TheCornellLab of Ornithology

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Aurelia Skipwith
Director
U.S. Fish and Wildlife Service
Public Comments Processing, Attn: FWS-HQ-MB-2018-0090
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Dear Director Skipwith:

I appreciate the opportunity to comment on the Draft Environmental Impact Statement for the Department of the Interior's proposed regulatory change to the Migratory Bird Treaty Act.

I am an applied ecologist and professor in the Department of Natural Resources at Cornell University, where I also serve as the senior director of conservation science and codirector of the Center for Avian Population Studies at the Cornell Lab of Ornithology. Outside of academia, I am a fellow of the American Association for the Advancement of Science and the American Ornithological Society and have previously served on the Science Advisory Board of the U.S. Environmental Protection Agency, the Scientific Review Committee of the National Socio-environmental Synthesis Center, and as an ad-hoc science advisor to government agencies and nonprofit organizations. My research focuses on understanding how species and ecosystems respond to changing land use, land cover, and climate. As part of my work, I collaborate with scientists, practitioners, and decision-makers to develop innovative approaches to conservation that accommodate human activities and, hence, meet both social and ecological needs in natural and human-dominated landscapes.

Last Fall an international team of scientists quantified, for the first time ever, the total change in bird populations in the continental U.S. and Canada in recent decades, and the results were worse than the scientists had even imagined—showing that North America had lost nearly 3 billion birds, over 1 in 4, since 1970. The ground-breaking research was published in the Oct. 4 issue of the journal *Science*[1]. Declines span ecosystems, with losses of more than 1 billion forest birds, as well as half of all grassland birds. As the Cornell Lab's Executive Director Dr. John W. Fitzpatrick has said, "These losses of birds by the billions are on par with those of the legendary Passenger Pigeon extinction."

1 https://science.sciencemag.org/content/366/6461/120.full?ijkey=dcWYzH9MGv13I&keytype=ref&siteid=sci

The U.S. Fish and Wildlife Service (USFWS), by its very mission statement, has the responsibility to safeguard bird populations in the United States and work toward their protection: "The mission of the U.S. Fish and Wildlife Service is working with others to conserve, protect, and enhance fish, wildlife, plants, and their habitats for the continuing benefit of the American people." At the very least, the agency and the Department of the Interior should be committed to actions that do not contribute to declines in our nation's bird populations. One of the key legislative tools for the USFWS in its mission is the 102-year-old Migratory Bird Treaty Act (MBTA). In its Draft EIS, the agency wrote that the MBTA has the goal "to stop the unregulated killing of migratory birds."

Yet rather than strengthen efforts for the USFWS to use the MBTA to protect birds, the proposed action seeks to erode bird protections by formally codifying the exclusion of incidental, or unintentional, harm to birds from the Migratory Bird Treaty Act. This exclusion both renders the Act impotent on most sources of mortality for migratory birds and eliminates a powerful incentive for industrial and commercial enterprises to proactively reduce or mitigate harm to birds.

As I will articulate in this public comment, the preferred alternative in the Draft EIS does not accomplish its stated goal (to create legal certainty in enforcement of incidental-take actions that harm migratory birds) and also grossly conflicts with the mission of Interior, the USFWS, and the Act to conserve and protect America's birds.

1. **The agency's preferred Alternative (A) does not satisfy the overarching goal of the Interior Principal Deputy Solicitor's opinion (M-Opinion 37050) to resolve regulatory and legal uncertainty for business and industry because, as the Draft EIS describes, operators would still need to comply with state laws that vary widely.**

   In its DRAFT EIS, the USFWS makes its case that historic judicial interpretations of MBTA enforcement actions have "*created a patchwork system of enforcement across the country and creating legal uncertainty for the American people."*

   The USFWS states regulatory consistency is its main goal for its preferred alternative: "*The Service believes this action is necessary to improve consistency in enforcement of the MBTA's prohibitions across the country and inform the public, businesses, government agencies, and other entities what is and is not prohibited under the MBTA."*

   However, in the DRAFT EIS, the USFWS evaluation explicitly recognizes that many states have or are initiating their own legal frameworks for migratory bird protection, and that there will still be uncertainty—especially for entities that operate across state boundaries. The uncertainty, in effect, is just being pushed from the federal government to the states, which will only exacerbate the patchwork enforcement and regulatory uncertainty.

Already, California has enacted a new state law to counter M-Opinion 37050 and any federal action to remove incidental take from MBTA protections. The California Migratory Bird Protection Act reinstates a prohibition on incidental take of migratory birds, notwithstanding the recent reinterpretation of the Migratory Bird Treaty Act by Interior.

California is also one of eight states (joined by New York, Illinois, Maryland, Massachusetts, New Jersey, New Mexico, and Oregon) that are suing Interior and the USFWS in order to vacate the M-Opinion 37050. It is possible, and probable, that many of these states will follow the California legislature's action to create state regulations that mimic the federal government's past interpretation of the MBTA protecting birds against incidental take.

<u>In this context, enacting preferred Alternative A effectively replaces federal regulation with a patchwork of legal liability among different states for business and industry actions that harm migratory birds through incidental take.</u>

Even the Draft EIS itself states on page 53 that the resulting patchwork of state migratory bird protections will nullify the supposed benefits of removing incidental take from federal MBTA enforcement, creating a costlier and more complicated regulatory environment for industry while shifting the burden of migratory protection to the states:

"However, if individual states enact separate incidental take protections for birds in response to Alternative A (see Economic effects on government entities below), as many are now considering, industries doing business across state lines may be faced with an increasingly complex, costly, and inconsistent regulatory environment."

The Draft EIS also acknowledges that exclusion of incidental take from MBTA would result in higher enforcement costs for state agencies:

"Under Alternative A, with the legal certainty provided by a regulation, some states may need to enact changes in their regulatory processes and staffing to meet state laws governing birds (see 4.2.1). This would likely increase costs for states as they work to develop and implement regulatory and policy changes to meet their state mandates to protect birds."

Given the current economic crisis, this is an unreasonable burden to place on states that are stressed in their current capacity to fund these needs.

2. **The Draft EIS explicitly acknowledges one of the key criticisms of either No Action or Alternative A—voluntary implementation of industry best practices and standards that reduce harm to birds will decline over time because industries would no longer be incentivized by or fear prosecution. When operators fail to implement these best practices, both risk and harm to birds increase substantially.**

It is surprising that the agency would advance an alternative that will dampen adoption of standards and practices known to be effective at reducing harm to birds and palatable to industry.

For example, on page 59 of the Draft EIS, the authors admit that industry best practices to reduce threats to migratory birds have been successful:

"*Business and industry have taken steps to reduce bird loss. Organizations in which industry has participated, such as the Wind Turbine Guidelines Advisory Committee and the Avian Power Line Interaction Committee, worked closely with the Service to develop guidelines that include mitigation measures for migratory bird protection. Some architects and building developers have instituted anti-glare measures, and some industrial sites are using covers for ponds that contain material deleterious to migratory birds. Oil and gas operations are increasingly using closed-containment systems instead of open pits for waste materials during drilling operations, eliminating this threat to birds. <u>These past measures will continue to benefit migratory birds into the future to the extent they continue to be implemented."</u>*

However, the Summary of Effects of the Alternatives states that Action A will "likely decrease" the implementation of best practices and industry standards, as "some entities would likely reduce implementation with legal certainty of no enforcement." The summary also references that some entities may implement practices and standards if compelled by state and local regulations (again, the outcome contrary to the action's goals with a regulatory environment made more uncertain by a patchwork of state and local regulations).

Moreover, the authors conclude that under the preferred alternative there will be higher mortality for birds impacted by activities previously mitigated under MBTA (page 49):

> *"the level of bird mortality reported in Section 3.7 would likely be higher, particularly for those industries previously subject to enforcement actions under the MBTA."*
>
> *"it is likely that fewer entities would seek or implement guidance from the Service about ways to avoid or minimize adverse effects on migratory birds. If the implementation of these measures is reduced, other taxa might also experience increased negative impacts. In summary, Alternative A would likely cause negative impacts to vegetation and wildlife."*

3. **There is no evidence that other pre-existing federal laws referenced in the Draft EIS protect birds in ways that eliminate the need to regulate incidental take under the MBTA. Other federal laws, many of which the current Administration is attempting to weaken at the same time, play very different roles and would come with higher costs than the MBTA.**

The Draft EIS references other federal laws that might apply to cases of MBTA incidental-take enforcement, but the current Administration has a record of consistently attempting to weaken these laws and/or increase the number of exemptions. For example, in August 2019 the current Administration weakened the protections of birds listed as "threatened" under the Endangered Species Act (ESA). The Administration is currently finalizing rules that will weaken environmental reviews under the National Environmental Policy Act.

Relative to ESA specifically, it applies only to species or distinct populations that are in danger of extinction throughout all or a significant part of their ranges, or likely to become endangered within the foreseeable future. For this reason, ESA only lists about 100 bird species in the U.S. compared to the more than 1,100 species protected by MBTA.

There are important tradeoffs with delaying action until a species is teetering on the brink of endangerment or extinction. When we proactively conserve birds, the efforts are usually less costly, more efficient in terms of time and oversight, less constraining to human activities, and nearly always more effective than waiting to act until a declining species is in crisis. This reality is especially relevant when we consider that many of the bird species in steep decline still do not qualify for listing under ESA. Yet if we take steps now, we can likely avoid having to list them, as well as avoid enacting conservation measures that are more restrictive and burdensome to industry and other commercial interests.

In the Draft EIS, the authors specifically recognize that continued bird population declines that result in more bird species qualifying for ESA listing would result in higher costs and more regulation for business and industry:

"*As birds of conservation concern and other vulnerable bird species face likely negative effects from the No Action Alternative (see 4.2.1.1), some may decline to the point of requiring listing under the ESA. In addition, the lack of legal protection against incidental take for migratory birds under the No Action Alternative may factor into delisting decisions for birds listed under the ESA, which may prolong such decisions. Entities affecting newly listed species or species delayed for delisting as a result of this alternative, may face increased costs of compliance*."

Keeping common birds common also safeguards the ecosystem services that birds provide and their contributions to our economy by way of hunting and recreation. On page 42, the Draft EIS states that birds are worth billions in ecosystem services and socioeconomic value.

The last thing anyone wants—the conservation community; ranchers, farmers, and other landowners; industry groups—is to be forced to add many more species to the Endangered Species list. An ounce of prevention through the MBTA is far better for everyone, including the birds, than the pound of cure through the ESA.

4. **The agency failed to advance alternatives that merit strong consideration—namely alternatives that would have either implemented a permitting process or restricted incidental take to cases of gross negligence. The Draft EIS misses an opportunity to consider an alternative that, instead of weakening past implementations of best practices, would promote and incentivize use of best practices known to reduce risk to birds.**

One of the legally mandated steps that USFWS must take to codify the exclusion of incidental take in the preparation of Draft EIS is to thoroughly analyze the potential ecological and social consequences of federal actions as well as alternative actions. However the Draft EIS did not move forward two alternatives that either would establish a permit framework to regulate incidental take or develop an enforcement system to address gross negligence.

Such permitting could be focused on industries that pose the greatest threats to birds. According to the Draft EIS, two industries accounted for 81% of incidental-take investigations between 2010 and 2018, with electrical distribution/transmission and oil/gas cases accounting for 54% and 27% of investigations, respectively.

The Draft EIS itself references examples of how best practices in both of these industries are known to be highly effective: "*Communication towers, for example, have been shown to reduce mortality by about 70 percent by changing to flashing lights and removing guy wires (Gehring et al. 2011). For oil pits, bird mortality can be virtually eliminated if netting is installed and maintained (Trail 2006)*."

There is clearly a need for these best practices to be continued. For instance, more than 80 of the 172 bird species reported to be killed in oil pits are in steep population decline[2], and more than 50 of the 350 species of Neotropical migratory songbirds (a group that has lost more than 600 million birds since 1970[3]) are vulnerable to collisions with tall structures, such as electrical towers.[4]

2 Trail, P.W. 2006. Environmental Management 38:532-544.

3 https://science.sciencemag.org/content/366/6461/120.full?ijkey=dcWYzH9MGv13I&keytype=ref&siteid=sci

4 Communications Towers: A Deadly Hazard to Birds; American Bird Conservancy; June, 2000; Shire, Brown, Winegrad.

Below are examples of declining bird species that could be impacted by the proposed MBTA regulatory revision and are thought to be especially vulnerable to industry-related mortality. Included are the scale of losses for each species since 1970 along with a note about their higher susceptibility to incidental take (e.g., oil spills, uncovered oil pits, and collisions with tall structures) due to the proposed rule.[5]

- Northern Bobwhite quail—4 in 5 lost since 1970; susceptible to higher risks from oil pits
- Eastern Meadowlark—3 in 4 lost; susceptible to higher risks from oil pits, collisions
- Lark Bunting—3 in 4 lost; susceptible to higher risks from oil pits
- Golden-winged Warbler—3 in 5 lost; susceptible to higher risks from collisions
- Canada Warbler—3 in 5 lost; susceptible to higher risks from collisions
- Purple Finch—3 in 5 lost; susceptible to higher risks from collisions
- Wood Thrush—3 in 5 lost; susceptible to higher risks from collisions
- Horned Lark—3 in 5 lost; susceptible to higher risks from collisions
- Least Tern—more than half lost; susceptible to higher risks from oil spills
- Western Meadowlark—2 in 5 lost; susceptible to higher risks from oil pits, collisions
- Barn Swallow—2 in 5 lost; susceptible to higher risks from oil pits
- American Kestrel—2 in 5 lost; susceptible to higher risks from collisions
- Black Skimmer—more than 1 in 4 lost; susceptible to higher risks from oil spills
- Kentucky Warbler—1 in 4 lost; susceptible to higher risks from collisions
- Common Yellowthroat—1 in 4 lost; susceptible to higher risks from collisions
- Black-and-white Warbler—1 in 4 lost; susceptible to higher risks from collisions
- Swainson's Thrush—1 in 4 lost; susceptible to higher risks from collisions

The scale of direct mortality of birds due to industry activities is large. Of the nearly 4 billion birds the USFWS estimates to be killed each year, industry alone kills 453 million to 1.1 billion birds each year (median = 709 million birds). These numbers include industry-related mortality from electrocution or collisions with powerlines (>28 million birds), wind turbines (>573,000 birds), and oil pits (750,000 birds).[6]

5 Species susceptible to various form of incidental take chosen from:

- Oil pits: Avian mortality at oil pits in the United States: A review of the problem and efforts for its solution; Trail. Environmental Management 38:532-544. 2006.
- Oil spills: Bird mortality from the Deepwater Horizon oil spill. II. Carcass sampling and exposure probability in the coastal Gulf of Mexico; Haney, Geiger, Short; Marine Ecology Progress Series 513:239–252(2014).
- Collisions: Bird-Building Collisions in the U.S. Loss et al. 2014. Condor.
  Communications Towers: A Deadly Hazard to Birds; American Bird Conservancy; June, 2000; Shire, Brown, Winegrad.
  Estimates of bird collision mortality at wind facilities in the contiguous United States; Loss, Will, Marra. Biological Conservation. Vol. 168, Dec. 2013, pgs 201-209. Appendix D.

Species population loss proportions from: Decline of the North American Avifauna. Rosenberg, Dokter, et al. Science. 04 Oct. 2019.

6 U.S. Fish and Wildlife Service; https://www.fws.gov/birds/bird-enthusiasts/threats-to-birds.php

> Though true that incidental take is neither the sole, nor necessarily even the primary, cause of declines, the prevailing thought among scientists is that mortality from industry activities are often additive in nature, and therefore expected to increase the vulnerability of bird populations**.**

In summary, the Department of Interior and the USFWS are legally mandated to conserve and protect migratory bird populations as best they can, and the preferred action falls short on these organizational missions while also failing to conclusively deliver the more consistent regulatory environment that is the stated aim in the Draft EIS.

In the Draft EIS, the authors argue that bird declines have occurred since 1970 even with the regulation of incidental take. The suggestion is that the MBTA didn't historically make a difference in stopping bird population declines, so the preferred action won't make a difference either. But the more relevant question is: How many *more* birds would have been lost in the absence of MBTA?

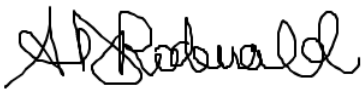
On page 59, the authors of the Draft EIS admit that there will indeed be negative impacts to migratory birds that are already in decline, but that these further losses could be avoided:

"*Regardless of what alternative is selected, existing trends of habitat loss and the proliferation of anthropogenic hazards on the landscape are expected to continue and will adversely affect most migratory birds and the ecosystems that support them, in some cases contributing to population declines. The No Action Alternative and Alternative A (promulgate regulations) have the potential to increase the rate and severity at which anthropogenic effects negatively affect migratory birds. Alternative B (rescind M-Opinion 37050) encourages or requires the use of best practices and thus could decrease the rate and severity at which anthropogenic effects negatively impact migratory birds."*

The steep declines in avifauna point to the need to strengthen, rather than weaken, protections for migratory birds. Yet this proposed exclusion of incidental take from the Migratory Bird Treaty Act represents a significant weakening of bird protections. The main argument in the Draft EIS for the preferred action is to reduce regulatory uncertainty and unnecessary burden on industry, but the authors admit that regulatory uncertainty will continue (or even be exacerbated), and that costs and liability could increase. At the same time, the preferred action runs directly counter to the MBTA's main purpose and the USFWS mission.

There are alternative actions as yet not fully explored (such as targeted permitting) that could balance the goals of enhancing regulatory certainty while protecting migratory birds. In the absence of that, Interior and the USFWS should choose the option that accomplishes both (providing regulatory certainty on incidental take of birds by industry and protecting bird population) by rescinding the M-Opinion 37050 and resuming enforcement of incidental take under the MBTA.

Sincerely,



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