

United States Senate
WASHINGTON, DC 20510

March 19, 2020

The Honorable David Bernhardt
Secretary
U.S. Department of the Interior
1849 C Street NW
Washington, D.C. 20240

Dear Secretary Bernhardt:

We are writing to express our serious concerns with the proposed rule on the Migratory Bird Treaty Act (MBTA) that would codify Solicitor's Opinion M-37050 to exempt bird deaths caused by incidental take. We strongly urge you to reconsider this proposed rule. We also have concerns about the short comment period that failed to give the public a meaningful opportunity to provide input on the likely devastating impacts of this proposed rule.

More than 100 years ago, the executive branch and the Congress of the United States made a commitment to migratory bird conservation. The signing of the migratory bird treaty with Canada in 1916, along with subsequent treaties with Mexico, Japan, and Russia, and the passage of the MBTA committed our nation to the task of protecting and conserving migratory birds for the benefit of the American people. Our country recognized that neither individual states, nor individual nations, could effectively conserve these migratory species on their own. The MBTA was a foundational achievement for the conservation movement, and it has underpinned successful migratory bird conservation in the century following its passage.

Thanks to the leadership of the U.S. Fish and Wildlife Service (FWS), the MBTA has helped catalyze efforts that have saved millions of birds from unnecessary and preventable harm by exercising the law's authority to address incidental take. For decades, both Republican and Democratic administrations have implemented the MBTA to minimize industrial hazards to birds. These efforts have led to the development and adoption of best management practices that have saved millions of waterfowl from oil waste pits, vast numbers of raptors from power line electrocutions, and more. When entities have failed to take reasonable measures to protect birds from foreseeable harm, or following negligent and reckless actions such as the Exxon Valdez and Deepwater Horizon oil spills, financial penalties under the MBTA have helped impacted species recover by directing these resources to the North American Wetlands Conservation Act program.

New scientific studies make it clear that these longstanding efforts to protect migratory birds must continue. These reports illustrate that our nation's bird populations are in trouble and face a dire future. A 2019 report published in *Science* found that North America's bird populations

have declined by three billion birds since 1970, which represents a 29% decline.¹ These declines are prevalent across nearly all species, including beloved and iconic backyard birds. Additionally, birds face significant threats from climate change in the years and decades to come. A report from the National Audubon Society found that two-thirds of North America's birds are threatened by climate change.² These ongoing and impending threats require that the FWS and conservation partners redouble efforts to protect and conserve birds, yet the Department of the Interior's 2017 legal opinion on incidental take and this proposed rule represent the most significant rollback of migratory bird protections in our nation's history.

The stakes of the proposed rule are considerable, and like the legal opinion, it will have a significant detrimental impact on migratory birds. Birds provide tremendous value to our communities. Congress and the executive branch understood this fact a century ago when it signed the 1916 treaty and passed the MBTA, even in the midst of World War I. Birds provide significant recreational opportunities for our constituents, including for millions of birdwatchers and sportsmen, improving the quality of life in our states and contributing to our economy. According to the FWS, birdwatching supports a total economic output of \$107 billion and creates more than 600,000 jobs, and hunting provides an additional \$7.6 billion in economic output and supports 69,000 jobs.³ Congress also recognized that birds benefit American agriculture and forestry through the consumption of vast numbers of insect pests.⁴ This fact remains true today, and takes on new importance with the spread of invasive species and outbreaks

We believe that the proposed rule contravenes the text and purpose of the MBTA and fails to align with the purpose of our migratory bird treaties and our international obligations. Numerous stakeholders have deep concerns about this change in longstanding policy. Three Flyway Councils, which represent states and provinces on migratory bird management, along with 17 former senior Interior officials from every Republican and Democratic administration since the 1970s, asked the Department of the Interior to suspend the legal opinion and convene a broad group of stakeholders to find a consensus path forward.⁵ We are concerned that the Department ignored their requests and instead doubled down on this policy.

The proposed rule will undermine decades of conservation work by the FWS and partners, and the significant amount of resources from federal, state, and non-governmental organizations that have been directed to bird conservation. The rule also presents a false choice between regulatory certainty and implementing the MBTA. The FWS has struck a careful balance over the decades in applying the law, and also has the authority to chart a new path forward through rulemaking

¹ <https://science.sciencemag.org/content/366/6461/120.abstract>

² <https://www.audubon.org/climate/survivalbydegrees>

³ <file:///C:/Users/KB49898/Downloads/FWS-HQ-MB-2018-0090-0173.pdf>

⁴ <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.458.482&rep=rep1&type=pdf>

⁵ Central Flyway Council, letter to Sec. Zinke, 27 March 2018. Mississippi Flyway Council, letter to Sec. Zinke, 5 April 2018. Atlantic Flyway Council, letter to Sec. Zinke, 27 September 2018. Former officials letter to Sec. Zinke, 10 January 2018.

that could meet the needs of birds and provide additional regulatory certainty through an incidental take authorization framework, yet the administration decided to withdraw the rulemaking that considered this approach.

Finally, we have concerns that the comment period on the proposed rule is closing at the same time as the scoping process for the National Environmental Policy Act, and the comment period simply did not provide enough time for the public to weigh in on this rule.

We are at a turning point for migratory bird conservation. Ongoing declines and serious threats on the horizon demand leadership to address the significant challenges ahead. Maintaining longstanding MBTA protections is the minimum of what is required to meet this challenge; yet removing them will be disastrous. We urge you to reverse course and carry out your responsibility to protect our nation's birds on behalf of the American people.

Sincerely,


United States Senator


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