



**Legal Certainty and Certain Death:
FWS DEIS sacrifices migratory birds for regulatory relief**

Environmental Data and Governance Initiative's Comment on the
Fish and Wildlife Service (FWS) Draft Environmental Impact Statement:
Regulations Governing Take of Migratory Birds (Docket No. FWS-HQ-MB-2018-0090-8411)

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Introduction

The Environmental Data and Governance Initiative (EDGI) is a multi-disciplinary collective that documents and analyzes changes to federal environmental governance in the US. Our comments regarding the Regulations Governing Take of Migratory Birds Draft Environmental Impact Statement (FWS-HQ-MB-2018-0090-8411) address the dissonance between the anticipated impacts of the proposed alternatives and the US Fish and Wildlife Service's (FWS) assignment of Alternative A--codifying the M-37050¹ interpretation that the Migratory Bird Treaty Act (MBTA) does not prohibit incidental take--as the agency's proposed action. We urge the agency to instead promulgate Alternative B, rescinding M-37050 and codifying the long-standing interpretation represented in M-37041² that the MBTA prohibits incidental take, and then pursuing a permit structure to better regulate incidental take. We also urge the agency to make informational resources regarding migratory birds and incidental take publicly accessible through the FWS website and restore previously removed resources to better inform the public about this crucial issue.

The FWS DEIS describes three alternative actions to take in order to provide more regulatory certainty regarding incidental take. The three alternatives include:

- No Action Alternative: FWS will abide by the 2017 DOI Solicitor Opinion M-37050 which interprets the MBTA to allow incidental take, and thus FWS will not pursue enforcement actions against incidental take.
- Alternative A: FWS will codify M-37050 to specify that the MBTA does not prohibit incidental take, and thus FWS will not pursue enforcement actions against incidental take.
- Alternative B: FWS will codify the previous DOI Solicitor Opinion M-37041 which interprets the MBTA to prohibit incidental take, and thus FWS will pursue enforcement actions against incidental take using agency discretion.

The only logical alternative is B: to codify M-Opinion 37041

Center the mission of FWS in this decision

An organization's mission and values should underpin the development of its policies. The stated mission of FWS is to "work with others to conserve, protect, and enhance fish, wildlife, and plants and their habitats for the continuing benefit of the American people."³ If FWS' actions were to support its mission, then in the present case, the agency would be impelled to propose a course of action that most readily supports protecting migratory

¹ M-37050, "The Migratory Bird Treaty Act Does Not Prohibit Incidental Take," Department of the Interior, December 22, 2017 (hereinafter referred to as "M-37050").

<https://www.doi.gov/sites/doi.gov/files/uploads/m-37050.pdf>. Accessed on July 19, 2020.

² M-37041, "Incidental Take Prohibited Under the Migratory Bird Treaty Act," Department of the Interior, January 10, 2017 (hereinafter referred to as "M-37041").

<https://www.doi.gov/sites/doi.gov/files/uploads/m-37041.pdf>. Accessed on July 19, 2020.

³ US Fish and Wildlife Service, "About Us," https://www.fws.gov/help/about_us.html. Accessed on July 19, 2020.

birds. Indeed, FWS understands itself to have "... a responsibility to ensure the sustainability of migratory bird populations for the benefit of the American public."⁴

Section 4.4 of the DEIS addresses the dire consequences of climate change and habitat loss due to urbanization and other activities to support human population growth.⁵ FWS has also clearly articulated the likely consequences of each alternative regarding anthropogenic impacts on migratory birds:

The No Action Alternative and Alternative A (promulgate regulations) have the potential to increase the rate and severity at which anthropogenic effects negatively affect migratory birds. Alternative B (rescind M-Opinion 37050) encourages or requires the use of best practices and thus could decrease the rate and severity at which anthropogenic effects negatively impact migratory birds.⁶

As such, it is critical that FWS fulfill its responsibility to ensure the sustainability of migratory birds by taking action to reduce anthropogenic impacts with the adoption of Alternative B.

Uphold the intention of the MBTA

The US and Great Britain entered into a treaty in 1916 "being desirous of saving from indiscriminate slaughter and of ensuring the preservation of such migratory birds as are either useful to man or are harmless."⁷ Two years later, this treaty was implemented as the MBTA with the singular goal of protecting migratory birds. Agency records of enforcement actions over the last 80 years "demonstrate that the government has construed the MBTA as a strict-liability statute,⁸ which "makes any unauthorized taking of migratory birds an illegal action, regardless of intent."⁹ For decades, FWS has worked to uphold the purpose of the MBTA, protecting birds by leveraging fines for the incidental killing of migratory birds and driving industries to implement measures that take migratory bird safety into account. While courts have adjudicated cases regarding the MBTA in different ways,¹⁰ prior legislative and legal analysis indicates that "FWS' s longstanding interpretation and implementation of the Act strongly supports construing the MBTA to apply to incidental take."¹¹

As delineated in Table 3-1, migratory birds are in a perilous position.¹² The population of migratory birds that rely exclusively on grasslands for breeding habitat has decreased by

⁴ US Fish and Wildlife Service, "Regulations Governing Take of Migratory Birds Draft Environmental Impact Statement, FWS-HQ-MB-2018-0090-8631 (hereinafter referred to as "FWS, DEIS"), p 42.

⁵ FWS, DEIS, pp 57-59.

⁶ FWS, DEIS, p 59.

⁷ US Treaty Series no. 628, "Convention Between the United States and Great Britain for the Protection of Migratory Birds." Accessed at <https://www.fws.gov/migratorybirds/pdf/Treaties-Legislation/Treaty-Canada.pdf> on July 19, 2020.

⁸ M-37041, p 12.

⁹ FWS, DEIS, p 3.

¹⁰ See discussions of case law in [M-37041](#) and [M-37050](#).

¹¹ M-37041, p 12.

¹² FWS, DEIS, p 24.

53% in the last 50 years.¹³ More than 10% of species included in the MBTA are also listed as endangered species¹⁴ and a further 24% are listed as Birds of Conservation Concern.¹⁵ It is widely known that the “decline of North American avifauna has largely been driven by anthropogenic sources that cause both direct and indirect mortality”¹⁶ and a lessening of protections for migratory birds at this point would explicitly undermine the intention of the MBTA.

The damage inflicted by the Department of the Interior (DOI) Solicitor Opinion M-37050 can already be seen, even if mortality data and estimates have flagged since its issuance, hindering quantitative analysis.¹⁷ For decades, FWS Ecosystem Services (ES) “included migratory bird recommendations to inform project proponents how to reduce incidental take. With the implementation of M-Opinion 37050 recommendations regarding migratory birds are less frequent.”¹⁸ Furthermore, FWS anticipates that if it were to codify M-37050 to assert that incidental take is not prohibited by the MBTA, the “regulation would create more legal certainty and thus it is likely that fewer entities will implement best practices aimed at reducing incidental take, unless still required to do so under other federal, state, tribal, or local laws and regulations. As a result, compared to the No Action Alternative, the level of bird mortality reported in Section 3.7 would likely be higher, particularly for those industries previously subject to enforcement actions under the MBTA.”¹⁹ As FWS summarized in Table S1, the effects on migratory birds for this alternative would be “likely negative.”²⁰

The annual loss of migratory birds due to incidental take is staggering. Table 3.2 details an estimated 500 million to 1 billion bird deaths from incidental take each year.²¹ Rather than sacrificing millions or potentially hundreds of millions of birds annually by stripping protections for them, it is imperative that FWS work to reduce incidental take in order to fulfill its express responsibility to ensure a sustainable migratory bird population.²² Of the assessed alternatives in this DEIS, only Alternative B would support the intention of the MBTA or FWS’ mandate to uphold it.

Mitigation measures are of critical importance to protect migratory birds

Compelled by potential enforcement, several industries worked with FWS to develop best practices to mitigate the risk of industry operations for migratory birds. As FWS explains, “Prior to M-Opinion 37050, the Service relied on the combination of technical assistance and enforcement discretion to manage the incidental take of migratory birds. Under this

¹³ FWS, DEIS, p 24 referencing Rosenberg et al, 2019.

¹⁴ FWS, DEIS, p 36.

¹⁵ FWS, DEIS, p 37.

¹⁶ FWS, DEIS, p 42.

¹⁷ FWS, DEIS, p 28.

¹⁸ FWS, DEIS, p 40.

¹⁹ FWS, DEIS, p 49.

²⁰ FWS, DEIS, p 8.

²¹ FWS, DEIS, p 29.

²² FWS, DEIS, p 42.

framework, best practices were developed and implemented by many industries."²³ Mitigation measures have been voluntary and inconsistently applied, which may contribute to the dramatic population declines migratory birds are experiencing (see Table 3-2²⁴).

FWS acknowledges that for many activities, it is hard to quantitatively assess their effectiveness, often due to lack of research.²⁵ However, for industries where there have been sufficient studies, data indicate that mitigation measures can be extremely effective at protecting bird life. "Communication towers, for example, have been shown to reduce mortality by about 70 percent by changing to flashing lights and removing guy wires (Gehring et al. 2011). For oil pits, bird mortality can be virtually eliminated if netting is installed and maintained (Trail 2006)."²⁶

If Alternative B were to be promulgated, creating legal certainty that incidental take is prohibited, the DEIS states "it is anticipated that demand for technical assistance provided by the Service would increase, which we would expect to result in greater adoption of beneficial practices compared to the No Action Alternative and Alternative A."²⁷ While implementing best practices would remain voluntary for some time, FWS could develop a permit system, such as it intended in 2015,²⁸ requiring best practice implementation to avoid enforcement of a certain amount of incidental take in a given year. Alternative B is the only presently-considered alternative that would be likely to increase best practices with regard to migratory birds,²⁹ and the only alternative that would allow a path forward to require such practices.

Regulatory relief is a straw man argument

It is crucial to not confuse regulatory certainty with reducing the regulatory burden. While seemingly applied interchangeably by FWS in this DEIS, regulatory certainty and regulatory burden are not interchangeable terms or ideas. Regulatory certainty simply means that all parties understand the rules and the consequences of breaking those rules. Regulatory burden is a subjective term that only incorporates the perspective of the regulated industry in the interpretation that regulations are burdensome (while another entity might consider regulations life-saving and life-giving).

Seeking regulatory certainty

The stated purpose of the proposed action by (Alternative A) is to establish legal certainty and a regulatory definition of the scope of the MBTA with regard to incidental take, which

²³ FWS, DEIS, p 53.

²⁴ FWS, DEIS, p 29.

²⁵ FWS, DEIS, p 41.

²⁶ FWS, DEIS, p 41.

²⁷ FWS, DEIS, p 54.

²⁸ US Fish and Wildlife Service, "Migratory Bird Permits, Programmatic Environmental Impact Statement," Notice of Intent, FWS-HQ-MB-2014-0067.

²⁹ FWS, DEIS, pp 8-10.

can be summarized as regulatory certainty.³⁰ While the use of regulatory discretion worked moderately well for a century (e.g. through voluntary best practices to mitigate risks to migratory birds), the ongoing risks to migratory birds from climate change and infrastructures supporting human population growth impel the establishment of a stricter regulatory framework for the protection of migratory birds. Additionally, the overnight reversal of decades of interpretation of the law without any oversight or public input, such as what occurred with the issuance of M-37050, underscores the necessity of a notice-and-comment rulemaking for regulatory certainty on this issue.

FWS has stated its preferred alternative as Alternative A, to codify the recent interpretation in M-37050³¹ issued under the Trump Administration that the MBTA does not prohibit incidental take. When introducing the three alternatives, FWS stated the reason it selected Alternative A as the preferred alternative and proposed action is that it “provides regulatory certainty for industries and agencies, is feasible to implement using current Service resources, and is consistent with the purpose and need for the proposed action” (which begs the questions, as the purpose and need for the proposed action is regulatory certainty).³² However, Alternative B, codifying the long-standing interpretation that the MBTA does indeed prohibit incidental take, would likewise provide regulatory certainty, and might be feasible to implement with current FWS resources (which was not directly assessed in the DEIS), and could reduce strain on agency resources in other areas, such as migratory bird endangered species listings. Under both Alternatives A and B, regulatory certainty would increase, but it would not be absolute under either. FWS expects that a legal and regulatory patchwork would continue even if Alternative A were promulgated, stating “it is expected that some additional states will craft new regulations to clarify that they have jurisdiction to regulate or otherwise oversee incidental take of migratory birds (AFWA 2019).”³³ The only stated reason for which Alternative A appears to carry more regulatory certainty than Alternative B is that FWS decided not to consider a permit-based regulatory framework for migratory bird take in this DEIS because it would be “a complex process.”³⁴

Conflating regulatory certainty with limiting regulation

The driving purpose for FWS’ proposed action to promulgate Alternative A is also stated as it “reduces the regulatory burden on the public and the enforcement burden on the Service’s law enforcement officers.”³⁵ Note that reducing regulatory burden is explicitly *not* the stated purpose or need of the proposed action. Moreover, reducing the “burden” on regulated entities is in no way part of the FWS mandate or mission. By selecting Alternative A as the proposed action, in disregard for all indicators included in its own DEIS regarding the welfare of migratory birds or their ecosystem services,³⁶ FWS is handing its mission

³⁰ FWS, DEIS, p 3.

³¹ M-37050.

³² FWS, DEIS, p 15.

³³ FWS, DEIS, p 15.

³⁴ FWS, DEIS, p 6.

³⁵ FWS, DEIS, pp 5, 17.

³⁶ FWS, DEIS, p 15.

over to industry. Rather than upholding its responsibilities, FWS suggests that it intends to foist conservation responsibility onto voluntary partners, stating “to mitigate the expected adverse impacts from this alternative, the Service could expand and promote our continued work with appropriate stakeholders and industry to develop and promote best practices for the mitigation of impacts to migratory birds.”³⁷

By conflating improved regulatory certainty with a reduction of regulations applying to industry, FWS has misconstrued the perceived benefit of Alternative A and ignored the myriad benefits of Alternative B that the legal record supports.

Incidental take information should be publicly accessible

Information about the incidental take of migratory birds is notably absent from the FWS website (www.fws.gov), especially after targeted removals in 2017 and 2018 of the sparse resources that had existed, such as the singular Incidental Take webpage.³⁸ As we described in our public comment regarding the FWS Proposed Rule Migratory Bird Permits; Regulations Governing Take of Migratory Birds in March, 2020, the insufficiency of information FWS has made available constrains the public’s ability to effectively participate in the rulemaking process.³⁹

While the information presented in the DEIS regarding the scale of migratory bird death due to incidental take is staggering, it is also remarkable that the data is not presented or addressed directly anywhere on the FWS website. Nowhere can you find summaries such as those presented in the DEIS Table 3.2 about the causes of death of hundreds of millions of migratory birds each year. FWS used to host a website, www.birdregs.org, on which a header read “An open public conversation about the incidental take of migratory birds.” This website was restricted from public access shortly after the Trump Administration took office and was permanently removed in 2018.⁴⁰ A resource such as the birdregs.org public involvement initiative would be extremely valuable to inform the public about incidental take and provide the tools to develop and support their positions regarding mitigation strategies.

This DEIS is written in language that is geared toward a broad audience, which invites public engagement. While the document is available through the website, it is unclear how the public would be expected to navigate to the web page on which it is hosted

³⁷ FWS, DEIS, p 49.

³⁸ 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 (hereinafter referred to as “EDGI report on FWS website removals”).
<https://envirodatagov.org/aar-8-fws-migratory-bird-treaty-act-180925>. Accessed on July 20, 2020.

³⁹ Environmental Data and Governance Initiative, “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,” Public Comment, March 19, 2020.
https://envirodatagov.org/wp-content/uploads/2020/03/EDGI_MBTA_Public_Comment_20200319.pdf. Accessed on July 20, 2020.

⁴⁰ EDGI report on FWS website removals.

(<https://www.fws.gov/regulations/mbta/resources>), since the www.fws.gov/regulations page returns an error message “This page isn’t working,” and the MBTA rulemaking process page (<https://www.fws.gov/regulations/mbta/>) is not linked from the working FWS regulations webpage, <https://www.fws.gov/birds/policies-and-regulations/regulations.php>. The shortest route of navigation from anywhere on the FWS website appears to be if a member of the public were to go to the Migratory Bird Program page (<https://www.fws.gov/birds/index.php>), click on the Featured News link to “Proposed Regulation Regarding Take of Migratory Birds” (<https://www.fws.gov/birds/news/200605MBTA.php>), and from there click a link to <https://www.fws.gov/regulations/mbta/> at the bottom of that page to arrive at the MBTA rulemaking process page (<https://www.fws.gov/regulations/mbta/>).

The information selected for posting on the MBTA rulemaking process webpage is problematic. There are clear timelines and links to regulatory proceedings documents, and brief, helpful explanations about the overall process of notice-and-comment rulemaking. However, the substantive information regarding this specific proceeding is skewed. For example, while the DEIS describes promulgating regulations based on either M-37050 (Alternative A) or M-37041 (Alternative B), only M-37050 is linked from or described in this website. It is worth noting that access to M-37041 has been substantially reduced by the DOI removing M-37041 from its Solicitor’s Opinions webpage (<https://www.doi.gov/solicitor/opinions>).⁴¹ Thankfully, M-37041 is still available at <https://www.doi.gov/sites/doi.gov/files/uploads/m-37041.pdf> (as of July 20, 2020), even though the public has no way of accessing it without preexisting knowledge of its URL. In addition to failing to provide access to M-37041, the example FWS selected to describe the regulation of incidental take on its FAQ page (<https://www.fws.gov/regulations/mbta/faq>) is exceedingly unlikely to have been enforced at any point in the history of the MBTA. Hundreds of thousands of birds are killed each year by eminently avoidable industrial practices such as open oil pits, and hundreds of millions die from collisions with glass on buildings. Providing the single example of a scenario in which a single homeowner accidentally kills a single nest of birds in a one-time occurrence disingenuously trivializes the massive scale of this world-wide plight.

Conclusion

We urge FWS to promulgate Alternative B and codify M-37041 to define incidental take as prohibited under the MBTA. Upon promulgation, we urge FWS to immediately research and develop a permit system to facilitate this regulation.

The DEIS conveys the dire environmental and ecosystem consequences that would transpire if Alternative A were promulgated. Table S1 clearly shows that the only “positive” of Alternative A is its legal certainty (by granting legality to all incidental take) and its possible financial relief on certain industries (while creating significant costs for others).⁴²

⁴¹ EDGI report on FWS website removals.

⁴² FWS, DEIS, pp 8-10.

With the bird population declining by close to 29% in the last 50 years⁴³ and incidental take claiming hundreds of millions of bird lives each year (which is at an order of magnitude more than intentional take kills each year), it is unconscionable that FWS would select as the preferred alternative the one that would assuredly exacerbate this dire situation. In addition to being unfathomable on a mass scale, the potential impacts to specific bird populations is even more alarming. As the DEIS describes, in relation to the 1,093 migratory bird species protected under the MBTA, “because the 239 species that appear on the BCC list receive little to no other federal protection aside from the MBTA and are in documented decline, this proposed action has the potential to negatively affect their population sizes...”

⁴⁴ The FWS holds sole federal responsibility for ensuring a sustainable migratory bird population and purports that its overarching goal is to “conserve, protect and enhance fish, wildlife, and plants and their habitats.”⁴⁵ The only action that would uphold these responsibilities is to promulgate Alternative B.

⁴³ FWS, DEIS, p 22.

⁴⁴ FWS, DEIS, p 37.

⁴⁵ US Fish and Wildlife Service, “About Us,” https://www.fws.gov/help/about_us.html. Accessed on July 19, 2020.