March 1, 2021

Public Comments Processing
Attention: FWS-HQ-MB-2018-0090
U.S. Fish and Wildlife Service


Submitted electronically at: http://www.regulations.gov

On behalf of the National Audubon Society, Natural Resources Defense Council, and our millions of members and online activists, please accept and fully consider these comments on the U.S. Fish and Wildlife Service’s (Service) regulations governing take of migratory birds under the Migratory Bird Treaty Act (MBTA), Docket No. FWS–HQ–MB–2018–0090, and the delay of its effective date and request for public comments.

For many years, our organizations have been deeply engaged in efforts to protect the publicly-owned resources under the jurisdiction of the Department of the Interior (Interior), including migratory birds protected by federal laws and treaties. The MBTA is one of our Nation’s oldest and most important laws protecting birds and we are fully committed to ensuring that this bedrock environmental law remains fully intact and singularly focused on avian protection, as Congress intended over a century ago.¹

We thank the Service for taking action to correct the effective date of the MBTA rule to conform with the Congressional Review Act² and for considering public comments related to the rule. We submit this petition for reconsideration of the rulemaking and request that the MBTA rule be reopened, the effective date further suspended, and consideration of a permitting program for incidental take under the MBTA be immediately initiated.

We urge the Service to recognize the MBTA rule’s severe defects, including clear errors of fact, law and policy throughout the rulemaking docket and associated actions, and to remedy such defects with a robust public process to address alternatives that provide conservation benefits to birds. Such a process could and should pick-up where the 2015 MBTA scoping process left off.

Our organizations have submitted detailed comments on this docket at each stage of the rulemaking process – scoping, proposed rule, draft and final Environmental Impact Statement (EIS), and following the federal district court ruling vacating the 2017 Solicitor’s Opinion – as well as comments on the 2015

¹ See Missouri v. Holland, 252 U.S. 416 (1920) (“Here, a national interest of very nearly the first magnitude is involved...But for the treaty and the statute, there soon might be no birds for any powers to deal with.”)
² One note of clarification is with respect to the proper effective date, which the Congressional Review Act requires to be the “later of the date occurring 60 days after the date on which— (i) the Congress receives the report submitted under paragraph (1); or (ii) the rule is published in the Federal Register” for major rules. 5 U.S.C. §801(a)(3)(A). The Congressional Record does not include notice that the House of Representatives received such report, which would indicate that further suspension of the effective date is warranted.
scoping to consider an incidental take permitting program. We incorporate our previous comments by reference here,\(^3\) and summarize and attach a subset of such comments below.

**Unlawful Final Rule**

We strongly oppose the rulemaking to codify the 2017 Solicitor’s Opinion (M-Opinion 37050 or the Jorjani Opinion) and any action to remove the prohibition against incidental take under the MBTA or otherwise limit the statute’s scope “only to actions directed at migratory birds, their nests, or their eggs.” And we are not alone. In addition to hundreds of thousands of public comments – with more than 98% of the comments opposed to the rule\(^4\) – unresolved objections by more than 25 states, 30 tribes, three flyway councils, our treaty partner, Canada, and more remain on the record.

There was little attempt made to address the multitude of concerns expressed and instead the MBTA rule and associated documents carried forward fundamental flaws while remaining virtually silent on key issues related to law, agency precedent, and environmental impacts, including in its analysis of adverse impacts to birds, treaty partners, tribes and environmental justice\(^5\), and more.

The MBTA rule stands in clear contradiction to the MBTA’s statutory mandate to protect and conserve birds, the broad conservation intent of the four bilateral treaties implemented by the MBTA, decades of administrative policy, the missions of the Service and its programs, the science that demonstrates bird populations are at significant risk, and the widespread public opposition to this policy.

**Flawed Legal Basis**

The fundamental defect of the MBTA rule is that the central legal basis on which it relies – the Jorjani Opinion – was declared unlawful and vacated by the U.S. District Court for the Southern District of New York in August 2020.\(^6\) The Court explained that the “statute’s unambiguous text” is in “direct conflict

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with the Jorjani Opinion.” The government has now withdrawn its appeal of the district court’s ruling in apparent acknowledgement that the Jorjani Opinion is indefensible as a matter of law and policy.

The Court rejected the very same policy arguments that the final rule set forth and concluded that the “Jorjani Opinion’s interpretation runs counter to the purpose of the MBTA to protect migratory birds.” Because the Service’s final MBTA rule presented no new science, legal rationale or policy justification beyond what was presented in the Jorjani Opinion, the final rule is similarly unlawful and contrary to the plain language and conservation intent of the MBTA. Concurrent with reconsideration of the rule, we urge the Service to affirm that due to the Court’s order, the Jorjani Opinion and the Service Guidance implementing it no longer have any force or effect.

**Wholly Inadequate Environmental Review**

The Final EIS is deeply flawed and falls far short of the requirements under the National Environmental Policy Act. From the outset, it was clear that the EIS merely served as a pretense to justify a decision that was made in December 2017 when Interior issued the M-Opinion. The purpose and need failed to even mention the conservation of birds and the EIS lacked a detailed analysis of adverse impacts, including on impacts to birds and species of concern, international impacts on our four treaty partners, and impacts to tribes, environmental justice, subsistence and cultural resources, and ecosystem services. The Final EIS also failed to consider a reasonable range of alternatives – dropping consideration of any other reasonable alternatives and relying on a baseline No Action alternative that was essentially the same as its preferred alternative.

**Need to Address an Incidental Take Permit**

In its public webinars in March 2020, the Service informed the public it would consider an alternative that includes a permitting approach. The Service had previously issued a notice of intent to consider an incidental take permit in 2015, but the Service removed this alternative from consideration before publishing the DEIS and did not meaningfully consider such an approach or the previous docket for the final rule.

Our organizations supported the process in 2015, and numerous stakeholders – including industry representatives – signaled support for the concept of an incidental take permit. This record therefore provides a substantial starting point and would meet the purposes of Executive Order 13186, which directs agencies to address intentional and unintentional take of migratory birds and to avoid and minimize adverse impacts to birds.

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We urge the Service to again consider and pursue an incidental take permitting approach building off of the 2015 docket. A permitting framework can provide a balanced approach to meet the conservation intent of the MBTA and its underlying treaties, while also promoting regulatory certainty for modern industrial operation. It can do this by relying on a science-based conservation framework, with an emphasis on measures that avoid and minimize incidental take as well as opportunities to compensate for impacts, which ultimately should result in conservation benefits for birds.

Conclusion
In sum, the MBTA rule, EIS, and rulemaking process reveal insurmountable flaws and we urge the Service to fully review these issues, correct the errors, and pursue an alternative approach as outlined above. With the latest science showing that bird populations have declined by 30% since 1970 and that climate change poses a threat to two-thirds of North America’s birds, now is the time for the Service to ensure it is meeting its mission to protect and conserve birds.

We are fully committed to working with the Service, industries, and other stakeholders on a collaborative process with a strong scientific and legal basis to establish a path forward for addressing incidental take under the MBTA. Please do not hesitate to reach out to us for additional information.

Thank you for your consideration of these comments.

Sincerely,

Katie Umekubo
Senior Attorney, Nature Program
Natural Resources Defense Council

Sarah Greenberger
Senior Vice President, Conservation Policy
National Audubon Society