

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

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VIA ELECTRONIC FILING

Jerome Ford
U.S. Fish and Wildlife Service
5275 Leesburg Pike
Falls Church, VA 22041

RE: Regulations Governing Take of Migratory Birds Proposed Rule, 86 Fed. Reg. 24573, May 7, 2021, [Docket No. FWS–HQ–MB–2018–0090]

Dear Mr. Ford:

The U.S. Chamber of Commerce (Chamber) appreciates the opportunity to comment on the U.S. Fish and Wildlife Service’s (FWS) proposed rule, “Regulations Governing Take of Migratory Birds.”¹ The Chamber recognizes the importance of avian conservation but it nevertheless opposes revocation of the January 7, 2021, final rule² (January 7 Rule), which interprets the Migratory Bird Treaty Act (MBTA) to prohibit only those affirmative acts directed at migratory birds.

The conservation of migratory birds is important to businesses operating across industries. As detailed here, businesses have invested (and continue to invest) significant resources to develop and implement conservation practices, including Avian Protection Plans (APP). And businesses have taken these steps voluntarily, with the goal of minimizing incidental impacts to migratory birds. Subjecting businesses to criminal liability and significant penalties under the MBTA for incidental taking under the MBTA—particularly as businesses operate in good faith to help sustain healthy migratory bird populations—is improper and inconsistent with the statute. Moreover, as a matter of policy, the public, industries, states, tribes, and other stakeholders will face serious regulatory uncertainty and risk with an expansive reading and implementation of the MBTA, none of which is necessary to support best practices for conservation and protection of migratory birds. Such increased uncertainty is of particular concern due to the expansive list of migratory birds that FWS has identified as protected by the MBTA. FWS’s current list of protected birds comprises 1093 species of birds, including such common species as the American crow.³

¹ Regulations Governing Take of Migratory Birds Proposed Rule, 86 Fed. Reg. 24573 (May 7, 2021).

² Regulations Governing Take of Migratory Birds Final Rule, 86 Fed. Reg. 1134 (January 7, 2021).

³ General Provisions; Revised List of Migratory Birds, 85 Fed. Reg. 21282 (April 16, 2020)

FWS should retain the January 7 Rule for the following reasons:

1. Current Programs Are Supporting Migratory Birds and Reducing Impacts

Regarding the conservation and protection of migratory birds, there is an array of current programs that support migratory birds through the conservation of habitat and through other preventative measures. The energy sector, for example, working in collaboration with FWS, has invested significant resources to develop and implement voluntary guidelines to minimize the impacts of energy infrastructure on migratory birds. Below are two examples of these voluntary efforts to name but a few:

- ***APP Guidelines*** for the electric power sector were developed through a collaborative process to ensure that utilities minimized adverse impacts to migratory birds from power lines.⁴ The guidelines provide examples and guiding principles that utilities can adapt to specific circumstances.
- ***Land-based Wind Energy Guidelines*** were developed by the renewable energy sector with the FWS to identify best practices for the siting and operation of wind facilities to limit impacts to migratory birds.⁵

In addition to these voluntary efforts, numerous national and state programs as well as private-public partnerships provide conservation funding to help enhance or create new habitat for migratory birds in the United States, Canada, and Mexico. Below are a few of these programs that are designed to help create and enhance habitat for migratory birds, including:

- ***America's Conservation Enhancement Act of 2020*** reauthorized the North American Wetlands Conservation Act and the associated grant program to conserve wetlands for waterfowl and other birds. Over the last two decades, the program has funded over 3,000 projects totaling \$1.83 billion in grants, while more than 6,350 private and business partners contributed another \$3.75 billion in matching funds.⁶ Almost 30 million acres of bird habitat have been acquired, restored, or enhanced under the program.
- ***The Neotropical Migratory Bird Conservation Act*** provided over \$75 million in grants to support 628 projects in 36 countries, including Canada and Mexico. These projects

⁴ Avian Protection Plan (APP) Guidelines, Edison Electric Institute's Avian Power Line Interaction Committee and U.S. Fish and Wildlife Service, April 2005, https://www.aplic.org/uploads/files/2634/APPguidelines_final-draft_Aprl2005.pdf

⁵ Land-Based Wind Energy Guidelines, U.S. Fish and Wildlife Service, March 23, 2012, https://www.fws.gov/ecological-services/es-library/pdfs/WEG_final.pdf

⁶ North American Wetlands Conservation Act, Protecting, Restoring, and Enhancing Wetland Habitats for Birds, U.S. Fish and Wildlife Service, <https://www.fws.gov/birds/grants/north-american-wetland-conservation-act.php>

have positively affected approximately five million acres of bird habitat and have spurred partnerships resulting in investments of an additional \$286 million.⁷

- ***The Great American Outdoors Act*** will not only improve our national parks system, but will also help protect migratory birds and other wildlife. Almost \$800 million in annual royalties from oil and gas revenues from production in the Gulf of Mexico could be directed to this conservation effort each year. The U.S. Chamber of Commerce strongly supported this legislation issuing a Key Vote Letter to Congress stating the Chamber would consider votes related to this legislation in our “How They Voted” congressional scorecard.⁸ We also worked collaboratively, issuing a joint statement of support, with the National Audubon Society and The Pew Charitable Trusts to urge the Senate to pass this important conservation legislation.⁹
- ***Farm Bills*** provide incentives to private landowners to create conservation easements and partnership programs to improve millions of acres of wildlife habitat, including that of migratory birds. A key driver of conservation action for birds was the conservation title of the 2018 Farm Bill. The conservation title of the 2018 Farm Bill includes \$60 billion in projected mandatory spending on conservation over 10 years.¹⁰
- ***North American Waterfowl Management Plan*** was adopted by the United States and Canada to set forth a strategy for restoring waterfowl populations to 1970s levels through voluntary, non-regulatory, public-private partnerships. The program brings together government, businesses, and conservation groups to develop site-specific habitat management programs and projects.

The funding and other incentives in these federal programs help support migratory birds through the development, enhancement, and protection of their habitat. Such programs also demonstrate to our neighbors the United States’ strong commitment to the protection of migratory birds. Coupling the funding provided through these conservation programs with the voluntary guidelines adopted by industry will help minimize and often avoid impacts to migratory birds.

Even as these conservation programs help conserve habitat, the American Bird Conservancy described free-ranging, un-owned cats as the “single greatest source of human-caused mortality for birds...” killing between 1.3 and 4.0 billion migratory birds per year.¹¹ Cats and collisions

⁷ Neotropical Migratory Bird Conservation Act, Conserving Birds Across the Americas, <https://www.fws.gov/birds/grants/neotropical-migratory-bird-conservation-act.php>

⁸ U.S. Chamber Key Vote Letter on S. 3422, the “Great American Outdoors Act,” June 4, 2020, <https://www.uschamber.com/letters-congress/us-chamber-key-vote-letter-s-3422-the-great-american-outdoors-act>

⁹ National Audubon Society, The Pew Charitable Trusts and U.S. Chamber of Commerce Praise Enactment of the Great American Outdoors Act, August 4, 2020, <https://www.globalenergyinstitute.org/national-audubon-society-pew-charitable-trusts-and-us-chamber-commerce-urge-senate-passage-great>

¹⁰ Agricultural Conservation in the 2018 Farm Bill, Congressional Research Service, April 18, 2019, <https://crsreports.congress.gov/product/pdf/R/R45698#>.

¹¹ Outdoor Cats: Single Greatest Source Of Human-Caused Mortality For Birds And Mammals, Says New Study, American Bird Conservancy, January 29, 2013, <https://abcbirds.org/article/outdoor-cats-single-greatest-source-of-human-caused-mortality-for-birds-and-mammals-says-new-study/>

with buildings and vehicles are the largest threats account for 95 percent of bird kills, according to a 2018 FWS report.¹² Conversely, critical infrastructure such as electrical lines and communications towers were estimated to have orders of magnitude lower bird kills.

2. Retaining the January 7 Rule Will Provide Regulatory Certainty and Support Current Efforts to Improve U.S. Infrastructure

Retaining the January 7 Rule will enable more rapid deployment of the investments laid out in various infrastructure proposals currently being considered in Congress, including President Biden’s American Jobs Plan. These proposed investments call for building better roads, bridges, water resources, expanding broadband access, and undertaking many other initiatives to improve the built environment. Some of the initiatives, if implemented, would allocate significant resources to support a transition to a lower carbon economy that will require the build-out of renewable energy generation infrastructure, carbon-capture and storage pipelines, electric transmission lines, battery storage, advanced nuclear infrastructure, and other energy infrastructure. This work requires regulatory certainty. Revoking the January 7 Rule does the opposite, creating uncertainty over potential enforcement for otherwise legal activities and over whether future regulatory actions could require infrastructure redesign or change orders. The unknown and open-ended risk of criminal liability and penalties for MBTA violations, augmented by further uncertainty over potential efforts at civil enforcement, will substantially deter and discourage private investments and activities that could give rise to such risk. Such risks and uncertainties will inevitably add significant costs and delays to the implementation of any infrastructure program.

Revoking the January 7 Rule will not only delay the implementation of any infrastructure program, including the President’s plan, but it has the potential to delay any associated climate benefits—and by extension the benefits to migratory birds—that new, resilient infrastructure is intended to deliver. The Audubon Society stated in its report, “Audubon’s Birds and Climate Change Report,” that absent efforts to curb climate change over 300 species of birds stand to lose significant portions of their ranges.¹³ To effectively and timely address the climate challenge and its associated impacts, infrastructure project sponsors need regulatory certainty. With such certainty, industry can rapidly deploy and develop significant new infrastructure while improving environmental outcomes.

3. The Text of the MBTA Does Not Prohibit Incidental Take

As noted in the proposed rule, courts have issued varying and conflicting opinions on whether the MBTA applies to incidental taking to species protected by the statute. The Chamber supported the January 7 Rule because it clarified the federal government’s understanding of the question and sought to apply a uniform interpretation of MBTA that accorded with the text and purpose of the statute—that its prohibitions do not apply to incidental take.

¹² Migratory Bird Mortality – Questions and Answers, U.S. Fish & Wildlife Service, September 14, 2018, <https://www.fws.gov/birds/bird-enthusiasts/threats-to-birds.php>

¹³ Audubon’s Birds and Climate Change Report, http://climate.audubon.org/sites/default/files/NAS_EXTBIRD_V1.3_9.2.15%20lb.pdf

The MBTA reads, in relevant part, that “it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill ... any migratory bird, [or] any part, nest, or egg of such kind.” 16 U.S.C. § 703(a). Unlike the Endangered Species Act, the statutory text of the MBTA does not define “take.” But the common law definition of the term is helpful. See *United States v. Shabani*, 513 U.S. 10, 13 (1995) (“[A]bsent contrary indications,” courts presume that “Congress intends to adopt the common law definition of statutory terms.”). As applied to wild animals, “take means to reduce those animals, by killing or capturing, to human control.” *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 717 (1995) (Scalia, J., dissenting) (citing *Greer v. Connecticut*, 161 U.S. 519, 523 (1896); 2 *William Blackstone, Commentaries* 411 (1766)). And “[o]ne does not reduce an animal to human control accidentally or by omission; he does so affirmatively.” *United States v. CITGO Petroleum Corp.*, 801 F.3d 477 (5th Cir. 2015). In other words, the term “take” denotes an intentional and affirmative act to cause migratory bird deaths.

Consistent with that interpretation, the Fifth, Eighth, and Ninth Circuits have each read the MBTA’s criminal prohibitions narrowly. See *Seattle Audubon Society v. Evans*, 952 F.2d 297 (9th Cir. 1991); *Newton County Wildlife Association v. U.S. Forest Service*, 113 F.3d 110 (8th Cir. 1997); *United States v. CITGO Petroleum Corp.*, 801 F.3d 477 (5th Cir. 2015). In *CITGO Petroleum Corp.*, for example, the Fifth Circuit held that the “statute’s text, its common law origin, a comparison of other relevant statutes, and rejection of the argument that strict liability can change the nature of the necessary illegal act” all led to the conclusion that the MBTA does not apply to incidental take. *Id.* at 490. The court declined to adopt a broader reading of the statute, in part, because the “scope of liability” under an interpretation that includes incidental take “is hard to overstate” and would lead to “far-reaching ... societal impact if the government began exercising its muscle to prevent ‘taking’ and ‘killings’ by regulating every activity that proximately causes bird death.” *Id.* at 494. By way of example, the court explained that “[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.” 801 F.3d at 493; *see id.* at 489.

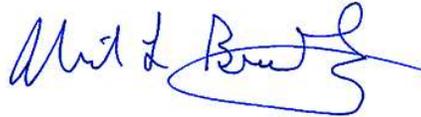
As the Fifth Circuit observed and the January 7 Rule reiterated, an interpretation of the MBTA that allows for liability pursuant to incidental take is virtually unlimited and would permit a troubling expansion of federal power. Put simply, common actions—from owning and operating electric transmission lines and wind farms to collisions with vehicles or building windows—involve inherent risk of incidental take. These inevitable and unavoidable circumstances should not be subject to criminal liability under MBTA, which provides for imprisonment and criminal fines even for misdemeanor violations of the statute. The risk of such penalties and liability will substantially deter the very infrastructure investments that this Administration seeks to support. For these reasons, we urge FWS to undertake thoughtful consideration of the text of the statute itself, court precedent, and the practical implications of rescinding recent efforts to institute a uniform, nationwide prohibition on criminalization of incidental take.¹⁴

¹⁴ For many of the same reasons, we respectfully submit that “the MBTA’s prohibition on ‘killing’ is similarly limited to deliberate acts that effect bird deaths.” *CITGO Petroleum Corp.*, 801 F.3d at 489 n.10; *see Newton Cty. Wildlife Ass’n*, 113 F. 3d at 115 (“The government argues that the statute imposes ‘strict liability’ on violators,

To conclude, we support the implementation of the January 7 Rule as it will provide regulatory certainty for a vast range of commercial and industrial activities across the economy. We continue to support the use of voluntary programs and to advocate for the full use of the conservation funding appropriated through national and state legislation to protect migratory bird populations.

Thank you for considering our comments and request to retain the January 7 Rule.

Sincerely,

A handwritten signature in blue ink, appearing to read "Neil L. Bradley". The signature is fluid and cursive, with a large loop at the end.

Neil L. Bradley

except for felony violations, which under a recent amendment must be done ‘knowingly.’ Strict 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. Thus, we agree with the Ninth Circuit that the ambiguous terms ‘take’ and ‘kill’ in [the MBTA] mean ‘physical conduct of the sort engaged in by hunters and poachers, conduct which was undoubtedly a concern at the time of the statute's enactment in 1918.’”).