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**VIA ELECTRONIC FILING**

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**RE: Migratory Bird Permits: Authorizing the Incidental Take of Migratory Birds (Advance Notice of Proposed Rulemaking; notice of intent to prepare a National Environmental Policy Act document), 86 FR 54667, October 4, 2021 [Docket No. FWS-HQ-MB-2021-0105-0001]**

Dear Assistant Director Ford:

We, the undersigned, appreciate the opportunity to comment on the U.S. Fish and Wildlife Service's (FWS) advance notice of proposed rulemaking, "Migratory Bird Permits: Authorizing the Incidental Take of Migratory Birds."

The FWS should consider the potential impacts of changes in policy and regulations on the ability of the Administration to build the infrastructure of the future. Restrictive and costly permitting policies will only add to already lengthy delays in the federal permitting processes.

Federal agencies should strive to develop policies that allow for the timely deployment of these resources. Policies and regulations under the Migratory Bird Treaty Act (MBTA) should also help support the current efforts to deploy clean energy infrastructure needed to meet the climate challenge.

Avian conservation is important to businesses operating across industries. As detailed below, businesses have invested (and continue to invest) significant resources to develop and implement conservation practices. Businesses have taken these steps voluntarily, with the goal of minimizing incidental impacts to migratory birds and other avian wildlife. Encouraging businesses to continue to engage in established conservation programs and implement best management practices (BMPs) is preferable to imposing unnecessarily burdensome regulatory restrictions.

FWS should address the following comments when developing and implementing a new MBTA permitting program:

**1. For Policy as Well as Legal Reasons, Any Permitting Program Pursued by the FWS Should Seek to Limit Criminal Liability for Incidental Take, Which is Not Prohibited by the Text of the MBTA**

Criminal liability and significant penalties for incidental take of migratory birds under the MBTA 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 under an expansive reading and implementation of the MBTA, which is not necessary to support best practices for conservation and protection of migratory birds. Such increased uncertainty and potential liability 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.<sup>1</sup> In addition, as FWS has indicated, the overwhelming majority of bird mortality is not caused by industrial sources that FWS seeks to regulate. Accordingly, any permitting program pursued by the FWS should not impose criminal liability for incidental take.

**Figure 1. FWS Estimates of Annual Bird Mortality<sup>2</sup>**

<b>Hazard/Type</b>	<b>Median/Avg. Estimated</b>	<b>% of Total</b>
Cats	2,400,000,000	72.2
Collision - Building Glass	599,000,000	18.0
Collision - Vehicles	214,500,000	6.5
Poison	72,000,000	2.2
<b><i>Non-Industrial Subtotal</i></b>	<b><i>3,285,500,000</i></b>	<b><i>98.8</i></b>
Collisions - Electrical lines	25,500,000	0.8
Collisions - Communication towers	6,600,000	0.2
Electrocutions	5,600,000	0.2
Oil Pits	750,000	0.02
Collisions - Land-based Wind Turbines	234,012	0.01
<b><i>Industrial Subtotal</i></b>	<b><i>38,684,012</i></b>	<b><i>1.2</i></b>
<b>Total</b>	<b>3,324,184,012</b>	<b>100.0</b>

Courts have issued conflicting opinions on whether the MBTA applies to the incidental take of migratory birds. FWS’s January 7, 2021 rulemaking<sup>3</sup> to clarified the federal government’s understanding of this issue and to applied a uniform interpretation of the MBTA

<sup>1</sup> General Provisions; Revised List of Migratory Birds, 85 Fed. Reg. 21282 (April 16, 2020)

<sup>2</sup> Fish and Wildlife Service, Migratory Bird Mortality Question and Answer, <https://www.fws.gov/birds/bird-enthusiasts/threats-to-birds.php>

<sup>3</sup> Regulations Governing Take of Migratory Birds Final Rule, 86 Fed. Reg. 1134 (January 7, 2021).

that was in accord with the text and purpose of the statute—that its prohibitions do not apply to incidental take of migratory birds. We continue to support that position.

The MBTA states, 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.” However, the common law is informative. *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 held that the MBTA take prohibition applies only to actions purposefully directed against migratory birds (e.g., hunting). *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); *CITGO Petroleum Corp.*, 801 F.3d at 489-94. 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.” *Id.* at 493; *see id.* at 489.<sup>4</sup>

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<sup>4</sup> 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, 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.’”).

## 2. As the FWS Considers Potential Regulatory and Policy Changes, the FWS Should Take Careful Account of Existing Agency Procedures, Best Management Practices and Guidelines Accepted Across Industries

Regarding the conservation and protection of migratory birds, there is an array of current agency plans and procedures, voluntary programs and practices that support migratory birds through the conservation of habitat and through other protective measures. In establishing any new permitting program, the FWS should carefully consider these programs and practices, and should avoid taking action that could compromise their viability and effectiveness.

For example, the Federal Energy Regulatory Commission has issued the Upland Erosion Control, Revegetation, and Maintenance Plan (“FERC Plan”) and the Wetland and Waterbody Construction and Mitigation Procedures (“FERC Procedures”).<sup>5</sup> FERC developed the Plan and Procedures in collaboration with other federal and state agencies, as well as the natural gas pipeline industry. The FERC Plan and Procedures represent a suite of construction and mitigation best practices to avoid, minimize, and mitigate the potential environmental effects resulting from construction and operation of projects, including potential effects on migratory birds. Pursuant to the FERC Plan and Procedures, developers routinely conduct tree and brush clearing associated with new construction activities, where practicable, in periods that avoid the nesting season for migratory birds. Developers also employ efforts, including limitations on the extent, frequency, and schedule of right-of-way maintenance clearing (i.e., avoiding right-of-way mowing activities during the migratory bird nesting season) to maintain habitat and avoid impacts to migratory birds over the life of a project.

Further, the energy sector, for example, 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:

- ***Avian Protection Plan (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.<sup>6</sup> 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.<sup>7</sup>

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<sup>5</sup> See FERC, Upland Erosion Control, Revegetation, and Maintenance Plan (May 2013), available at <https://www.ferc.gov/industries/gas/enviro/guidelines/upland-pocket-guide.pdf>; FERC, Wetland and Waterbody Construction and Mitigation Procedures (May 2013), available at <https://www.ferc.gov/industries/gas/enviro/guidelines/wetland-pocket-guide.pdf>.

<sup>6</sup> 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](https://www.aplic.org/uploads/files/2634/APPguidelines_final-draft_Aprl2005.pdf)

<sup>7</sup> 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](https://www.fws.gov/ecological-services/es-library/pdfs/WEG_final.pdf)

In accordance with a recent Director's Order, FWS will take these "beneficial practices" into account by not prioritizing activities conducted in accordance with these measures for enforcement action.<sup>8</sup> If the FWS were to pursue a permitting program, it should consider the existing requirements and best practices to reduce incidental take. The implementation of these established measures should obviate the need to impose any additional requirements through an MBTA permit.

### 3. Current Conservation Programs Are Helping Support Migratory Birds and Reducing Impacts

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.<sup>9</sup> 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 have positively affected approximately five million acres of bird habitat and have spurred partnerships resulting in investments of an additional \$286 million.<sup>10</sup>
- ***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.<sup>11</sup> 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.<sup>12</sup>

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<sup>8</sup> Director's Order No. 225, Incidental Take of Migratory Birds (Oct. 5, 2021).

<sup>9</sup> 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>

<sup>10</sup> Neotropical Migratory Bird Conservation Act, Conserving Birds Across the Americas, <https://www.fws.gov/birds/grants/neotropical-migratory-bird-conservation-act.php>

<sup>11</sup> 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>

<sup>12</sup> 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>

- *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.<sup>13</sup>
- *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.

#### **4. Any Permitting Program Must Ensure Timely Decision Making to Avoid Costly Delays to U.S. Infrastructure Development**

If the FWS chooses to develop new permitting process, FWS must of course make a detailed draft of its proposed process and requirements available for public comment available prior to promulgation and implementation. Any such program should account for industry-specific regulatory requirements, best practices, and considerations and ensure that decisions are made in a timely manner to avoid delaying valuable infrastructure development and project delivery. Complicated federal processes and permitting criteria could not only delay the implementation of any infrastructure program but delay any associated benefits—including climate benefits that would extend to migratory birds and other species. 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.<sup>7</sup> To meet the climate challenge and reduce any associated impacts, infrastructure project sponsors need regulatory certainty. With such certainty, industry can rapidly deploy and develop significant new infrastructure while improving environmental outcomes. If exploring options for an efficient permitting process for incidental take of migratory birds, the FWS should consider establishing a “general” permit program similar to U.S. Environmental Protection Agency (EPA) multi-sector general permit authorizing stormwater discharges from 29 industrial sectors, EPA’s general permit authorizing stormwater discharges from construction activities, and EPA’s general permit authorizing discharges associated with pesticide applications. If properly designed, the characteristics of such permit programs—online notice of intent (NOI), no additional agency review or approval, beneficial practices documented in a project specific plan, etc.—can allow the agency to ensure that multiple industrial sectors are taking steps to minimize

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<sup>13</sup> Agricultural Conservation in the 2018 Farm Bill, Congressional Research Service, April 18, 2019, <https://crsreports.congress.gov/product/pdf/R/R45698#>.

their impacts while avoiding the burden on the agency, applicant, and public of developing project specific individual permits. This type of general permit program, if established correctly, may serve the dual purpose of minimizing adverse impacts on migratory birds, and focusing government and private-sector resources on the subset of activities that may have more serious impacts.

At the same time, we note that any new permitting provisions, whether in the form of a general permit program or in some other form, must not be so complex or burdensome as to negate the benefits of the new program. Any general permits should incorporate insights from best management practices that industry stakeholders are already implementing, and should not impose new, burdensome regulatory responsibilities. This includes monitoring or surveying duties that would deter participation in a permit program or introduce new liabilities or uncertainties for regulated parties. Indeed, the same effort should be made to avoid duplicative actions on public works projects, for example, that have already completed the environmental review under the National Environmental Policy Act and conducted studies/surveys to assess any impacts to birds and evaluated alternatives. Of course, any new permitting program must be consistent with law, including the limits on the reach of the MBTA noted above. Additionally, the Service should properly account for the staffing requirements needed to ensure timely processing and administration of any permitting program.

#### **5. Any New Permitting Program Should be Both Reasonable and Limited in Scope**

Any new program should also seek to limit the scope of monitoring to avoid imposing unfair burdens on particular companies or industries. For example, an energy business with thousands of miles of infrastructure or telecommunications businesses with thousands of communication towers that could arguably give rise to incidental take will not be able to fulfill the same monitoring requirements as a facility whose physical footprint is concentrated in one discrete location. Monitoring requirements should be site-specific, industry-specific, and consider the sometimes vastly different scope of operations and terrains on which commercial activity is conducted. In some instances, the scope of a company's operations will cause a comprehensive monitoring program to substantially increase costs to customers without any significant corresponding benefit to migratory birds.

FWS should appropriately limit monitoring requirements in those circumstances to prevent imposing disproportionately costly, or otherwise unreasonable, burdens. Further, any permitting program should include clear safe-harbor provisions that would allow regulated parties to manage risk by satisfying reasonably feasible, understandable, stable, and predictable criteria.

Regarding new fees or enforcement measures, it bears emphasis that any new fees must be limited and reasonable in nature, and that the same is true of enforcement efforts. Costly permits and fines have the potential to further weaken certain industries at a time when they are attempting to recover from the recent COVID-19 crisis and economic downturn. Increased fees and fines could leave a business with less resources to innovate and to pursue its conservation, climate, and infrastructure goals. They could also overly deter private-sector activities that would benefit the environment and the economy.

## **Conclusion**

We continue to support the position that subjecting businesses to criminal liability and significant penalties under the MBTA for incidental take of migratory birds is improper, inconsistent with the statute, and inconsistent with good policy. 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. If the FWS pursues any permitting program, it must be practical, appropriately limited in scope, and carefully take into account the vast and varied range of commercial and industrial activities across the economy that could be affected by such a program.

Thank you for considering our comments.

Sincerely,

American Gas Association  
American Road & Transportation Builders Association  
Associated General Contractors of America  
Interstate Natural Gas Association of America  
National Rural Electric Cooperative Association  
National Ocean Industries Association  
U.S. Chamber of Commerce