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U.S. Fish and Wildlife Service
Public Comments Processing, Attn: FWS-HQ-MB-2018-0090
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Dear Assistant Director Ford:

I appreciate the opportunity to comment on the proposed regulatory change to the Migratory Bird Treaty Act.

I am an applied ecologist and professor in the Department of Natural Resources at Cornell University, where I also serve as the senior director of conservation science and codirector of the Center for Avian Population Studies at the Cornell Lab of Ornithology. Outside of academia, I am a fellow of the American Association for the Advancement of Science and the American Ornithological Society and have previously served on the Science Advisory Board of the U.S. Environmental Protection Agency, the Scientific Review Committee of the National Socio-environmental Synthesis Center, and as an *ad-hoc* science advisor to government agencies and nonprofit organizations. My research focuses on understanding how species and ecosystems respond to changing land use, land cover, and climate. As part of my work, I collaborate with scientists, practitioners, and decision-makers to develop innovative approaches to conservation that accommodate human activities and, hence, meet both social and ecological needs in natural and human-dominated landscapes.

The proposed regulation to specifically exclude incidental take from Migratory Bird Treaty Act protections undermines the important role that the 100-year-old Act plays in conserving birds and protecting healthy environments. In this public comment, I will draw upon my testimony to the U.S House of Representatives Subcommittee on Water, Oceans, and Wildlife¹, as well as introduce new points based upon my review of recently published and other relevant research.

¹ <https://naturalresources.house.gov/imo/media/doc/Rodewald%20Testimony%20WOW%20Leg%20Hrg%2006.13.19.pdf>

In my House testimony, I outlined the following key points:

- 1) A growing body of evidence indicates that we need to strengthen, not erode, our efforts to protect and conserve migratory birds.
- 2) Migratory birds are subject to numerous threats and sources of mortality, of which the vast majority are unintentional or incidental.
- 3) The Migratory Bird Treaty Act has long provided a powerful incentive for industry and landowners to work with the U.S. Fish and Wildlife Service to reduce harm to birds.
- 4) When we protect birds and their habitats, we derive many co-benefits that support human health and well-being, the economy, and healthy environments. What is good for birds is usually good for people, too.

In this public comment, I will expand upon on my first point, which is now further backed by a recent multi-institutional study led by the Cornell Lab that establishes the enormity of avian population losses in North America. The ground-breaking research was published in the Oct. 4 issue of the journal *Science*². The report documented a 29% decline in avian populations in the U.S. and Canada since 1970, which translates to a stunning loss of 3 billion birds (or over 1 in 4 birds) in breeding bird populations in the last 50 years. Declines span ecosystems, with losses of more than 1 billion forest birds, as well as half of all grassland birds. As the Cornell Lab's Executive Director Dr. John W. Fitzpatrick has said, "These losses of birds by the billions are on par with those of the legendary Passenger Pigeon extinction."

Whereas the staggering losses of Passenger Pigeons reflected a population collapse within one species, this new research quantifies massive losses among more than 300 bird species across North America. Declines span multiple taxa, habitats, and regions. North America is experiencing a profound, unprecedented, and continuing loss of birds.

Steep declines in avifauna point to the need to strengthen, rather than weaken, protections for migratory birds. Yet this proposed exclusion of incidental take from the Migratory Bird Treaty Act represents a significant weakening of bird protections. To help illustrate what's at stake here, I reviewed published literature and white papers³ that document some industry-associated sources and impacts of bird mortality and then cross-referenced that list with estimates of loss for individual bird species based upon the research published in *Science*.

² <https://science.sciencemag.org/content/366/6461/120.full?ijkey=dcWYzH9MGv13I&keytype=ref&siteid=sci>

³ <https://law.lclark.edu/live/files/27946-49-1scottpdf> [V. The Department of Interior's New Approach to Incidental Take; A. Interior's Historical Position, pgs 217-8]
http://www.int-res.com/articles/suppl/m513p239_supp.pdf

What I learned is sobering. For instance, more than 80 of the 172 bird species reported to be killed in oil pits are in steep population decline⁴, and more than 50 of the 350 species of Neotropical migratory songbirds (a group that has lost more than 600 million birds since 1970⁵) are vulnerable to collisions with tall structures.⁶

Below are examples of declining bird species that could be impacted by the proposed MBTA regulatory revision and are thought to be especially vulnerable to industry-related mortality. Included are the scale of losses for each species since 1970 along with a note about their susceptibility to incidental take (e.g., oil spills, uncovered oil pits, and collisions with tall structures).⁷

- Northern Bobwhite quail—4 in 5 lost since 1970; susceptible to oil pits
- Eastern Meadowlark—3 in 4 lost; susceptible to oil pits, collisions
- Lark Bunting—3 in 4 lost; susceptible to oil pits
- Golden-winged Warbler—3 in 5 lost; susceptible to collisions
- Canada Warbler—3 in 5 lost; susceptible to collisions
- Purple Finch—3 in 5 lost; susceptible to collisions
- Wood Thrush—3 in 5 lost; susceptible to collisions
- Horned Lark—3 in 5 lost; susceptible to collisions
- Least Tern—more than half lost; susceptible to oil spills
- Western Meadowlark—2 in 5 lost; susceptible to oil pits, collisions
- Barn Swallow—2 in 5 lost; susceptible to oil pits
- American Kestrel—2 in 5 lost; susceptible to collisions
- Black Skimmer—more than 1 in 4 lost; susceptible to oil spills
- Kentucky Warbler—1 in 4 lost; susceptible to collisions
- Common Yellowthroat—1 in 4 lost; susceptible to collisions
- Black-and-white Warbler—1 in 4 lost; susceptible to collisions
- Swainson's Thrush—1 in 4 lost; susceptible to collisions

Though true that incidental take is neither the sole, nor necessarily even the primary, cause of declines, the prevailing thought among scientists is that mortality from industry activities are often additive in nature, and therefore expected to increase the vulnerability of populations.

⁴ Trail, P.W. 2006. Environmental Management 38:532-544.

⁵ <https://science.sciencemag.org/content/366/6461/120.full?ijkey=dcWYzH9MGv131&keytype=ref&siteid=sci>

⁶ Communications Towers: A Deadly Hazard to Birds; American Bird Conservancy; June, 2000; Shire, Brown, Winegrad.

⁷ Species susceptible to various form of incidental take chosen from:

- Oil pits: Avian mortality at oil pits in the United States: A review of the problem and efforts for its solution; Trail. Environmental Management 38:532-544. 2006.
- Oil spills: Bird mortality from the Deepwater Horizon oil spill. II. Carcass sampling and exposure probability in the coastal Gulf of Mexico; Haney, Geiger, Short; Marine Ecology Progress Series 513:239–252(2014).
- Collisions: Bird-Building Collisions in the U.S. Loss et al. 2014. Condor. Communications Towers: A Deadly Hazard to Birds; American Bird Conservancy; June, 2000; Shire, Brown, Winegrad. Estimates of bird collision mortality at wind facilities in the contiguous United States; Loss, Will, Marra. Biological Conservation. Vol. 168, Dec. 2013, pgs 201-209. Appendix D.

Species population loss proportions from: Decline of the North American Avifauna. Rosenberg, Dokter, et al. Science. 04 Oct. 2019.

The scale of direct mortality of birds due to industry activities is large. Of the nearly 4 billion birds the USFWS estimates to be killed each year, industry alone kills 453 million to 1.1 billion birds each year (median = 709 million birds). Industry-related mortality sources can include poisoning (72 million birds), electrocution or collisions with powerlines (>28 million birds), oil pits (750,000 birds), and wind turbines (>573,000 birds).⁸

By removing incidental take from the Migratory Bird Treaty Act, we lose a powerful incentive for industry to cooperate with the U.S. Fish and Wildlife Service to minimize harm to birds.

Below are several examples that showcase how the Act has engaged industry in pro-conservation actions:

Powerlines. In the 1970s the Nixon administration used the Migratory Bird Treaty Act to convince power companies to increase the distance between powerlines to reduce deaths and avoid violations. More recently, the U.S. Fish and Wildlife Service worked cooperatively with the Edison Electric Institute, the Electric Power Research Institute, the National Rural Cooperative Electrical Association, the Rural Utilities Service, and over 50 electric utility companies in the U.S. and Canada to develop guidance documents to reduce avian electrocutions and collisions.⁹

Communication towers. More than 6.5 million birds die each year in collisions with communication towers. After years of research, pressure from conservation groups, and affirming intentions to avoid violating the act, the Federal Aviation Administration revised regulations¹⁰ to require new blinking lights and marking standards to reduce the impact of tall communication towers on migratory birds.

Wind turbines. With an estimated >573,000 birds killed annually at wind turbines, the wind industry harms comparatively fewer birds than many other industry sectors. Nevertheless, the wind industry continues to invest heavily in the development of technological solutions, siting guidelines, and monitoring programs to make wind energy safer for migratory birds and other wildlife like bats. The U.S. Fish and Wildlife Service issued a set of guidelines¹¹ and training materials¹² for land-based wind energy that details a variety of steps that wind energy companies can take to reduce harm to migratory birds and avoid violating the act. “From a cost-benefit standpoint, it makes sense to invest in the development of technology that may reduce risk (of bird mortality),” said Tim Hayes, environmental director for Duke Energy Renewables.¹³

⁸ U.S. Fish and Wildlife Service; <https://www.fws.gov/birds/bird-enthusiasts/threats-to-birds.php>

⁹ Avian Power Line Interaction Committee. <https://www.aplic.org>

¹⁰ U.S. Department of Transportation, Federal Aviation Administration, Advisory Circular 70/7460-1L; https://www.faa.gov/documentLibrary/media/Advisory_Circular/AC_70_7460-1L_.pdf

¹¹ U.S. Fish and Wildlife Service Land-based Wind Energy Guidelines OMT 108-0148S; https://www.fws.gov/ecological-services/es-library/pdfs/WEG_final.pdf

¹² <https://www.fws.gov/ecological-services/energy-development/wind-training-materials.html>

¹³ American Wind and Wildlife Institute; <https://awwi.org/news-events/success-stories/success-story-technology/>

Oil pits. According to the American Petroleum Institute, more than 18 billion barrels of waste fluids are generated annually from oil and gas production. Oily wastewater and spills are sequestered in storage ponds called oil pits, which broadly refer to production skim ponds, reserve pits, flare pits, and uncovered tanks or containers. Many animals, including birds, bats, small mammals, big game, and even livestock, can mistake them for wetlands or other water bodies and quickly become entrapped. Even birds that escape pits often die later from the toxic effects of the oil. Conservative estimates suggest that avian mortality at U.S. oil pits ranges from 500,000 to 1 million birds per year, and that more than 170 bird species are susceptible to death from oil pits.¹⁴ The Migratory Bird Treaty Act has provided strong leverage to prod the oil industry to cover pits with nets or employ alternative approaches, such as closed containment systems.

As the Agency reviews the proposed removal of incidental take from the MBTA, I urge the Agency to consider:

- (1) the recent science showing that the extent and magnitude of population declines among North American birds has been more serious than previously thought by many scientists and practitioners; and,
- (2) the evidence that industry activities may disproportionately affect species that are already in trouble. Moreover, I want to underscore that my examples represent only a few of the many bird species that are in steep decline and expected to be further impacted by industry activities should incidental take be excluded from the MBTA.

The science is clear—we should be doing more, not less, to protect birds. The exclusion of incidental take from the MBTA renders the Act impotent on most sources of mortality for migratory birds and eliminates a powerful incentive for industry, commercial enterprises, and landowners to proactively reduce or mitigate impacts to birds. Not only does this change fundamentally weaken the protections our nation has granted to birds, but it dismisses commitments to our international treaty partners and undermines broader benefits to American society.

Sincerely,



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¹⁴ Trail, P.W. 2006. *Environmental Management* 38:532-544.