

**Public Access to Federal Information Relevant to
Incidental Take under the Migratory Bird Treaty Act
is Insufficient
for Engagement in Rulemaking and for the Public Record**

Environmental Data and Governance Initiative's Comment on the
Fish and Wildlife Service (FWS) Proposed Rule:
Migratory Bird Permits; Regulations Governing Take of Migratory Birds
(Docket No. FWS-HQ-MB-2018-0090)

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The Environmental Data and Governance Initiative (EDGI) welcomes the opportunity to comment on the U.S. Fish and Wildlife Service (FWS) Proposed Rule: Migratory Bird Permits; Regulations Governing Take of Migratory Birds (Docket No. FWS-HQ-MB-2018-0090)

I. INTRODUCTION

The Environmental Data and Governance Initiative's (EDGI's) comments on this proceeding address removals, omissions, and revisions of Migratory Bird Treaty Act (MBTA) resources, including those related to incidental take, that constrain the public's ability to effectively participate in the rulemaking process. These resource removals also constitute an abandonment of DOI's responsibility to maintain and preserve the regulatory public record. We focus on two categories of these removals, omissions, and revisions: a) the lack of information for and the removals of online Migratory Bird Treaty Act resources on the U.S. Fish and Wildlife Service's (FWS) websites and b) incomplete and selective information in the proposed rule document (Docket No. FWS-HQ-MB-2018-0090) itself.

The Federal Register Notice for this proceeding highlights six topic areas that FWS is seeking information about from the public. The informational webinars regarding the proposed rule held by the DOI in March 2020 identified additional topics for which they were seeking specific information. This comment addresses "information regarding resources that may be impacted by the proposal."

Importance of DOI and FWS website access related to the MBTA and Incidental Take

The U.S. Fish and Wildlife Service (FWS) website is the primary federal source of information to the public regarding the MBTA, and as such is crucial to the public's ability to knowledgeably comment on this proposed rule to revise the MBTA. However, actions taken by FWS and the Department of the Interior (DOI), which oversees it, have curtailed public information related to the MBTA, its history, and provisions. Our public comment highlights website changes that include removal of the DOI's record of Solicitor Opinions regarding incidental take activities under the MBTA addressed under this proposed rule, as well as reduced access to broader MBTA resources on the FWS websites that constrain the ability of stakeholders to stay abreast of iMBTA resources. Access to these resources should continue to be a priority for effective public participation in support of the ongoing responsibilities of FWS to fulfill its mission of "working with others, to conserve, protect and

enhance fish, wildlife, and plants and their habitats for the continuing benefit of the American people.”¹

Website changes referenced in these comments are detailed in EDGI’s Report “AAR-8: Removals of Access to Migratory Bird Treaty Act and Incidental Take Resources on the DOI’s U.S. Fish and Wildlife Service Website”, dated September 25, 2018.²

Importance of presentation of information in the proposed rule

Along with public information on agency websites, information provided in Notices of Rulemaking themselves is essential for the public to understand the exact issue at hand and learn about the environmental, regulatory, and legal context and potential impacts. The notices are often the most comprehensive documents directly relevant to the proposed rule and its purpose that the public can access. The proposed rule for Regulations Governing Take of Migratory Birds unfortunately presents the public with incomplete information that skews the history and legal record of the MBTA including considerations of incidental take. There are significant omissions, such as potential impacts of the proposed regulation or information about possible alternative avenues for creating more regulatory certainty, something that FWS explored for three years in developing an environmental impact statement for this topic. The presentation of case law related to the MBTA is notably inadequate, including several instances of discussing dissenting opinions without discussion of the actual record. Additionally, several arguments presented in the notice use faulty analogies that, in effect, stack the deck in support of codifying DOI Solicitor Opinion M-37050. In sum, the information provided to the public in this proposed rule is both insufficient and misleading.

II. LACK OF ACCESS TO ONLINE MBTA AND INCIDENTAL TAKE INFORMATION HINDERS PUBLIC PARTICIPATION IN RULEMAKING

Lack of information on FWS website about incidental take in relation to migratory birds

¹ “About Us,” U.S. Fish and Wildlife Service, Last modified February 10, 2020, https://www.fws.gov/help/about_us.html.

² Environmental Data and Governance Initiative. *Removals of Access to Migratory Bird Treaty Act and Incidental Take Resources on the DOI’s U.S. Fish and Wildlife Service Website*, September 25, 2018, <https://envirodatagov.org/aar-8-fws-migratory-bird-treaty-act-180925>.

Federal websites are the primary means by which the public receives information from agencies,³ but the FWS website currently lacks information to support the public's understanding and ability to assess this proposed rule. Using the FWS website search function, searches for "migratory bird" and "Migratory Bird Treaty" do not bring up resources that address incidental take. In fact, the only FWS webpages linked on the top page of search results under FWS.gov to even mention incidental take are this proposed rule and the press release announcing the proposed rule. A search for "incidental take" on the FWS website yielded only results related to the Endangered Species Act (ESA) and the Marine Mammal Protection Act (MMPA), without mention of incidental take as it relates to the MBTA. As such, the FWS website lacks pertinent baseline information for the public to engage in this important component of the democratic process of environmental decision-making.

The availability of relevant informational resources on a federal agency's website should be a core requirement for a rulemaking to proceed under its aegis. In this case, the FWS has not only dropped the ball, but appears to have subverted the process by removing resources addressing incidental take and the MBTA that had been available on its website just two years prior. As we detail below, the removal of these resources and their continued cloistering following DOI Solicitor Opinion M-37050 in advance of and during this public comment period undermine the public's ability to participate as well as FWS's authenticity in requesting input.

Overview of removed resources

Observable changes to the DOI and FWS websites related to the MBTA and incidental take were implemented soon after the current administration took office.

On February 6, 2017, the DOI removed the 30-page DOI Solicitor's Opinion Memorandum M-37041, dated January 10, 2017, that supported continued incidental take prohibitions in the MBTA from the DOI "Solicitor Opinions" page and replaced the memorandum with a one-page suspension memo.⁴ On December 22, 2017, the DOI issued and posted Memorandum M-37050, an opinion that incidental take provisions do not apply to the MBTA and that serves as the reference for this proceeding.

³ Office of Management and Budget, "Policies for Federal Agency Public Websites and Digital Services," Memorandum M-17-06, November 8, 2016.

⁴ "Solicitor's Opinions," U.S. Department of Interior, Accessed March 8, 2020, <https://www.doi.gov/solicitor/opinions>.

Beginning in late December 2017, two webpages within the FWS.gov domain, titled “Energy Development Laws and Policies”⁵ and “Conservation Planning,”⁶ were altered to remove links to the “Migratory Bird Treaty Act” webpage. A third page, titled “Energy Project Review,”⁷ was altered to remove a link to another MBTA webpage.

A section of the FWS website, titled “Birds,” was altered to remove a webpage on incidental take and the associated links in the section’s menu that linked to the page. The removed page was titled, “Incidental Take: Migratory Bird Program Provides Voluntary Guidance to Help Project Proponents Reduce Incidental Take.”⁸

FWS also removed access to all content, images and links on the birdregs.org website--referenced in the webpage footer as a “public involvement initiative” of FWS and in the header as “An open public conversation about the incidental take of migratory birds;” the birdregs.org website was subsequently removed.

While information on the Migratory Bird Treaty Act and on incidental take still exists on the FWS website, access to them has been reduced. Access to information about incidental take, specifically of migratory birds, and to measures to protect migratory birds from hazards that result in incidental take, appear to have been removed entirely from FWS domains.

Removal of DOI Solicitor Opinion M-37041 related to Incidental Take

On January 10, 2017, in the final days of the Obama Administration, the DOI Solicitor released Memorandum M-37041⁹ detailing “... the Department of the Interior’s legal analysis supporting FWS’s long-standing interpretation that the MBTA prohibits incidental take.” Memorandum M-37041, along with three other Solicitor Opinions, was suspended and temporarily withdrawn by the Acting

⁵ “Permits, Policies, and Authorities,” U.S. Fish and Wildlife Service, Last modified May 23, 2019, <https://www.fws.gov/ecological-services/energy-development/laws-policies.html>.

⁶ “Conservation Planning,” U.S. Fish and Wildlife Service, Last modified July 27, 2018, <https://www.fws.gov/ecological-services/habitat-conservation/cp.html>.

⁷ “Energy Project Review” U.S. Fish and Wildlife Service, Last modified May 23, 2019, <https://www.fws.gov/ecological-services/energy-development/energy-project-review.html>.

⁸ A version archived by the Internet Archive Wayback Machine can be found at <https://web.archive.org/web/20171228224533/https://www.fws.gov/birds/policies-and-regulations/incidental-take.php>. Accessed March 19, 2020.

⁹ “M-37041,” U.S. Department of Interior, Accessed March 8, 2020, <https://www.doi.gov/sites/doi.gov/files/uploads/m-37041.pdf>.

Secretary of the Interior on February 6, 2017, pending review by agency officials.¹⁰ From February 6, 2017 to the date of this public comment, the “DOI Solicitor’s Opinions” webpage¹¹ includes only the brief suspension memo under its M-37041 listing, not the M-37041 Opinion itself. While a copy of the Opinion is still available via the URL <https://www.doi.gov/sites/doi.gov/files/uploads/m-37041.pdf>, a user without the URL in hand would be unable to access the historical document, and would be unable to access it by navigating through the DOI website.

On December 22, 2017, the DOI Solicitor’s office released Memorandum M-37050, titled “The Migratory Bird Treaty Act Does Not Prohibit Incidental Take.”¹² This Opinion reversed the conclusion of the January 2017 memo, stating that the Migratory Bird Treaty Act only prohibits those activities that “have as their purpose the taking or killing of migratory birds, their nests, or their eggs,” and serves as the reference for this proposed rule. M-37050 includes a statement on p. 1 that “this memorandum permanently withdraws and replaces Opinion M-37041.”

The removal of the full M-37041 Opinion from the DOI Solicitor Opinion website is on a continuum with other EDGI findings related to the MBTA and incidental take and the reduction in public access to information germane to this Notice of Rule proceeding. It also represents a breathtaking example of a sweeping under the rug of the official record.

Removal of incidental take information from FWS webpages

EDGI’s MBTA Report¹³ highlights several other examples of reduced federal website access to incidental take. Between December 28, 2017 and March 28, 2018, the FWS removed in its entirety the “Incidental Take” webpage subtitled “Migratory Bird Program Provides Voluntary Guidance to Help Project Proponents Reduce Incidental Take”¹⁴ from its FWS Birds website <https://www.fws.gov/birds/>. This appears to have been the only webpage on the FWS website dedicated specifically

¹⁰ “Temporary Suspension of Certain Solicitor M-Opinions Pending Review,” U.S. Department of Interior, Accessed March 8, 2020, https://www.doi.gov/sites/doi.gov/files/uploads/temp_suspension_20170206.pdf.

¹¹ “Solicitor’s Opinions,” U.S. Department of Interior, Accessed March 8, 2020, <https://www.doi.gov/solicitor/opinions>.

¹² “M- 37050,” U.S. Department of Interior, Accessed March 8, 2020, <https://www.doi.gov/sites/doi.gov/files/uploads/m-37050.pdf>.

¹³ Environmental Data and Governance Initiative. *Removals of Access to Migratory Bird Treaty Act and Incidental Take Resources on the DOI’s U.S. Fish and Wildlife Service Website*, September 25, 2018, <https://envirodatagov.org/aar-8-fws-migratory-bird-treaty-act-180925>.

¹⁴ “Incidental Take,” U.S. Fish and Wildlife Service, Accessed March 8, 2020, <https://www.fws.gov/birds/policies-and-regulations/incidental-take.php>.

to the incidental take of migratory birds, and from this page, viewers were able to navigate to several other pages with more specific information about threats to migratory birds. Menu text and menu links related to incidental take were also removed from the FWS “Management” and “Procedures/Policies” menus, further reducing navigation to such resources.

During the same time period, the FWS also removed all content, links, and images on the BirdRegs.org webpage¹⁵ described as “An open public conversation about the incidental take of migratory birds.” The Birdregs.org website subsequently was rendered unavailable.¹⁶ Before access was removed, the Birdregs.org website had preserved the conversations and processes that the previous administration had undertaken to develop Opinion M-37041 on the incidental take of migratory birds. The website and its structure demonstrate that the previous administration valued the importance of online resources, and how those online resources can encourage the public input in the rulemaking process. The current administration has failed to preserve this historical information and, by doing so, has undermined the public’s right to access and learn about previous conversations on incidental take.

Removal of MBTA Resources from FWS webpages

Between February 26, 2018 and February 28, 2018, the FWS removed text and links to information on the Migratory Bird Treaty Act from three FWS Ecological Services website pages: a) one listing Energy Development “Permits, Policies, and Authorities” administered by the FWS,¹⁷ b) a second page on “Energy Project Review,”¹⁸ and c) a third page listing the authorities under which FWS biologists carry out conservation planning work.¹⁹

The removed links to MBTA information from these websites underscore the actions taken by the current administration to hide the historical precedent set by previous administrations regarding protections for migratory birds. On the FWS “Permits, Policies, and Authorities” page, the removed link to MBTA information was previously featured alongside links to information on the Endangered Species Act,

¹⁵ U.S. Fish and Wildlife Service, Accessed March 8, 2020, <http://birdregs.org>.

¹⁶ Whois data indicates that FWS ownership of the birdregs.org domain has lapsed and the domain may have been purchased by another entity. Users visiting the URL will see a temporary GoDaddy page.

¹⁷ “Permits, Policies, and Authorities,” U.S. Fish and Wildlife Service, Last modified May 23, 2019, <https://www.fws.gov/ecological-services/energy-development/laws-policies.html>.

¹⁸ “Energy Project Review,” U.S. Fish and Wildlife Service, Last modified May 23, 2019, <https://www.fws.gov/ecological-services/energy-development/energy-project-review.html>.

¹⁹ “Conservation Planning,” U.S. Fish and Wildlife Service, Last modified July 27, 2018, <https://www.fws.gov/ecological-services/habitat-conservation/cp.html>.

the Bald and Golden Eagle Protection Act (Eagle Act), and the Fish and Wildlife Coordination Act (FWCA) under text that stated, “Many species that may be affected by energy production receive protection under the following federal laws, which are administered by the U.S. Fish and Wildlife Service (Service).” The MBTA link was singled out from the list and was the only link removed.

The removal of MBTA information was also evident on a second page concerning energy production, titled “Energy Project Review,” in which descriptions can be found regarding the ways that FWS biologists provide expertise to “avoid and minimize impacts to wildlife and their habitats” and to review proposed energy projects. The page was altered to remove the text “under the Migratory Bird Treaty Act (MBTA)” from the phrase “service biologists may provide information on migratory birds and impacts to their habitats under the Migratory Bird Treaty Act (MBTA).” The removed “Migratory Bird Treaty Act (MBTA)” text, in turn, linked to a page providing the official text of the Act. Further, the page was altered to remove text that stated, “The Service has signed memorandums of understanding with several agencies including the Bureau of Land Management, the National Marine Fisheries Service and FERC addressing the responsibilities of federal agencies to protect migratory birds under the MBTA.”

A third page, titled “Conservation Planning,” removed text and a link regarding the MBTA from a list of authorities under which FWS biologists carry out conservation planning work. The MBTA link was previously listed alongside authorities such as the Bald and Golden Eagle Protection Act (Eagle Act) and the Fish and Wildlife Coordination Act (FWCA); however, similar to the alteration made on the “Permits, Policies, and Authorities” page, the text and link for the MBTA was singled out from the list and was the only link removed.

III. INCOMPLETE AND SELECTIVE INFORMATION IN PROPOSED RULE SYSTEMATICALLY SKEWS THE PUBLIC RECORD

Omission of information about impacts

The proposed rule would codify the Solicitor Opinion M-37050, which reversed the longstanding MBTA interpretation with regard to the prohibition of incidental take. Striking the prohibition of incidental take would undoubtedly have impacts on migratory birds and ecosystems that support them. However, those impacts are not discussed in this proposed rule, and are barely alluded to as the FWS anticipates “that some entities that currently employ mitigation measures to reduce

or eliminate incidental migratory bird take would reduce or curtail these activities.”

²⁰ The proposed rule states that FWS intends to comply with the National Environmental Policy Act (NEPA) and publicize its environmental analysis prior to finalizing the proposed rule,²¹ but currently offers nothing that would help the public understand the scale of impacts. This is a substantial departure from the types of information we have seen included in most proposed rules related to the environment.

The FWS does have relevant information in hand regarding the likely impacts of this proposed rule, as it had been preparing a Programmatic Environmental Impact Statement (PEIS) for the development of a permitting program to regulate incidental take of migratory birds beginning in 2015.²² That work was underway for three years, until FWS released a notice that it would not complete that work due to the issuance of the M-37050 Opinion.²³ However, aside from a single brief reference to the PEIS regarding the estimated percentage of species covered in the MBTA that are also endangered, there is no discussion of the findings of the PEIS or presentation of that piece of regulatory history in this notice. Interestingly, an official FWS webinar held to explain the proposed rule²⁴ presented three alternatives for public comment that address the purpose and need for taking action and that will be reflected in the related EIS this year, including development of a permit program similar to that under the 2015 proposed rule. The decision by FWS to not include substantive information in this proposed rule about the earlier PEIS is an example of overt omission of relevant information. The public was well-served by the inclusion of the three action alternatives in the DOI webinar presentations relating to this proceeding. Their omission from the proposed rule

²⁰ Fish and Wildlife Service, Department of Interior, *Regulations Governing Take of Migratory Birds*, pp 5923, <https://www.federalregister.gov/documents/2020/02/03/2020-01771/regulations-governing-take-of-migratory-birds>, accessed March 18, 2020.

²¹ Fish and Wildlife Service, Department of Interior, *Regulations Governing Take of Migratory Birds*, pp 5926, <https://www.federalregister.gov/documents/2020/02/03/2020-01771/regulations-governing-take-of-migratory-birds>, accessed March 18, 2020.

²² Fish and Wildlife Service, Department of Interior, *Migratory Bird Permits; Programmatic Environmental Impact Statement*, <https://www.federalregister.gov/documents/2015/05/26/2015-12666/migratory-bird-permits-programmatic-environmental-impact-statement>, accessed March 18, 2020.

²³ Fish and Wildlife Service, Department of Interior, *Migratory Bird Permits; Programmatic Environmental Impact Statement*, <https://www.federalregister.gov/documents/2018/05/24/2018-11147/migratory-bird-permits-programmatic-environmental-impact-statement>, accessed March 18, 2020.

²⁴ FWS Webinar 3, <https://www.youtube.com/watch?v=CB4hc9swPHQ&feature=youtu.be>. Attended March 4, 2020.

itself raises serious questions about inattention to or intended suppression of key information needed for informed public response.

Biased selection of court cases and other information

The legal precedent presented in the proposed rule is incomplete with biased selection. Among the most notable examples is the frequent inclusion of quotes and perspectives cases' dissenting opinions (especially Antonin Scalia's dissenting opinion of *Sweet Home*, 515 U.S.) without discussion of the majority or concurring opinions and therein the actual case law precedent.

The primary case FWS cites in this proposed rule to support its proposed interpretation of take as only applying to actions intended to kill birds is the 2015 case *United States vs Citgo Petroleum Company*.²⁵ While the merits of that case are not within the scope of this discussion, FWS omits a critical acknowledgement in that court opinion that is directly relevant to the proposed rule. The Texas appeals court judge wrote, "The scope of liability under the government's preferred interpretation is hard to overstate."²⁶ Throughout this proposed rule, FWS declines to acknowledge or inform the public that, prior to the issuance of M-37050, the government's preferred interpretation of the MBTA for 100 years was that incidental take is strictly illegal. FWS briefly mentions that the previous Solicitor Opinion, M-37041, had interpreted the MBTA (specifically 16 U.S. §703) to be a strict liability provision, such that no criminal intent was required for a violation to have occurred,²⁷ but fails to address that this was aligned with and reinforced a century of precedent.

In addition to a biased presentation of legal precedent, FWS presents other critical framing information in predisposed ways. For example, it asserts that oil drilling and wind farms are "*common activities*"²⁸ that would inherently become criminalized with the concept of incidental take. However, FWS fails to address the known precautionary measures, for which there is ample scientific evidence, that mitigate risks to migratory birds such that these operations would not risk criminal activity. Similar to its omissions regarding likely impacts in this proposed rule, FWS also fails to discuss the existing, widely implemented, evidence-based practices that

²⁵ *United States v. Citgo Petroleum Corp.*, 801 F.3d 477 (5th Cir. 2015)

²⁶ *Id.*, pp 493.

²⁷ Fish and Wildlife Service, Department of Interior, *Regulations Governing Take of Migratory Birds*, pp 5917,

<https://www.federalregister.gov/documents/2020/02/03/2020-01771/regulations-governing-take-of-migratory-birds>, accessed March 18, 2020.

²⁸ *Id.*, pp 5922, emphasis added.

companies use to minimize risks to birds and other species. By ignoring this information, FWS presents the reinterpretation of MBTA as necessary, rather than referring to decades of precedent requiring harm reduction measures of companies to be implemented.

The proposed rule also reflects no DOI or FWS response to the outcry against Solicitor Opinion M-37050, not only from the public, but also from current and former agency officials and state attorneys general. Less than three weeks after M-37050 was issued in December, 2017, 17 former DOI and FWS agency leaders appointed under both Republican and Democratic administrations, sent an official letter to Secretary Zinke denouncing the Opinion.²⁹ They stated the new Opinion was a “contrived legal standard that creates a huge loophole in the MBTA” and “needlessly undermines a history of great progress, undermines the effectiveness of the migratory bird treaties, and diminishes U.S. leadership.” Legal action was taken against the DOI Opinion, as well, with eight state attorneys general filing a lawsuit to reverse the “arbitrary, capricious, and unlawful” Opinion.³⁰ Also important to mention is the current piece of legislation originating in the House of Representatives, H.R. 5552, “To amend the Migratory Bird Treaty Act to affirm that the Migratory Bird Treaty Act’s prohibition on the unauthorized take or killing of migratory birds includes incidental take by commercial activities, and to direct the United States Fish and Wildlife Service to regulate such incidental take, and for other purposes.”³¹ It is noteworthy that these challenges come from sources with a thorough understanding of the MBTA, incidental take and its broad implications that have been ignored in this proceeding. The disregard of these well-founded responses to Opinion M-37050 is unfortunately consistent with the removals and omissions highlighted throughout this comment, and brings into question the integrity of the rulemaking proceeding at hand.

Use of flawed arguments

FWS applies several flawed arguments to support this proposed rule, many reflecting those in the M-37050 opinion itself. Here, we discuss three particular instances that this proposed rule leans on heavily.

²⁹ The letter is available at <https://defenders.org/sites/default/files/publications/mbta-zinke.pdf>. Accessed March 19, 2020.

³⁰ The lawsuit is described and available at <https://ag.ny.gov/press-release/2018/ag-underwood-leads-suit-against-trump-administration-abandoning-longstanding>. Accessed March 19, 2020.

³¹ HR 5552, <https://www.congress.gov/116/bills/hr5552/BILLS-116hr5552ih.pdf>, accessed on March 19, 2020.

First, FWS presents the reasoning of *noscitur a sociis* to the verbs listed in the MBTA, pursue, hunt, take, capture, and kill.³² FWS asserts that the logical following is that, because direct, intentional actions are necessary to “pursue” and “hunt,” the remaining verbs must also be the consequence of direct, intentional actions. However, “take,” “capture,” and “kill,” can all happen as the result of unintentional actions. For example, you may set a bear trap and unintentionally capture a doe. You may attempt to shoot a deer, but slip and fire at another hunter, and be guilty of manslaughter--unintentional killing. There are, of course, myriad examples of ways in which someone may “take” something unintentionally as well. Another possible way of interpreting the connection among “pursue, hunt, take, capture, kills” is that they all do harm, whether intentional or unintentional. The logic FWS uses to insist that the intentionality of “pursue” and “hunt” necessitates intentionality in “take,” “capture,” and “kill” is both a fallacy of composition, or, assuming the properties of a piece must be properties of the whole, and a fallacy of omission, as FWS fails to consider any other relationships among the five verbs.

Second, FWS appeals to a lack of evidence with its argument that the inclusion of the terms “harm,” “harass,” and “wound” to further define “take” in the 1973 Endangered Species Act³³ necessitates that their absence in the 1918 Migratory Bird Treaty Act is meaningful. Far from FWS’s bold assertion (which referenced only a dissenting opinion as its legal support) that the “ultimate conclusion that Congress's decision to define “take” in the ESA obviated the need to divine its common-law meaning is inapplicable here,”³⁴ the absence of those terms to further define “take” in a law written 55 years prior to the ESA cannot be held as evidence that the vague word “take” should be narrowly defined to exclude considerations of those elements. Similarly, FWS’s pronouncement that “Subsequent legislative history does not undermine a limited interpretation of the MBTA, as enacted in 1918,”³⁵ is a blanket statement allowing for a sweeping dismissal of congressional, and indirectly, regulatory precedent for interpreting and applying this law. In addition to disregarding 100 years of interpretation and application, this strict textual approach to interpretation fails to acknowledge the broad clauses that are included in the MBTA, such as “it shall be unlawful at any time, by any means or in any manner,” and using the verbs “take” and “kill,” that could reasonably be applied to emerging

³² Id, pp 5916.

³³ 16 U.S. Code §1532 (19).

³⁴ Fish and Wildlife Service, Department of Interior, *Regulations Governing Take of Migratory Birds*, pp 5917,

<https://www.federalregister.gov/documents/2020/02/03/2020-01771/regulations-governing-take-of-migratory-birds>, accessed March 18, 2020.

³⁵ Id, pp 5919.

threats. The threats to migratory birds that existed in 1918 pale in comparison to those that exist today: in 1918 oil spills weren't common, wastewater pools from hydraulic fracturing didn't exist, power lines were still rare, and glass skyscrapers and towers didn't exist. Attempting to interpret the MBTA more narrowly than ever before assumes evidence of absence by the absence of evidence and abandons the FWS's stated mission to "conserve, protect, and enhance"³⁶ wildlife.

Third, the FWS presents this proposed rule as the sole avenue to create regulatory certainty for industries and American citizens with regards to prosecution under the MBTA. This is a clear fallacy of omission. In 2015, FWS approached this issue by proposing to develop a permit system³⁷ for industries whose actions often result in accidental killing of birds. The three years' worth of FWS work developing a programmatic environmental impact statement were not acknowledged in this proposed rule, and the very idea of a permit system was readily dismissed due to the absence of current regulations creating a permit system.³⁸ The irony is that this proposed rule could be a proposed rule to create a permit system. While it is true that there is currently a "convoluted patchwork of legal standards"³⁹ applying the MBTA, the failure in logic here is to assert that decriminalizing incidental take is the only way to achieve a solution to that legal problem.

Perhaps even more unsettling than the logical fallacies that underlie the proposed rule is the fact that we are in a Catch-22 with regards to the outcome: if there is sufficient support for the rule or FWS decides to promulgate the rule despite public dissent, then Solicitor Opinion M-37050 will be codified. If public dissent is strong enough that FWS cannot move forward with the proposed rule, then Solicitor Opinion M-37050 still governs the agency's approach to the Migratory Bird Treaty Act and is effectively still the law of the land. The issuance of M-37050 already has had far-reaching implications, including the shuttering and cloistering of three

³⁶ "About Us," U.S. Fish and Wildlife Service, Last modified February 10, 2020, https://www.fws.gov/help/about_us.html.

³⁷ Fish and Wildlife Service, Department of Interior, *Migratory Bird Permits; Programmatic Environmental Impact Statement*, <https://www.federalregister.gov/documents/2015/05/26/2015-12666/migratory-bird-permits-programmatic-environmental-impact-statement>, accessed March 18, 2020.

³⁸ Fish and Wildlife Service, Department of Interior, *Regulations Governing Take of Migratory Birds*, pp 5922, <https://www.federalregister.gov/documents/2020/02/03/2020-01771/regulations-governing-take-of-migratory-birds>, accessed March 18, 2020.

³⁹ Fish and Wildlife Service, Department of Interior, *Regulations Governing Take of Migratory Birds*, pp 5923, <https://www.federalregister.gov/documents/2020/02/03/2020-01771/regulations-governing-take-of-migratory-birds>, accessed March 18, 2020.

years' of tax-payer-funded preparation of a programmatic environmental impact statement for another avenue toward more regulatory certainty with regards to incidental take. With either of these two outcomes for this proposed rule, protections for migratory birds have been stripped, and the public has been effectively excluded from the environmental decision-making under the illusion of inclusion. This illusion, along with the illusion of adequate information on FWS and DOI websites, undermine the spirit of the National Environmental Policy Act and our democratic environmental governance.

IV. CONCLUSION

Accessible online information is essential for meaningful public commentary and for responsible website governance by the DOI and FWS

The proposed rule regarding the take of migratory birds under the MBTA would reverse more than a half-century of federal policy that held industry and companies liable for irresponsible actions resulting in preventable (if unintentional) bird deaths. Promoting transparency and public participation extends beyond the logistics of the rulemaking process to include access to information and data. The removal and reduced access to MBTA and incidental take information on FWS websites does special harm to the public's ability to understand the feasibility of MBTA implementation options and assess the impacts of such options on wildlife conservation.

Wherever this proceeding and proposed rule leads, historic interpretation and application of incidental take provisions under the MBTA should be a matter of public record. In this regard, we urge the DOI and FWS to uphold the integrity of the notice-and-comment rulemaking process by restoring access to resources relevant to the MBTA, including its incidental take provisions and historical interpretations.

Information within the proposed rule is both insufficient and misleading about the history and legal record of the MBTA

FWS builds a case for the necessity of the proposed rule in its Notice of Rulemaking, but does so by omitting substantial relevant information, including a biased selection of legal precedent, and utilizing flawed arguments. For example, FWS fails to provide information about potential impacts of this proposed rule, and does not acknowledge the information yielded from, or alternative actions conceived in its three years of study to develop a programmatic environmental impact statement

providing for a permit program to regulate incidental take of migratory birds, which was abruptly halted due to the issuance of Opinion M-37050. The proposed rule also leans heavily on dissenting opinions, and specifically one dissenting opinion from a 1995 case, to support its narrow interpretation of the term “take,” and neglects to discuss the majority opinion and actual legal precedent emergent from that case. FWS further utilizes omissions for its analyses, creating inherently flawed arguments. For example, FWS fails to acknowledge commonalities among the terms “pursue,” “hunt,” “take,” “capture,” and “kill” beyond the intentionality inherent to “pursue” and “hunt,” and then asserts that the other three terms must follow intentionality as well. These obvious omissions of relevant information and options are disingenuous to the democratic process this public comment period embodies.

We urge FWS to produce for the public a more complete and neutral account of the legislative, legal, and agency implementation history of the MBTA, the impacts resulting from those actions, and the potential impacts of severely curtailing the protections of the MBTA.