

**ATTORNEYS GENERAL OF THE STATES OF NEW YORK, CONNECTICUT,
ILLINOIS, MARYLAND, MINNESOTA, NEW JERSEY, NEW MEXICO,
OREGON, AND WASHINGTON, AND THE COMMONWEALTH OF
MASSACHUSETTS**

July 20, 2020

Rob Wallace
Assistant Secretary for Fish and Wildlife and Parks
Attention: FWS-HQ-MB-2018-0090
U.S. Fish and Wildlife Service
MS: JAO/1N
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Via Federal eRulemaking Portal

RE: Comments on Draft Environmental Impact Statement Concerning
Regulations Governing Take of Migratory Birds (May 2020)

Dear Assistant Secretary Wallace:

The Attorneys General of New York, Connecticut, Illinois, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, Oregon, and Washington (the “States”) submit the following comments on the Draft Environmental Impact Statement (“DEIS”) prepared by the U.S. Fish and Wildlife Service (“FWS” or the “Service”), part of the U.S. Department of the Interior (“Interior”), with respect to proposed regulations governing take of migratory birds. The FWS produced the DEIS in connection with its proposal to issue a regulation that would limit the scope of conduct prohibited by the Migratory Bird Treaty Act (“MBTA” or the “Act”) to “actions directed at migratory birds,” 5 Fed. Reg. 5915 (Feb. 3, 2020) (the “Proposed Rule”). In their March 19, 2020 comments, the States explained that the Proposed Rule is predicated on a legally erroneous reinterpretation of the MBTA and that Interior’s prior longstanding interpretation is the only reasonable interpretation of the Act. The States urged the Service to withdraw the Proposed Rule and reinstate the previous interpretation that the MBTA prohibits both intentional and incidental take (conduct that incidentally takes or kills migratory birds), which is not only legally correct but better policy: it would protect our diminishing populations of migratory birds and the benefits they provide, as opposed to causing millions of additional bird deaths.¹

¹ The States’ Comments on the Proposed Rule and the States’ Comments on the Notice of Intent to Prepare an Environmental Impact Statement, both filed on March 19, 2020, as well as all of the exhibits attached thereto, are incorporated by reference and part of the administrative record.

The DEIS analyzed the likely environmental impacts of three scenarios: (1) a No Action Alternative, which would retain Interior’s misguided reinterpretation of the Act without implementing the Proposed Rule; (2) Alternative A, the Service’s preferred alternative, which would implement the Proposed Rule to further codify Interior’s misguided reinterpretation of the Act; and (3) Alternative B, which would reinstate the correct interpretation of the Act, as the States urged in their March 19, 2020 comments.² While the DEIS suffers from legal deficiencies and its analysis is not the thorough probing one that NEPA requires, it does support the States’ assertion that Alternative B, in addition to being consistent with the MBTA, furthers the MBTA’s animating policy and the States’ interests in protecting migratory birds that nest, winter or migrate within their boundaries, including when those birds are outside particular States’ territories. A more thorough lawful analysis would make that even clearer.

For the reasons set forth below and in their earlier comments, the States therefore urge the Service to adopt Alternative B, which would restore and codify the Service’s previous—and correct—interpretation that the Act prohibits not only conduct directed at birds, but also conduct that incidentally takes or kills migratory birds. In particular, the Service should adopt Alternative B both because: (1) it is the only alternative based on a legally sound interpretation of the Act and (2) it is, as the DEIS acknowledges, the only alternative that would *increase* the number of entities implementing best practices for avoiding bird deaths and *decrease* mortality of migratory birds. The other two alternatives presented in the DEIS are based on an interpretation of the Act that is unsound as a matter of law and misguided as a

² In the DEIS, the Service explained that it also considered two additional alternatives that it declined to carry forward for review, including: (1) developing a general-permit framework to address incidental take; and (2) developing an enforcement system to address gross negligence. *See* DEIS at 5-6. In their Comments on the Notice of Intent to Prepare an Environmental Impact Statement the States urged the Service to fully consider the former, but the Service concluded that it would be “premature” to do so, because such a framework would only be relevant if the Service first selected Alternative B. *See id.* at 6. However, NEPA requires a thorough review of all reasonable alternatives, including those based on “connected actions” that “[c]annot or will not proceed unless other actions are taken previously or simultaneously,” 40 C.F.R. § 1508.25(a)(ii). Thus, the Service was wrong not to analyze the potential environmental impacts of a general-permit framework. Indeed, the Service already has before it an extensive record regarding how such a permit program would work, which was developed in association with its Notice of Intent to prepare a programmatic Environmental Impact Statement on that very topic. *See* Migratory Bird Permits; Programmatic Environmental Impact Statement, 80 Fed. Reg. 30,032 (May 26, 2015).

matter of policy. In addition, as the DEIS shows, the other two alternatives would result in significant and unnecessary bird deaths.

I. Alternative B Is the Only Option Consistent with the Act’s Text, Purpose, Legislative History, and Principles of International Comity

As the States have previously commented—and as some of the States are currently arguing in a federal action pending in the U.S. District Court for the Southern District of New York—the Act’s text, purpose, and legislative history, as well as principles of international comity, make clear that Congress intended to prohibit conduct that incidentally takes or kills migratory birds. Only Alternative B, which would restore and codify the Service’s previous, correct interpretation, properly recognizes that the Act prohibits conduct that incidentally takes or kills migratory birds. By the same token, Solicitor’s Opinion M-37050, which incorrectly concluded that the Act prohibits only conduct directed at migratory birds, is invalid as a matter of law and misguided as a matter of policy. Therefore, the Service should reject both the No Action Alternative, which would retain M-37050 without finalizing the Proposed Rule, and Alternative A, which would finalize the Proposed Rule and thereby codify M-37050.

II. Alternative B Would Avoid Significant and Unacceptable Risks to Migratory Birds and Provide Numerous Other Benefits to Society

As the States have also previously commented, any enforcement framework based on the misguided interpretation expressed in M-37050 would cause significant and unacceptable risks to migratory birds. The DEIS validates the States’ concerns and makes clear that codification of M-37050 will exacerbate any such risks to migratory birds.³ The States therefore urge the Service to adopt Alternative B, which, by restoring and codifying the previous, correct interpretation, would avoid those risks and provide numerous other benefits to the States, their residents, society at large, and the natural environment and ecosystems on which they depend.

As the DEIS acknowledges, bird populations in North America are experiencing a historic collapse: between 1970 and 2017, the total number of birds

³ That is so even though FWS failed in the DEIS to fully evaluate the environmental impacts of M-37050 by, among other things, quantifying how specifically the Opinion has changed industry behavior since its issuance and what effect that changed behavior has had on industry efforts to employ best management practices to limit incidental take and associated adverse impacts on migratory birds. *See, e.g.,* States’ Comments on Proposed Rule, Exhibit F (Declaration of Gary G. Mowad) ¶¶ 23-46 (describing how, since the new interpretation took effect, hazardous conditions that would have previously been subject to enforcement actions have gone unchecked).

in North America declined by 3 billion, or 29%. DEIS at 22. As the DEIS further notes, “existing trends of habitat loss and the proliferation of anthropogenic hazards on the landscape are expected to continue and will adversely affect most migratory birds and the ecosystems that support them, in some cases contributing to population declines.” *Id.* at 59.

Mitigating these trends will require strengthening bird protections, not weakening them, which, as the FWS concedes, will be the result if it finalizes the Proposed Rule as written. Here, as the DEIS makes clear, only Alternative B would strengthen bird protections and thus further the MBTA’s animating purpose: whereas Alternative B “encourages or requires the use of best practices and thus could *decrease* the rate and severity at which anthropogenic effects negatively impact migratory birds,” the other two alternatives (Alternative A and the No Action Alternative) “have the potential to *increase* the rate and severity at which anthropogenic effects negatively affect migratory birds.” *Id.* (emphasis added). And, indeed, even that tacit acknowledgement itself does not go far enough, because it is virtually certain that those two alternatives will increase the rate and severity at which anthropogenic activities will negatively affect migratory birds. *See* States’ Comments on Proposed Rule, Exhibit F (Declaration of Gary G. Mowad) ¶¶ 23-46.

The FWS acknowledges in the DEIS that industry best practices are highly effective in reducing bird mortality. For example, the FWS notes that “[f]or oil pits, bird mortality can be virtually eliminated if netting is installed and maintained.” DEIS at 41. Likewise, for communications towers, changing to flashing lights and removing guy wires has been shown to reduce mortality by 70%. *Id.* The installation and maintenance of netting for oil pits and the implementation of measures to reduce bird mortality caused by communications towers, however, have not been undertaken merely out of good will. Instead, those actions have been spurred by the FWS’s longstanding prior interpretation that those activities—maintaining open oil pits and unmitigated communications’ towers—can give rise to liability under the MBTA. In addition, deterrence was not only ecologically beneficial but also economically beneficial because those practices are often easy and relatively cheap compared to the widespread adverse effects caused by the easily avoidable deaths of migratory birds. Moreover, the industry best practices incentivized by the FWS’s prior interpretation (Alternative B) also directly and indirectly benefit other natural resources.

Importantly, while Alternative B would likely increase the implementation of best practices, the other alternatives would likely *decrease* use of best practices and therefore increase bird mortality. *See, e.g., id.* at 8-9, 46. Specifically, the FWS finds in the DEIS that, under Alternative B, “[m]ore entities would likely implement best practices to avoid the threat of enforcement. Therefore, there is likely to be a decrease in bird mortality compared to the No Action Alternative.” *Id.* at 8. By contrast, the FWS finds in the DEIS that, under the No Action Alternative,

“as entities become more confident of the long-term application of M-37050, there will be a likely *reduction* in the number of best practices implemented.” *Id.* (emphasis added). Alternative A is even worse. According to the DEIS, if M-37050 were codified pursuant to Alternative A, even “fewer entities would likely implement best practices compared to the No Action Alternative, resulting in increased bird mortality.” *Id.*

Inconsistently, the FWS claims that “in an effort to mitigate the expected adverse impacts from” adoption of its preferred Alternative A, “the Service could expand and promote [its] continued work with appropriate stakeholders and industry to develop and promote best practices for mitigation of impacts to migratory birds.” DEIS at 49. As FWS recognizes, “NEPA . . . requires federal entities to assess potential mitigation of unavoidable adverse environmental impacts, which include analysis of project design or mitigation measures that reduce potential impacts to migratory birds.” DEIS at 15-16. In doing so, the FWS must assess “whether the proposed mitigation measures can be effective.” *South Fork Band Council of Western Shoshone of Nevada v. U.S. Dep’t of the Interior*, 588 F.3d 718, 727 (9th Cir. 2009); *see also High Sierra Hikers Ass’n v. U.S. Dep’t of Interior*, 848 F. Supp. 2d 1036, 1054 (N.D. Cal. 2012). Here, however, FWS includes no assessment of whether future efforts to promote the development of best management practices could actually mitigate the recognized harms associated with the adoption of the Service’s preferred alternative. *See* DEIS at 49. Indeed, it separately acknowledges, as noted above, that the adoption of its preferred alternative will do the opposite—“reduc[e] . . . the number of best practices implemented.” DEIS at 8. The FWS’s suggested mitigation is thus no mitigation at all. And, in any event, the FWS’s failure to reconcile these two assertions does not satisfy the FWS’s obligation to include “a reasonably complete mitigation discussion.” *South Fork*, 588 F.3d at 727.

The differences among these alternatives are not trivial. Indeed, the FWS finds in the DEIS that certain species “may decline to the point of requiring listing under the ESA” (*i.e.*, Endangered Species Act) as a result of the “likely negative effects” of the No Action Alternative or Alternative A. DEIS at 48, 52. By contrast, the FWS finds in the DEIS that, under Alternative B, “birds of conservation concern and other vulnerable bird species face likely *positive* effects,” and that “some may avoid declining to the point of requiring listing under the ESA compared to the No Action Alternative and Alternative A.” *Id.* at 55-56 (emphasis added). And, again, these acknowledged differences are made all the more meaningful by the fact that only one of those alternatives—Alternative B—represents a lawful interpretation of the MBTA. Unsurprisingly, it also furthers the MBTA’s core purpose of protecting migratory birds, not accelerating their decline.

The FWS further recognizes in the DEIS that enforcement actions under Alternative B would result in fines that “would benefit birds through habitat

protection and restoration.” *Id.* at 54. Between 2010 and 2018, enforcement actions generated more than \$100 million in such funding—on average, more than \$10 million per year. *Id.* at 18-19. These recoveries dwarfed the salary cost that the Service spent on enforcement efforts, which, in the five years from 2013 through 2017, was only \$2 million—on average, about \$400,000 per year. *Id.* at 56. The States and the migratory birds and other wildlife within their borders have benefitted from these actions as well. For example, as the States stated in their comments on the Proposed Rule, an enforcement action arising out of an oil spill in Buzzards Bay, Massachusetts in 2003 “resulted in the payment of a \$7 million fine . . . , which was used to protect and/or restore 1,773 acres of important coastal habitat in the Buzzards Bay watershed.” States’ Comments on Proposed Rule at 4. The dramatic change in policy reflected in Alternative A and the No Action Alternative would harm the States while also completely contradicting the FWS’s mission “to conserve, protect and enhance . . . wildlife . . . and their habitats for the continuing benefit of the American people . . . based on ecological principles, scientific knowledge of . . . wildlife, and sense of moral responsibility.” About the U.S. Fish and Wildlife Service, https://www.fws.gov/help/about_us.html (last visited July 19, 2020). In the DEIS, however, the FWS makes no effort to reconcile its wildlife-conservation-focused mission with its unlawfully truncated interpretation of the MBTA and the adverse consequences that that interpretation will sow if adopted.

Finally, Alternative B would provide great benefits to the States, their residents, society at large, and the natural environment and ecosystems on which they depend. The States own, hold in trust, and/or manage all game and wildlife within their borders, including migratory birds. *See* States’ Comments on Proposed Rule, Exhibit A (Complaint) ¶ 8; *id.*, Exhibit B (Decision Denying Motion to Dismiss) at 9. Thus, adoption of Alternative B would provide tremendous tangible and intangible benefits to the States as millions fewer birds would die under that alternative. As the FWS acknowledges in the DEIS, “[m]igratory birds provide tremendous value to society and ecosystems.” DEIS at 42. Indeed, “[t]he value from bird watching alone exceeds \$92 billion annually, not including the economic benefit provided by supporting over 782,000 jobs.” *Id.* In addition, while certain industries may enjoy cost savings for as long as M-37050 remains in place through acceptance of Alternative A or the No Action Alternative, the FWS also concedes in the DEIS that any such savings may be offset, at least in part, by the cost of complying with the patchwork of state regulations that could emerge as states, which are less well-positioned to provide protections for populations that freely move across state boundaries, act to fill the vacuum created by the federal government’s retreat from pursuing its mission to protect the nation’s migratory birds. *Id.* at 48. The FWS also notes in the DEIS that other industries dependent on ecosystem services, such as pollination and seed dispersal, would be harmed through the FWS’s maintenance of the No Action Alternative—and even more so, by codifying it as suggested in the FWS’s preferred Alternative A. *Id.* at 9. In any

event, whatever cost savings certain industries may enjoy as a result of eliminating potential liability for incidentally taking or killing migratory birds do not justify the significant and unacceptable risks to migratory birds or the harms to society at large.

III. Conclusion

In sum, the States strongly urge the Service to reject its preferred Alternative A, as well as the No Action Alternative, and instead adopt Alternative B, because it is the only alternative based on a legally sound interpretation of the Act, because it would avoid significant and unnecessary harm to migratory birds, and because it would further both the MBTA's core migratory-bird protection purpose and the FWS's mission. And, in all events, the Service must in the final EIS perform the probing analysis of the potential direct and indirect consequences of the proposed action, including a complete assessment of all reasonable alternatives, potential mitigation, and inadequacies raised by other commenters, that NEPA requires but the FWS has yet to conduct.

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Respectfully submitted,

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