

July 20, 2020

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

Re: Regulations Governing Take of Migratory Birds DEIS (Docket No. FWS-HQ-MB-2018-0090; EIS No. 20200117)

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

On behalf of the National Audubon Society, Natural Resources Defense Council, American Bird Conservancy, National Wildlife Federation, The Nature Conservancy, Defenders of Wildlife, National Parks Conservation Association, Environmental Defense Fund, The Conservation Fund, Sierra Club, American Birding Association, and Tennessee Ornithological Society, 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 or FWS) draft environmental impact statement (DEIS) for regulations governing take of migratory birds under the Migratory Bird Treaty Act (MBTA), Docket No. FWS-HQ-MB-2018-0090; EIS No. 20200117.

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 strongly oppose the Service's proposed rule to redefine the scope of the MBTA to not prohibit incidental take. Our legal, scientific, and policy explanations for opposing this action are well documented, and we incorporate by reference previous comments here.² The Service's proposal, just like the Solicitor's legal opinion that the Service is now attempting to codify, is unlawful and contrary to the plain language and conservation intent of the MBTA.³ Moreover, as set forth below, the DEIS is insufficient in its analysis to form a reasoned basis on which the Service can justify its action. Simply put, the Service has not taken a "hard look" at the proposed action.⁴

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 *Comments on the U.S. Fish and Wildlife Service's Proposed Rule and Notice of Intent to Prepare an Environmental Impact Statement to redefine the scope of the Migratory Bird Treaty Act*, Docket No. FWS-HQ-MB-2018-0090 (March 19, 2020), available at <https://www.regulations.gov/document?D=FWS-HQ-MB-2018-0090>.

³ Natural Resources Defense Council et al., *Comments on the U.S. Fish and Wildlife Service's proposed rule to redefine the scope of the Migratory Bird Treaty Act*, Docket No. FWS-HQ-MB-2018-0090 (March 19, 2020); *NRDC v. U.S. Dep't of the Interior*, No. 18-CV-4596 (VEC) (S.D.N.Y.); *Nat'l Audubon Soc'y v. U.S. Dep't of the Interior*, No. 18-CV-4601 (VEC) (S.D.N.Y.); *State of New York v. U.S. Dep't of the Interior*, No. 18-CV-8084 (VEC) (S.D.N.Y.).

⁴ NEPA's "action-forcing" procedures "implement that statute's sweeping policy goals by ensuring that agencies will take a 'hard look' at environmental consequences and by guaranteeing broad public dissemination of relevant information, it is well settled that NEPA itself does not impose substantive duties mandating particular results, but simply prescribes the necessary process for preventing uninformed—rather than unwise—agency action." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 333 (1989). We recognize that the administration

The DEIS itself unequivocally concludes that the proposed action will negatively impact birds, as well as the broader affected environment. As our Nation's steward "to conserve, protect, and enhance fish, wildlife, and plants and their habitats for the continuing benefit of the American people," the Service should immediately reverse course and go back to the drawing board on both the proposed action and DEIS on regulations governing take of migratory birds.

The landmark 2019 study, *Decline of the North American Avifauna*, published in the journal *Science*, found that bird populations have declined by 3 billion birds since 1970, representing a 29% overall decline in 50 years.⁵ The study cites an "urgent need to address ongoing threats" including "direct anthropogenic mortality," in order to "avert continued biodiversity loss and potential collapse of the continental avifauna." Additionally, National Audubon Society released a study, *Survival By Degrees: 389 Species on the Brink*, which found that two-thirds of North America's birds are threatened by climate change.⁶ Yet M-Opinion 37050 and the proposed rule significantly undermine efforts to address a substantial source of anthropogenic mortality and instead exacerbate the threats facing birds now and into the future.

The DEIS compounds the failures of the proposed rule through a flawed process and analysis that prevents the agency from making a sound and supportable decision, and robs the public of critical information that it needs to understand and comment on the impacts of the rule. We urge the Service to meaningfully consider the overwhelming majority of public comments opposing the proposed rule and to directly address the MBTA's conservation mandate in its environmental review. A requisite "hard look" necessitates consideration of a full range of actions that would meet our domestic and international conservation commitments, including detailed analysis of a robust permitting program to authorize incidental take under the MBTA and a scientific and biologically-driven analysis of the direct, indirect and cumulative impacts of all reasonable alternatives.

I. Flawed Process and Lack of a Meaningful Opportunity for Public Engagement

Public Input is Rendered Meaningless Because the Action Has Already Been Taken

The National Environmental Policy Act (NEPA) requires that the Service take a "hard look" at the environmental consequences of its proposed action, while also prescribing a detailed public process that ensures the broad dissemination and consideration of relevant information with an ultimate aim of ensuring informed decisions.⁷ That process is completely undermined and rings hollow when, as is the case here, the decision has already been made.

announced a major revision of the Council on Environmental Quality's regulations implementing NEPA. 85 Fed. Reg. 43304 (July 16, 2020). We note that those revisions will not be in effect until September 2020, and therefore are not applicable to the Service's obligations in preparing the DEIS or these comments.

⁵ Rosenberg, K. V. et al. 2019. *Decline of the North American Avifauna*. *Science* 365(6461). doi: 10.1126/science.aaw1313.

⁶ Wilsey, C, B Bateman, L Taylor, JX Wu, G LeBaron, R Shepherd, C Koseff, S Friedman, R Stone. *Survival by Degrees: 389 Bird Species on the Brink*. National Audubon Society: New York.

⁷ See 42 U.S.C. § 4332(2)(C); *Robertson supra* note 4; *Nat'l Audubon Soc'y v. Dep't of Navy*, 422 F.3d 174, 184 (4th Cir. 2005) (a "federal agency will carefully consider the effects of its actions on the environment by specifying formal procedures the agency must follow *before* taking action...[and] disseminate widely its findings on the environmental impacts of its actions [emphasis added].")

At its core, the Service’s proposed rule and DEIS are simply pretense to support the decision that was made in December 2017 when Interior issued M-Opinion 37050, declaring that “[t]he Migratory Bird Treaty Act Does Not Prohibit Incidental Take.”⁸ The Service makes no attempt to take a fresh look at this issue. Instead it purposefully shuts out the majority of public comments submitted and attempts to justify M-Opinion 37050 with an inadequate environmental analysis more than two years after the actual decision was made and implemented.

The Service’s proposal squarely contradicts NEPA’s requirement that: “[a]n agency shall commence preparation of an environmental impact statement as close as possible to the time the agency is developing or is presented with a proposal...The statement...*will not be used to rationalize or justify decisions already made* [emphasis added].⁹

We also have concerns about the Service’s press release announcing the opening of a public comment period, which included praise from numerous industry representatives and other officials, with none expressing the opposite view.¹⁰ This does the public a disservice and harms the process that should fully and objectively consider public comments and the science, other issues and alternatives in the NEPA analysis. It also suggests that these entities were given advance notice and information on the rule, which has led to serious concerns by former FWS officials, who have called for an Inspector General investigation.¹¹

A “hard look” at the environmental consequences of the decision to exclude incidental take from the reach of the MBTA requires much more than a perfunctory process to codify Interior’s unlawful reinterpretation of the MBTA.

Public Engagement is Obstructed by the Rushed Rulemaking

In seeking to codify M-Opinion 37050, the Service both adopted an unconventional strategy of releasing the proposed rule simultaneous with the scoping notice to draft an environmental impact statement and chose to ignore the hardships posed by a global pandemic due to COVID-19. Both significantly undermine NEPA’s requisite commitment to facilitate meaningful public engagement and informed decision making.

⁸ Memorandum from Daniel Jorjani, Principal Deputy Solicitor of the Interior, Opinion M-37050, *The Migratory Bird Treaty Act Does Not Prohibit Incidental Take 2* (Dec. 22, 2017).

⁹ 40 CFR § 1502.5.

¹⁰ Press Release, U.S. Fish and Wildlife Service Solicits Public Input on Proposed Rule and Environmental Impact Statement for Migratory Bird Treaty Act (Jan. 30, 2020), available at: https://www.fws.gov/news/ShowNews.cfm?ref=u.s.-fish-and-wildlife-service-solicits-publicinput-on-proposed-rule-and-&_ID=36517.

¹¹ See Public Employees for Environmental Responsibility, *Even Bureaucracies Taking on Trumpian Tone* (February 12, 2020); available at: https://www.peer.org/even-bureaucracies-taking-on-trumpian-tone/?fbclid=IwAR2dSMH34IQSKoC4HPItmm7y6-fYA-qesOE3AB_T_6yEWcg8N_bv0xxNOUk; Letter From Megan Durham, *et al.* to Interior Inspector General on MBTA Press (March 13, 2020); Public Employees for Environmental Responsibility, *Ten Retired Press Officers Attack Validity of Bird Death Rule* (March 16, 2020); available at: <https://www.peer.org/ten-retired-press-officers-attack-validity-of-bird-death-rule/>; Politico, *Former Officials Call Fowl* (March 17, 2020), available at: <https://www.politico.com/newsletters/morning-energy/2020/03/17/how-oil-prices-could-affect-2020-786136>.

The Service should have initiated scoping well before releasing the proposed rule, as most commonly done, so that the DEIS and resulting public input could inform the proposed rule and guide additional engagement and public comment. Instead, the Service closed the comment period on the proposed rule before releasing the DEIS, thus adding to the specter of a predetermined outcome and rebuking NEPA's requirement that, "[e]nvironmental impact statements shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made."¹² In comments to the press, the Service similarly reinforced that the DEIS aims to merely justify M-Opinion 37050 and stated, "We believe this is the only viable alternative in line with this legal conclusion."¹³

In March 2020, the rapid and uncertain spread of COVID-19 caused unparalleled disruption to almost every facet of our daily lives. Five months later we are witnessing a return to stricter safety measures and most organizations and individuals are far from resuming normal operations. Yet, in its rush to finalize a legally flawed rule, the Service continues to reject reasonable and necessary requests for extensions, even though the Service's counsel has requested and been afforded that very same courtesy in ongoing litigation challenging M-Opinion 37050 during the pandemic.¹⁴ We urge the Service to allow additional time and consideration commensurate with this fundamental change in application of a bedrock environmental law.

Denying all extension requests and failing to reopen the comment periods for both the environmental review and proposed rule prevent a robust environmental analysis and full consideration of all reasonable alternatives for the proposed action.

A Flawed Process is Compounded by Failing to Consider the Majority of Public Comment

Against the advice of more than 99% of comments submitted thus far,¹⁵ the Service has purposefully limited the scope of the proposed action and accompanying environmental review to exclude consideration of the environmental costs and benefits of M-Opinion 37050 and to dismiss a range of alternatives that would actually benefit birds.

NEPA requires that the Service provide a meaningful opportunity for public engagement and to thoughtfully consider all input. Yet, Interior and the Service not only have proposed an unlawful rule but also have simply ignored well-reasoned and overwhelming public opposition.¹⁶

¹² 40 CFR § 1502.2(g).

¹³ Brown, Matthew, ABC News, *U.S. Moves Forward with Plan to End Wild Bird Protections* (June 5, 2020), available at <https://abcnews.go.com/US/wireStory/us-moves-forward-plan-end-wild-bird-protections-71092468>.

¹⁴ See Letters from Mr. Jerome Ford, U.S. Fish and Wildlife Service to Katie Umekubo, NRDC (March 6, 2020) (July 16, 2020). Inside EPA, *EPA Facing Calls To Extend Consent Decree, Rule Deadlines Due To Virus* (March 17, 2020).

¹⁵ Based on a review of public comments on the proposed rule docket, as of July 20, 2020, finding fewer than 50 comments expressing support for the rule.

¹⁶ As an overarching policy matter, NEPA mandates that: "Federal agencies shall to the fullest extent possible...(d) Encourage and facilitate public involvement in decisions which affect the quality of the human environment...[and] (f) Use all practicable means, consistent with the requirements of the Act and other essential considerations of national policy, to restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of their actions upon the quality of the human environment." 40 CFR § 1500.2.

The DEIS does not even acknowledge, let alone substantively address, the more than 198,000 public comments calling on the agency to reverse course and reinstitute protections for birds. Detailed comments critical of Interior’s drastic reinterpretation of the MBTA and recommended alternatives have been submitted by concerned citizens, scientists, hunters, tribal interests, three Flyway Councils, more than a dozen state wildlife agencies, 70 Members of Congress, more than 100 NGO’s, and more than 250 former Interior officials.

Instead of considering these submissions, the Service is rushing ahead with the rulemaking for the benefit of a select few industrial actors who stand to profit from this regulation—evidenced by the approximately 50 supporting comments submitted on the proposed rule, primarily from industry associations. Moreover, there is scant evidence in the DEIS that the Service has abided by tribal consultation requirements¹⁷—with mention of just one interested tribe—or international treaty obligations to provide notice and formally discuss how its rulemaking impacts obligations to conserve migratory birds covered under the bilateral conventions with Canada, Mexico, Russia, and Japan.¹⁸

Similarly, the DEIS lacks any indication that the Service has abided by Endangered Species Act (ESA) Section 7 consultation requirements,¹⁹ or even considered enforcement implications for either ESA or the Bald and Golden Eagle Protection Act²⁰—which provide concurrent authorities for more than 100 species listed under the MBTA. Instead the Service only offers, “None of these alternatives directly affect the implementation and enforcement of the [ESA],) or the Bald and Golden Eagle Protection Act (citation omitted).”²¹

NEPA requires consideration of the concerns and recommendations from all submitted public comments, as well as from any related government-to-government relationships and other applicable environmental laws, with particular emphasis on those actions that will protect, restore or enhance the quality of the human environment.²²

II. Inadequate and Improper Purpose and Need

The Purpose and Need Inappropriately Limits the Scope of Review

The Service’s stated *Purpose and Need* for the proposed rule “is to provide an official regulatory definition of the scope of the statute as it relates to incidental take...to improve consistency in enforcement of the MBTA’s prohibitions....”²³ Notably, it does not mention conservation, biological impacts or assessment of bird species protected by the MBTA. The *Purpose and Need* thereby sets the stage for an environmental review devoid of a true analysis of environmental costs and benefits.

¹⁷ DEIS at 14, 30.

¹⁸ DEIS at 42.

¹⁹ 16 U.S.C. § 1536. See also U.S. Fish and Wildlife Service, *Consultations with Federal Agencies (2011)*, available at <https://www.fws.gov/endangered/esa-library/pdf/consultations.pdf>, stating: “section 7(a)(2). . . requires Federal agencies to consult with the Service to ensure that actions they fund, authorize, permit, or otherwise carry out will not jeopardize the continued existence of any listed species or adversely modify designated critical habitats.”

²⁰ 16 U.S.C. §§ 668-668d.

²¹ U.S. Fish and Wildlife Service *Migratory Bird Permits; Regulations Governing Take of Migratory Birds; Environmental Impact Statement* (“DEIS”), 85 Fed. Reg. 34625 (June 5, 2020), at 15.

²² 40 CFR § 1500.2, *supra* note 14.

²³ DEIS at 3.

An EIS should evaluate a proposed action by comparing that action to baseline conditions without the action, i.e., the “no action” alternative. Here, the inadequacy of the DEIS is made apparent because the proposed action is essentially the same as the no action alternative. By narrowly tailoring the DEIS to a simple yes or no approval of regulations codifying Interior’s December 2017 reinterpretation and making the baseline for comparison continued implementation of M-Opinion 37050, the Service ignores comments calling for a detailed range of alternatives to implement the incidental take authority of the MBTA. Such consideration “goes beyond the purpose and need” of this rulemaking according to the DEIS.²⁴

While Alternative B—withdrawing the M-opinion—purports to present a return to previous precedent, and the DEIS unsurprisingly concedes that Alternative B is better for birds and the environment than the other alternatives, the DEIS only provides an incremental analysis given that the baseline is implementation of M-Opinion 37050. The Service erroneously fails to examine how devastating Interior’s sweeping reinterpretation of the MBTA is for birds and the environment in the first place, something that was also not done before issuance of M-Opinion 37050.

The Service further says that its proposed rule will provide legal certainty and improve consistency in enforcement, but the extent of legal uncertainty is never addressed and consistency of enforcement lies within the Service’s control.

The *Purpose and Need* must align with the overarching statutory mandate of the MBTA to conserve and protect migratory birds and should be “to conserve migratory birds under the MBTA through an incidental take authorization program.”

III. Lack of a Range of Alternatives

An Informed Decision is Precluded by the Alternatives Presented

NEPA requires the Service to “rigorously explore and objectively evaluate” a range of alternatives to proposed federal actions, including considering more environmentally protective alternatives and mitigation measures.²⁵ This requirement prevents the environmental impact statement from becoming “a foreordained formality.”²⁶ Yet, that is exactly what the Service’s environmental analysis and rushed process demonstrate—a “foreordained formality” that glosses over the majority of public input and longstanding practice, and fails to set forth action alternatives that would provide meaningful benefits to birds.

The lack of a full range of alternatives presented in this DEIS condemns it under NEPA. The preferred alternative and no action alternative are essentially identical and the only other alternative presented, Action Alternative B, is limited to rescission of M-Opinion 37050, with no additional regulatory action or

²⁴ DEIS at 20.

²⁵ See 40 C.F.R. §§ 1502.14(a) and 1508.25(c); see also, *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1122-1123 (9th Cir. 2002) (and cases cited therein).

²⁶ *City of New York v. Dep’t of Transp.*, 715 F.2d 732, 743 (2nd Cir. 1983). See also *Davis v. Mineta*, 302 F.3d 1104 (10th Cir. 2002). The range of alternatives is “the heart of the environmental impact statement.” 40 C.F.R. § 1502.14.

detail provided. At a minimum, the Service should consider an alternative whose goal is to promote both regulatory certainty *and* protect birds (i.e., further the MBTA’s statutory purpose and the Service’s statutory mission).

The Service presented an incidental take permitting program as an alternative in scoping webinars to the public, a consideration that is overwhelmingly supported by multiple state wildlife agencies, the Central Flyway Council, dozens of conservation groups, hunting advocates, and more. However, the Service eliminated this action from consideration “because developing a general-permit system would be a complex process” and “goes beyond the current purpose and need of simply providing regulatory certainty.”²⁷

Numerous comments were submitted by conservation and industry groups on the Service’s efforts to consider an authorization program for incidental take in 2015,²⁸ offering detailed recommendations on how to make the program workable.²⁹ More than a dozen industry associations and entities from a variety of sectors expressed support for the concept of an incidental take permit under certain conditions. This included representatives of the oil and gas industry, utilities, chemical industry, renewable energy, water districts, and more. Even before 2015, the Interstate Natural Gas Association of America issued a 2010 report concluding that “it is timely for both natural gas pipeline companies and the FWS to develop a permit program for incidental take of migratory birds.”³⁰ Ironically, such a permitting system would meet the Service’s stated *Purpose and Need*, but the Service rejects it out of hand. Apart from violating NEPA, not including such an alternative suggests that the aim of the rulemaking was simply to benefit certain entities as quickly as possible.

The Service has had years to consider a permit program and it is simply untenable to say, now, that even considering it would be unduly burdensome. More important, NEPA does not privilege an agency to disregard an existing, already extensively explored alternative on the ground that it is “complex” or “goes beyond the current purpose.” Indeed, the Service’s refusal to go “beyond the current purpose” is simply an admission that this DEIS’s “purpose” is to rubber-stamp M-Opinion 37050, not to do the principled analysis NEPA requires.

A full range of alternatives would include alternatives that provide meaningful benefits to birds, specifically including detailed consideration of an incidental take permitting program, and a no action alternative that represents MBTA implementation before the issuance of M-Opinion 37050.

IV. Affected Environment

As an overarching matter, the DEIS essentially concedes its analytical inadequacy. The *Affected Environment* section is intended to “provide an environmental baseline for the analysis of

²⁷ DEIS at 6.

²⁸ See attachments for Natural Resources Defense Council, *Comments on U.S. Fish and Wildlife Service, Regulations Governing Take of Migratory Birds, Notice of Intent to Prepare an Environmental Impact Statement*, Docket No. FWS–HQ–MB–2018–0090 (March 19, 2020), available at <https://www.regulations.gov/document?D=FWS-HQ-MB-2018-0090>.

²⁹ *Ibid.*

³⁰ Development of a Permit Program for Incidental Take of Migratory Birds. Prepared for INGAA, available at <https://www.ingaa.org/File.aspx?id=11062>.

alternatives.”³¹ Yet, in the section purporting to discuss the status of bird population trends, the DEIS states that “[t]here is no analysis or data describing the amount or percentage of this loss that is attributable to enforcement of incidental take under the MBTA.”³²

The DEIS further states that 22% of MBTA-protected species are in decline and three billion birds have been lost over the last 50 years, and that these losses have been driven by “anthropogenic sources.”³³ Astoundingly, the DEIS then concludes that “[t]he extent that this impact is related to any interpretation of the MBTA is unknown and has not been quantified.” The purpose and mandate of NEPA is to take a “hard look” at these impacts; this DEIS utterly fails to do so.

Incomplete Presentation and Analysis of the Impacts to Birds from Incidental Take

As referenced in comments submitted by Scott Loss,³⁴ an expert in the field, this section does not include important details on how different sources of incidental take impact various guilds, species, and populations of birds. Publishing the raw numbers of mortality estimates alone misses relevant information about unique and particularly harmful threats to birds that have already increased due to the M-Opinion and will continue to threaten birds over time. While section 3.4 references bird guilds and their declines, section 3.7 does not tie this information to how these guilds or any individual species may be impacted by sources of incidental take. It notes, for example, that grassland birds have faced the greatest declines among these guilds, but the DEIS does not analyze how grassland species may be further impacted by the proposed rule and the alternatives.

Numerous studies have analyzed the unique values and threats surrounding particular guilds and species. For example, certain types of oil waste pits have been found to threaten waterfowl species,³⁵ such as Blue-Winged Teal and Northern Shoveler, which are also Birds of Management Concern. The DEIS fails to account for the unique and important cultural, economic, and ecological values of these and other waterfowl species. Similarly, power lines have particular impacts on raptors due to electrocutions, and on large waterfowl and waterbirds due to collisions, including Red-Tailed Hawks, Great Horned Owls, Sandhill Cranes, and Tundra Swans. Failing to include information such as this severely limits the analysis of how the alternatives will impact birds and broader consideration of environmental impacts.

Additionally, FWS should take into account greater consideration of the baseline of migratory bird mortality.³⁶ The DEIS did not further consider natural sources of mortality, as well as factor in the noted

³¹ DEIS at 21. See “An agency’s hard look should include neither researching in a cursory manner nor sweeping negative evidence under the rug.” *Nat’l Audubon Soc’y*, 422 F.3d at 194.

³² DEIS at 22.

³³ DEIS at 42.

³⁴ Comments on Docket No. FWS-HQ-MB-2018-0090, EIS No. 20200117, Migratory Bird Permits; Regulations Governing Take of Migratory Birds, available at <https://www.regulations.gov/document?D=FWS-HQ-MB-2018-0090-11360>.

³⁵ Ramirez Jr, P. (2010) Bird Mortality in Oil Field Wastewater Disposal Facilities. *Environmental Management* 46:820-826.

³⁶ Scientific studies indicate that incidental take and anthropogenic mortality is likely contributing to population declines. See Lewison, R. L., and L. B. Crowder. 2003. Estimating fishery bycatch and effects on a vulnerable seabird population. *Ecological Applications* 13:743-753) and McGowan, C. P., and M. R. Ryan. 2009. A quantitative framework to evaluate incidental take and endangered species population viability. *Biological Conservation* 142:3128-3136.

mortality from hunting and other permitted and illegal take, which would help further inform the analysis and conclusions of how this rule and the alternatives will ultimately impact bird populations.

The DEIS fails to specify how bird species and populations are impacted by sources of incidental take, including particular guilds and species of concern, and how those birds have been impacted by protections from incidental take as compared to baseline mortality.

Lack of a Detailed Discussion on MBTA Enforcement

DEIS section 3.7 should provide additional details regarding previous and recent enforcement, or lack of enforcement, of incidental take beyond the brief summary in Section 2.3.2. This would further inform how birds have previously benefitted from protections under the MBTA, and how birds will be impacted by the alternatives going forward.

A more comprehensive review of the history of MBTA enforcement, beyond the arbitrary 9-year timeframe of data from 2010 to 2018, is necessary to provide the full picture of how frequently incidental take provisions had been enforced and the level of fines over time. Such information is necessary to analyze the impacts of removing the prohibition on incidental take and to understand the costs of eliminating these protections.

Relatedly, the DEIS does not include sufficient examples of the benefits to birds from protections from incidental take. The Office of Law Enforcement annual reports provide numerous instances over the years of cases that demonstrate the benefits of the policy to birds, including thousands of miles of power lines that have been updated with markers and diverters, thousands of power poles that have been retrofitted to eliminate electrocutions, thousands of oil pits that have been augmented, and more. This type of information directly informs a detailed analysis of impacts. For example, an estimate of the number of oil pits that had been netted, with an estimate of reduced mortality per oil pit, should have been included in the *Environmental Consequences* analysis.

The Service also should have included specific information on the lack of enforcement since the publication of M-Opinion 37050 and the resulting environmental impacts. Through Freedom of Information Act requests, there is a significant body of evidence of how birds have been impacted by the reversal of the incidental take policy, yet that information is missing in the DEIS.³⁷ The DEIS should describe and quantify how issuance of M-Opinion 37050 has altered industrial activities, fines, and implementation of best management practices, including any efforts to collaborate with industry on these practices to minimize harm to birds, and the resulting or expected changes in incidental take estimates by industry.

³⁷ See Lisa Friedman, *A Trump Policy 'Clarification' All but Ends Punishment for Bird Deaths*, New York Times (December 24, 2019) available at <https://www.nytimes.com/2019/12/24/climate/trump-bird-deaths.html?action=click&module=RelatedLinks&pgtype=Articlelink>; Elizabeth Shogren, *Killing migratory birds, even unintentionally, has been a crime for decades. Not anymore*, Reveal (April 8, 2019) available at <https://www.revealnews.org/article/killing-migratory-birds-even-unintentionally-has-been-a-crime-for-decades-not-anymore/>.

Detailed information on historical and recent MBTA enforcement, including environmental costs and benefits before and after issuance of M-Opinion 37050, is necessary to understand the baseline implications for the proposed action.

Failure to Incorporate Analysis of Affected Resources

The DEIS dismisses any analysis of environmental resources such as air quality, water resources, geology and soils, floodplains, visual resources, and land ownership and use, finding that it “would not be meaningful.”³⁸ However, many of these resources would be impacted by the continued and codified incidental take policy at issue here, and those resources are required to be considered under NEPA. For example, water resources can be beneficially impacted in conjunction with best management practices for birds, as well as restoration activities that can result from MBTA fines and adjudications. The MBTA has been a key component for management of oil waste pits and other toxic wastewater pits, which can affect whether toxic materials are contained or could be leaked into other water resources. These decisions can also impact soils, floodplains and air quality. While other federal and state laws also apply, we’ve seen that the MBTA was a critical component for cleaning up oil waste pits and other toxic pits,³⁹ and the lack of incidental take authority could have a meaningful impact on related resources.

Analysis of additional environmental resources that are likely to be impacted, including water resources, should be included the DEIS.

V. Environmental Consequences

This rulemaking suffers from the fundamental flaw of failing to analyze the significant environmental impacts from issuance of M-Opinion 37050, a major policy change. We urge the Service to complete a full analysis of the environmental impacts of the Solicitor’s Opinion itself, not just the incremental impacts of codification.

Failure to Consider Direct, Indirect, And Cumulative Impacts of the Alternatives on Migratory Birds

Even under its legally flawed, limited scope, the DEIS fails to adequately analyze direct, indirect, and cumulative impacts, on migratory birds and other environmental resources, and broadly lacks a scientific and biologically-driven analysis to support its decision making and public engagement.⁴⁰ Section 4.2.2.1, the analysis of the preferred alternative’s impacts on migratory birds, should be the most critical and analytically rigorous sections of the DEIS, yet its sum total of 264 words has an extraordinary lack of detail and analysis.

³⁸ DEIS at 21.

³⁹ Trail, P. (2006) Avian Mortality at Oil Pits in the United States: A Review of the Problem and Efforts for Its Solution. *Environmental Management* 38:532-544.

⁴⁰ NEPA mandates federal agencies to “study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.” 42 U.S.C. § 4332(E). Thus, agencies must take a “hard look” at the environmental consequences of a proposed action, considering “detailed information concerning significant environmental impacts” in preparing an EIS. *Robertson supra* note 4 at 349. *See also Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 374 (1989); *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983) (explaining that an agency must “consider every significant aspect of the environmental impact of a proposed action”).

The Service does acknowledge that the rulemaking is expected to negatively impact the vast majority of the nation's birds: under the preferred alternative, it is "likely that fewer entities will implement best practices aimed at reducing incidental take..." and "the level of bird mortality reported in Section 3.7 would likely be higher." Yet, the Service makes no attempt to explain how it reached this conclusion, offering no methodology and no detail in the significant variety of ways that birds could be adversely impacted.

As an example, the DEIS offers no method to quantify the adverse impacts to birds, whether as a result of a modeling exercise or even a simple estimate. As noted in the *Affected Environment* chapter, there are data sources and methodologies for estimating this information. For instance, studies have indicated that communications towers can reduce bird mortality by 70% through operational adjustments.⁴¹ By determining the total number of communications towers and estimates of compliance, the Service could develop a range of estimated impacts. While uncertainty is inherent in these analyses, it should not preclude the Service from undertaking them. The Service should analyze each of the sources of the incidental take, at least where it has applied the law in the past, such as oil waste pits and tanks, power lines, and more, and fully incorporate available data and estimates.

This analysis should further take a more refined and deeper look at the differing impacts that may result from its preferred alternative, as well as the no action alternative and Alternative B. It is not enough to merely describe the impacts as broadly negative, without studying and explaining the variety of ways that birds will be impacted. The proposed rule will impact guilds, flyways, populations, species, and regions in different ways. The *Affected Environment* chapter includes reference to these various groupings, but lacks analysis of how the alternatives will affect them.

A scientific and biologically-driven analysis is needed to fully consider and explain the direct, indirect, and cumulative impacts of the alternatives on migratory birds, and it should specify and quantify impacts to birds that will result from the proposed rule and preferred alternative.

Lack of Analysis of Impacts to Vulnerable Species, and Subsistence and Cultural Resources

The Service should also complete an in-depth analysis of how the proposed rule will adversely impact vulnerable species, particularly those that are not yet listed under the ESA. The MBTA has been a critical conservation tool not only for helping to keep common birds common, but also for limiting further harm to vulnerable species. The law has fostered practices that serve as proactive conservation measures and has guarded against easily avoidable harms. These cost-effective and successful measures help reduce the need for species to be listed under the ESA and have been factored into delisting decisions, as the DEIS itself acknowledges.

Accordingly, the Service should analyze and explain the impacts on Birds of Conservation Concern (BCC), as well as candidates for ESA listing, and state-designated Species of Greatest Conservation Need identified by State Wildlife Action Plans. While the Service states that, as a result of its preferred alternative, some species "may decline to the point of requiring listing under the ESA", it does not identify which species may be impacted. The Service should publicly release an updated BCC list before

⁴¹ Gehring J., P. Kerlinger, A.M. Manville II. Communication towers, lights, and birds: successful methods of reducing the frequency of avian collisions. *Ecological Applications*, 2009; 19 (2): 505 DOI: 10.1890/07-1708.1.

issuing a final rule and include it in the final EIS in order to inform the public and address the risks to these species, most of which face threats from incidental take sources. The Service should also take a closer look at impacts to subsistence and cultural resources, including particular species that may be harmed that are important for tribal and Alaska Native communities.

Additional detail is needed on impacts to vulnerable species, including Birds of Conservation Concern, and species that are valued as subsistence and cultural resources.

Best Available Science and Detailed Local, Regional, and Nationwide Information is Absent

An analysis of the rule's impact on birds must rely on the best available science,⁴² including in population dynamics. This should include an exhaustive analysis of how the removal of incidental take enforcement impacts local and regional populations, along with Bird Conservation Regions and flyways. Some impacts may be diffuse and vary by geography, but there are likely to be areas of particular threat that could affect populations at regional scales, and entire subspecies, potentially leading to local and regional extirpations and increasing some species' vulnerability to an endangered status.

FWS also should take into account threats to particularly sensitive habitat and landscapes, such as Important Bird Areas. Cross referencing these sites and other particularly valuable nesting, migratory, and wintering sites against areas with industrial hazards where the threats may increase due to M-Opinion 37050 and the proposed rule will be important to understand how localized effects may have outsized impacts on species.

The more than 1,000 species protected by the MBTA are highly diverse in their life histories and demographics, and these are critical factors in determining how certain species respond to the additional mortality that is anticipated under M-Opinion 37050 and the proposed rule. Species that are slower to reproduce and longer-lived, for example, will be slower to recover from higher mortality. This is particularly important for species that are already in peril. Population demographics are also an important factor in this response, as populations with different age and sex ratios, for example, will have different responses to additional mortality. These factors should be included in the analysis, at multiple scales, and the Service should address the level of certainty and sufficiency of the data.

The Service must analyze how the proposed rule will impact the large-scale conservation planning efforts that Service and partners undertake, including the North American Waterfowl Management Plan (NAWMP), the United States Shorebird Conservation Plan, North American Colonial Waterbird Plan, and others. Regarding NAWMP, the Service and partners have made tremendous strides over the decades in waterfowl conservation. This was reflected in the recent *Science* article on long-term bird population trends, which found that waterfowl populations have increased 56% since 1970.⁴³ The Service needs to

⁴² The Service cannot evaluate consequences to the environment without adequate data and analysis. NEPA's hard look at environmental consequences must be based on "accurate scientific information" of "high quality." 40 C.F.R. § 1500.1(b). "Agency regulations require that public information be of 'high quality' because 'accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA.'" 40 C.F.R. § 1500.1(b)." *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1151 (9th Cir. 1998). Essentially, NEPA "ensures that the agency, in reaching its decision, will have available and will carefully consider detailed information concerning significant environmental impacts." *Robertson supra* note 4 at 349.

⁴³ Rosenberg, *supra* note 5.

carefully consider how this rule would set back the progress made in these efforts, including planning and on-the-ground conservation. As noted above, waterfowl are particularly threatened by incidental take caused by oil waste pits. Compared to waterfowl, nongame species have had fewer dedicated resources and monitoring, and are likely to be at even greater risk in the future, and these data and distinctions should be delineated.

The DEIS fails to incorporate the best available science, including analysis broken down by local and regional populations, Bird Conservation Regions, flyways, and Important Bird Areas.

No Consideration of International Impacts and the Bilateral Migratory Bird Treaties

The extent of the Transboundary Impacts section can be summarized by the Service's conclusion that, "if migratory birds are negatively affected during the time they spend in the U.S. before migrating to another country, this could also negatively affect bird populations in those countries as well as the ecosystem services and socioeconomics derived from migratory birds."⁴⁴ There is no further discussion on international impacts, nor how such impacts may undermine our treaty obligations.⁴⁵ The Service fails to acknowledge that this rulemaking is likely to have significant consequences to migratory bird conservation for treaty partners (Canada, Mexico, Japan, and Russia) and may significantly undermine cooperative international bird conservation efforts and treaty terms, subsequently resulting in even greater harm to migratory birds.⁴⁶

Detailed analysis of international impacts that will result from the rule, including impacts to bilateral migratory bird treaties, is needed.

Failure to Address Cumulative Impacts, Including Industrial Growth and Interactive Threats such as Climate Change

A comprehensive analysis of the impacts of the proposed rule must include a more complete study of cumulative impacts from industrial operations and activities and subsequent effects on bird populations that compound over time.⁴⁷ For example, multiple stressors congregated in specific geographies or

⁴⁴ DEIS at 57.

⁴⁵ NEPA directs the Service to, "recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment." 42 U.S.C. § 4332(F).

⁴⁶ See DEIS comment by the Government of Canada (ID: FWS-HQ-MB-2018-0090-13282), submitted July 20, 2020, which states that "the Government of Canada believes the preferred option of the USFWS (Option A) is inconsistent with previous understandings between the Canada and the United States (U.S.), and is inconsistent with the long standing protections that have been afforded to non-targeted birds under the Convention for the Protection of Migratory Birds in the United States and Canada (the "Treaty" or the "Convention") as agreed upon by Canada and the U.S. through Article I.", and, "Unmitigated activities that will substantially increase migratory bird mortality and threaten populations is, from a Canadian perspective, in contravention of the Convention."

⁴⁷ NEPA regulations define "cumulative impact" as: the impact on the environment which results from the *incremental impact of the action when added to other past, present, and reasonably foreseeable future actions* regardless of what agency (Federal or non-Federal) or person undertakes such other actions. *Cumulative impacts*

landscapes may create cascading effects on individual populations. The Service should forecast industrial growth in order to analyze potential cumulative impacts over time. Industrial activity is not static, and certain industrial sectors are expected to grow and concentrate in particular regions, which links to impacts on regional and local populations. The DEIS confusingly relies on a cursory overview of human population growth that does not include any estimated impacts, modeling, or quantification specific to bird conservation.

The Service should also consider how climate change will factor in to the proposed rule's impacts on migratory birds. Audubon's report, *Survival by Degrees: 389 Species on the Brink*, finds that two-thirds of North American birds are threatened by climate change.⁴⁸ The Service should analyze how additional bird mortality from incidental take may interact with threats from climate change.

Section 4.4.3, Beneficial Effects, in the cumulative impacts section, is incomplete. The language here does not support any conclusions about the beneficial effects of this rulemaking. It notes that other environmental laws have benefitted birds, that industries have taken steps to minimize harm to birds, without stating that the MBTA has been the key incentive, and that these measures will continue to benefit birds "to the extent they continue to be implemented." Yet, as the DEIS concludes, the preferred alternative will reduce their implementation, and there is no connection made between the preferred alternative or other alternatives and any beneficial effects.

The DEIS fails to set forth a comprehensive analysis of the cumulative impacts of the proposed rule and alternatives, including industrial growth and incorporating climate change.

No Analysis of Adverse Economic and Ecosystem Services Impacts

The Service has done little to describe how these alternatives will affect the values that birds provide, including ecosystem services and economic benefits. The analysis in the three alternatives includes conclusory statements, such as a "loss of ecosystem services," without any methodology or rigorous analysis. Again, these impacts will arise in a wide variety of ways that will harm particular regions, communities or businesses, for example, but these sections do not fully capture or attempt to quantify the scale or specific impacts.

While Table S1 at the beginning of the document includes findings that the preferred alternative "may decrease revenue for businesses directly dependent on birds (hunting, bird watching, guides, and ecotourism)" and lead to "likely increased costs for businesses dependent on ecosystem services provided by birds (seed dispersal and pollination, etc.),"⁴⁹ there is no further discussion of these findings. The Service should explain these impacts and weigh such findings against any other economic considerations, such as costs to industrial entities from implementing best management practices.

Additionally, the Service should clarify its analysis of the "enforcement burden" on the Service regarding implementation of the law, including any justification provided for this consideration and whether it is a legitimate factor in its decision. The Service has an obligation to enforce the law and carry out its

can result from individually minor but collectively significant actions taking place over a period of time. 40 C.F.R. § 1508.7 (emphasis added).

⁴⁸ Wiley, *supra* note 6.

⁴⁹ DEIS at 8, 9.

missions, and the level of effort required by the agency to meet these responsibilities should not influence its decision making. Thus, its statement that its preferred alternative reduces this “burden,” and Alternative B would increase it, should be clarified or removed from consideration.

The DEIS fails to fully analyze and explain the impacts to economic benefits and ecosystem services provided by birds that would be harmed by its preferred alternative.

Mitigation Measures that will Minimize Harm to Migratory Birds are not Considered

In section 4.2.2, the Service relies on furthering voluntary best management practices as a way to mitigate the adverse effects of its preferred alternative, stating that “The Service could expand and promote our continued work with appropriate stakeholders and industry to develop and promote best practices for the mitigation of impacts to migratory birds.” Yet the preceding sentence states that “we expect the implementation of best practices to be further reduced over time.” Accordingly, relying on voluntary practices which the Service expects to decrease is insufficient mitigation, to say the least. The Service should provide additional mitigation measures that are likely to positively impact birds.⁵⁰

Additional and justifiable mitigation measures that would minimize the harm to migratory birds as a result of the proposed rule are needed.

VI. Conclusion

We appreciate the opportunity to comment on this docket and urge the Service to reverse course and reject finalizing a rule that codifies M-Opinion 37050. Instead, the Service should recognize the critical importance of setting forth a regulatory standard for permitting incidental take under the MBTA. Such a rulemaking would be consistent with the MBTA’s statutory mandate to protect and conserve migratory birds and would help address the significant long-term declines and growing threats facing bird populations in the years and decades to come.

Our groups are committed to working with the Service, industries, and other stakeholders to identify and incorporate a collaborative, legally sound and scientifically credible framework for addressing authorizations for incidental take under the MBTA and to above all, provide meaningful benefits to birds. Please do not hesitate to reach out to any one of us for additional information.

Thank you for your consideration of these comments.

⁵⁰ By statute and regulation, an EIS must include a discussion of possible mitigation measures to avoid adverse environmental impacts. See 40 C.F.R. §§ 1502.14(f), 1502.16(h); see also *Robertson supra* note 4 at 351-52; *Neighbors of Cuddy Mountain v. United States Forest Service*, 137 F.3d 1372, 1380 (9th Cir. 1998). Simply identifying mitigation measures, without analyzing the effectiveness of the measures, violates NEPA. Agencies must “analyze the mitigation measures in detail [and] explain how effective the measures would be . . . A mere listing of mitigation measures is insufficient to qualify as the reasoned discussion required by NEPA.” *Nw. Indian Cemetery Protective Ass’n v. Peterson*, 764 F.2d 581, 588 (9th Cir. 1985), *rev’d on other grounds*, 485 U.S. 439 (1988). NEPA also directs that the “possibility of mitigation” should not be relied upon as a means to avoid further environmental analysis. Council on Environmental Quality, *Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations*, available at <http://ceq.hss.doe.gov/nepa/regs/40/40p3.htm>; *Davis v. Mineta*, 302 F.3d at 1125.

Sincerely,

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