



# Southern California Chapter

## The Wildlife Society

February 26, 2021

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

**Subject: Comments on the Regulations Governing Take of Migratory Birds; Delay of Effective Date (FWS-HQ-MB-2018-0090)**

Thank you for the opportunity to submit new comments regarding the Final Rule on “Regulations Governing Take of Migratory Birds”. The Southern California Chapter of The Wildlife Society (TWS) respectfully requests that the United States Fish and Wildlife Service (Service) rescind the Final Rule. As presented in our submitted comments for the Draft Environmental Impact Statement (DEIS), and included below, the analysis was inadequate, the conclusions misguided, and the Proposed Action is irresponsible. The role of the Migratory Bird Treaty Act (MBTA) and the Service is to protect birds, not adopt regulations that will result in increased take. We therefore urge the Service to rescind the Final Rule and reissue the DEIS selecting as the preferred alternative promulgation of 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. Our position for rescinding the Final Rule is supported by the courts vacating Solicitor's Opinion M-37050 and the objection by Canada, a signatory to the treaty.

### **The Basis for Comments by the Southern California Chapter of The Wildlife Society**

This letter is being submitted on behalf of the Southern California Chapter of The Wildlife Society ([wildlife.org/socal](http://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](http://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

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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.

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policy and regulatory decision-making processes, and this letter's comments provide our expert opinion about the "Regulations Governing Take of Migratory Birds" Final Rule.

### **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 Final Rule is not biologically or scientifically supportable and is contrary to the Service's mission and the ethics of our profession. Implementation of the Final Rule would 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.

### **2. The Final Rule 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 Opinion M-37050, which was vacated by the courts, 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 argument is supported by the December 18, 2020 public statement issued by Canada's Minister of Environment and Climate Change on behalf of Canada's Government in which they clearly stated that the treaty includes incidental take protections.

### **3. The Range of Alternatives Considered was Inadequate**

The National Environmental Policy Act (NEPA) requires a reasonable range of alternatives be presented in an EIS. The Service failed to meet this standard. In effect, there were no alternatives presented. The DEIS acknowledged that the No Project Alternative and the Proposed Action were essentially the same and have the same environmental consequences. It also stated 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 was 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 under 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, but rather to demonstrate that the analysis was insufficient and 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 was 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 was 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 Final Rule should be rescinded, the DEIS 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 have been carried forward for further review.

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

The DEIS described Alternative B as a reversion to the administration of incidental take prohibitions to the situation before M-Opinion 37050 was issued. It also specified the potential future development of additional regulations to authorize incidental take. However, Alternative B did not provide for, or propose the withdrawal of, M-Opinion 37050 even though the title of Section 2.3.2 was “Alternative B: Withdraw M-Opinion 37050 and promulgate regulations that define the scope of the MBTA to include incidental take”.

The DEIS relied on vague statements about how Alternative B might be implemented. The description provided 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 mischaracterized 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 justified 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 have been described in Alternative B.

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

The DEIS did not provide mitigation for the significant adverse effects to federally protected migratory birds from the implementation of the Preferred Alternative, now Final Rule. Adoption and implementation of the Final Rule will 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, did 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. Therefore, the Final Rule should be rescinded.

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

The DEIS stated that the negative effects of the Proposed Action, now Final Rule, 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 acknowledged 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 acknowledged that adoption of the Preferred Alternative, now Final Rule, would contribute to this decline. The magnitude of the contribution of the Final Rule, if allowed to go into effect, 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 acknowledged 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 was 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 were correct: 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 under a future action following rescinding of the Final Rule.

## **9. Characterization of Cumulative Impacts Are Inaccurate**

Section 4.4, Beneficial Effects under Cumulative Impacts, was 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 Preferred Action, now Final Rule, 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, implementation of the Final Rule will greatly reduce the incentive for development of new technologies to reduce mortality impacts.

In Section 4.4.3, the DEIS described 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 did 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 Final Rule 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 have been 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 concluded 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 rescind the Final Rule, 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 was 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 was not fully analyzed. There also was 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, prior to it being vacated by the courts. This will only intensify under the Final 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 Final 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 have been 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 rescind the Final Rule 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  
President-Elect  
Chair, Conservation Affairs Committee

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