



July 20, 2020

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Public Comments Processing  
Attn: FWS-HQ-MB-2018-0090  
U.S. Fish and Wildlife Service  
MS: JAO/1N  
5275 Leesburg Pike  
Falls Church, VA 220451-3803

**Re: Regulations Governing Take of Migratory Birds; Environmental Impact Statement**

Dear Sir/Madam:

Western Energy Alliance and the Petroleum Association of Wyoming submit the following comments on the U.S. Fish & Wildlife Service's (FWS) draft environmental impact statement (EIS) for the rule defining the scope of the Migratory Bird Treaty Act (MBTA). We reaffirm [our strong support](#) for the underlying rulemaking, and we urge FWS to adopt Alternative A in the draft EIS and finalize the rule expeditiously. However, we believe the EIS could be strengthened with additional information, as we outline below.

Western Energy Alliance represents over 450 members involved in all aspects of environmentally responsible exploration and production of oil and natural gas in the West. The Alliance represents independents, the majority of which are small businesses with an average of fifteen employees.

PAW is the voice of Wyoming's primary economic driver, the oil and gas industry. Collectively, PAW's members produce over 90% of the State's oil and gas, generate more than \$5 billion in economic activity, and employ more than 18,000 of Wyoming's hardworking men and women.

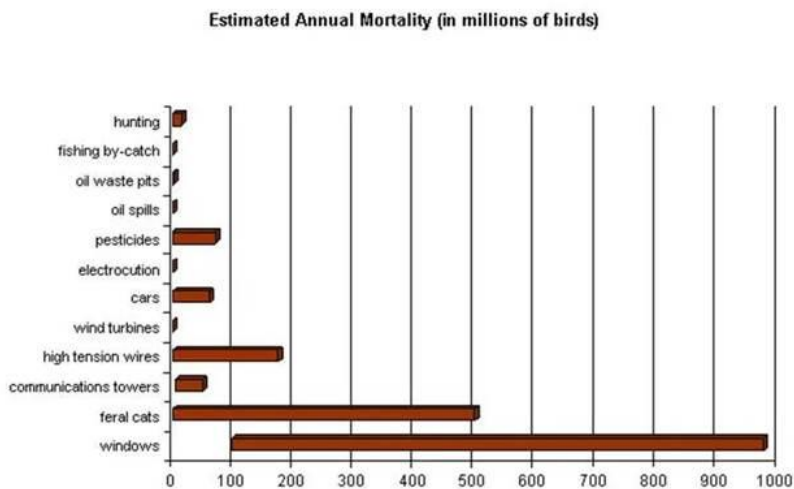
As noted above, the Alliance and PAW strongly support the rulemaking regarding application of the MBTA to incidental take of covered species. Our comments below are intended to strengthen support for the final rulemaking, and highlight additional information FWS should incorporate to accomplish that goal.

### **Anthropogenic Impacts**

**Comment 1:** FWS should add a discussion of "additive" versus "compensatory" mortality to the final EIS. Banks/USFWS (1979) says as many as 10 billion birds are born and die each year. Additive deaths cause population level declines while compensatory deaths denote bird mortalities that would have occurred anyway by other natural causes. On page 27 of the draft EIS, FWS notes that hunting results in

“direct” mortality of about 30 million birds a year in the US. It should also be noted that wildlife agencies use the best available science to ensure hunting mortalities are not additive.

**Comment 2:** Anthropogenic-related bird mortalities should be discussed in more detail and placed into proper scale perspectives. For example, the figure below, from a 2010 publication by Sibley Guides, indicates building windows are the largest contributor to bird mortalities, while oil spills, wind turbines and electrocution were the smallest contributors in this historical data set. The EIS should include a figure such as the one below using the most current data available, including but not limited to the draft EIS’s Table 3.2, to better inform the public thru visualization regarding the range of impacts from anthropogenic causes of bird mortalities.



**Comment 3:** Table 3.2 and its accompanying text should discuss the incredibly high mortalities from domestic and feral cats (defined as unowned domestic cats). In a 2015 article by Loss (Oklahoma State University), Will (USFWS), and Marra (Smithsonian Conservation Biology Institute) titled [“Direct Mortality of Birds from Anthropogenic Causes”](#) cats are by far the primary cause of bird mortality in the United States with a central estimate of **2.4 BILLION** bird mortalities per year.

**Comment 4:** After domestic and feral cats, the next biggest threat to birds is urbanization. The draft EIS’s Table 3.2 notes building collisions cause about 600 million bird mortalities per year. The United States population has increased by about 50 million over the last 50 years, and the impact of population growth and the concurrent increase in urbanization should be discussed in the EIS as a significant cause for increasing bird mortalities.

**Comment 5:** The next biggest threats to birds are vehicle collisions, electrical lines, and communication towers, followed by oil and natural gas and wind at a combined total of less than 2 million per year. FWS should clearly note in the final EIS that oil and natural gas development is responsible for less than 0.1 percent of annual anthropogenic bird mortalities.

## Impacts from Energy Development

**Comment 6:** There are about 57,000 wind turbines in the US and per a 2013 paper by Loss, Will, and Marra ([\*“Estimates of bird collision mortality at wind facilities in the contiguous United States”\*](#)) each turbine kills on average 5.25 birds annually. This amounts to about 300,000 bird mortalities per year from wind and this estimate is relatively close to the FWS estimate included within the EIS in Table 3.2. However, the EIS should include a discussion noting that wind impacts are expected to increase independent of the proposed rulemaking. Per the Loss, Will, and Mara paper, “The total amount of bird collision mortality at U.S. wind facilities will likely increase with increased wind development in the coming decades. Scaling our estimates to the scenario projected to meet the DOE’s 20% goal (a six-fold increase from current generation capacity, U.S. DOE 2008) produces a mean annual mortality estimate of roughly 1.4 million birds.” Impacts from other energy development technologies such as solar energy should also be added to Table 3.2.

**Comment 7:** Oil and natural gas drilling, completion and operations has changed dramatically over the last 15 years. Oil and natural gas companies have significantly reduced their use of reserve pits and now predominantly use closed-loop drilling. Where reserve pits are used, generally on an emergency basis, the companies remove harmful substances from them, use nets and fences to cover them and prevent birds from falling in, and comply with state regulations that have been enacted since the earlier studies.

## Incidental Take Prosecutions

**Comment 8:** Prosecutions under the MBTA have focused on high-visibility industries. On page 18 of the draft EIS, Table 2.1 notes that on average from 2010 to 2018 FWS initiated 57 investigations per year: “the majority of investigations involving incidental take of migratory birds were of electrical or oil and gas businesses (about 47 investigations annually representing 81 percent of the annual total.)” Over this same period FWS collected about \$180 million in fines/collections from these cases.

Page 22 of the draft EIS notes three billion fewer birds were estimated to exist in 2017 compared to 1970, and notes this loss occurred despite MBTA’s application to incidental take. On page 42, FWS says “The loss and continuing decline of North American avifauna has largely been driven by anthropogenic sources that cause both direct and indirect mortality. **The extent that this impact is related to any interpretation of the MBTA is unknown and has not been quantified.**” (bold added).

It’s highly unlikely that the interpretation of MBTA making incidental take illegal has had a statistically significant impact on migratory birds, as it has been used almost exclusively as an enforcement tool against electrical utilities, wind companies, and oil and natural gas companies. FWS has not actively pursued MBTA incidental take prosecutions against car owners, airlines, cat owners, skyscrapers, automobile manufacturers, or window manufacturers.

Given the incremental contribution of oil and natural gas to bird mortality, the industry has received a disproportionate amount of prosecutions. The draft EIS presents no data on what positive effect this effort has had on migratory bird mortalities. In other words, prosecuting or threatening to prosecute electrical utility companies, oil and natural gas companies, and wind companies does very little for migratory bird populations given these industries contribute less than 1 percent of annual bird mortality

in total. Therefore, FWS has had and will have virtually no impact on overall bird mortality in a statistically meaningful way by continuing to have prosecutorial powers for incidental take, and this should be acknowledged in the final EIS.

### **State Regulations and Best Management Practices**

**Comment 9:** On page 47 of the draft EIS, FWS says “Section 3.13.1 includes information on the types of practices and types of costs associated with implementing best practices.” This section does not appear to be included in the draft EIS but should be added as a means of disclosing the practices various industries undertake to protect migratory birds. Companies will continue to implement these best practices regardless of the threat of criminal prosecution for incidental take.

**Comment 10:** Federal and state agencies maintain strict regulatory schemes to protect migratory birds. For example, in the State of New Mexico, oil and natural gas development must meet numerous requirements to protect migratory birds:

- The State of New Mexico Oil Conservation Division’s PIT Order R-8952, effective September 1, 1989, states: “This rule requires all pits and open-top tanks over 16 feet be screened, netted, or covered. Exception to this rule may be obtained by showing that the pit or open-top tank is not a hazard to migratory birds or that an alternate method other than those indicated will be installed to prevent the facility from becoming a hazard to migratory birds.”
- Further, New Mexico Administrative Code NMAC 19.15.17.11 (E) has the following requirements: “The operator shall ensure that a permanent pit, a multi-well fluid management pit, or an open top tank is screened, netted or otherwise rendered non-hazardous to wildlife, including migratory birds. Where netting or screening is not feasible, the operator shall on a monthly basis inspect for, and within 30 days of discovery, report discovery of dead migratory birds or other wildlife to the appropriate wildlife agency and to the appropriate division district office in order to facilitate assessment and implementation of measures to prevent incidents from reoccurring.”

In the State of Texas, oil and natural gas development must meet similar requirements, as seen below:

- Texas Administrative Code, 16 TAC 3.22 Protection of Birds  
(b) An operator must screen, net, cover, or otherwise render harmless to birds the following categories of open-top tanks and pits associated with the exploration, development, and production of oil and gas, including transportation of oil and gas by pipeline:  
open-top storage tanks that are eight feet or greater in diameter and contain a continuous or frequent surface film or accumulation of oil; however, temporary, portable storage tanks that are used to hold fluids during drilling operations, workovers, or well tests are exempt;  
skimming pits as defined in §3.8 of this title (relating to Water Protection) (Statewide Rule 8).

Similar rules apply for pits in the state of Wyoming:

- WOGCC Rules on Pits Chapter 4.

#### Pollution and Surface Damage

The Commission exercises its regulatory authority over the construction, location, operation, and reclamation of oilfield pits within a lease, unit or communitized area which is used solely for the storage, treatment, and disposal of drilling, production and treater unit wastes. The following pits are subject to this regulation: Reserve pits on the drilling location; Reserve pits off the location within a lease, unit or communitized area permitted by Owner or unit Operator drilling the [well](#); Produced water retention pits, skim pits, and emergency production pits including the following:

- (A) Pits associated with approved [disposal wells](#) which act as fluid storage, filtering or settling ponds prior to underground disposal in a [Class II well](#);
- (B) Pits constructed for disposal of produced fluids in connection with [oil](#) and [gas](#) exploration and production used as part of the filtering and/or settling process upstream of a National Pollutant Discharge Elimination System (NPDES) discharge point;
- (C) Pits constructed in association with heater treaters or other dehydration equipment used in production, such as free water knockouts, or first, second and third stage separators;
- (D) Pits constructed for blowdown or gas flaring purposes. Pits constructed for the storage and treatment of heavy sludges, oils, or basic sediment and water (BS&W) in connection with production operations; Temporary pits constructed during well [workovers](#), including spent acid and frac fluid pits; Permanent or temporary emergency use pits; Miscellaneous pits associated with oil and gas production not listed above.

#### Centralized Pits

Owners or Operators must obtain approval of the Supervisor for the location, construction and closure of noncommercial centralized pits located within a lease, unit, or communitized area used for field operations. Requirements may be more stringent than individual reserve or produced water pits depending on pit size, waste type, migratory bird protective measures, mosquito control with the county weed and pest control board guidance in the county where operations are located, and location. Applicants, upon request of the Supervisor, shall provide additional notice, plats and plan views, and information relative to the location of water supplies, residences, schools, hospitals, or other structures where people are known to congregate, site security, groundwater monitoring and leak detection. These permits will be issued for a term of five (5) years and may be renewed at the discretion of the Supervisor.

All pits shall be fenced completely and for any produced water pit, workover, completions, or emergency pit found containing oil, sheens, condensate, other hydrocarbons or chemicals proven to be hazardous to public health, safety and welfare, or to wildlife, domestic animals, or migratory birds, the Owner or Operator shall have these fluids removed as soon as practical or in accordance with Chapter 4, Section 1(dd) of these rules. If timely fluid removal is not possible, the pit should be netted or otherwise secured in a manner that avoids the loss of wildlife, domestic animals, or migratory birds. Alternative methods of netting or securing pits may be authorized at the discretion of the Supervisor. See Appendix A for information relative to the Migratory Bird Treaty Act. Owners or Operators shall provide for devices on hydrogen sulfide flare stacks to discourage birds from perching. The Supervisor may make additional requests for security when operations are conducted in close proximity to residences, schools, hospitals, or

other structures or locations where people are known to congregate. For reserve pits, see subsection (jj) of this section.

For reserve pits containing oil, sheens, condensate, other hydrocarbons or chemicals proven to be hazardous to public health, safety and welfare, or to wildlife, domestic animals, or migratory birds, the Owner or Operator shall have these fluids removed as soon as practical. If fluid removal is not possible in a timely manner, the reserve pit shall be fenced completely and netted or otherwise secured at the time the rig substructure has been moved from the location in a manner that avoids the loss of wildlife, domestic animals, or migratory birds. Alternative methods of netting or securing pits may be authorized at the discretion of the Supervisor.

## Conclusions

**Comment 11:** The EIS states the proposed rule change will increase bird deaths but fails to say that the numbers will likely not be statistically significant. This assertion of non-significance can be made with confidence because a) incidental take prosecutions have not been directed towards those activities that kill the vast majority of birds, so it's unlikely human behavior will change with the rulemaking and b) the anticipated increase in mortality from industries that have been prosecuted will not be statistically significant as they remain regulated through other means to protect migratory birds.

**Comment 12:** The EIS should more affirmatively state that energy development in general is not a significant cause of migratory bird mortality. We urge FWS to acknowledge the oil and natural gas industry's technological innovations and to consider [more recent studies](#) showing that analysis of the industry's impacts on migratory birds is outdated.

Thank you for the opportunity to provide these comments. Please do not hesitate to contact us with any questions.

Sincerely,



Tripp Parks  
Vice President of Government Affairs  
Western Energy Alliance



Pete Obermueller  
President  
Petroleum Association of Wyoming