ATTORNEYS GENERAL OF THE STATES OF NEW YORK, CALIFORNIA, CONNECTICUT, ILLINOIS, MARYLAND, MINNESOTA, NEW JERSEY, NEW MEXICO, OREGON, AND WASHINGTON, AND THE COMMONWEALTHS OF MASSACHUSETTS AND PENNSYLVANIA

March 1, 2021

Jerome Ford
Assistant Director, Migratory Birds
Attention: FWS-HQ-MB-2018-0090
U.S. Fish and Wildlife Service
MS: JAO/1N
5275 Leesburg Pike
Falls Church, VA 22041-3803

Via Federal eRulemaking Portal

RE: Comments on "Regulations Governing Take of Migratory Birds; Delay of Effective Date," 86 Fed. Reg. 8715 (Feb. 9, 2021)

Dear Assistant Director Ford:

The Attorneys General of New York, California, Connecticut, Illinois, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, Oregon, Pennsylvania, and Washington (the "States") welcome the opportunity to comment on the rule titled "Regulations Governing Take of Migratory Birds," 86 Fed. Reg. 1134 (Jan. 7, 2021) (the "Rule"), and on "whether that rule should be amended, rescinded, delayed pending further review by the agency, or allowed to go into effect." 86 Fed. Reg. 8715, 8715-8716 (Feb. 9, 2021).

The Rule reinterprets the Migratory Bird Treaty Act of 1918 (MBTA or the "Act") not to prohibit incidental take. By eliminating liability for incidental take, the Rule flouts the MBTA's text, purpose, and history, and abandons the U.S. Fish and Wildlife Service's (FWS) prior, longstanding interpretation of the Act. In so doing, the Rule removes a critical incentive for industry to take reasonable measures to avoid killing birds in their daily operations. The States urge the FWS to rescind the Rule and to further delay the effective date of the Rule pending FWS's finalization of its rescission action. As the States have previously commented[1] and more recently alleged in a lawsuit challenging the Rule, *see State*

[1] For ease of reference, the States' March 19, 2020 comments on the Proposed Rule to Limit the Scope of the Migratory Bird Treaty Act's Prohibitions to "Actions Directed at Migratory Birds," 85 Fed. Reg. 5915 (Feb. 3, 2020), are attached as Exhibit 1; the State's March 19, 2020 comments on the Notice of Intent to Prepare Draft Environmental Impact Statement Concerning the Proposed Rule to Limit the Scope of the Migratory Bird Treaty Act's Prohibitions to "Actions Directed at

of New York, et al. v. U.S. Department of the Interior, et al., 21-cv-452 (VEC) (S.D.N.Y. Jan. 19, 2021),[2] the Rule is both needlessly harmful to migratory birds and unlawful.

Unless the FWS takes action to further delay and ultimately rescind the Rule, it will cause unnecessary harm to migratory birds and to millions of the States' residents who enjoy and otherwise benefit from those birds. In its final environmental impact statement (FEIS), the FWS acknowledged that industry best practices for avoiding incidental take are highly effective in reducing bird mortality, and that promulgating the Rule would undermine the implementation of best practices, resulting in increased bird mortality. For example, the FWS noted that "[f]or oil pits, bird mortality can be virtually eliminated if netting is installed and maintained." FEIS at 43. Likewise, the FWS noted that for communication towers, changing to flashing lights and removing guy wires has been shown to reduce mortality by 70%. *Id.* Ultimately, the FWS found that, if the Rule were implemented, "fewer entities would likely implement best practices . . . resulting in increased bird mortality." *Id.* at 8. That increased mortality can—and must—be avoided by not allowing the Rule to take effect pending the FWS's action to rescind it.

From a legal perspective, the Rule is defective in at least six ways. First, the Rule's interpretation of the Act is in "direct conflict" with the Act's "clear language making it unlawful 'at any time, by any means or in any manner, to . . . kill . . . any migratory bird,'" as the U.S. District Court for the Southern District of New York found when it vacated the legal opinion by the U.S. Department of the Interior that served as the rationale for the Rule, and which was the Rule's precursor. *NRDC v. U.S. Dep't of the Interior*, 478 F. Supp. 3d 469, 481 (S.D.N.Y. 2020) (quoting 16 U.S.C. § 703(a)), *appeal voluntarily dismissed*, No. 20-3491 (2d Cir. Feb. 25, 2021).

Second, as the District Court further concluded, the interpretation that the Rule adopts "runs counter to the purpose of the MBTA to protect migratory bird populations," *id.* at 480, because the Rule's express purpose is to narrow the scope of protections afforded to migratory bird populations.

Migratory Birds," 85 Fed. Reg. 5913 (Feb. 3, 2020), are attached as Exhibit 2; and the States' July 20, 2020 comments on the Draft Environmental Impact Statement Concerning Regulations Governing Take of Migratory Birds (May 2020), are attached as Exhibit 3. To avoid redundancy, the attachments to Exhibit 2 are not provided.

[2] On February 15, 2021, the States' lawsuit challenging the Rule was consolidated with a related case in the same district under the caption, *National Audubon Society, et al. v. U.S. Fish & Wildlife Service, et al.*, 21-CV-448 (VEC).

Third, the Rule is inconsistent with the Act's legislative history, which makes clear that the Act imposes strict liability for killing migratory birds and does not require any mental state. When Congress amended the Act in 1986 to impose a mental state requirement for selling migratory birds and once again in 1998 to impose a mental state requirement for hunting migratory birds over baited fields, it reaffirmed that in all other circumstances the Act is not limited to acts specifically directed at killing migratory birds. *See* Emergency Wetlands Resources Act of 1986, Pub. L. 99-645, § 501, 100 Stat. 3590 (codified at 16 U.S.C. §§ 707(b)-(c)); Migratory Bird Treaty Reform Act of 1998, Pub. L. 105-312, § 102(2), 112 Stat. 2956 (codified at 16 U.S.C § 704(b)).

Fourth, the Rule cannot be reconciled with subsequent legislation confirming that the Act regulates incidental take, including legislation that required FWS to regulate incidental take from military-readiness activities; nor can it be reconciled with the incidental take regulations that the FWS promulgated in response to that legislation. *See* Pub. L. No. 107-314, § 315, 16 Stat. 2458, 2509 (2002).

Fifth, the Rule conflicts with the findings of a majority of federal courts that have upheld MBTA prosecutions for incidental take. *See* Hilary Tompkins, "Incidental take Prohibited Under the Migratory Bird Treaty Act," M-37041 (Jan. 10, 2017) at 13.

Sixth, as a matter of international comity, the Rule is inconsistent with the treaties that the Act implements, which mandate that the United States and other signatories regulate incidental take. Particularly for this reason, during the earlier comment period the government of Canada urged the FWS not to promulgate the Rule. *See* FEIS at 98.

For these reasons, the States urge the FWS to rescind the Rule and further delay its implementation pending finalization of its rescission action. The States also recommend that the FWS consider instituting a permitting regime for incidental take, such as the one the FWS previously began to develop in 2015. *See* Notice of Intent to Prepare Programmatic Environmental Impact Statement Concerning Migratory Bird Permits, 80 Fed. Reg. 30,032, 30,334 (May 26, 2015). A well-designed permitting regime would both ensure that regulated parties adopt best practices and increase regulatory certainty.

DATED: March 1, 2021

Respectfully submitted,

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