



THE WILDLIFE SOCIETY

Leaders in Wildlife Science, Management and Conservation

24 February 2021

Public Comments Processing
Attn: FWS– HQ–MB–2018–0090
U.S. Fish and Wildlife Service
MS: JAO/3W
5275 Leesburg Pike
Falls Church, VA 22041–3803

Re: Regulations Governing Take of Migratory Birds [Docket No. FWS-HQ-MB-2018-0090]

The Wildlife Society appreciates the opportunity to provide additional comments regarding the final rule defining the scope of the Migratory Bird Treaty Act (MBTA) published on 7 January 2021. This rule – codifying the 2017 Interior Solicitor’s M-Opinion indicating that incidental taking and killing of migratory birds is permitted under the MBTA – could limit the nation’s ability to uphold obligations under the 1916 Migratory Bird Treaty and restrict the ability of public and private sector wildlife professionals to conserve migratory birds.

Founded in 1937, The Wildlife Society (TWS; wildlife.org) and our network of affiliated chapters and sections represents over 15,000 wildlife biologists and managers, dedicated to excellence in wildlife stewardship through science and education. Our mission is to inspire, empower, and enable wildlife professionals to sustain wildlife populations and their habitat through science-based management and conservation.

The Wildlife Society previously submitted comments to the original proposed rule in March 2020 and in response to the related Draft Environmental Impact Statement in July 2020. **We reiterate our request that Department rescind this rule and renew the longstanding interpretation of the Act.**

Background

The Migratory Bird Treaty Act has long been the nation’s key tool in conserving migratory birds, which are an international public trust resource that must be managed through scientific understanding. As a public trust resource, migratory birds are managed by government agencies for the benefit of current and future generations.

Migratory birds are also culturally and economically important wildlife species. There are 46 million bird watchers in the United States who contribute more than \$85 billion annually in economic activity ([Pullis La Rouche 2006](#)). More than 2.4 million migratory bird hunters spent more than 16 million days and \$2.3 billion pursuing migratory birds in 2016 ([USFWS 2016](#)). Migratory birds can also assist with agricultural production by responding to pest outbreaks, and provide key ecological services such as seed dispersal ([Hougnier et al. 2005](#), [Wenny et al. 2011](#)).

These populations, however, continue to face threats in part due to longstanding industrial practices. Since 1970, North America has lost more than 2.9 billion birds – about 30% of the continent-wide total ([Rosenberg et al. 2019](#)). Each year, an estimated 64 million birds are killed by power lines ([Loss et al. 2014](#)), with an additional five million killed by communications towers ([Manville 2005](#)) and nearly 600,000 by wind energy operations ([Smallwood 2013](#)). While this taking of migratory birds is incidental and unintentional, it does have an impact – which can be minimized and mitigated through adherence to best management practices. Decades of administrative and diplomatic interpretation of the MBTA enabling regulation of incidental take within the scope of the law has provided clear incentives for industry to work with wildlife professionals to implement conservation and mitigation practices.

Recommendations

The Wildlife Society recommends the Service rescind the final MBTA rule and reinstate the Department's longstanding interpretation of the Act. As explained in our July 2020 comments, the Final Environmental Impact Statement upon which the final rule is based is fundamentally flawed and legally and scientifically insufficient. In the EIS, the Service analyzed three alternatives, and for each, described the possible effects on migratory birds, other environmental resources, ecosystem services and the economy. These analyses, in general, were perfunctory and not scientifically robust. Alarming, there was a complete absence of any sufficient analysis regarding the effect on migratory birds, the very species the Migratory Bird Treaty Act is intended to conserve.

This was notably the case for the analysis of the effects of the preferred alternative – the final rule – which was patently insufficient. To truly understand the impacts of changing the interpretation of the MBTA, the agency must analyze migratory species population levels, trends, range, and distribution, life history traits, and the threats faced. In the EIS, the entirety of the discussion on the possible effects of the preferred alternative to migratory birds was only three paragraphs. This analysis simply does not sufficiently assess the impacts of the proposed regulatory decision on migratory birds.

In order to work towards productive partnerships with industry partners, we encourage the Service to once again explore the creation of an industry permitting program that would allow for incidental take of MBTA-listed species when adhering to best management practices. Such a process would alleviate concerns regarding an undue burden placed on the American public under current regulations, while still enabling wildlife professionals to work alongside commercial and industrial activities to minimize and mitigate impacts on migratory birds.

In light of the impacts of incidental take on migratory birds and the inadequacy of the environmental analysis conducted on this rule, we urge you to rescind the final MBTA rule entirely and revert to the former interpretation of the Migratory Bird Treaty Act to uphold the spirit of the original treaty, recognize migratory birds as an international and public trust resource, and ensure science-based conservation and management of migratory birds.

Please contact Caroline Murphy, AWB®, government relations manager at The Wildlife Society (cmurphy@wildlife.org; 301-968-1903), with any questions regarding these comments.

Sincerely,



Carol L. Chambers, PhD
President, The Wildlife Society