



December 2, 2021

Public Comments Processing
Attn: FWS-HQ-MB-2021-0105
U.S. Fish & Wildlife Service
MS:PRB/3W
5275 Leesburg Pike
Falls Church, Virginia 22041-3803

To Whom It May Concern:

The Independent Petroleum Association of America (“IPAA”) is pleased to provide comments to the U.S. Fish and Wildlife Service’s (“the Service”) Advanced Notice of Proposed Rulemaking to prepare a National Environmental Policy Act document with regards to governing the Migratory Bird Treaty Act (“MBTA”), especially where it comes to the issue of incidental take.

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. IPAA understands that the Service is concerned about the current status of migratory birds and that publishing this advance notice of proposed rulemaking is an initial step in a process to achieve and manage the long-term conservation of migratory birds and provide regulatory certainty to the regulated community. However, IPAA believes that the January 7th 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 effort can be achieved in conjunction with responsible development of our nation’s natural resources. IPAA supports the clarity provided by the January 7th final rule which mandated the scope of the rule only apply to “intentional takes” rather than “incidental takes”. This clarification was badly needed as five federal circuit courts have issued divided opinions on when criminal takings apply, and we are disappointed to

see the Service revoke the January 7th rule. For “incidental takes” within the oil and gas industry, including wastewater disposal pits and methane or other gas burner pipes, individuals are not acting directly to bring about the taking or killing of a protected bird.

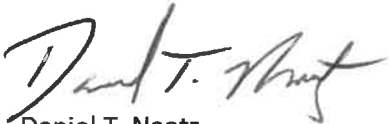
IPAA believes that malintent must be present in order to constitute criminal proceedings and we urge the Service to keep that in mind as the agency moves forward. Without malicious intent, a broad application of the MBTA that includes an incidental take prohibition would subject those persons who engage in lawful industry practices 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.

While IPAA remains strongly opposed to the rescission of the January 7 final rule, we hope to work with the Service as you develop a NEPA plan for MBTA. It is not industry’s intent to circumvent our 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.

Thank you for your attention to this matter.

Sincerely,

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

Daniel T. Naatz

Executive Vice President

Independent Petroleum Association of America