



June 7, 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: Docket No. 2021-09700, RIN1018-BD76

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 includes reducing environmental impacts to avian species and their habitats. Given this, we understand the importance of the Migratory Bird Treaty Act (MBTA): we applaud and support efforts to conserve 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. 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, interpretation of the MBTA should not be again expanded beyond the original statutory intent to penalize unlawful hunting and poaching¹. Indeed, it was some half a century² after the MBTA's passage before courts expanded the law's interpretation to incidental take and federal enforcement actions against companies for this kind of take. 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 enforcement costs have been applied to energy projects even though collisions with buildings alone cause dramatically more deaths than any energy source.

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

Given this, we oppose revocation of the 2021 final rule, which clarified that conduct resulting in *unintentional* injury or death of migratory birds is not prohibited under the MBTA. The January 7, 2021 rule is consistent with the law and serves to merely accede to legal realities—multiple courts provide that this interpretation and the associated plain reading of the statute is appropriate. The Administration's recognition of this legal interpretation and consistent application of the regulatory requirements will provide investment certainty for our members and the broader regulated community. Furthermore, a renewed layer of Administrative bureaucracy, fees, and the threat of criminal prosecution 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, our members continuously improve 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 conservation has helped lead to ever-increasing environmental stewardship and continuous improvement. This movement will continue regardless of the ongoing legal debate around the MBTA. Finally, the use of enforcement discretion results in arbitrary government action and creates significant uncertainty for the regulated community. Job-creating projects depend upon a regulatory environment that provides certainty and eliminates the possibility of criminal sanctions for otherwise lawful activity. Enforcement discretion puts project developers in limbo, in light of the central element of the proposal to create strict liability for lawful activities that result in unintentional, incidental

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.

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> >

takes. The current proposal to revoke the January 7, 2021 rule is contrary to law, creates significant uncertainty, and should be abandoned.

Very respectfully,

Erik Milito
President, NOIA