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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 previous administration’s proposed regulatory change to exclude incidental take from regulation under the Migratory Bird Treaty Act.

I am an applied ecologist and professor in the Department of Natural Resources and the Environment at Cornell University, where I also serve as the senior director 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 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 Wildlife in June 2019, as well as introduce points based upon more recently published relevant research.

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.

To expand upon on my first point, the most comprehensive continental assessment of North American bird populations ever conducted—a multi-institutional study led by the Cornell Lab that was published in the Oct. 4, 2019 issue of the journal *Science*—establishes the enormity of avian population losses in North America. 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 lost from breeding populations in the last 50 years. The bird declines spanned 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, particularly from industry threats; and, the scale of direct mortality of birds due to industry activities is already 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).

To help illustrate what’s at stake with the removal of incidental take as a regulatory mechanism against industry threats to birds, I reviewed published literature and white papers 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*.

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2 [https://science.sciencemag.org/content/366/6461/120.full?ijkey=dcWYzdH9MGv13I&keytype=ref&siteid=sci](https://science.sciencemag.org/content/366/6461/120.full?ijkey=dcWYzdH9MGv13I&keytype=ref&siteid=sci)
4 [https://law.lclark.edu/live/files/27946-49-1scottpdf](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]
What I learned is sobering. For instance, more than 80 bird species reported to be killed in oil pits are in steep population decline, and more than 50 species of Neotropical migratory songbirds (a group that has lost more than 600 million birds since 1970) are vulnerable to collisions with tall structures.

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).

- 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. As the authors of the previous EIS noted in assessing the potential impacts of eliminating incidental-take regulation from the MBTA: “the level of bird mortality reported in Section 3.7 would likely be higher, particularly for those industries previously subject to enforcement actions under the MBTA.” And as the supporting document for the

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6 https://science.sciencemag.org/content/366/6461/120.full?ijkey=dcWYdH5Gv13l&keytype=ref&siteid=sci
7 Communications Towers: A Deadly Hazard to Birds; American Bird Conservancy; June, 2000; Shire, Brown, Winegrad.
8 Species susceptible to various form of incidental take chosen from:
- 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).

Correction of Effective Date published by the USFWS in the Federal Register on Feb. 9, 2021 noted, the proposed rule laid out no monitoring plan for assessing the ongoing impacts to bird populations from weakening these protections on industry take, which means there would be no means for corrective action beyond listing impacted species under the Endangered Species Act when their populations are close to extinction (a costlier outcome for industry). Any open-ended rule that increases the mortality rates for already-declining and at-risk bird populations and pushes them toward extinction would seem to violate both the core intent of the Migratory Bird Treaty Act and the obligation of the United States to its treaty partners Canada and Mexico.

**By removing incidental take from the Migratory Bird Treaty Act, we lose a powerful incentive with a proven successful record for incenting 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 MBTA, the Federal Aviation Administration revised regulations\(^10\) 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 guidelines\(^11\) and training materials\(^12\) 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

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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


may reduce risk (of bird mortality),” said Tim Hayes, environmental director for Duke Energy Renewables.  

**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.\(^\text{14}\) (As noted earlier, more than 80 of those bird species susceptible to oil pits already have declining populations.) 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.

I strongly urge the U.S. Fish and Wildlife Service to use this review of the rule as an opportunity to advance an MBTA rule that promotes and incentivizes, rather than erodes, the use of industry best practices to reduce risk to birds.

Two previously considered—but not implemented—alternatives in the EIS process last year have potential to deliver meaningful benefits to migratory birds: (1) creating a permitting process to allow certain cases of incidental take, or (2) restricting enforcement of incidental take to cases of gross negligence.

Evidence suggests that a permitting program for incidental take could be effective, even if focused only on those industries that pose the greatest threats to birds. According to the previous EIS, two industries accounted for 81% of incidental-take investigations between 2010 and 2018, with electrical distribution/transmission and oil/gas cases accounting for 54% and 27% of investigations, respectively.

Through instituting a permitting program or focusing MBTA incidental-take regulations on gross negligence, the Department of Interior and the USFWS can make good on their legally mandated mission to conserve and protect migratory bird populations AND deliver on the goal of previous administration to create a more certain and consistent regulatory environment.

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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. It also dismisses commitments to our international treaty partners and undermines broader benefits to American society. The current administration has an opportunity to restore the strength of the Migratory Bird Treaty Act and make it a more effective regulatory tool that works better for business and industry and better protects birds. I urge this administration to consider and follow the science in making its decision about how to regulate incidental take within the MBTA.
There are alternative actions as yet not fully explored (such as targeted permitting) that could balance the goals of enhancing regulatory certainty while protecting migratory birds. In the absence of that, Interior and the USFWS should choose the option that accomplishes both (providing regulatory certainty on incidental take of birds by industry and protecting bird population) by rescinding the M-Opinion 37050 and resuming enforcement of incidental take under the MBTA.

Sincerely,

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