Olympic Forest Coalition

Promoting the protection, conservation and restoration of natural forest ecosystems and their processes on the Olympic Peninsula, including fish and wildlife habitat, and surrounding ecosystems

To: U.S. Fish and Wildlife Service
Public Comments Processing
U.S. Fish and Wildlife Service
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Attn: FWS-HQ-MB-2018-0090

Also submitted electronically via comment portal at:
https://www.regulations.gov/comment?D=FWS-HQ-MB-2018-0090-8411

Subject: Comments on the Draft Environmental Impact Statement "Regulations Governing the Take of Migratory Birds."

Date: June 17, 2020

Dear Sir or Madam,

Thank you for the opportunity to comment on the U.S. Fish and Wildlife Service's proposed rule regarding a new interpretation of "incidental take" under the Migratory Bird Treaty Act of 1918 (MBTA). We acknowledge the vital work of the U.S. Fish and Wildlife Service in conserving our nation's fish, wildlife and plants and their habitats for the continuing benefit of the American people, and we wish to remind the Department of the Interior (DOI) of how deeply the vast majority of Americans care about these resources. More than 46 million bird enthusiasts have told the Fish and Wildlife Service that birds matter to them.[1] More than one million waterfowl hunters and 15 million hunters and harvesters of other migratory bird species,[2] as part of practicing a recreational sport or subsistence way of life that creates 700,000 jobs nationwide[3] and spends $22 billion dollars per year, are emphatic about their support of healthy bird and other wildlife populations.

We are Connie Gallant, president of the Olympic Forest Coalition, and Karen Sullivan, retired U.S. Fish and Wildlife Service employee. In addition to submitting this comment letter electronically, we are also mailing a print copy in order to ensure that it arrives timely.

We believe that the 69-page Draft Environmental Impact Statement (DEIS)[4] does not adequately address significant potential impacts from this unprecedented restriction of the MBTA's authority, and in failing to do so, has not properly considered the agency's statutory

[1] https://www.fws.gov/birds/bird-enthusiasts.php
[2] https://www.fws.gov/migratorybirds/pdf/surveys-and-data/HarvestSurveys/MBHActivityHarvest2017-18and2018-19.pdf
[3] https://www.dfg.ca.gov/wildlife/hunting/econ-hunting.html
[4] DEIS is at: https://beta.regulations.gov/document/FWS-HQ-MB-2018-0090-8631

responsibilities. Our comments focus on both procedural and substantive problems that we feel must be addressed, among them:

Procedural:

1. There are no instructions in the DEIS on how or where to submit comments, and no addresses or links to web sites for the public to use to submit them, as discussed below.

2. Only one tiny footnote in a single reference on page 44 links to a supplemental, 16-page Regulatory Impact Analysis[5] that cannot easily be found via Google Search and would have better informed the public of impacts had it been appropriately incorporated into the DEIS. Requiring the extra step of finding a footnote so far into the DEIS and typing in a long, complex link to access this important information is contrary to NEPA's requirement that an agency not make procedural requirements somehow 'discretionary.'[6]

3. With only one out of 573 federally recognized Native American Tribes responding with a request for government-to-government consultation, the DEIS infers the appearance of consensus and agreement; therefore, the accuracy and intent of the language in those notices sent to Tribes should be questioned and re-examined, and a significant extension of time added to the comment period, which is currently at the minimum allowable.

4. The no-action alternative is not "no action." Removing liability exceeds the statutory authority of the Department of the Interior, as discussed below.

Substantive:

5. The argument for overturning a century of legislative and judicial precedent for the sake of removing criminal and financial liability from individuals and entities who were previously found criminally and financially liable is irrational.

6. State and federal agencies such as the Departments of State, Defense, Commerce, and the Federal Aviation Commission do not agree that the proposed rule is reasonable or sound.[7]

The procedural duties imposed by NEPA are meant to be carried out by federal agencies "to the fullest extent possible." When they are not, substantive issues are also triggered, as they have been here. This process and this DEIS itself fail both procedural and substantive standards. Courts have ruled that the phrase "to the fullest extent possible" does not provide "…an escape hatch for foot-dragging agencies. Congress did not intend the Act to be a paper tiger." NEPA's procedural requirements "must be complied with to the fullest extent, unless there is a clear conflict of statutory authority."[8] In this case, there is no such conflict and the agency is obligated to adhere to the statute.

A federal agency that makes it difficult for the public to comment by not supplying them with contact information within the document they are commenting on, or that infers the lack of response from Tribes as a lack of interest, or manipulates language to infer the appearance of consensus and agreement, is out of NEPA compliance and therefore invalidates the public process.

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[5] Proposed Rulemaking to Revise Migratory Bird Permits and Regulations Governing Take of Migratory Birds Regulatory Impact Analysis. https://www.regulations.gov/document?D=FWS-HQ-MB-2018-0090-0173

[6] *Calvert Cliffs' Coordinated Committee v. Atomic Energy Commission*, 449 F.2d 1109 (D.C. Cir. 1971), cert. denied, 404 U.S. 942 (1972)

[7] From conversations with employees inside those other agencies: If those agencies stop doing things to avoid incidental take there will be cumulative impacts. Those impacts are not analyzed in the DEIS other than saying there could be more Endangered Species Act listings.

[8] *Calvert Cliffs' Coordinated Committee v. Atomic Energy Commission*, 449 F.2d 1109 (D.C. Cir. 1971), cert. denied, 404 U.S. 942 (1972).

Closer in size and quality to a minimal Environmental Assessment than a proper Environmental Impact Statement, the DEIS contains major gaps, inaccuracies, and contradictions. It fails to analyze significant direct, indirect, and cumulative impacts despite acknowledging that they will occur.

Due to the scope and size of un-analyzed significant impacts from this proposed rule, we request that the comment period be extended for another 30 days. Executive Order 12866, which provides for presidential review of agency rulemaking via the Office of Management and Budget's Office of Information and Regulatory Affairs, states that the public's opportunity to comment, "in most cases should include a comment period of not less than 60 days."[9] Forty-five days is not enough time for the public to prepare substantive comments on such a large and adverse change, especially with all the deficiencies in this process. The rule must be withdrawn until the procedural and substantive defects of the DEIS can be remedied and sufficient notice, adequate consultation of Tribes and the public, are conducted with impartiality and without inappropriate outside interference.

Detailed comments follow this summary. Thank you for your consideration.

Sincerely,

Connie Gallant, President
Olympic Forest Coalition

Karen Sullivan, Biologist and Board Member
Olympic Forest Coalition

Cc: The Honorable Patty Murry, Senator
The Honorable Maria Cantwell, Senator
The Honorable Derek Kilmer, Representative, 6th Congressional District
The Honorable Jay Inslee, Governor
The Honorable Kevin Van de Wege, State Senator, 24th Legislative District
The Honorable Steve Tharinger, Representative, 24th Legislative District
The Honorable Mike Chapman, Representative, 24th Legislative District

[9] Exec. Order No. 12866, § 6(a), 58 Fed. Reg. 51735 (October 4, 1993).

Contents:

1. Introduction:

Connie Gallant is the president of the Olympic Forest Coalition (OFCO). In this capacity, she has led the organization through many environmental issues affecting forests, wildlife, and waterways, and was recognized by the Hood Canal Coordinating Council for her water quality monitoring, sampling and educational efforts. She works closely with Representative Derek Kilmer on the Wild Olympics Campaign and the Olympic Forest Collaborative, and with the Washington Congressional delegation and state agencies on species and habitat protections.

Karen Sullivan, an OFCO board member, is retired from the U.S. Fish and Wildlife Service (Service). As a biologist she worked in Delaware, Washington D.C. and Alaska, on estuarine and terrestrial species and habitats, endangered species, permits, national wildlife refuges, and outreach and communications. As the Assistant Regional Director for External Affairs in the USFWS Alaska Region, she oversaw congressional correspondence, media relations, outreach, environmental education, web content, and Native American/Alaska Native grants.

The DEIS acknowledges but does not address anticipated declines in bird populations as a result of this proposed rule, and it rejects the alternative that would. In its brief Status and Trends analysis in section 3.4, it affirms that "…many bird species and bird populations as a whole are declining across the nation, and in 2017 there were an estimated 3 billion fewer birds on the landscape in North America, representing a 29% decrease in overall bird numbers when compared to 1970."[10] It acknowledges a "…continent-scale decline of birds relating to human activities and changes in the quality of the environment." So, to suggest as mitigation that Service biologists promote the very measures the DEIS encourages industry to drop[11] is scientifically unsound and procedurally illogical.

If an agency acknowledges the decline in bird populations without considering causation (citing the studies of those declines) and if it proceeds directly to mitigation of an undiagnosed condition, then that would be irrational. However, if an agency proposes mitigation measures that won't work because they won't be adopted, *after* having cited the causation, yet it then proposes an action that exacerbates that condition, that is not only irrational, but is inherently an action (not an inaction) that fraudulently identifies its exacerbating action as mitigation. To abandon the more reasonable alternative of developing a general-permit framework to regulate incidental take merely because it's complicated, or to ignore or withdraw law enforcement in cases of gross negligence because the Department feels that case law is inconsistent (when it

[10] Cornell Lab of Ornithology. "Nearly 3 billion birds gone since 1970." https://www.birds.cornell.edu/home/bring-birds-back/
[11] 4.2.2 Alternative A: Promulgate regulations that define the scope of the MBTA to exclude incidental take

overwhelmingly is not) is not only irrational and inherently an action before finalizing the proposed rule, it is the opposite of serving the public.

An EIS provides a basis for evaluation of the benefits of a proposed project in light of its environmental risks, and a comparison of the net balance for the proposed project with the environmental risks presented by alternative courses of action. An agency must look at 'reasonable' alternatives. It is not appropriate to disregard alternatives merely because they do not offer a complete solution to the problem.[12]

Table 3.2, *Annual Mortality Estimates for Stressors and Hazards Affecting Migratory Birds*, estimates a minimum of 463 million and a maximum of 1.4 billion annual bird deaths from 9 categories of stressors, the largest being building glass collisions. Up to 140 million bird deaths annually are caused by chemicals, collisions with electrical lines, communications towers and wind turbines, electrocution at power poles, and oil pits and open pipes. Over 50 years, the latter toll adds up to seven trillion bird deaths that could be prevented by more widespread adoption of best practices. This sobering assessment, when combined with the assertion that further declines will happen as industries get used to no legal liability and decrease their best practices, makes the DEIS contradictory and internally inconsistent. An agency may not acknowledge significant impacts in one sentence and dismiss them in the next.[13]

The Olympic Forest Coalition strongly objects to this proposed rule and to the Trump Administration Solicitor's M-Opinion 37050 (Solicitor's Opinion) upon which it is based. We urge the Service to withdraw the proposed rule, and we urge the Department to withdraw its Opinion.

2. Legislative intent and precedent:

As stated in both the MBTA and in the Solicitor's Opinion upon which the proposed rule is based, the original legislative intent of the Act was the protection and sustainability of migratory bird populations. The word "protection" occurs in its first sentence and means birds, not industry. There has been no express delegation of law-making duties or authority to amend the MBTA. Until the Solicitor's Opinion, the presumption, precedent, and bipartisan consensus have existed for decades, affirming that the Service's interpretation of its own regulations has, with the exception of a few contrary court decisions, been correct.

Congress does not create discontinuities in legal rights and obligations, including for this law. Without some clear statement from Congress, there exists a legally defensible super-strong presumption of correctness for existing statutory and regulatory precedents. A letter of objection to this proposed rule from 23 sitting Senators[14] bears this out.

More specifically, the MBTA's legislative intent is to prevent needless losses, establish closed seasons for hunting, prohibit the taking of nests or eggs of migratory game or insectivorous nongame birds except for scientific or propagating purposes, further establish longer closures for certain species, and provide for the issuance of permits to address the killing of specified birds. Additional changes provided for more, not less protection, and not just in the United States but internationally. The DEIS does not address potential impacts to our treaty partners.

Changes in the law still allowed for cultural and traditional subsistence hunting by Aboriginal and Indigenous peoples in Canada and the U.S., and for a flexible process designed to address specific circumstances for killing migratory birds. While formal concurrence on the application of the MBTA has never been reached, the Service has historically used its prosecutorial discretion

[12] *Natural Resources Defense Council v. Morton*, 458 F.2d 827 (D.C. Cir. 1972)
[13] *Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995), cert. denied, 116 S.Ct. 698 (1996) and *Catron County Board of Commissioners v. U.S. Fish and Wildlife Service*, 75 F.3d 1429 (10th Cir. 1996)
[14] https://www.epw.senate.gov/public/index.cfm/2020/3/23-senators-urge-the-interior-department-to-reverse-course-on-proposed-changes-to-the-migratory-bird-treaty-act

to limit the statute from extending beyond the bounds of reason. The Department of the Interior lacks the authority to reinterpret a longstanding law by redefining its terms to benefit the financial interests of industry over the interests of the public trust, for which the law was originally intended.

Despite legislative changes made in 1985 by Congress after an appeals court decision limiting a felony charge to "knowing" violations, the category of misdemeanor was never eliminated, nor was enforcement of the law. This case was cited by the Solicitor's Opinion as a reason for overturning a century of precedent and eliminating incidental take prohibitions.

Despite specific exclusions for the unintentional killing of migratory birds by military readiness and live fire exercises, the definition of prohibited actions was never weakened.

Despite the phrase "incidental take" not appearing in either the MBTA or implementing regulations, its protective statutory intent remains clear, as evinced by its common and long-time use in Congressional hearings and correspondence, and in inter- and intra-agency communications, as discussed below. If it were not clear, the MBTA would likely have been amended or clarified in the first century of its existence. Since its intent has not been amended by an act of Congress, the agency charged by Congress with its administration does not have the authority to restrict its meaning or intent.

3. Take prohibitions are at the heart of migratory bird protection:

The MBTA provided a clear definition of prohibited actions that kill birds, and of measures for prevention of foreseeable bird deaths. This was 50 years before the phrase "incidental take" was codified into the landmark environmental legislation of the early 1970s; nevertheless, the intent to avoid unnecessary deaths of migratory birds by limiting harmful practices remained clear. Yet despite this, preferred Alternative A proposes to remove the law's authority to avoid preventable deaths, and the no action alternative leaves in place the Solicitor's Opinion that would enable it.

The deaths of birds in an open leach or cyanide pit, or by improperly lit communications towers, or oil waste ponds, any of which may have killed birds last year and will kill them again this year and again next year, are preventable and foreseeable. Thus, it has been successfully argued, they are also negligent. To allow the deaths to continue when voluntary best practices exist that could reduce or prevent them is to sanction industry refusal to do the right thing by codifying negligence as a legal liability strategy. The proposed rule attempts to parse the difference between definitions of the terms "deliberate" and "foreseeable," in the context of negligence. Deliberate implies an intentional act, where foreseeable means consequences that may be reasonably anticipated. This rule proposes to put deliberateness in the form of passive negligence out of the reach of prosecution and penalty. By specifying that entities should be held liable only if they can be proven to have set out to purposefully kill birds, the proposed rule turns Service employees into private detectives who are required to prove what was in the hearts and minds of violators.

The definition of incidental take is consistently aligned across other federal wildlife statutes with civil and criminal ramifications, such as the Endangered Species Act, Marine Mammal Protection Act, Bald and Golden Eagle Protection Act, and in many State wildlife protection laws. So, to use the fact that the phrase "incidental take" does not appear in the MBTA or its implementing regulations as justification that such take is not prohibited is insufficient basis for supporting the proposed rule.

The Fish and Wildlife Service has long been using the phrase "incidental take," and courts have upheld violations of it as well as the need for permits. A simple search of the congressional record, committee reports, legislation, and communications found 331 mentions of incidental

take from both chambers in the last four decades. There is massive precedent and established consequence for violations. There is also a substantial history of prosecutorial discretion. The DEIS points out that over a 9-year period ending in 2019, ninety-nine percent of fines and penalties collected under the MBTA's authority were related to just one incident: the BP Deepwater Horizon Gulf Oil Spill. Other regulated industries who violated the law paid fines that, compared to the total, were relative pittances. Were the proposed rule in place during that spill, there would have been no liability for the destruction of more than one million birds of more than a hundred species,[15] and the restoration of damaged habitat and the recreational sporting and tourism businesses that depended on them.

Memoranda of understanding among agencies, such as the April 2010 MOU "To Promote the Conservation of Birds"[16] between the Bureau of Land Management and the Fish and Wildlife Service, outline a collaborative approach and directs them to "take certain actions to further implement the migratory bird conventions" (including the MBTA). These memoranda neither altered legal obligations nor authorized the take of migratory birds. The fact that such memoranda state that they do not authorize take does not render them invalid by the proposed rule, because the proposed rule does not have the authority to supersede existing MOUs, international treaties, or the statute itself.

4. The fault in converting the law to no-fault liability:

The DEIS acknowledges that the Migratory Bird Treaty Act (MBTA) has "…generally been interpreted under the lens of strict liability." This well-established legal precedent, in which no permit program exists to authorize incidental take, holds a person or organization responsible for consequences whether they act unknowingly, knowingly, purposefully, recklessly, or with negligence. The law and its interpretation to date are designed to discourage reckless behavior and needless loss by forcing potential defendants to take every possible precaution, many of which are clearly delineated in agency guidance and voluntary best practices. To force the century-old statute into a fault-based liability standard is incompatible with its original legislative purpose. It adds a layer of obfuscation in which fault, established by intent, would become easy to elude. Given the scenario that the DEIS lays out, of industries dropping their best practices once the threat of prosecution is lifted, conversion to no-fault liability would make the law inoperable.

Oliver Wendell Holmes Jr. noted that the law rightly applies the same standard to both the competent and the incompetent,[17] and that the standard for negligence makes no room for excuses.

The Solicitor's Opinion upon which this proposed rule is based reversed the previous Solicitor's M-Opinion 37041, issued eleven months earlier. That previous Solicitor's Opinion, which has been removed from the DOI's web site,[18] formalized a longstanding interpretation of the MBTA in asserting that the law prohibits both intentional and incidental take of migratory birds. The Trump Administration Solicitor's Opinion cites an unresolved Circuit Court split. There are twelve Circuit Courts of Appeal in the United States. A controversial Fifth Circuit judge, who was the

[15] Two studies by Haney et al. were published in Marine Ecology Progress Series. The first paper, which looked at mortality of coastal birds, estimated that 800,000 coastal birds died during the acute phase of the Deepwater Horizon spill. The second paper examined the mortality of offshore birds. In that paper, the authors found that approximately 200,000 offshore birds died during the spill's acute phase. These numbers, coupled with Audubon scientists' observations of bird colonies and bird mortality well after the acute phase, have led scientists like Driscoll to conclude that more than one million birds ultimately succumbed to the lethal effects of the Gulf oil spill. https://www.int-res.com/articles/meps_oa/m513p225.pdf
and https://www.int-res.com/articles/meps_oa/m513p239.pdf
[16] https://www.fws.gov/migratorybirds/pdf/management/moublm.pdf
[17] Oliver W. Holmes, Jr., The Common Law (The Lawbook Exch., Ltd. 2009) (1881).
[18] https://www.doi.gov/solicitor/opinions

subject of a rare formal review for judicial misconduct,[19][20] reversed the convictions of two Citgo Petroleum Corp entities for the deaths of migratory birds in two uncovered refinery pits, holding that the MBTA does not prohibit incidental take. It is on this reversal that the Department's legal argument for the proposed rule largely rests.

The fact that the Trump Administration Solicitor's Opinion rests on but does not resolve the Circuit court split indicates that courts are not obligated to adhere to its interpretation. The fact that no permit program has ever existed for incidental take demonstrates established precedent. The Department of the Interior and the U.S. Fish and Wildlife Service cannot ethically, legally or morally make enforcement of federal law a moving target for the convenience of the regulated industry.

5. Tribal consultation claim is inconsistent with importance of birds to Tribes:

We note that since June 2017 the Department of the Interior Solicitor has issued eleven Opinions, nine of them being reversals, withdrawals or suspensions of previous Solicitor's Opinions, with eight specifically aimed at Tribes and tribal lands.[21] According to the Bureau of Indian Affairs, there are 573 federally recognized American Indian and Alaska Native Tribes and villages in the United States.[22] Birds loom large in Native American and Alaska Native culture. An Internet search reveals the existence of at least 48 distinct Native American/Alaska Native bird legends on nearly 50 species.[23] Yet in Section 1.5.4, the DEIS notes that only one Tribe requested a government-to-government consultation. Section 4.2.1.3 admits that the concerns of Tribes "…may not be adequately addressed on a project-by-project basis. If … there is an increase in the incidental take of migratory birds and associated impacts with other biological resources, species that are culturally important to native peoples could be impacted." Yet, in section 4.2.1.5 (Environmental Justice) and without evidence, the DEIS states, "Overall, environmental justice effects of the No Action alternative [on minority and low-income populations] are expected to be minimal." This is contradictory and inconsistent.

Tribes are routinely inundated with legal and financial issues, many of which constitute threats to their sovereignty. Tribal staff are often severely underfunded and unable to respond to requests beyond a triage basis, especially if those requests come with a short timeline or are ambiguously worded. Under 5 U.S.C. § 553, agencies are required to provide the public with adequate notice of a proposed rule followed by a meaningful opportunity to comment on the rule's content. How was the notification letter worded? Did it adequately describe the magnitude of the proposed rule, and did it ask for confirmation of receipt? What possible explanation could there be for such a remarkable lack of response by Tribes on an issue that always interests them? If more Tribes had been properly notified of the nature of this proposed rule, it seems unlikely that the DEIS would be inferring no interest on their part by saying only one of them requested government-to-government consultation. The lack of response indicates that the federal outreach effort may have been deficient, which would invalidate the public process.

Access to eagle feathers, for example, is highly regulated. Through a rigorous permitting process, the Service's Division of Migratory Birds, in partnership with Native American tribes, established seven tribal eagle aviaries expressly for cultural needs.[24] If the notice sent to Tribes

[19] http://www.ca5.uscourts.gov/docs/default-source/judicial-council-orders/resolution-of-judicial-misconduct-complaint-against-circuit-judge-edith-h-jones.pdf
[20] Houston Chronicle. "Rare formal review ordered for federal judge," October 14, 2014. https://www.chron.com/news/houston-texas/houston/article/Rare-formal-review-ordered-for-federal-judge-4597601.php
[21] https://www.doi.gov/solicitor/opinions
[22] Bureau of Indian Affairs. Frequently Asked Questions. https://www.bia.gov/frequently-asked-questions
[23] Native American Birds of Myth and legend. http://www.native-languages.org/legends-bird.htm
[24] U.S. Fish and Wildlife Service. Tribal eagle aviaries in the Southwest. https://www.fws.gov/news/ShowNews.cfm?ref=tuggle:-tribal-eagle-aviaries-in-the-southwest-reflect-the-spirit-of-the-&_ID=36084

adequately explained the proposed "pass" to be given to industry for the deaths of millions of migratory birds per year, is it not likely that they might perceive a double regulatory standard? Would it not be likely that more than one in all of the 573 Tribes might have requested government-to-government consultation?

Therefore, we request that the DEIS be withdrawn until adequate notification has been sent to Tribes in order to allow legally mandated government-to-government consultation.

6. The no action alternative invalidates the proposed rule:

The Fish and Wildlife Service received nearly 8,400 comments plus petitions from ten organizations representing an additional 180,000 individuals during the scoping process. NEPA is designed for public input, and the vast majority of these comments expressed opposition to the proposed rule. Yet despite that, the DEIS's no action alternative takes the action of allowing the Solicitor's Opinion to remain in place, thus redefining the scope of the MBTA. In practice, if an agency has radically changed its application of the law because of a Solicitor's Opinion, then the Opinion is an action with an impact on the intention of the statute. Withdrawal of some law enforcement as a result of the Solicitor's Opinion, for example, has already occurred before the proposed rule is finalized. Therefore, this no action alternative is an action.

While a Solicitor's Opinion is not binding, the courts may defer to it; thus, because of its potential effect on the courts, it fails the standard of no action. An attempt to amend the law by restricting its scope fails the standard of no action. Placing the Solicitor's Opinion as the no action alternative also circumvents the NEPA process by not considering substantive and procedural public objections and overwhelming opposition to radically restricting and restructuring the law. This is especially true considering that reasonable alternatives discussed in the scoping process are absent from the DEIS, as discussed below. The definition of a no-action alternative for a newly proposed action seems clear (i.e., the agency will not implement the proposed action or alternative actions). To manipulate the NEPA process by leaving in place the mechanism that would enable the inoperability of the law is akin to leaving malware installed on a computer; it invalidates everything you do and won't go away until removed.

While the Council on Environmental Quality (CEQ) regulations[25] for implementing the National Environmental Policy Act of 1969 (NEPA) do not specifically define "no-action alternative," stating only that NEPA analyses shall "include the alternative of no action,"[26] the term "no action" is implicitly, explicitly and universally interpreted to mean the absence of action. Here by example is a precedent: If it's legal for a regulated industry to request relief from regulatory enforcement via a legal mechanism called a no-action letter,[27] then no action means no action, and there should be no double standard for it. The fact that this proposed rule requires the highest level of environmental review is the agency's acknowledgement of the magnitude of change and potential significant impacts to resources as well as to the original legislative intent of the law. Therefore, to leave inserted the fulcrum for such impacts as the standard for future interpretation[28] would amount to an action with significant consequence.

Leaving the Solicitor's Opinion in place as the no action alternative will all by itself encourage regulated industries to drop their voluntary compliance with best practices. The DEIS specifically affirms this in section 4.2.1 and reaffirms it in section 4.2.1.1: "…over time as entities become more confident in the long-term stability of M-37050, there will be a likely reduction in the number of best practices implemented. Therefore, migratory birds will likely experience increasing negative impacts over time as compared to current conditions; these impacts may be

[25] 40 CFR 1500–1508
[26] 40 CFR 1502.14
[27] Securities and Exchange Commission. No Action Letters. https://www.sec.gov/fast-answers/answersnoactionhtm.html
[28] https://www.doi.gov/sites/doi.gov/files/uploads/solicitors_opinions_paper_-_undated.pdf

significant." This no action alternative is not without action; it will cause significant adverse effects to bird populations, because the Solicitor's Opinion and the regulations promulgated from it attempt to restrict the scope of the law and could find deference in the courts. Other agencies who cease efforts to avoid incidental take will amplify these consequences, and none of that is analyzed in the DEIS. Therefore, the no action alternative is invalid and the DEIS must be withdrawn.

7. The DEIS's scientific integrity is deficient:

Despite the Fish and Wildlife Service's longstanding assertions that relatively low-cost lighting changes on communications towers could reduce bird mortality by 70 percent, best practice compliance among regulated industries remains voluntary and low. 30 million birds are unnecessarily killed each year by the oil and gas industry. Communications towers alone kill 6.8 million birds per year,[29] so a reduction in those deaths via a required rather than voluntary low-cost lighting change would save 4.7 million birds per year. Over 50 years, that would be 238 million bird deaths prevented from this cause alone.

While the stated purpose and need for this proposed rule is "more legal certainty" for industry, discussion of its impacts within the DEIS is perfunctory and delivered with no supporting detail. The few supporting details, contained in a Regulatory Impacts Analysis buried via a single tiny link on page 44, merely confirm the damage to be done to migratory birds and the financial savings to industry. The current, flexible, voluntary approach to best practices has limited the MBTA's full potential to protect birds from incidental take in these circumstances; it is therefore ludicrous to allow virtually unlimited incidental take just because corporate legal departments feel an unacceptably precarious liability.

The Regulatory Impacts Analysis uses nonspecific examples of indirect costs as: higher premiums on industry loans, financial capital, and insurance associated with the risk of liability, and the cost to the economy from business opportunities that are foregone due to the risk associated with prosecution, which, according to the analysis, "inhibits otherwise lawful conduct." Every cost-benefit statement in that analysis is qualified with, "The Service does not have information available to quantify these potential [costs/benefits]." If neither impacts nor benefits can be quantified because the DEIS and the Impacts Analysis lack the data, then neither document is scientifically supportable.

For companies whose adoption of best practices is spotty at best, and who write endorsements of deregulation on Departmental press releases, a free pass to kill birds with impunity is neither a rational nor reasonable decision for a conservation agency charged by Congress, the courts, and the people of the United States to conserve wildlife. Nor is the title of this DEIS accurate. It might be more truthful to call it "Regulations Governing *Unlimited* Take of Migratory Birds."

The DEIS proves again and again that the proposed rule is not a biologically driven decision but rather is a regulatory relief giveaway that acknowledges the certainty of increased bird population declines. In section 4.2.1.2 it admits, "…The lack of legal liability for incidental take under the No Action alternative would likely cause many project proponents to no longer seek or implement guidance from the Service about ways to avoid or minimize adverse effects on migratory birds. Other taxa might also experience negative impacts from reduced implementation of these recommended avoidance and minimization measures." Combing through the DEIS for any supporting details about balancing adverse impacts with a scientifically supported benefit to protected resources, or even about mitigation, we came up empty-handed.

The preferred alternative (A) delivers contradictory statements. First, the DEIS states that as industries get used to the "stability" of the Trump Solicitor's Opinion, they will drop best practices

[29] https://www.livescience.com/19908-migratory-birds-killed-towers.html

and more birds will die. Then section 4.2.2 says, "In an effort 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." A weaker mitigation statement would be hard to find. It's the equivalent of suggesting that Service biologists become salesmen pitching products nobody wants.

Scientific analyses and information are at the core of the National Environmental Policy Act's rational decision-making model for federal agencies, and the consideration of a project's likely environmental consequences. While the Council on Environmental Quality regulations provide that an environmental impact statement's alternatives section "is the heart" of the EIS, it is "accurate scientific analysis, expert agency comments, and public scrutiny" that are essential to implementing NEPA."[30] No court has suspended the "harder look" review required by NEPA.[31]

In preparing an EIS, agencies must "ensure the professional . . . [and] scientific integrity of the discussions and analyses in environmental impact statements."[32] In so doing, they must identify the methodologies used, and must explicitly refer to the scientific and other sources of information relied upon for conclusions set forth in the EIS."[33] The information included in an EIS "must be of a high quality," and must allow for "accurate scientific analysis, expert agency comments, and public scrutiny."[34] The agency must also discuss responsible opposing views.[35] EISs should be "concise, clear, and to the point, and . . . supported by evidence that agencies have made the necessary environmental analyses."[36] Impacts should be discussed in proportion to their significance, and "…data and analyses in a statement shall be commensurate with the importance of the impact" of the proposed action or its alternatives.[37]

There is no scientific methodology offered for the DEIS's breezy assertions. No high-quality data was presented to justify what passes for its analyses. No responsible opposing views were discussed in any detail, and no evidence was presented that the agency made any supporting analyses commensurate with the importance of impacts. Nor were these impacts discussed in proportion to their significance. An agency violates NEPA when it fails to provide a reasoned explanation to support its decision regarding the adequacy of its data.[38] If the agency has failed to articulate "a rational connection between the facts found and the choice made," the agency's decision cannot be upheld in court.[39]

For a biological agency to propose a significant regulatory change to a wildlife protection law, scientific evidence that would improve the administration of that law must predominate in the rulemaking. While cost analyses for the regulated public do figure into some agency decisions, it is science, not financial benefit, upon which the foundation of regulatory change must rest in wildlife protection laws. If a biological agency under pressure is forced to obscure science from the public by retrofitting false or misleading justifications, the result is a DEIS that's also a departure from longstanding Departmental policy and scientific integrity, both of which are codified in official manuals. Combined with the discounting of best practices, it provides a

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[30] 40 C.F.R. §§ 1502.9, 1502.22, 1502.24.
[31] *Sierra Club v. Marita*, 46 F.3d 606, 616 (7th Cir. 1995) (citing Methow Valley, 490 U.S. at 350).
[32] 40 C.F.R. §§ 1502.24. *see also Save the Peaks Coal. v. U.S. Forest Serv.*, 669 F.3d 1025, 1037-38 (9th Cir. 2015) (agencies have a "duty to ensure the scientific integrity of the [EISs] discussion and analysis"); *League of Wilderness Defenders-Blue Mountains Biodiversity Project v. U.S. Forest Serv.*, 689 F.3d 1060, 1073-75 (9th Cir. 2012) (an agency must "ensure the 'scientific integrity' of the discussions and analyses in an EIS" (quoting 40 C.F.R. § 1502.24)).
[33] 40 C.F.R. § 1502.24.
[34] 40 C.F.R § 1500.1(b).
[35] 40 C.F.R. § 1502.9(b).
[36] 40 C.F.R. §§ 1500.2(b), 1502.1.
[37] 40 C.F.R. §§ 1502.15, 1502.2.
[38] *W. Watersheds Project v. BLM*, 2015 WL 846548, at *10-11 (D. Ariz. Feb. 26, 2015), and *Sequoia Forestkeeper v. Benson*, 108 F.Supp.3d 917, 935 (E.D. Cal. 2015)
[39] *State Farm*, 463 U.S. at 43

woefully inadequate scientific, legal, and ethical basis for claiming the MBTA's deficiencies justify this proposed rule. Blaming and weakening the law after kneecapping it is not only irrational and unsupported by science, it is not in the public interest.

8. Procedural integrity is deficient; the Federal Record specific to this matter is misrepresented.

Case law affirms that NEPA makes environmental protection a part of the mandate of every federal agency and department. Agencies are "not only permitted, but compelled, to take environmental values into account. Perhaps the greatest importance of NEPA is to require [all] agencies to consider environmental issues just as they consider other matters within their mandates."[40]

The stated intent of the DEIS's Preferred Alternative A, with its promise of legal certainty for liability, is that fewer entities would seek or implement guidance from the Service on ways to avoid or minimize adverse effects to birds.[41] Combined with the DEIS's predicted increase in bird deaths and its affirmation that impacts are expected to be amplified, there are no analyses on indirect or cumulative effects, and no justification for proposed actions. The DEIS contains no analysis of going back to previous policy, or development of a permitting program, or developing a gross negligence standard. Those three things were mentioned in the scoping document but are absent from the DEIS.

NEPA Section 102 requires agencies to prepare a "detailed statement." The apparent purpose of the "detailed statement" is to aid in the agencies' own decision-making process and to advise other interested agencies and the public of the environmental consequences of the planned action.[42] The fact that other federal agencies disagree with DOI on this proposed rule is reason for withdrawing it until there is consistency among federal agencies.

The Council on Environmental Quality (CEQ) scoping regulations require connected, cumulative, and similar actions to be considered together in the same EIS—where proposals up for decision are functionally or economically related, those proposals must be considered in one EIS. "If proceeding with one project will, because of functional or economic dependence, foreclose options or irretrievably commit resources to future projects, the environmental consequences of the projects should be evaluated together."[43] The DEIS has failed to do this.

Of the 28 outside groups whose endorsements for the proposed rule appeared inappropriately in the Department's press release, none placed conservation concerns above financial gain. Not one statement objected to the proposed rule. This violates standards of fairness and impartiality codified in Title 5 of the Code of Federal Regulations (C.F.R.) § 2635.101, Basic Obligation of Public Service, which states: "Employees shall act impartially and not give preferential treatment to any private organization or individual."

Seven of the 28 groups whose statements appeared in the press release are among the largest industry lobby groups in the United States. Their professed goals include increasing access for domestic oil and gas production, putting anti-takings votes on ballot initiatives throughout the west, claiming that renewable energies contribute to climate change while denying climate disruption is a crisis, and defeating global warming legislation and clean energy initiatives. One endorser even hosted events that dismissed "the cult of climate change."[44] A quick tally of

[40] *Calvert Cliffs' Coordinated Committee v. Atomic Energy Commission*, 449 F.2d 1109 (D.C. Cir. 1971), cert. denied, 404 U.S. 942 (1972)
[41] Section 4.2.2.2 Other Biological Resources
[42] *Calvert Cliffs' Coordinated Committee v. Atomic Energy Commission*, 449 F.2d 1109 (D.C. Cir. 1971), cert. denied, 404 U.S. 942 (1972).
[43] *Fritiofson v. Alexander*, 772 F.2d 1225 (5th Cir. 1985)
[44] https://www.greenpeace.org/usa/global-warming/climate-deniers/front-groups/independence-institute/

funding sources shows that hundreds of millions of dollars flow to these groups from Exxon and other oil companies, plus various Koch Brothers foundations. The Interior Department's Solicitor himself is a former Koch employee. The groups whose endorsements appeared in the press release included the U.S. Chamber of Commerce, Pacific Legal Foundation, Independence Institute, Mackinac Center for Public Policy, Americans for Limited Government, Western Energy Alliance, and the National Mining Association. There is special irony to appreciate in knowing that such energetic lobbying for a proposed rule that would financially benefit extractive industries comes mostly from nonprofits.

To be more specific about our concerns on procedural violations that appear to invalidate the NEPA public process, on June 12, 2019, seven months before the proposed rule was announced, one of the abovementioned endorsers, the U.S. Chamber of Commerce, sent a letter[45] to the House Subcommittee on Water, Oceans & Wildlife expressing concern about the Fish and Wildlife Service's attempt to develop a permitting program for migratory bird incidental take that was based on the previous, Obama Administration Solicitor's Opinion, which had said incidental take is fundamental to the MBTA, and is prohibited.

The Chamber's letter, written after the Trump Administration Solicitor's Opinion reversed the previous Opinion, said that operations at a "vast range of commercial and industrial activities" would be "unduly hindered" and subjected to a "liability scheme." While not evidence in itself of advance nonpublic information illegally shared by the Department, when combined with the Chamber's statement of support for a *proposed* rule on the Department's initial public press release, there is reason for doubt about the integrity of the rulemaking process. Including these 28 endorsements and no dissenting statements in a press release for a *proposed* rule created the appearance not only of a "sales pitch," but also of improper and unauthorized advance use of nonpublic information, and of prejudice and lack of impartiality due to apparent suppression of dissenting views. These actions violate Title 5 of the Code of Federal Regulations (C.F.R.) § 2635.101, Basic Obligation of Public Service, and Title 5, Chapter XVI, Subpart G, Standards of Ethical Conduct for Employees of the Executive Branch § 2635.703 Use of Nonpublic Information.

And because those 28 statements were received before the public comment period opened, they are not part of the administrative record on this matter. Therefore, any comments submitted from these groups should also not be considered in the rulemaking. If the Department's evaluation was based on comments already received that weren't supposed to be considered before the proper time, then the decision becomes predetermined, the entire analysis on which it is based is faulty, and the rulemaking process becomes invalid and must be re-done.

Basic obligations in public service covered in Title 5 of the Code of Federal Regulations (C.F.R.) § 2635.101 state: "Employees shall endeavor to avoid any actions creating the appearance that they are violating the law, or the ethical standards set forth in this part. Whether particular circumstances create an appearance that the law or these standards have been violated shall be determined from the perspective of a reasonable person with knowledge of the relevant facts."

On March 11, 2020, ten retired senior Fish and Wildlife Service employees including this writer sent a complaint[46] to the Department of the Interior's Inspector General alleging that the news release "…strongly suggests that industry groups were given prejudicial, pre-announcement knowledge of or access to the content of the proposed rule, and may represent prohibited *ex-parte* communication possibly in violation of the Administrative Procedure Act." Our letter said, "We regard the handling of this news release as a potential violation of the Administrative

[45] https://www.uschamber.com/letters-congress/us-chamber-letter-the-discussion-draft-of-the-migratory-bird-protection-act-of-2019

[46] First complaint letter to Inspector General, March 11, 2020. https://www.peer.org/wp-content/uploads/2020/03/3_16_20_MBTA_Inspector-General-letter.pdf

Procedure Act (APA) which governs agency rulemakings and requires agencies to maintain a fair and impartial approach to considering public comments. As DOI's press release clearly gives the impression that it has already made a decision, we hope that, going forward, the Inspector General's office will ensure that all public comments are duly considered and not pushed aside in a rushed effort to complete this rulemaking."

Our letter also pointed out the inconsistencies in the departure from published Scientific Integrity Procedures and Ethics guidance,[47] and asked the Inspector General to investigate whether improper sharing of public information had occurred, and whether inappropriate relationships existed between industry and personnel of the Interior Department. We provided a list of senior employees in the Department and a reasonably short range of dates and asked that the Inspector General examine emails to determine whether any of this had occurred.

Finally, our complaint said, "During the preparation of the news release, supporting materials, and press call for this proposed rule, it is our understanding that professional staff within the Fish and Wildlife Service's Division of Migratory Bird Management were urged, if not pressured, to assist in providing misleading information to the public or to otherwise violate their professional ethics. We encourage the Inspector General to review email traffic between the Division of Migratory Bird Management and the Service's Office of External Affairs regarding a proposed or draft "Myths and Facts" document, and also to review any emails between the DOI Office of Communications and these two FWS divisions regarding this document and the press announcement. In our experience, directions or pressure to prepare this type of document may have originated at higher levels of the Department. We want to ensure that professional staff within the Division of Migratory Bird Management and External Affairs Office were not concerned about possible retaliation for their refusal, on the basis of science, to fully support the proposed rulemaking."

Any reasonable person would consider these things to be substantial evidence indicating procedural and ethical problems and a decision already made. Under § 10 of the Administrative Procedure Act, 5 USC §§ 701-706, courts reviewing agency regulations are instructed to overturn actions they find to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." While the complaint in our first letter that references the APA is not about the "final agency action" and thus was not judicially reviewable at the time, it and our comment letter are part of the administrative record for that eventuality.

Section 102 of NEPA also mandates a careful and informed decision-making process and creates judicially enforceable duties. The reviewing courts probably could not reverse a substantive decision on the merits, but if the decision were reached procedurally without consideration of environmental factors—conducted fully and in good faith—it is the responsibility of the courts to reverse.[48]

The D.C. Circuit Court stated in its findings that agencies have "the duty under NEPA to exercise a degree of skepticism in dealing with self-serving statements from a prime beneficiary of the project."[49]

After a number of email exchanges in which the Office of Inspector General insisted that the names of those FWS employees who had quietly complained were required as a precondition or they would not investigate any aspect of our complaint, we wrote a second letter that narrowed the focus of our original complaint.[50] In order to better understand the mission, obligations, and

[47] Departmental Manual (470 DM 1.4 F)
[48] *Calvert Cliffs' Coordinated Committee v. Atomic Energy Commission*, 449 F.2d 1109 (D.C. Cir. 1971), cert. denied, 404 U.S. 942 (1972)
[49] *Citizens Against Burlington v. Busey*, 938 F.2d 190 (D.C. Cir. 1991), cert. denied, 502 U.S. 994, 112 S.Ct.616 (1992)
[50] Second complaint letter to Inspector General, May 8, 2020. https://www.peer.org/wp-content/uploads/2020/06/6_11_20_OIG_follow-up_MBTA_proposed_rule.pdf

limitations of the Office of Inspector General, we read materials available from the OIG online that included FAQs, Semiannual Reports to Congress, memos, letters, articles, ethics principles, and investigative reports. Again, our letter cited Title 5 of the Code of Federal Regulations, including Chapter XVI, Subpart G, Standards of Ethical Conduct for Employees of the Executive Branch § 2635.703 Use of Nonpublic Information. We repeated our request that the OIG investigate correspondence between the Department and these 28 groups, in order to establish whether or not improper advance sharing of nonpublic information had occurred. We pointed out that the Inspector General's hotline permits anonymous complaints, so it was inconsistent that the names of those Fish and Wildlife Service employees were being required in order for the IG to investigate any facet of our complaint.

We asked seven questions, saying, "We would like to know:

1. If nonpublic information was disclosed to private sector sources.

2. Whether the Department violated impartiality (and possibly the Law) by improperly insulating the public from opposing opinions, or by making a decision before the public process was begun.

3. If the Department gave preferential treatment to any organization or individual. The press release gives the appearance of favoritism and a violation of either the Law and/or ethical standards.

4. If there is/has been pressure on biologists to alter biological information or data for the purpose of misleading or withholding information from the public. A search of emails of the names, offices and dates already provided could shed light.

5. What, if any, written criteria the OIG's office followed in its determination on our March complaint,

6. If the OIG's office prepared a written record or report on the disposition and current status of our March complaint. If so, we request a copy of the report or record.

7. Why OIG opened at least one previous case from an anonymous employee complainant, as was stated in an investigative report, on April 11, 2006, yet why in this case in 2020 the OIG must have names, or the OIG won't investigate."

We received a response from the OIG on May 12 that said, "I have forwarded them to my leadership for their awareness. I also added them to our electronic case file." No response has been received since that date.

The procedural duties imposed by NEPA are to be carried out by the federal agencies "to the fullest extent possible." It is the duty of complainants to exhaust every possibility for administrative remedy. As we stated before, courts have ruled that agencies cannot drag their feet or make some legal requirements discretionary. Refusal of the Inspector General to open an investigation of alleged procedural malfeasance by the Department, while not directly applicable to our comments on the substance of DEIS, nonetheless contributes to a public impression of ignoring procedural violations that are applicable.

9. Amending the law is outside agency authority:

An agency charged with administering a statute cannot restrict, amend, repeal or expand it without Congressional approval. An agency has no authority to take protection away without Congressional approval. A ruling cannot violate a statute or make it inoperable. A ruling must be consistent with the legislative intent of the law.

In a recent Supreme Court decision, *County of Maui, Hawaii v. Hawaii Wildlife Fund*, Maui County tried unsuccessfully to redefine the meanings of the words "to" and "from" as applied to nonpoint source pollution under the Clean Water Act. It amounted to an attempt to reinterpret the law so radically that it would, if successful, have made the law inoperable. The court recognized EPA's interpretation of the existing statute. We use this example as an analogy, because the proposed rule attempts to redefine the term "incidental," co-mingling it with the intent of "deliberate." By arguing for the deliberateness of incidental take as the basis for exemption of industries whose projects kill birds, the Department excludes time and negligence. The proposed rule would largely make the statute inoperable, thus violating its congressional intent by removing its purpose.

10. Demonizing wild birds as justification for the proposed rule is scientifically unsound and irrational:

In its attempt to justify the proposed rule, the DEIS's analysis suggests that there would be benefits to having fewer wild birds in the world. Birds spread diseases, it says, pointing to wild birds as implicated in the spread avian influenza without once mentioning that transmission to humans would be most likely through consumption of infected poultry. It does not attempt to clarify that more than a hundred zoonotic diseases, including cat scratch fever, giardia, anthrax, brucellosis, rabies, bovine tuberculosis, Lyme disease, swine flu, and tapeworms, come from non-bird animals. It does not mention that 11 zoonotic diseases come from dogs, 10 come from cats, 9 from horses, 5 from gerbils, rabbits and other pocket pets, or similarly imply that the world would be better off with fewer of these animals. The CDC states on its web site that "Six out of every 10 infectious diseases in people can be spread from animals and 3 out of every 4 new or emerging infectious diseases in people come from animals." These diseases "…are zoonotic, which makes it crucial that the nation strengthen its capabilities to prevent and respond to these diseases… using an approach that recognizes the connection between people, animals, plants, and their shared environment and calls for experts in human, animal, and environmental health to work together to achieve the best health outcomes for all." No agency except the Department of the Interior has either suggested or implied that proactive, untargeted destruction of large numbers of birds is a potential solution to emerging infectious disease.

Climate disruption and its effects on hosts, vectors and pathogens are not mentioned in the discussion of birds as potential disease vectors, yet this has been studied and documented.[51] A study published in 2010 said, "Climate change may affect the incidence of VBZDs [Vector-borne zoonotic diseases] through its effect on four principal characteristics of host and vector populations that relate to pathogen transmission to humans: geographic distribution, population density, prevalence of infection by zoonotic pathogens, and the pathogen load in individual hosts and vectors. These mechanisms may interact with each other and with other factors such as anthropogenic disturbance to produce varying effects on pathogen transmission within host and vector populations and to humans."[52]

The words "climate change" and "disease" are not mentioned in the Solicitor's Opinion, so the Department's attempt to use disease to justify its proposed destruction of migratory birds sounds irrational and desperate.

[51] https://www.astho.org/programs/environmental-health/natural-environment/climate-change-and-vector-borne-diseases/

[52] Mills, James N., Gage, Kenneth L., and Khan, Ali S. Environ Health Perspect. 2010 Nov; 118(11): 1507–1514. Published online 2010 Jun 24. doi: 10.1289/ehp.0901389 https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2974686/

Citing FAA statistics for aircraft strikes between 1990 and 2011, the DEIS calls bird strikes "a major concern," citing a five-fold increase and the 2009 collision with Canada geese that forced U.S. Airways Capt. Sullenberger to land a plane on the Hudson River in New York. While it's true that the number of wildlife strikes have increased, and that birds are not the only animals to strike aircraft, it's also true that the number of flights have significantly increased—to more than 16 million in the U.S. per year, according to the FAA, with at least 5,000 planes in the air at any given time. The Fish and Wildlife Service recognizes that "…over 250 people have been killed worldwide as a result of wildlife strikes since 1988." But let's put it in context. Deer-vehicle collisions cause 200 human deaths per year and $1.1 billion in property damage; by this logic, the world would be better off with fewer deer. The DEIS also failed to acknowledge that wildlife strikes in cited FAA statistics from 1990-2011 also included bats, terrestrial mammals, and one iguana, and were mostly non-damaging.

FAA's statistics acknowledge, "The number of wildlife strikes reported per year to the FAA increased steadily from about 1,800 in 1990 to 16,000 in 2018. Expanding wildlife populations, increases in number of aircraft movements, a trend toward faster and quieter aircraft, and outreach to the aviation community all have contributed to the observed increase in reported wildlife strikes."[53] The DEIS does not acknowledge the increase in reporting bird strikes as a factor in the statistics. FAA also stated, "Waterfowl (ducks and geese) account for only 5% of the strikes but are responsible for 28% of the strikes that cause damage to the aircraft."[54] It further clarifies by stating that about 61 percent of bird strikes with civil aircraft occur during landing phases of flight (descent, approach and landing roll); 36 percent occur during take-off run and climb; and the remainder (3 percent) occur during the en-route phase." Airport runway hazing to clear birds from runways is a long-standing practice. While the problem of bird strikes is real, the DEIS inappropriately uses it as rationale for allowing bird deaths in non-aviation circumstances.

According to FAA's database, in 2018 the active US air carrier fleet was at an all-time high, numbering 211,749 planes and transporting 1 billion passengers on more than 16 million flights across 29 million miles of airspace. The International Air Transport Association predicts 8.2 billion air travelers in 2037, with a demand for more than 39,000 new commercial airliners in the next 20 years.[55] Thus, if we carry the DEIS's argument to its conclusion, the world might be better off without any birds.

Birds are not a fashion accessory and their conservation is not an indulgence. The rationale of citing disease and a plane accident and including an entire section on the "detrimental impacts of migratory birds" in its analysis of eliminating protections for them is not only irrational, but irresponsible and unbecoming of a federal conservation agency.

11. Conclusion

We already know what kills birds. We also know how to reduce that toll. And we know that liability for bird deaths is a major concern for energy, mining, communications, and other industry interests. We also know that relatively minor fixes that are now voluntary would vastly reduce, by orders of magnitude, the incidental take of migratory birds and provide a biological margin for conserving species from extirpation or extinction. The Department's interpretation of this law makes a mockery of its scientific and procedural responsibilities. NEPA requires that an agency—to the fullest extent possible—consider alternatives to its actions that would reduce environmental damage. By refusing to consider such alternatives, the Department of the Interior

[53] https://wildlife.faa.gov/home
[54] https://www.faa.gov/airports/airport_safety/wildlife/faq/
[55] Bureau of Transportation Statistics. https://www.bts.gov/content/active-us-air-carrier-and-general-aviation-fleet-type-aircraft

and the Fish and Wildlife Service may effectively foreclose the environmental protection envisioned by Congress.

Throughout the MBTA's 102-year history, Congress has clearly said what it intended about protecting migratory birds, as well as penalties for violations. The phrase "incidental take" did not legally exist in 1918, but the meanings of "unintentional" and "accidental" in the context of killing birds were made clear over the ensuing century, and were not subject to the vagaries of wild interpretation. Therefore, precedent shows that they should not be reinterpreted now. The negligent or knowing and premeditated conditions at sites where bird deaths are routine and chronic cannot be interpreted as accidental or incidental. To allow this proposed rule to become regulation would be to legalize industrial gross negligence. The rule must be withdrawn until the procedural and substantive defects of the DEIS can be remedied and sufficient notice, adequate consultation of Tribes, and consideration for opposing arguments are conducted with impartiality and without inappropriate outside interference.