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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”) proposed rule to revoke the January 7, 2021 final rule 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 believe species conservation is important as they actively work 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 of dollars of private capital on the conservation of listed and candidate species. IPAA was pleased with the January 7, 2021 rule that finalized a regulation to affirm the Solicitor’s Opinion, M-37050. We have long felt that this was 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 does not support the Services' current proposed rule, which would rescind the January 7 decision and broadens the scope of application for the MBTA. IPAA believes that the January 7 final rule, which promulgated 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 welcomed the clarity provided by the January 7 final rule which mandated 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 believes 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 for circumstances beyond their control.

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 is strongly opposed to any efforts to rescind the January 7 final rule. It is not industry's intent to circumvent their responsibilities of avoiding impacts to and protecting migratory birds and their nests. However, the January 7 final rule provided the necessary clarifying language to protect independent producers from criminal prosecution for unintended and incidental bird takes. Rescinding the final rule would be a mistake.

IPAA appreciates the opportunity to provide comment.

Sincerely,

A handwritten signature in black ink, appearing to read "Dan Naatz". The signature is written in a cursive, flowing style.

Dan Naatz
Senior Vice President of Government Relations and Political Affairs
Independent Producers Association of America