

February 28, 2021

Public Comments Processing  
Attention: FWS–HQ–MB– 2018–0090  
U.S. Fish and Wildlife Service  
MS: JAO/3W  
5275 Leesburg Pike  
Falls Church, VA 22041– 3803

**Subject: Incidental Take of Migratory Birds [Docket No. FWS-HQ-MB-2018-0090]**

The San Francisco Bay Area Chapter of the Wildlife Society is writing to express concern about the final rule on the scope of the Migratory Bird Treaty Act (MBTA) published January 7, 2021 (Final Rule), and request that this Final Rule be rescinded. The Final Rule would codify the 2017 Interior Solicitor M-Opinion which has been vacated in court, and there is no standing for the rule. Based on a history of enforcement and court decisions the rule would “remove” prohibitions of incidental take and not “clarify” the scope of the MBTA. Allowing the Final Rule to take effect would result in declines of bird populations as described in the Draft Environmental Impact Statement (DEIS), limit our nation’s ability to uphold obligations under the Migratory Bird Treaty (Treaty), and restrict the ability of public and private sector wildlife professionals to conserve migratory birds. We welcome the opportunity to submit comments on the delay of the Final Rule effective date and offer our professional opinion that the Final Rule should be rescinded.

I am writing on behalf of the 200+ professional biologists from nine counties in the San Francisco Bay Area of California who comprise the San Francisco Bay Area Chapter of The Wildlife Society. The Wildlife Society (TWS; <https://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 Final Rule.

**Breach of Treaty Agreement**

The Migratory Bird Treaty Act of 1918 encompasses conservation treaties with Canada, Mexico, Russia, and Japan. No provision in the MBTA distinguishes intentional acts from unintentional acts that kill migratory birds, nor does it limit protections only to those that are not incidental. Removing incidental take protections will create discontinuities among partners in interpretation of the Treaty, and Treaty partners may be harmed through reduction in migratory bird populations that emigrate through the United States. This 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. Therefore, the United States may violate the Treaty by removing incidental take protections, and the Service should not unilaterally remove incidental take protections.

## **Scope of the MBTA as it applies to conduct resulting in the injury or death of migratory birds protected by the MBTA**

The MBTA should apply to all activities that result in injury or mortality to migratory birds, both intentional or incidental. The MBTA originated from a conservation crisis in which migratory birds were being killed for feathered hats, for meat, and for other market goods. Although many of the pressures migratory birds face today are not the same market forces as those that created the 1918 Migratory Bird Treaty Act, wind turbines, power infrastructure including power lines, agricultural conversion, pesticide use, and large scale development including energy and water development are threats to migratory birds today. Such developments are certainly necessary to support modern society when carried out with proper regulatory controls, but can cause problems for wildlife when regulatory safeguards are not in place.

A recent comprehensive study led by Cornell University and published in the preeminent journal *Science* concluded that bird populations in the U.S. and Canada have declined by nearly one-third since 1970 (Rosenberg et al. 2019). Today's threats to migratory bird populations result primarily from habitat loss and degradation, as well as from activities that result in incidental take, including residential and commercial development, agricultural activities (including pesticide application), energy development (including wind turbines and power lines), mining, and a multitude of other activities. For example, an estimated 64 million birds killed by power lines, five million birds killed by communications towers, and nearly 600,000 birds killed by wind energy operations occurs each year as a result of what are otherwise considered legal business operations.

There is also a new class 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 (Morrissett et al 2015, Forister et al 2016, Sanchez-Bayo and Wyckhuys 2019). This was not analyzed in the EIS. The Final Rule will relax restrictions on incidental take and will likely 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.

The EIS acknowledges that adoption of the Preferred Alternative A (now Final Rule) would contribute to this decline. The magnitude of the contribution of Alternative A to this the future decline was 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.

### **Lack of Mitigation**

Should the Final Rule go into effect, it would result in substantial declines in bird populations protected under the MBTA, and this was also described in the EIS analysis (85 FR 76077, November 27, 2020). Although declines were predicted in the EIS, no identification or analysis of mitigation measures that might avoid, reduce, or compensate for the potential impacts was provided. The EIS 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 the National Environmental Protection Act (NEPA), nor does it

meet requirements of NEPA to assess potential mitigation of unavoidable adverse environmental impacts. Implementation of the Final Rule would allow those causing incidental mortality to avoid responsibility, and those deaths could be avoided through implementation of simple mitigation measures that were not reviewed in the EIS or Final Rule.

**The appropriateness of delaying the effective date of the MBTA rule beyond March 8, 2021.**

We believe that delaying the effective date of the MBTA rule is prudent to review the additional comments being submitted. The fact that the proposed rule on incidental take did not change in any substantive way following public comment suggests that the comments were not fully considered. Given the widespread belief that the process was unduly influenced by commercial interests, we commend the USFWS for seeking more public input. We expect that there will be a large volume of additional public comments. Obviously under a new administration, the Service has discretion regarding what policies it chooses to pursue, and it should avail itself of this opportunity.

In short, the Service should take the time needed to appropriately review and address these comments. In order to do so, the effective date of the MBTA rule must be extended.

**Summary**

**On behalf of the members of the San Francisco Bay Chapter of The Wildlife Society, I ask you to rescind the Final Rule and uphold the spirit of the original treaty to ensure science-based conservation and management of migratory birds.** As part of the review of this Final Rule, we also urge the Department of Interior to pursue creation of a rule that allows the Service to issue permits for incidental take of migratory birds under the MBTA. Such a process would allow the weighing of the population impacts of proposed actions that result in incidental take; identification of reasonable measures to avoid, minimize, and mitigate for such take; and the issuance of permits that allow legal taking of migratory birds consistent with permit conditions. This should alleviate previous concerns of inflexibility on the incidental take prohibition that has created difficulties for commercial interests which in some cases resulted in substantial disruptions to otherwise lawful activities even when impacts to migratory birds were of limited or *de minimus* importance. A migratory bird incidental take permitting process would provide both protections for migratory birds consistent with the MBTA and a streamlined process to allow permitted project actions to go forward. This was not properly considered as an alternative in the EIS for the Final Rule.

The San Francisco Bay Area Chapter of The Wildlife Society thanks you for the opportunity to submit comment on the delay and reevaluation of this Final Rule. Please contact Patricia Valcarcel, CWB®, the Conservation Affairs Committee Chair for the San Francisco Bay Area Chapter of The Wildlife Society (valcarcelp@yahoo.com), with any follow up questions regarding these comments.

Sincerely,



Patricia Valcarcel, CWB®  
Conservation Affairs Chair  
The Wildlife Society, San Francisco Bay Area Chapter

CC: San Francisco Bay Area Representatives and California Senators

Hon. Jared Huffman  
Hon. John Garamendi  
Hon. Mike Thompson  
Hon. Jerry McNerney  
Hon. Mark DeSaulnier  
Speaker Nancy Pelosi  
Hon. Barbara Lee  
Hon. Jackie Speier  
Hon. Eric Swalwell  
Hon. Ro Khanna  
Hon. Anna Eshoo  
Hon. Zoe Lofgren  
  
Sen. Diane Feinstein  
Sen. Alex Padilla

### **Literature Cited**

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