



March 1, 2021

Comments regarding:

February 8, 2021 Request for Public Comments Regarding Final Rule Defining the Scope of the Migratory Bird Treaty Act

Submitted by:

Energy and Wildlife Action Coalition

Filed electronically to the attention of:

Public Comment Processing
Attn: Docket No. FWS-HQ-MB-2018-0090
U.S. Fish & Wildlife Service
MS: JAO/3W
5275 Leesburg Pike,
Falls Church, VA 22041-3803

The Energy and Wildlife Action Coalition (EWAC)¹ submits these comments in response to the U.S. Fish and Wildlife Service's (USFWS) February 9, 2021, notice inviting comments on the final rule defining the scope of the Migratory Bird Treaty Act (MBTA) as it applies to conduct resulting in injury or death of migratory birds (the MBTA Rule).² Specifically, USFWS requested comments on the issues of fact, law, and policy raised by the MBTA Rule, which USFWS published on January 7, 2021.

U.S. electric companies and renewable energy companies have a long history of wildlife and natural resource conservation, including the 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 and regulatory obligations.

Also, customers and investors expect electric power be increasingly environmentally friendly, while continuing to be reliable and affordable. As a result, EWAC's members will continue to find ways to reduce impacts on wildlife and other natural resources, including migratory birds, regardless of the interpretation of the MBTA.

Nevertheless, if the statute is read to apply to any and all take of migratory birds, then it is uncertain how affected entities can assure their compliance. An absolute prohibition on the unintentional take of migratory birds and the statute's only sanction for violations being criminal penalties leaves the agency to decide, with no clear direction, what causes of bird mortality to pursue, and among those, what conduct warrants sanctions. This uncertainty presents challenges for the operation and maintenance of existing electric power industry infrastructure, 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.

It also is a challenge for the significant transformation of the electric power industry that is underway. This transformation includes a major shift to cleaner sources of 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, which has been identified as an existential threat to migratory birds.³ While the electric power industry continues to invest in carbon-free technologies and new

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 86 Fed. Reg. 8715 (February 9, 2021).

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

energy infrastructure, regulatory uncertainty has the high potential to increase costs, hinder investment decisions, and ultimately impact the deployment of clean energy infrastructure.

As USFWS considers its next action regarding the MBTA Rule, EWAC encourages the agency to consider the issues that the MBTA Rule was intended to address. EWAC addressed these questions in its comments on the proposed MBTA rule, which we have attached to these comments for ease of reference. If the USFWS does take regulatory action on the MBTA, we strongly encourage USFWS to engage with EWAC and its members to develop policies, guidance and regulations that do not impede the industry's clean energy transformation.

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'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, to avoid power outages and wildfires, and to continue to provide reliable, affordable, and increasingly clean electricity to their customers.

EWAC's members will continue to work with USFWS and with other stakeholders to reduce impacts on the natural environment regardless of the outcome of this regulatory proceeding. EWAC and its members also look forward to working with the various stakeholder groups to find equitable solutions that achieve the dual goals of avian conservation and the development and operation of an increasingly clean and resilient energy grid.

Please feel free to contact the following EWAC representatives:

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