



March 19, 2020

Submitted via www.regulations.gov

Public Comments Processing
Attn: FWS–HQ–MB–2018–0090
U.S. Fish and Wildlife Service
MS: JAO/1N
5275 Leesburg Pike
Falls Church, VA 22041–3803

Re: Regulations Governing Take of Migratory Birds

Dear Sir/Madam:

Western Energy Alliance, the American Exploration & Production Council, and the Petroleum Association of Wyoming (the Trades) submit the following comments on the U.S. Fish & Wildlife Service's (FWS) proposed regulation defining the scope of the Migratory Bird Treaty Act (MBTA). The Trades strongly support the draft rule and urge FWS to finalize the proposal expeditiously.

The Alliance represents over 300 companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas in the West. Alliance members are independents, the majority of which are small businesses with an average of fourteen employees.

AXPC is a national trade association representing 25 of the largest independent oil and natural gas exploration and production companies in the United States. Our companies were the primary driver of the energy independence we sought for decades. Because of our perseverance, investments in innovation, and focus on made-in-America energy, the U.S. has gone from a nation reliant on foreign oil to a net exporter. This has provided low, stable prices for our economy, good American jobs, and a more secure country. We are proud of this accomplishment.

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.

The proposed rule's codification of Opinion M-37050, which held that the MBTA applies only to intentional take and does not criminalize otherwise lawful actions that cause incidental injury or death, is both legally justified and sound policy. It also provides much-needed clarification given the federal circuit court split, which has led to different interpretations of the law across the United States.

The MBTA was enacted by Congress as a criminal statute to prevent the hunting and poaching of migratory birds, not to prosecute unintentional injuries. In the Fifth Circuit's 2015 [ruling](#) in *United States*

v. Citgo, the court notes well the “absurd results” that would otherwise follow: “If the MBTA prohibits all acts or omissions that ‘directly’ kill birds, where bird deaths are ‘foreseeable,’ then all owners of big windows, communication towers, wind turbines, solar energy farms, cars, cats, and even church steeples may be found guilty of violating the MBTA.” Clearly this was not Congress’s intent, and we greatly appreciate FWS codifying the extensive legal analysis found within Opinion M-37050, consistent with the Fifth Circuit’s ruling.

The proposed rule’s background section and the Solicitor’s Opinion both provide extensive legal justifications for the regulation, and the Trades fully support these documents. We would note, however, that each cite statistics from outdated studies regarding the number of annual bird deaths attributable to the oil and natural gas industry.

Specifically, FWS [relies on studies](#) that are more than a decade old to estimate that pits cause between 500,000 and 1,000,000 deaths per year. In fact, as a result of both technological innovation and state regulations, pits are much less of a threat to birds. Companies now remove harmful substances from pits, use nets and fences to cover the pits and prevent birds from falling in, and comply with state regulations that have been enacted since the earlier studies.

The estimate of deaths attributable to the oil and natural gas industry does not ultimately impact the legal interpretation of the MBTA, but we believe the final rule would be strengthened by an acknowledgment of current best practices and uncertainty over the exact mortality rates. A [2015 study](#), for instance, concluded that a survey of relevant scientific studies of avian losses at oil and natural gas well sites “have not been studied sufficiently” or are “comparatively speculative.” Accordingly, we request that FWS recognize these most recent studies in the final rule.

Finally, we request FWS revise its implementing guidance documents to synthesize them with the final rule and M-37050 and collaborate with the Bureau of Land Management (BLM) on potential regulatory and guidance policy related to management of migratory bird habitat on federal lands managed by BLM. We urge FWS to closely examine any documents related to migratory bird conservation or management issued prior to the M-Opinion to ensure they remain consistent with this rule, and where necessary revise or replace those implementing documents.

MBTA implementation has rarely resulted in criminal prosecutions, but it has frequently been used by BLM to place overly burdensome restrictions on oil and natural gas development and other land uses. Inconsistent and unwarranted use of BLM lease stipulations and permit conditions of approval allegedly designed to prevent potential impacts to migratory birds and nests have become an increasingly troubling issue for oil and natural gas operators in the West. Some BLM field offices informally treat disturbance alone as a potential “take” under the MBTA, despite no legal justification and the minimal likelihood that a take—intentional or incidental—would occur as a result of disturbance from oil and natural gas activities in the proximity of migratory bird nests.

BLM imposes these restrictions based on reliance on FWS recommendations, which require revision in light of this rulemaking. We urge FWS to update or replace its guidelines in [Wyoming](#) and [Utah](#) and any similar guidance documents in other states, as well as any instruction memoranda (IM) or memoranda of understanding with other agencies such as BLM. Furthermore, we request that FWS coordinate with

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BLM on a rulemaking or IM that would remove timing and spatial stipulations in migratory bird habitat from BLM resource management plans (RMP) across the West. The rule should also clearly align the definitions of active and inactive nest between the two agencies, as BLM currently uses a definition of activity that differs greatly from the FWS policy [outlined here](#).

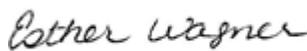
Ultimately, this proposed rule is intended to provide clarity regarding the scope of MBTA and its prohibitions. We fully support the rule and urge FWS to finalize it expeditiously, while simultaneously amending relevant guidance documents and BLM's implementing stipulations in RMPs to remove any lingering uncertainty. These restrictions are unnecessary and inconsistent in light of the Solicitor's Opinion and this rulemaking.

Thank you again for the opportunity to comment on the proposed rule. Please do not hesitate to contact us with any questions.

Sincerely,



Tripp Parks
VP of Government Affairs
Western Energy Alliance



Esther Wagner
Vice President – Public Lands
PAW



Anne Bradbury
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