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MEMORANDUM

FROM: Lane Kisonak Association of Fish and Wildlife Agencies
TO: Gordon Myers North Carolina Wildlife Resources Commission
Tamara Zmuda North Carolina Department of Justice
Judith Scarl AFWA Bird Conservation Committee
RE: State regulation of incidental or accidental take of migratory birds absent incidental take coverage under the Migratory Bird Treaty Act (MBTA)
DATE: February 5, 2019

In March 2018 at the 83rd North American Wildlife and Natural Resources Conference in Norfolk, Virginia, the AFWA Bird Conservation Committee asked AFWA legal staff and interns to compile the statutes of the 50 states and Washington, D.C. pertaining to regulation of incidental or accidental take of migratory birds. This request sought to address Solicitor’s Opinion M-37050 (Dec. 22, 2017) (“S.O.”) by the U.S. Department of the Interior (DOI) which interpreted section 2 of the Migratory Bird Treaty Act (MBTA), codified at 16 U.S.C. § 703, to not prohibit the incidental take of migratory birds resulting from otherwise lawful activity.

The objective of this assignment is to advise the Association in its process of concluding what, if any, response to the S.O. is appropriate, including recommendations, legislative or regulatory remedies, best management practices, or other vehicles.

This cover memo accompanies a set of spreadsheets containing each state’s migratory bird-related statutes, including relevant definitions, statements of jurisdiction, references to federal law and/or regulation, prohibited actions and exceptions, and provisions for enforcement and penalties. Each state’s spreadsheet also shows a determination suggested by AFWA legal staff as to whether that state’s statutes provide for any incidental or accidental take coverage identical or substantially similar to a reading of the MBTA that would prohibit such take.

Search methods

State statutes similar to MBTA’s take provisions were compiled from each state legislature’s online collection of 2017 statutes. Such statutes were pulled from the environmental, wildlife and/or natural resource titles of those statutes after thorough review. If a state defined terms pertaining to birds, such as “migratory (game) bird”, “game bird”, and “migratory waterfowl”, or “take/taking” or “waste”, those definitions were included. Definitions of more general terms such as “wildlife” were also included if the definition clearly extended to or explicitly mentioned birds. Statements of jurisdiction were included if they explicitly mentioned the MBTA and/or migratory birds, and/or state ownership thereof. Prohibited actions regarding the take of birds in general, exceptions, permits, and any carve-outs for incidental take were included. Some states included

enforcement provisions in conjunction with a unified series of violations, while others scattered them throughout a chapter, and others scattered them across different chapters or divisions of code.

After reviewing and compiling relevant statutes, a final double-check was conducted using the search functions of state websites on not only the state's wildlife code, but also all other titles in the state's entire statutory compilation, for mentions of terms such as “birds”, “migratory birds”, “eggs”, “nests”, and/or references to the MBTA. If the search resulted in any relevant statutes not initially included, those statutes would be included, and that section would be revisited to check for other possible inclusions.

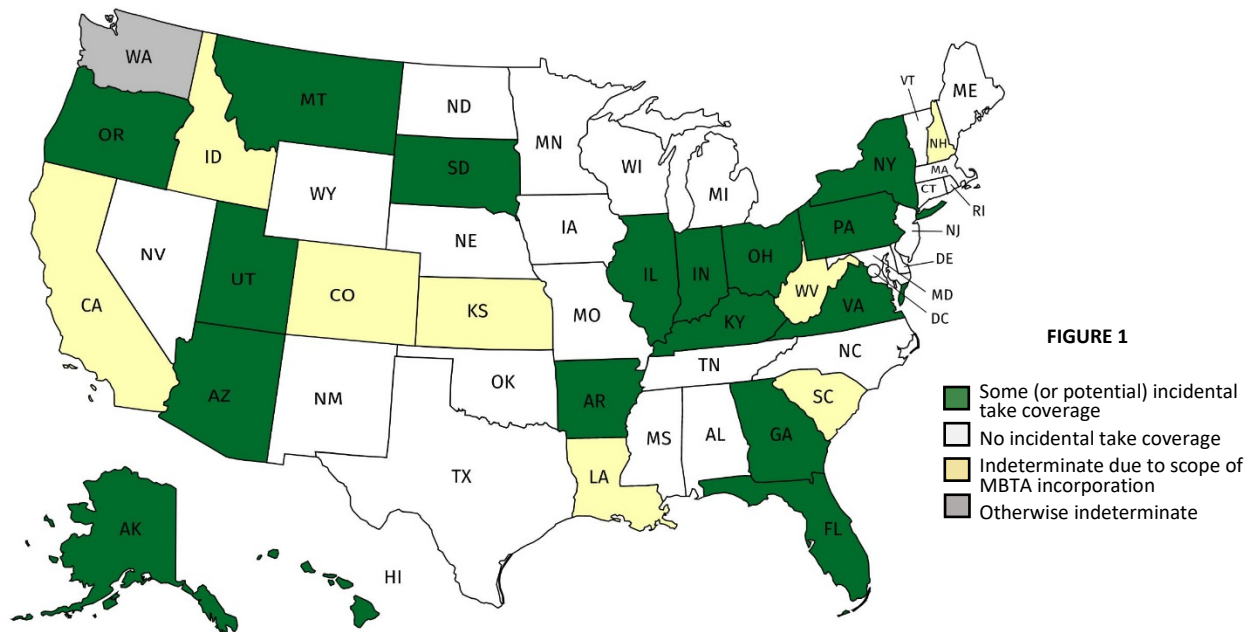
After receiving feedback on determinations from four states, AFWA legal staff reviewed relevant provisions in those states and updated this memo and spreadsheet in February 2019, resulting in the current version.

Results in brief

Of the 51 jurisdictions, seventeen (17) had provisions regulating some form of incidental, indirect, or accidental take, or potentially allowing commissions or agencies to make applicable rules (beyond take for scientific or religious purposes, or in response to predation or property damage); nine (9) were of indeterminate effect, and 25 had no such provisions (see Fig. 1 below). The provisions of the 17 states with possible coverage vary substantially in structure and come with unique limitations. A WestLaw search across these 17 states turned up zero cases where such provisions were enforced for incidental, indirect, or accidental take of migratory birds. These states are included even where potential authority may be narrow in order to foster as complete a discussion of the current state landscape as possible.

Below are brief explanations of each state that was determined to have laws with potential to fill, at least in part, the prosecutorial gap left by the S.O.

I. Positive Determinations



Alaska

Alaska defines “take” to mean “taking, pursuing, hunting, fishing, trapping, or *in any manner* disturbing, capturing, or killing or attempting” to do so for any fish or game. Ak. Stat. § 16.05.940(35) [emphasis added]. The “in any manner” formulation formed much of the basis for a reading of the MBTA as covering incidental take. (See M-37041, “Incidental Take Prohibited Under the Migratory Bird Treaty Act”, Jan. 10, 2017, at pp. 5-6 *et seq.*) Statutory prohibition in Alaska, however, centers around devices for, rather than manners of, taking. “A net, seine, lantern, snare, device, contrivance, and material while in use, had and maintained for the purpose of...taking...fish or game, contrary to law or regulation...is a public nuisance and is subject to abatement.” § 16.05.800. The use of the words “for the purpose of” may also preclude enforcement of incidental, indirect, or accidental take by way of any such device.

Arkansas

The Arkansas Game and Fish Commission (AGFC), under its state constitutional authority, conserves migratory birds by regulation, specifically through Ark. Admin. Code § 002.001-14.01. Section 14.01 generally prohibits the take, or attempt to take, wild birds or bird eggs except in compliance with federal permitting requirements under 50 C.F.R. § 21.12 (general), 21.43 (depredation), or for nuisance migratory birds. The chief statutory source for this authority appears to be Ark. Code § 15-45-210(a), which designates Arkansas a “sanctuary for wild fowl of all species except black birds, crows, and starlings” and provides that “[n]o person shall catch, kill, injure, pursue, or have in his or her possession, either dead or alive...any species of wild fowl except black birds, crows, and starlings unless authorized to do so by [AGFC] or by a federal regulation...”

Violation is a misdemeanor punishable by a fine of up to \$50. § 210(c).**Arizona**

It is unlawful in Arizona to “take or injure any bird or harass any bird upon its nest, or remove the nests or eggs of any bird, except as may occur in normal horticultural and agricultural practices *and* except as authorized by commission order” (emphasis added). Ariz. Rev. Stat. § 17-236(A). The Game and Fish Commission is authorized to issue “regulations pertaining to taking migratory birds in accordance with the migratory bird treaty act [sic] and regulations issued thereunder...” § 17-235. Absent other specific penalties, anyone who “violates or fails to comply with a lawful order or rule of the commission, is guilty of a class 2 misdemeanor.” § 17-309(B). It is possible for Commission to make and enforce rules prohibiting take of migratory birds for certain industrial activities or issue incidental take permits under § 17-236(A) but, as currently written, this authority is limited. Section 17-235’s invocation of the MBTA may limit its reach as long as the S.O. limits the MBTA’s coverage.

NOTE: On a conference call in February 2018 an Arizona state attorney did not know of any statute criminalizing incidental or indirect take, and said the state had relied on federal enforcement.

Florida

Florida defines “take” to mean “taking, attempting to take, pursuing, hunting, molesting, capturing, or killing any wildlife...or their nests or eggs, *by any means*, whether or not such actions result in obtaining possession of such wildlife...or their nests or eggs.” Fla. Stat. Ann. § 379.101(38) [emphasis added]. While lacking “in any manner” language, this statute offers some latitude for FFWCC to regulate take along a sliding scale of state of mind. Only in regulation does prohibition of take appear, referring back not to statute but to Art. IV, sec. 9 of Florida’s constitution. Fla. Admin. Code § 68A-4.001(1) (“No wildlife...or their nests, eggs, young, homes or dens shall be taken...in any manner or quantity at any time except as specifically permitted by these rules...”). By regulation Florida adopts the MBTA and implementing regulations. § 68A-16.001(1)(a), (2). As such, it may be easier for Florida than other states adopting the MBTA in statute to modify its approach in light of the S.O.

Georgia

Georgia defines “migratory game birds” to include brants, coots, cranes, doves, ducks, gallinules, geese, rails, snipe, swans, and woodcock. Ga. Code Ann. § 27-1-2(43). Under a statute presumably applicable to migratory birds, it is a misdemeanor violation to “disturb, mutilate, or destroy the dens, holes, or homes of any wildlife . . . in order to drive such wildlife out of such habitats.” §§ 27-1-30, 27-1-38. It is a separate offense to “hunt, trap, take, possess, ship, or transport any...bird or any part, nest, or egg thereof [with limited exceptions]...except as otherwise permitted by [Georgia] game and fish laws...” § 27-3-22. This section, however, is nested under the “Hunting” section of Georgia’s fish and game code and may not be intended to apply to incidental or accidental take pursuant to non-hunting activity. Any regulation of incidental take could have to target habitat destruction rather than take of individual migratory birds.

Hawaii

While the Hawaii Department of Land and Natural Resources’ (DLNR) general authority to issue take permits is limited to scientific, educational, distributional, captivity, or for crop destruction, Haw. Rev. Stat. § 183D-61, Hawaii’s take prohibition is broad enough to prosecute some instances of incidental take. Except as permitted under § 183D-61, “no person shall intentionally, knowingly, or *recklessly* take, catch, injure, *kill*, or *destroy*, or attempt to take, catch, injure, kill, or destroy, any wild bird . . . or to damage or destroy a nest of any wild bird. § 183D-62 [emphasis added]. Whether it be intentional, knowing, or reckless, a violation of §183D-62 is a misdemeanor punishable by a fine of at least \$200 and/or one year in prison. § 183D-5(b).

Recklessness is defined in Hawaii’s penal code as “consciously disregard[ing] a substantial and unjustifiable risk” of specified circumstances or of the likelihood of causing a certain result, “involv[ing] a gross deviation from the standard of conduct that a law-abiding person would observe in the same situation.” § 702-206(3)(b)-(d).

Illinois

Under Illinois statute: “It shall be unlawful to take, possess, transport or use migratory game birds except during such periods of time, and only in such manner and numbers, as may be permitted pursuant to the [MBTA]...and further as permitted by this Act and State regulations made pursuant to this Act. The Director shall give due notice of any regulations, or any

administrative rule, issued pursuant to [the MBTA] and observe the provisions thereof in the enforcement of this Act.” 520 ILCS 5/2.18. The Wildlife Division of Illinois DNR has historically interpreted this provision to cover incidental take, but notes that the change in federal MBTA policy may cause a change in state interpretation.

Indiana

Unlike Georgia’s individual take prohibition, Indiana’s is not nested with provisions regulating hunting, and therefore may be construed as broadly applicable to the take of migratory birds for a range of purposes. “A person may not...take...a migratory bird designated in [Article 22] or a part, nest, or egg of a migratory bird except as otherwise permitted” Ind. Code Ann. § 14-22-6-2. A violation of this section is a civil infraction unless a person’s actions were knowing or intentional, in which case the actions are punishable as a criminal misdemeanor. § 14-22-38-1. Specifically during the closed season no one may “take or possess *for any purpose* . . . a migratory bird or [its] nest, eggs, or increase” without a permit or license. § 14-22-6-3 (emphasis added). Each single take is a separate offense, first punishable with a fine of \$20 and each subsequent offense punishable with a fine of \$35. § 14-22-38-5(a). Section 4-8-2-278 defines “take” to mean “to kill, shoot, spear, gig, catch, trap, harm, harass, or pursue a wild animal” or attempt to do so. Separately, the Director of Indiana’s Department of Natural Resources shall recover damages and restoration costs from the “accidental[], negligent[], or willful[]” release or discharge of waste materials, chemicals, or other substances into any state water or onto any public or private land which results in the killing of animals. § 14-22-10-6(a)-(b).

The sum total of these provisions appears to afford Indiana a relatively high degree of authority to regulate incidental take.

Kentucky

While Kentucky statute refers to the MBTA (“No person shall take...any migratory birds, except as authorized by the [MBTA] as amended and regulations under it.” Ky. Rev. Stat. § 150.330(1)), Ky. Rev. Stat. § 150.320, according to a state biologist, is cited for general protection of native birds and may offer some protection from incidental take for many migratory birds. In relevant part the section reads: “No person shall take any wild bird except game birds or live raptors for which there is an open season, either under the laws of Kentucky and the regulations of the department or the laws of the United States...No person shall take, disturb, or destroy the nest or eggs of any wild birds except for raptors as prescribed by regulation. § 150.320(1), (3).

Montana

Montana does not differentiate according to migratory versus resident birds or among activities. Broadly, it is unlawful to “kill . . . any wild bird, other than a game bird, or any part of the plumage, skin, or body of the bird . . . or to take or destroy [its] nest or eggs . . . except under a certificate...or permit issued by the director” of Montana’s Department of Fish, Wildlife and Parks. Mt. Code § 87-5-201(1). Violations of this section results in fines of \$50-\$1,000 and/or imprisonment of up to 6 months, and may result in relinquishment of hunting licenses or payment of restitution. § 87-6-301.

More than most states, the link between violation and penalty of loss of hunting license may indicate legislative intent to restrict prosecution to instances of deliberate take.

New York

New York prohibits take of any protected wildlife unless allowed in code or by permit. N.Y. Env'tl. Conserv. L. § 11-0107(1) (using “in any manner, number, or quantity” language). Nests of protected birds are also protected from intentional “rob[bing] or “willful” destruction, while nest boxes are protected from disturbance in general. § 11-0505(5), (7). “Take” is defined in § 11-0103(13) as “pursuing, shooting, hunting, killing, capturing, trapping, snaring and netting...wildlife...and all lesser acts such as disturbing, harrying or worrying, or placing, setting, drawing or using any net or other device commonly *used to take any such animal.*” While the definition of take includes active means flagged by the S.O. as “active” and not evincing “passive” or unintentional states of mind, the general prohibition’s “in any manner...” language may suffice.

While as of this writing the New York Department of Environmental Conservation is authorized by statute to “adopt rules and regulations...*no less restrictive than* federal regulations made under authority of the [MBTA,]” § 11-0307(1). [emphasis added], legislation will take effect on Dec. 31, 2018 directing NYDEC to “adopt rules and regulations...*consistent with* federal regulations made under authority of the [MBTA]” The extent to which NYDEC’s statutory authority to regulate incidental take may shift on Dec. 31 could depend on whether pending litigation determines that the S.O. constitutes a final and binding regulation.

Ohio

More even than Indiana, Ohio’s regulatory regime for migratory birds contemplates issuance of permits for industrial activities. The Chief of the Division of Wildlife may regulate the taking of wild animals “at any time and place or in any number, quantity, or length, and in any manner, and with such devices as the chief prescribes” Ohio Rev. Code § 1531.08(A). (See also Ak. Stat. § 16.05.940(35) (using “in any manner”). Furthermore, no one may “catch, kill, injure, [or] pursue . . . any bird other than a game bird” or destroy its eggs, nest, or young, except as permitted by the Ohio’s Division of Wildlife. § 1533.07. While accompanying statutes suggest that the Chief is primarily intended to regulate acceptable methods of taking for migratory game birds as pertains to hunting, *see* §§ 1531.02, 1531.101, 1533.02, permits are specifically provided for energy facilities “whose operation may result in the incidental taking of a wild animal” § 1533.081. A violation of § 1533.07 is a first-degree misdemeanor that may result in a fine of up to \$1,000, § 1533.99(C), while a violation of § 1533.081 or other offenses in the same chapter is a fourth-degree misdemeanor that may result in a fine of up to \$250. *Id.*; § 2929.28(A)(2)(a)(iv). Restitution for the value of the birds may also be imposed. § 1533.99(G).

Finally, anyone who “caus[es] or allow[s] an unauthorized spill, release, or discharge of material into or on any land or any ground or surface water or into the air that results in the death of a wild animal” must pay the costs of an investigation into such a death. § 1531.202.

Oregon

Oregon’s wildlife disturbance statutes are similar to Georgia’s habitat disturbance statute, Ga. Code § 27-1-30, but are not indicated to apply mainly to hunting. Or. Rev. Stat. §§ 497.308,

498.006. The State Fish and Wildlife Commission may issue permits for the otherwise unlawful take of wildlife or removal from habitat, and determine the terms and conditions thereof. §§ 497.308(1)-(2), 498.012(1). A breach of these permitting conditions, as well as of Oregon's wildlife disturbance statute, is a Class A misdemeanor if the violator had a culpable mental state. § 496.992(1). If take or removal of a *non*-game migratory bird from its habitat is done without a culpable mental state, it is a Class A violation. § 496.992(3). If the take or removal is of a migratory *game* bird, it is a Class C violation if the offense is committed without a culpable mental state. § 496.992(4). Oregon's distinction between mental states for take or removal is relatively uncommon among states. While Indiana, Hawaii, and Utah invoke reckless or negligent states of mind, Oregon is the only state to explicitly distinguish between culpability and non-culpability.

Finally, section 498.012(2)(b) provides that, for wildlife damage and public health risks, “[n]othing . . . requires the [C]ommission to issue a permit for the taking of any wildlife species for which a [U.S. FWS] permit is required pursuant to the [MBTA.] But nothing in Oregon statute appears to restrict the commission from issuing permits where FWS permits are not required.

Pennsylvania

Pennsylvania statute states that the MBTA is “hereby made a part of” its conservation title. 34 Pa. Cons. Stat. § 2103(a). What distinguishes Pennsylvania from states like New York is the further provision that “[f]ederal regulations shall not apply if commission regulations or other provisions of this title prescribe stronger or more detailed restrictions for the taking of migratory birds” *Id.* Violation of regulations made pursuant to section 2103(a) are fifth degree offenses punishable with fines of \$100-200. § 925(b)(9).

It is a first degree offense punishable by a \$1,000-1,500 fine and/or up to 3 months imprisonment to “drive or disturb game or wildlife except while engaged in the lawful activities set forth in this title.” §§ 2162(a), 925(b)(5). A federal court in Connecticut read § 2162(a) to “prohibit[] any harassment of wildlife, regardless of intent, except in the course of a lawful hunt.” *Dorman v. Satti*, 678 F.Supp. 375, 377 n.1 (D. Conn. 1988). Other than that, it is not cited in cases available on WestLaw. It is a fifth degree offense for each bird to “kill or attempt or conspire to kill or take or attempt, assist, aid or abet in the taking of any protected birds” § 2164, or nest or egg. § 2165.

While Pennsylvania's “take” definition does not use “in any manner” or “by any means”, § 102, the proviso in § 2103(a) implies a robust foundation for authority to exceed the MBTA's protections in fulfillment of its purposes. However, statutory permitting authority currently exists only for collecting birds, nests or eggs for exhibition in museums, scientific study, or school instruction. § 2922.

South Dakota

Depending on the definition of “wanton”, South Dakota may be able to prosecute and issue permits for incidental take. Section 41-1-4 provides that it is a Class 2 misdemeanor to “wantonly waste or destroy any of the birds, animals, or fish of the kinds protected by the laws of this state.” One such protective law is section 41-11-2, which provides, with limited exceptions, that “no person may kill . . . any wild bird other than small game” Another is section 41-11-4, which

provides that, aside from open season, “no person may hunt, *take*, [or] *kill* . . . any . . . wild duck of any variety, wild geese of any variety, brant, or any variety of aquatic fowl . . . ” § 41-11-4 [emphasis added]. The former appears more promising than the latter.

Next, “except as permitted by *statute*, no person may take . . . or break or destroy any nest or the eggs of the kinds of birds, the taking or killing of which is at any time or at all times prohibited.” § 41-11-7 (emphasis added). The restriction to statutory authority likely limits South Dakota’s ability to regulate certain forms of incidental take permit by rulemaking.

Finally, the definition of “wanton” captures some of the scenarios covered by an incidental-take-inclusive reading of the MBTA. The South Dakota Supreme Court has defined “willful and wanton misconduct” as “something more than ordinary negligence but less than deliberate or intentional conduct . . . [i.e.,] act[ing] or fail[ing] to act, with a conscious realization that injury is a *probable*, as distinguished from a *possible* . . . result of such conduct.” *VerBouwens v. Hamm Wood Products*, 334 N.W. 2d 874, 876 (S.D. 1983) [emphasis added]. The rescinded S.O., M-37041, similarly supported prosecuting incidental take where migratory bird deaths could be “reasonably anticipated or foreseen as a natural consequence” such that the action at issue was a proximate cause of the deaths. M-37041 at 20-22. *See also* Section 1(a) of the Bald and Golden Eagle Protection Act, codified at 16 U.S.C. § 668(a):

Whoever...without being permitted to do . . . shall knowingly, or with *wanton disregard* for the consequences of his act take . . . at any time or in any manner any bald eagle . . . or any golden eagle, alive or dead, or any part, nest, or egg thereof . . . or whoever violates any permit or regulation issued pursuant to this subchapter, shall be fined not more than \$5,000 or imprisoned not more than one year or both [emphasis added].

Utah

The Utah Wildlife Board has substantial authority to issue rules, proclamations, or orders prohibiting or regulating the taking of wildlife including migratory birds or parts thereof, by any “method, means, process or practice not specifically authorized . . . ” in Utah’s Wildlife Resources Code, or with any “weapon, ammunition, implement, tool, device, or any part of these not specifically authorized by the Code or the Board. Utah Code Ann. § 23-20-3(1). A violator is criminally negligent (under a standard set forth in §76-2-103(4), if s/he “ought to be aware of a substantial and unjustifiable risk that [a] result will occur . . . [to] a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise in all the circumstances as viewed from the actor’s standpoint). § 23-20-3(2). Such criminal negligence, similar to Hawaii’s, is a Class B misdemeanor. *Id.*

Additionally, any take in violation of § 23-20-3(1) constitutes “wanton destruction of protected wildlife” punishable as a third-degree felony if the aggregate value of destroyed wildlife exceeds \$500. § 23-20-4(3). Restitution is \$100, \$15, or \$5 per animal for most specified migratory birds. *Id.*

- NOTE: Utah, like Arizona, felt that its statute did not prohibit incidental take. This could perhaps owe to the high bar for a criminally negligent state of mind.

Virginia

Virginia Code § 29.1-521(A)(10) makes it unlawful to “hunt, trap, take, capture, or kill...by any means whatever...at any time or in any manner, any wild bird...or the carcass or any part thereof, except as specifically permitted by law and only by the manner or means and within the numbers stated.” Violation of this provision or any implementing rules is a class 3 misdemeanor punishable with fines of up to \$500. §§ 18.2-11(c), 29.1-521(D), 29.1-505.

II. Indeterminate

To categorize Arkansas and Washington as “indeterminate” may overstate the suitability of the statutes of those states with positive determinations. But these two states uniquely have statutes that defy analysis on quite the same lines as the above states’. The others are assigned indeterminate status for the collective, simpler reason that they incorporate the MBTA into their statutes without providing for the authority their agencies to make stronger or more restrictive rules or regulations with accompanying permit systems.

Washington

For species that are not designated threatened or sensitive, Washington prohibits the unauthorized or unpermitted hunting, fishing, malicious taking, harassment, and possession of wildlife, and malicious destruction of nests and eggs thereof. Wa. Rev. Code § 77.15.130(1)(a). For threatened or sensitive species, Washington prohibits hunting, fishing, and intentional take, harassment, and possession of wildlife, and intentional destruction of nests and eggs without a permit. § 77.15.130(1)(c). For game birds worth less than \$250, it is an infraction to “recklessly allow the game birds to be wasted”. § 77.15.160(2)(c). For game birds worth over \$250, it is a gross misdemeanor to recklessly allow such waste. § 77.15.170.

Washington’s sensitive species list (<https://wdfw.wa.gov/conservation/endangered/list/Bird/>) includes many of the species protected under the MBTA at 50 C.F.R. § 10.13. But the intentional take standard likely precludes enforcement of incidental or accidental take under § 77.15.130(1)(c). The reckless waste statute could provide a hook for enforcement, but the list of game bird species has little overlap with the state sensitive species or federal MBTA lists.

California, Colorado, Idaho, Kansas, Louisiana, New Hampshire, South Carolina, and West Virginia

These states are distinct from others with indeterminate status because they explicitly refer to or incorporate the federal MBTA and its implementing regulations.

- **California:** “It is unlawful to take or possess any migratory nongame bird as designated in the [MBTA] or any part of such migratory nongame bird except as provided by rules and regulations adopted by the Secretary of the Interior under provisions of the [MBTA].” Ca. Fish & Game Code §3513.

- **Colorado:** “Any change made by the [U.S. DOI], [FWS], or any new ruling made by the [S]ecretary of the [Interior] under said act which is applicable to the state of Colorado shall be in effect in the state of Colorado and shall be enforced by the division.” Co. Rev. Stat. § 33-1-115(1).
- **Idaho:** “No person shall hunt, take or have in possession any migratory birds except as provided by federal regulations made pursuant to the federal [MBTA], as amended, and in accordance with related rules and proclamations promulgated by the commission.” Id. Rev. Code § 36-1102(a)(1).
- **Kansas:** “It is unlawful to take...by any means or in any manner any migratory bird or birds in Kansas except as authorized and permitted by federal regulations now in force or hereafter adopted pursuant to authority provided by the [MBTA].” Ks. Stat. § 32-1008(b).
- **Louisiana:** “The open season for taking migratory game birds and the bag limit and other rules and regulations affecting migratory game birds shall conform to federal regulations promulgated under the treaty between the United States and Great Britain for a period of years in the case of certain species. No person shall take...a greater number of migratory game birds than specified under federal and state regulations.” La. Rev. Stat. § 56:115(C). “Notwithstanding any other provision of law to the contrary, any violation of the [MBTA] of 1972, as amended.” § 56.118(A).
- **New Hampshire:** “No person shall...take...any migratory game bird or part thereof, except during such time and in such manner and numbers as may be prescribed by regulations promulgated under the [MBTA], which regulations are hereby made a part of the game law of the state.” N.H. Rev. Stat. § 209:6(I).
- **South Carolina:** “The Federal [MBTA] and its implementing regulations are the law of this State...A violation of the [MBTA] or its implementing regulations or a violation of regulations set by the board is a misdemeanor.” S.C. Code § 50-11-10.
- **West Virginia:** “Except as authorized by the director or by law, it is unlawful at any time for any person to...(16) [h]unt, catch, take, kill, capture, pursue, transport, possess, or use any migratory game or nongame birds except as permitted by the [MBTA] and its regulations.” W. Va. Code § 20-2-5(a).

Having incorporated both the MBTA and regulations and rulings made by the Secretary of the Interior into statute, these states (with the possible exception of West Virginia) are more limited than those states with positive determinations to regulate incidental take of migratory birds.

III. States with bills pending

Three state legislatures have introduced bills in order to partially or fully adapt state codes to prosecute incidental, accidental, or indirect take of migratory birds.

California – A.B. 2627

Of the bills pending in state legislatures, California's would go the farthest in creating a statewide system for regulating and permitting the incidental take of migratory nongame birds. A.B. 2627 would permit any entity to take such birds if "incidental to otherwise lawful activity" upon "certification to the [California Department of Fish and Wildlife] of the entity's implementation of best management practices for avoiding, minimizing, and mitigating take" to avoid any "significant adverse impact". The bill would require permitted entities to submit annual status reports, revoke entities' permits if they fall out of compliance and do not cure after a grace period, and carve out limited circumstances where incidental take is generally lawful (routine and ongoing farming or ranch activity, or activities that result in take but have no significant adverse impact).

New York – A. 8779 / A. 11093

Two bills that were considered in the New York State Assembly would take more limited action to conserve migratory birds, neither of which involve regulating incidental take *per se*. A.B. 8779 would work to deter bird collisions on construction sites in New York City by requiring the adoption of rules establishing deterrent safety measures and creation of best practices for use of glass. A.B. 11093 would amend the state code by requiring the development of pamphlets on 1) the importance of using flashing lights rather than static lights on towers, and 2) for wind turbine operators, flight routes of migratory birds.

Maryland – H. 986 / S. 1009

Two companion bills in the Maryland legislature would establish standards for State buildings to minimize bird collisions, especially through restrictions on the use of glass or plexiglass, and encourage the inclusion of elements that preclude bird collisions (e.g., facades, netting, screens, or ultraviolet-reflective patterned glass). These bills did not make it out of their respective committees.

So far, only California's seeks to substantially fill the enforcement gap opened by the Solicitor's Opinion.