

MBTA Rulemaking Comment Guidelines for Chapters

Background

- On June 5th, the U.S. Fish and Wildlife Service issued a [draft Environmental Impact Statement](#) (DEIS) with a 45-day comment period ending on July 20th, 2020, on its rulemaking regarding incidental take protections under the Migratory Bird Treaty Act. The page to submit a comment can be found [here](#).
- The DEIS is supposed to analyze the impacts of the regulation on birds and other resources and consider a range of alternatives as required by the National Environmental Policy Act (NEPA). Once this comment deadline ends, FWS can issue a final EIS and final rule, which it expects in the fall. So this is the last opportunity to submit public comments, and a chance to provide feedback on the DEIS itself, including information that may be missing.
- This stage follows the release of the [proposed rule](#) on the Migratory Bird Treaty Act to codify its 2017 legal opinion that exempts all “incidental take” from the law’s prohibitions. At the same time, they began a “scoping” process to gather information for preparing the EIS. The comment deadline ended March 19, 2020, despite requests to extend it. NAS comments can be found [here](#).
- The 2017 legal opinion has let industries off the hook for bird deaths caused by hazards such as oil spills, oil waste pits, mining ponds, power lines, and more, which are also known as “incidental take” (i.e., take that is not intentional). For decades, both Republican and Democratic administrations have carefully enforced the MBTA to minimize these hazards, saving millions of birds.
- By advancing this rulemaking, the administration is attempting to lock in this unprecedented attack on bird protections into the regulations that implement the MBTA. If finalized, it will mean that the policy could become more difficult to reverse and could lead to even more bird deaths.

Overall message

- Let the Fish and Wildlife Service know you have strong concerns about the draft Environmental Impact Statement and that you oppose this rulemaking and their preferred alternative to codify the legal opinion that ends enforcement of incidental take under the MBTA.

Message points

- **Concerns about the draft Environmental Impact Statement**
 - The draft Environmental Impact Statement (DEIS) fails to adequately account for the significant impacts that this rulemaking and policy will have on birds.
 - The document does not go into any meaningful detail or provide any scientific analysis to explain how birds will be impacted
 - FWS should provide a more robust analysis that takes into account specific impacts to bird populations and guilds, vulnerable species, particular regions, and multiplier threats including climate change, and more specific impacts on the reduction of the economic and ecological benefits
 - It also includes irrelevant information, such as the section regarding the “detrimental impacts of migratory birds”

- The DEIS is fundamentally flawed because it does not consider the impacts from reversing these longstanding protections
 - Instead, it only focuses on the incremental effects of the codifying the legal opinion, which minimizes the full extent of the harm
- The DEIS does not consider a reasonable range of alternatives
 - Despite telling the public it would consider an incidental take permit alternative during its scoping webinars, FWS is removing that alternative from consideration
 - An incidental take permit is a reasonable alternative that would provide regulatory certainty, as well as advance bird conservation, which has wide support and has been previously formally considered by FWS
 - Alternative B, which would codify the previous interpretation, is insufficient
 - We strongly support rescinding the current M-Opinion, but FWS is limited in selecting this option by the Interior Department's legal opinion, and we believe the best long-term solution is a permit framework
- The purpose and need of the DEIS is not sufficient
 - The purpose of the rulemaking should be to advance the conservation of birds, rather than limiting it to regulatory certainty alone, since FWS has an obligation to protect and conserve birds
- The DEIS fails to respond to the serious concerns and requests from Audubon, other conservation groups, state wildlife agencies, flyway councils, sportsmen, tribes, and more
 - Instead, it represents a rubber stamp that aims to justify a foregone conclusion
- The DEIS process is concerning, including asking for public comment during a pandemic and national emergency
 - The FWS should not have released this document now, nor should it have only provided the minimum 45 days to comment. It also should not have closed the comment period on the proposed rule before issuing the DEIS.
- **Concerns about the rulemaking and preferred alternative**
 - This rule and preferred alternative will double down on the legal opinion that has reversed decades of bipartisan precedent for bird protection in this country and gutted the enforcement of the MBTA.
 - Even with a flawed analysis, it's clear from the agency's own conclusions that the preferred alternative should not be chosen due to its harm to birds and the value that birds provide
 - This policy is exactly the wrong thing to do when science tells us that we've lost 3 billion birds in the past 50 years and two-thirds of North America's birds are threatened by climate change in the years to come.
 - The Migratory Bird Treaty act protects beloved birds like the Sandhill Crane, Red-Tailed Hawk, and more than 1,000 other species, and this rule will only further threaten our country's birds.
 - The Migratory Bird Treaty Act has incentivized companies to undertake reasonable practices like covering oil waste pits, which birds mistake for bodies of water, and

implementing best practices for power lines to reduce bird electrocutions and collisions, among other practices.

- Millions of birds are killed in preventable ways every year, and the MBTA has been the key tool for saving birds from unnecessary mortality, yet this rule would further lock in a policy that removes the incentive to protect birds and hinders the ability to help birds recover from events such as oil spills.
 - BP had to pay a \$100 million fine under the MBTA after the Deepwater Horizon oil spill killed one million birds. Yet under the legal opinion and this proposed rule, BP would be off the hook from having to pay any MBTA fines. These fines have helped restore habitat for species impacted by this spill and from many other spills and bird deaths.
 - The preferred alternative ignores its obligations under the MBTA, the underlying treaties, Executive Orders, and other statutes that require the protection and conservation of migratory birds.
 - This rule should be withdrawn, and the legal opinion should be rescinded. FWS should once again enforce incidental take as it has for decades, and it should also consider a reasonable framework for incidental take permits that can provide regulatory certainty and advance bird conservation at the same time.
- **Other recommendations**
 - Provide a local perspective
 - Include information about the species of birds in your region, including any notable species that the chapter or organization cares or is concerned about or works to conserve.
 - Include information about industrial hazards in your region that may threaten birds. The industries associated with these activities are no longer legally required to protect birds and have no incentive to reduce their impacts. Thus, these activities may pose even greater threats now and in the future.
 - Include information about how and why people in your chapter/organization and in your region care about birds, such as the people who volunteer, attend events, watch birds, etc, and why this rule will be harmful to your goals and your community.
 - Include any relevant data, anecdotes, or studies
 - Include any data or information about local or regional declines for particular bird species or populations, including since the release of the legal opinion in 2017 if available, or any species of conservation concern in your area, which could be further threatened by the rule.
 - Include any available anecdotes or studies that indicate how birds benefit your community, including any economic or ecological values, or studies about relevant bird conservation issues in your region.
 - If possible, quantify engagement by volunteers, birders and others, and any known local and regional economic benefits that birds provide.