



Southern California Chapter

The Wildlife Society

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Public Comments Processing
Attn: FWS-HQ-MB-2018-0090-8411
U. S. Fish and Wildlife Service
MS: JAO/1N
5275 Leesburg Pike
Falls Church, VA 22041-3803

Subject: Comments on the Draft Environmental Impact Statement (DEIS) “Regulations Governing Take of Migratory Birds” (FWS-HQ-MB-2018-0090-8411)

Thank you for the opportunity to submit comments on the Draft Environmental Impact Statement (DEIS) “Regulations Governing Take of Migratory Birds”. Upon review, the Southern California Chapter of The Wildlife Society (TWS) has concluded that the DEIS is inadequate, the conclusions misguided, and the Proposed Action is irresponsible. The role of the Migratory Bird Treaty Act (MBTA) and the United States Fish and Wildlife Service (Service) is to protect birds, not adopt regulations that will result in increased take. We therefore urge the Service to repeal the DEIS, withdraw M-Opinion 37050, and reissue the DEIS selecting as the preferred alternative to promulgate incidental take as a protection under the Migratory Bird Treaty Act MBTA, with a permitting framework, as described in Section 2.4.1 of the DEIS.

The basis for our request includes:

1. Role of the U.S. Fish and Wildlife Service
2. The Proposed Action is Inconsistent with the MBTA
3. The Range of Alternatives Considered is Inadequate
4. Eliminating the General Permit Framework from Further Consideration is Inappropriate
5. The Alternative B Description and Analysis is Inadequate and Inaccurate
6. Lack of Effective Mitigation Measures to Address the Impacts of Take
7. Relying on the States to Pass Legislation is Inappropriate and is Not Mitigation
8. Overall Assessment of Impacts to Bird Populations is Incomplete
9. Characterization of Cumulative Impacts Are Inaccurate
10. Legal Uncertainty does not Justify the Proposed Action
11. Proposed Action Could Result in More Cumbersome Regulation

The Southern California Chapter of The Wildlife Society is a non-profit professional organization representing wildlife biologists from Riverside, Orange, Los Angeles, San Bernardino, San Diego, Ventura, and Imperial counties.

twssocalchapter@gmail.com | wildlife.org/socal | <https://www.facebook.com/socalwildlife>

The Basis for Comments by the Western Section of the Wildlife Society

This letter is being submitted on behalf of the Southern California Chapter of The Wildlife Society (wildlife.org/socal), which includes San Diego, Imperial, Orange, San Bernardino, Riverside, Los Angeles, and Ventura Counties and represents professional wildlife managers, biologists, ecologists, botanists, law enforcement, and students devoted to the sustainable conservation of wildlife and wildlife habitat in the western United States. The Wildlife Society (wildlife.org) is an international non-profit scientific and educational association, representing over 15,000 wildlife biologists and managers, dedicated to excellence in wildlife stewardship through science and education. Our mission is to ensure that wildlife and habitats are conserved through management actions that take into careful consideration relevant scientific information. TWS and our membership work to ensure that science plays an active role in policy and regulatory decision-making processes, and this letter's comments provide our expert opinion about the DEIS "Regulations Governing Take of Migratory Birds".

1. Role of the U.S. Fish and Wildlife Service

The Service has an exemplary history of protecting and managing the Nation's fish and wildlife resources. As the DEIS notes, the Service's mission is: "working with others to conserve, protect, and enhance fish, wildlife, and plants and their habitats for the continuing benefit of the American people." We believe that the Proposed Action and M-Opinion 37050 are not legally or biologically supportable and are directly contrary to the Service's mission and the ethics of our profession. Rather, the Proposed Action represents politically motivated interference in the management of America's wildlife resources. We are sympathetic to those Service employees who ascribe to The Wildlife Society's code of ethics but have been directed to participate in forcing through this misguided policy change on the American people, in direct violation of the Service's mission.

The Administration's proposal to codify a significant weakening of the MBTA, in direct contrast to the intent and letter of the law, the associated treaties, the Service's mission, and the public's support for conservation of bird resources, is a shameful episode in the otherwise upstanding history of the Service. As wildlife professionals, we urge our colleagues to use the best science and their objective training to carry out the responsible management of the Nation's wildlife resources and act accordingly.

2. The Proposed Action is Inconsistent with the MBTA

The MBTA clearly states that, "except as permitted by regulations as herein provided... it shall be unlawful...to pursue, take, capture, [or] kill...*at any time, or in any manner...*any migratory bird...nest, or egg..." (16 U.S.C. 703; emphasis added). The primary purpose of the MBTA is to protect populations of native bird species throughout their life cycles. Adopting a regulation that codifies M-Opinion 37050, which specifies that the Act does not cover incidental take, is contrary to this purpose and the language of the MBTA. No provision in the Act distinguishes intentional acts from unintentional acts that kill migratory birds, or limits protections only to those that are not incidental. This is in direct contradiction to the conclusions of M-Opinion

37050, which is based on faulty legal reasoning, has not been tested in the courts, and should be withdrawn. Consistency with the MBTA requires selection of an alternative that promulgates incidental take protections, in the DEIS that means Alternative B or the Alternative described in Section 2.4.1 but not carried forward.

3. The Range of Alternatives Considered is Inadequate

The National Environmental Policy Act (NEPA) requires a reasonable range of alternatives be presented in an EIS. The Service has failed to meet this standard. In effect, there are no alternatives presented. The DEIS acknowledges that the No Project Alternative and the Proposed Action are essentially the same and have the same environmental consequences. It also states in Section 2.3.2 that Alternative B “would be inconsistent with the Office of the Solicitor’s current view of the law, as stated in M-Opinion 37050, adopting this alternative is dependent on that view changing and the opinion being withdrawn.” Since there is no proposal for M-Opinion 37050 to be withdrawn, this is not a complete Alternative and cannot be presented as an alternative under NEPA. Therefore, a reasonable range of alternatives was not presented.

In addition, there are many ways in which to structure a general permitting framework other than that briefly described in the EIS. For example, rather than having the process be industry and activity-based, the approach could focus on the magnitude of impacts to affected bird species and the sensitivity of the species to the expected impacts. Species could be assigned to sensitivity classes based on their legal or administrative status (e.g., listed under federal or state Endangered Species Acts), population status (e.g., Service-designated or state lists of Species of Special Concern [e.g., Shuford and Gardali 2008]), and population size and status (e.g., Rich et al. 2004, Pardieck et al. 2019). Criteria could be developed for the acceptable amounts of take that could be sustained for various species, and these levels of take could be covered in granted regional or nationwide permits (similar to the Nationwide permitting process used in the Clean Water Act). Certain activities could be covered in their entirety or to some threshold level of take in nationwide permits. This example is not intended to definitively describe the desired alternative for analysis in the DEIS, but rather to demonstrate that a workable system could be readily developed to address the take of migratory birds in a manner that would increase certainties for the regulated public while maintaining a higher level of protection for those avian resources that are at greatest risk.

4. Eliminating the General Permit Framework from Further Consideration is Inappropriate

The DEIS inappropriately eliminated the alternative described in Section 2.4.1, which would withdraw M-Opinion 37050 and establish a regulatory general-permit framework to create general permits that provide legal coverage for a variety of activities that commonly result in incidental take of migratory birds. The reasoning for this action is faulty, it should have been carried forward as Alternative C, not dismissed because “developing a general-permit system would be a complex process” (Section 2.4.1). The DEIS should be revised and reissued to

include Section 2.4.1 as Alternative C, and then Alternative C should be selected as the Preferred Alternative.

Further, we also note that the U.S. Military has utilized an incidental take framework since it was granted authority for such take in 2002 (Pub. L. 107–314, div. A, title III, §315, Dec. 2, 2002, 116 Stat. 2509). The incidental take framework developed for military use requires provisions to minimize, mitigate, and monitor the effects of their actions. This system has worked effectively for the military for 18 years. This demonstration disproves the DEIS claim that an incidental take permitting system is overly complex and not possible and therefore an alternative that includes a general permitting system should be carried forward for further review.

5. The Alternative B Description and Analysis Is Inadequate and Inaccurate

The DEIS describes Alternative B as a reversion to the administration of incidental take prohibitions to the situation before M-Opinion 37050 was issued. It also specifies the potential future development of additional regulations to authorize incidental take. However, Alternative B does not provide for, or propose the withdrawal of, M-Opinion 37050 even though the title of Section 2.3.2 is “Alternative B: Withdraw M-Opinion 37050 and promulgate regulations that define the scope of the MBTA to include incidental take”. We support the withdrawal of M-Opinion 37050 and promulgation of regulations defining the MBTA to include incidental take. However, since the required actions, such as withdrawal of M-Opinion 37050 and proposal of additional regulations or a permitting framework were not included in Alternative B, there is no mechanism to implement Alternative B.

The DEIS relies on vague statements about how Alternative B might be implemented. The description provides an inadequate basis to assess the potential impacts and benefits of Alternative B. The lack of an adequate description is in violation of NEPA requirements that the alternatives be described and evaluated at an equal level of detail.

The Alternative B description mischaracterizes the basis for implementing protections for incidental take as solely “complaint based” enforcement measures. Our many members can clearly attest that prior to M-Opinion 37050, enforcement actions were not the primary vehicle by which protections from incidental take were achieved. Rather, the primary mechanism for application of protections was notification by the Service of MBTA requirements during other environmental permitting and compliance processes, such as NEPA, the federal Endangered Species Act, and Clean Water Act. Project proponents were given upfront notice of requirements to avoid incidental take of birds and were largely able to incorporate protection measures into project planning, design, construction, and monitoring processes along with other environmental conditions.

The DEIS justifies lack of selection of Alternative B on the basis that it would not resolve uncertainty in enforcement. This uncertainty results largely from the lack of detail regarding the establishment of a process to authorize incidental take under the MBTA, not from a true

inability to provide clarity in enforcement. Therefore, it is an invalid argument. Prior to issuance of M-Opinion 37050, the lack of a process by which the Service could issue permits to allow incidental take did, at times, create difficulties for project implementation. The appropriate solution to these problems, however, is not to remove incidental take protections, but rather to develop an improved system for permitting incidental take that is efficient and effective. Such a system should be described in Alternative B.

6. Lack of Effective Mitigation Measures to Address the Impacts of Take

The DEIS does not provide mitigation for the significant adverse effects to federally protected migratory birds from the implementation of the Preferred Alternative. Adoption and implementation of the Preferred Alternative would result in significant adverse effects including substantial declines in federally protected bird populations that are supposed to be protected by the MBTA. The DEIS notes (Section 3.10.1) that NEPA “requires federal entities to assess potential mitigation of unavoidable adverse environmental impacts, which may include analysis of project design or mitigation measures that reduce potential impacts to migratory birds.” The DEIS, however, does not identify any mitigation measures to avoid, reduce, or compensate for the bird mortality impacts that are acknowledged to result from the Proposed Action. These adverse impacts could be reduced through mitigation measures. This omission makes the DEIS deficient by not meeting obligations to evaluate how available mitigation measures could reduce the take of bird populations. The DEIS should be revised and reissued with adequate mitigation measures to reduce the significant adverse effects to a less than significant level.

7. Relying on the States to Pass Legislation is Inappropriate and is Not Mitigation

The DEIS states that the negative effects of the Proposed Action promulgating M-Opinion 37050 would be mitigated if states voluntarily choose to pass legislation to protect migratory birds from incidental take. This does not qualify as mitigation under NEPA. It is the responsibility of the Service, not others, to mitigate their adverse impacts. Further, the MBTA is an international treaty so the responsibility of compliance lies with the Federal government. Per the Service website, “The Migratory Bird Treaty Act of 1918 (16 U.S.C. 703-712, MBTA) implements four international conservation treaties that the U.S. entered into with Canada in 1916, Mexico in 1936, Japan in 1972, and Russia in 1976.” Therefore, it is the responsibility of the United States, not the individual states, to fulfill the treaty and enforce legislation to protect migratory birds and “ensure the sustainability of populations of all protected migratory bird species” (<https://www.fws.gov/birds/policies-and-regulations/laws-legislations/migratory-bird-treaty-act.php>). Relying on states choosing to pass legislation does not qualify as an action by the Service.

The MBTA was adopted in recognition that many bird species travel long distances, crossing state and international boundaries, relying on widely divergent lands during various times of the year. The purpose of the MBTA is to address issues regarding mortality throughout their life cycles, not just while present at a specific location, and incidental take is a type of mortality that occurs throughout their life cycles. In order to do this, action must be taken at the federal level.

8. Overall Assessment of Impacts to Bird Populations is Incomplete

The DEIS acknowledges that native bird populations are declining. For example, a recent comprehensive study showed a decline in the total population of North American birds by nearly 30% since 1970 (Rosenberg et al. 2019). The DEIS also acknowledges that adoption of the Preferred Alternative would contribute to this decline. The magnitude of the contribution of the Preferred Alternative to this future decline is not properly quantified or even qualitatively described, which is required to judge the effects of the Proposed Action. Furthermore, the DEIS acknowledges the potential negative effects of the Proposed Action on 239 species of Birds of Conservation Concern, which receive little to no federal protection other than the MBTA and are in decline. These species may not currently have any state protections and are unlikely to receive such protections. Given these declines, it is contrary to both the intent of the MBTA and the mission of the Service to adopt a program that further contributes to the decline of birds when other options to meet the purpose and need are available that would result in fewer impacts.

The assessment of impacts of the alternatives on bird populations is perfunctory and not scientifically robust. More specifically, there is a complete absence of any sufficient analysis regarding the effect on migratory birds, the very species that the MBTA is supposed to protect. As noted in Section 3.12 Summary, “The loss and continuing decline of North American avifauna has largely been driven by anthropogenic sources that cause both direct and indirect mortality. The extent that this impact is related to any interpretation of the MBTA is unknown and has not been quantified. The detrimental impacts of anthropogenic sources of mortality can be lessened through the adoption of best practices, but the extent of their use and effectiveness has not been quantified in all cases.” This statement acknowledges three deficiencies of the DEIS analysis. First, the quantification of the impacts of implementing the Proposed Action is inadequate to provide public disclosure. Second, the statement supports a position that the vague idea of best management practices (BMPs) “can” reduce impacts. The DEIS acknowledges elsewhere that many of the agreements to impose BMPs will likely be increasingly abandoned after adoption and implementation of the Proposed Action, as there will be less force of law behind them. Third, the lack of any quantification of the extent and effectiveness of BMPs does not provide a proper basis for analyzing the impact of their elimination under the Proposed Action.

Notwithstanding the superficiality of the depiction, the general effects of the No Action Alternative and Alternative A are correct: that bird populations will decline. Both Alternatives would have detrimental impacts to bird populations, which would be compounded by environmental changes that are not subject to regulation or enforcement under the MBTA. The analysis also correctly shows that Alternative B could substantially reduce impacts to bird populations which, given the mandates of the MBTA, should cause it or the Alternative presented in Section 2.4.1 of the DEIS (proposed Alternative C in Section 4 of this letter) to be selected as the Preferred Alternative.

9. Characterization of Cumulative Impacts Are Inaccurate

Section 4.4, Beneficial Effects under Cumulative Impacts, is particularly and egregiously inaccurate. The section should describe the specific benefits that result from selection and implementation of the Preferred Action. The section presents as benefits outcomes that resulted from the previous administration of the MBTA, which the Proposed Action seeks to undermine. The DEIS states “These past measures will continue to benefit migratory birds into the future to the extent they continue to be implemented. New technologies may also continue to reduce impacts from sources of mortality that have traditionally killed birds.” A statement that uses the term “to the extent they continue to be implemented” is not a quantified description of a benefit, and fails to acknowledge, as the DEIS does elsewhere that many of the BMP agreements negotiated under the previous interpretation of incidental take prohibitions under the MBTA are likely to be abandoned. Similarly, by eliminating incidental take prohibitions, the adoption of the Preferred Action will greatly reduce the incentive for development of new technologies to reduce mortality impacts.

In Section 4.4.3, the DEIS describes benefits of past regulatory action that successfully allowed recovery of many species from pesticide contamination, which have nothing to do with the Proposed Action. Conversely, the DEIS does not acknowledge the new classes of insecticides that are contaminating the environment and causing dramatic declines in insect populations that form the food base for many birds, and bird populations themselves (Morrissey et al. 2015, Forister et al. 2016, Sanchez-Bayo and Wyckhuys 2019). Relaxing restrictions on incidental take under the Proposed Action will inhibit efforts to restrict existing pesticides that are causing harm to birds and prevent future regulation of new chemicals, since all effects on birds and other wildlife will be considered incidental.

Section 4.4.4, Overall Cumulative Impacts, succinctly makes our argument as to why the Proposed Action should not be adopted and instead the alternative described in Section 2.4.1 should be fully evaluated as Alternative C and identified as the Preferred Alternative. Alternative A will contribute significantly to the ongoing and future global collapse of bird populations. The new Alternative C will achieve the goal of the MBTA to “stop the unregulated killing of migratory birds” and reduce global bird population decline, while meeting the purpose and need of increasing consistency and clarity in enforcement of the MBTA by promulgating incidental take protections.

10. Legal Uncertainty does not Justify the Proposed Action

Chapter 1 of the DEIS - Background and Purpose and Need lays out the case of legal uncertainty regarding incidental take as the basis and need for “Regulations Governing Take of Migratory Birds.” While we agree that there is legal uncertainty regarding incidental take pertaining to the MBTA and support the statement that “...it is in the public interest to apply a national standard that sets a clear, consistent, and articulable rule...” (Section 1.1), we disagree with the conclusion that this presents valid justification for removing incidental take protections from the MBTA. In fact, within the DEIS analysis it concludes that much of the current uncertainty regarding incidental take is directly related to the release of M-Opinion

37050, stating directly “The release of M-Opinion 37050 left many states uncertain as to how to effectively minimize and prevent incidental take of migratory birds” and continuing that in some states, the state legislation to protect against incidental take “...was made indeterminate or ambiguous by the change in federal interpretation in M-37050.” The commensurate response for legal uncertainty regarding incidental take protections is to clarify the process, not remove the protections. Therefore, the appropriate action at this time is to withdraw M-Opinion 37050, promulgate incidental take protections, and develop a framework for incidental take, which would provide a clear, consistent, and articulable rule, similar to that described in Section 2.4.1 of the DEIS.

11. Proposed Action Could Result in More Cumbersome Regulation

The analysis of the effects on migratory birds in the DEIS is incomplete. While the high loss of birds previously protected by incidental take prohibitions under the MBTA was acknowledged under the No Action Alternative and Alternative A, the potential impacts of these losses was not fully disclosed. In Chapter 4, the potential for species on the list of Birds of Conservation Concern to become warranted for listing due to the added pressure of incidental take is acknowledged but the extent of this potential impact is not fully analyzed. There also is no mention of the potential for species not currently on the list of Birds of Conservation Concern to be impacted by incidental take to the extent that they will be warranted for listing.

As professionals engaged in daily action to conserve bird populations, we have already observed difficulties in preventing incidental take as a result of M-Opinion 37050. This will only intensify under the Proposed Rule, furthering the abandonment of existing agreements and activities that minimize or avoid take of individual birds and will thereby contribute significantly to the decline of numerous species from the effects of habitat loss, pesticide effects, direct mortality due to collisions, and many other factors. Given the pervasiveness of these effects, we conclude that it is highly likely that declines will occur in many species’ populations to the point where they may qualify for listing under Federal and State Endangered Species Acts. Thus, implementation of the Proposed Rule could result in substitution of one form of regulatory enforcement (MTBA) for another (ESAs) that could be more expensive, cumbersome, and restrictive. This is cursorily mentioned in the DEIS but should be more fully disclosed and analyzed in the economic impacts of the No Action Alternative and the Proposed Rule.

Conclusion

We appreciate the opportunity to offer comments on behalf of the membership of the Southern California Chapter of the Wildlife Society. We urge the U.S. Department of Interior to withdraw M-Opinion 37050 and the Service to complete the assessment of the alternative described in Section 2.4.1 of this DEIS as Alternative C, properly analyze the impacts of all alternatives in a revised DEIS, and adopt Alternative C as the best solution to protecting bird populations while achieving the Service’s goal of improving consistency in enforcement of the MBTA. We look forward to continuing our involvement in the process of protecting birds.

Sincerely,



Lisa Fields

Chair, Conservation Affairs Committee
Southern California Chapter of The Wildlife Society

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