



David Mears, Executive Director

January 21, 2020

**Testimony Before the Vermont General Assembly
House Committee on Natural Resources, Fish, and Wildlife**

- Audubon Vermont supports H.683 as a means for the State of Vermont to replace a level of protection prohibiting the incidental take of migratory birds that was in effect at the national level under the Migratory Bird Treaty Act for over fifty years until a recent decision by the U.S. Department of Interior to reinterpret the law.
- As you will hear from the three Audubon chapter members from around the state, protecting birds is an issue that matters to Vermonters. Birds are an important part of the fabric of our communities. Government and university reports and the experience of Audubon's members, in Vermont and beyond, demonstrate that birds are an important contributor to Vermont's economy. The economic benefits provided by birds includes the money spent in Vermont by bird-watchers, as well as the pest reduction and pollination benefits that birds provide for our farms and forests.
- As you will hear from Professor Allan Strong in a moment, and as you can read in the articles linked to my testimony below, bird populations are in significant decline across North America and in Vermont as a result of human activities. H.683 will not address the full range of causes for the declines of bird populations but will serve as an important deterrent to human activities conducted without regard to the impacts on birds from obviously harmful activities.
- This law will restore protections where harm to birds is a direct and foreseeable result of a human activity. At the federal level, the MBTA has only been applied in instances where the impacts on birds were significant. Typically, the activity in question can be adapted to avoid or minimize harm to birds. The U.S. Fish and Wildlife Service and many states have guidance to guide activities known to impact bird populations.
- H.683 is crafted to avoid requiring the Department of Fish and Wildlife to adopt a new regulatory program, and instead gives the Department the authority to enforce the prohibition on activities that will directly and foreseeably cause harms to birds without requiring new regulations or a permitting system.

- A recent [report](#) by the Association of Fish and Wildlife Agencies, of which the Vermont Department of Fish and Wildlife is a member, offers helpful guidance to states interested in addressing the confusion over incidental take following the U.S. Department of Interior opinion re-interpreting the law. Only 17 states currently have laws addressing incidental take, since most states historically relied on the U.S. Fish and Wildlife Service to address this issue. For this reason, the Association developed model language for those states, like Vermont, without such laws. The drafting of H.683 was informed by the recommendations in this report.
- In addition, the Association also developed a compilation of [Best Management Practices](#) used by federal and state agencies for avoiding incidental take of migratory birds. This helpful document is available to the Vermont Department of Fish and Wildlife to assist in the implementation of H.683.
- There is a possibility of federal action to address the gaps created by the U.S. Department of Interior's new interpretation of the Migratory Bird Treaty Act. A [lawsuit](#) has been filed by the National Audubon Society and other environmental organizations, and another [lawsuit](#) filed by eight states (not Vermont), challenging Interior's decision. In addition, a bill has been introduced in the U.S. House of Representatives, the Migratory Bird Protection Act (H.R. 5552), which recently passed out of the House Natural Resources Committee (article about the bill [here](#)).
- Given the uncertainties of both the litigation and federal legislation, Vermont would be well-served to fill the gap created by the change in the federal interpretation of the MBTA. If either the lawsuit or the legislation result in a return to the prior level of protection, the overlap between state and federal law will provide complementary authority for the State of Vermont and federal fish and wildlife protection agencies, both of which have a successful history of collaboration in the implementation of fish and wildlife protections.

Fact Sheet for H.683: Prohibiting the Incidental Take of Birds

A Few Bird Statistics:

- North America has experienced a bird population decline of nearly three billion birds since 1970 according to a [study](#) released last Fall by the Cornell Lab of Ornithology. The declines, totaling nearly a third of historic bird populations, were spread across hundreds of species including birds once considered common like the Red-winged Blackbird
- A 2017 Vermont Center for Ecostudies [report](#) shows a 14% decline in Vermont's forest bird species abundance since 1989 with the species in steepest decline including the Common Yellowthroat, Canada Warbler, White-throated Sparrow, and Eastern Wood-Pewee
- Birds are important to Vermont's economy. Vermont has highest proportion of self-reported birders (39%) of any state. Wildlife watching generates an estimated \$289 million in economic activity annually. Birds are important to both agriculture and timber because they control pests and pollinate plants.

Migratory Bird Treaty Act (MBTA) Background

- Congress passed the MBTA in 1918 to implement an international bird protection treaty with Canada (later joined by Mexico, Japan, and Soviet Union). This landmark environmental law was passed in response to significant bird population declines and outright extinctions driven by the uncontrolled hunting of birds for their plumage, sport, and food. More background [here](#).
- Under the MBTA, it is illegal to “pursue, hunt, take, capture, kill...by any means...at any time or in any manner...” any migratory bird or part of its nest, eggs, and feathers. As a result of this law, birds like the Snowy Egret, Wood Duck and Sandhill Crane were protected and pulled from the brink of extinction.
- Until recently, the MBTA has been enforced to include incidental takes (harm or death that results from human activities where the intent was not to kill birds, but where significant bird deaths were a direct and foreseeable result of the activity).
- Neither the U.S. Fish and Wildlife Service nor the courts have extended the MBTA's protections to penalizing everyday activities that may harm birds, such as car collisions. Instead, the law has been used to incentivize best management practices for projects and

activities with the significant potential to impact bird populations, and assist with recovery from accidents, like oil spills, that impact large numbers of birds.

- The U.S. Department of Interior issued an [opinion](#) in December of 2017 construing the law more narrowly, stating that the MBTA only applies when “the actor [is] engaged in an activity the object of which was to render an animal subject to human control”. This interpretation means that the law now only applies to intentional harm or death such as trapping or shooting, and no longer applies in cases where killing birds is a direct and foreseeable result of the activity, but is not the purpose of the activity.
- The new opinion undoes fifty years of legal precedent and the application of the law by both Administrations of both political parties.
- The U.S. Fish and Wildlife Service is already implementing these new directions and has declined on several occasions to take action to address significant projects affecting birds (see [NY Times article](#) for examples).