EWAC®
Energy and Wildlife Action Coalition

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Comments regarding:

May 7, 2021 Regulations Governing Take of Migratory Birds: Proposed Rule

Submitted by:

Energy and Wildlife Action Coalition

Filed electronically to the attention of:

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On January 7, 2021, U.S. Fish and Wildlife Service (USFWS) issued a final rule defining the scope of the Migratory Bird Treaty Act (MBTA)[1] as it applies to conduct resulting in the injury or death of migratory birds (MBTA Rule).[2] On May 7, 2021, USFWS issued a proposed rule revoking the MBTA Rule (Proposed Rule).[3] The Energy and Wildlife Action Coalition (EWAC)[4] submits these comments regarding the Proposed Rule.

Summary of EWAC's Interest and Comments

EWAC's members recognize the Administration's goals for decarbonizing the economy, and as such, its members continue adding low or no-carbon generation and associated infrastructure to ensure a reliable, affordable, and responsible electricity supply. EWAC's members share the Administration's interest in fostering the development and rapid deployment of renewable energy generation and the infrastructure needed to deliver that renewable energy to the market.

Migratory bird conservation and policies are also very important to EWAC members as they work to meet future electricity needs. Arguably, the electric power industry has done more for bird conservation than any other industry sector. They employ, or through consultants contract with, hundreds of biologists. The electric power industry has worked for decades to understand and minimize its potential impacts on migratory birds.

In each action the Administration takes on environmental policy and regulation, including policies affecting migratory birds, it should give serious consideration to the potential impacts on the electric power industry and the effect these actions might have on the rapid deployment of renewable energy and in turn, meeting the Administration's robust climate goals.

While renewable energy has been slowly integrating into our national electric system since the 1970s, the transformation of the electric power industry began accelerating more than a decade ago. The mix of resources used to generate electricity in the United States has changed dramatically and is increasingly cleaner. The shift to less carbon intensive electricity generation, including carbon free wind and solar generation, is accelerating. This shift also necessitates building new power lines to bring these new sources of clean generation to market, as well as upgrading our existing energy grid to facilitate this transformation. Continued renewable energy

[1] 16 U.S.C. §§ 703-711.

[2] 86 Fed. Reg. 1134 (Jan. 7, 2021).

[3] 86 Fed. Reg. 24573 (May 7, 2021).

[4] 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.

development and new transmission lines are central to the Administration's greenhouse gas objectives and its plans to transform America's energy sector.

Climate change also has been identified as an existential threat to migratory birds.[5] To address the threat of climate change, the electric power sector is poised to make great investment in new infrastructure to achieve further carbon reductions. However, regulatory uncertainty hinders those investments and the necessary transformation of the national electric system.

Due to strict liability for violations of the MBTA, if the statute is interpreted to apply to any and all take of migratory birds, then affected entities cannot assure their compliance if they have any potential to incidentally take migratory birds. An absolute prohibition on incidental take and the statute's only sanction for violations being criminal penalties also leaves the agency to decide, with minimal direction in the absence of a clear enforcement policy, 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 and the development of new projects, even though potential impacts to migratory birds are reduced by the implementation of measures the industry already employs. In addition to corporate sustainability goals, the electric power industry must comply with other conservation laws and state and local requirements. Minimizing avian interactions also addresses safety, reliability and wildfire prevention.

Further, uncertainty also stems from the second reversal of the federal interpretation of the MBTA in five years. USFWS states that the Proposed Rule "would be a return to implementing the MBTA as prohibiting incidental take and applying enforcement discretion, consistent with judicial precedent." However, as the current MBTA Rule and prior Solicitor opinions demonstrate, there is no consensus among the nation's courts as to whether the MBTA applies to the incidental take of migratory birds. USFWS's Proposed Rule is simply aligning with a subset of rulings among a number of conflicting precedents.

Unfortunately, USFWS cannot end the inconsistent interpretation of the MBTA in different parts of the country or address the criminal liability that the MBTA imposes for even the most minor of violations through this or any other rulemaking. That will take legislation or a Supreme Court decision. However, in order to somewhat alleviate the noted challenges the Proposed Rule poses, USFWS could take action simultaneously with its repeal of the MBTA Rule that would make enforcement of the MBTA more predictable throughout the country. With the forgoing in mind, USFWS should adopt a clear enforcement policy that focuses MBTA criminal enforcement resources on culpable criminal conduct.

USFWS's Proposed Action and Stated Justification

The MBTA makes it a crime to pursue, hunt, take, capture or kill any migratory bird.[6] On January 7, 2021, USFWS issued the MBTA Rule, which limited this prohibition to purposeful actions

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

[6] 16 U.S.C. §§ 703(a), 707(a).

directed at migratory birds, their nests, or their eggs and excluded incidental take.[7] USFWS is now proposing to repeal this recently-adopted rule.[8] USFWS proposes reverting to its pre-2017 interpretation of the MBTA as applicable to incidental take, which USFWS characterizes as consistent with judicial precedent.[9]

The Federal Register preamble for the Proposed Rule is notably focused on contrasting legal arguments regarding the scope of the MBTA. It provides a lengthy analysis of the decision by the U.S. Court of Appeals for the Fifth Circuit in *United States v. Citgo Petroleum Corp*., 801 F.3d 477 (5th Cir. 2015), explaining why USFWS takes issue with the Fifth Circuit's legal reasoning and its conclusion that the MBTA does not apply to incidental take.[10] USFWS prefers the more recent decision from the U.S. District Court for the Southern District of New York, *Natural Res. Def. Council v. U.S. Dep't of the Interior*, 478 F.Supp.3d 469 (S.D.N.Y. 2020), holding that the MBTA does apply to incidental take.[11]

However, the Federal Register notice does not discuss the views that have been expressed by other courts, which also have come down on both sides of this question:

- Courts in the Eighth Circuit have twice held that incidental take of migratory birds does not violate the MBTA's take prohibition. One Court of Appeals case involved migratory bird deaths associated with timber sales;[12] another district court case involved migratory bird deaths associated with oil pits in conjunction with oil and gas production.[13] In the latter, the court noted that "to extend the [MBTA] to reach other activities that indirectly result in the deaths of covered birds would yield absurd results . . . To be consistent, the government would have to criminalize driving, construction, airplane flights, farming, electricity, and wind turbines, which cause bird deaths and many other everyday lawful activities . . . the [MBTA] cannot reasonably be read to criminalize the legal operation of a reserve pit at an oil exploration site."[14]

- The Ninth Circuit has held similarly and refused to extend the MBTA to incidental take that occurs through habitat modification.[15] A district court in the Ninth Circuit, analyzing MBTA claims related to BLM approvals of a wind energy facility, noted that USFWS itself has acknowledged that the "MBTA has no provision concerning 'incidental' takings," and

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[7] 86 Fed. Reg. 1134.

[8] 86 Fed. Reg. 24573.

[9] 86 Fed. Reg. 24573.

[10] 86 Fed. Reg. at 24574-75.

[11] *Id*.

[12] *Newton County Wildlife Association v. U.S. Forest Svc*., 113 F.3d 110 (8th Cir. 1997);

[13] U.*S. v. Brigham Oil and Gas, L.P*., 840 F.Supp. 2d 1202 (8th Cir. 2012).

[14] *Id.* At 1212-1213.

[15] *City of Sausalito v. O'Neill*, 386 F.3d 1186 (9th Cir. 2004); *Seattle Audubon Society v. Evans*, 952 F.2d. 297 (9th Cir. 1991).

reiterated that, "[i]n interpreting the word 'take' in the MBTA, the Ninth Circuit stated that the definition of 'take' in the MBTA was limited to conduct engaged in by hunters and poachers."[16]

- The Second Circuit, which includes the Southern District of New York, has extended MBTA liability to incidental take where a chemical company was aware of "extrahazardous" chemicals existing on its property and did not properly prevent the extrahazardous chemicals from reaching a pond, leading to migratory bird deaths.[17] However, even in this landmark case which proponents often point to as definitively showing that incidental take was a violation of law, the court rejected a construction of the MBTA that would bring every killing of a migratory bird within the statute, saying it "would offend reason and common sense."[18] The court added that imposing strict liability on an extrahazardous activity "does not dictate that every death of a bird will result in imposing strict criminal liability on some party."[19]

- The Tenth Circuit has found incidental take is regulated under the MBTA where oil and gas activities directly resulted in mortalities associated with "heater-treater" equipment. The court's decision focused on those mortalities that occurred after the defendant had notice that its equipment would result in bird deaths as USFWS had implemented an educational program in the region to minimize heater-treater mortalities.[20]

Repeal of the MBTA Rule will not address the issues raised in each of these and other cases, or change the split in how the courts have interpreted the MBTA. That split is likely to persist until this question is heard by the Supreme Court or a reasonable and balanced legislative solution is passed..

USFWS also points to comments from treaty partner Canada regarding the conservation objectives of the migratory bird treaties.[21] As USFWS weighs input from Canada, it also should consider how that country has implemented the treaty. The only prohibition on the incidental take of migratory birds under Canada's Migratory Bird Convention Act is a provision making it an offense to deposit a substance that is harmful to migratory birds in waters frequented by migratory birds.[22] Under Canada's statute, unlike the MBTA, exercising due diligence to prevent a fatality (take) is a complete defense.[23] Canada's statute does authorize regulations "for prohibiting the killing, capturing, injury, taking or disturbing of migratory birds or the damaging, destroying or recovery

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[16] *Protect our Communities Foundation v. Salazar*, 2013 WL 5947137, at 18 (S.D. Cal. 2013) (citing *Seattle Audubon Society v. Evans*).

[17] *U.S. v. FMC Corp*., 572 F.2d 902 (2d Cir. 1978).

[18] 572 F.2d at 905.

[19] *Id*.

[20] *U.S. v. Apollo Energies, Inc*., 611 F.3d 679 (10th Cir. 2010).

[21] 86 Fed. Reg. at 24575-76.

[22] Migratory Bird Convention Act, 1994, Sec. 5.1(1).

[23] *Id*., Sec. 13.17.

or disturbing of nests,"[24] which is similar language to the MBTA. However, Canada's current Migratory Bird Regulations apply to hunting practices and the directed take of migratory birds.[25] Canada does not appear to have any law in place imposing the broad prohibition on incidental take "by any means, or in any manner" that the Proposed Rule seeks to impose.

USFWS also points to significant MBTA penalties that were imposed following the *Exxon Valdez* and *Deepwater Horizon* oil spills, the two most significant oil spills in U.S. waters in the last 35 years.[26] Indeed, BP's MBTA fine for the *Deepwater Horizon* represents $100 million of the $105.8 million in criminal fines that USFWS has collected under the MBTA since 2010.[27] While the *Deepwater Horizon* fine was quite large in the context of MBTA enforcement, it still was less than one percent of the collective settlement costs for that spill. The MBTA portion of the settlement also 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.[28] Those damages include injury to or destruction of natural resources,[29] including wildlife.[30] 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).[31]

The reference to those oil spill settlements highlights one of the MBTA's significant flaws: its inability to differentiate the *Deepwater Horizon* or the *Exxon Valdez* from birds striking the glass of an urban skyscraper, a vehicle, an overhead power line, wind turbine, or solar panel. Those two oil spills involved culpable conduct (i.e., gross negligence or willful misconduct) with catastrophic consequences. Neither factor is typically present when there is incidental migratory bird mortality. Those incidents do not make the case for strict liability and criminal penalties for any and all migratory bird mortalities, especially when they occur despite active steps being taken to reduce impacts to migratory birds.

The electric power industry has a long history of migratory bird conservation that will likely continue with or without he MBTA definitional rule

EWAC's members have many reasons to employ measures that benefit migratory birds, 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

[24] *Id*., Sec. 12(1)(h).

[25] Migratory Bird Regulations (C.R.C., c. 1035).

[26] 86 Fed. Reg. at 24576.

[27] *See* USFWS, Regulatory Impact Analysis, Proposed Rulemaking to Revise Regulations Governing Take of Migratory Birds (Dec. 2020) at 12.

[28] 33 U.S.C. § 2702(a).

[29] 33 U.S.C. § 2702(b).

[30] 33 U.S.C. § 2701(20) (definition of "natural resources").

[31] 42 U.S.C. § 9607(a)(1)(C).

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.

The measures employed by EWAC's members to avoid, minimize, and mitigate for impacts on migratory birds include implementation of established industry practices, like Avian Power Line Interaction Committee (APLIC) recommended practices and the Land-based Wind Energy Guidelines (WEGs). The threat of MBTA liability does not drive adherence to these practices. Indeed, under the Proposed Rule, companies could be held strictly liable for any migratory bird mortalities, even though they implement appropriate impact reduction practices for their project/facility and location. Adherence to these practices would provide no defense to criminal liability.

The MBTA's sole remedy of criminal enforcement is not well suited to broad conservation objectives and invites inconsistent treatment.

If USFWS adopts the Proposed Rule and reverts to its pre-2017 interpretation of the MBTA, a company can adhere to industry practices appropriate to their project and location and yet still be at risk of being held criminally liable for any migratory bird deaths that nevertheless occur. The law provides no effective means of avoiding liability, and no alternative penalty. The statute provides no standards to guide the exercise of enforcement discretion, nor any means for those who incidentally take migratory birds to know whether they have done enough to avoid prosecution. This illustrates the fundamental weakness of the MBTA as a centerpiece of migratory bird conservation.

The MBTA's sole reliance on criminal penalties may be an appropriate deterrence for illegal hunting or trade, but not for unintentional take. 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 minimal 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. This is true even without taking into account the divergent views of the courts as to whether the MBTA applies to incidental take.

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."[32]

Broad application of the MBTA, tempered only by unwritten enforcement discretion, invites inconsistent results and is perhaps inherently arbitrary.

USFWS can achieve its stated objectives by adopting a formal MBTA enforcement policy simultaneous to its repeal of the MBTA definitional rule.

If USFWS adopts the Proposed Rule and reverts to its pre-2017 MBTA interpretation, the potential for arbitrary enforcement of the statute that was highlighted in *CITGO* would return. However, USFWS can easily provide greater certainty, and make better use of its own resources, through the issuance of a formal MBTA enforcement policy contemporaneously with adoption of the Proposed Rule. This could come from the Director or the Office of Law Enforcement. It is within the agency's discretion to adopt a policy that sets out the criteria USFWS will apply in determining which cases to prosecute under the MBTA.

Through an MBTA enforcement policy, USFWS should provide a clear declaration that it will exercise its enforcement discretion to not enforce the MBTA in the absence of gross negligence or willful misconduct. A federal agency's decision to not institute enforcement proceedings is insulated from judicial review.[33] Typically the courts become involved only when an agency takes action to enforce a statute. An agency's exercise of its discretion to focus its scarce enforcement resources on particular conduct is generally unreviewable.

Such an enforcement policy would be in line with policies that have been adopted by other federal agencies with regulatory authority for environmental laws. For example, the Environmental Protection Agency (EPA) has long employed internal guidance setting out the specific factors that distinguish cases meriting criminal investigation.[34] In adopting its policy, EPA recognized that "the Office of Criminal Enforcement has an obligation to the American public, to our colleagues throughout EPA, the regulated community, Congress, and the media to instill confidence that EPA's criminal program has the proper mechanisms in place to ensure the discriminate use of the powerful law enforcement authority entrusted to us."[35] USFWS should, for the same reasons, put internal safeguards in place, if the agency does revert to an interpretation of the MBTA that makes the incidental take of migratory birds "by any means, or in any manner" a criminal act.

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[32] 801 F.3d at 494.

[33] *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).

[34] *See* EPA Office of Criminal Enforcement Memorandum to All EPA Employees Working in or in Support of the Criminal Enforcement Program, *The Exercise of Investigative Discretion* (January 12, 1994).

[35] *Id*. at 2.

Under EPA's enforcement policy, criminal case selection is guided to two general measures: significant environmental harm and culpable conduct.[36] USFWS should adopt similar criteria for its MBTA enforcement policy. If USFWS focuses MBTA enforcement on culpable acts – willful or grossly negligent conduct – and events that result in significant migratory bird mortality, it will achieve the objectives that it has set for the Proposed Rule. Events like the *Exxon Valdez* and *Deepwater Horizon* oil spills would easily fit the policy's case selection criteria. The periodic mortality of birds at a facility adhering to industry practices would not. The objectives of the migratory bird treaties discussed in the Proposed Rule's preamble[37] would likewise be satisfied.

Such a policy would not change the statutory criteria applicable if and when USFWS brings charges under the MBTA. Consistent with existing MBTA case law, the agency would not have to establish *mens rea* to prove its case in court. But by employing culpability-based case selection criteria, USFWS can nevertheless provide assurance that the MBTA's sole sanction of criminal penalties will only be applied to severe and significant violations. By sharing such a policy with the regulated community and the public, USFWS would do much to limit the unpredictability that was a hallmark of the pre-2017 MBTA policy.

Conclusion

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's members have a host of reasons to assure the safe and reliable operation of their facilities, avoid power outages and wildfires, and continue to provide affordable electricity to their customers.

If USFWS decides to adopt the Proposed Rule, it 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. One solution to the MBTA's flaws would be the adoption of new legislation that is better tailored to migratory bird conservation. We firmly believe that through a concerted effort by the public and private sectors that bipartisan legislation focused on avian conservation and not regulation could create a lasting funding

[36] *Id*. at 3.
[37] 86 Fed. Reg. at 24575-76.

mechanism to make significant advancements for migratory bird conservation and provide durable clarity to the legal uncertainties posed under the current MBTA. EWAC members stand ready to work with USFWS, the conservation community and other stakeholders in advancing a solution that brings tangible and lasting conservation to migratory birds. But this will take time. In the meantime, USFWS can do much to temper these flaws by adopting a clear MBTA enforcement policy in conjunction with final action on the Proposed Rule.

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