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March 19, 2020

Docket ID No. FWS-HQ-MB-2018-0090
Fish and Wildlife Service
5275 Leesburg Pike
Falls Church, VA 22041
(submitted via regulations.gov)

Re: Comments on Regulations Governing Take of Migratory Birds, FWS-HQ-MB-2018-0090

To Whom it May Concern:

On February 3, 2020, the U.S. Fish and Wildlife Service (FWS) published *Regulations Governing Take of Migratory Birds* (Proposed Rule) limiting the scope of the Migratory Bird Treaty Act (MBTA) to "actions directed at migratory birds, their nests, or their eggs" and not to "injury to or mortality of migratory birds that results from, but is not the purpose of, an action (i.e., incidental taking or killing)."[1] The MJB&A Permitting and Infrastructure Coalition appreciates the opportunity to comment on the Proposed Rule.

MJB&A Permitting and Infrastructure Coalition member companies collectively engage the Administration and agencies on potential permitting modernization as well as regulatory and legislative opportunities to ensure energy infrastructure projects can proceed in a timely and cost-effective manner. The member companies design, permit, and operate fossil fuel-fired and nuclear power plants; electric and natural gas transmission and distribution systems; and solar, wind, and other renewable generation projects. The energy industry takes a range of voluntary and effective measures to protect avian species, and FWS has successfully worked with many of our member companies to develop voluntary, industry-specific best management practices to conserve migratory birds. For example, the Land-Based Wind Energy Guidelines (WEGs) establish a tiered approach to wind development that evaluates and minimizes potential risks to avian (and other wildlife) species and their habitats. In the final WEGs, FWS stated, "[w]hen used in concert with appropriate regulatory tools, the Guidelines form the best practical approach for conserving species of concern." Additionally, FWS, through its participation in the Avian Power Line Interaction Committee (APLIC), has contributed to the development of Avian Protection Plan guidelines and developed guidance documents identifying causes and minimization methods for avian electrocutions and collisions that our member companies implement.

Even though the energy industry takes voluntary measures to protect migratory birds, many of our member companies' facilities and projects are affected by the uncertainty surrounding prohibitions under the MBTA. Thus, we support FWS's Proposed Rule limiting the scope of the MBTA, consistent with the intent of the MBTA and the Solicitor's Opinion, M-37050, to only those actions that are directed at migratory birds, their nests, or their eggs and not to incidental takings or killings, as outlined in the comments below. The Proposed Rule will also make it

[1] For purposes of these comments, incidental take of migratory birds; the incidental killing of migratory birds; and the incidental taking of bird parts, nests, and eggs is generally referred to as "incidental take" to reflect the Proposed Rule's use of the term. The phrase "incidental take" is not synonymous with the phrase used in the Endangered Species Act (ESA), which is broader than the definition of "take" under the MBTA.

clear that FWS will not require any permit that covers accidental injury to birds for construction and operation of lawfully permitted generation, transmission, and distribution structures and operational activities, including vegetation management. The Proposed Rule would provide much needed business and legal certainty to our member companies.

I. The Proposed Rule accurately reflects the legislative intent of the MBTA to include in the definition of "take" only those actions that are directed at migratory birds and not indirect or accidental acts or omissions that result in a bird's death.

The MBTA was enacted in 1918 to implement the United States' obligations under international treaties and conventions devised to protect against the "indiscriminate slaughter" of, and trafficking in, migratory birds. The statute makes it unlawful to "pursue, hunt, take, capture, kill…[or transport] any migratory bird, any part, nest, or egg of such bird." We agree with FWS's analysis of relevant case law interpreting the operative verbs (e.g., "pursue, hunt, take, capture, kill") in the MBTA as affirmative, deliberate actions against an animal—not acts that indirectly and accidentally cause an animal's injury or death.

In *U.S. v. FMC Corp*, 572 F.2d 902 (2d Cir. 1978), the Court found that an interpretation that brings 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." Under *FMC*, the Second Circuit Court of Appeals extended MBTA liability to the limited situation where a company was aware of "extrahazardous" chemical pesticides manufactured on its property and the disposal of those chemicals led to migratory bird deaths. Such circumstances are not consistent with those that exist at most industrial facilities, and they are not consistent with circumstances at facilities that meet existing, voluntary FWS guidance for the conservation of birds. The electric sector's activities to design, permit, and operate generating facilities would not be considered "extrahazardous" or "abnormally hazardous," and the industry will continue to implement voluntary measures for the conservation of migratory birds.

In a separate case in the Eighth Circuit Court of Appeals (*Newton County Wildlife Ass'n v. U.S. Department of Agriculture*, 113 F.3d 110, 115 (8th Cir. 1997)), the Court agreed with the holding in *FMC* finding that "[s]trict liability may be appropriate when dealing with hunters and poachers. But it would stretch this 1918 statute far beyond the bounds of reason to construe it as an absolute criminal prohibition on conduct, such as timber harvesting, that *indirectly* results in the death of migratory birds."

Similarly, in *U.S. v. Brigham Oil & Gas*, 840 F.Supp. 2d 1202 (DND 2012), the District Court of North Dakota held that "the use of reserve pits in commercial oil development is [a] legal, commercially-useful activity that stands outside the reach of the [MBTA]. Like timber harvesting, oil development and production activities are not the sort of physical conduct engaged in by hunters and poachers, and such activities do not fall under the prohibitions of the [MBTA]." The Court recognized that "to extend the [MBTA] to reach other activities that indirectly result in the deaths of covered birds would yield absurd results." Extending criminal liability to commercial activity would "criminalize driving, construction, airplane flights, farming, electricity and wind turbines, which cause bird deaths, and many other everyday lawful activities." Further, the Court noted, quoting a commentator, that "'[e]xtending the MBTA's reach beyond activity directed at wildlife would hamper normal land use activities that often result in bird deaths—such as farming, timber harvesting, and brush clearing...When the MBTA is construed sensibly, as a whole and in light of legislative history, it can be read only to criminalize activity directed against migratory birds.'"

In *U.S. v. CITGO Petroleum Corp*., 801 F.3d 477, (5th Cir. 2015), the Court reversed a criminal conviction for migratory bird deaths when birds flew into oil production-related tanks. The Court stated, "we agree with the Eighth and Ninth circuits that a 'taking' is limited to deliberative acts done directly and intentionally to migratory birds.

Our conclusion is based on the statute's text, its common law origin, a comparison with other relevant statutes, and rejection of the argument that strict liability can change the nature of the necessary illegal act." The Court noted that other Circuit Courts took a broad reading of the MBTA and "[t]hese and like decisions confuse the *mens rea* and the *actus reus* requirements. Strict liability crimes dispense with the first requirement; the government need not prove the defendant had any criminal intent. But a defendant must still commit the act to be liable." The Court also explained:

> [t]here is no doubt that a hunter who shoots a migratory bird without a permit in the mistaken belief that it is not a migratory bird may be strictly liable for a 'taking' under the MBTA because he engaged in an intentional and deliberate act toward the bird…[but] [a] person whose car accidentally collided with the bird…has committed no act 'taking' the bird for which he could be held strictly liable. Nor do the owners of electrical lines 'take' migratory birds who run into them. These distinctions are inherent in the nature of the word 'taking' and reveal the strict liability argument as a non-sequitur.

In *Seattle Audubon Society v. Evans*, 952 F.2d 297 (9th Cir. 1991), the Ninth Circuit Court of Appeals found additional limits to the statute when it held that logging timber from lands that might provide habitat for northern spotted owls does not result in a taking under the MBTA. The Court explained that "[t]he differences in the proscribed conduct under the ESA and the MBTA are 'distinct and purposeful'." The Court noted that Congress amended the MBTA the year after enactment of the ESA, "but did not modify its prohibitions to include 'harm'." The case concluded its discussion of the point by stating that "[h]abitat destruction causes 'harm' to the owls under the ESA, but does not 'take' them within the meaning of the MBTA."

The MBTA was clearly intended to address hunting, poaching, and trafficking of birds, and numerous court cases have confirmed this statutory interpretation. Furthermore, when Congress had the opportunity to include incidental take in 1974 when other MBTA amendments were made, it chose not to do so. Thus, we agree that accidental migratory bird deaths or injuries that occur in the course of lawful activities, such as accidental collisions with or impacts from electric generating, transmission, and distribution activities, are clearly beyond the scope of the MBTA's criminal penalties and, therefore, should not require a permit to avoid criminal liability. The Proposed Rule would support this legally defensible conclusion.

II. The Proposed Rule's clarification that the MBTA does not apply to incidental takings or killings of migratory birds is necessary to avoid constitutional issues.

We agree with FWS' analysis of relevant case law that previous interpretations of the MBTA applying to takings or killings of migratory birds that are incidental to otherwise lawful activities raise due process concerns. Because the MBTA does not clearly prohibit those types of takings or killings of migratory birds, it does not give fair notice as to what qualifies as legal activity so that individuals and businesses can competently comply with the law. As discussed above, *U.S. v. FMC Corp* noted that a broad interpretation that "brings 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." For the same reasons, it would fail to provide fair notice and due process. Even if companies follow industry-specific best management practices to conserve migratory birds, they may still be prosecuted and found guilty of criminal conduct depending on the enforcement discretion of FWS. The Proposed Rule would mitigate this issue by providing a clear and reasonable standard for what is legal.

III. The Proposed Rule's clarification that the MBTA does not apply to incidental takings or killings of migratory birds is necessary to provide compliance certainty.

The Proposed Rule notes that, "the [agency's] prior approach to incidental take was enacted without public input, and has resulted in regulatory uncertainty and inconsistency." FWS has no record of enforcement of incidental take until the 1970s, fully 50 years after the enactment of the MBTA. The Proposed Rule also explains that, in an effort to limit the potential reach of MBTA liability, FWS decided to pursue enforcement proceedings against only those who failed to take "'reasonable' precaution against foreseeable risks." FWS's analysis of its own enforcement history in the Proposed Rule illustrates that "common activities such as owning and operating a power line, wind farm, or drilling operation pose an inherent risk of incidental take" thus "subject[ing] those who engage in common, necessary activities to criminal liability."

The Proposed Rule accurately points out that an expansive reading of the MBTA that includes an incidental take prohibition would "[leave] otherwise lawful, productive, and often necessary businesses to take their chances and hope they avoid prosecution." This interpretation would make otherwise lawful commercial activity dependent on enforcement discretion. Moreover, courts are split on how to interpret the MBTA, resulting in a patchwork of legal standards. Given these policy issues, we support FWS's conclusion in the Proposed Rule that "it is in its own interest, as well as that of the public, to have and apply a national standard that sets a clear, articulable rule for when an operator crosses the line into criminality." This will provide the business and legal certainty that is critical to our member companies' abilities to make well-informed operational and long-term investment decisions to facilitate the safe and reliable generation, transmission, and distribution of electric power.

We look forward to continuing to engage with FWS on this rulemaking. If you have any questions, please do not hesitate to contact me at cjenks@mjbradley.com.

Sincerely,

Carrie F. Jenks
MJB&A Permitting and Infrastructure Coalition