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Sent via U.S. Mail and Email

Jerome Ford
Assistant Director, Migratory Bird Program
U.S. Fish and Wildlife Service
1849 C Street, NW
Room 3331
Washington, DC 20240
Jerome_Ford@fws.gov

Re: Request for Enforcement of the Migratory Bird Treaty Act for Killing of Migratory Birds Caused by Management, Operation, and Regulation of McCormick Place in Chicago, IL

Dear Assistant Director Ford,

On behalf of Center for Biological Diversity, we submit this letter requesting that the U.S. Fish and Wildlife Service (USFWS or “the Service”) enforce the Migratory Bird Treaty Act (MBTA) as it pertains to the deaths of over 1,000 migrating songbirds on the night of October 4th to October 5th at McCormick Place in Chicago. More broadly, the Service needs to issue a proposed rule to regulate the killing of under the MBTA, including provisions for permitting of activities that foreseeably cause the deaths of migratory birds where measures to first avoid and if necessary, mitigate death of birds.

Under the Trump administration, the Service finalized a rule upending decades of MBTA enforcement through a radical and unlawful reinterpretation of the MBTA concluding that it did not prohibit the killing of migratory birds where that is an entirely foreseeable, albeit unintentional, consequence of the action. In response to litigation, the Biden administration revoked this rule May 7, 2021, and on October 4, 2021, published an advance notice of rule making and sought public comments toward the development of regulations to address the killing of migratory birds by certain economic activities, but has yet to propose a rulemaking. This failure - despite the passage of two years - has hamstrung enforcement of the MBTA and contributed to the unprecedented mortality event at McCormick Place.

As acknowledged by the Service, “[o]ver the last 50 years, the total population of North American birds has declined by an estimated 3 billion birds,” and “[m]any of the 1,093 species of birds protected under the MBTA [] are experiencing population declines due to increased threats across the landscape.”¹

Although this event was unusual in the number of birds killed, it was not the first time killed of songbirds has occurred at McCormick Place. To date, state and federal agencies and the Metropolitan Pier and Exposition Authority (as owners of McCormick Place) have failed to take adequate steps to avoid, minimize, and mitigate this ongoing threat. Without the Service’s enforcement of the MBTA, we are gravely concerned that the continued operation of McCormick Place and other sources of migratory bird

¹ Migratory Bird Permits; Authorizing the Incidental Take of Migratory Birds, 86 Fed. Reg. 54,667, 54,668 (Oct. 4, 2021).

collisions will continue to contribute to the catastrophic decline of migratory bird populations in blatant violation of the MBTA.

We urge you to enforce the MBTA and to immediately issue the proposed rule to address tragic situations such as what occurred at McCormick Place. These incidents occur all over the country on a regular basis and highlight the need to enforce the MBTA. We are reliant on the U.S. Fish and Wildlife Service (USFWS) to take enforcement action under the MBTA and, in this case, the USFWS needs to initiate an investigation into this October 4 – 5, 2023 incident that occurred at McCormick Place in Chicago, IL., specifically.

I. Interested Parties

The Center for Biological Diversity (Center) is a national, nonprofit organization dedicated to protecting wildlife and wild places through science, law, and creative media. The Center has worked for decades to protect migratory birds by seeking protections for individual species under federal and state laws and taking legal action to ensure migratory birds remain protected under the MBTA. The Center's offices work in locations around the country to prevent the extinction of some of the most imperiled bird species living in the U.S. and other countries.

II. Factual Background

a. October 4-5, 2023, McCormick Place

October 5, 2023, the U.S. saw a "once in a lifetime" migration event in the Chicago area: The migration floodgates opened the night of October 4 to October 5, 2023, and millions of birds started their southbound journeys from Canada en route to South and Central America. As a result, on October 5, Chicago woke up to a river of warblers and other passerines flying overhead: From late Wednesday, October 4th, through early Thursday, October 5th, a peak estimate of 1.5 million birds were in the air over Cook County, home to the Chicago metropolitan area.²

As the day wrapped up, a grim report surfaced from McCormick Place Lakeside, Chicago's convention center: Nearly 1,000 birds were killed by the building windows on that day alone; 700 more than any other day in the four decades that birds have been collected and collisions have been tracked at that building. Carcasses of Tennessee warblers, hermit thrush, American woodcocks, and other varieties of songbirds were collected.

² <https://dashboard.birdcast.info/region/US-IL-031?night=2023-10-04>



Figure 1: Some of the many birds that were killed when colliding with McCormick Place in Chicago (Credit: Lauren Nassef/AP)

b. The Impact & Insufficiency of State & Private Regulatory Mechanisms

Everywhere birds visit, they perform essential ecosystem services that have economic value and are necessary for the functioning of ecosystems. Following major wildfires like those in Canada, birds that return to burned areas can disperse seeds and aid forest landscape regeneration.³ Global increases in temperatures contribute to the increase in insect populations, and birds that feed on them can help curb the issues that pose a threat for humans and food systems.⁴

Large mortality events like at McCormick Place tend to occur during peak migration periods in spring and fall.⁵ Weather conditions - like opposing wind, rain, and fog - can make it difficult for birds to orientate themselves; in addition to light pollution from cities that can draw them in and trap them among deadly structures. As a result, anywhere you have glass, you have birds hitting windows, with up to one billion birds dying due to collisions with buildings annually.

Of all cities in the US, Chicago's light pollution poses the greatest risk for migrating birds. Turning off building lights is one way to reduce fatalities: A 2021 study done in McCormick Place, the same site of October 5th's bird deaths, found that shutting off half the lights in large buildings can reduce collisions by

³ *Birds as mediators of passive restoration during early post-fire recovery*, Biol. Cons., <https://www.sciencedirect.com/science/article/abs/pii/S0006320712004247#:~:text=Remnant%20trees%20or%20artificial%20perches,shrubs%20in%20post%2Dfire%20areas> (Vol. 158, February 2013, pgs. 342 – 350).

⁴ *Insect Disturbance and Climate Change*, U.S. Forest Service, <https://www.fs.usda.gov/ccrc/topics/insect-disturbance-and-climate-change#:~:text=forest%20insect%20species,-,In%20some%20cases%2C%20larger%20and%20more%20frequent%20insect%20outbreaks%20may,to%20forest%20insect%20population%20growth> (last visited October 11, 2023).

⁵ *New York's plan to save birds from crashing into buildings: lights out*, <https://www.theguardian.com/us-news/2023/sep/07/nyc-migrating-birds-night-lights-architecture> (Sept 7, 2023).

six to 11 times.⁶ McCormick Place is also a participant of the Lights Out Chicago program, which involves buildings voluntarily switching off or dimming lights at night unless someone is inside.⁷ During the October 4-5th incident, there was an event going on at the location, therefore, the lights were left on, and this terrible incident occurred as a result. This represents a catastrophic failure of the voluntary program, indicating regulation is desperately needed.

Chicago and Illinois have taken additional steps to protect migratory birds, but they are insufficient: In 2020, Chicago also approved a bird-friendly design ordinance, which has yet to take effect. In addition, in 2021, the Illinois governor JB Pritzker signed the Bird Safe Buildings Act, which requires “bird-friendly design to be incorporated into the construction and renovation of state-owned buildings.” However, it is *existing* buildings that are often killing birds, not just new construction, therefore, this tool has had limited impact on preventing harm to migratory birds.

III. Legal Background

The Migratory Bird Treaty Act of 1918, as amended, 16 U.S.C. § 703 *et seq.* (MBTA), is intended to ensure the sustainability of all protected migratory bird species. It implements Conventions between the United States and four neighboring countries (Canada, Mexico, Japan, and Russia) for the protection of migratory birds.⁸

To that end, the MBTA prohibits the killing of protected migratory bird species without prior authorization from the Service.⁹ Specifically, the MBTA provides that, “[u]nless and except as permitted by regulations . . . it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture or kill” migratory birds.¹⁰ The Service defines “take” as “to pursue, hunt, shoot, wound, kill, trap, capture, or collect” a migratory bird, or to attempt to engage in any of those activities.¹¹ The Service has regularly investigated causes of lethal mortality, such as oil pits, power-lines, contaminated waste pools, oil spills, commercial fishing lines and nets, and wind turbines.¹²

The Service has used a range of strategies to ensure compliance with the MBTA’s prohibitions, including the use of notices, guidance, informally negotiated remediation, issuance of permits, and—when attempts to achieve voluntary compliance have failed—enforcement actions.¹³

⁶ *Drivers of fatal bird collisions in an urban center*, Biological Sciences, <https://www.pnas.org/doi/full/10.1073/pnas.2101666118> (June 7, 2021).

⁷ *McCormick Place’s Proactive Plan to Protect Migratory Birds*, <https://www.mccormickplace.com/birds/> (last visited October 11, 2023).

⁸ See Convention Between the United States and Great Britain for the Protection of Migratory Birds, Aug. 16, 1916, 39 Stat. 1702 (Canada Convention); Convention for the Protection of Migratory Birds and Game Mammals, Feb. 7, 1936, 50 Stat. 1311 (Mexico Convention); Convention for the Protection of Migratory Birds and Birds in Danger of Extinction, and Their Environment, Mar. 4, 1972, 25 U.S.T. 3329, T.I.A.S. No. 7990 (Japan Convention); Convention Concerning the Conservation of Migratory Birds and Their Environment, Oct. 13, 1978, 29 U.S.T. 4647, T.I.A.S. No. 9073 (Russia Convention); see also 50 C.F.R. § 10.13(a).

⁹ There is, at present, no system for authorizing take under the MBTA by permit; however, the U.S. Fish and Wildlife Service has indicated its intent to establish such a system. Migratory Bird Permits; Authorizing the Incidental Take of Migratory Birds, 86 Fed. Reg. 54,667 (Oct. 4, 2021).

¹⁰ 16 U.S.C. § 703(a).

¹¹ 50 C.F.R. § 10.12.

¹² *NRDC*, 478 F. Supp. 3d at 473.

¹³ *Id.* at 473–74.

Violations of the MBTA are sorted into two categories: criminal penalties and forfeitures. Any person, association, partnership, or corporation who violates the MBTA or its implementing regulations commits a misdemeanor punishable by a fine of up to \$15,000 and imprisonment for up to six months.¹⁴

The Service maintains a list of protected migratory birds,¹⁵ which includes Tennessee warblers, hermit thrush, American woodcocks and other varieties of birds that were killed due to the McCormick Place collision and many others regularly taken due to a lack of enforcement of the MBTA.

IV. Request to Enforce the Migratory Bird Treaty Act

Activities authorized at McCormick Place, and many other buildings, are causing repeated and continuous unauthorized take of protected migratory birds on a massive scale, in patent violation of the MBTA. As of the date of this letter, state agencies, USFWS, and Metropolitan Pier and Exposition Authority (as owners of McCormick Place) have failed to effectively or adequately avoid, minimize, and mitigate take of migratory birds. While McCormick Place voluntarily participates in the Lights Out program, clearly this has not even come close to ensuring compliance with the MBTA.

There is no question the Service has long-delayed officially putting in place and implementing appropriate regulations required under the MBTA that could minimize take or killing of birds from precisely this kind of threat. The Service has produced a draft proposal, but it has been at the Office of Management and Budget (OMB) since March. There is no reason for this additional delay.

Even in the absence of this rule, the Service has the authority take enforcement action at McCormick Place; specifically, USFWS' website states the following:

*On October 4, 2021, the Service published a final rule revoking the January 7, 2021, regulation that limited the scope of the MBTA. With this final and formal revocation of the January 7 rule,¹⁶ **the Service returns to implementing the MBTA as prohibiting incidental take and applying enforcement discretion**, consistent with judicial precedent and long-standing agency practice prior to 2017. This final rule goes into effect on December 3, 2021.¹⁷*

V. Necessary Minimization and Mitigation Measures for McCormick Place

Illinois and other states have authorized the taking of wildlife in violation of the MBTA for decades, without putting in place effective, lasting action to mitigate the problem. For these reasons, we ask that the U.S. Fish and Wildlife Service intervene to enforce the MBTA and ensure the establishment of effective, long-term solutions for the massive take occurring at McCormick Place and elsewhere. We also suggest that McCormick Place specifically be required to individually and collectively take immediate action to prevent and mitigate injuries and deaths of migratory birds, including taking

¹⁴ 16 U.S.C. § 707(a). "Person" as used in the MBTA has been broadly defined to include governmental entities. See *Humane Soc'y of the U.S. v. Glickman*, 217 F.3d 882, 886 (D.C. Cir. 2000).

¹⁵ 50 C.F.R. § 10.13(c).

¹⁶ *Regulations Governing Take of Migratory Birds; Revocation of Provisions*, <https://www.federalregister.gov/documents/2021/10/04/2021-21473/regulations-governing-take-of-migratory-birds-revocation-of-provisions> (effective Dec. 3, 2021).

¹⁷ *Governing the take of migratory birds under the Migratory Bird Treaty Act*, U. S. Fish and Wildlife Service, <https://www.fws.gov/regulations/mbta> (last visited October 11, 2023).

measures to remediate their glass in order to avoid bird collisions and implement a stricter “lights out” policy during migration. However, we also emphasize that these additional actions, alone, would not be sufficient to address take of migratory birds at McCormick Place.

VI. Conclusion

Activities authorized at McCormick Place continue to injure and kill migratory birds that are protected under MBTA at an alarming rate. State and federal agencies and the Metropolitan Pier and Exposition Authority have failed to adequately prevent, minimize, and mitigate these deaths and injuries, leaving thousands of birds to suffer in a tortuous and inhumane way. For these reasons, we respectfully urge the U.S. Fish and Wildlife Service to intervene and, to the extent necessary to address the problem, enforce the MBTA to protect migratory birds at McCormick Place.

Thank you for considering our request. If you have any questions or would like copies of the sources cited, please contact Tara Zuardo at tzuardo@biologicaldiversity.org or (415) 419-4210. Regardless, we respectfully request a response to this letter within thirty days so that we and other members of the interested public know whether migratory birds will be protected in the manner dictated by federal law.

Sincerely,

Tara Zuardo, Esq.
Senior Advocate
Center for Biological Diversity
(415) 419-4210
tzuardo@biologicaldiversity.org