

March 19, 2020

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

Re: Regulations Governing Take of Migratory Birds (Docket No. FWS-HQ-MB-2018-0090)

Submitted electronically at: <http://www.regulations.gov>

On behalf of the Natural Resources Defense Council (NRDC), and our over three million members and online activists, please accept and fully consider these comments on the U.S. Fish and Wildlife Service's (Service) proposed rule and accompanying Notice of Intent (NOI) to prepare an environmental impact statement (EIS) to redefine the scope of the Migratory Bird Treaty Act (MBTA) as it applies to conduct resulting in the injury or death of migratory birds, Docket No. FWS-HQ-MB-2018-0090.

For many years, NRDC has been deeply engaged in efforts to protect the publicly-owned resources under the jurisdiction of the Department of the Interior (Interior) and animals and plants, including migratory birds, protected by federal laws and treaties. The MBTA is one of our nation's oldest and most important laws protecting birds—from resident birds seen in every American backyard to those that migrate across North America and beyond. NRDC is fully committed to ensuring that this bedrock environmental law remains intact and singularly focused on avian protection, as Congress intended over a century ago.

Overarching Recommendations

NRDC strongly opposes any regulatory action that limits the scope of the MBTA's prohibitions "only to actions directed at migratory birds, their nests, or their eggs," as set forth and further described in the Solicitor of the Interior Memorandum Opinion 37050 (M-Opinion 37050).¹ Interior's reinterpretation of the MBTA is unlawful, and if finalized the Service's proposed rule to codify M-Opinion 37050 would likewise run counter to the plain language and intent of the statute, as detailed in additional comments submitted by NRDC and others to this docket.²

Recommendation: We urge the Service, as our nation's top wildlife agency, to immediately reverse course by rejecting Interior's rollback of this bedrock environmental law and to instead institute a conservation-focused incidental take permitting program under the MBTA.

¹ Memorandum from Daniel Jorjani, Principal Deputy Solicitor of the Interior, Opinion M-37050, *The Migratory Bird Treaty Act Does Not Prohibit Incidental Take 2* (Dec. 22, 2017).

² Natural Resources Defense Council, American Bird Conservancy, National Wildlife Federation, Center for Biological Diversity, Defenders of Wildlife, National Audubon Society et al., *Comments on the U.S. Fish and Wildlife Service's proposed rule to redefine the scope of the Migratory Bird Treaty Act*, Docket No. FWS-HQ-MB-2018-0090 (March 19, 2020).

Recognizing that the MBTA prohibits foreseeable yet unintentional industrial harm to birds, or “incidental take,” is not only required by the Act itself, but it is also necessary to protect birds facing unprecedented man-made threats and to meet our international conservation commitments. The Service should revive decades of agency precedent that judiciously applied the MBTA to avert millions of needless bird deaths at oil and gas and other development sites, as well as ensured mitigation and compensation for harm to birds where man-made disasters did occur—for example, at disastrous oil spills and chemical releases. The Service should immediately withdraw this proposed rule, the M-Opinion should be rescinded, and the Service should set forth an appropriate regulatory program for the foreseeable incidental killing and taking of migratory birds.

Recommendation: Ensure that this rulemaking is not treated as a “rubberstamp” process to codify Interior’s misguided reinterpretation of the MBTA and provide due consideration to the associated environmental review and extensive public interest.

We appreciate the opportunity to comment on this docket and the Service’s recent efforts to engage stakeholders through public webinars. We are, however, disappointed that the Service appears to be hastily rushing through this rulemaking process, as evidenced by a denial to extend the public comment period³ even when significant new information—information noticeably absent from the Federal Register notices—has been presented to the public.⁴

This is particularly concerning when it appears that industry stakeholders supportive of the proposed rule were given advanced notice of the timing and scope of the rulemaking, while all other stakeholders were not.⁵ A group of retired Interior Public Affairs, External Affairs, and Communications Officers, representing over 200 years of experience in public communication at Interior, recently sent a letter calling for the Interior Inspector General to investigate such preferential treatment.⁶ Equally troublesome, the Service continued to deny public comment period extension requests as our nation faced unprecedented disruptions due to COVID-19, while the administration concurrently was afforded unopposed extensions for the same reason in on-going MBTA litigation in the Southern District of New York.⁷

³ See Letter from Mr. Jerome Ford, U.S. Fish and Wildlife Service to Katie Umekubo, NRDC (March 6, 2020).

⁴ In the first public webinar that the Service held following publication of the notice of proposed rulemaking, the Service presented new and additional alternatives to analyze, including a verbal statement that there was not a preferred alternative – contrary to what the notice of proposed rulemaking states. The Service also set forth the timeline for finalization of the EIS and Rule on its website. See U.S. Fish and Wildlife Service, *MBTA Public Webinar Powerpoint Presentation* (March 3, 2020) and U.S. Fish Wildlife Service, *MBTA Rulemaking Process and Timeline* at <https://www.fws.gov/regulations/mbta/process> (accessed on March 19, 2020).

⁵ See Press Release, U.S. Fish and Wildlife Service Solicits Public Input on Proposed Rule and Environmental Impact Statement for Migratory Bird Treaty Act (Jan. 30, 2020), available at: <https://www.fws.gov/news/ShowNews.cfm?ref=u.s.-fish-and-wildlife-service-solicits-publicinput-on-proposed-rule-and- ID=36517>; Public Employees for Environmental Responsibility, *Even Bureaucracies Taking on Trumpian Tone* (February 12, 2020); available at: <https://www.peer.org/even-bureaucracies-taking-on-trumpian-tone/?fbclid=IwAR2dSMH34IQSKoC4HP1tmm7yf6-fYA-qesOE3AB T 6yEWcg8N bvOxxNOUk>.

⁶ See Letter From Megan Durham, *et al.* to Interior Inspector General on MBTA Press (March 13, 2020); Public Employees for Environmental Responsibility, *Ten Retired Press Officers Attack Validity of Bird Death Rule* (March 16, 2020); available at: <https://www.peer.org/ten-retired-press-officers-attack-validity-of-bird-death-rule/>; Politico, *Former Officials Call Fowl* (March 17, 2020), available at: <https://www.politico.com/newsletters/morning-energy/2020/03/17/how-oil-prices-could-affect-2020-786136>.

⁷ Inside EPA, *EPA Facing Calls To Extend Consent Decree, Rule Deadlines Due To Virus* (March 17, 2020).

NRDC members have submitted over 38,000 comments to this docket, and many other conservation organizations, recreational groups, academic institutions, research organizations, and tribal, state and local interests are similarly engaged.⁸ The Service would be derelict in its responsibilities to the American public by providing anything less than the utmost consideration to the concerns and input from all interested stakeholders, as well as providing anything short of a full commitment to protect and preserve federal trust species including those species listed under the MBTA.

Recommendation: A detailed analysis of direct, indirect and cumulative impacts to the environment must be made available for public comment well in advance of issuance of the final rule, and must include the latest biological information, reports and research on birds.

As mentioned, the Service presented significant new information following publication of the MBTA notices in the Federal Register, including release of additional action alternatives and a timeline for the rulemaking and associated National Environmental Policy Act (NEPA) review. The Service's timeline identifies that a draft EIS will be released for public review by Summer 2020 and a final EIS and record of decision published in Fall 2020.⁹ This is an extremely aggressive timeline and leaves little room for the Service's substantive analysis, drafting, and consideration and response to public comment.

Given the breadth and wide reach of the proposed action, we must underscore the extreme importance of—and legal requirement for—a meaningful opportunity for public engagement. Such an opportunity cannot be met without providing and analyzing detailed scientific information on species status, including an accounting of industry impacts to birds, well in advance of issuance of the final rule.¹⁰ Moreover, the proposed rule and any proposed regulations governing the scope of the MBTA constitute a major federal action that warrants a robust and full analysis of direct, indirect and cumulative impacts including impacts caused by climate change.¹¹

There could be no worse time to slash protections for birds, as recent reports have uniformly sounded alarms that birds are in deep decline, both domestically and abroad. Last year, *Science* reported that

⁸ See Natural Resources Defense Council, Defenders of Wildlife, ABC, *et al.* Press Release, *More than 180,000 Americans Oppose Trump's Plan to Cripple Migratory Bird Protections* (March 19, 2020); available at: <https://www.nrdc.org/media/2020/200319>.

⁹ *MBTA Public Webinar Powerpoint Presentation and MBTA Rulemaking Process and Timeline*.

¹⁰ NEPA requires "that environmental information is available to public officials and citizens before decisions are made and before actions are taken." 40 C.F.R. § 1500.1(b). CEQ's regulations require agencies to "commence preparation of an environmental impact statement as close as possible to the time the agency is developing or is presented with a proposal ... so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made." 40 C.F.R. § 1502.5.

¹¹ NEPA compels preparation of an EIS for a major federal action with significant impacts to the human environment. 40 C.F.R. § 1500.1(a); 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1508.18. "Major federal actions" include, among other things, "new or revised agency rules, regulations, plans, policies, or procedures." 40 C.F.R. § 1508.18(a). This encompasses the "[a]doption of official policy," including "formal documents establishing an agency's policies which will result in or substantially alter agency programs." *Id.* § 1508.18(b)(1); see also 43 C.F.R. §§ 46.205(c)(1), 46.210(d), 46.215(b), (c), (d) (Interior regulations requiring legal opinions to be analyzed in an EIS when they have significant impacts, including on migratory birds)].

nearly 3 billion birds have been lost in North America since 1970.¹² The highlighted report, “Decline of North American Avifauna,” warns of a developing crisis in biodiversity that will result in additional, costly endangered species listings as well as detrimental impacts to the ecosystem benefits provided by birds.¹³ The United Nations’ Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES) Biodiversity Report further detailed the direct link between nature and future sustainability goals—unequivocally pronouncing that nature is essential to success in combating poverty, hunger, health, and overall well-being.¹⁴ And a recent report by Audubon, “Survival by Degrees,” found that two-thirds of North American birds are at risk of extinction due to climate change.¹⁵

Interior’s radical reinterpretation of the MBTA removed a broad layer of protection to birds against industrial harms and the Service must fully explain how such action compounds or alleviates the findings of the aforementioned reports and other available science and biological data—including but not limited to data from Partners in Flight, the State of the Birds report, Christmas Bird Counts, Breeding Bird Surveys, and project-level nesting and demographic information that the Service has on file.¹⁶ In doing so, the Service should provide updated statistics on impacts to birds and pre- and post- M-Opinion 37050 incidental take estimates, including direct, indirect and cumulative impacts broken down by industry, flyway and/or region, and species. Without information to the contrary, we must assume that birds, and therefore the whole of the human environment, are severely negatively impacted by the proposed rule.

Background

We must underscore the monumental weight of the Service’s proposed rule and drastic about-face taken by the Trump administration. Over two years ago, Interior effectively gutted a century-old bird conservation statute by reversing the long-held and widely accepted understanding that the MBTA applied to incidental take. Interior did this without public notice and comment, without considering biological impacts to birds, and without regard to the concerns of Congress, former agency officials, academics, conservation organizations and the public.¹⁷

¹²Kenneth V. Rosenberg, *et al.*, *Decline of the North American avifauna*, *Science*, Vol. 366, p. 120-124 (October 4, 2019); available at: <https://www.birds.cornell.edu/home/wp-content/uploads/2019/09/DECLINE-OF-NORTH-AMERICAN-AVIFAUNA-SCIENCE-2019.pdf>.

¹³ *Id.*

¹⁴ [United Nations’ Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services](#) (IPBES), *Biodiversity Report* (May 6, 2019).

¹⁵ Wilsey, C, *et al.*, *Survival by Degrees: 389 Bird Species on the Brink*, National Audubon Society: New York (2019); available at: <https://www.audubon.org/climate/survivalbydegrees>

¹⁶ See e.g. K. V. Rosenberg, *et al.*, *Partners in Flight Landbird Conservation Plan: 2016 Revision for Canada and Continental United States*, Partners in Flight Science Committee (2016); available at: <https://www.partnersinflight.org/wp-content/uploads/2016/08/pif-continental-plan-final-spread-single.pdf>; NABC, *State of the Birds 2019*; available at: <https://www.stateofthebirds.org/2019/wp-content/uploads/2019/09/2019-State-of-the-Birds.pdf>.

¹⁷ See e.g. Darryl Fears and Dino Grandoni, *The Trump Administration has officially clipped the wings of the Migratory Bird Treaty Act*, *Washington Post* (April 13, 2018); available at: <https://www.washingtonpost.com/news/energy-environment/wp/2018/04/13/the-trump-administration-officially-clipped-the-wings-of-the-migratory-bird-treaty-act/>.

Opinion M-37050 was immediately implemented, resulting in the Service turning a blind eye towards virtually all industrial harms to birds. Now, the Service appears to be directing a predetermined outcome to codify Interior's ill-conceived decision. At a minimum, the Service must take this opportunity to thoroughly detail and analyze the biological impacts of such a decision and set forth a full range of alternatives that will meet the MBTA's bird protection mandate.

Our comments below focus on additional recommendations for elements of a robust and thorough environmental review and defensible MBTA rulemaking process.

Purpose and Need

Recommendation: Purpose and Need should be "to conserve migratory birds under the MBTA through an incidental take authorization program."

The overarching purpose and conservation mandate of the MBTA must not be lost: any MBTA regulation or permitting program must first and foremost guarantee the conservation and protection of all imperiled bird species listed under the Act. Interior and the Service have done little to demonstrate how this proposed rule actually benefits birds, instead focusing almost exclusively on economic interests of previously regulated industries. The Service's stated purpose and need for the proposed rule "is to provide an official regulatory definition of the scope of the statute as it relates to incidental take...to improve consistency in enforcement of the MBTA's prohibitions...."¹⁸ Notably, there is little mention in either notice of biological impacts or assessment of bird species protected by the Act.

Interior and the Service fail to recognize that the MBTA's singular statutory purpose is to protect and conserve migratory birds. The U.S. Supreme Court described this purpose as "a national interest of very nearly the first magnitude"¹⁹ and the origin of the statute to implement the international treaties signed for migratory bird conservation must not be overlooked.²⁰ In 2001, President Clinton signed Executive Order 13186, *Responsibilities of Federal Agencies to Protect Migratory Birds*, which underscores the national importance of migratory birds and substantive treaty obligations that are implemented through the MBTA. Executive Order 13186 states,

Migratory birds are of great ecological and economic value to this country and to other countries. They contribute to biological diversity and bring tremendous enjoyment to millions of Americans who study, watch, feed, or hunt these birds throughout the United States and other countries. The United States has recognized the critical importance of this shared resource by ratifying international, bilateral conventions for the conservation of migratory birds...These migratory bird conventions impose substantive obligations on the United States for the conservation of migratory birds and their habitats, and through the Migratory Bird Treaty Act (Act), the United States has implemented these migratory bird conventions with respect to the United States.²¹

¹⁸ U.S. Fish and Wildlife Service *Migratory Bird Permits; Regulations Governing Take of Migratory Birds; Environmental Impact Statement*, 22 Fed. Reg. 5913, p. 5914 (February 3, 2020).

¹⁹ *Missouri v. Holland*, 252 U.S. 416, 435 (1920).

²⁰ 16 U.S.C. § 703 *et seq.*

²¹ Exec. Order No. 13186, 66 Fed. Reg. 3853 (Jan. 17, 2001). Conventions include the Convention for the Protection of Migratory Birds with Great Britain on behalf of Canada 1916, the Convention for the Protection of Migratory Birds and Game Mammals-Mexico 1936, the Convention for the Protection of Birds and Their Environment- Japan

Not only does this Executive Order recognize the critical importance of migratory bird species and the United States' obligations to conserve populations and their habitats, but it also defines and describes critical components of the MBTA as the primary mechanism carrying out these obligations. The Executive Order states that "take" includes both "intentional" and "unintentional" take, and it purposefully underscores the importance of habitat conservation throughout—including defining "migratory bird resources" as migratory birds and the habitats upon which they depend, as well as directing agencies to inventory and monitor bird habitat and populations, promote research and information exchange related to the conservation of migratory bird resources, and provide training and information to staff on methods and means of avoiding or minimizing the take of migratory birds and conserving and restoring migratory birds habitat.²²

In this EIS, the "Purpose and Need" should focus on the overarching statutory mandate of the MBTA to conserve and protect migratory birds. This environmental review should focus on the biological impacts and benefits to birds of the proposed rule and any authorization program that the Service is considering. Hundreds of comments were submitted to this effect in the Service's 2015 scoping and notice of intent to prepare a programmatic EIS to evaluate the potential environmental impacts of a proposal to authorize incidental take of migratory birds under the MBTA.²³ Numerous comments were submitted in support of the Service's efforts to clarify an authorization program for incidental take,²⁴ including a wide range of industry comments that set forth detailed recommendations on how to make such a program workable.²⁵ It is misleading and simply false to suggest, as Interior does, that *any* regulation of incidental take under the MBTA is unduly burdensome.

No Action Alternative

Recommendation: Analysis of the No Action Alternative must include detailed descriptions of how implementation of M-Opinion 37050 has impacted birds covered by the MBTA, and such analysis should be released as soon as available.

The proposed rule has been implemented by the Service since issuance of M-Opinion 37050 in December of 2017. Due to the Service's somewhat unconventional and confusing choice to issue both the proposed rule and scoping notice of intent to prepare an EIS examining the proposed rule, and as mentioned above, the public has been deprived of any ability to understand and consider the environmental impacts of the proposed rule prior to commenting on the proposed rule itself.

The Service should therefore immediately release any information and analysis regarding environmental impacts that it has on file, and especially including enforcement information that the agency acquired and considered leading up to and following issuance of M-Opinion 37050. Such information should include enforcement investigations and cases closed since December 2017, as well as recent agency

1972, and the Convention for the Conservation of Migratory Birds and Their Environment-Union of Soviet Socialist Republics 1978.

²² *Id.* at 3853, 3855.

²³ U.S. Fish and Wildlife Service, *Migratory Bird Permits; Programmatic Environmental Impact Statement*, 80 Fed. Reg. 30032 (May 6, 2015).

²⁴ Supportive Comments submitted to the U.S. Fish and Wildlife Service, *Migratory Bird Permits; Programmatic Environmental Impact Statement*, 80 Fed. Reg. 30032 (July 2015).

²⁵ Industry Comments submitted to the U.S. Fish and Wildlife Service, *Migratory Bird Permits; Programmatic Environmental Impact Statement*, 80 Fed. Reg. 30032 (July 2015).

efforts to collaborate with industry on best management practices and consultations with other federal, state and local agencies to minimize harm to birds.

As part of a Freedom of Information Act inquiry initiated by NRDC, we became aware of numerous examples of extreme confusion between both the Service law enforcement, state fish and game agencies, and the public in determining how to apply Interior's reinterpretation and the Service's accompanying guidance, as well as blatant disregard for actual impact to birds covered under the Act – this information was further documented and described by The New York Times and Reveal in efforts to unveil the specific harms occurring to birds as a direct result of M-Opinion 37050.²⁶ The Service must address such harm in the environmental review and demonstrate how impacts will be mitigated if the proposed rule is to move forward.

Recommendation: Explain the differences between the No Action Alternative and Action Alternative A/Proposed Rule, and include an alternative that returns to the decades-old position that the MBTA governs incidental take.

In order to ensure a robust environmental review that considers a full range of alternatives, the public must understand any differences between the No Action Alternative and the Proposed Rule/Action Alternative A. Similarly, since the No Action Alternative mirrors Action Alternative A, the Proposed Rule, the Service should also include an alternative that examines a return to the previously-held agency position that the MBTA governs incidental take, as detailed by the withdrawn Interior Solicitor's M-Opinion 37041.²⁷ Such examination would be more akin to a no action alternative because it represents decades of previous agency practice and it would allow a more thorough look at the true environmental costs and benefits of the proposed rule. The Service should clearly explain any assumptions relied upon and significant new information that influences its analysis and decision.

Action Alternative A/Proposed Rule

Recommendation: Clarify whether and how the Service continues to collect project-level data on industrial impacts to birds in the environmental analysis of Action Alternative A/Proposed Rule.

One significant concern and negative environmental impact of the proposed rule centers around the long-term loss of data and oversight of industrial impacts to avian species. In conjunction with working cooperatively with various industries, issuing permits and investigating activities prior to the issuance of M-Opinion 37050, the Service also requested and collected a wide array of data concerning impacts resulting from various industrial activities.

With industrial activities no longer falling under the purview of the MBTA, as dictated under M-Opinion 37050, it is assumed and at least unclear as to whether such information on impacts to birds continues

²⁶ Lisa Friedman, *A Trump Policy 'Clarification' All but Ends Punishment for Bird Deaths*, New York Times (December 24, 2019); available at: <https://www.nytimes.com/2019/12/24/climate/trump-bird-deaths.html?action=click&module=RelatedLinks&pgtype=Articlelink>; Elizabeth Shogren, *Killing migratory birds, even unintentionally, has been a crime for decades. Not anymore*, Reveal (April 8, 2019); available at: <https://www.revealnews.org/article/killing-migratory-birds-even-unintentionally-has-been-a-crime-for-decades-not-anymore/>.

²⁷ Memorandum from Hilary C. Tompkins, Solicitor of the Interior, to Director, U.S. Fish & Wildlife Serv., Opinion M-37041, Incidental Take Prohibited Under the Migratory Bird Treaty Act 8 (Jan 10, 2017).

to be collected by the agency. This data collection was a primary marker for agency and public assessment of various industrial impacts, the loss of which represents a major gap in understanding the status of protected bird species. The MBTA seeks to ensure the overall preservation of over 1,000 bird species, an outcome that cannot be achieved without the very type of information that has seemingly vanished under Interior's current legal opinion.

In its environmental analysis of Action Alternative A/Proposed Rule, the Service should at least acknowledge the importance of this type of data and confirm whether the agency continues to collect information surrounding industrial harms to birds. Ostensibly, previously issued but still active special purpose permits and other federal agency permits continue to provide such information, but it is unclear as to whether the Service has stopped requesting and collecting such information altogether.

Action Alternative B

Recommendation: Incorporate the Service's 2015 MBTA proposal and previous analysis to regulate incidental take into Action Alternative B, including a full description of a science-based conservation framework to guide an incidental take permitting program.

NRDC and Audubon submitted detailed comments, incorporated by reference here,²⁸ to the Service's 2015 MBTA scoping notice to prepare a supplemental EIS for a proposal to institute an incidental take permitting program. In those comments, we detailed various elements that would be necessary to establish a science-based conservation framework to guide issuance of incidental take permits while also ensuring the preservation of birds covered under the Act. Elements included: providing robust information on migratory bird population status and current and expected impacts; detailed consideration of staff resources and oversight capabilities; clear processes for integrating transparency and adaptive management prescriptions, and prioritization of science-based conservation and proven mitigation measures

We urge the Service to reexamine the elements suggested in our previous comments, as well as those from other stakeholders,²⁹ and to set forth a comprehensive framework for an incidental take permit program under the MBTA. Such detail will be necessary to effectively outline and examine expected environmental benefits and impacts of any such a proposal.

Reliance on Industry Assurances

Recommendation: The Service cannot defensibly rely on blanket industry assurances that best management practices are currently being followed to draw conclusions on environmental impacts to birds in the absence of liability under the MBTA.

Of particular note is the Service's request for comment on and anticipated reliance on industry comments detailing continued implementation of best management practices to analyze impacts to birds. While it is certainly important and laudable if certain industry actors are continuing to institute

²⁸ National Audubon Society and Natural Resources Defense Council, Comments on the U.S. Fish and Wildlife Service's NOI to prepare a PEIS to evaluate the potential environmental impacts of a proposal to authorize incidental take of migratory birds, Docket No. FWS-HQ-MB-2014-0067 (July 27, 2015).

²⁹ See Supportive Comments submitted to the U.S. Fish and Wildlife Service and Industry Comments submitted to the U.S. Fish and Wildlife Service (July 2015).

best management practices for birds in the absence of liability under the MBTA, such declarations cannot be relied upon to demonstrate and analyze expected environmental impacts of Action Alternative A/Proposed Rule. Not only is there no guarantee that such voluntary action will continue into the future, but as described above there is no longer a data collection or reporting mechanism for the Service to even identify or understand when such action occurs or terminates, nor is there a credible process in place to verify the veracity of such data.

The Regulatory Planning and Review analysis in the proposed rulemaking itself acknowledges that:

It is anticipated that some entities that currently employ mitigation measure to reduce or eliminate incidental migratory bird take would reduce or curtail those activities given the legal certainty provided by this proposed regulation.³⁰

One of the Service's greatest achievements under the MBTA was attributable to the agency's effectiveness in providing industry stakeholders meaningful opportunities to help inform and guide such actors to take common-sense and practicable measures that would avoid and minimize harm to birds, while also affording industry partners a degree of certainty for their operations.³¹ However, the Service's leverage in pressing entire industrial sectors to adopt such measures was the threat of MBTA liability. For example, Service law enforcement agents long employed a strategy of targeted enforcement actions and cooperative work with oil and gas interests to ensure that millions of birds were saved from open waste pits.³² Without Service oversight and engagement there is little expectation that industry actors will continue to prioritize resources for voluntary bird conservation measures. Last fall, state fish and wildlife agencies documented concern that voluntary mitigation measures are rarely used and raised questions surrounding uniform adoption of the Land-based Wind Energy Guidelines.³³

Consideration of Economic Interests

Recommendation: Carefully delineate any reliance on and consideration of economic interests, for example cost of best management practices and legal fees, in proposing the action alternatives and adopting a final rule.

The MBTA has no mention of balancing economic interests with bird conservation or accounting for economic losses when addressing harm to birds. It is therefore confusing that the Service has prioritized requesting this type of economic information in the proposed rulemaking. More specifically, the agency

³⁰ U.S. Fish and Wildlife Service *Regulations Governing Take of Migratory Birds*, 22 Fed. Reg. 5923 (February 3, 2020).

³¹ See e.g. U.S. Fish and Wildlife Service Wind Turbine Guidelines Advisory Committee Policy Recommendations (March 4, 2010); available at: https://www.fws.gov/habitatconservation/windpower/Wind_Turbine_Guidelines_Advisory_Committee_Recommendations_Secretary.pdf.

³² See Elizabeth Shogren, *Egged on by industry lobbyists, Interior weakens bird protections*, *Reveal* (March 15, 2018); available at: <https://www.revealnews.org/article/egged-on-by-industry-lobbyists-interior-dept-weakens-bird-protections/>; *Reveal* audio file, *Behind Trump's Energy Dominance* (March 23, 2019); available at: <https://www.revealnews.org/episodes/behind-trumps-energy-dominance-rebroadcast/>.

³³ Association of Fish and Wildlife Agencies, *State Fish and Wildlife Agency Wind Siting Survey Final Report* (September 2019); available at: https://www.fishwildlife.org/application/files/5315/7427/3199/2019_AFWA_Wind_Wildlife_Summary_Report_FINAL.pdf.

asks for information centering on mitigation measures implemented prior to issuance of the M-Opinion 37050, the cost of such measures, the cost of legal fees surrounding the risk of prosecution and the extent to which industries are continuing to use such measures. The Service should clarify the extent to which this information will factor into their decision-making in adopting a final rule and the associated environmental analysis and what authorities, if any, they are relying on to incorporate such considerations.

Conclusion

We appreciate the opportunity to comment on this docket and urge the Service to reverse course and reject finalizing a rule that codifies M-Opinion 37050. Instead, the Service should recognize the critical importance of setting forth a science-based conservation framework and regulatory standard for permitting incidental take under the MBTA and initiate a rulemaking that is consistent with the MBTA's statutory mandate.

NRDC is committed to working with the Service, industries, and other stakeholders to identify and incorporate a collaborative, legally sound and scientifically credible framework for addressing authorizations for incidental take under the MBTA and to above all, provide meaningful benefits to birds.

Please do not hesitate to contact me at kumekubo@nrdc.org for any additional information. Thank you for your consideration of these comments.

Sincerely,

Katie Umekubo
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Natural Resources Defense Council