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Public Comments Processing
Attn: FWS-HQ-MB-2018-0090-8411
U. S. Fish and Wildlife Service
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Subject: Comments on the Draft Environmental Impact Statement (DEIS) for New Regulations Governing Take of Migratory Birds (FWS-HQ-MB-2018-0090-8411)

Summary of Comments

The Western Section of the Wildlife Society conveys our conclusion that the DEIS addressing new regulations governing take of native birds under the Migratory Bird Treaty Act (MBTA) is inappropriate and inadequate for numerous reasons. The Proposed Action (Alternative A) is substantially damaging to bird populations and in a way that is unnecessary to achieve the project's Purpose and Need. The Proposed Action is inconsistent with the requirements to protect migratory bird populations under the MBTA. The range of alternatives considered in the DEIS is unreasonably narrow. The DEIS is deficient because it does not fully describe Alternative B and does not fully analyze the feasible alternative that would adopt a General Permit Framework for authorizing take. Finally, we determined that the DEIS is inadequate in its treatment of the impacts of the proposed rule. We therefore urge that the U.S. Department of Interior withdraw M-Opinion 37050 and that the U.S. Fish and Wildlife Service (Service) revise Alternative B to the General Permitting, properly analyze the impacts of this alternative in a revised DEIS, and adopt this alternative as the best solution to protecting bird populations while achieving the Service's goal of improving the consistency in enforcement of the MBTA.

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

The Western Section of the Wildlife Society provides these comments on the DEIS that was prepared for the proposed regulations addressing take of migratory birds under the MBTA. The Wildlife Society was founded in 1937 and is a non-profit professional society representing wildlife biologists, managers, and educators dedicated to excellence in wildlife stewardship through science and education. Our mission is to inspire, empower, and enable wildlife professionals to sustain wildlife populations and habitats through science-based management and conservation.

Excellence in Wildlife Stewardship through Science and Education

The Western Section of The Wildlife Society represents over 1,000 professional wildlife biologists residing in Nevada, California, Hawaii, and Guam. Our members have extensive experience in addressing MBTA compliance for take of migratory birds under both the previous and current interpretations of the definition of take under the MBTA. Our professional training and experience provide a strong basis for evaluating the appropriateness of the Proposed Action to codify the recent M-Opinion 37050 regarding prohibitions under the MBTA, the environmental consequences of implementing the Proposed Action and alternatives, and the feasibility and impacts of other alternatives that were not considered in the DEIS.

In the following sections, we provide detailed comments supporting our objections to the Proposed Action and the inadequacy of the evaluation of impacts in the DEIS.

The Western Section of the Wildlife Society Opposes the Adoption of the Proposed Action

The Western Section of The Wildlife Society opposes the Service's proposed rule to codify the recently reconsidered definitions of "take" and "kill" under the MBTA. The proposed rule would codify the unwise and legally unsupportable M-Opinion 37050 regarding the definition of take in the MBTA, which reverses decades of previous interpretation and has not been validated in the courts.

As freely acknowledged in the DEIS, codification of the new take definition under Alternative A, the Proposed Action, would result in significant environmental impacts. It would cause substantially negative consequences on populations of migratory birds, other wildlife and environmental values, and cultural values associated with wildlife. These impacts are avoidable by maintaining incidental take protections and developing a General Permit Framework to authorize take that does not result in significant effects.

Alternative A is in direct contradiction to the intent of the MBTA. The new rule would severely limit the ability of wildlife professionals to work with commercial entities to address activities that result in harm to bird species by developing effective management and conservation measures. As a result, the Proposed Action would contribute substantially to declines in bird species populations, which could cause listing of species under the federal or state Endangered Species Acts, and, thereby, trigger administrative permitting issues that defeat the streamlining purpose of the Proposed Action.

The Proposed Rule is Inconsistent with the MBTA

The primary purpose of the MBTA is to protect populations of native bird species. Adopting a regulation that codifies the M-Opinion 37050, that specifies that the act does not cover incidental take, is contrary to this purpose. M-Opinion 37050 is based on faulty legal reasoning, has not been tested in the courts, and should be withdrawn. The MBTA clearly states that, "except as permitted by regulations as herein provided... it shall be unlawful...to "pursue, take, capture, [or] kill... any migratory bird, nest, or egg". No provision in the MBTA distinguishes intentional acts from unintentional acts that kill migratory birds, or limits protections only to those that are not incidental, in direct contradiction to the conclusions of M-Opinion 37050.

The Purpose and Need Are Too Narrowly Defined

The stated project Purpose and Need are narrowly stated as to "improve consistency in the enforcement of the MBTA's prohibitions across the Country and inform the public, businesses, government agencies, and other entities what is and isn't prohibited under the MBTA." The purpose of the MBTA is to protect migratory and other

native birds. The Proposed Action, as clearly described in the DEIS' Environmental Consequences would negatively affect Migratory Birds. Therefore, the Proposed Action is inconsistent with the MBTA. The DEIS likely will be subject to litigation that challenges its consistency with the Act, and the challenge has a high degree of success. In addition, Congress is considering legislation to clarify that incidental take (as broadly defined) is prohibited under the MBTA. Therefore, adopting the measure will not lead to consistency, but rather has a high potential to cause inconsistency as adoption and subsequent possible court rulings and legislation changes the applicable regulations.

The Range of Alternatives Considered is Inadequate

The DEIS acknowledges that the No Project Alternative and Alternative A (Proposed Action) are essentially the same and have the same environmental consequences. It also states that Alternative B is not feasible to implement because a system for regulating incidental take has been found to be unnecessary in M-Opinion 37050. If so, this is not a real alternative and the range of alternatives do not meet the standard of a reasonable range under the National Environmental Policy Act (NEPA). Given that M-Opinion 37050 is only an opinion and lacks the force of law, Alternative B should include a rescission of M-Opinion 37050 as a part of its description.

The Description of Alternative B and the Discussion of Incidental Take Prior to M-Opinion 37050 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, but whether such authorizations are a part of the Alternative and were considered in assessing environmental consequences is unclear.

Alternative B is inadequately described. It lacks detail that would allow it to be properly analyzed in the DEIS and implemented. There is not even a programmatic description of how it would be developed and applied. Rather, the DEIS relies on vague statements about how it might be implemented. The description provides an inadequate basis to assess the potential impacts and benefits of potential adoption, in violation of NEPA requirements that 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 attest clearly 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.

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.

The Treatment of the General Permit Framework as a Separate Alternative that was Eliminated from Detailed Consideration is Inappropriate

As described in the DEIS, under this Alternative, which was considered but not carried forward, the Service would establish a regulatory general-permit framework to provide general permits that provide legal coverage for a variety of activities that commonly result in the incidental take of migratory birds. The DEIS inappropriately eliminated this alternative using the rationale that it required a “complex” process better suited to a separate analysis if Alternative B were selected as preferred. Thus, by its own admission, the DEIS acknowledges that the description of Alternative B is inadequate to properly evaluate in the EIS.

The DEIS specifies that analyzing this Alternative would require “a separate process to adequately define the parameters of such a system” and that such a system would likely require “determining reasonable and adequate conservation measures for different industries and activities, whether separate rulemaking would be required for each individual permit”, and how to authorize activities that don’t fit into a general permit category.

There are many ways to structure a general permitting framework other than that briefly described in the DEIS. For example, 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. As another 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 by 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.

The description above 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.

Overall Assessment of Impacts to Bird Populations

The assessment of impacts of the alternatives on bird populations is very general in nature. 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 Preferred Alternative is inadequate to provide public disclosure. Second, the statement supports a position that the vague idea that best management practices (BMPs) “can” reduce impacts. The DEIS acknowledges elsewhere that many of the agreements to impose BMPs will likely be abandoned, since M-Opinion 37050 and increasingly 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 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 to be selected as the Preferred Alternative.

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 A would contribute to this decline. The magnitude of the contribution of Alternative A to this future decline is not properly quantified or even qualitatively described, which is required to judge the effects of the Proposed Action. Nonetheless, 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 the North American avifauna when other options to meet the purpose and need are available that would result in less impact or benefits to birds.

The DEIS Lacks Effective Mitigation Measures to Address the Impacts of Take Under the Proposed Action

Adoption and implementation of the Preferred Alternative would result in substantial declines in bird populations that are specifically tied to the lack of legal protection under 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. 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 the required analysis of available mitigation measures.

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 Alternative. 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 Alternative 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 current Preferred Alternative (Alternative A) should not be adopted and a fully developed version of Alternative B should be identified as the Preferred Alternative, fully evaluated in a revised DEIS, and adopted. Alternative A will contribute significantly to the ongoing and future global collapse of bird populations. Alternative B, if properly developed, 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.

The Proposed Action is the Wrong Approach to Resolve Legal Uncertainty Regarding What Constitutes a Violation of the MBTA

The Western Section of the Wildlife Society agrees with the statement in the DEIS, “The Service believes that it is in the public interest to apply a national standard that sets a clear, consistent, and articulable rule for when a person or operator commits a criminal misdemeanor violation of the MBTA” (Section 1.1, paragraph 3, page 11). Thus, the issue is to improve legal certainties, not remove protections. Full development of Alternative B with a General Permit Framework would provide a clear, consistent, and articulable rule without allowing wholesale violations of the MBTA and its resulting impacts on avian species.

Reliance on the States to Protect Migratory Birds from Incidental Take is Inappropriate

The DEIS indicates that states can choose to pass state legislation to protect migratory birds from incidental take, and that this option mitigates the negative effects of the Proposed Action. Per the USFWS 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 states, to 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>). Further, the MBTA was specifically adopted in recognition that many bird species populations travel long distances and rely on widely divergent lands during various times of the year. The MBTA attempted to address issues regarding mortality issues in one region that could affect populations in other regions during other times of the year. Relying on a patchwork

system of state migratory bird protection measures is likely to be less effective than the operation of an integrated system, as occurred for a century before M-Opinion 37050. Therefore, the Proposed Action will have detrimental effects on bird populations on lands of Treaty signatories Mexico and Canada, as well as impacts within individual United States.

Relaxation of Take Prohibitions Could Result in More Cumbersome Regulation

The benefits of protecting birds from incidental take under the MBTA have not been properly quantified in the DEIS. Nonetheless, it is clear that the past interpretation resulted in many formal and informal agreements and individual actions initiated by entities to prevent incidental take of birds. The issuance of M-Opinion has led to an abandonment of measures to prevent incidental take.

As professionals engaged in daily action to conserve bird populations, we believe that the adoption and implementation of Alternative A will further 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 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 or state Endangered Species Acts. Thus, implementation of Alternative A could result in the substitution of one form of regulatory enforcement (MTBA) for another (ESAs) that could be more expensive, cumbersome, and restrictive than administering the MBTA under a fully developed version of Alternative B. Thus, perversely, adopting Alternative A may result in an outcome directly opposite of the intentions to reduce regulatory burden.

The Western Section of the Wildlife Society Supports the Adoption of a Modified Version of Alternative B

As discussed above, and acknowledged in the DEIS, Alternative B has not been fully described. It would only be fully developed if it were to become the Preferred Alternative. Please see the section ***The Description of Alternative B and the Discussion of Incidental Take Prior to M-Opinion 37050 Is Inadequate and Inaccurate*** below for details about why the inclusion of an incompletely described Alternative B is inadequate treatment under (NEPA).

Notwithstanding its inadequate description and analysis in the DEIS, The Western Section of the Wildlife Society supports the selection of an augmented version of Alternative B as the Preferred Alternative. As disclosed in the DEIS, Alternative B is the only alternative that would not result in significant environmental effects. Full development of Alternative B with the elements of a General Permit Framework would achieve clarity and consistency in enforcement of the MBTA and provide a higher level of protection for bird populations, consistent with the goal of the MBTA.

There can be benefits to wildlife from a carefully defined and administered system for authorizing incidental take. For example, there are many circumstances in which native bird species may require control to protect other species. Such instances include removal of individual predators from species whose populations have dramatically increased due to the availability of anthropogenic foods, such as common ravens (*Corvus corax*) that prey on federally endangered desert tortoises (*Gopherus agassizii*) and sage grouse (*Centrocercus urophasianus*) (Dinkins *et al.* 2016; Kristan and Boarman 2003). A simple permitting system to allow incidental or even purposeful take of species that are highly abundant, such as nesting cliff swallows (*Petrochelidon*

pyrrhonota) could reduce a widespread nuisance and reduce time spent addressing their effects, while not significantly affecting the aggregate population.

Role of the U.S. Fish and Wildlife Service

The Service has an exemplary history of protecting and managing the Nation's 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." Many Service employees are members of The Wildlife Society and ascribe to the Society's code of ethics.

We believe that the Proposed Action and the 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. The Administration's proposal to codify a significant weakening of the MBTA, in direct contrast to the intent and letter of the Migratory Bird Treaty Act, the Service's mission, and the public's support for conservation of bird resources is a shameful episode in the history of the Service. As professionals, we urge our colleagues to hold fast to their long-held culture of responsible management of the Nation's wildlife resources and act accordingly.

Conclusion

I appreciate the opportunity to offer comments on behalf of the membership of the Western Section of the Wildlife Society. We encourage you to seriously consider our suggestions, modify your proposed approach by fully developing a revised Alternative B, and revise the DEIS and recirculate it for review. We look forward to continuing our involvement in the process of protecting the birds of North America.



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Literature Cited

Dinkins, J.B., M.R. Conover, C.P. Kirol, J.L. Beck, and S.N. Frey. 2016. Effects of common raven and coyote removal and temporal variation in climate on greater sage-grouse nesting success. *Biological Conservation* 202:50-58.

Forister, M., B. Cousens, J.G. Harrison, K. Anderson, J.H. Thorne, D. Waetjen, C.C. Nice, M. De Parsia, M.L. Hladik, R. Meese, H. van Vliet, and A.M. Shapiro. 2016. Increasing neonicotinoid use and the declining butterfly fauna of lowland California. *Biology Letters* 12.

Kristan, W. and W. Boarman. 2003. Spatial pattern of risk of common raven predation on desert tortoises. *Ecology*. 84. 2432-2443. 10.1890/02-0448.

Morrissey, C.A., P. Mineau, J.H. Devries, F. Sanchez-Bayo, M. Leiss, M.C. Cavallaro and K. Liber. 2015. Neonicotinoid contamination of global surface waters and associated risk to aquatic invertebrates: a review. *Environment International* 74:291-303.

Pardieck, K.L., Ziolkowski Jr., D.J., Lutmerding, M., Aponte, V.I., and Hudson, M-A.R. 2020, North American Breeding Bird Survey Dataset 1966 - 2019: U.S. Geological Survey data release, <https://doi.org/10.5066/P9J6QUF6>.

Rich, T.D., C. J. Beardmore, H. Berlanga, P. J. Blancher, M.S.W Bradstreet, et al. 2004. North American Landbird Conservation Plan. Cornell Lab of Ornithology. Ithaca, NY

Rosenberg, K.V., A.M. Dokter, P.J. Blancher, J.R. Sauer, A.C. Smith, P.A. Smith, J.C. Stanton, A. Panjabi, L. Helft, M. Parr, and P.P. Marra. 2019. Decline of North American Avifauna. *Science*:10.1126/science.aaw1313.

Sanchez-Bayo, F. and K.A.G. Wyckhuys. 2019. Worldwide decline of the entomofauna: A review of its drivers. *Biological Conservation* 232:8-27.

Shuford, W.D. and T. Gardali (editors). California Bird Species of Special Concern: A ranked assessment of species, subspecies, and distinct populations of birds of immediate conservation concern in California. *Studies of Western Birds* 1. Western Field Ornithologists, Camarillo, CA and California Department of Fish and Game, Sacramento, CA.