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EIS No. 20200117, Draft, USFWS, REG, Regulations Governing Take of Migratory Birds

The Independent Petroleum Association of America (“IPAA”) is pleased to provide comments to the U.S. Fish and Wildlife Service’s (“the Service”) draft regulation governing “take” for the Migratory Bird Treaty Act (“MBTA”).

IPAA is the national trade association representing the thousands of independent crude oil and natural gas explorers and producers in the United States. IPAA 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 work actively to protect the environment and habitats where they operate and live. Many independent companies 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. Finalizing a regulation that 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. For this reason, IPAA is supportive of the Services’ preferred Alternative A approach which is consistent with the Solicitor’s legal analysis of the scope of the MBTA. Promulgating regulations that define the scope of MBTA to prohibit incidental take actions brings the regulation closer to the original intent of the law, as passed by Congress.

IPAA supports the goal of the Service to conserve migratory birds and believes this goal can be achieved in conjunction with responsible development of our nation’s natural resources. IPAA welcomes the clarity provided by Alternative A 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. 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 actions are truly accidental because the birds collide or otherwise interact with industrial structures.

IPAA agrees with Alternative A 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 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 strongly agrees with **Alternative A** to define the scope of MBTA to exclude incidental take. It is not industry's intent to circumvent their responsibilities of avoiding impacts to and protecting migratory birds and their nests. Alternative A 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,



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