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Comments regarding:

February 3, 2020 Notice of Proposed Rule: Regulations Governing Take of Migratory Birds; and

February 3, 2020 Notice of Intent to Prepare Environmental Impact Statement for the Proposed Regulations Governing Take of Migratory Birds

Submitted by:

Energy and Wildlife Action Coalition

Filed electronically to the attention of:

Attn: Docket No. FWS-HQ-MB-2018-0090
U.S. Fish & Wildlife Service
MS: JAO/1N
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The Energy and Wildlife Action Coalition (EWAC)¹ submits these comments in response to the U.S. Fish and Wildlife Service's (USFWS) February 3, 2020, Proposed Rule Amending Regulations Governing Take of Migratory Birds (Proposed Rule)² and the accompanying Notice of Intent to prepare an Environmental Impact Statement for the Proposed Rule (NOI).³

The electric power industry is in the midst of a major transformation. This transformation includes a major shift to less carbon intensive electricity generation, including carbon free wind and solar generation. It also includes building new power lines to bring these new sources of clean generation to market and upgrading our existing energy grid to facilitate this transformation. As it relates to this proposed rule, climate change has been identified as an existential threat to migratory birds, and to address this threat the electric power sector is poised to make great investment in new infrastructure to achieve further carbon reductions.⁴ However, to achieve this transformation, clear regulatory certainty is needed.

The Migratory Bird Treaty Act (MBTA)⁵ makes it a crime to pursue, hunt, take, capture or kill any migratory bird.⁶ On December 22, 2017, the Solicitor's Office of the Department of the Interior issued a legal opinion, M-37050, "The Migratory Bird Treaty Act Does Not Prohibit Incidental Take" (M-Opinion), concluding that the MBTA's prohibitions apply only to actions directed at migratory birds, their nests, or their eggs and do not apply to incidental take. The Proposed Rule would codify the M-Opinion.

I. The Proposed Rule Would Resolve Long-Standing Legal Uncertainty Regarding the Scope of Criminal Liability Under the MBTA

From enactment of the MBTA in 1918 until the 1970s, the statute was applied to market hunting and poaching and was not enforced against what we now think of as incidental take. Beginning in the 1970s, however, USFWS began adopting the position that the MBTA prohibited conduct that unintentionally or incidentally resulted in migratory bird mortality.⁷ But courts in different parts of the country have had varying opinions on whether that interpretation of the statute was correct.

The U.S. Courts of Appeals for the Fifth, Eighth and Ninth Circuits, as well as district courts in the Third and Seventh Circuits, have held that the MBTA's prohibition is limited to intentional

¹ EWAC is a national coalition formed in 2014 whose members consist of electric utilities, electric transmission providers, and renewable energy entities operating throughout the United States, and related trade associations. The fundamental goals of EWAC are to evaluate, develop, and promote sound environmental policies for federally protected wildlife and closely related natural resources while ensuring the continued generation and transmission of reliable and affordable electricity. EWAC supports public policies, based on sound science, that protect wildlife and natural resources in a reasonable, consistent, and cost-effective manner. EWAC is a majority-rules organization and therefore specific decisions made by the EWAC Policy Committee may not always reflect the positions of every member.

² 85 Fed. Reg. 5915 (Feb. 3, 2020).

³ 85 Fed. Reg. 5913 (Feb. 3, 2020).

⁴ Audubon's Birds and Climate Change Report, http://climate.audubon.org/sites/default/files/NAS_EXTBIRD_V1.3_9.2.15%20lb.pdf

⁵ 16 U.S.C. §§ 703-711.

⁶ 16 U.S.C. §§ 703(a), 707(a).

⁷ See 85 Fed. Reg. at 5920.

conduct, directed at migratory birds,⁸ while the U.S. Courts of Appeals for the Second and Tenth Circuits, as well as district courts within the Ninth and D.C. Circuits, have held that the MBTA also prohibits the unintentional or incidental take of migratory birds.⁹ Thus, despite the pre-2017 USFWS position that the MBTA prohibits incidental take, in significant portions of the country the courts have ruled that is not the case. As discussed in the preamble for the Proposed Rule,¹⁰ the split among the courts creates a patchwork of different legal standards applicable in different regions of the country.

As a federal law, the MBTA should be given a uniform interpretation across all regions of the country. However, as a result of the court split, and in the absence of the Proposed Rule, the same activities that are entirely in compliance with the MBTA in some parts of the country could give rise to criminal liability elsewhere. As a result, EWAC members that operate across the boundary lines of multiple states and judicial circuits face potential liability under the MBTA for some of their operations but not for others.

EWAC has reviewed a range of comments that already have been submitted to the docket for the Proposed Rule. Those critical of the Proposed Rule generally focus on the pre-2017 USFWS interpretation and largely ignore this split in how the courts have interpreted the MBTA. If the Proposed Rule is not adopted, then the various court rulings that the MBTA does or does not apply to incidental take remain in place and the uncertainty that stems from this split is unresolved. The legal uncertainty that results from this split presents an untenable situation.

II. EWAC's Members Expend Significant Resources to Conserve Migratory Birds and Their Habitat, and Do So for Reasons Unrelated to The MBTA

Many electric companies and renewable energy companies have a long history of wildlife and natural resource conservation, which includes protection of migratory birds, and they have many reasons to continue those conservation efforts regardless of the scope of criminal liability under the MBTA. Companies' reasons for employing measures that benefit migratory birds include safety, reliability, wildfire prevention, sustainability goals, and compliance with other conservation laws. The Endangered Species Act, the Bald and Golden Eagle Protection Act, state endangered species acts and other state wildlife laws, federal land management plan requirements, and conditions that result from environmental reviews conducted under the National Environmental Policy Act (NEPA) for other federal approvals may also require protection of bird species. These other regulatory obligations, as well as customer and investor expectations that electric power be increasingly environmentally friendly, in addition to being reliable and affordable, provide EWAC's members with ample incentives to reduce impacts on wildlife and other natural resources, including migratory birds.

⁸ *United States v. Citgo Petroleum Corp.*, 801 F.3d 477 (5th Cir. 2016); *Newton County Wildlife Ass'n v. U.S. Forest Serv.*, 113 F.3d 110 (8th Cir. 1997); *Seattle Audubon Soc'y v. Evans*, 952 F.2d 297 (9th Cir. 1991); *Mahler v. U.S. Forest Serv.*, 927 F.Supp.2d 1559 (S.D. Ind. 1996); *U.S. v. Brigham Oil & Gas, L.P.*, 840 F.Supp.2d 1202 (D.N.D. 2012); *Curry v. U.S. Forest Serv.*, 988 F.Supp. 541, (W.D. Pa. 1997).

⁹ *U.S. v. FMC Corp.*, 572 F.2d 902 (2nd Cir. 1978); *U.S. v. Apollo Energies, Inc.*, 61 F.3d 679 (10th Cir. 2010); *U.S. v. Corbin Farm Service*, 444 F.Supp. 510 (E.D. Cal. 1978); *Ctr. For Biological Diversity v. Pirie*, 191 F.Supp.2d 161, 175 (D.D.C. 2002).

¹⁰ 85 Fed. Reg. at 5922-23.

The electric power industry, wildlife resource agencies, conservation groups, and manufacturers of avian protection products have worked together for decades to understand bird-power line interactions for the purpose of reducing avian mortalities and associated power outages. The Avian Power Line Interaction Committee (APLIC), established in 1989, has brought together the electric industry, wildlife resource agencies, and technology developers to further develop measures to protect avian resources while also enhancing reliable energy delivery. APLIC has worked in partnership with USFWS, environmental advocacy groups and other stakeholders to educate stakeholders on avian impacts and electricity delivery and to develop and implement industry recommended practices and innovative solutions to protect birds where warranted, which many APLIC members follow even in the regions where courts have ruled that incidental take is not a violation of the MBTA. In 2005, APLIC and USFWS jointly developed and released the Avian Protection Plan (APP) Guidelines which provide a toolkit for individual companies to tailor programs to meet their specific avian program needs for power lines. In 2006, APLIC followed up with the “Suggested Practices for Avian Protection on Power Lines: State of the Art 2006” and in 2012 with “Reducing Avian Collisions with Power Lines: State of the Art in 2012.” These documents, as well as others produced and developed by APLIC working with wildlife agencies, are recognized as the leading resource for avian protection from power line interactions throughout the world.

Renewable energy companies also have worked over the past several decades, in partnership with agencies and conservation organizations, to develop practices designed to reduce avian impacts at wind and solar facilities. One of the most prominent examples is the 2012 Land-based Wind Energy Guidelines (WEGs) that were developed by the USFWS based on the consensus recommendations of a collaborative federal advisory committee, which included representatives from federal and state agencies, conservation organizations, tribes, and industry. The WEGs were designed to avoid, minimize, and mitigate for the wind industry’s impacts to migratory birds and other wildlife and their habitats more broadly and are deemed by many to be the most comprehensive set of voluntary measures being utilized by any industry nationally. They are consistently applied to wind energy project development, including in regions where courts have ruled that the MBTA does not apply to incidental take.

Utility-scale solar energy project developers also have put extensive efforts into understanding their potential impacts on migratory birds including the careful siting of new solar projects to avoid and minimize wildlife conflicts and habitat impacts. Over the last several years the solar energy industry has funded significant research to determine potential causes for, and the extent to which, solar energy development and operations may impact migratory birds and what measures might be employed during the siting, construction, and operations of facilities to avoid or minimize the potential effects.

Some of EWAC’s members also provide funding to numerous bird-related conservation and education programs and organizations, including wildlife rehabilitation centers, birds of prey programs, local bird conservation groups, and other similar groups and initiatives. Finally, several EWAC members also participate in collaborative efforts with federal and state agencies and conservation organizations to: (1) better understand wind turbine and solar panel risks and impacts on bird species, and (2) design approaches to further reduce the risks and impacts.

However, despite all these proactive efforts, under a strict reading of the law and applying the notion that incidental take is a violation, as a strict liability law, MBTA would allow the government to initiate enforcement actions against a company for the loss of migratory birds at their facilities.

III. The MBTA's Sole Remedy of Criminal Enforcement Is Not Well Suited to Broad Conservation Objectives and Invites Inconsistent Treatment

MBTA liability is triggered by the affirmative act of pursuing, hunting, taking, capturing or killing a migratory bird, or attempting to do so.¹¹ As discussed above, USFWS began taking the position in the 1970s that the MBTA imposed criminal liability on conduct that was not intended to result in the taking or killing of migratory birds (incidental take).¹² The Second Circuit, among the first courts to consider that argument, while agreeing that incidental take was a violation of law, balked at the breadth of the government's reading of the MBTA in its 1978 decision in *U.S. v. FMC Corp.*:

Of course, this is a *reductio ad absurdum* argument but so is the Government's claim that the statute as to killing is "without limitation" (Appellee's Br. p. 13). Certainly construction that would bring every killing within the statute, such as deaths caused by automobiles, airplanes, plate glass modern office buildings or picture windows in residential dwellings into which birds fly, would offend reason and common sense.¹³

The Second Circuit nevertheless found FMC liable for bird deaths that resulted from pesticide wastes the company washed into a pond on its property because it found pesticide manufacturing was an abnormally hazardous activity and the company should have taken steps for preventing birds from coming into contact with their waste, which had high potential of causing harm to birds utilizing the facility ponds.¹⁴ The court also limited its holding: "Imposing strict liability on FMC in this case does not dictate that every death of a bird will result in imposing strict criminal liability on some party."¹⁵ Subsequent courts came down on either side of the issue of whether the MBTA applies to incidental take, resulting in the circuit court split discussed above.

In January 2017, Interior's Office of the Solicitor issued an opinion articulating the pre-2017 interpretation of the MBTA as imposing criminal liability on incidental take: "the MBTA's prohibitions on taking and killing migratory birds apply broadly to any activity, subject to the limits of proximate causation, and are not limited to certain factual contexts. Therefore, those prohibitions can and do apply to direct incidental take."¹⁶ This pre-2017 interpretation extended criminal liability to "any and all" activities that proximately (directly) cause migratory bird mortality – not just commercial activities (prohibitions "not limited to certain factual contexts").¹⁷ That opinion was suspended in February, 2017, then withdrawn and replaced by the M-Opinion in December 2017.¹⁸

¹¹ 16 U.S.C. § 703(a).

¹² See 85 Fed. Reg. at 5920.

¹³ 572 F.2d at 905.

¹⁴ 572 F.2d at 908.

¹⁵ *Id.*

¹⁶ Interior Solicitor's Opinion M-37041 at 30 (Jan. 10, 2017).

¹⁷ *Id.*

¹⁸ Interior Solicitor's Opinion M-37050 at 1 (Dec. 22, 2017).

Under the pre-2017 interpretation of the MBTA, criminal liability is triggered by causing migratory bird mortality, without regard to any efforts a party makes to avoid or minimize that mortality. Those efforts could be accounted for as a matter of prosecutorial discretion as the agency decides whether to bring charges but would be irrelevant as to whether the statute was violated.

Thus, under the pre-2017 interpretation of the MBTA, even if an electric company or renewable energy company fully implements all the industry's best practices to avoid and minimize migratory bird mortality, it still could be held criminally liable for any bird deaths that nevertheless occur. The law would provide no effective means of avoiding liability, and no alternative penalty. This is both arbitrary and flawed, and it illustrates the fundamental weakness of the MBTA as a centerpiece of migratory bird conservation.

EWAC agrees that the MBTA originally achieved monumental conservation benefits by stopping the poaching, market hunting and killing for feather trade of migratory birds that Congress intended to stop by enacting the MBTA. But the MBTA is an old statute that predates all of our nation's modern conservation laws. It has not materially changed since its adoption in 1918, even though the challenges facing migratory bird conservation have evolved over the last 100 years. The criminal penalty that it imposes on the unauthorized killing of migratory birds is the only tool that it offers to foster conservation. Whereas, modern environmental statutes typically provide meaningful standards for evaluating conduct and reserve criminal penalties for the most egregious acts and for those who knowingly and willfully break the law.¹⁹ The statute is inherently limited, inflexible, and its one-size-fits-all remedy invites inconsistent, and even arbitrary, outcomes.

It is important to recognize how the sole remedy of criminal sanctions distorts the potential application of the MBTA to incidental take. As a threshold matter, the uncertainty regarding whether the MBTA applies to incidental take is itself traceable to the statute's sole reliance on criminal penalties – an appropriate deterrence for illegal hunting or trade, not unintentional take. Prior to issuance of the M-Opinion, a company had to risk criminal prosecution to present the question to a court. CITGO, for example, was convicted of violations of the MBTA in federal district court before obtaining a ruling from the Court of Appeals for the Fifth Circuit that the MBTA does not apply to incidental take.²⁰

The absence of any tool other than criminal sanctions also distorts efforts to enforce the MBTA. The statute provides no standards to guide the agency's decision whether to prosecute. If the MBTA is read to apply to any and all take of migratory birds, the agency is left to decide, with no clear direction, what causes of bird mortality to pursue, and among those, what conduct warrants sanctions. This invites inconsistent application of the statute across offices and over time, due to different perceptions of the risks to migratory birds and changes in personnel.²¹

¹⁹ 16 U.S.C. § 1540(b) (Endangered Species Act –knowing violations); 33 U.S.C. § 1319(c) (Clean Water Act – negligent or knowing violations); 42 U.S.C. 7413(c) (Clean Air Act – knowing violations).

²⁰ See 801 F.3d at 480-81.

²¹ To survive Constitutional due process requirements, a criminal statute must establish minimal guidelines to govern law enforcement. *City of Chicago v. Morales*, 527 U.S. 41, 60, 119 S.Ct. 1849, 1861 (1999). Vagueness may invalidate a criminal law if it authorizes, or even encourages, arbitrary and discriminatory treatment. *Id.*, 527 U.S. at 56. Too broad a reading of the MBTA risks running afoul of these due process requirements.

The prospective threat of criminal liability for bird mortality also has the potential to distort decisions made during the permitting of renewable energy projects and electric power infrastructure. The threat of criminal prosecution is such a severe sanction that it may lead companies to agree to compensatory mitigation and future measures to minimize mortality that are disproportionate to estimates of the harm that a project will cause, and also could lead the agency and the company to disregard the balancing that would otherwise occur between those measures and other important considerations, like the reliability of electric power supply. There is no MBTA standard that the company or the agency could look to in evaluating whether the resulting terms are appropriate. And the same dynamic holds true once a project is completed, should bird mortality at the facility draw the attention of the agency's enforcement personnel.

As the Fifth Circuit explained in its *CITGO* decision:

If the MBTA prohibits all acts or omissions that “directly” kill birds, where bird deaths are “foreseeable,” then all owners of big windows, communications towers, wind turbines, solar energy farms, cars, cats, and even church steeples may be found guilty of violating the MBTA. This scope of strict criminal liability would enable the government to prosecute at will and even capriciously (but for the minimal protection of prosecutorial discretion) for harsh penalties: up to a \$15,000 fine or six months’ imprisonment (or both) can be imposed for each count of bird “taking” and killing.”²²

The inconsistent nature of MBTA enforcement under the pre-2017 USFWS interpretation is demonstrated by two similar bird mortality incidents that occurred in West Virginia a decade ago. In 2008, hundreds of birds – mostly yellow warblers – were attracted at night by lights at a high school in Hambleton, West Virginia, and died when they collided with windows and structures at the school.²³ No MBTA enforcement action occurred. A few years later, at a wind energy facility a short distance away, a similar number of birds and species composition died when they were attracted by the lighting around an associated battery storage facility and collided with that structure (not the wind turbines).²⁴ In both instances, the deaths were caused by attraction to lighting (in the school and around the wind energy facility’s battery storage area), yet USFWS took action only against the wind energy facility operator, resulting in an MBTA settlement.

The inconsistent, and perhaps inherently arbitrary, nature of broad application of the MBTA, tempered only by enforcement discretion, is demonstrated by the data presented in the preamble for the Proposed Rule and the associated Regulatory Impact Analysis (RIA)²⁵ prepared by USFWS.

The preamble identifies nine threats to migratory birds, ranging from collisions with buildings and vehicles to feral and domestic cats.²⁶ Excluding the deaths caused by cats, the USFWS data

²² 801 F.3d at 494.

²³ Times West Virginian, [Hundreds of Dead Birds Found Outside High School](#) (Sept. 30, 2008).

²⁴ New York Times, [Nearly 500 Birds Found Dead Near Wind Farm](#) (Nov. 9, 2011).

²⁵ USFWS, *Proposed Rule to Revise Migratory Bird Permits and Regulations Governing Take of Migratory Birds, Regulatory Impact Analysis* (January 2020) (RIA).

²⁶ 85 Fed. Reg. at 5921.

indicate that electric power lines represent only 3 percent of the annual mortality attributed to human activity, and wind turbines only 0.02 percent.

Even though these data demonstrate that power lines and wind turbines represent a small fraction of migratory bird mortality, enforcement statistics included in the RIA also show that the electric power sector has received a disproportionate share of enforcement attention. The RIA reports that more than 50 percent of the migratory bird incidental take cases investigated by the USFWS Office of Law Enforcement (OLE) each year between 2010 and 2018 involved electric power lines.²⁷ The RIA also states that about 4 percent of OLE's cases involved wind energy companies.²⁸ Thus, in any given year about 54 percent of OLE's migratory bird enforcement efforts were focused on the electric power sector (power lines and wind energy), which – according to USFWS data – collectively causes only about 3 percent of incidental migratory bird mortality.

These numbers alone demonstrate that reliance on enforcement discretion is inadequate to avoid inconsistent results from a broad reading of the MBTA. As the preamble observes: “Productive and otherwise lawful economic activity should not be functionally dependent upon the ad hoc exercise of enforcement discretion.”²⁹ As addressed above, the electric power sector has a host of reasons for implementing best practices to reduce bird mortality, without regard to any threat of enforcement under the MBTA.

Building collisions are an example of where alternatives to the MBTA have been used to address one of the most significant anthropogenic causes of migratory bird mortality. USFWS estimates that collisions with building glass kill more migratory birds than almost any other cause.³⁰ But even prior to 2017, when USFWS maintained that the MBTA applied to incidental take, it did not enforce the MBTA against building owners. Instead, the governmental response has favored a “best practices” approach akin to those previously developed for the electric power sector and already utilized by EWAC's members. Other jurisdictions have followed with bird-friendly building design standards, like those that New York City plans to implement in December 2020.³¹

There are several other wildlife conservation laws that focus on habitat protection and enhancement, an issue that the MBTA is incapable of addressing. These laws, anchored by the North American Model for Wildlife Conservation that is considered the “gold standard” for wildlife management, have been hugely successful in bringing many wildlife species back (including some migratory birds) from dangerously low populations. These include the Duck Stamp Act, Federal Aid in Wildlife Restoration Act, North American Wetland Conservation Act, and the Restoring Americans Wildlife Act currently working its way through Congress. An approach to the human causes of incidental mortality that is integrated with these existing efforts focused on protecting, restoring and enhancing migratory bird habitat would have much more long-term conservation benefits to migratory birds than relying on an archaic law that was developed for an entirely different purpose and is poorly designed to address this issue.

²⁷ USFWS, RIA at 3.

²⁸ *Id.*

²⁹ 85 Fed. Reg. at 5922.

³⁰ 85 Fed. Reg. at 5921.

³¹ Citylab, [New York City Will Require Bird-Friendly Glass on Buildings](#) (Dec. 13, 2019),

Finally, some have suggested that application of the MBTA to incidental take is needed to address catastrophic events, like the *Deepwater Horizon* oil spill. It is true that the settlement negotiated following the *Deepwater Horizon* spill included a large monetary fine under the MBTA, although the amount attributed to MBTA fines was less than one percent of the collective settlement costs for that spill.³² That fact aside, the MBTA portion of the settlement could just as easily have been negotiated under the natural resource damage assessment provisions of the Oil Pollution Act of 1990 (OPA). OPA provides that those responsible for a vessel or facility that discharges oil into navigable waters or adjoining shorelines are liable for removal costs and damages.³³ Those damages include injury to or destruction of natural resources,³⁴ including wildlife.³⁵ And, if bird mortality resulted from a release of some substance other than oil, natural resource damages could be recovered under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).³⁶ As with migratory bird conservation, other – and frequently better – tools are available to regulators to address catastrophic events that harm migratory birds.

IV. Information Requested for NEPA Process

In addition to soliciting comments on the Proposed Rule, USFWS has in its NOI requested information for use in developing an EIS to evaluate the proposed rule change. EWAC is responding to three of the topics outlined in the NOI:

A. Avoidance, minimization, and mitigation measures entities employed to address incidental take of migratory birds (prior to the M-Opinion)

The measures employed by EWAC’s members to avoid, minimize, and mitigate for impacts on migratory birds include adherence to established best practices, like the APLIC recommended practices and the WEGs discussed above. Examples of measures that may be employed, depending on appropriateness for local conditions and the needs of particular facilities, include:

- Marking lines in high bird traffic areas to increase visibility to reduce collisions;
- Retrofitting existing power poles and designing new power poles in high raptor use areas to increase spacing between wires and insulating conducting elements to reduce the potential for electrocutions;
- Establishing avian protection zones where enhanced bird protection measures are implemented around areas of major bird activity;
- Installing and maintaining nesting platforms and boxes for a variety of species including ospreys, peregrine falcons, wood ducks, and blue birds;
- Developing and implementing integrated vegetation management practices on power line rights-of-way to minimize impacts to breeding, nesting and brooding birds;
- Establishing avian and pollinator friendly habitat within powerline rights-of-way;
- Managing wetland, forest, and grassland habitats on power plant buffer properties for bird conservation;

³² See RIA at 4.

³³ 33 U.S.C. § 2702(a).

³⁴ 33 U.S.C. § 2702(b).

³⁵ 33 U.S.C. § 2701(20) (definition of “natural resources”).

³⁶ 42 U.S.C. § 9607(a)(1)(C).

- Conducting pre-construction studies to identify bird species and habitat when siting new structures/facilities by conducting pre-construction studies to identify species and habitat;
- Avoiding areas of high avian use and sensitive habitats, when possible;
- Reducing lighting at O&M buildings, substations, and other infrastructure to avoid attracting birds; and
- Providing mitigation for habitat impacts.

Additional measures that may be employed by the developers of renewable energy projects, again depending on appropriateness for a particular location and the needs of a particular project, include:

- Siting projects to avoid or minimize the impact to birds and their habitat.
- Removing carrion from the site to avoid attracting scavenging birds such as eagles and vultures;
- Reducing lighting at turbines, solar arrays, and related infrastructure to avoid attracting birds;
- Implementing operational adjustments to avoid potential collisions with large birds;
- Conducting post-construction monitoring to estimate actual bird fatalities related to the facility operations to inform future siting decisions and/or potential changes in operational practices;
- Funding research and development of detection and deterrent technology; and
- Providing mitigation for habitat impacts.

B. Direct and indirect costs associated with implementing these measures

There are multiple factors that influence the decision to implement bird-protection measures, making it very difficult to separate and quantify costs incurred in response to the pre-2017 USFWS interpretation of the MBTA. Electricity providers vary greatly in size from very small rural electric cooperatives serving a few customers to large investor owned electric companies serving millions of customers over several states. As a general matter, those costs were not segregated on that basis as they were incurred, and so there is no readily available source of these data. And as discussed elsewhere in these comments, migratory bird protection measures are implemented for a wide variety of reasons, including other regulatory requirements that remain in place regardless of how the scope of the MBTA is interpreted. Further complicating the matter, the cost of any measure can vary widely across the full range of electric power facilities. And, as noted above, the types of measures that are appropriate for a project also vary markedly across the landscape. Accordingly, any estimates that could be generated likely would be anecdotal and limited by the facts concerning an individual project, rather than typical or representative of experience across the industry. Given these limitations, we are not able to accurately quantify these compliance costs across the entire industry at this time.

C. The extent that avoidance, minimization and mitigation measures continue to be used (after issuance of the M-Opinion)

EWAC members are committed to conserving our nation's natural resources and supporting the communities we serve. The industry's efforts for migratory bird conservation are part of our culture and will continue regardless of the regulatory requirements under the MBTA. We have a

responsibility to our stakeholders, including our customers, shareholders, investors, the general public, and future generations to implement sustainable business practices and to provide safe, reliable, and affordable electricity while protecting the environment and the communities we serve. EWAC members have a deeply rooted commitment to the conservation of our nation's natural resources, which includes migratory birds.

V. Conclusion

EWAC's members take the issue of wildlife conservation, and avian protection in particular, very seriously, and for a host of reasons will continue to do so, without regard to any threat of enforcement under the MBTA, to assure the safe and reliable operation of their facilities, avoid power outages and wildfires, and continue to provide affordable electricity to their customers. However, USFWS should recognize that when applied to incidental take the MBTA provides few tools for fostering migratory bird conservation. The MBTA was enacted more than 100 years ago for a very different purpose and offers only a single indiscriminate tool. It provides no mechanism for differentiating between those who are working to advance migratory bird conservation and those who are not. In the absence of meaningful standards to guide conduct or to inform enforcement discretion, the MBTA exposes companies and individuals, on an indiscriminate basis, to criminal sanctions for any and all unintended migratory bird mortality. This does not advance conservation, but rather invites arbitrary enforcement decisions and fosters conditions in which the most significant human-related causes of bird mortality are ignored, and industry and individual citizens cannot reasonably discern whether they are in compliance with the law. Central to EWAC's mission is to support public policies, based on sound science, that protect wildlife and natural resources in a lawful, reasonable, consistent, and cost-effective manner. EWAC does not support reliance on criminal sanctions as a singular tool to promote migratory bird conservation, but as stated above, will continue to work to reduce impacts on the natural environment regardless of the outcome of this regulatory proceeding.

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