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July 20, 2020

BY ELECTRONIC SUBMISSION
Via Federal eRulemaking Portal
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Attn: FWS-HQ-MB-2018-0090
U.S. Fish and Wildlife Service
MS: JAO/1N
5275 Leesburg Pike
Falls Church, VA 22041-3803

Re: Docket No. FWS-HQ-MB-2018-0090, Draft Environmental Impact Statement, Regulations Governing Take of Migratory Birds

Please accept the following comments on behalf of over 35 undersigned organizations, which work to protect and restore the natural environment in the Southeast. We write in response to the U.S. Fish and Wildlife Service's ("FWS" or "Service") Draft Environmental Impact Statement ("DEIS"), FWS-HQ-MB-2018-0090-8631, June 5, 2020,[1] regarding regulations governing take of migratory birds. Through these comments, we address deficiencies in the agency's analysis and supplement the comments we submitted on March 19, 2020,[2] on the agency's earlier Notice of Intent to prepare an environmental impact statement.[3]

FWS is proposing to insulate through this rulemaking its policy reversing course on decades of recognition that incidental take of protected migratory birds is prohibited under the Migratory Bird Treaty Act ("MBTA"). The fundamental purpose of an agency's environmental impact statement is to provide an analysis that informs the public and the decisionmaker of the environmental consequences of its proposed course of action and a detailed analysis of alternatives to that action. However, this DEIS leaves the agency and the public uninformed about the consequences of stripping away protections for migratory birds. If the agency looked hard at its proposed action, as it must, it would see the environmental costs will be severe and far-reaching, particularly for those species already in steep decline.

[1] https://beta.regulations.gov/document/FWS-HQ-MB-2018-0090-8631.

[2] Those comments, which we incorporate by reference, are available here: Comments on Docket No. FWS-HQ-MB-2018-0090, Notice of Proposed Rulemaking: Regulations Governing Take of Migratory Birds, and Notice of Intent to Prepare an Environmental Impact Statement, https://www regulations.gov/document?D=FWS-HQ-MB-2018-0090-8210 ("Scoping Comments").

[3] Proposed Regulations Governing Take of Migratory Birds, 85 Fed. Reg. 5915 (Feb. 3, 2020) (to be codified at 50 C.F.R. pt. 10) ("Proposed Rule") and the related Notice of Intent to Prepare an Environmental Impact Statement ("EIS"), 85 Fed. Reg. 5913 (Feb. 3, 2020).

As organizations involved in preserving the environment of the Southeast, ensuring durable protections for migratory birds is critical to our goals of sustaining healthy ecosystems and communities in our region. Migratory bird populations are already in significant decline and face increasing threats of extirpation due to stressors like habitat loss and climate change.[4] This is particularly true in the Southeast,[5] which is one of the fastest growing areas of the country.[6] The Southeast is a region in which population growth, high-density urbanization, industrial expansion, and resource exploitation often create conflict with conservation values and resources important to local communities. *See* 42 U.S.C. § 4331(a). The Southeast's diverse and complex environmental resources also contain more remaining wetlands than anywhere else in the continental United States.[7] The Appalachian region, an area known for its mature forests and biodiversity, supports high densities of forest breeding birds, including neotropical songbirds.[8]

The work of our organizations will be adversely affected by any rule that eliminates important protections we rely on to ensure projects and industrial operations do as little damage to migratory bird species as possible. The DEIS signals FWS intends to do just that. Worse, it does so without analyzing the impacts of that decision to migratory birds. Such an omission is neither legal nor inconsequential. In the face of what scientists deem an "urgent need to address threats to avert future avifaunal collapse and associated loss of ecosystem integrity, function, and services,"[9] FWS's rule instead threatens to hasten collapse of migratory bird populations.

The costs of FWS's rule will come not only to migratory birds themselves, but also to the ecosystems, economies, and communities who depend on a healthy environment. Significant losses in avian populations have follow-on effects across ecosystems. "Declines in abundance can degrade ecosystem integrity, reducing vital ecological, evolutionary, economic, and social

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[4] *E.g.*, Elizabeth Pennisi, *Three billion North American birds have vanished since 1970, surveys show*, SCI. (Sept. 19, 2019), https://www.sciencemag.org/news/2019/09/three-billion-north-american-birds-have-vanished-1970-surveys-show, attached to Scoping Comments; Kenneth V. Rosenberg et al., *Decline of the North American avifauna*, SCI. (Oct. 4, 2019), https://science.sciencemag.org/content/366/6461/120, attached to Scoping Comments.

[5] *See* Mark Anderson et al., *Southern Blue Ridge: An Analysis of Matrix Forests*, THE NATURE CONSERVANCY (Apr. 2012) at 1, https://www.conservationgateway.org/Files/Documents/FINAL_SBR_Forest_Block_Report_May2013.pdf, excerpt attached to Scoping Comments; *see also* Heather A. Lumpkin & Scott M. Pearson, *Effects of Exurban Development and Temperature on Bird Species in the Southern Appalachians*, 27 CONSERVATION BIOLOGY No. 5, 1069-1078 (2013), attached to Scoping Comments.

[6] *See* U.S. Census Bureau, Press Release, *New Census Bureau Population Estimates Reveal Metro Areas and Counties that Propelled Growth in Florida and the Nation*, U.S. DEP'T OF COMMERCE (DOC) (Mar. 26, 2015), https://www.census.gov/newsroom/press-releases/2015/cb15-56.html.

[7] Natural Res. Conservation Serv., *The Status and Recent Trends of Wetlands in the United States*, U.S. DEP'T OF AGRICULTURE (N.d.), www nrcs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb1262239.pdf.

[8] Mark Anderson et al., *supra* note 5; Appalachian Mountains Bird Conservation Region Partnership, Appalachian Mountains Bird Conservation Initiative Concept Plan (2005), http://www.acjv.org/documents/bcr28_concept_plan.pdf; T.D. Rich et al., *Partners in Flight: North American Landbird Conservation Plan*, Cornell Lab of Ornithology, Ithaca, NY (2004) (attached); K.V. Rosenberg & J.V. Wells, *Global perspectives on neotropical migratory bird conservation in the Northeast: long-term responsibility versus immediate concern*, USDA FOREST SERVICE PROCEEDINGS RMRS-P-16 (2000) (attached).

[9] Rosenberg et al. at 1, *supra* note 4.

services that organisms provide to their environment."[10] The extent of this damage goes un-analyzed in the DEIS. Thriving migratory bird populations are essential to healthy and functioning ecosystems in the Southeast.

Our prior comments explained why the agency's proposal to write incidental take prohibitions out of the MBTA is not a lawful interpretation of that Act or the U.S.'s treaty obligations that underlie the Act. Should FWS determine to proceed with consideration of an ill-fated rule anyway, it must separately comply with the mandates of the National Environmental Policy Act ("NEPA"), which demands far more analysis than could be squeezed into the agency's mere sixty pages of environmental review. In order to comply with NEPA, the agency should also fully analyze a more sensible alternative: withdraw Opinion M-37050 and develop a program to uniformly protect migratory birds against incidental takes, consistent with decades of agency practice.

I. The DEIS Does Not Analyze the Major Federal Action Properly Subject to Analysis Under NEPA

The national cornerstone for environmental protection, NEPA compels preparation of an environmental impact statement for a major federal action with significant impacts to the human environment. 42 U.S.C. § 4332(2)(C).[11] That detailed statement must analyze the likely environmental effects of the proposed major federal action, any unavoidable adverse effects, and potential alternatives to that action. *See* 42 U.S.C. § 4332(2)(C). Important here, the "federal agency must carefully consider the effects" of its proposed action and "disseminate widely its findings on the environmental impacts of its actions," *before* taking that action. *Nat'l Audubon Soc'y v. Dep't of Navy*, 422 F.3d 174, 184 (4th Cir. 2005) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989)).

Fundamental to that task is properly identifying the major federal action that will have significant impacts in the first place. Major federal actions include policy changes like Opinion M-37050.[12] As with scoping, the DEIS skips over the true major federal action and agency decision of greatest consequence: FWS's reliance on Interior's Opinion M-37050 to reverse course on decades of protections for migratory birds against incidental take. FWS previously understood the expansive language and protective purpose of the MBTA to apply to activities that present equally grave threats to migratory birds as hunting—like oil and gas development and communication towers. In December 2017, the administration abandoned that longstanding

[10] *Id.* (citations omitted).

[11] On July 15, 2020, the administration announced a major revision of the Council on Environmental Quality's ("CEQ's") regulations implementing NEPA. 85 Fed. Reg. 43304, https://www.govinfo.gov/content/pkg/FR-2020-07-16/pdf/2020-15179.pdf . Those revisions are not effective until September 14, 2020, at the earliest, and therefore were not applicable to the agency's obligations in preparing the DEIS or these comments. In any event, the fundamental obligations governing environmental review described in these comments arise from NEPA itself, as interpreted by courts for decades. Furthermore, CEQ's new rule appears invalid, is likely to be challenged, and is vulnerable to being vacated on judicial review.

[12] *See* 40 C.F.R. § 1508.18(a); 43 C.F.R. §§ 46.205(c)(1), 46.210(d), 46.215(b), (c), (d) (Interior regulations requiring legal opinions to be analyzed in an EIS when they have significant impacts, including on migratory birds).

interpretation. The environmental consequences of the underlying sweeping policy change, which occurred in Opinion M-37050, have yet to be held up to the mandates of NEPA.

Signaling no intent to correct that omission, the DEIS persists in the fiction that the relevant federal action subject to NEPA is the codification of Opinion M-37050, not the change in policy itself. Reinforcing this, the vast policy change that is Opinion M-37050 is now assumed in the DEIS to be "no action." DEIS at 4. By framing the proposed action as a codification of existing policy, FWS obscures the actual major federal action with the greatest environmental implications: the abandonment of decades of interpretation that protected migratory birds from incidental takes. The major federal action affecting the human environment is not the decision to adopt an agency policy as a regulation; it is the change in policy that permits incidental takes of migratory birds.

To proceed in any defensible fashion, the agency must reckon with the consequence of adopting Opinion M-37050 in the first place. Although the DEIS seems to recognize that the opinion, its "no action" alternative, is already harming migratory birds (DEIS at table S1), by accepting that harm into the baseline, it does not analyze the effects of the agency's underlying decision to abandon protections against incidental take. The relevant starting point for ascertaining effects of this sweeping policy change is the policy and decades of practice that existed *before* the adoption of M-37050, which protected migratory birds from incidental takes.

Congress enacted NEPA "to reduce or eliminate environmental damage." *Sierra Club v. U.S. Forest Serv.*, 897 F.3d 582, 590 (4th Cir. 2008) (quoting *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 756 (2004)). NEPA itself recognizes as a key purpose the promotion of "efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man." 42 U.S.C. § 4321. "Specifically, the purpose of NEPA is to sensitize all federal agencies to the environment in order to foster precious resource preservation." *Nat'l Audubon Soc'y*, 422 F.3d at 184 (citing *Andrus v. Sierra Club*, 442 U.S. 347, 350-51 (1979); *Hodges v. Abraham*, 300 F.3d 432, 438 (4th Cir. 2002)). Although NEPA does not mandate a particular outcome, it does require the agency to consider every significant aspect of the environmental impact of a proposed action in order to focus the agency on the environmental consequences *before* resources have been committed. *Robertson*, 490 U.S. at 349.

This DEIS does not come close. Instead, the agency appears set on insulating a two-year-old decision to abandon protections for migratory birds against incidental take—a decision it already implements—through a *post hoc* environmental impact statement. This misses the point of NEPA entirely and causes a cascade of errors throughout the DEIS.

II. The Analysis of Alternatives in the DEIS Requires Significant Revision

NEPA requires an agency to take a "hard look" at environmental impacts before taking major actions. *Nat'l Audubon Soc'y*, 422 F.3d at 184. An effective hard look requires a detailed consideration of "alternatives to the proposed action." 42 U.S.C. § 4332(c)(iii); *see Cowpasture River Pres. Ass'n v. U.S. Forest Serv.*, 911 F.3d 150, 170 (4th Cir. 2018).[13] The detailed

[13] Reversed in part on unrelated grounds in *U.S. Forest Serv. v. Cowpasture River Pres. Ass'n*, ___ U.S. ___, 140 S. Ct. 1837 (2020).

development and study of alternatives must include reasonable alternatives that would avoid or minimize adverse impacts. 42 U.S.C. §4332(C), (E); 40 C.F.R. § 1502.1. The evaluation of alternatives provides a clear basis for the decisionmaker and the public to understand the comparative merits and tradeoffs between alternative courses of action. *See* 40 C.F.R. §§ 1502.1; 1502.14.

The DEIS's approach to alternatives requires significant revision to comply with NEPA. First, the DEIS was developed with the Service having already committed to a course of action: cementing the agency's previous policy reversal into a regulation. That much was clear at scoping. Not until the agency considers the consequences of that underlying policy choice through a proper NEPA analysis can it evaluate alternatives to that choice. Second, the DEIS's summary dismissal of alternatives displays incoherent reasoning that appears arbitrary and capricious. Third, the agency's preferred alternative is not a lawful interpretation of the MBTA in any event. Compounding these errors, as discussed in section III.F below, the effects analysis is so cursory and generalized that the DEIS provides no way to meaningfully compare alternatives, meaning the agency has no basis to consider the tradeoffs between alternatives and their significant environmental costs. Because of these errors, explained in further detail below, the agency's analysis is unsound.

A. The DEIS Foretells a Predetermined Alternative

NEPA prohibits agencies from conducting an environmental review simply to justify decisions already made. 40 C.F.R. § 1502.2 (g).[14] The environmental review required by NEPA must be "timely," undertaken "objectively," and not exercised "as a subterfuge designed to rationalize a decision already made." *Metcalf v. Daley,* 214 F.3d 1135, 1142 (9th Cir. 2000). When "an agency predetermines the NEPA analysis by committing itself to an outcome, the agency likely has failed to take a hard look at the environmental consequences of its actions due to its bias in favor of that outcome and, therefore, has acted arbitrarily and capriciously." *Forest Guardians,* 611 F.3d at 713.

Here, FWS's commitment to an outcome was evident in the scoping notice for the EIS and the accompanying proposed rule announced in February 2020. In its notice of intent to prepare an EIS, FWS announced its purpose of "codifying the Solicitor's Opinion, M-37050." 85 Fed. Reg. at 5914. Opinion M-37050 determines that the MBTA's prohibition against taking protected migratory birds applies only to intentional take, and as such, take is not prohibited when the underlying purpose of the actor is not aimed at taking birds. Only one alternative, the adoption of M-37050, would satisfy the purpose of the rulemaking identified at scoping—to codify Opinion M-37050. The proposed rulemaking does just that, by declaring the MBTA's "prohibitions . . . apply only to actions that are directed at migratory birds, their nests, or their eggs." 85 Fed. Reg. at 5916; M-37050 at 2 ("[P]rohibitions . . . apply only to affirmative actions that have as their purpose the taking or killing of migratory birds, their nests, or their eggs.").

The DEIS now attempts to shift away from the original myopic focus at scoping of entrenching what has already been done to a broader purpose: to provide an "official regulatory

[14] *Accord Int'l Snowmobile Mfrs. Ass'n v. Norton,* 340 F. Supp. 2d 1249, 1257-58 (D. Wyo. 2004); *Forest Guardians v. U.S. Fish & Wildlife Serv.,* 611 F.3d 692, 712-13 (10th Cir. 2010).

definition . . . as it relates to incidental take of migratory birds." DEIS at 3. Facially, that purpose seems to allow for a regulatory definition that would *prohibit* incidental takes of migratory birds, rather than *allow* them. But the DEIS's actual consideration of alternatives belies any sincere attempt to go beyond the preferred alternative. As such, the DEIS's shift in stated purpose appears to be, at most, an attempt to avoid the obvious implication that the outcome of this NEPA process was determined when Interior announced the proposed rule eliminating incidental take from the MBTA in February 2020 based on an earlier policy reversal—and well before the agency conducted an environmental analysis or considered public comment.

The broader articulation of purpose in the DEIS, critically, does not rid the agency of the timing problem. An agency violates NEPA when it makes a decision before analyzing the environmental effects of that action. *See, e.g.*, *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 892 (9th Cir. 2002) (holding that NEPA requires environmental assessment be prepared early enough to serve practically as an important contribution to the decisionmaking process, and not merely be used to rationalize or justify decisions already made).

The NEPA process must "focus[] the agency's attention on the environmental consequences of a proposed project" at a time *before* "resources have been committed or the die otherwise cast." *Robertson*, 490 U.S. at 349; *see also Paulsen v. Daniel*, 413 F.3d 999, 1005 (9th Cir. 2005) ("It is antithetical to the structure and purpose of the APA for an agency to implement a rule first, and then seek comment later.").[15]

The die here was cast with the 2017 policy reversal and is reflected in the proposed rule that preceded this DEIS. In truth, Interior made the decision to eliminate the prohibition against incidental takes of migratory birds from the MBTA in December 2017, with issuance of Opinion M-37050. It undertook no environmental review at the time, and it took more than two years, during which multiple lawsuits were filed, before the agency started this environmental review.[16] For FWS to properly analyze the major federal action embodied in its rulemaking, and alternatives to that action, the agency would have to engage a NEPA process without the policy reversal baked into its consideration of alternatives. Otherwise, the agency cannot escape the implication that its decision is the foregone conclusion it announced at scoping alongside its proposed rule—codifying Opinion M-37050 into a regulation.

B. <u>The Analysis of Alternatives is Legally Deficient</u>

The DEIS considers three alternatives: the No Action Alternative and Alternatives A and B. Under the "No Action" Alternative, "the Service would continue to implement the MBTA consistent with the direction given in M-Opinion 37050, which defines the scope of the MBTA

[15] "[U]nder the first sentence of §102(2)(C) the moment at which an agency must have a final statement ready 'is the time at which it makes a recommendation or report on a *proposal* for federal action.'" *Kleppe v. Sierra Club*, 427 U.S. 390, 405-06 (1976) (quoting *Aberdeen & Rockfish R. C. v. SCRAP*, 422 U.S. 289, 320 (1975)). As the Supreme Court has recognized, the plain language of NEPA requires the timing of the agency's environmental review to be integrated into its decisionmaking. *Andrus*, 442 U.S. at 350-51 (quoting S. Rep. No. 91–296, 20 (1969)); *see also Weinberger v. Catholic Action of Haw./Peace Educ. Project*, 454 U.S. 139, 143 (1981).

[16] *See NRDC v. U.S. Dep't of the Interior*, No. 18-CV-4596 (VEC) (S.D.N.Y.); *Nat'l Audubon Soc'y v. U.S. Dep't of the Interior*, No. 18-CV-4601 (VEC) (S.D.N.Y.); *State of New York v. U.S. Dep't of the Interior*, No. 18-CV-8084 (VEC) (S.D.N.Y.).

to exclude incidental take." DEIS at 16.[17] The preferred Alternative A would "promulgate a regulation that defines the scope of the MBTA take prohibitions to apply only to actions directed at migratory birds." *Id.* As described, the only change between Alternative A and the No Action Alternative is that promulgating a rule "would increase judicial deference owed to that interpretation." *Id.* at 17. Alternative B "would promulgate a regulation that defines the scope of the MBTA to include incidental take." *Id.* at 17.

Additionally, the DEIS briefly addresses two alternatives that were not carried forward for further review. *Id.* at 19-20. Under the first, the Service would "promulgate[] a regulation defining what constitutes incidental take of migratory birds, and subsequently establish[] a regulatory general-permit framework." *Id.* at 19. The DEIS rejects consideration of this alternative "at this time because developing a general-permit system would be a complex process and better suited to analysis in a separate subsequent proposal if we were to choose Alternative B." *Id.* at 20. The DEIS goes on to explain that this alternative "goes beyond the stated purpose and need of simply providing regulatory certainty." *Id.*

In the second alternative not carried forward for analysis, the Service would "promulgate a regulation defining what constitutes incidental take of migratory birds and develop an enforcement policy requiring gross negligence to establish a misdemeanor violation of the MBTA." *Id.* The agency rejects consideration of this alternative purportedly because "it rests on an uncertain legal premise, potentially reducing legal certainty and thereby failing to meet the purpose and need of this proposal." *Id.* That "uncertain legal premise" is the establishment of a minimum *mens rea* of gross negligence—ironically something the proposed rule would also do.

For the reasons set forth below, the agency's cursory analysis of alternatives is insufficient. The purpose and need, as articulated in the DEIS, is in truth satisfied by multiple alternatives, some of which are entirely absent from the DEIS even though they are reasonable and feasible within the scope of the action. Unless these errors are corrected, the agency's selection and analysis of alternatives is fatally flawed under NEPA.

1. The Analysis Erroneously Dismisses Alternatives That Would Satisfy the Purpose and Need as Stated in the DEIS

The purpose and need for an action defines the alternatives that should be considered under an adequate EIS. *See, e.g., Little Traverse Lake Prop. Owners' Ass'n v. Nat'l Park Serv.*, 883 F.3d 644, 655 (6th Cir. 2018) ("Alternative actions . . . are measured against the Purpose and Need Statement." (internal quotation and alteration omitted)); *Protect Our Communities Found. v. LaCounte*, 939 F.3d 1029, 1038 (9th Cir. 2019) ("The stated goal of a project necessarily dictates the range of 'reasonable' alternatives. . . ."). The DEIS describes the purpose and need for the rule here as follows:

[17] As discussed above, defining the "no action" alternative in this way completely misses the mark on assessing the actual policy change at issue, which occurred when Opinion M-37050 was implemented in 2017. It also makes the alternatives analysis deeply strange; the no action alternative provides the same level of enforcement certainty as the proposed rule.

> The purpose of this action is to *provide an official regulatory definition of the scope of the statute* as it relates to incidental take of migratory birds. The Service needs to conduct this action to *improve consistency* in enforcement of the MBTA's prohibitions across the country and thereby *eliminate public uncertainty* caused by the current patchwork of legal standards across the different Circuit Courts of Appeal, which have reached different conclusions on the central question of whether the MBTA prohibits incidental take.

DEIS at 12 (emphases added). In short, according to the DEIS, the rule will create an official definition of the scope of the MBTA in order to provide consistency of enforcement and legal certainty.

The agency's explanation for why it prefers Alternative A over other alternatives does not line up with this stated purpose and need. The agency asserts Alternative A "best fulfills the purpose and need for action by *reducing both the regulatory burden on the public and the enforcement burden on the Service's law enforcement officers*, and provides the public with a clear, binding rule on what does and does not constitute an MBTA misdemeanor violation." *Id.* at 17 (emphasis added). Reduction of regulatory and enforcement burdens is not part of the stated need for the proposed rule, which instead, by its own terms, is the need to provide *consistency* of enforcement and reduce legal uncertainty.[18]

Although the DEIS fails to recognize it, Alternative B, as well as the two alternatives not carried forward in the DEIS, would satisfy the purpose and need for the rule stated in the DEIS. Alternative B, under which the Service would codify a regulatory definition of the scope of the MBTA that includes incidental take, would "provide an official regulatory definition of the scope of the statute as it relates to incidental take of migratory birds," the purpose of the proposed action. It would meet the need of the action to "eliminate public uncertainty caused by the current patchwork of legal standards" because it would increase judicial deference to the agency's interpretation to the same extent as Alternative A; in fact, it would likely do a better job of this because more circuits have determined that the MBTA covers direct incidental take than have determined that it does not.[19]

Opinion M-37050 argues that because protecting against incidental take under the MBTA allows for prosecutorial discretion, it does not provide enough certainty about when incidental take will be prosecuted. To the extent that concern is unaddressed by existing legal standards that adopt a proximate cause requirement for MBTA incidental take liability,[20] the rule could set out to define incidental take in such a way as to limit prosecutorial discretion and provide additional certainty to industries that cause take of migratory birds. For example, the rule could limit the scope of incidental take where best practices, already developed for the majority of industries

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[18] Whether the rule actually reduces the regulatory burden or merely shifts it to consideration and mitigation at the individual project level is not addressed by the DEIS.

[19] Compare, e.g., *Protect Our Cmtys. Found. v. Jewell*, 825 F.3d 571, 585-87 (9th Cir. 2016); *Turtle Island Restoration Network v. Dep't of Commerce*, 878 F.3d 725, 733-35 (9th Cir. 2017); *Newton County Wildlife Ass'n v. U.S. Forest Serv.*, 113 F.3d 110, 115 (8th Cir. 1997); United States v. FMC Corp., 572 F.2d 902, 903-04, 908 (2d Cir. 1978), with *United States v. CITGO Petroleum Corp.*, 801 F.3d 477 (5th Cir. 2015).

[20] *See* Scoping Comments, https://www.regulations.gov/document?D=FWS-HQ-MB-2018-0090-8210.

causing a large amount of industry incidental take of migratory birds, are being followed and provide some assurance against prosecution to industry implementing those existing best practices. In other words, if certainty alone were driving this rulemaking, the supposedly lacking clarity could be addressed with an alternative that protects migratory birds from incidental take, consistent with previous practice, and also provides certainty about prosecution. The DEIS does not explain why Alternative B could not accomplish that.

The first alternative not further analyzed in the DEIS, which would define the scope of the MBTA as including incidental take and establish a general permitting system, similarly fulfills this purpose and need. Despite the DEIS's unsupported statement to the contrary, a general permitting system does not "go beyond the purpose and need of providing regulatory certainty." DEIS at 20. Anyone could apply for a permit, and obtaining that permit would provide certainty that enforcement for incidental take would not occur as long as its terms were followed. That is exactly within the parameters of a purpose and need for enforcement consistency. And like any permitting scheme, it would "reduce the enforcement burden" for the Service because cases in which a permit holder complied with permit terms would not be candidates for enforcement.

The DEIS implies that the real problem with a general permitting scheme is that it is a "complex process," DEIS at 20, and would therefore take too long to develop, time that is only warranted if the Service first promulgates a regulatory definition that includes incidental take in the scope of the MBTA.[21] But that too misses the mark. First, the agency has not established why any sense of urgency exists with regard to a rulemaking stripping long-standing protections for migratory birds. In fact, the DEIS makes clear that the agency does "not expect [the preferred] alternative to change the current implementation or enforcement of the MBTA." DEIS at 17. Because the agency has abandoned its enforcement authority, no enforcement actions for incidental take are currently being taken. The benefit of making a rule quickly has not been weighed against the harms to the environment that the rule will cause, in violation of NEPA. And if the action of defining the scope of the MBTA to include incidental take really must be a separate action from one establishing a general permit system, then that regulatory definition could place limits on prosecutorial discretion (*e.g.*, following best practices) until a general permit system is established.

Second, many of these best practices were previously developed when the Service recognized its authority to regulate incidental take. According to the DEIS, the "solar; building glass, and lighting; communication towers; coal-bed methane; commercial fisheries; electric utility lines; fluid mineral practices; mining claim markers; transportation; urban vegetation management; and wind energy" industries have all already worked with the Service to develop and implement guidelines. DEIS at 28. Considering that many of these industries are also responsible for a large portion of the hazards causing migratory bird fatalities, especially from industry sources, DEIS at 29, those best practices would seem to provide strong starting parameters for any permitting scheme, which could likely be moved through development fairly quickly. But the DEIS elects not to consider the possibilities of general permitting either, and instead refuses to analyze this option at all, because it is "complex."

[21] As discussed below, any regulatory definition that does not include incidental take in the scope of the MBTA is illegal under the MBTA and does not comply with the treaty obligations of the United States.

Similarly, the DEIS elects not to carry forward consideration of an alternative that includes incidental take in the scope of the MBTA but only prosecutes a misdemeanor violation where there is gross negligence, which "would allow the Service to focus its law enforcement resources on activities known to incidentally take birds, for which reasonable best practices that have been developed to avoid or minimize the take are not being implemented." DEIS at 20.

Although it is questionable that this more lax approach would comport with the MBTA, the tenuous logic deployed to dismiss this alternative is contradictory in its own right. The DEIS finds that because a gross negligence-based system of enforcement would incorporate a *mens rea* standard, this would potentially conflict with the views of federal courts. DEIS at 20. This is utterly baffling. At the same time, the agency is proposing to adopt a rule that *assigns* a minimum *mens rea* of intentionality, with no discussion of the "potential conflict" that this action would create according to the DEIS's own statements. How the proposed definition, which runs counter to the opinions of "most federal courts" that the scope of the MBTA includes strict liability for incidental take, avoids that same conflict is wholly unaddressed. "An environmental impact statement is 'deficient, and the agency action it undergirds is arbitrary and capricious, if the EIS . . . *does not demonstrate reasoned decisionmaking*.'" *City of Boston Delegation v. FERC*, 897 F.3d 241, 251 (D.C. Cir. 2018) (quoting *Sierra Club v. FERC*, 867 F.3d 1357, 1368 (D.C. Cir. 2017) (emphasis added)). Rejecting even the consideration of one alternative while codifying the *very thing* the agency claims is fatal to that alternative is the height of arbitrary and capricious decisionmaking.

The dubious reasoning and perfunctory analysis used to dismiss alternatives that appear to meet the agency's purpose and need, as now articulated in the DEIS, calls the entire analysis into question. It appears the agency is somewhat aware of the problem, as it attempts to drum up an additional "benefit" to its preferred rule—reducing the "regulatory burden" for industry. However, as discussed below under effects of the action, the agency misrelies on this factor without analyzing the adverse effects of the action, and therefore cannot support choosing that benefit over the substantial environmental costs of the proposed rule.

2. Reasonable Alternatives Not Raised in the DEIS

Along these same lines, the analysis does not consider other, reasonable alternatives that would satisfy the DEIS's stated purpose and need for the action (providing legal certainty and consistency of enforcement), while also reducing Alternative A's significant environmental costs in order to satisfy the purpose and need for the rule.

In considering a major federal action like the proposed rule, an agency must "study, develop, and describe *appropriate* alternatives" to the proposed action. 42 U.S.C. § 4332(E) (emphasis added).[22] Although the agency need not consider alternatives that are only remote and speculative, the agency must evaluate feasible alternatives and must be guided by a rule of reason in that determination. *See Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 551 (1978); *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196

[22] *See, e.g.*, 40 C.F.R. § 1502.1 (EIS "shall provide full and fair discussion of significant environmental impacts and shall inform decision makers and the public of the *reasonable* alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.") (emphasis added); 40 C.F.R. §§ 1500.2(e), 1502.14.

(D.C. Cir. 1991); *see also Audubon Society of Greater Denver v. Army Corps of Engineers*, 908 F.3d 593, 603 (10th Cir. 2018) ("A rule of reason applies to an agency's choice of alternatives to include in its analysis." (quotation and internal alterations omitted)).[23] Alternatives that are not "impractical or ineffective," and that accomplish the purpose of an action are considered reasonable. *Audubon Soc. of Greater Denver*, 908 F.3d at 603 (quotation omitted); *see also, e.g., Webster v. U.S. Dep't of Agric.*, 685 F.3d 411, 427 (4th Cir. 2012). The existence of a viable but unexamined alternative renders an environmental impact statement inadequate. *See, e.g., Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 814 (9th Cir. 1999).[24] Courts will scrutinize an agency's explanation for rejecting consideration of an alternative to ensure that the reasons given are adequately supported by the record. *See id.* at 813-15; *Idaho Conserv. League v. Mumma*, 956 F.2d 1508, 1522 (9th Cir. 1992) (while agencies can use criteria to determine which options to fully evaluate, those criteria are subject to judicial review).

The agency here failed to, but should, consider reasonable alternatives that would satisfy the purpose and need for the project while also upholding the MBTA and its underlying treaties, as well as reducing the enormous environmental impacts of the preferred alternative.

The DEIS rejects without further analysis a general permitting program alternative as being too time consuming to implement, but does not consider an individual permitting program, which could be implemented without the need to promulgate general permitting standards. Under that unaddressed alternative, any industrial project that might cause incidental take could apply for an individual project permit, much like the Incidental Take Statements already prepared by the Service under the Endangered Species Act. Given the existence of best practices to apply to permits as mitigation and the already-established ESA consultation schemes within the Service, this alternative would be feasible to implement quickly and would satisfy the purpose and need for the project, as the scope of incidental take would be defined and enforcement discretion would be limited by the terms of the permit.

Similarly, the DEIS fails to analyze an alternative that combines both general and individual permitting, similar to the permitting scheme implemented by the Army Corps of Engineers to enforce Section 404 of the Clean Water Act. Under that scheme, general permits could be developed incorporating industry mitigation practices, and for those specific projects for which a general permit did not exist or was not applicable, an individual permit could be applied for. To the extent that development and promulgation of general permits takes time,

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[23] Under that rule of reason, an agency's purpose, which defines the scope of alternatives, "is unreasonable when the agency defines it so narrowly as to allow only one alternative from among the environmentally benign ones in the agency's power, such that the EIS becomes essentially a foreordained formality," as well as when the agency "draws the purpose so broadly that an infinite number of alternatives would accomplish the project's goals." *Sierra Club*, 897 F.3d at 599. Ultimately, the purpose and need as defined here seem to fall into the latter category. Any rule that limits enforcement discretion and receives more judicial deference than guidance satisfies the "need." The universe of rules that limit enforcement discretion is certainly unreasonably broad. We focus in these comments, however, on certain reasonable alternatives the DEIS should clearly have addressed and that mimic schemes from FWS or other agencies.

[24] *See also Citizens for a Better Henderson v. Hodel*, 768 F.2d 1051, 1057 (9th Cir. 1985) ("In order to be adequate, an environmental impact statement must consider not every possible alternative, but every reasonable alternative." (internal citations omitted)).

individual permits would be able to fill the gap, ensuring that illegal incidental take did not occur while also limiting enforcement discretion.

These suggested alternatives are distinguishable from those purportedly analyzed in the DEIS. *See, e.g., High Country Conservation Advocates v. U.S. Forest Service*, 951 F.3d 1217, 1223 (10th Cir. 2020) (agencies must consider alternatives that are "significantly distinguishable" from alternatives already considered) (quotation omitted). Unlike the general permit scheme dismissed in the DEIS, an individual permit scheme or general-individual permit hybrid scheme could be implemented immediately, removing the obstacle of alleged complexity that makes the timeline for a general permit scheme alone too extended for further consideration in the DEIS. Both alternatives would satisfy the purported purpose and need of improving consistency and eliminating uncertainty and are logical extensions of permitting systems that already exist within resource management agencies.

And even if the agency, with proper analysis and explanation, determines that *any* permitting scheme is too "complex" regardless of time to initial implementation (which in terms of the purpose and need for the rule stated in the DEIS does not actually matter), an alternative defining the scope of the MBTA to include incidental take but limiting liability under certain circumstances also would be implementable on a short timeline, and satisfy the legal requirements of the MBTA and underlying treaties to protect migratory birds.

C. The Service's Preferred Alternative Is Unlawful

An agency decision is impermissible under the Administrative Procedure Act if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(A), (C). A decision based on an invalid interpretation of a statute does not meet the APA's requirements. *See United States v. Mead Corp.*, 533 U.S. 218, 227 (2001) (agency regulation will be set aside if "procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute"); *Friends of Back Bay v. U.S. Army Corps of Engineers*, 681 F.3d 581, 587 (4th Cir. 2012) ("Insofar as an agency's decision may be deemed unreasonable as a matter of law, it is likely to have been arbitrary and capricious."). Ultimately, there can be no "satisfactory explanation" for an agency action when that action runs counter to the authorizing statute. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). Given that the interpretation of the MBTA advanced by the proposed rule and analyzed in the preferred Alternative A is contrary to the statute, the adoption of this alternative renders the entire NEPA analysis as being "not in accordance with the law" and therefore invalid. Because the agency cannot adopt an illegal alternative, it also should not be considered in the NEPA analysis.

For the reasons discussed more extensively in our comments on the Notice of Proposed Rulemaking, the Service's definition of the scope of the MBTA as excluding prohibition of incidental take is illegal. *See* Scoping Comments at 2-5. In summary, the MBTA is a "conservation statute[] designed to prevent the destruction" of protected migratory birds. *Andrus v. Allard*, 444 U.S. 51, 52 (1979). The Act prohibits the killing or taking of "any migratory bird" by "any means or in any manner." 16 U.S.C. § 703(a) (It "shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture [or] kill . . . any migratory bird."). For

decades, the Department of the Interior and the Service recognized that the Act's broad language encompasses both purposeful and incidental direct killing of migratory birds. Opinion M-37050, which would be codified under the preferred alternative, is a complete reversal of decades of policy and practice by the Service.

The preferred alternative runs counter to the plain language of the statute, which is "broad and unqualified,"[25] restricting "take" and "kill[ing]" of migratory birds "at any time, by any means or in any manner." 16 U.S.C. § 703(a). That interpretation, codified in Alternative A, also contravenes Congress's view of the MBTA, as demonstrated by Congressional actions in the 1980s and 1990s that amended other portions of the MBTA to require a specific level of purposeful intent by the actor in limited instances in order for the Service to prosecute take. Congress also specifically (and temporarily) relieved certain military-readiness actions from incidental take prohibitions in 2002,[26] which would have been unnecessary if the MBTA could permissibly be read to not apply to incidental take. Combined with other Congressional choices over time,[27] these legislative actions make clear that Congress understands the MBTA to prohibit incidental take.

Further, the preferred alternative would define the scope of the MBTA in a way that runs counter to the nation's obligations under the four migratory bird treaties that animate the MBTA.[28] These treaties include expansive language not only limiting take of nests, eggs, and birds directly through hunting and trapping, but also calling for protection and improvement of the environment for birds, including protecting against degradation from pollution and detrimental alteration of environments.[29] The MBTA has never been updated despite Congressional ratifications of these treaties with extensive obligations for the United States, because Congress understood the MBTA to already provide protection against environmental degradation in the form of incidental take protections.

Opinion M-37050, which provides the legal rationale for the preferred alternative here, attempts to dismiss the "broad language in the later conventions aspiring to preservation of bird populations, protection of their environments, and protection from pollution" as meaningless because there is not discussion of "specific protective mechanisms beyond regulation of hunting and preservation of habitat." M-37050 at 30-31; *see also* 85 Fed. Reg. at 5920. But treaties do not require specific details to create specific legal obligations in the members. Members may

[25] *Humane Soc'y v. Glickman*, 217 F.3d 882, 885 (D.C. Cir. 2000).

[26] *See* Pub. L. No. 107-314, § 315, 116 Stat. 2458, 2509 (2003).

[27] *See, e.g.*, Pub. L. No. 100-653, § 802, 102 Stat. 3825, 3833 (1988); 16 U.S.C. § 4401(a)(9), (10); 16 U.S.C. § 4406(b).

[28] *See* Scoping Comments at 7-8.

[29] *See* Convention between the Government of the United States and the Government of Japan for the Protection of Migratory birds and Birds in Danger of Extinction, and their Environment, 25 U.S.T. 3329, T.I.A.S. No. 7990 (Mar. 4, 1972); Convention between the United States of America and the Union of Soviet Socialist Republics Concerning the Conservation of Migratory Birds and their Environment, T.I.A.S. No. 9073 (Nov. 19, 1976); Protocol between the Government of the United States and the Government of Canada Amending the 1916 Convention between the United Kingdom and the United States of America for the protection of Migratory Birds, Sen. Treaty Doc. 104-28 (Dec. 14, 1995).

choose to enact those obligations in their own ways; but it is clear here that refusing to protect migratory birds from incidental take, a significant source of migratory bird harm, does not cut it.

The preferred alternative is in conflict with the plain language of the statute, Congress's demonstrated understanding of the MBTA's scope, and the treaty obligations of the United States. Selecting the preferred alternative would result in a final rule that is contrary to the MBTA under the Administrative Procedure Act, and the agency's adoption of the rule would therefore be arbitrary and capricious. *See* 5 U.S.C. § 706(2)(A), (C).

To sum up, the Service's alternatives analysis provides no valid basis to dismiss a number of possible alternatives that would provide consistency and certainty *and* protect migratory birds from incidental take consistent with the Act and treaty obligations. The Service must start over and work instead on developing an appropriate regulatory program addressing the foreseeable incidental killing and taking of migratory birds.

III. Excluding Incidental Takes Will Have Significant Effects on Protected Migratory Birds That Must Be Analyzed Under NEPA

FWS must analyze in detail the environmental impact of its proposed action, including "any adverse environmental effects which cannot be avoided." 42 U.S.C. § 4332(C)(i-ii). This necessary part of the agency's hard look ensures that: (1) the agency carefully will consider the effects of its actions on the environment, and (2) the public and other agencies will be able to analyze and comment meaningfully on the proposal and its impacts. *Nat'l Audubon Soc'y*, 422 F.3d at 184; *see Oglala Sioux Tribe v. U.S. Nuclear Regulatory Comm'n*, 896 F.3d 520, 532 (D.C. Cir. 2018) (emphasizing agencies must take the required hard look *before* taking an action). An incomplete analysis of environmental effects "undermine[s] the 'action-forcing' function of NEPA," because "neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse effects." *Robertson*, 490 U.S. at 352. NEPA prohibits uninformed agency action. *Id.* at 351.

In carrying out its statutory responsibilities under NEPA, the agency also may not ignore its broader obligations to carry out foreign policy commitments to protect migratory birds—conservation of which requires international cooperation. NEPA requires "all agencies" to "recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment." 42 U.S.C. § 4332(F). The migratory bird treaties are such international obligations that counsel against removing protections for migratory birds, for reasons we explained in prior comments on the proposed rulemaking. *See* Scoping Comments at 5-8. For purposes of NEPA, FWS must consider how its own proposed action runs counter to treaty obligations aimed at conserving migratory birds on an international scale.

A complete evaluation of effects of FWS's proposed rule and Interior's underlying policy change, which removes protections that shielded migratory birds from incidental takes, must consider the effects to protected birds, the context of the action, and the international scale of the problem, with corresponding international policy commitments. The Service announced its

rollback at a time when migratory bird populations are already in significant decline and facing increasing threats of extirpation due to other stressors like habitat loss and climate change.[30] For example, forest loss and fragmentation pose serious threats to biodiversity and are contributing to population declines of forest birds.[31]

Eliminating incentives to avoid killing birds incidental to industrial activities, in combination with existing threats to migratory birds, risks deepening this decline and hastening extirpation of species already facing multiple and interacting threats across their life cycles. As the DEIS recognizes, avian declines will likely continue, even without a rule allowing incidental takes. *See* DEIS at 22, 53, 59. The DEIS must assess how much worse avian declines will be with action that erodes protections in place for decades under the MBTA. In other words, what is the ecological consequence and cost to species and the environment of taking action targeted at *undoing* conservation measures?

A. The DEIS Provides a Misguided and Cramped Analysis of Effects

As we pointed out at scoping, the agency has failed so far to elicit the kind of information it would need to evaluate the effects of its action. This leaves it ill-equipped to answer the primary question at hand. No category of requested information at scoping sought to assist in quantifying the direct and indirect impacts to migratory bird species that have already been or will be incidentally killed as a result of the 2017 policy change—much less with respect to particular industries, or in combination with other stressors (*i.e.*, habitat loss, climate change). Despite the fact that the scoping notice named as an objective assessing "the effects on migratory bird populations of mortality resulting from incidental take," 85 Fed. Reg. at 5914, the agency did not solicit information that would provide data on that issue, favoring instead information like indirect costs of insurance related to possible liability for activities that kill migratory birds incidental to industrial activities. The lop-sided inquiry that began at scoping carries through to the DEIS.

Although the DEIS indicates awareness of avian declines, its consideration of the impacts of removing protections for migratory birds is cursory and superficial. For example, in discussing effects, the DEIS states that "migratory birds will likely experience increasing negative impacts over time as compared to current conditions; these impacts may be significant." DEIS at 46. Birds of Conservation Concern and other vulnerable species, it acknowledges, "likely face negative effects" on account of the current policy, and may "decline to the point of requiring listing under the ESA." DEIS at 48. Codification of the existing policy would likely cause "higher" levels of bird mortality as compared to the policy at present. DEIS at 49.

[30] *E.g.*, Elizabeth Pennisi, *supra* note 4; Kenneth V. Rosenberg et al., *supra* note 4.

[31] *See, e.g.*, S.L. Pimm & R.A. Askins, *Forest losses predict bird extinctions in Eastern North America*, PROCEEDINGS OF THE NAT'L ACADEMY OF SCIENCES 92:9343-9347 (1995) (attached); S.K. Collinge, *Ecological consequences of habitat fragmentation: implications for landscape architecture and planning*, LANDSCAPE AND URBAN PLANNING 36:59-77 (1996) (attached); K.H. Riitters et al., *Fragmentation of continental United States forests*, ECOSYSTEMS 5:815-822 (2002) (attached); R.A. Askins, *Open corridors in a heavily forested landscape: impact on shrubland and forest-interior birds*, WILDLIFE SOCIETY BULLETIN 22:339-347 (1994) (attached); S.K. Robinson et al., *Regional forest fragmentation and the nesting success of migratory birds*, SCIENCE 267:1987-1990 (1995) (attached); T. Boulinier, et al., *Forest fragmentation and bird community dynamics: inference at regional scales*, ECOLOGY 82:1159-1169 (2001) (attached).

Implementing the proposed codification means "negative impacts on migratory birds are expected to increase over time." DEIS at 50. But these acknowledgements only begin to touch on NEPA's requirements.

Missing is an analysis of direct, indirect, and cumulative effects to birds by region and species, particularly in light of the unique threats facing migratory birds.[32] The DEIS's discussion of environmental harm focuses on "immediate bird mortality resulting from direct anthropogenic threats on the landscape, rather than mortality caused by secondary negative effects, such as habitat change." DEIS at 26. Elsewhere, the DEIS lists out the leading threats to different kinds of bird habitat. DEIS at 36.[33] The DEIS's glib assessment of the direct effects it does acknowledge misses the mark, and many foreseeable indirect and cumulative effects remain unanalyzed entirely. For example, as noted in our scoping comments, migratory birds perform important ecosystem services, which in turn have impacts on air and water quality, as well as soils and floodplains.[34] Healthy bird populations perform critically important ecosystem services like insect pest control, seed dispersal, and other functions of bird foraging behavior and help to sustain important sectors of the economy, including hunting and ecotourism.[35]

Despite these documented, foreseeable, and far-reaching effects migratory birds have on natural resources, the Service explicitly omits discussion of how the alternatives would impact a variety of resources, including water resources, geology and soils, floodplains, and visual resources, claiming that the Service does not expect the action to have an effect on these resources. DEIS at 21. Given that the DEIS acknowledges the robust, economically significant role of birdwatching and associated tourism—with nearly one-fifth of the adult population in the U.S. engaging in bird-watching activities (DEIS at 32)—it is bizarre that the DEIS suggests that none of the alternatives would have impacts on visual resources. The loss of funding for wetland conservation will certainly have an impact on water resources, the extent of which is unexamined in the DEIS. *See* DEIS at 19. Additionally, if certain environmentally harmful actions are no longer deterred by incidental take prohibitions, those actions will certainly have far-reaching environmental impacts beyond just the impacts to migratory birds.[36] The DEIS mentions in passing some examples[37] of such potential, negative consequences but fails to give these related impacts the "hard look" required by NEPA. And nowhere does the analysis consider how the Service's proposed rule or alternatives would interact with additional threats.

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[32] *See, e.g.,* 40 C.F.R. § 1508.25(c). Cumulative impacts result "from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." 40 C.F.R. § 1508.7.

[33] Several identified threats include projects that would likely have been influenced by the MBTA's previous protections against incidental take, such as agricultural practices, hydrologic modifications, and various types of development projects.

[34] *See* DEIS at 22 ("Birds are indicators of environmental health and many species are relatively easy to study.")

[35] Scoping Comments at 25-26 (and literature cited and attached therein).

[36] DEIS at 50 ("In summary, Alternative A would likely cause negative impacts to vegetation and wildlife.")

[37] DEIS at 47 (discussing how covering oil pits and measures to reduce bird electrocutions from power lines have environmental benefits beyond protecting migratory bird species).

The DEIS fails to specifically analyze how its proposal would interact with the effects of climate change that also threaten migratory birds. As highlighted in greater detail in our scoping comments,[38] scientists predict that climate change will significantly transform several habitats in the Southeast. Severe storm activity continues to increase in frequency and severity, causing significant, immediate and long-term destruction and alteration of available bird habitat. Wildfire intensity and frequency is likely to increase as a result of warmer temperatures. Southeastern coastal habitats are especially susceptible to impacts from sea level rise, which will erode shorelines and inundate wetlands that comprise key migratory bird habitat. In addition, upward elevational shifts in bird distributions in the Appalachian region, in response to warming climates, is likely to intensify impacts to higher elevation ridge habitats from energy development, like natural gas, frequently installed along ridgetops.[39] The DEIS's only mention of climate change summarily notes existing threats to different habitat types (DEIS at 25-26, 36)—without any specific analysis of how climate change-induced changes alone will impact birds, let alone in combination with its proposal. The agency should instead focus its efforts on planning for ecosystem resiliency and adaptation in the face of climate change, not taking actions that weaken the ability of ecosystems, of which migratory bird populations are an integral part, to respond to these known and foreseeable changes.

The DEIS's brief and incomplete discussion of effects of its proposed action allows neither the agency nor the public to evaluate the severity of the adverse effects of the proposed action. In the absence of a forthright disclosure of the extent of effects, the DEIS also does not analyze these effects in combination with other stressors. We provided high-quality and relevant scientific information on the significant effects of abandoning longstanding protections against incidental take, with reference to specific industries and species, at scoping. *See* 40 C.F.R. § 1500.1. The DEIS does not appear to account for this industry- and project-specific information provided in comments, and the agency provides no response illuminating why it omitted consideration of this information. In addition to issues we raised at scoping, the agency must consider the additional information discussed below. The FWS must include this, and other similar information submitted by stakeholders, in a complete analysis of effects of its action.

[38] Scoping Comments at 27-28.

[39] An increasing body of evidence indicates that species in the eastern U.S. are moving upwards in elevation in response to climate change. T.R. Duclos, W.V. DeLuca, & D.I. King, *Direct and indirect effects of climate on bird abundance along elevation gradients in the Northern Appalachian mountains*, BIODIVERSITY RESEARCH 25:1670-1683 (2019) (attached); J.J. Kirchman & A.E. Van Keuren, *Altitudinal range shifts of birds at the southern periphery of the boreal forest: 40 years of change in the Adirondack Mountains*, WILSON JOURNAL OF ORNITHOLOGY 129:742-753 (2017) (attached). Ridge-associated habitats are used in high concentrations by raptors and songbirds during spring and fall migration. Many forest interior songbirds nest in ridge-associated habitat, including Cerulean warblers, which are known to preferentially breed in ridgetop areas, throughout their range. D.A. Buehler, M.J. Welton, & T.A. Beachy, *Predicting Cerulean Warbler habitat use in the Cumberland Mountains of Tennessee*, JOURNAL OF WILDLIFE MANAGEMENT 70:1763-1769 (2006) (attached); P.B. Wood, S.B. Bosworth, & R. Dettmers, *Cerulean Warbler abundance and occurrence relative to large-scale edge and habitat characteristics*, CONDOR 108:154-165 (2006) (attached). Thus, negative effects of forest loss may be exacerbated in higher elevation habitats, where climate sensitive species—including forest interior obligate species—are more common in these areas. H.A. Lumpkin & S.M. Pearson, *Effects of climate and exurban development on nest predation and predator presence in the southern Appalachian Mountains*, CONSERVATION BIOLOGY 26:679-688 (2012) (attached).

B. The DEIS Must Provide an Accurate Baseline to Assess the Severity of Effects of Abandoning Protections for Migratory Birds

In order to evaluate the effects of the action, the agency must first admit the true major federal action with significance: abandoning mitigation measures and enforcement mechanisms that have been used to reduce incidental takes of protected migratory birds for decades. In order to do this, the agency must look beyond Opinion M-37050 for its "no action" and baseline for effects, and compare effects instead to conditions before the opinion was implemented in 2017, when protections against incidental take were in place. *See, e.g.*, DEIS at 4 (describing no action as continuing to implement Opinion M-37050), table S1 (comparing effects against that no-action baseline). Given that the only tangible difference between no-action and the proposed alternative is codification of the no-action policy, the DEIS lumps their cumulative impacts together: "The No Action Alternative and Alternative A … have the potential to increase the rate of severity at which anthropogenic effects negatively affect migratory birds." DEIS at 59. This comparison allows no meaningful differentiation between the no-action and action alternatives, underscoring the very problem with assuming the impacts of the underlying policy change are part of the baseline.

Without accurate information about existing environmental conditions in the absence of the relevant proposed federal action, "an agency cannot carefully consider information about significant environment impacts." *See N.C. Wildlife Fed'n v. N.C. Dep't of Transp.*, 677 F.3d 596, 603 (4th Cir. 2012) (reversing where baseline data assumed project existed) (quoting *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1085 (9th Cir. 2011)). As a consequence, courts have found assuming that the existence of a project into the environmental baseline as the no-action alternative violates NEPA. *See Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1037-38 (9th Cir. 2008) (holding that "the baseline alternative should not have assumed the existence of the very plan being proposed") (internal quotation and citation omitted)); *see also Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 623 F.3d 633, 642 (9th Cir. 2010) (holding an agency's NEPA analysis invalid because it improperly defined the baseline by assuming no-action and action alternatives would have the same effect).

So too, for purposes of this rulemaking, FWS cannot simply sweep the significant effects of its proposed rule under the rug by continuing with the fallacy that the rulemaking is only a small, incremental change from existing policy. "An agency's hard look should include neither researching in a cursory manner nor sweeping negative evidence under the rug." *Nat'l Audubon Soc'y*, 422 F.3d at 194.

FWS also must acknowledge and consider site-specific impacts of the underlying policy change reflected in Opinion M-37050 in order to understand the adverse effects of codifying that policy. To be clear, the severity of such effects must be compared not with the policy it aims to codify (an incremental change), but with the protections that existed before the abrupt policy change, and the environmental consequences to migratory birds and ecosystem health of removing those protections.

Below we provide information regarding significant effects, which must be considered against the proper baseline and in the context of particular species and industries.

C. Particularly Vulnerable Species Were Not Assessed

Migratory birds have already experienced a dramatic drop in numbers over the past several decades, with North American populations plummeting by *three billion* in recent decades. This much is acknowledged by the DEIS (at 22). The Service admits that this downward trajectory will only be exacerbated by the agency's current proposal,[40] with vulnerable species likely declining to the point of warranting listing under the ESA. DEIS at 52. Despite acknowledging these overarching trends, the DEIS fails to identify any specific species of birds that are especially vulnerable to changes in incidental take protections given their traits, ranges, or known interactions with particular industries. The Service's cursory discussion of ESA protections and Birds of Conservation Concern in the DEIS, as well its failure to discuss specific, particular impacts to any specific, vulnerable species, falls far short of NEPA's requirement to carefully consider "any adverse environmental effects which cannot be avoided" in a manner that facilitates meaningful public review and comment. 42 U.S.C. § 4332 (c)(i-ii); *Nat'l Audubon Soc'y*, 422 F.3d at 184.

The DEIS makes passing reference to the number of migratory bird species listed under the ESA—102, or roughly 10 percent the MBTA-protected species—and makes no further attempt to elaborate on which species receive what kinds of protection, such as how many are listed as threatened versus endangered, or how many have designated critical habitat under the ESA.[41] These conclusory, high-level statements fail to demonstrate an informed, "hard look" at the impacts of this proposal. The DEIS glosses over the fact that 991 species, or more than 90 percent of the birds listed under the MBTA, do *not* receive any protections under the ESA.

Worse still, the Service notes that approximately a quarter, or 258, of the bird species currently protected under the MBTA are also on the list of Birds of Conservation Concern—but fails to disclose how its proposed rule would harm these inherently vulnerable species' chances to avoid further declines that would necessitate listing under the ESA.

The MBTA's protections are especially important for Birds of Conservation Concern and other bird species that do not receive protections under the ESA. Again, as raised in our scoping comments, conservation measures are more effective—with species responding and reaching recovery more quickly—when implemented prior to a species reaching the point of needing the protections of the ESA. Scoping Comments at 23. The DEIS fails to analyze how removing incidental take protections for Birds of Conservation Concern would likely expedite these species' need for ESA protections, and in turn require more intensive, expensive, and longer-term recovery efforts. For example, the Cerulean warbler, with core breeding habitat that overlaps the Marcellus shale region, has already been experiencing increased population declines in recent years. Removing incidental take protections under the MBTA stands to accelerate those declines in the face of threats from gas development projects in the region—thus increasing

[40] DEIS at 50 ("[N]egative impacts on migratory birds are expected to increase over time as more entities react to the certainty that incidental take is not prohibited under the MBTA.").

[41] DEIS at 36 (mentioning some migratory birds receive ESA-protections "in at least a portion of their range based on their status as species, subspecies, or distinct population segments listed as threatened or endangered under the ESA" without any further discussion).

the likelihood that ESA protections and more intensive and long-term conservation management will be necessary. As highlighted in our scoping comments, a Bird of Conservation Concern may have to wait years to officially be listed under the ESA even once it warrants listing as an endangered or threatened species—further underscoring the importance of protections for these species absent an ESA status. Scoping Comments at 25.

In our scoping comments, we specifically identified several at-risk Southeastern bird species that rely on protections against incidental take under the MBTA for long-term recovery. The Service's DEIS fails to mention any of these species and the specific, severe consequences the proposed rule will have for these imperiled birds. The DEIS omits any analysis of how removal of incidental take protections will impact the long-term viability of the Brown pelican and Kirtland's warbler, two species previously protected by the ESA but now delisted. Nor does the DEIS mention the Least tern, a migratory bird species proposed for delisting premised partially on mitigation measures under the MBTA—which will no longer exist under the proposed rule. We noted the Eastern black rail and Black-capped petrel as species awaiting a decision on possible ESA protections for which MBTA protections are especially important, but the DEIS does not mention these, or similarly situated species, anywhere. The DEIS's superficial discussion of the interplay between the ESA and MBTA did not acknowledge the unique status of the Whooping crane under these two statutes—yet another species our scoping comments specifically identified—where the MBTA provided protections against incidental take that the Whooping crane's special ESA rule did not.[42]

The type of incidental take protections previously afforded to birds under the MBTA could prevent further population declines, making recovery more likely, cheaper, and less burdensome. In other words, removing the incidental take protections for imperiled migratory birds may put populations on a fast-track to endangered or extinct status, and ultimately create more regulatory uncertainty and complexity as specific species become listed under the ESA. The DEIS fails to adequately examine how choosing not to require protections for species at risk could affect their status and recovery opportunities.

D. Project and Industry Effects

1. Oil and Gas Development and Infrastructure

Oil and gas infrastructure development is poised to have far more severe impacts on migratory birds in the absence of mitigation measures that have been used in previous project permitting to avoid the most acute impacts. *See* Scoping Comments at 13-18. The Atlantic Coast Pipeline ("ACP") and Mountain Valley Pipeline ("MVP") are two such examples of projects authorized by federal agencies to cut, blast, and trench pipe through hundreds of miles of migratory bird habitat. Both projects overlap a number of important bird areas identified by the National Audubon Society that provide essential habitat for bird species.[43] And numerous Birds of Conservation Concern were identified in the path of the pipelines.

[42] *See* 50 C.F.R. §17.84(h); Endangered and Threatened Wildlife and Plants; Establishment of a Nonessential Experimental Population of Whooping Cranes in the Eastern United States, 66 Fed. Reg. 33910 (June 26, 2001).

[43] *Important Bird Areas*, AUDUBON, https://www.audubon.org/important-bird-areas (last visited July 18, 2020).

Since submission of our prior comments, Dominion and Duke Energy have cancelled the ACP.[44] MVP remains partially constructed.[45] Relevant here, the requirements in ACP and MVP to reduce impacts to migratory birds, which predate the policy reversal in Opinion M-37050, are a useful basis to evaluate the far greater impacts that would result from constructing similar projects in the future without those measures.

Environmental review for the ACP recognized 600-miles of tree-clearing had the greatest potential for impacts to protected migratory birds if it were conducted during the nesting season.[46] Furthermore, its eleven planned communication towers posed a collision risk during migration, and night-time lighting risked causing disorientation.[47] ACP committed to several conservation measures to mitigate and minimize impacts to migratory birds, including clearing the right-of-way outside of migratory bird nesting season, buffering raptor nests and rookeries along the pipeline route, and incorporating design features to reduce collisions with towers. MVP's federal permitting similarly required tree-clearing and operational right-of-way maintenance outside of breeding date ranges for Birds of Conservation Concern in the project area, routing to avoid bird concentration areas, and maximizing existing rights of way to avoid additional fragmentation.[48] All of these measures were directly tied to activities that will foreseeably take or kill migratory birds or their nests—even though that is not the purpose of the activities.

Any attempt to properly analyze the impacts of this rulemaking to migratory birds, including those already facing significant stressors, like decades of habitat depletion in the Southeast, would have to address significant impacts to migratory birds for present and future similar infrastructure projects that fail to utilize these types of conservation measures. Deforestation and habitat fragmentation from natural gas development in the Appalachian region has negatively impacted breeding populations of forest interior species, according to a growing body of evidence.[49] Forest loss and fragmentation have contributed to declines of multiple bird

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[44] Dominion Energy and Duke Energy Cancel the Atlantic Coast Pipeline (July 5, 2020), https://atlanticcoastpipeline.com/news/2020/7/5/dominion-energy-and-duke-energy-cancel-the-atlantic-coast-pipeline.aspx.

[45] MVP is missing multiple federal authorizations at the time of these comments.

[46] Atlantic Coast Pipeline, LLC, Implementation Plan, Migratory Bird Plan (Sept. 2017) ("ACP Plan"), 18, FERC eLibrary Accession No. 20171018-5002; *see also* https://atlanticcoastpipeline.com/filings/20/public_appendix-b_updated-migratory-bird-plan.pdf (stating same).

[47] ACP Plan at 22.

[48] Measures designed to avoid take under the MBTA, like preventing tree-clearing during migratory bird nesting season, incentivize developers to select and co-locate routes with areas already cleared. Collocation of new development also mitigates current declines of forest interior birds in response to forest loss and fragmentation in landscapes experiencing shale gas development, across the central Appalachian region. *See* L.S. Farwell et al., *Threshold responses of songbirds to forest loss and fragmentation across the Marcellus-Utica shale gas region of central Appalachia, USA*, LANDSCAPE ECOLOGY 35:1353-1370 (2020) (attached).

[49] Much unconventional shale gas development in the central Appalachians is occurring in interior forests where pipelines and access roads result in extensive forest fragmentation. L.S. Farwell, et al., *Shale gas development effects on the songbird community in a central Appalachian forest*, BIOLOGICAL CONSERVATION 201:78-9 (2016) (attached); L.A. Langlois, P.J. Drohan, & M.C. Brittingham, *Linear infrastructure drives habitat conversion and forest fragmentation associated with Marcellus shale gas development in a forested landscape*, JOURNAL OF ENVIRONMENTAL MANAGEMENT 197:167-176 (2017) (attached). Forest interior birds show decreases in abundance

species of conservation concern, including Wood thrush, Cerulean warbler, and Summer tanager.[50] Against this backdrop, allowing take of migratory birds and nests incident to construction will only worsen these already occurring declines. The DEIS leaves this, like many other adverse effects, unanalyzed.

Furthermore, the fact that future gas pipeline projects will abandon these measures and have the potential to cause greater impacts is far from hypothetical. MVP's Southgate project is a recently FERC-approved natural gas pipeline set to connect to the MVP in Virginia and run 75 miles south into Alamance County, North Carolina. FERC's environmental review for the Southgate project demonstrates protections for migratory birds are already eroding in federal permitting, based on the 2017 policy change. The FEIS for the project notes that FERC and the Service in 2011 entered into a Memorandum of Understanding regarding compliance with the MBTA. That MOU, developed in response to Executive Order 13186,[51] requires FERC to focus on avoiding and minimizing adverse impacts on migratory birds, to further the purposes of "the migratory bird conventions" and the MBTA, by incorporating appropriate mitigation measures to avoid or minimize take of migratory birds into project planning and license terms.[52] After noting the existence of the MOU in the MVP Southgate FEIS, however, FERC's next breath notes the policy reversal in Opinion M-37050, clarifying the Service's new position that "the MBTA does not prohibit incidental take." Southgate FEIS at 1-6.[53] Migratory birds in the path of Southgate will be worse off as a result, although neither FERC nor the Service have analyzed the consequences of that.

The FEIS identifies seventeen Birds of Conservation Concern potentially affected by the Project. *Id.* at 4-81. These birds are generally "experiencing population declines due to habitat loss and fragmentation," and additional loss and fragmentation of forested habitat could

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and species richness near unconventional shale gas pipelines, access roads, and well pads, and at sites containing conventional oil and gas wells. *See* E.P. Baron, S.E. Pabian, & M.C. Brittingham, *Bird community response to Marcellus shale gas development*, JOURNAL OF WILDLIFE MANAGEMENT 80:1301-1313 (2016) (attached); L.S. Farwell et al., *Proximity to unconventional shale gas infrastructure alters breeding songbird abundance and distribution*, CONDOR 121:1-20 (2019) (attached); M.W. Frantz et al., *Demographic response of Louisiana Waterthrush, a stream obligate songbird of conservation concern, to shale gas development*, CONDOR 120:265-282 (2018) (attached).

[50] *See id.*, as well as species-specific information at related to: Wood thrush, https://www.audubon.org/field-guide/bird/wood-thrush and https://explorer.natureserve.org/Taxon/ELEMENT_GLOBAL.2.106491/Hylocichla_mustelina; Cerulean warbler, https://explorer.natureserve.org/Taxon/ELEMENT_GLOBAL.2.101759/Setophaga_cerulea and https://www.fws.gov/migratorybirds/pdf/management/focal-species/CeruleanWarbler.pdf; Summer tanager, K.V. Rosenburg, *Effects of Forest Fragmentation on Breeding Tanagers: A Continental Perspective*, CONSERVATION BIOLOGY, 13:568–583 (1999) (attached).

[51] Exec. Order No. 13,186, Responsibilities of Federal Agencies To Protect Migratory Birds, 66 Fed. Reg. 3853 (Jan. 10, 2001), https://www.fws.gov/migratorybirds/pdf/management/executiveordertoprotectmigratorybirds.pdf.

[52] Notice of Availability of a Memorandum of Understanding Between the Federal Energy Regulatory Commission and the U.S. Fish and Wildlife Service To Promote Conservation of Migratory Birds (April 5, 2011), https://www.federalregister.gov/documents/2011/04/05/2011-8021/notice-of-availability-of-a-memorandum-of-understanding-between-the-federal-energy-regulatory.

[53] Southgate Project, FEIS (Feb. 2020), FERC eLibrary Accession No. 20200214-3010, https://www.ferc.gov/final-environmental-impact-statement-southgate-project.

"negatively affect species such as the brown-headed nuthatch, prothonotary warbler, willow flycatcher, and wood thrush." *Id.* at 4-82. As with the projects above, the MVP Southgate FEIS identifies disturbance from construction that "occurs during the nesting season" as a primary threat resulting in incidental take of protected species. *Id.* Setting this project apart, however, is the absence of a firm commitment to avoid causing that harm. MVP states that it will "attempt" to minimize project impacts on nesting migratory birds "by conducting construction-related vegetation clearing outside of the peak migratory bird nesting season," that is—unless that becomes "infeasible." *Id.* at 4-83. To the extent there is any doubt about the durability of this commitment, the appendix clears that up: "Should a significant delay to the start of construction occur, then incidental take may occur." *Id.* at Appendix I.3-83.

The erosion of protections for migratory birds in this manner will foreseeably occur in other projects, and the Service must take these and other impacts to migratory birds that will become more intense with infrastructure projects into account.[54] The DEIS does not even attempt such an analysis. For the oil and gas sector, it only mentions "more birds dying in uncovered [oil] pits," DEIS at 50, which is a separate (and no less alarming) prediction. The DEIS indicates that oil and gas, as well as electrical businesses, accounted for the "majority of investigations involving incidental take of migratory birds." DEIS at 18. Despite recognizing the clear potential for what was previously considered prohibited take to occur incident to oil and gas, the DEIS does not assess or quantify the severity of adverse effects that will come from greenlighting such incidental takes in the future. In other words, the Service knows its rulemaking codifies a damaging policy that is and will be detrimental to migratory birds, but it has not taken the time to understand the full consequences of this choice in the context of an industry responsible for a large percent of incidental take. Of course, in the absence of conducting the necessary analysis, the DEIS cannot support informed agency decisionmaking.

2. Transportation Infrastructure Projects

The DEIS fails to analyze impacts of removing migratory bird protections in transportation infrastructure projects like the Hampton Roads Bridge Tunnel project in Virginia. As explained in greater detail in our scoping comments, this project will expand the existing Hampton Roads Bridge Tunnel stretching from Settlers Landing in Hampton Roads to I-564 in Norfolk. *See* Scoping Comments at 18-20. For several decades, a colony of 25,000 migratory birds has called the South Island of the existing Hampton Roads Bridge Tunnel home. The colony comprises eight different species of birds, including Gull-billed terns, Sandwich terns, Royal terns, and Black skimmers.

The original plans for this expansion project included consideration of measures to mitigate impacts to these migratory birds—including building a new island for the birds to nest on during project construction. With the issuance of Opinion M-37050, however, the state's efforts to pursue this option were significantly hindered, and the Virginia Department of Transportation subsequently paved over the South Island colony site to use as a staging area for construction, but without a new island or other sufficient measure in place to mitigate the habitat

[54] *See* Farwell et al. 2020, supra note 47 (noting forest interior breeding bird populations in areas of oil and gas development are already experiencing steep declines and a variety of other environmental stressors).

loss. Virginia Governor Northam intervened in February 2020 with plans to restore and preserve an alternate nearby site for the 25,000 displaced migratory birds.

As part of the Governor's plan, this past spring the Virginia Department of Game and Inland Fisheries, recently renamed the Department of Wildlife Resources, worked to attempt to deter birds from returning to their decades-long home on South Island, now an active construction zone, and redirect the birds to the nearby decommissioned and newly-cleared Fort Wool and rental barges as new, temporary nesting sites until a long-term solution to address damage already done is established.[55] The Department of Wildlife Resources has also started developing a state regulation to attempt to fill the void left by Opinion M-37050, but the scope of its applicability to interstate projects (like some infrastructure and pipelines projects) is unclear in federally licensed projects, and cannot be assumed to fill all of the gaps created by the Service's choice to stop protecting migratory birds.

The Hampton Roads Bridge Tunnel is a prime example of how large infrastructure projects can have devastating consequences for migratory birds absent measures to prevent incidental take—the type of consequences that should have been evaluated in this DEIS. By the time Virginia stepped in to blunt the effects of the federal policy reversal at Hampton Roads, irrevocable damage had already been done to the bird colony, with only limited and after-the-fact attempts to mitigate that damage a possibility, rather than the thoughtful, proactive solutions the MBTA previously required. Moreover, the future fate of this massive colony is still uncertain. While the actions being pursued by Governor Northam's administration are certainly better than allowing the habitat of 25,000 protected birds to be transformed into a construction zone dangerous to those birds without any minimization of harm, these actions are having to be pursued in response to the harmful situation created by Opinion M-37050, rather than preventing the harmful situation in the first place.

Although we highlighted this specific project and its consequences in our scoping comments, FWS nowhere mentions the Hampton Roads Bridge Tunnel or any other transportation infrastructure projects in its DEIS. FWS should have disclosed and analyzed how its Opinion M-37050 and proposed rule are affecting impacts from this project, as well as impacts from similar infrastructure projects currently and in the future.

3. Other Unanalyzed Industry Impacts

In addition to the above-highlighted pipeline and transportation infrastructure examples, the DEIS failed to discuss other industries and projects we detailed in our scoping comments.[56] Even where the DEIS mentions certain industries, it does so without any meaningful analysis or evaluation of impacts.

We previously highlighted how incidental take protections for migratory birds were important in the context of off-road vehicle use at Cape Hatteras National Seashore—but the

[55] Gordon Rago, *Seabirds Return to the HRBT—But to a Different Island This Time*, THE VIRGINIAN-PILOT (Apr. 25, 2020 2:05PM), https://www.pilotonline.com/life/wildlife-nature/vp-nw-hampton-roads-bridge-tunne-birds-20200425-xrdy6ihnv5c2blwpvrbggoobda-story html.

[56] Scoping Comments at 20-23.

DEIS never mentions the Seashore or off-road vehicles. The only discussion of vehicle impacts of any kind occurs when the DEIS lists average annual mortality numbers for vehicle collisions (DEIS at Table 3.2), and when the DEIS suggests that bird-vehicle strikes are detrimental to human safety. DEIS at 34. Similarly, nowhere does the DEIS address impacts associated with Atlantic pelagic longline fisheries, beyond a bare mention of the Service having worked with the commercial fishing industry in the past to create voluntary guidance. DEIS at 28. We also highlighted in our scoping comments the importance of analyzing the consequences of removing protections for migratory birds in the context of wind energy development, noting the importance of responsible development of wind energy as part of needed efforts to reduce our reliance on climate change inducing-fossil fuels. Artificial lighting on other tall structures, including oil platforms, can attract birds and cause direct mortality through collision and disruption of migration routes—but effective mitigation measures can help prevent such incidental takes.[57] And these are just some industry impacts, specific to our region; the world of impacts unanalyzed in the DEIS is much broader.

The closest the DEIS comes to providing any information about industry-specific impacts is a simple table listing nine categorical sources of incidental take—building glass collisions, vehicle collisions, poisons, electrical line collisions, communication towers collisions, power pole electrocution, oil pits, open pits, open pipes, and wind turbine collisions—and associated annual estimates of mortality, accounting for a total average estimate of nearly one billion bird mortalities per year. DEIS at Table 3.2. As admitted in the DEIS, these numbers predate the adoption of Opinion M-37050. DEIS at 28. Under the new opinion, where incidental take is explicitly not prohibited, these numbers are likely much higher and will only continue to grow higher as industry no longer has an incentive to implement preventive practices. The DEIS makes no attempt to quantify or qualitatively explore how these numbers changed for specific categories, or in specific geographic locations or habitat types, as a consequence of implementation of Opinion M-37050, much less the intensified consequences that would result from the rulemaking.

Even this outdated data is presented in a summary fashion that does little to inform the public of the full scope of impacts from different industries or specific projects, historically or in the future. No discussion accompanies the table of mortality numbers. There is no explanation of how the categories were developed and how mortalities were assigned to different categories. While the underlying data sources appear to be from the years 2012, 2014, and 2015, there is no explanation of whether these annual estimates are based on data from those three years, or a different time period entirely. There is no accompanying discussion of what types of mitigation measures different categories historically employed—which would help illuminate how these historical mortality numbers might change in light of the Service's proposed rule.

Worst of all, the DEIS's chapter specifically dedicated to analyzing impacts of the different alternatives does not discuss any industry- or project-specific impacts. It is possible that certain industry practices are more likely than others to continue or to be abandoned under

[57] *See* F.K. Wiese et al., *Seabirds at risk around offshore oil platforms in the Northwest Atlantic*, MARINE POLLUTION BULLETIN 42:1285-1290 (2001) (attached); T. Longcore, & C. Rich, *Ecological light pollution*, FRONTIERS IN ECOLOGY AND EVOLUTION 2:191-198 (2004) (attached); H. Poot et al., *Green light for nocturnally migrating birds*, ECOLOGY AND SOCIETY 13: article 47 (2008) (attached).

the Service's proposal, with varying consequences for migratory birds, but the DEIS does not explore such possibilities. For a proposal of national scope, with international implications to ecosystems and the human environment, the DEIS's superficial discussion of different industry-specific impacts is woefully inadequate.

E. The DEIS Erroneously Relies on Mitigation That Is Speculative to Discount Effects

The Service suggests that the adverse effects of eliminating protections for migratory birds will be mitigated by promoting non-binding "best practices" and through reliance on state programs that might step in to protect migratory birds in some instances. DEIS at 45, 49. The brief discussion of mitigation measures in the DEIS is far too speculative, however, to provide any basis to discount the unanalyzed adverse effects of its rulemaking.

Mitigation must "be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated." *Robertson*, 490 U.S. at 352; *see also Cowpasture River Pres. Ass'n*, 911 F.3d at 174 (invalidating EIS that lacked information about the effectiveness of mitigation techniques to reduce risks).[58] "This ordinarily obligates agencies to do more than simply list possible mitigation measures." *Webster*, 685 F.3d at 431*; see Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1380-81 (9th Cir. 1998) (listing possible measures without examining effectiveness is inadequate). It requires "assessment of whether the proposed mitigation measures can be effective." *S. Fork Band Council Of W. Shoshone Of Nev. v. U.S. Dep't of Interior*, 588 F.3d 718, 727 (9th Cir. 2009); *see Okanogan Highlands All. v. Williams*, 236 F.3d 468, 477 (9th Cir. 2000) (upholding an EIS where "[e]ach mitigating process was evaluated separately and given an effectiveness rating").

The DEIS offers a muddled analysis of impacts and possible mitigation measures, obscuring the full extent of the likely impacts of any of the alternatives. The Service makes no effort to quantify or even fully evaluate the likely extent of impacts to birds under any of the alternatives, simply suggesting that there would generally be increased negative impacts under its proposed rule or the no action alternative, without elaborating on the nature or scope of those impacts. At the same time, the Service half-heartedly points to various speculative mitigation measures that might help reduce those harmful effects.

The Service notes that in the past, it has worked with a variety of different industries to create and implement "voluntary guidance," but provides no details about what those measures entail. DEIS at 28. Later, the Service claims that under its proposed rule, "the Service would continue to rely on voluntary guidance as the means of managing incidental take of migratory birds." DEIS at 50. The Service fails to mention that under Opinion M-37050 and the proposed rule, industry would have little incentive to continue implementing any such voluntary measures or other best practices, or develop new ones. In its scoping notice, the Service specifically requested information about "[t]he extent that avoidance, minimization, and mitigation measures continue to be used (after issuance of M-Opinion 37050)" (DEIS at 13), yet the DEIS provides no information on this point.

[58] Reversed in unrelated part by *U.S. Forest Serv. v. Cowpasture River Pres. Ass'n*, ___ U.S. ___, 140 S. Ct. 1837 (2020).

Similarly, the DEIS makes no effort to actually identify which, if any, best practices might continue to be employed by industry under its preferred alternative. Indeed, the Service even dodges any commitment to actually continue working with stakeholders to "develop and promote best practices," saying the agency *could* but not that it *would* undertake such efforts under the proposed rule. And, similar to industry best practices implementation, the lack of incentives here suggests the Service may well not make the effort.

The Service bounces back and forth throughout the DEIS, both seeming to say that the no action alternative and its preferred alternative would not have as many negative effects because of possible mitigation measures, but also acknowledging that most voluntary measures would decrease over time. For example, the Service observes that even under its No Action Alternative—which includes adherence to Opinion M-37050—"there is no regulatory requirement to implement beneficial practices for birds under the MBTA, and no threat of federal criminal prosecution under the MBTA for the incidental take of migratory birds" (DEIS at 45), and admits that consequently over time fewer entities would implement best practices. DEIS at 46. Similarly, under the proposed rule, the DEIS predicts that "fewer entities would seek or implement guidance from the Service about ways to avoid or minimize adverse effects on migratory birds" in the first instance. DEIS at 50. The Service makes no attempt to identify which best practices or other voluntary measures would continue to be employed under the different alternatives.

The Service also gestures to state regulation of incidental take as filling the void left by its abandonment of incidental take prohibitions. Again, the DEIS omits details of such state regulations and fails to identify or analyze any specific existing or planned state programs, instead only noting briefly that 17 states regulate incidental take to "some degree." DEIS at 45. For the states that actually regulate *some* form of incidental take, which reflects a minority of states, those programs "vary substantially" and have "unique limitations," by the DEIS's own account (DEIS at 45), and appear to only provide spotty and disparate protections, at best. This decidedly lacks the certainty that would be required to discount effects. Later, in its purported analysis of impacts under FWS's proposed rule, the DEIS makes passing reference to the possibility of states enacting "separate incidental take protections for birds in response to Alternative A . . . as many are now considering," without any mention of how many or which states are considering such protections or how they compare in scope to the pre-2017 Service policy. DEIS at 52. Even in mentioning the possibility of state programs mitigating impacts, the DEIS goes on to acknowledge that a patchwork of differing incidental take protections could prove more burdensome and costly to industry, creating greater uncertainty—undermining the Service's own stated purpose of providing greater regulatory certainty about incidental take of migratory birds. *Id.*

The Service cannot rely on such a generalized and speculative discussion of possible mitigation measures to discount an accounting of the true, vast impacts of its proposal.

F. A Deficient Analysis of Effects Prevents a Meaningful Comparison Between Alternatives

To allow for an informed comparison of the tradeoffs between each of the action alternatives, the DEIS would have to analyze the environmental effects of each alternative—which has not yet occurred—and *then* evaluate the comparative merits of each alternative, which

has also not yet occurred. NEPA requires a comparison of the full measure of impacts under each alternative. *See Baltimore Gas & Elec. v. Nat. Res. Def. Council*, 462 U.S. 87, 97 (1983). This fosters "both informed decision-making and informed public participation." *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin*., 538 F.3d 1172, 1194 (9th Cir. 2008) (citations omitted). The examination of alternatives must allow an agency to make a "real, informed choice" from the spectrum of reasonable options. *Friends of Yosemite Valle*, 520 F.3d at 1039.

Because the DEIS does not provide any meaningful impacts analysis, it also cannot meaningfully compare alternatives. To be sure, the DEIS candidly discloses that migratory birds will be significantly worse off under any scheme that does not enforce incidental take, and even more so if the preferred alternative is chosen. But as a result of the paltry analysis of actual environmental, social, and economic impacts of the rule, it is impossible to compare alternatives in a meaningful way. Where, as here, a swath of possible alternatives satisfy the purpose and need for the rule stated in the DEIS, that comparison is absolutely vital in providing the agency the groundwork to make a determination.

This DEIS does not even attempt such a comparison; instead, it makes generalized conclusions about the effects of each alternative, ignores the analytical differences between alternatives, and chooses as its preferred alternative the alternative that the rule set out to codify before the analysis even began. Simply supplying new rationales for why the Service is choosing Alternative A will not solve this problem; it stems from fundamental flaws in this NEPA analysis, which cannot be papered over. Instead, the agency must go back, perform an actual, quantitative and qualitative analysis of environmental effects, and then use that analysis to inform its choice of alternative. The current analysis leaves the Service blind to the consequences of trading migratory bird and associated environmental harms for a supposedly reduced regulatory burden on industries.

Moreover, without an adequate effects analysis, the agency also cannot balance claimed economic benefits against economic harms. Ultimately, the agency is relying solely on the notion that not prosecuting incidental take under the MBTA will decrease economic costs to industry in selecting its preferred alternative (even though reducing costs to industry is not part of the purpose and need for the action). *See* DEIS at 9. According to the agency, that is the real, defining difference between protecting against incidental take and not, because, assuming the Service's proposed definition of take is legal (which it is not), adoption of *any* rule defining the scope of the MBTA to include incidental take will provide the same degree of "legal certainty" as the preferred alternative and meet the DEIS's stated objectives. And every other effect of Alternative A apart from the "economic effects" weighs in favor of Alternative B. DEIS at 8-10. So economic effects must be the deciding factor behind the DEIS's assumptions.

But the DEIS has not actually quantitatively analyzed the economic benefits it believes will occur for industry—"Likely reduced legal and financing costs with improved legal certainty of regulation," and "Likely decrease in the costs of implementing best practices when not required by other federal, state, tribal or local laws and regulations"—against the economic consequences it acknowledges will also occur—"May decrease revenue for businesses directly dependent on birds (hunting, bird watching, guides, and ecotourism), and "Likely increased costs for businesses dependent on ecosystem services provided by birds (seed dispersal and

pollination, etc.)". And because it has not performed further analysis on environmental consequences, it likely misses other significant economic harms (e.g., loss of funding for wetlands preservation under 16 U.S.C. § 4406(b), an increase in regulatory burden created by pushing analysis to the state and project level, lack of pest control). Assuming economic benefit is the defining factor in the agency's selection of its current preferred alternative (and putting aside the unlawfulness of that alternative), the Service would have to provide adequate analysis of economic benefits and consequences for comparison purposes.

According to the DEIS, from 2010-2018, FWS investigated an average of 57.3 cases per year for incidental take violations. DEIS at 18-19. The total fines and collections during that period, not including the Deepwater Horizon Gulf Oil Spill,[59] but including costs of corrective actions taken after investigation, was $78.7 million for the entire 9-year period. This works out to, on average, a fine, collection, or remediation cost in each case of less than $153,000. These low numbers suggest that the MBTA is an economically unburdensome deterrent and encourages industry to use best practices to prevent harm to migratory birds. And there is no corresponding information provided to quantify the costs that would be created when incidental take is not enforced.

Because the agency has not adequately identified and evaluated environmental effects, it cannot weigh them against the only purported benefit of the chosen alternative as compared to other possible alternatives. The DEIS does not support meaningful comparison of alternatives.

IV. Factors Limiting Effective Public Participation

Public participation and transparency are crucial aspects of the NEPA process. By requiring agencies to make public the environmental impact of their actions, NEPA "ensures that the public and government agencies will be able to analyze and comment on the action's environmental implications." *Nat'l Audubon Soc.*, 422 F.3d at 184; *see N.C. Wildlife Fed'n*, 677 F.3d at 601 (quoting *Robertson*, 490 U.S. at 350). Instead of facilitating public review and input, the Service's process here has limited public engagement and appears to have largely ignored the public input it did receive.

As already noted above, the Service's choice to release a proposed rule first based on a policy change it is already implementing, and conduct a NEPA analysis after-the-fact, turns NEPA on its head. This confused order of events also hampers a fair public understanding of the agency's proposed action, alternatives, and likely impacts. The agency in essence has already been implementing the underlying policy change that is reflected in the rulemaking without public review and comment to inform that proposal it has prematurely chosen.

When the Service published its proposed rule and NEPA scoping notice on February 3, 2020, the agency set a public comment period of 45-days, ending on March 19, 2020, right as the COVID-19 pandemic was erupting across the nation. The agency denied multiple requests,

[59] The Deepwater Horizon Gulf Oil Spill was a devastating event that created severe environmental consequences for the entire Gulf ecosystem, including migratory birds, and continues to leave lasting impacts to this day. Investigation and prosecution of this spill is a clear demonstration of the type of environmental damage that industry may choose not to avoid or mitigate if FWS is not enforcing incidental take prohibitions.

including one from SELC, for an extension to this public comment period—which was warranted based on the significance and complexity of the issue alone, much less the unfolding national health crisis. Despite the minimal public comment period, according to the Regulations.gov docket, numerous individuals and groups provided nearly 45,000 written comments on the proposed rule and scoping notice.[60] Countless more may have weighed in if the comment period had been extended, or if the public had not been dealing with the COVID-19 crisis.

Instead of slowing down or pausing its NEPA process, the Service pushed through with finalizing its DEIS, and on June 5, 2020, set in motion another 45-day comment period.[61] Not even three months had passed between the close of the proposed rule's public comment period and FWS's release of the DEIS. The brief time between the close of scoping and the public release of the DEIS invites the question of whether the agency could have even reviewed all of the thousands of scoping comments it received. Indeed, the DEIS does not provide any discussion of the nature or substance of the comments FWS received on its scoping notice and proposed rule. As repeatedly highlighted above, the DEIS failed to address numerous issues raised in our scoping comments.

In addition to refusing to extend public comment periods, the Service has also not held any public hearing or provided any method of providing oral comment on its proposed rule or DEIS, again limiting who is able to weigh in. We recognize the difficulty in holding in-person public hearings in light of the pandemic; however, FWS has already demonstrated its ability to engage with the public remotely on this precise issue with the March webinars it held on its proposed rule. FWS should have held such opportunities for public discussion regarding its DEIS—and at a minimum, should have provided a method for the public to record oral comment regarding the DEIS and proposed rule to ensure that this process is as inclusive as possible. For some members of the public, securing internet access or providing written mail-in comments may not be feasible, especially during a public health emergency, making some sort of oral, call-in public comment opportunity even more important.

The Service has been pushing forward this proposal during a time when public participation is more difficult than ever. In doing so, the Service is impeding a proper NEPA analysis and process on a proposal with consequences to migratory bird species, healthy and functioning ecosystems, and ecosystem services on a worldwide scale.

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[60] The DEIS purports to have received 8,398 comments, and ten petition-style letters signed by nearly 180,000 individuals. Not only does the DEIS provide no detail as to the nature or substance of these comments, it also fails to explain the discrepancy between its numbers and the nearly 45,000 comments displayed on Regulations.gov.

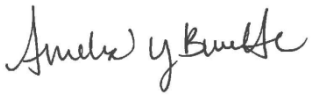
[61] Press Release, U.S. Fish & Wildlife Serv., *Service Solicits Comments on a Draft Environmental Impact Statement on Proposed Migratory Bird Treaty Act Regulatory Changes* (June 5, 2020), https://www.fws.gov/news/ShowNews.cfm?ID=858BE00F-5056-9613-D876D21325914369. The supporting documents section on the docket at Regulations.gov indicates that FWS, without explanation, withdrew the DEIS it initially posted on June 5 and replaced it with a different DEIS document on June 10.

V. Conclusion

As the agency knows, migratory birds are in steep decline from multiple stressors, and many are already at risk of extirpation even *with* protections against incidental take in place under the MBTA. Reversing course on decades of protections will hasten the decline of bird species that should be the object of the agency's conservation efforts, not the undoing of them. A valid NEPA analysis must address the full range of effects of *abandoning* decades of protections to migratory birds from incidental takes. And the agency must fully evaluate alternatives to that course of action in a NEPA process that is not based on a decision already made. More fundamentally, however, FWS's proposed rulemaking cannot be squared with the broad protections afforded by the MBTA. Rather than continuing down the path of trying to paper over the unlawful interpretation that is Opinion M-37050, we urge Interior and the Service to withdraw the proposed rule, rescind Opinion M-37050, and work instead on developing an appropriate regulatory program addressing the foreseeable incidental killing and taking of migratory birds.

We appreciate the opportunity to submit these comments.

Sincerely,



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