



# Animal Welfare Institute

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January 11, 2018

The Honorable Ryan Zinke  
Secretary of the Interior  
U.S. Department of the Interior  
1849 C Street, N.W.  
Washington DC 20240

Dear Secretary Zinke:

The Animal Welfare Institute requests that the US Department of the Interior halt its plan to implement Solicitor's Opinion M-37050 – *The Migratory Bird Treaty Act Does Not Prohibit Incidental Take*, issued December 22, 2017. Opinion M-37050 would reverse a 2017 policy (Solicitor's Opinion M-37041) that clarified the scope of prohibited activities under the Migratory Bird Treaty Act to include “incidental take,” or accidental killing, of migratory birds. The 2017 policy is the correct interpretation of the MBTA, and fulfilled the conservation intent of the Act by restricting activities that result in millions of migratory bird deaths every year.

According to the US Fish and Wildlife Service, the “Migratory Bird Program has the legal mandate and the trust responsibility to maintain and enhance migratory bird populations and habitats for the continued enjoyment of the American public.”<sup>1</sup> The categorical exclusion of incidental take under the MBTA fails to fulfill both this legal mandate and trust responsibility. The MBTA's legislative history and numerous court cases, including *U.S. v. Moon Lake Electric Ass'n, Inc.* (D. Colo. 1999), *U.S. v. Apollo Energy* (10<sup>th</sup> Cir. 2010) and, most recently, *Turtle Island Restoration Network v. U.S. Dept of Commerce* (9<sup>th</sup> Cir. Dec. 27, 2017), have repeatedly clarified that the MBTA's definition of “take” is to be interpreted broadly and includes incidental take.<sup>2</sup>

The USFWS website notes that millions of birds die each year from collisions with human-made structures, electrocutions, chemicals, and other similar causes,<sup>3</sup> and notes, “Today, the greatest threat to birds is the loss and/or degradation of habitat due to development or disturbance.”<sup>4</sup> In 2005, the US Forest Service estimated that man-made structures result in the deaths of 500 million to over 1 billion

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<sup>1</sup> “Policies,” Migratory Bird Program. U.S. Fish & Wildlife Service, 2015. <https://www.fws.gov/birds/policies-and-regulations/policies.php>

<sup>2</sup> *Turtle Island Restoration Network*, No. 13-17123 Slip Opinion at 6 (“The FWS also has authority to enforce the MBTA which strictly prohibits the taking of any migratory bird the Act protects except under the terms of a valid permit issued by the Secretary of the Interior.” [citations omitted, emphasis added]).

<sup>3</sup> “Incidental Take,” Migratory Bird Program. U.S. Fish & Wildlife Service, 2017. <https://www.fws.gov/birds/policies-and-regulations/incidental-take.php>

<sup>4</sup> “Migratory Bird Mortality: Many Human-Caused Threats Afflict Our Bird Populations.” U.S. Fish & Wildlife Service, 2002.

birds annually in the US.<sup>5</sup> The FS further estimates that power lines kill up to 175 million birds annually, communications towers kill 50 million,<sup>6</sup> uncovered oil waste pits kill 500,000 to 1 million,<sup>7</sup> and wind turbines kill around 300,000.<sup>8</sup> These unnatural threats are becoming increasingly prevalent with spreading development, and are putting many vulnerable species at further risk of extinction.

Not only is Opinion M-37050 an incorrect legal interpretation and potentially devastating for migratory bird species, it is also contrary to the wishes of millions of American citizens. A 2016 poll conducted by the National Audubon Society found that 62 percent of registered voters support regulations requiring powerlines to reduce electrocutions and collisions by implementing inexpensive design changes. Sixty-five percent of respondents also indicated support for regulations requiring that wind farms minimize harm to birds.<sup>9</sup> Americans value native wildlife, including migratory birds, and are invested in protecting the country's beloved species.

Opinion M-37050 is a drastic reinterpretation of the MBTA that favors development at the expense of vulnerable and vital bird populations. The prioritization of industry over bird conservation is antithetical to the intent of the MBTA, and the rollback of the 2017 policy sends a clear message about the administration's disregard for migratory birds. For the sake of both the protection of America's valued wildlife and the sake of a sound legal interpretation of the law, we urge the DOI not to move forward with the plan to allow incidental take of migratory birds under the MBTA.

Thank you for your consideration of our request.

Sincerely,



Cathy Liss  
President

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<sup>5</sup> Erikson, Wallace P., et al. "A Summary and Comparison of Bird Mortality from Anthropogenic Causes with an Emphasis on Collisions." USDA Forest Service, 2005.

[https://www.fs.fed.us/psw/publications/documents/psw\\_gtr191/psw\\_gtr191\\_1029-1042\\_erickson.pdf](https://www.fs.fed.us/psw/publications/documents/psw_gtr191/psw_gtr191_1029-1042_erickson.pdf)

<sup>6</sup> Manville II, Albert M. "Bird Strikes and Electrocutions at Power Lines, Communication Towers, and Wind Turbines: State of the Art and State of the Science – Next Steps Toward Mitigation." USDA Forest Service, 2005. [http://www.fs.fed.us/psw/publications/documents/psw\\_gtr191/Asilomar/pdfs/1051-1064.pdf](http://www.fs.fed.us/psw/publications/documents/psw_gtr191/Asilomar/pdfs/1051-1064.pdf)

<sup>7</sup> Trail, PW. "Avian mortality at oil pits in the United States: A review of the problem and efforts for its solution." *Environmental Management*, 2006 Oct; 38(4):532-44. <http://www.ncbi.nlm.nih.gov/pubmed/16988870>

<sup>8</sup> Loss, Scott R., et al. "Estimates of bird collision mortality at wind facilities in the contiguous United States." *Biological Conservation*, 2013 Dec; 168:201-209. <http://www.sciencedirect.com/science/article/pii/S0006320713003522>

<sup>9</sup> "A Majority of Registered Voters Want Stronger Protections for Birds." National Audubon Society, 2016. <http://www.audubon.org/news/a-majority-registered-voters-want-stronger-protections-birds>