

March 18, 2020

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: Docket No. FWS-HQ-MB-2018-0090

The National Ocean Industries Association (NOIA) is the only national trade association representing all segments of the offshore energy industry. For over 45 years, NOIA has been committed to ensuring a strong, viable U.S. offshore energy industry capable of meeting the energy needs of our nation in an efficient and environmentally responsible manner. NOIA member companies are engaged in traditional oil and natural gas exploration and production, as well as offshore wind energy development. Our member companies are proud that they contribute to America’s energy security, and we want to continue providing that service in a way that protects our environment, rich cultural history, and the interests of communities across the country.

Our members are succeeding in this today. Offshore energy companies responsibly provide roughly one sixth of all oil produced in this country, a key part of our increasing self-reliance and ability to slash imports of oil from less stable parts of the world. At the same time, our members are bringing online the first wind turbines in the waters off the United States, bringing affordable clean energy to the northeast and creating an entire new sector for made-in-America energy. Additionally, offshore resources will play a major role in the energy economy as we confront the challenges of climate-change.

A key part of responsibly developing energy infrastructure, of course, includes protecting avian populations. Given this, we understand the importance of the Migratory Bird Treaty Act: we applaud and support efforts to protect migratory birds. Neither NOIA nor its members wish to see the unlawful taking of the birds covered by the MBTA; and our membership prides itself on strong environmental stewardship. We also believe there is a proper place for enforcement of the MBTA. In fact, our members have developed best practices aimed at protecting migratory birds, including extensive planning, training facility inspections, engineering controls, installation of fencing, and anti-perching and anti-collision devices. Energy development and sustainable wildlife populations can—and do—co-exist.

However, we are all-to-aware of the fact that the interpretation of the MBTA has expanded significantly from its inception as an effort to stop over-poaching¹. Indeed, it was some half a century² after the MBTA’s passage before courts expanded the law’s focus to incidental takes

¹ Souder, Williams. “How Two Women Ended the Deadly Feather Trade.” *Smithsonian Magazine*. March 2013.

² Greenspan, Jesse. “The History and Evolution of the Migratory Bird Treaty Act.” *Audubon*. 22 May 2015.

and federal actions against companies inadvertently responsible for the death of birds. In the intervening years, the energy sector has faced *millions of dollars*³ in fines and settlement costs for the accidental death of birds covered by the MBTA, arguably held to a higher standard than companies in other industries. Arbitrarily high costs have been applied to energy projects even though collisions with buildings alone cause more than 2,560 times more bird deaths than wind turbines and more than 800 times more bird deaths than oil production annually.⁴

At the same time, federal courts have repeatedly found that the MBTA was *not* designed to cover incidental takes. This has been fully laid out in the Department of Interior's M-Decisional on this matter (M-37050), but in short courts are now realizing that a strict view of incidental takes could criminalize the most trivial and basic of human activities. In fact, the 5th (*United States vs. Citgo Petroleum Corp*) U.S. Court of Appeals recently joined prior rulings by the 8th and 9th US Courts of Appeals in issuing rulings finding that prior interpretations of the MBTA were flawed or overly aggressive.

Given this, we view this proposal by USFWS as merely acceding to legal realities—multiple courts and a sweeping M-Decisional believe that prior interpretation (and in our opinion, the plain reading) of a key statute is inappropriate. We believe that *all* of our members will benefit to some degree from recognizing this fact and adjusting regulatory requirements. Specifically though, a renewed layer of Administrative bureaucracy, fees, and the threat of criminal prosecution, not to mention the likelihood of rising compensatory mitigation costs, are not inconsequential for an offshore industry that already faces significant regulatory costs and hurdles in bringing new forms of energy to market.

At the same time, if anything our members are *increasing* their environmental stewardship. NOIA recently created an Environmental, Societal and Governance (ESG) program to help our members share best practices and examine ways to reduce the environmental impact of their operations. Community engagement and the need to secure investment from equity or debt markets that are increasingly sensitive to environmental protections, particularly for our oil and gas members, means that the industry as a whole *must* move towards ever-increasing environmental protection. These pressures will continue regardless of the ongoing legal debate around the MBTA.

Again, we support the Department of Interior's efforts to provide legal certainty in this matter. Should you need further information, you may contact Richard England, our Vice President of Government Affairs, at REngland@NOIA.org.

Very respectfully,

Erik Milito
President, NOIA

³ Office of Public Affairs, United States Department of Justice. 19 December 2014.

< <https://www.justice.gov/opa/pr/utility-company-sentenced-wyoming-killing-protected-birds-wind-projects-0>>

⁴ U.S. Fish and Wildlife Service, "Migratory Bird Mortality: Questions and Answers" 14 Sept. 2018, <https://www.fws.gov/birds/bird-enthusiasts/threats-to-birds.php>