

March 19, 2020

Public Comments Processing
Attention: FWS–HQ–MB– 2018–0090
Division of Policy and Directives Management
U.S. Fish and Wildlife Service
MS: JAO/1N
5275 Leesburg Pike, MS–PPM
Falls Church, VA 22041– 3803

Submitted via regulations.gov

RE: Incidental Take of Migratory Birds
Docket No. FWS-HQ-MB-2018-0090

To the U.S. Fish and Wildlife Service,

The undersigned organizations strongly oppose the proposed rule to exempt the enforcement of incidental take under the Migratory Bird Treaty Act regulations. Additionally, we are deeply concerned that a fast-tracked rulemaking process will not only shut out meaningful public engagement but will also lead to a process that fails to fully consider significant environmental impacts. We urge you to not move forward with a final rule that codifies the erroneous Solicitor’s Opinion (M-37050).

The Migratory Bird Treaty Act (MBTA) is a foundational environmental law for the United States. Signed into law more than 100 years ago, the MBTA sparked significant progress in conserving migratory bird populations and laid the groundwork for a broader commitment to protect wildlife and our natural resources. Without the MBTA, Americans likely would not be able to witness and enjoy many of the birds that we see today, such as the Snowy Egret, Wood Duck, and Sandhill Crane. And the MBTA remains a critical safety net necessary for the protection of birds and the important role they play in our ecosystems and our economy.

With the signing of the migratory bird treaties and the passage of the MBTA, the United States recognized the tremendous value that birds provide to the nation and determined that broad protections for birds were vital for the well-being of the country. Birds are indicator species for the environment and play an irreplaceable part in the food web that keeps our ecosystems functioning. Birds consume vast numbers of insects and pests and pollinate crops, providing significant benefits for agriculture. And birdwatching is now one of the country’s most popular pastimes and a major element of the nation’s outdoor economy. More than 47 million birders spend at least \$40 billion each year, which benefits local economies everywhere.

These and other benefits are diminished when bird populations decline. While the MBTA has helped save and recover many species of birds, a significant number of species are still struggling due to a variety of ongoing threats. A recent report in the journal *Science* found that North America’s bird populations have declined by nearly three billion birds since 1970, representing a loss of more than one

in four birds, while a National Audubon Society report found that two-thirds of North America's birds are threatened by climate change.

Meeting this challenge and continuing our progress depends on fully implementing the MBTA, including the authority to address incidental takes. Congress and the executive branch have long understood that fulfilling the visionary goals of the MBTA and our treaty obligations requires addressing the diversity of threats that birds face. Since the early 1970s, every administration under both political parties has reasonably applied the law to preventable bird deaths from industrial hazards.

Through judicious enforcement and by working directly with industries to provide best management practices, this authority has provided a key incentive for adopting common-sense practices that protect birds. As a result, the MBTA has helped clean up oil waste pits, made transmission lines bird-friendly, and restored habitat after oil spills, saving countless numbers of waterfowl, raptors, and songbirds.

Eliminating the legal authority to address incidental takes deprives billions of birds of protections that they have had for decades. Without any legal obligations, industries no longer need to consider how their activities may harm migratory birds or take action to prevent it.

Hazards in all of our communities, including current and future industrial development, or disasters such as oil spills, now represent a higher risk to birds. Companies will no longer face penalties for bird deaths when another major oil spill occurs, which will limit the ability to recover after these disasters. The \$100 million MBTA fine from the Deepwater Horizon spill provided a significant boost for habitat restoration for birds impacted by the spill, benefitting more than 350,000 acres of habitat thus far.

Failing to address preventable bird deaths by exempting incidental take greatly inhibits the previous, current, and future work by your agency and partners to conserve birds. The U.S. Fish and Wildlife Service, along with state agencies, NGOs, and industry, invest a significant amount of resources into habitat protection and restoration, management planning, and other conservation strategies.

The proposed rulemaking directly undermines substantial investments in conservation. For example, when a Northern Pintail successfully hatches in a National Wildlife Refuge or state wildlife management area only to succumb to an avoidable death in an oil pit, not only is it a tragic event, it is a loss of significant investment by your agency and the broader conservation community that stunts the progress of decades of hard work on the ground.

The proposed rule is unsupported by the MBTA's text and intent and contradicts later Congressional action. Administrations have properly utilized discretion in its application, and several district and appeals courts have upheld its enforcement. Numerous former Interior officials have opposed this change in longstanding policy, along with state wildlife agencies and attorneys general, Members of Congress, and organizations like ours representing millions of people.

A far better solution to resolve any questions on regulatory certainty under MBTA is through a rulemaking to develop an incidental take permit. This process, which began under the previous

administration but was withdrawn under the current administration, would allow for greater certainty for the regulated community while also advancing bird conservation.

A century ago, the obligation to manage and protect migratory birds fell to your hands. It was an opportunity and a charge to address the many threats they face, and to set a better course for birds in this country. Thanks to the vision and effort that led to the Migratory Bird Treaty Act and its implementation over the decades, hundreds of species have continued to endure and enrich our lives. But with a myriad of threats on the horizon, birds can ill afford to lose their fundamental protections.

Addressing these challenges calls for a recommitment and redoubling of bird conservation efforts. Instead, the proposed rulemaking would be a historic and profound step backwards. It contravenes our treaties and law, and it unnecessarily harms our birds and the millions of people that benefit from them. We urge you to rethink this rulemaking, and to fully consider your responsibility for protecting birds as guardians of the public trust.

Sincerely,

Alabama Ornithological Society
Alaska Wilderness League
American Bird Conservancy
American Birding Association
Animal Legal Defense Fund
Animal Welfare Institute
Anne Arundel Bird Club
Appalachian Trail Conservancy
Audubon Naturalist Society
Baltimore Bird Club
Bird Conservation Network
Black Canyon Audubon Society
Bold Alliance
Born Free USA
Center for Biological Diversity
Chesapeake Conservancy
City Wildlife
Climate Hawks Vote
Coalition to Protect America's National Parks
Conservation Congress
Conservatives for Responsible Stewardship
Defenders of Wildlife
Earthjustice
Endangered Species Coalition
Environment for the Americas
Environmental Defense Fund
Environmental Law & Policy Center

Environmental Protection Information Center
Evergreen Audubon
Flyway Journeys
Frederick Bird Club
Friends of the Bitterroot
Friends of the Clearwater
Friends of the Earth
Friends of the Sonoran Desert
Genesee Valley Audubon Society
George Miksch Sutton Avian Research Center
Greater Hells Canyon Council
Howard County Bird Club
Humane Society Legislative Fund
Idaho Conservation League
International Crane Foundation
Kalmiopsis Audubon Society
Klamath Forest Alliance
Klamath Wingwatchers
League of Conservation Voters
Los Padres ForestWatch
Maryland Ornithological Society
Mesilla Valley Audubon Society
Minnesota River Valley Audubon Chapter
Montgomery Bird Club
Nashville Chapter of Tennessee Ornithological Society
National Audubon Society
Native Songbird Care & Conservation
Natural Resources Defense Council
Northeastern Minnesotans for Wilderness
NYC Audubon
Openlands
Patuxent Bird Club
Public Citizen
Rappahannock League for Environmental Protection
Raptor Resource Project
Raptors Are The Solution
Rockbridge Bird Club
Sacajawea Audubon Society
Safe Skies Maryland
San Fernando Valley Audubon Society
Santa Cruz Bird Club
Santa Fe Forest Coalition
Save Our Cabinets
Seatuck Environmental Association

Sequoia ForestKeeper
Sheep Mountain Alliance
Sierra Club
Skagit Audubon Society
South Umpqua Rural Community Partnership
St. Louis Audubon Society
Sycamore Audubon Society
Talbot County Bird Club
Tampa Audubon Society
The Conservation Fund
The Humane Society of the United States
The International Wildlife Rehabilitation Council
The Nature Conservancy
The Wildlife Society
Tri-County Bird Club
Umpqua Watersheds
Valley Women's Club of San Lorenzo Valley
Virginia Eastern Shore Land Trust
Virginia Society of Ornithology
Waterkeeper Alliance
Western Watersheds Project
Wild Watershed
WildWest Institute
Yellowstone to Uintas Connection