



**July 20, 2020**

Comments regarding:

**June 5, 2020 Draft Environmental Impact Statement for Regulations Governing Take of Migratory Birds**

Submitted by:

**Energy and Wildlife Action Coalition**

Filed electronically to the attention of:

Public Comment Processing  
Attn: Docket No. FWS-HQ-MB-2018-0090  
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The Energy and Wildlife Action Coalition (EWAC)<sup>1</sup> submits these comments in response to the U.S. Fish and Wildlife Service's (USFWS) June 5, 2020, Draft Environmental Impact Statement (DEIS) for Regulations Governing Take of Migratory Birds (Proposed Rule).<sup>2</sup> EWAC's comments will follow the organizational structure of the DEIS.

## **I. Purpose and Need for the Proposed Rule**

The DEIS identifies the purpose and need for the Proposed Rule to be providing legal certainty for the public regarding what actions are prohibited by the Migratory Bird Treaty Act (MBTA).<sup>3</sup>

There is ongoing uncertainty as to whether the MBTA applies to the "take" of migratory birds occurring incidentally to otherwise lawful activity. If the statute is applied to incidental take, then it also is uncertain how affected entities are to comply with the law's absolute prohibition on the unintentional take of migratory birds, given that the statute imposes strict liability and nothing other than criminal penalties for any violation.

This uncertainty presents challenges for the operation and maintenance of existing infrastructure in the electric power sector, even though potential impacts to migratory birds are reduced by the implementation of measures the industry already employs to promote safety, reliability, wildfire prevention, sustainability goals, and compliance with other conservation laws.

The uncertainty also is a challenge for the ongoing, significant, and necessary transformation of the electric power industry. This transformation includes a major shift to less carbon intensive electricity generation, including carbon-free wind and solar generation, battery storage, and energy efficiency efforts. It also includes building new power lines to bring these new sources of cleaner generation to market and upgrading our existing energy grid to facilitate this transformation. All of this is occurring with the backdrop of climate change having been identified as an existential threat to migratory birds.<sup>4</sup> While the electric power sector continues to invest in new energy infrastructure to achieve further carbon reductions, regulatory uncertainty has the high potential to hinder this transformation to bring these changes to the market in a cost-effective manner.

The MBTA makes it a crime to pursue, hunt, take, capture or kill any migratory bird.<sup>5</sup> From enactment of the MBTA in 1918 until the 1970s, the statute was applied to market hunting, poaching, and other forms of purposeful killing of birds and was not enforced against what we now think of as incidental take. Beginning in the 1970s, however, USFWS began applying the

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<sup>1</sup> 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.

<sup>2</sup> 85 Fed. Reg. 34,625, 34,626 (June 5, 2020).

<sup>3</sup> 16 U.S.C. §§ 703-711.

<sup>4</sup> Audubon's Birds and Climate Change Report, [http://climate.audubon.org/sites/default/files/NAS\\_EXTBIRD\\_V1.3\\_9.2.15%20lb.pdf](http://climate.audubon.org/sites/default/files/NAS_EXTBIRD_V1.3_9.2.15%20lb.pdf)

<sup>5</sup> 16 U.S.C. §§ 703(a), 707(a).

MBTA against conduct that unintentionally or incidentally resulted in migratory bird mortality.<sup>6</sup> USFWS continued to apply this interpretation of the MBTA until December 22, 2017, when 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.

Courts in different parts of the country have split regarding the validity of the pre-2017 USFWS interpretation of the MBTA, creating a patchwork of different legal standards applicable in different regions of the country. 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 conduct, directed at migratory birds.<sup>7</sup> Thus, in significant portions of the country, the courts have ruled that the MBTA does not apply to incidental take. But 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 does, to a certain extent, prohibit the unintentional or incidental take of migratory birds.<sup>8</sup>

Thus, 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 activities but not for others. This should not be the case; as a federal law, the MBTA should be interpreted uniformly across all regions of the country.

The Proposed Rule (DEIS Alternative A) appropriately seeks to end the inconsistent interpretations of the MBTA by codifying a single interpretation. As discussed below, Alternative A is superior to the other alternatives evaluated in this DEIS that would either allow geographically inconsistent interpretations to persist, or codifying an absolute prohibition on incidental take that, due to its universal scope, can only be enforced arbitrarily.

## **II. Alternatives Not Carried Forward For Detailed Analysis**

EWAC's comments regarding the "no action" alternative and the two alternatives fully evaluated in the DEIS are set out below. In this section we will address the two alternatives that the DEIS identified but did not carry forward for further analysis.

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<sup>6</sup> See 85 Fed. Reg. 5915, 5920 (Feb. 3, 2020).

<sup>7</sup> *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).

<sup>8</sup> *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). The Second Circuit, among the first courts to consider whether the MBTA should apply to incidental take, found that the defendant's manufacturing of a pesticide, and management of the resulting waste, was an ultrahazardous activity that justified strict liability under the MBTA. *FMC Corp.*, 572 F.2d at 908. The court rejected the government's argument that the MBTA applies to all migratory bird deaths, without limitation, stating: "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." *Id.* at 905.

## **A. General Permit to Regulate Incidental Take**

The DEIS describes the broad outlines of a possible general permit program to “provide legal coverage for a variety of activities that commonly incidentally take migratory birds.” The DEIS explains that this alternative was not carried forward because it would go beyond the purpose and need of providing regulatory certainty, and also because its complexity would be better suited to development of a separate proposal, if USFWS were to adopt a rule applying the MBTA to incidental take.

It is EWAC’s opinion that it was appropriate for the DEIS to not carry forward an MBTA general permit program for further analysis, given the scope of the proposed action and the complexity of any permit program. However, it would be appropriate in the FEIS, perhaps in response to comments, for the agency to recognize the inherent challenges in a general permit approach. The idea of MBTA permits, including general permits, has been suggested before. While EWAC’s members understand how this may seem appealing to some, the inherent complexity of such a program is immediately apparent. Any program attempting to regulate human causes of mortality for the 1093 bird species protected by the MBTA would consume enormous administrative resources, both for regulators and for regulated industries.

In order to implement such a permitting program, USFWS would have to gather enormous amounts of new information, requiring resources it does not have. Specifically, for each covered species, similar to how it manages other permitting programs, USFWS would need to assess the population size and health, set take limits, track annual take from all causes (permitted and otherwise), and regularly adjust authorized take levels, and all that leaves open the question of how it would handle a situation where take limits were exceeded. In short, USFWS simply does not have the information about bird populations or current causes of bird mortality that it would need to regulate the take of more than 1000 migratory bird species and the collection of such necessary information would be a monumental task.

USFWS also should recognize that the resulting permitting program would produce little conservation benefit if it focuses on industries like the electric power sector that already have developed and are implementing best practices to avoid and minimize impacts on migratory birds. A permit program that adopts conservation measures that have already been developed and are widely used would not make a material contribution to migratory bird conservation. Thus, the regulators and the regulated community would expend enormous administrative resources for little or no conservation gain.

Further, for industries that do not have established best practices, determining appropriate conservation measures would likely take years for each industry, during which any migratory bird deaths for any covered industries would be criminal violations of the law, without any mechanism available for relief. Moreover, the majority of anthropogenic causes of migratory bird mortality, like collisions with building windows and moving vehicles, would be difficult – if not impossible – to address through a permitting program, leaving the regulatory focus on just a subset of commercial activities – including the electric power sector.

There are better ways to advance migratory bird conservation than to indiscriminately declare all incidental take of migratory birds to be a crime, create a permit to authorize take for some

industries based on best practices that already are in use today, try to apply the permitting model to industries that do not yet have established best practices, and all the while leave the most common causes of human-related migratory bird mortality unaddressed.

## **B. Enforcing the MBTA Against Grossly Negligent Conduct**

The DEIS also indicates that USFWS considered, if it were to determine that the MBTA applies to incidental take, taking the further step of adopting an enforcement policy requiring gross negligence to establish a misdemeanor violation of the MBTA. The DEIS states that this alternative was not analyzed further because it would require establishing a *mens rea* requirement and most courts have concluded that the MBTA is a strict liability statute that has no minimum *mens rea* requirement.

It was appropriate for USFWS to not carry this alternative forward for further analysis, as the current or future administrations could change an administrative enforcement policy at any time. Accordingly, it would not satisfy the stated purpose and need for the proposed agency action, since it would not provide any legal certainty.

However, if USFWS were to reverse course and attempt to apply the MBTA to incidental take, then, contrary to the concern expressed in the DEIS, the agency would be legally empowered to adopt an accompanying policy that limits the enforcement of the MBTA's criminal penalties. A federal agency's decision to not institute enforcement proceedings is insulated from judicial review.<sup>9</sup> Typically, the courts become involved only when an agency takes action to enforce a statute. Thus, USFWS would have unreviewable discretion to adopt an enforcement policy that it would not bring criminal charges under the MBTA in the absence of gross negligence or willful misconduct. Nor would such a policy conflict with any MBTA case law, as it would not change the required elements to prove a violation of the MBTA. It would be an exercise of enforcement discretion, not a change to statutory criteria.

Providing clear criteria for the application of enforcement discretion would be an improvement on pre-2017 practices, when USFWS relied upon enforcement discretion, applied with no articulated criteria, to mitigate the potentially harsh effects of its prior interpretation of the MBTA. However, the Court of Appeals for the Fifth Circuit highlighted the inherent weakness of the enforcement discretion approach 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.”<sup>10</sup>

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<sup>9</sup> *Heckler v. Chaney*, 470 U.S. 821, 831–832 (1985); See *Dept. of Homeland Security v. Regents of Univ. of Cal.*, 591 U.S. \_\_\_\_ (2020).

<sup>10</sup> 801 F.3d at 494.

In sum, an agency policy that relies on enforcement discretion to limit MBTA criminal charges to willful misconduct and gross negligence would reduce the potential for arbitrary enforcement. This would be an improvement over the pre-2017 implementation of the MBTA, but it would not provide the level of regulatory certainty provided by a rule clearly defining what is and is not a violation of law.

### **III. The Affected Environment**

The DEIS appropriately discusses the decline in many migratory bird populations in North America since 1970, documented by the North American Bird Conservation Initiative (NABCI) and others. DEIS Sec. 3.4. It summarizes declines (and increases) since 1970 for birds grouped by habitat type, as well as population trends by bird guild. Sec. 3.4.2. The DEIS also notes that these declines have occurred despite the MBTA's application to incidental take. *Id.*

In discussing the declining trend in many migratory bird populations since 1970, the DEIS does not explore the significant contribution that past and on-going habitat changes have made to that decline. USFWS acknowledges that connection in the cumulative impact analysis, which discusses the potential impacts on migratory birds from future habitat loss due to population growth in the United States. DEIS Sec. 4.4. There is some discussion in the "Affected Environment" section of how wetland indicator species, which unlike other groups have increased 13 percent since 1970, have benefited from proactive habitat conservation efforts. DEIS Sec. 3.4.2. A general discussion of how habitat changes have contributed to the decline of other species would better put the MBTA and its role in conservation into context.

The DEIS explores the potential environmental consequences from different interpretations of the MBTA. Regardless of which interpretation applies, however, the MBTA is neither designed nor equipped to address habitat loss. The MBTA indisputably played an important conservation role when it was first adopted in prohibiting the feather trade and market hunting. It still may be a workable tool for addressing some of the forms of intentional take summarized in the DEIS (purposeful illegal take, permitted take). *See* Sec. 3.6. But regardless of the alternative USFWS selects regarding incidental take of migratory birds, the environmental impacts are likely to be muted at the population level, given the significant role of past habitat loss in the decline of migratory bird species and its likely importance in the future, as indicated by DEIS Sec. 4.4.

### **IV. Analysis of Environmental Consequences**

The DEIS recognizes that entities may implement measures designed to protect migratory birds from incidental take for a variety of reasons that are unrelated to the MBTA. *See* Secs. 2.1.1, 4.1). This is certainly the case for the electric power industry. The DEIS also recognizes that considerations other than the MBTA require or provide incentives for measures that benefit migratory bird conservation. However, the DEIS does not appear to give much weight to these other considerations in its analysis of the potential impacts of the alternatives on migratory birds. As discussed below, this results in overstating, or too broadly generalizing, the positive and negative environmental impacts of the various alternatives. For the electric power sector in particular, the incremental difference between the alternatives in the implementation of best practices is not likely to be significant. As USFWS prepares the FEIS, it should refine its

evaluation of environmental impacts by giving greater weight to these other factors, the existence of which it already has acknowledged.

Electric power companies and renewable energy companies have a number of reasons for employing measures that reduce impacts to migratory birds. These include safety, reliability, wildfire prevention, sustainability goals, and compliance with other conservation laws. The Endangered Species Act (ESA), Bald and Golden Eagle Protection Act (BGEPA), state endangered species acts and other state wildlife laws, requirements of federal land management plans, 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.

For example, most of the country falls within the range of one or more avian species, bald and golden eagles, whooping cranes and condors, to name a few, which are protected by other federal and state environmental laws. To avoid impacting these species, many electric power companies and renewable energy companies implement Avian Protection Plans, which include designing new and rebuilding existing power lines in high risk areas, to avian safe standards, and power pole retrofits and line markings to reduce the risk of electrocutions and collisions. They do so without regard for the MBTA, because these species are protected by the BGEPA, the ESA, or state law requirements. In some cases, they do so to comply with conditions that result from NEPA reviews or state NEPA equivalents. They may also do so voluntarily, to protect equipment, public safety and avoid the creation of hazards, as well as in response to customer and investor expectations, or their own corporate environmental stewardship culture. While these and other measures are implemented to benefit a particular protected species, they also benefit migratory birds more broadly.

Importantly, power line and electric substation electrocutions of wildlife, including birds, often result in outages, and, in some cases, costly equipment damage and wildfires. This fact provides an additional incentive to build, maintain, and retrofit this equipment in ways that minimize this electrocution risk to wildlife, including migratory birds, irrespective of the requirements of environmental laws.

These are a few examples of the types of non-MBTA requirements and incentives that will continue to motivate the electric power industry to implement such practices regardless of the interpretation of the MBTA. These other regulatory obligations and safety and reliability concerns, as well as customer and investor expectations that electric power be increasingly environmentally friendly, while remaining affordable, provide EWAC's members with ample incentives to reduce impacts on wildlife and other natural resources, including migratory birds.

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 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's work products are recognized as the leading resource for avian protection from power line interactions.

Renewable energy companies have also worked over the past several decades, in partnership with agencies and conservation organizations, to develop practices designed to reduce avian impacts. One of the most prominent examples are the 2012 Land-based Wind Energy Guidelines (WEGs). These voluntary guidelines 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 measures and best management practices being utilized by any industry nationally.

EWAC discussed the above in its comments on the Proposed Rule (see attached), which also served as scoping comments for the DEIS. If the full weight of those other considerations is properly incorporated, then the limited impact of the "no action" alternative and the Proposed Rule (Alternative A) on bird conservation comes into sharper relief. Likewise, the limited incremental conservation benefits and the significant economic and administrative burdens of applying the MBTA to all incidental take (Alternative B) are more clear. USFWS should give greater weight to these other considerations as it completes the NEPA analysis in its FEIS.

#### **A. Alternatives Analyzed in the DEIS**

##### **1. The "No Action" Alternative**

Under the "no action" alternative, USFWS would continue to implement the MBTA consistent with the M-Opinion, which defines the scope of the MBTA to exclude incidental take. As the DEIS observes, this alternative would not provide the same degree of regulatory certainty as the Proposed Rule (Alternative A) because (1) it is a non-binding legal opinion and (2) it would be relatively easy for a future administration to revisit or reverse its conclusions.

The DEIS (Sec. 4.2.1.1) presents a general assessment of the potential impact of the M-Opinion on migratory birds. It makes what the DEIS described as a logical assumption that, notwithstanding other reasons industries may have for implementing best practices, migratory bird mortality is likely to be higher under implementation of the M-Opinion, particularly in the industries previously subject to enforcement under the MBTA. It adds that the use of best practices will likely decline over time as entities become more confident of the long-term application of the M-Opinion.

This assumption overstates the potential impact of the M-Opinion on migratory birds because it lumps all industries and all members of these industries together and does not give sufficient weight to the other requirements and incentives discussed above that continue to apply, regardless of the status of the MBTA. As USFWS prepares the FEIS, it should moderate this assumption accordingly.

For example, the electric power industry was a disproportionately frequent target of MBTA enforcement prior to 2017. The DEIS (Table 2-1) reports that electric power lines and wind energy facilities were the subject of more than 57 percent of USFWS incidental take investigations



between 2010 and 2018 (even though, as shown in Table 3.2, they collectively represented only about 3 percent of annual migratory bird mortality).

By the logic of the DEIS, the electric power sector should be most likely to reduce implementation of best practices, since it was the subject of more than half of MBTA enforcement efforts. But that disregards the very real incentives outlined above that the industry has to continue best practices that benefit migratory birds, without regard to the MBTA.

Indeed, many EWAC member utilities operate partially or entirely within the geographic boundaries of the courts that have held that the MBTA's prohibition is limited to intentional conduct and does not apply to the incidental take of migratory birds. And yet these companies have a decades-long history of implementing avian-friendly construction standards and of retrofitting existing infrastructure to minimize avian electrocution and collision risks. Their past performance demonstrates that the electric power industry has, and will, in most instances, continue to, implement avian protection measures without regard to the threat of MBTA enforcement.

## **2. Alternative A – Proposed Rule**

The DEIS presents a qualitative comparison of Alternatives A and B and the “no action” alternative. It asserts that if USFWS selects Alternative A and adopts the Proposed Rule, even fewer entities would implement best practice to reduce incidental take of migratory birds, compared to the “no action” alternatives. While the DEIS does not characterize the size of this shift, it states that the implementation of best practices and industry standards would likely decrease under Alternative A and likely increase under Alternative B. However, for the reasons previously noted, there would likely be no more than a small incremental change in practices in the electric power sector under either of the alternatives. This suggests that the FEIS would better conclude that adoption of Alternative A “may” reduce the application of best practices, at least in the electric power industry.

In its analysis of Alternative A, the DEIS acknowledges, but does not give any apparent weight to, the electric power sector's non-MBTA requirements and incentives that already are in place and which will remain in place regardless of whether USFWS adopts the Proposed Rule.

As detailed above (Sec. IV) and in EWAC's comments on the Proposed Rule, the electric power industry has a host of reasons to implement best practices that are unrelated to the MBTA. As a result of those other existing requirements and incentives, best practices that reduce impacts on migratory birds are widespread in the electric power industry. As USFWS prepares the FEIS, it should improve its assessment by giving greater weight to these non-MBTA influences that are likely to keep best practices in place, at least for the electric power sector. This should have the effect of narrowing the differences between the potential conservation impacts of Alternatives A and B.

The DEIS recognizes that climate change is adversely affecting migratory bird habitat, with impacts including sea level rise, warming temperatures, and expanded ranges for disease-carrying mosquitoes. DEIS Secs. 3.4.2 & 3.4.2.1. There also is a connection of sorts between the threat that climate change poses to migratory birds and the application of the MBTA to the electric power

industry, which should be reflected in the analysis of the environmental conservation impacts of Alternative A. Specifically, the U.S. electric power industry is making significant strides in voluntarily reducing carbon emissions. In March of this year, the Energy Information Administration (EIA) released its preliminary full-year CO2 emissions estimates for 2019<sup>11</sup>, showing electric power sector emissions declined 8 percent from 2018, reducing the sector's emissions to 35 percent below 2005 levels. According to EIA data, in 2019, zero-emitting resources – wind, solar, nuclear and hydroelectric – produced nearly 40 percent of the electricity generated in the United States.

This shift in generation mix, which includes the growth in renewable energy generation and transition to less carbon intensive electric power generation results from building new, zero- and low-carbon emitting power generation facilities, as well as the transmission lines needed to bring that power to market. The regulatory certainty provided by the Proposed Rule fosters the development of these facilities, and the importance of these facilities to the transition in the U.S. electric power sector should be considered when weighing their contribution to incidental take of migratory birds. This does not relieve the electric power industry of its commitment to migratory bird conservation, but it does put the fairly low level of incidental take resulting from this sector (about 3 percent of human-related causes (Table 2-1)) into context.

The DEIS also suggests that Alternative A would decrease costs for regulated industries by reducing the use of best practices and related costs. While that may be true for some industries, for the electric power sector Alternative A is not likely to significantly decrease the implementation of best practices, for the same reasons discussed above. Electric power companies have worked over many years to development and refine engineering design standards to make their infrastructure safer, more durable, and reliable (i.e. reduced forced outages), notably including design standards for reducing forced outages caused by birds and other wildlife. It is doubtful that electric power companies will change design standards and practices that foster reliability based solely on the adoption of this rule. Equally, renewable energy companies will also continue to implement practices that are required by other laws or by other agency actions, or that companies voluntarily implement for a variety of reasons discussed above.

### **3. Alternative B – Applying MBTA to Incidental Take**

Alternative B would codify USFWS's pre-2017 interpretation of the MBTA. Presumably such an action would track the January 2017 opinion (M-37041) issued by Interior's Office of the Solicitor: "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."<sup>12</sup> The Solicitor's January 2017 opinion extended criminal liability to "any and all" activities that proximately (directly) cause migratory bird mortality – not just commercial activities.<sup>13</sup> That

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<sup>11</sup> U.S. Department of Energy, Energy Information Administration, *Monthly Energy Review*, March 2020.

<sup>12</sup> Interior Solicitor's Opinion M-37041 at 30 (Jan. 10, 2017).

<sup>13</sup> *Id.* The U.S. Supreme Court recently rejected reliance on proximate cause as a limitation on liability under the Clean Water Act for discharges to groundwater that ultimately reach navigable waters. *County of Maui v. Hawaii Wildlife Fund*, 590 U.S. \_\_\_\_ (2020).

opinion was suspended in February 2017, then withdrawn and replaced by the M-Opinion in December 2017.<sup>14</sup>

The DEIS also overstates the potential benefits to the conservation of birds of reverting to the pre-2017 interpretation of the MBTA.

First, making incidental take a violation of the MBTA offers a poor incentive for implementing best practices because the law provides no effective means of avoiding liability, and no alternative to a criminal penalty. Under the pre-2017 interpretation, 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.

Second, as the statute does not differentiate between those who do or do not implement best practices, only prosecutorial discretion can offer an incentive to adopt such practices. But the statute provides no standards to guide the agency's decision whether to prosecute. USFWS Office of Law Enforcement is left to decide, with no clear direction, what causes of bird mortality to pursue, and among those, what conduct warrants sanctions. Therefore, it is very challenging for EWAC members to determine what level of effort to reduce impacts is sufficient to garner enforcement discretion. This invites arbitrary and inconsistent application of the statute across offices and over time, due to different perceptions of the risks to migratory birds and changes in personnel.<sup>15</sup> As the Fifth Circuit noted in its *CITGO* decision, quoted above, if the statute makes any and all bird mortality a criminal act, prosecutorial discretion offers minimal protection against capricious government enforcement.<sup>16</sup>

The DEIS demonstrates that there was a disconnect between past USFWS enforcement efforts under the pre-2017 MBTA interpretation and the actual causes of migratory bird mortality. As previously noted, the electric power industry was the subject of more than 57 percent of MBTA investigations between 2010 and 2018, even though it represents only about 3 percent of migratory bird mortality attributed to human activity. *See* DEIS Tables 2-1 and 3.2. At the same time, USFWS appears to have conducted no investigations related to collisions with buildings, even though that is by far the most significant cause of incidental take of migratory birds. *See* DEIS Table 2-1.

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.<sup>17</sup> No MBTA enforcement action occurred. A few years later, at a wind energy facility a short distance away, a similar number and species mix of birds died when they were attracted by

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<sup>14</sup> Interior Solicitor's Opinion M-37050 at 1 (Dec. 22, 2017).

<sup>15</sup> 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.

<sup>16</sup> 801 F.3d at 494.

<sup>17</sup> Times West Virginian, [Hundreds of Dead Birds Found Outside High School](#) (Sept. 30, 2008).

lighting around a battery storage facility and collided with that structure (not the wind turbines).<sup>18</sup> In both instances, the deaths were caused by attraction to lighting (at the school and around the battery storage area), yet USFWS took action only against the wind energy facility operator, resulting in an MBTA settlement.

The DEIS also suggests that if USFWS were to revert to once again interpreting the MBTA as prohibiting incidental take, that an increase in the use of best practices “would likely” occur across most industries, reducing impacts on birds. DEIS Sec. 4.2.3.1. As discussed above in relation to the other alternatives, the electric power industry has a host of reasons to implement best practices that are unrelated to the MBTA. These are detailed above (Secs. IV ) and in EWAC’s comments on the Proposed Rule. Since those other requirements and incentives for reducing impacts on migratory birds are in place already, if USFWS were to adopt Alternative B and revert to its pre-2017 MBTA interpretation, any increase in implementation of best practices in the electric power industry would be small. It would be more accurate for USFWS to state in the FEIS that a revision to the prior MBTA interpretation “may” increase the application of best practices, at least in the electric power industry.

Nor is it a given that appropriate resource allocations will result from the prospective threat of criminal liability. The threat of criminal enforcement has the potential to distort decisions made during the permitting of renewable energy projects and electric power infrastructure. It is such a severe sanction that it may lead companies to agree to compensatory mitigation and minimization measures that are disproportionate to estimates of the harm that a project will cause. It 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. The same dynamic holds true once a project is completed and the facility is operating, should bird mortality at the facility draw the attention of the agency’s enforcement personnel.

## **V. Conclusion**

EWAC’s members take the issue of wildlife conservation, and avian protection in particular, very seriously. For a host of reasons, they will continue to do so to assure the safe and reliable operation of their facilities, avoid power outages and wildfires, and continue to provide reliable, clean and affordable electricity to their customers. However, USFWS should recognize that when the MBTA is applied to incidental take, it provides few tools for fostering migratory bird conservation. The MBTA was enacted more than 100 years ago for a very different purpose and need 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

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<sup>18</sup> New York Times, [Nearly 500 Birds Found Dead Near Wind Farm](#) (Nov. 9, 2011).

whether they are or are not 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, its members will continue to work with USFWS and other stakeholders to reduce impacts on the natural environment regardless of the outcome of this regulatory proceeding.

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