

Statement of Stanley Senner
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to the U.S. House Committee on Natural Resources
Subcommittee on Water, Oceans, and Wildlife
Legislative Hearing on
Discussion Draft of the *Migratory Bird Protection Act*

Chairman Huffman, Ranking Member McClintock, and Members of the Subcommittee, thank you for the opportunity to be present here today, representing the National Audubon Society (Audubon), to discuss conservation of migratory birds. Audubon's mission is to protect birds and the places they need, today and tomorrow. Audubon represents 1.3 million members and has 462 affiliated chapters, 22 state offices, and 41 nature centers across the country.

My name is Stanley Senner, and I am Audubon's Vice President for Bird Conservation, based in Missoula, Montana. I am a biologist by training with a M.S. degree from the University of Alaska Fairbanks and a career of more than 45 years in bird and natural resources conservation. Early in that career I worked three years here in the House of Representatives as a Professional Staff Member for what was then the Merchant Marine and Fisheries Committee. I have worked for Audubon for 19 years in various capacities, including 10 years as director of its Alaska State Office. Following the *Exxon Valdez* oil spill, I worked as the State of Alaska's restoration program manager for three years and then four years as Science Coordinator for the state-federal *Exxon Valdez* Oil Spill Trustee Council. Finally, as Conservation Science Director for Ocean Conservancy, I spent four years with a strong focus on restoration planning following the Deepwater Horizon blowout.

History of MBTA and Audubon

The histories of Audubon and the Migratory Bird Treaty Act (MBTA) are inextricably intertwined. Audubon advocated for legal protection for migratory birds before the MBTA was even conceived, and we have remained deeply engaged throughout its century-long history and implementation up to the present day. We are pleased to be

here today to discuss the MBTA with reference to possible legislation to address the issue of incidental taking.

In 2018, Audubon celebrated the 100th anniversary of the MBTA, widely recognized as the “Year of the Bird,” alongside National Geographic, Cornell Lab of Ornithology, and more than 180 other partners, including state agencies, zoos, businesses and conservation groups. As Audubon recognized this centennial and marked the progress made since its passage, we recommitted our organization to continue the work of our founders as we seek to protect birds over the next century.

In the late 1800s, many bird populations were plummeting. The first Audubon Societies were formed to tackle the dire threats that birds faced and obtain strong protections for birds under the law¹. In 1896, Harriet Hemenway and Minna Hall formed the Massachusetts Audubon Society and helped organize the fight against the plume trade that then was devastating bird populations. By 1898, Audubon Societies were established in 14 states, including New York, Pennsylvania, Ohio, Texas, and California. The present-day Audubon began as the National Association of Audubon Societies in 1905 as an umbrella organization for these state societies. Theodore Roosevelt was an early, strong supporter of Audubon—and migratory bird protections—and Audubon worked closely with the President to establish the first bird sanctuary (in Florida), which became the basis for the National Wildlife Refuge System.

While individual states were able to pass a handful of bird protection laws, they were not sufficient to stem the tide of unregulated killing and declining populations. In part, that is due to the simple fact that most migratory birds cannot effectively be protected only by action in individual states or even in nations alone. Audubon helped advance the first national bird protection legislation in 1913, and soon thereafter the United States entered into treaty negotiations with Great Britain on behalf of Canada. The first migratory bird convention was signed by President Wilson in 1916, followed by passage of the MBTA in 1918, implementing the first of four international conventions. Treaties with Mexico in 1936, Japan in 1972, and Russia in 1976 were added to and implemented by the MBTA, and each treaty extended and expanded the United States’ commitment to migratory bird conservation.

¹ Graham, Frank, Jr. (1990) *The Audubon Ark*. University of Texas Press, Austin, Texas.

In the buildup to passage of the MBTA in 1918, Audubon members and other bird supporters sent thousands of telegrams and hand-written letters to Congress. We advocated for passage of the MBTA side by side with many sportsmen, state fish and game leaders, churches, and business leaders like Henry Ford. In the midst of World War I, the MBTA was considered a wartime measure, in part because of the role and importance of birds in eating insects that are pests to agriculture and forests.

When the Supreme Court upheld the MBTA in 1920, Justice Oliver Wendell Holmes wrote: "Here a national interest of nearly the first magnitude is involved...But for the treaty and the statute there soon might be no birds for any powers to deal with."

For some species it was already too late or nearly so. By this time, a number of bird species had gone extinct, including the Passenger Pigeon, once the most abundant bird on the continent, along with the Carolina Parakeet, the only native parrot species to range throughout much of the United States. Many others, including some of the egrets and shorebirds, teetered on the brink. Some of those species, like the Eskimo Curlew, never recovered, though extinction was not immediate.

Value of the MBTA

The MBTA is credited now with saving Snowy Egrets and many other species from extinction, including the Wood Duck, Sandhill Crane, American Golden-Plover and many more. Today, the MBTA protects most of the country's native bird species, including songbirds, shorebirds, raptors, wading birds, and more, from unauthorized taking or killing. The law and its regulations, particularly the broad, unequivocal prohibition of take under Section 703 of the Act, provided a backstop for efforts to stabilize and conserve bird populations and continue today to be the foundation for a wide array of bird conservation initiatives.

Passage of the MBTA led to the creation of a highly successful, sustainable migratory bird hunting framework with regulations that authorize the taking of birds, informed by the best science. This science-based regulatory framework, in conjunction with active habitat conservation and management efforts, has restored and enhanced many waterfowl populations, some of which were once in deep trouble. Yet, in passing the MBTA, Congress also had the foresight and provided the flexibility to address the

issues birds faced in 1918 *as well as* issues that would challenge birds in the future². Congress could have chosen to pass a more narrowly tailored bill that only regulated hunting, but it did not. Indeed, for decades now Republican and Democratic administrations have used the prohibition on taking without authorization as a tool to minimize impacts to birds from other threats, including avoidable industrial hazards. Along with loss of habitat, these hazards became major threats to birds by the mid-20th century, and the U.S. Fish and Wildlife Service (FWS) began to address situations where there were solutions: i.e., practical and effective methods for reducing the impact on birds of industrial hazards.

Oil pits

Dating back to the 1950s, reports began to document major bird mortality at open oil wastewater pits. Hundreds or even thousands of birds were found at a time at sites across the West. This problem was discovered in California in the San Joaquin Valley, where an estimated 150,000 birds were dying each year³. In the Playa Lakes region of Texas, Oklahoma and New Mexico, FWS estimated 100,000 ducks were dying every year: 10,000 more than were being taken annually by hunters⁴. The FWS previously estimated that across the country, up to 2 million birds were killed annually. In one analysis, from 1992-2005, carcasses of 172 bird species were documented in oil wastewater pits, including numerous waterfowl, but also songbirds, raptors, and others⁵. Another study of 28 oilfield wastewater disposal facilities in Wyoming found that waterfowl were the most frequently encountered dead bird at these sites.⁶

Thanks to the MBTA's prohibition on incidental taking, including several enforcement actions, and leadership from FWS and states, the most recent studies estimate that mortality has fallen by half: 500,000 to 1 million birds killed each year. Even with this progress, it is still too many birds to lose annually and the mortality is on par with estimated mortalities from catastrophic oil spills like the *Exxon Valdez* oil spill and

² Panarella, S. (2017) A Bird in the Hand: Shotguns, Deadly Oil Pits, Cute Kittens, and the Migratory Bird Treaty Act. Virginia Environmental Law Journal 35 (2).

³ Trail, P. (2006) Avian Mortality at Oil Pits in the United States: A Review of the Problem and Efforts for Its Solution. Environmental Management 38:532-544.

⁴ Kelly, S. (1990) Waste Oil Pits May Have Killed 500,000 Migratory Birds In '89. Washington Post. April 1990.

⁵ Trail, P. (2006) Avian Mortality at Oil Pits in the United States: A Review of the Problem and Efforts for Its Solution. Environmental Management 38:532-544.

⁶ Ramirez Jr, P. (2010) Bird Mortality in Oil Field Wastewater Disposal Facilities. Environmental Management 46:820-826 .

Deepwater Horizon blowout (see below). The author (P. Trail) of the aforementioned study noted in 2006 that this issue continued to be a problem:

The level of noncompliance to wildlife protection and environmental pollution laws remains too high. Further work by both government agencies and the oil industry is needed to eliminate this significant, preventable, and illegal source of avian mortality in the United States.

Power lines

Electrocutions and collisions with power lines have been longstanding concerns for wildlife agencies, conservation groups, and industry. With the MBTA as an important tool, FWS and partners are addressing power-line threats, and the Avian Power Line Interaction Committee, of which Audubon was a founding partner, has produced vital guidelines and best practices for the industry. Power lines, however, remain a significant source of mortality for birds, especially electrocution of raptors, and collisions by cranes, swans and other wetland and waterbirds. The latest studies estimate between 28 million to 68 million birds killed each year from just these two hazards⁷. For decades, the MBTA has provided a strong incentive to implement effective practices that minimize impacts, including installing diverters on power lines, and retrofitting power poles to increase the spacing between the energized elements. With the MBTA as a key backstop and stimulus, countless miles of power lines have been upgraded, saving a significant number of birds, while also limiting the potential for fires and outages that can result when birds are electrocuted.

Oil spills

Oil spills, both chronic and catastrophic, are major sources of mortality to birds. Chronic oil spills—accidental or deliberate releases of small amounts of oil—can take a major toll on marine birds. For example, based on beached bird surveys, as many as 300,000 seabirds die each year off the coast of Newfoundland due to chronic, small-scale releases.⁸ Estimated mortalities from catastrophic oil spills are well documented. For example, the official estimate for birds killed by 1989 *Exxon Valdez* oil spill in Alaska

⁷ Loss, S., Will T., and Marra P. (2015) Direct Mortality of Birds from Anthropogenic Causes. *Annual Review of Ecology, Evolution, and Systematics* 46:99-120.

⁸ O'Hara, P.D. and K.H. Morgan. (2006) Do low rates of oiled carcass recovery in beached bird Surveys indicate low rates of ship-source oil spills? *Marine Ornithology* 34: 133–140.

was 250,000⁹, though other estimates placed mortalities between 375,000 and 435,000¹⁰. For the 2010 Deepwater Horizon blowout in the Gulf of Mexico, government officials used an estimate of 56,000-102,400 birds killed¹¹, but independent assessments placed actual mortality at closer to one million^{12,13}. Periodic large oil spills are likely to continue, and Audubon believes that the responsible parties should be held accountable for the significant incidental mortalities of birds that can result.

As part of its criminal plea agreement, Exxon paid \$12M into the North American Wetland Conservation Fund for *Exxon Valdez*-related MBTA violations. British Petroleum paid \$100M into the North American Wetland Conservation Fund as a criminal fine for Deepwater Horizon-related MBTA violations. That fine was roughly equivalent to three years of appropriated funding for the North American Wetlands Conservation Act, and, as a result, hundreds of thousands of acres of wetland habitats have been protected, restored or enhanced.

Under the current administration's MBTA policy, there were at least two cases in 2018 for which the FWS law enforcement was unable to respond to oil spills even when dead birds apparently were documented¹⁴. As revealed in documents obtained through a FOIA request, one FWS agent wrote: "As this spill involves the incidental take of birds protected by the Migratory Bird Treaty Act, there is currently no enforcement action planned".

Renewable energy

Avian mortalities from renewable energy facilities can be significant, such as 140,000 to 328,000 birds per year from monopole wind turbines in the contiguous United

⁹ *Exxon Valdez* Oil Spill Trustee Council. Questions and answers about the spill. Retrieved from: <http://www.evostc.state.ak.us/index.cfm?FA=facts.QA>

¹⁰ *Exxon Valdez* Oil Spill Trustees. (1992) Volume 1: Restoration Framework. Exxon Valdez Oil Spill Trustees, Anchorage, Alaska.

¹¹ Deepwater Horizon Natural Resource Damage Assessment Trustees. (2016). Deepwater Horizon oil spill: Final Programmatic Damage Assessment and Restoration Plan and Final Programmatic Environmental Impact Statement. Retrieved from <http://www.gulfspillrestoration.noaa.gov/restoration-planning/gulf-plan>.

¹² Haney, J. C., Jr., H.J. Geiger and J.W. Short. (2014) Bird Mortality from the Deepwater Horizon oil spill. I. Exposure probability in the offshore Gulf of Mexico. *Marine Ecology Progress Series* Vol. 513: 225–237.

¹³ Haney, J. C., Jr., H.J. Geiger and J.W. Short. (2014) Bird Mortality from the Deepwater Horizon oil spill. II. Carcass sampling and exposure probability in the coastal Gulf of Mexico. *Marine Ecology Progress Series* Vol. 513: 239–252.

¹⁴ Shogren, Elizabeth. (2019) Killing migratory birds, even unintentionally, has been a crime for decades. Not anymore. *Reveal*, April 8. Retrieved at: <https://www.revealnews.org/article/killing-migratory-birds-even-unintentionally-has-been-a-crime-for-decades-not-anymore/>

States.¹⁵ Audubon strongly supports the rapid development of renewable energy in its various forms to reduce greenhouse gas emissions, and we work regularly at both the project and programmatic levels to help ensure that these projects are sited properly and operated to minimize impacts to birds and other wildlife. At Audubon, we do not believe that we must choose between advancing renewables or protecting birds—we can and must do both, and the MBTA can help us do so. For example, the law has helped spur wind-energy guidelines and the development and implementation of new operational technology, such as Identiflight, which is showing great promise.

Continued Protection Needed

The United States has made significant progress in bird conservation in the past 100 years, but birds continue to need the basic protections afforded by the MBTA as much as ever. Birds continue to provide great value to the country, including significant benefits to American agriculture and our forests by consuming insect pests. And today, birdwatching has become a \$100 billion-plus industry, which creates 860,000 jobs, and the tourism and consumer purchasing that results from it provide economic benefits in states and communities across the nation.¹⁶ These benefits ultimately depend on healthy populations of birds.

Despite the progress, many bird populations continue to struggle. According to the 2016 State of the Birds Report¹⁷, one third of North American bird species are in need of urgent conservation action. Birds continue to be a variety of threats, including habitat loss, invasive species, pollution and contaminants, industrial hazards and climate change¹⁸, which together can drastically shrink their ranges, eliminate or degrade more habitat, and disrupt the finely tuned connections that hold together the life histories of birds. The effects of these multiple threats on birds are cumulative and interactive, yet there is no choice but to address each problem—such as incidental taking from industrial hazards—individually.

¹⁵ Loss, S, Will T, and Marra, P. (2013) Estimates of bird collision mortality at wind facilities in the contiguous United States. *Biological Conservation* 168:201-209.

¹⁶ U.S. Fish and Wildlife Service. (2013) *Birding in the United States: A Demographic and Economic Analysis Addendum to the 2011 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation*.

¹⁷ North American Bird Conservation Initiative. (2016) *The State of North America's Birds 2016*. Environment and Climate Change Canada: Ottawa, Ontario. 8 pages. www.stateofthebirds.org

¹⁸ Langham G.M., Schuetz J.G., Distler T., Soykan C.U., and Wilsey C. (2015) Conservation Status of North American Birds in the Face of Future Climate Change. *PLoS ONE* 10(9): e0135350.

<https://doi.org/10.1371/journal.pone.0135350>

Concerns over the M-Opinion

At a time when there is urgent need to advance and strengthen bird conservation tools, the current administration has taken unprecedented steps to weaken or eliminate them. The Solicitor's Opinion (M-37050) issued in December 2017, which interpreted the MBTA to only apply to purposeful take, has put at risk the significant progress that stakeholders have made in advancing bird conservation related to incidental taking.

To Audubon, the legal opinion is likely the most significant roll back of bird protections in our history, and a rulemaking is expected from the administration soon that would codify this loss of protections. Today, every native bird covered under the MBTA has fewer protections than it did just two years ago, including nearly every state bird from Western Meadowlarks to Eastern Bluebirds, and most of every state's Species of Greatest Conservation Need (as per State Wildlife Action Plans). This policy change affects every state, district, and person who cares about birds, and apparently was decided without any analysis of the impacts to bird populations and without public input.

The response from the public against this policy has been significant. Last year more than 500 organizations joined together from every state, expressing opposition to the legal opinion. More than 50,000 Audubon members wrote to the administration and Congress to oppose the rollback. Former senior Department of the Interior officials, representing public service during every Republican and Democratic administration since the early 1970s, signed a letter to Interior asking that the opinion be suspended. Among the signatories were former Deputy Secretaries, Assistant Secretaries, and FWS Directors and Chiefs of Migratory Bird Management. The state-federal Flyway Councils, including the Atlantic, Central, and Mississippi Flyways, representing most state agencies in the country on migratory bird issues, sent letters asking Interior to suspend the opinion and expressed significant concerns about how the opinion will impact their flyways and states. Eight states also have filed litigation asking to rescind this opinion in court.

Audubon strongly disagrees with the legal interpretation that incidental take is not prohibited under the law and is meant to only apply to hunting and poaching. The language of the statute clearly prohibits the unauthorized killing of birds, without reference to a state of mind or purpose. This view is supported by the underlying conventions and amendments that aim to broadly conserve birds, along with a

consistent and decades-long interpretation by administrations of both parties. This interpretation is also supported by actions taken by Congress that implicitly affirmed the prohibition of incidental take. For example, these actions include a 1986 amendment requiring the establishment of intent for felony provisions but continued strict liability for misdemeanors, and the 2003 National Defense Authorization Act that exempted military readiness activities from incidental takes with certain exceptions. Neither of these legislative actions would have been necessary without Congress viewing the MBTA as prohibiting incidental take. Although different courts have reached different conclusions on this question, the prohibition on incidental take has been supported by a majority of court decisions, including decisions in two key appellate courts¹⁹.

Audubon recognizes there is current industry uncertainty about liability and there are conflicting interpretations of the law, which is why Audubon supports making improvements to the MBTA so that there is consistent interpretation and implementation across the country. What Audubon wants to support is a practical, reasonable path forward that advances bird conservation and works for industry.

Preliminary Views on Discussion Draft

Audubon now asks Congress to affirm the decades-long prohibition on unauthorized taking and supports establishing a consistent, nationwide framework to address incidental take. By doing so, Congress can provide clarity and certainty for industries, law enforcement, wildlife agencies, the courts, and the public, and—at the same time—advance the bird conservation goals of the MBTA and underlying treaties. Audubon supports the general approach of the discussion draft. We recognize this as a first step in a longer process, and we would welcome the opportunity to provide detailed comments on the language and engage in the process as it moves forward.

As we look at the current and future versions of this legislation, Audubon will look to the following as guiding principles:

- The legislation should clearly affirm that the MBTA covers incidental take.

¹⁹United States vs FMC Corp., 572 F.2d 902 (2d Cir. 1978); United States vs Apollo Energies, Inc., 152 611 F.3d 679 (10th Cir. 2010)

- The regulatory framework/permit program should be based on the best available science in regard to affected industries, best management practices, mitigation measures, etc.
- Incidental take permits should be issued to classes of industry with significant impacts on bird populations and for which there are solutions, such as known or anticipated technologies or best management practices, to reasonably avoid or reduce take.
- The permit program should provide real protection and mitigation for migratory birds and, at the same time, and offer an affordable and practical path for industry to obtain permits and honor their permit requirements.
- The FWS must have sufficient resources to implement, enforce and evaluate a permit program on a sustained basis.
- Avian mortalities must be monitored on site and populations must be monitored at appropriate scales to enable FWS, with public and industry input, to evaluate the effectiveness of permits and mitigation efforts.
- Data on avian mortalities should be publicly available.
- Mitigation funds from permit holders should be applied to ameliorate impacts on the specific groups of birds most affected by the different classes and geographies of industries under permit.
- The entire program should be re-evaluated and the results reported to Congress and the public at appropriate intervals.

Thank you again for the opportunity to testify on this important issue. Audubon is ready to work with this Subcommittee and others to find common ground on this vital law and help protect birds and the places they need, today and tomorrow. We believe and know that where birds thrive, people prosper.