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January 17, 2018

Daniel H. Jorjani  
Principal Deputy Solicitor  
Office of the Solicitor  
US Department of the Interior  
Washington, DC 20240

Dear Principal Deputy Solicitor Jorjani:

Regarding your December 22, 2018 memo *The Migratory Bird Treaty Act Does Not Prohibit Incidental Take* (Solicitor's Opinion M-37050), Mass Audubon respectfully disagrees with your interpretation of *The Migratory Bird Treaty Act* (MBTA) regarding the incidental take of migratory bird species and requests that the memo be rescinded. In contrast, we support the previous Solicitor's Opinion issued January 10, 2017 - *Incidental Take Prohibited Under the Migratory Bird Treaty Act*, (Solicitor's Opinion M-37041) which was based soundly in the MBTA and its historic interpretation over many decades by Congress, the related international treaties, many court decisions, and the U.S. Fish and Wildlife Services' (FWS) application of the law.

Mass Audubon is the largest non-profit nature conservation and environmental education organization in New England. In 1896, our founders established the first of the nation's Audubon societies, taking up the cause of stopping the killing of birds and trade in bird parts. Mass Audubon was instrumental in getting passed our first bird protection laws, including the original MBTA in 1918, 100 years ago this year<sup>1</sup>. Over the past decades we have worked successfully with FWS, state agencies, and municipalities to avoid incidental take from a variety of activities. Most recently, we participated in the development of a plan to ensure that recreational activities on municipal and federally-owned and managed beaches can continue without undue risk to coastal waterbirds from off-road vehicles<sup>2</sup>.

The MBTA is the primary legislation protecting native birds in the United States, and one of this country's earliest environmental laws, passed with the intent of protecting birds from the most prevalent threat at that time. As you well know, the purpose of the MBTA is to conserve migratory

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<sup>1</sup> History of Mass Audubon booklet <https://www.massaudubon.org/content/download/11636/186443/file/1921-History-of-Mass-Audubon-bookletC.pdf>

<sup>2</sup> <https://www.mass.gov/service-details/ma-piping-plover-habitat-conservation-plan-hep>

birds in compliance with the conventions that the MBTA implements. The MBTA clearly states that it is unlawful to take or kill migratory birds “at any time, by any means or in any manner,” and the previous Opinion (M-37041) thoroughly documents the proper basis for applying this to incidental take regardless of intent. Over the past 40 years, FWS and the Department of Justice have brought many enforcement cases and consistently taken the position that MBTA applies to incidental take.

We are deeply concerned that conformity to the M-37050 will discourage companies and individuals, from taking reasonable precautions to safeguard birds. The incidental take provision has protected millions of birds and bird species since it was first enacted. By ending industry and individuals’ responsibility to avoid millions of bird deaths each year, implementation of the memo will result in a break with a century of MBTA bird conservation legacy. We believe that FWS has utilized its authority prudently, pursuing criminal prosecution in cases of incidental take from oil pits, power line electrocutions, contaminated waste pools, pesticide application, and oil spills, only after providing notification of the problem, working to find solutions, and proactively educating industry about ways to avoid or eliminate the take of migratory birds<sup>3</sup>.

Mass Audubon’s *State of the Birds*<sup>4</sup> research indicates that 30% of our state’s breeding birds are currently in decline and in need of conservation action. Bird populations in the United States face a myriad of threats from man-made activities, including the degradation and fragmentation of critical habitat. Since passage of the MBTA in 1918, the threats to migratory birds have changed, but the MBTA remains critical to the protection of wild birds. We urge you to rescind Solicitor’s Opinion M-37050.

Sincerely,



John J. Clarke  
Director

cc: Massachusetts Congressional delegation  
Attorney General Maura Healey

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<sup>3</sup> See Chief’s Directive: Enforcement of the Migratory Bird Treaty as it Relates to Industry and Agriculture (Nov. 2, 2015).

<sup>4</sup> [https://www.massaudubon.org/content/download/21633/304821/file/mass-audubon\\_state-of-the-birds-2017-report.pdf](https://www.massaudubon.org/content/download/21633/304821/file/mass-audubon_state-of-the-birds-2017-report.pdf)