to protect migratory birds and their habitat. Such terms and conditions could be further designed to maintain or enhance migratory birds habitat and provide protection for those populations of birds that are depleted or in danger of extinction, consistent with the MBTA treaties. The following BLM and FWS documents provide examples of best management practices that may provide a starting point for design of sufficient terms and conditions for a general permit program.

C. Possible Permit Terms and Conditions

The BLM and the FWS have developed practices that are often recommended or required for the protection of migratory birds in conjunction with NEPA review. These practices could be used as examples of terms and conditions required as part of a general permit program for incidental take of migratory birds under the MBTA.

Impacts from Wind Turbines," May 13, 2003, available at <http://www.fws.gov/habitatconservation/Service%20Interim%20Guidelines.pdf> (last visited May 20, 2010).

²⁵ See U.S. Fish and Wildlife Service, "National Bald Eagle Management Guidelines," May 2007, available at <http://www.fws.gov/migratorybirds/CurrentBirdIssues/Management/BaldEagle/NationalBaldEagleManagementGuidelines.pdf> (last visited May 20, 2010).

1. BLM Best Management Practices

BLM Interim Management Guidance provides that “[m]igratory birds should be included in every NEPA analysis of actions that have a potential to negatively or positively affect migratory bird species of concern.” BLM, Instruction Memorandum No. 2008-050, to All Field Officials from Assistant Director, Renewable Resources and Planning, on Migratory Bird Treaty Act – Interim Management Guidance, Dec. 18, 2007.²⁶ BLM recommends that impacts to migratory birds be addressed in project planning and provides the following regarding BMPs to be employed to avoid or minimize the possibility of take of migratory bird species:

Best Management Practices to avoid or minimize the possibility of the unintentional take of migratory birds should be applied to all practices and projects. Practices should be applied to provide long-term benefits and improved vegetation community condition. If the proposed project or action does have the potential to impact migratory bird species populations which have been identified as occurring within the project or action area, evaluate options to mitigate the project to minimize or eliminate the identified impacts during periods of concentrated nesting activity.

Examples include:

- a. Minimize/avoid impacts to nesting migratory birds by imposing a Timing Limitation on use authorizations to mitigate vegetative disturbing activities during the primary portion of the nesting season. Most migratory birds nest between May 15 to July 15, but dates should be adjusted for the species and environmental conditions. Timing limitations may be modified based upon the species affected and the timing or intensity of breeding activity of the species of Birds of Conservation Concern involved.
- b. Where disturbance cannot be avoided, the scale and the length of time of disturbance may be considered mitigating circumstances.
- c. Inspect and clear an area for migratory bird nesting. These clearances could be performed by BLM or other qualified personnel. Factors to weigh in considering this option include vegetation type, vegetation density, timing and cost.

²⁶ Available at http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/national_instruction/2008/im_2008-050__migratory.print.html (last visited May 20, 2010).

- d. Explore opportunities to replace and prioritize habitat and habitat changes on or off site based upon the needs of Birds of Conservation Concern.

Id.

2. FWS Recommendations for Interstate Natural Gas Pipeline Development

The FWS does not have designated BMPs that it recommends be applied to all projects. Instead, the FWS generally recommends BMPs as part of the ESA or NEPA review processes or pursuant to agreement with project-proponents.

For example, in 2008, the FWS reached an agreement with Rockies Express Pipeline LLC (“REX”) regarding migratory bird avoidance, minimization, and mitigation measures for the company’s Rockies Express Pipeline - East Project. *See* Guidelines for Achieving Compliance with the Migratory Bird Treaty Act and Executive Order No. 13186 Through Voluntary Conservation Measures, Developed by Rockies Express Pipeline LLC and U.S. Fish and Wildlife Service, March 2008, Docket No. CP07-208-000 (“REX-East MOU”). Through this agreement, Rockies Express Pipeline proposed to take the following actions to minimize and/or offset impacts to migratory bird habitats from its interstate natural gas pipeline development project:

- Conduct pre-clearing surveys to determine the number and species of nesting migratory birds along sensitive portions of the right-of-way.
- Utilize, to the degree possible, areas that have limited or no habitat suitable for migratory birds to nest.
- Where possible, locate facilities along existing rights-of-way.
- As feasible, utilize horizontal directional drill equipment to avoid impacts on riparian forests and waterbodies.
- Avoid construction in sensitive forested areas prior to July 15, unless the FWS determines in writing that it would be safe to do so.
- Reduce maintenance right-of-way in sensitive forested areas, and allow for restoration of scrub/shrub community in such areas.
- Plant bare roots seedlings within temporary construction right-of-way to expedite the return of forest community.

REX-East MOU at 4-7. The conservation measures proposed in the REX-East MOU are useful as examples of measures that could be made terms and conditions of a general permit for interstate natural gas pipeline construction.

Although the REX-East MOU was useful in setting forth the measures that Rockies Express might take to comply with the MBTA, REX did not get a permit or other form of take authorization from the Service as part of the MOU. Rather, by following the guidelines outlined in the REX-East MOU, REX received an understanding from the Service that the conservation measures proposed in the MOU were anticipated to mitigate for the forest loss and fragmentation associated with the REX-East pipeline construction. *See* REX-East MOU at 4. Further, by complying with the conservation measures outlined in the MOU, REX may also have reduced its risk of prosecution for incidental take. But REX did not receive assurance that its project would not be in violation of the MBTA or any guarantees that there would be no prosecution for incidental take.

D. Administration by Regional Flyway

The FWS and its partner agencies currently manage for migratory birds based on specific migratory paths within North America. *See* FWS, *Migratory Birds, Migratory Bird Flyways*.²⁷ Based on these migratory paths, state and federal agencies have developed four administrative flyways for managing migratory bird resources: the Atlantic,²⁸ Mississippi,²⁹ Central,³⁰ and Pacific³¹ flyways. These flyways are indicated in Figure 1.

²⁷ Available at <http://www.fws.gov/migratorybirds/Flyways.html> (last visited May 20, 2010).

²⁸ The United States members of the Atlantic Flyway Council are the states of Connecticut, Delaware, Florida, Georgia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Vermont, Virginia, and West Virginia; plus the U.S. territories of Puerto Rico and U.S. Virgin Islands.

²⁹ The United States members of the Mississippi Flyway are the states of Alabama, Arkansas, Indiana, Illinois, Iowa, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Ohio, Tennessee, and Wisconsin.

³⁰ The United States members of the Central Flyway is composed of the states of Montana, Wyoming, Colorado, New Mexico, Texas, Oklahoma, Kansas, Nebraska, South Dakota, and North Dakota.

³¹ The United States members of the Pacific Flyway Council are Alaska, Arizona, California, Idaho, Nevada, Oregon, Utah, Washington, and those portions of Colorado, Montana, New Mexico, and Wyoming west of the Continental Divide.

Figure 1: Migratory Bird Flyways³²



The flyway structure was adopted for administering migratory bird resources within the United States because of the unique biological characteristics of migratory birds in each flyway, and because of the relative number of hunters in the different regions of the United States.³³ Waterfowl managers learned from early waterfowl banding efforts that waterfowl follow distinct, traditional migration corridors or flyways in their annual travels between breeding and wintering areas.³⁴ These “biological flyways” are indicated in Figure 2. The four administrative flyways could provide the organizational structure for administering an MBTA permit program, with each flyway tailoring the general permits to the habitat conditions, species, and issues specific to that flyway.

³² Figure available at <http://www.fws.gov/migratorybirds/Flyways.html> (last visited May 20, 2010)

³³ Pacific Flyway Council, Migratory Bird Management, available at <http://www.pacificflyway.gov/> (last visited May 20, 2010).

³⁴ Flyways.us, General Flyways Info, available at <http://www.flyways.us/flyways/info> (last visited May 20, 2010).

Figure 2: Biological Flyways³⁵



E. Incorporation into FERC Certificate Process

For interstate natural gas pipelines, MBTA permit compliance could be incorporated into the FERC Certificate process. Under Section 7 of the Natural Gas Act, interstate natural gas companies must obtain a Certificate for Public Convenience and Necessity for a project from the FERC. 15 U.S.C. § 717f(c). In issuing the certificate, the FERC must comply with the requirements of the NEPA and other environmental statutes and regulations. As part of this compliance, the FERC could establish a process for an interstate natural gas company seeking a certificate to demonstrate that its proposed project satisfies the terms and conditions of a general MBTA incidental take permit. Or, the company could demonstrate that it has obtained an individual permit. Such a general or individual permit could be a prerequisite for certification, thereby achieving protection of migratory birds through the FERC certification process. However, because the Secretary of the Interior has sole authority for administering the MBTA, the Secretary would still be required to oversee this process to ensure it achieves compliance with an MBTA permit program.

³⁵ Figure available at <http://www.fws.gov/migratorybirds/NewReportsPublications/flyways.html> (last visited May 20, 2010) (Credit: Michael A. Johnson, North Dakota Game and Fish).

VII. Conclusion

Based on the analysis in this report, nothing in the four migratory bird treaties, the MBTA, its regulations, Executive Order 13186, the MOUs, or Service guidance should preclude development or implementation of an incidental take permit program for migratory birds, so long as the permit program is developed consistent with the four migratory bird treaties. The Service's existing authorization of incidental take of migratory birds as a result of military readiness activities provides precedent for a permit program for non-federal entities because it shows that Congress and the Service believe that certain incidental take is consistent with the United States' treaty obligations. Thus, no amendment of the MBTA or other Congressional action would be required to develop a permit program.

After discussions with representatives from the interstate natural gas pipeline industry and the Service, it was determined that a permit-by-rule approach could provide a workable model for an MBTA permit program. Using this model, existing BMPs and other migratory bird guidance could serve as a starting point for the general permits' terms and conditions. Administration of the permit program could be handled according to the four administrative flyways that have already been established for management of migratory birds.

Based on the information summarized in this report, it is recommended that INGAA and its membership pursue the development of an MBTA incidental take permit program using a permit-by-rule approach. To move forward, the possible next steps (Phase II) to implement such a permit program could include:

1. Develop as broad a consensus within the interstate natural gas pipeline industry as is practicable regarding the preferred nature and format of a permit program based on the "permit by rule" model.
2. Contact key U.S. Fish and Wildlife staff to discuss their perspectives on the "permit by rule" model described in this report for an MBTA incidental take permit program, and the development of support for such an effort.
3. Contact U.S. Department of the Interior, Solicitor's Office, to discuss the establishment of an incidental take permit program.
4. Conduct outreach to the U.S. Department of State, in conjunction with U.S. Fish and Wildlife Service, to discuss consistency of an incidental take permit program with the MBTA treaties.
5. Identify contacts in Canadian and Mexican wildlife agencies, and possibly those of other treaty signatories (Russia and Japan).
6. Identify potential contributors and discuss cost-sharing arrangements with U.S. Fish and Wildlife Service to facilitate a draft incidental take permit rule.

7. Conduct outreach to the U.S. Department of Energy, the Federal Energy Regulatory Commission, and other key stakeholders within the federal government.
8. Conduct outreach to the migratory bird conservation community and other key stakeholders in migratory bird conservation activities.

The ultimate success of an MBTA incidental take permit program will require considerable outreach efforts to ensure general support for the program among agencies, conservation organizations, and the regulated community. In addition, the Service will require significant assistance with, and input for, the development of general permits with terms and conditions that are consistent with the Act and its conservation goals, and that can be feasibly implemented by the permittees.

**Guidelines for Achieving Compliance
With the Migratory Bird Treaty Act and
Executive Order No. 13186 Through Voluntary
Conservation Measures**

**Developed by
Rockies Express Pipeline LLC
and
U.S. Fish and Wildlife Service**

**Associated with the Construction and Operation of the
Rockies Express Pipeline – East Project in
Missouri, Illinois, Indiana, and Ohio**

March 2008

PREFACE

Rockies Express Pipeline LLC (Rockies Express) proposes to construct and operate pipeline, compression, and ancillary facilities to transport natural gas produced in the Rocky Mountain basins for delivery primarily to other pipelines and distribution customers located in the upper Midwest and Eastern United States (U.S.). The proposed project, the Rockies Express Pipeline – East Project, or REX-East Project, falls under the jurisdiction of the Federal Energy Regulatory Commission (FERC) and FERC is the lead federal agency for the project. This project is the subject of these Guidelines for Achieving Compliance with the Migratory Bird Treaty Act and Accompanying Executive Order No. 13186 Through Voluntary Conservation Measures (Guidelines).

The REX-East Project will consist of approximately 639.1 miles of new pipeline facilities from Audrain County, Missouri, to a terminus in Monroe County, Ohio, five new compressor stations along the REX-East route, two new compressor stations along the REX-West and REX-Entrega pipeline routes, and ancillary facilities consisting of 36 mainline valves and 13 meter station locations.

Rockies Express filed for a Certificate of Public Convenience and Necessity (Certificate) with FERC to construct and operate the REX-East Project. As part of its review of the proposed project, FERC has prepared an environment impact statement (EIS) for the project (CP07-208-000). The EIS references these Guidelines as a means to avoid and minimize impacts to migratory birds and to minimize and mitigate habitat impacts from forest loss and fragmentation (Sections 4.4 and 4.5). The EIS recommends (Section 4.5.3) that Rockies Express and FWS follow these Guidelines as described below.

Habitat assessments were conducted by Natural Resource Group, LLC (NRG), consultant for Rockies Express, to identify the major types of vegetation communities that will be disturbed by construction of the REX-East Project. Rockies Express will typically use a 125-foot-wide construction right-of-way in upland areas to allow for the safe and efficient construction of its pipeline. Rockies Express will acquire a permanent right-of-way width of 30 to 50 feet depending on existing land use type, which is explained in more detail in this document. The REX-East Project will disturb approximately 14,349 acres. Nearly 74.4 percent of the acreage that will be disturbed consists of agricultural lands. Of the remainder, approximately 2,307 acres is made up of forested land. This vegetation community provides foraging, cover, and breeding habitat for a diversity of wildlife species, including migratory birds. The project will result in permanent alteration (i.e., 30 to 50 feet ROW width maintained in an herbaceous or shrub condition) of 433 acres of forested land with the remaining 1,874 acres of forested land being allowed to return to forested condition over time.

The primary impact on the forested vegetation community will be the cutting, clearing, and/or removal of existing vegetation within the construction work area. Impacts on woody vegetation communities will be long-term given the length of time needed for the communities to mature to pre-construction conditions (approximately 50 years). Some of these impacts, particularly on woody vegetation, will be permanent due to normal maintenance activities conducted in accordance with Rockies Express' Upland Erosion Control, Revegetation and Maintenance Plan (Plan) and Wetland and Waterbody Construction and Mitigation Procedures (Procedures). These maintenance activities include annual vegetation clearing over a 10-foot-wide corridor centered over the pipeline and clearing of trees greater than 15 feet tall every 3 years within the 50-foot-wide permanent right-of-way in non-riparian areas, and a 30-foot-wide permanent right-of-way in forested wetlands and upland forests noted as FWS areas of concern.

There is also the impact of forest fragmentation, which is often greater than the actual acreage cleared. Many species of migratory birds, and often those of greatest conservation concern, require large blocks of contiguous forest to successfully reproduce and survive. Construction and maintenance of pipeline rights-of-way through forests fragments the forest, with the resulting fragments sometimes losing or having reduced capacity to successfully sustain interior forest species. Much of the REX-East Project corridor is collocated with existing rights-of-way or in areas fragmented by agricultural or other development and, as such, will not fragment areas of contiguous forest.

Rockies Express anticipates beginning construction of the REX-East Project in the summer 2008 and completing construction in fall 2008. This construction schedule means that at least the months of June and July of the proposed schedule may coincide with the recognized nesting season of migratory birds protected under the Migratory Bird Treaty Act (MBTA) (16 U.S.C. 703-712; Ch. 128 as amended).

The typical nesting season for migratory songbirds, game birds, and shorebirds in the four-state area where the REX-East Project is proposed ranges from April 1 through July 15. Some species and individuals within a particular species may begin nesting prior to April 1 or complete their nesting cycle shortly after July 15, but the vast majority will complete their initial nesting during this period. Depending upon the year and species, some bird pairs will typically undertake a second nesting effort, which could be impacted by forest clearing.

The Migratory Bird Treaty Act prohibits the taking, killing, possession, transportation, and importation of migratory birds, their eggs, parts, and nests, except when specifically authorized by the Department of the Interior. While the MBTA has no provision for allowing unauthorized take, the FWS recognizes that some birds may be taken during activities such as pipeline construction even if all reasonable measures to avoid take are implemented. The FWS's Office of Law Enforcement carries out its mission to protect migratory birds not only through investigation and enforcement, but also through fostering relationships with individuals and industries that proactively seek to eliminate their impacts on migratory birds. Although it is not possible under the MBTA to absolve individuals, companies, or agencies from liability (even if they implement avian mortality avoidance or similar conservation measures), the Office of Law Enforcement focuses on those individuals, companies, or agencies that take migratory birds with disregard for their actions and the law, especially when conservation measures have been developed but are not properly implemented.

Rockies Express recognizes that construction of the project and maintenance of the permanent right-of-way for the pipeline will result in temporary and/or permanent impacts to migratory birds and the habitats upon which they depend for various life requisites. Rockies Express also recognizes that due to the size of the project and the fact that some construction and operation will occur during the nesting season for a majority of migratory bird species found in the project area, take of active nests, (i.e., eggs and young) may occur in spite of all reasonable efforts to avoid such take.

Rockies Express desires to take all reasonable measures to comply with MBTA and also desires to provide for the restoration and preservation of habitats for migratory birds in the four states where the pipeline will be constructed, operated, and maintained. Accordingly, Rockies Express and the FWS have prepared, and will follow, these Guidelines for Achieving Compliance With the Migratory Bird Treaty Act and Executive Order No. 13186 Through Voluntary Conservation Measures (Guidelines):

GUIDELINES

I. PURPOSE

The purpose of these Guidelines is to set forth all reasonable measures that Rockies Express may take to comply with MBTA. Rockies Express and the FWS (the Parties) will work cooperatively to implement conservation measures that will provide benefits to bird species protected under MBTA within the states where the REX-East Project will be constructed, operated, and maintained. This document will remain in effect for the life of the Rockies Express Pipeline - East Project (FERC Docket #CP07-208-000). If these Guidelines are followed, the FWS does not anticipate the need for any additional mitigation for forest loss or forest fragmentation, not already described herein, for any future disturbance associated with this pipeline for the area in the existing construction route.

These Guidelines do not address issues related to the Section 7 review by the FWS for Federally listed species. That review and associated issues will be addressed in a separate Biological Assessment and appropriate response from the FWS. These Guidelines also do not address issues related to crossing of Wild and Scenic Rivers and their tributaries. Those issues are being addressed by the National Park Service under separate review.

II. ROLES OF THE PARTIES

A. Rockies Express Pipeline, LLC

Rockies Express recognizes that construction, operation, and maintenance of the project will result in temporary and/or permanent impacts on migratory bird habitats. Accordingly, Rockies Express has taken, or will take, the following actions to minimize and/or offset these impacts:

- The pipeline route proposed by Rockies Express utilizes, to the degree possible, areas that have limited or no habitat suitable for migratory birds to nest. More than 59 percent of the REX-East Project facilities will be collocated with existing rights-of-way and approximately 74.4 percent of the proposed pipeline route occurs in areas that are utilized for agricultural production. By routing the proposed pipeline to areas that are predominantly agricultural and co-locating it with existing rights-of-way, Rockies Express has substantially reduced the project's impacts on habitats of value to migratory birds.
- To avoid impacts on riparian forests, Rockies Express will avoid those forested communities, as feasible, by staging horizontal directional drill (HDD) equipment outside of those areas where they occur adjacent to waterbodies crossed via HDD. Those areas avoided by HDD are summarized in Attachment 1.
- To reduce impacts on vegetation within the project footprint and to improve the probability of successful revegetation of disturbed areas, Rockies Express will implement the restoration measures included in the Rockies Express' Plan and Procedures.

Rockies Express recognizes that it must take all reasonable measures to comply with MBTA by avoiding the take of active nests (e.g., eggs and young) of migratory birds during the construction, operation, and maintenance of the REX-East Project. In a letter dated September 12, 2007, to Rockies Express, the FWS recognized specific migratory birds of conservation concern and specific habitat areas of concern for migratory birds. Subsequent correspondence with the Columbia, Missouri, Field Office and the Bloomington, Indiana, Field Office of the FWS identified additional areas of concern. Attachment 2 and its corresponding maps (Attachment 3) summarize the FWS's primary areas of concern for forest fragmentation and migratory birds along the proposed route. Additionally, Rockies Express analyzed its proposed route and isolated forest crossings greater than 0.25 mile in length that were not cited by the FWS. These areas are also included in Attachments 2 and 3. All other forest impacts not accounted for by these two analyses were totaled and also taken into account.

Rockies Express created a decision tree (Attachment 4) to assign mitigation ratios for forest impacts according to the quality of forest affected. Areas cited by the FWS as being of concern for migratory birds, forest fragmentation, and riparian corridors have been assigned to Categories A, B, and C, with A and B being the highest quality (unfragmented, with Category A longer than 0.5 mile and Category B shorter than 0.5 mile) and C being the lowest quality (collocated or previously fragmented). For the remaining areas not indicated by the FWS but of possible fragmentation concern, Rockies Express assigned the areas to Categories D, E, and F, with D and E being the highest quality (unfragmented, with Category D longer than 0.5 mile and Category E shorter than 0.5 mile) and F being the lowest quality (previously fragmented). All other forest impacts not accounted for by the flow chart were assigned to Category G, being of the lowest quality, so that all forest impacts incurred by the project would be taken into account. To summarize:

- Category A = Large intact block of forest in area of concern
- Category B = Small intact block of forest in area of concern
- Category C = Fragmented or collocated forest in area of concern
- Category D = Large intact block of forest not in area of concern
- Category E = Small intact block of forest not in area of concern
- Category F = Fragmented forest not in area of concern
- Category G = All other low-quality forest impacts, based on Land Use Land Classification data

Accordingly, Rockies Express has taken, or will take, the following actions in forested areas specified in the attached forest fragmentation table (Attachment 2):

- In non-collocated forested areas identified by the FWS as sensitive in the September 12 letter and whose combined length totals approximately 20 miles (Attachment 5 and footnoted in Attachment 2), Rockies Express will avoid construction prior to July 15, unless the FWS determines in writing, based upon current surveys, that it would be safe to do so.
- Restoration in forested stands of concern will include a 30-foot-wide maintenance area within a 50-foot-wide right-of-way for Categories A, B, D and E (Attachment 2). Ten (10) feet centered over the pipeline will be kept in an herbaceous state with the remaining 20 feet of the corridor to return to a scrub/shrub community.

Trees larger than 15 feet tall will be removed from the 30-foot right-of-way every three years.

- In forested areas categorized as A, B, and D (Attachment 2), Rockies Express will plant bare root seedlings (both hard- and soft-mast species, as identified through discussions with the FWS) within the temporary construction right-of-way to expedite the return of forest community, unless otherwise restricted by landowner easement conditions. Tree species will be primarily deciduous as identified for the various areas by the FWS.

Despite these efforts, Rockies Express recognizes that construction, operation, and maintenance of the project may still result in temporary and/or permanent impacts on migratory birds, namely as a result of habitat loss. Accordingly, Rockies Express has taken, or will take the following actions to offset these impacts:

- Rockies Express will install 24 bird houses on Blackburn Island in the Mississippi River during restoration in order to mitigate for potential prothonotary warbler nesting cavities that may be removed during tree clearing of the HDD staging area on the island (see site number 11 in Attachments 2 and 3). In accordance with established recommendations, the wooden bird houses will be 4x4x6-inches with a 1.5-inch-diameter entrance hole 4 inches from the bottom, and installed between 4 and 12 feet high on trees adjacent to open water. These bird houses will be installed prior to completing construction and hung at least 5 feet above the highest floodwater levels.
- To offset for impacts on forested and scrub-shrub wetlands, Rockies Express will provide on-site and off-site mitigation, including restoration and preservation of approximately 66.2 acres of forested communities in accordance with permit requirements from the U.S. Army Corps of Engineers (COE) (Summarized in Attachment 6) for construction in Missouri, Illinois, Indiana, and Ohio, and permit requirements for the Indiana Department of Natural Resources (IDNR) (Summarized in Attachments 7a and 7b). This number is subject to change as surveys and consultations continue.
- Rockies Express will cooperate with the FWS to mitigate for habitat impacts on migratory birds, forest loss, and for forest fragmentation by contributing funds to the FWS for impacts on approximately 2,307.4 acres of forestland that will be cleared in the four states where the REX-East Project will be constructed. This number is based on impacts as identified in Attachment 2. Construction and permanent forest impacts will be mitigated on a category basis using the following ratios:¹
 - Category A: Construction: 2.2:1, Permanent: 6:1
 - Category B: Construction: 1.2:1, Permanent: 3:1
 - Category C: Construction: 1.2:1, Permanent: 2.2:1
 - Category D: Construction: 1.2:1, Permanent: 2.2:1
 - Category E: Construction: 1.2:1, Permanent: 2.2:1
 - Category F: Construction: 1.2:1, Permanent: 2.2:1
 - Category G: Construction: 1.2:1, Permanent: 2.2:1

¹ Minimum ratios for construction and permanent impacts were determined using Habitat Equivalency Analysis

These mitigation ratios and the calculations used to reach the total number of forested acres that will be mitigated are summarized in Attachment 8. From that total, Rockies Express subtracted 66.2 acres because an additional 18.9 acres of permanent impacts on wetland communities will be mitigated through permit stipulations required by the COE (Attachment 6), and an additional 47.3 acres of permanent impacts on forests in floodways will be mitigated in Indiana through permit stipulations required by the IDNR (Attachments 7a and 7b). This total is subject to change as surveys and consultation continue, but the finalized total will be subtracted from Rockies Express' forest impacts mitigation total.

To accomplish this mitigation objective, Rockies Express will contribute funds to an account for the purpose of cooperating with the FWS to protect migratory bird habitat through the acquisition of lands (through fee title or perpetual conservation easements), implementation of habitat restoration, and management the lands for the benefit of migratory birds. The amount of the funds contributed by Rockies Express to ensure that the objectives of the habitat mitigation are met is based on land values, fee title costs, easement costs, habitat restoration costs, costs for administration of the fund, and other anticipated costs as necessary to meet the agreed upon mitigation acreage. Total acres for mitigation equal 3,785 (see Attachment 8). As explained above, Rockies Express is mitigating for 66.2 acres of forested impacts through other regulatory mechanisms. Subtracting these mitigated acres from the total number of acres results in the mitigation of 3,718 acres. Rockies Express will contribute \$4,150,000 in an effort to mitigate for the loss of forest habitat and to conduct appropriate studies. Accordingly, Rockies Express will contribute funds in this amount prior to the commencement of construction to be placed in an interest-bearing escrow account to be drawn upon by 1) qualified personnel, as described below, for pre-construction survey purposes at the successful completion of those surveys and, by 2) an appropriate conservation organization, as described below, for mitigation purposes and post-construction surveys at the successful completion and placement in-service of the project.

- Rockies Express will identify, with FWS concurrence, qualified personnel to conduct pre-clearing surveys to determine the number and species of nesting migratory birds along sensitive portions of the proposed right-of-way. Rockies will also assist the bird survey personnel in locating and identifying the routes. Based on the results of these surveys, the FWS may determine, in writing, that it would be safe to clear some areas prior to July 15. An appropriate conservation organization, as discussed above, will conduct post-construction surveys during subsequent years (years 2, 5, and 10 following construction) to determine if there is a reduction in utilization by nesting birds along non-located rights-of-way.

B. U.S. Fish and Wildlife Service

The FWS will continue to cooperate with Rockies Express in an effort to provide for the conservation of migratory birds while the company proceeds with the construction of the REX-East Project. The FWS will do the following:

- The FWS will continue to cooperate with Rockies Express through technical assistance and guidance concerning reasonable measures to be taken by Rockies Express to comply with MBTA and avoid or minimize the impacts to

migratory birds during construction, operation, and maintenance of the REX-East Project.

- Rockies Express will identify, with FWS concurrence, an appropriate conservation organization to establish an account(s) into which Rockies Express will contribute funds for the conservation of migratory bird habitat.
- Rockies Express will identify, with FWS concurrence, qualified personnel to conduct pre-clearing surveys to determine the number and species of nesting migratory birds along sensitive portions of the proposed right-of-way. Rockies will assist the bird survey personnel in locating and identifying the routes. Based on the results of these surveys, the FWS may determine, in writing, that it would be safe to clear some areas prior to July 15. An appropriate conservation organization, as discussed above, will conduct post-construction surveys during subsequent years (years 2, 5, and 10 following construction) to determine if there is a reduction in utilization by nesting birds along non-located rights-of-way. Costs for these latter surveys will also be paid from the mitigation fund described above as they are incurred.

III. ACKNOWLEDGEMENT

All promotional materials (i.e., signage, brochure, articles, etc.) for the Rockies Express Pipeline-East Project regarding migratory bird habitats preserved through acquisition of fee title or conservation easements and/or restored with contributed funds shall contain the following statement acknowledging the source of the contributed funds and technical assistance: “These lands are being conserved, in part, by funding and technical assistance made available as mitigation for impacts caused by construction and maintenance of Rockies Express Pipeline, LLC in partnership with the U.S. Fish and Wildlife Service.”

IV. GENERAL PROVISIONS

Limitations on Authorities:

Nothing in these Guidelines shall be construed as affecting the authorities of any party or as binding them beyond their respective authorities or responsibilities. Nothing in these Guidelines shall be construed as obligating the United States, their officers, agents or employees, to expend any funds in excess of appropriations authorized by law.

Third Party Challenges or Appeals

These Guidelines may not be the basis of any third party challenges or appeals.

No Restriction of Similar Agreement:

These Guidelines in no way restricts the Parties from participating in similar activities with other public or private agencies, organizations, or individuals. It is the express intent of the Parties that the contributed funds be leveraged to the maximum extent practicable by supplemental funding from any legally available source.

V. CONTACTS

Notifications required hereunder may be sent by first class mail, postage pre-paid, or by properly addressed electronic mail to the following principal contacts:

Rockies Express Pipeline, LLC
Alice Weekley
Project Manager
500 Dallas Street
Houston, TX 77002
alice_weekley@kindermorgan.com

U.S. Fish and Wildlife Service
Robyn Thorson
Regional Director, Region 3
1 Federal Drive
Fort Snelling, MN 55111
robyn_thorson@fws.gov

VI. ATTACHMENTS

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|---------------------|---|
| ATTACHMENT 1 | Rockies Express Pipeline - East Project Summary of Riparian Impacts Avoided through use of Horizontal Directional Drill Crossing Method |
| ATTACHMENT 2 | Rockies Express Pipeline - East Project Construction and Permanent Acreage Impacts to Forested Areas by Category |
| ATTACHMENT 3 | Rockies Express Pipeline - East Project Maps of Impacted Forest Areas Summarized in Attachment 2 |
| ATTACHMENT 4 | Rockies Express Pipeline - East Project MBTA Mitigation Decision Tree |
| ATTACHMENT 5 | Rockies Express Pipeline - East Project Areas of Fragmentation Concern and Pipeline Collocation for Migratory Birds as Outlined by the U.S. Fish and Wildlife Service on September 12, 2007 |
| ATTACHMENT 6 | Rockies Express Pipeline - East Project U.S. Army Corps of Engineers Preliminary Compensatory Mitigation Requirements for Permanent Impacts to Wetlands |
| ATTACHMENT 7 | Rockies Express Pipeline - East Project Indiana Department of Natural Resources Preliminary Compensatory Mitigation Requirements for Permanent Impacts to Forested Wetlands and to Forested Land within Floodways |
| ATTACHMENT 8 | Rockies Express Pipeline - East Project MBTA Mitigation Requirements Summary |

SIGNATORY PAGE

IN WITNESS WHEREOF, the Parties have caused these Guidelines to be executed by their respective authorized representatives.

Date: 3-24-08

By: Alice Weekley
CB

Alice Weekley, Project Manager
Rockies Express Pipeline, LLC

Date: 3-25-08

By: Lynn M. Lewis for

Robyn Thorson, Regional Director,
Region 3
U.S. Fish and Wildlife Service