

**ATTORNEYS GENERAL OF THE STATES OF NEW YORK, CALIFORNIA,  
CONNECTICUT, ILLINOIS, MARYLAND, MINNESOTA, NEW JERSEY,  
NEW MEXICO, OREGON, AND WASHINGTON, AND THE  
COMMONWEALTH OF MASSACHUSETTS**

March 19, 2020

Rob Wallace  
*Assistant Secretary for Fish and Wildlife and Parks*  
Attention: FWS-HQ-MB-2018-0090  
U.S. Fish and Wildlife Service  
MS: JAO/1N  
5275 Leesburg Pike  
Falls Church, VA 22041-3803

*Via Federal eRulemaking Portal*

RE: Comments on Proposed Rule to Limit the Scope of the Migratory Bird Treaty Act's Prohibitions to "Actions Directed at Migratory Birds," 85 Fed. Reg. 5915 (Feb. 3, 2020)

Dear Assistant Secretary Wallace:

The Attorneys General of New York, California, Connecticut, Illinois, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, Oregon, and Washington (the "States") submit the following comments on the proposal by the U.S. Fish & Wildlife Service ("FWS" or the "Service"), part of the U.S. Department of the Interior ("Interior"), to adopt a regulation that would limit the scope of the conduct prohibited by the Migratory Bird Treaty Act's ("MBTA" or the "Act") to "actions directed at migratory birds, their nests or their eggs." 85 Fed. Reg. 5915 (Feb. 3, 2020) (the "Proposed Rule"). The States strongly oppose the Proposed Rule, because it is contrary to the MBTA provision it purports to interpret and therefore is unlawful and in violation of the MBTA and the Administrative Procedure Act. 5 U.S.C. § 706. The Proposed Rule is also inconsistent with the policy animating the MBTA and would harm the States' sovereign, quasi-sovereign, and proprietary interests in protecting migratory birds for the benefit of their citizens and the natural resources within their boundaries.

For nearly 40 years, from the 1970s until December 2017, the Service interpreted the Act to prohibit conduct that resulted in the deaths of migratory birds, whether those deaths were the purpose of the activity or incidental to otherwise lawful activity. That longstanding interpretation was consistent with the Act's language, purpose, and legislative history—indeed, that interpretation is compelled by the MBTA's text—and it was consistent with the decisions of a majority of federal courts that have addressed this issue and principles of international comity. Moreover, that interpretation saved large numbers of

migratory birds from injury and death and thereby effectuated the Act's chief purpose. Although the Service typically used enforcement as a last resort, the threat of enforcement provided a strong incentive for industry to take measures that mitigated foreseeable hazards to migratory birds such as oil, poison, and electrocution.

However, in December 2017, Interior reversed its longstanding interpretation. The Deputy Solicitor for the Interior issued a memorandum that promised to remove “the sword of Damocles” that had previously hung “over a host of otherwise lawful and productive actions.” See Solicitor’s Memorandum, *The Migratory Bird Treaty Act Does Not Prohibit Incidental Take*, M-37050 (Dec. 22, 2017), at 1 (the “December 2017 Memorandum”). The December 2017 Memorandum asserted—wrongly—that the MBTA applies only to “affirmative actions that have as their purpose the taking or killing of migratory birds, their nests or their eggs.” *Id.* at 2.

On September 6, 2018, the States of New York, California, Illinois, Maryland, New Jersey, New Mexico, and Oregon, and the Commonwealth of Massachusetts (“Plaintiff States”) brought an action in the U.S. District Court for the Southern District of New York seeking a ruling that the new interpretation is arbitrary, capricious, and contrary to law and therefore violates the MBTA and the Administrative Procedure Act. The Plaintiff States’ complaint is attached as Exhibit A. On July 31, 2019, the court denied Interior’s motion to dismiss, rejecting Interior’s contentions that the Plaintiff States lacked standing, that the December 2017 Memorandum was not a final agency action, and that the action was unripe. That decision is attached as Exhibit B. On January 17, 2020, the Plaintiff States filed a motion for summary judgment, which is currently pending. The Plaintiff States’ opening brief in support of their motion for summary judgment is attached as Exhibit C.

The Proposed Rule would codify the invalid interpretation of the MBTA that the Plaintiff States are challenging in court. The Plaintiff States’ arguments in that ongoing litigation, as more fully set forth in Exhibits A and C, are incorporated and summarized herein but not repeated at length and are joined by all of the undersigned States.

As the Plaintiff States argue in their opening brief, Interior’s reinterpretation of the MBTA is inconsistent with the Act’s text, which prohibits taking or killing migratory birds “at any time, by any means or in any manner.” See Ex. C at 17-21 (quoting 16 U.S.C. § 703(a)). It is also inconsistent with the Act’s legislative history and its clear purpose—to protect migratory birds. When Congress amended the Act to impose mental state requirements for selling migratory birds or hunting migratory birds over baited fields, it reaffirmed that the general prohibition on killing migratory birds would remain subject to strict liability and not limited to acts specifically directed at killing migratory birds. See *id.* In addition, the new interpretation is inconsistent with the decisions of the majority of federal courts

that have addressed this issue, which have found that the MBTA applies to actions that incidentally or unintentionally take or kill migratory birds. *See id.* at 8. Further, Interior's reinterpretation is inconsistent with the treaties that the MBTA implements, which mandate that the United States and other signatories regulate incidental take, and is therefore contrary to principles of international comity. *See id.* at 24-25.

The Proposed Rule would harm the States submitting these comments by depriving them of the MBTA's protections for migratory birds that nest in, winter in, or pass through their territories. The States own and hold migratory birds in trust for their citizenry. *See Ex. B* at 9. Moreover, the States and their citizens benefit from the role that migratory birds play in maintaining ecological balance and the valuable ecological services that they provide. *See Ex. A* ¶ 8. The critically important ecological services these species provide include insect and rodent control, pollination, and seed dispersal. *Id.*

Migratory birds also provide scientific and recreational opportunities and aesthetic benefits enjoyed by many people. For example, according to the most recent state-level data in the federal government's "2011 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation," an excerpt of which is attached as Exhibit D, birdwatchers and other wildlife watchers spent approximately \$4.2 billion per year in New York, \$3.7 billion in California, \$3.2 billion in Washington, \$2.3 billion in Massachusetts, \$1.7 billion in Oregon, \$1.3 billion in Illinois, \$986 million in New Jersey, \$935 million in Connecticut, \$621 million in Minnesota, \$480 million in Maryland, and \$327 million in New Mexico. *Ex. D.* at 97. That same year, approximately 6.5 million California residents participated in birdwatching and other wildlife watching, along with 4.1 million New York residents, 2.8 million Illinois residents, 1.9 million Washington residents, 1.7 million New Jersey residents, 1.5 million Massachusetts residents, 1.5 million Minnesota residents, 1.2 million Maryland residents, 1.2 million Oregon residents, 1.1 million Connecticut residents, and 486,000 New Mexico residents. *Id.* at 94. Nationwide, birdwatching was by far the most popular form of wildlife watching: of the 72 million U.S. residents who engaged in wildlife watching, 47 million were birdwatchers. *Id.* at 36. In addition, approximately 2.6 million migratory bird hunters generated approximately \$1.8 billion of economic activity across the country. *Id.* at 22. These benefits directly or indirectly generate economic activity and tax revenue for the States. However, these benefits are lost or diminished when bird numbers are depleted by activities or conditions that incidentally take or kill migratory birds.

As the U.S. Supreme Court recognized 100 years ago, state-level protections are insufficient to protect transient species that travel outside of a state's territorial bounds. In a landmark decision upholding the constitutionality of the MBTA, Justice Holmes wrote that migratory birds, which "yesterday had not arrived, tomorrow may be in another State and in a week a thousand miles away" can be "protected only by national action." *Missouri v. Holland*, 252 U.S. 416, 434-35

(1920). The science confirms that Justices Holmes’s observations were accurate. As Kenneth V. Rosenberg, Ph.D, an ornithologist with Cornell University, stated in the declaration attached as Exhibit E, migratory birds that nest in, winter in, or migrate through a particular state can be killed anywhere their migrations take them. Ex. E ¶¶ 1, 15. Individual States therefore rely on federal law (and the international treaties implemented by federal law) to protect their own bird populations when individual birds migrate beyond their boundaries. Interior’s elimination of longstanding federal protection harms State interests.

Already, Interior’s new interpretation—which the Proposed Rule seeks to adopt—has significantly increased the threat of death and injury to migratory birds. In a declaration by Gary G. Mowad, former Deputy Chief of the FWS Office of Law Enforcement, which is attached as Exhibit F, Mr. Mowad described how the threat of enforcement in the past induced industry to remedy hazards to migratory birds. Ex. F ¶ 29. Mr. Mowad explained that he has conducted two flyovers of oil-producing sites in Wyoming since the new interpretation took effect. Both times, he observed hazardous conditions that the Service, under its prior, longstanding interpretation, would have addressed. *Id.* ¶¶ 42-44. In May 2018, he saw “dozens of open, uncovered waste ponds with surface oil on them” as well as waste ponds in which the netting for excluding birds was poorly maintained. *Id.* ¶ 42. In August 2019, he observed a significant number of uncovered oil ponds and oil spills, as well as a broken flow line that threatened to spill oil into the local wetlands. *Id.* ¶ 43. Similar conditions exist in oil-producing regions of other states, where Mr. Mowad has also observed open waste ponds since the new interpretation took effect. *Id.* ¶¶ 45-46. Under the prior interpretation, the Service would have required the owners and operators of these facilities to fix the conditions that were harming or threatened to harm migratory birds. *See id.* ¶ 26. Under the new interpretation, the Service lacks authority to do so. *Id.* ¶¶ 32-33.

The new interpretation harms States in other ways as well. For example, the new interpretation will deprive them of the benefits of MBTA penalties for, among other things, oil spills in inland and non-inland waterways, which was previously a major source of funding for habitat restoration programs following incidents that caused deaths of birds reliant on the affected habitats. As Seth Schofield, Senior Appellate Counsel and natural resource damages coordinator at the Massachusetts Attorney General’s Office, explained in a declaration that is attached as Exhibit G, an oil spill in Buzzards Bay, Massachusetts in 2003, which killed more than 450 migratory birds, resulted in the payment of a \$7 million fine for violating the MBTA, which was used to protect and/or restore 1,773 acres of important coastal habitat in the Buzzards Bay watershed. *See* Ex. G ¶¶ 2-9. Due, in part, to the new interpretation, however, the Service recently declined to pursue an enforcement action following a recent oil spill in Woods Hole, Massachusetts. *See* Ex. C at 16.

Finally, the Service’s assertions that its prior, longstanding interpretation criminalized “everyday actions,” *see* 85 Fed. Reg. at 5921, and failed to provide “fair notice” to potential violators, *see id.* at 5920, are inaccurate. As Mr. Mowad

explained in his declaration, the Service previously employed an enforcement protocol that emphasized “working with industry to generate compliance voluntarily,” and which called for bringing enforcement actions “only as a last resort.” Ex. F. ¶ 25. Under that protocol, when the Service discovered an active hazard to migratory birds, it would provide notice to the responsible party and allow 30 days for the problem to be fixed. *Id.* ¶ 26. According to Mr. Mowad, enforcement proceedings were reserved for the “small number of recalcitrant actors, (usually no more than 15 percent of operators) who refused to comply by taking the same basic measures implemented by other operators.” *Id.* ¶ 27.

The States urge the Service to: (1) withdraw the Proposed Rule as arbitrary and capricious, unlawful, and otherwise inconsistent with the MBTA’s guiding policy; (2) vacate the December 2017 Memorandum; and (3) reinstate the agency’s longstanding interpretation that the MBTA prohibits incidental take.

DATED: March 19, 2020

Respectfully submitted,

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