



Docket No. FWS–HQ–MB–2018–0090.  
RIN 1018–BD76  
Regulations Governing Take of Migratory Birds

March 19, 2020

The Independent Petroleum Association of America (“IPAA”) is pleased to provide comments regarding the U.S. Fish and Wildlife Service (“the Service”) Proposed Rule and Environmental Impact Statement for the Migratory Bird Treaty Act (“MBTA”).

IPAA is a national trade association representing the thousands of independent crude oil and natural gas explorers and producers in the United States. It also operates in close cooperation with forty-four unaffiliated independent national, state, and regional associations, which together represent thousands of royalty owners and the companies that provide services and supplies to the domestic industry. IPAA is dedicated to ensuring a strong and viable domestic oil and natural gas industry, recognizing that an adequate and secure supply of energy developed in an environmentally responsible manner is essential to the national economy.

IPAA members take species conservation seriously, and actively work to protect the environment and habitats where they operate. Many independent producers have Fish and Wildlife-approved Avian Protection Plans and have spent millions on the conservation of listed and candidate species. Many other industries, such as wind and electric transmission companies, share this commitment, but face legal ramifications due to expanded interpretation of the MBTA. This rule, which affirms the Solicitor’s Opinion, M-37050, is an important step to clarify the legal role of the MBTA to support species protection, while limiting inappropriate legal impacts on otherwise lawful activities from an array of industries

IPAA supports the goal of the Service to conserve migratory birds and believes this objective can be achieved in conjunction with responsible development of our nation’s natural resources. IPAA welcomes the clarity provided by the rule which mandates the scope of the rule only applies to “intentional takes” rather than “incidental takes”. This clarification is badly needed as five federal circuit courts have issued divided opinions on when criminal takings apply. For “incidental takes” within the oil and gas industry including wastewater disposal pits and methane or other gas burner pipes, a person is not acting directly to bring about the taking or killing of a protected bird. Instead, in these instances, the birds themselves are the actors, colliding or otherwise interacting with industrial structures.

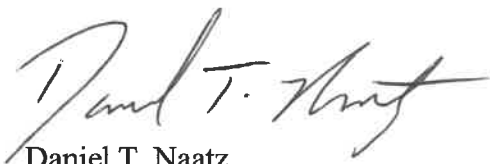
IPAA agrees with the Service that malintent must be present in order to constitute criminal proceedings. Without malicious intent, a broad application of the MBTA that includes an incidental take prohibition would subject those who engage in common oil and gas practices, such as open pits, to criminal liability.

Furthermore, nothing in MBTA's legislative history suggests that the terms "take" and "kill" refer to passive impacts resulting from otherwise lawful activities not directed at wildlife. The MBTA, enacted to implement a December 8, 1916 treaty between the United States and Great Britain, began with the stated purpose of saving migratory birds from indiscriminate slaughter and of ensuring the preservation of such birds as are either useful to man or are harmless. Congress later amended the MBTA to give effect to similar conventions for the protection of migratory birds with Mexico, Japan, and the Soviet Union. The Congressional Record reveals that the Act's drafters were particularly concerned about unregulated hunting and poaching.

For these reasons, IPAA appreciates and welcomes the Services' Proposed Rule to further define the regulations governing "take" as pertaining to the MBTA. It will never be industry's intent to circumvent their responsibilities of avoiding impacts to and protecting migratory birds and their nests. The Proposed Rule provides the necessary clarifying language to protect independent producers from criminal prosecution for unintended and incidental bird takes.

IPAA appreciates the opportunity to provide comment.

Sincerely,

A handwritten signature in cursive script, appearing to read "Daniel T. Naatz".

Daniel T. Naatz

Senior Vice President of Government Relations and Political Affairs  
Independent Petroleum Association of America