



To Whom it May Concern

Re: Draft Environmental Impact Statement - Regulations Governing Take of Migratory Birds – May 2020.

Docket ID: FWS-HQ-MB-2018-0090

23 June 2020

As President of Canada's 60-year veteran, non-governmental organization focussed on the science and conservation of all birds of Canada, I write to oppose changes proposed to "Regulations Governing Take of Migratory Birds".

Birds Canada is a science-based, partnering organization, supporting the understanding, appreciation and conservation of all Canadian birds. Since 70% of our 600 species of birds depart Canada for the U.S. and beyond, Canadians have a strong interest in the management and related regulations of birds and bird habitats outside of Canada. This echoes over 100 years of binational co-operation under the Migratory Birds Convention/Treaty between our two nations. For a century, that treaty has led to interpretation and practice in both countries that "take" includes all mortality caused by human activities on the landscape.

As such, we urge the U.S. government to implement the "No Action" alternative, modified to set aside the contentious M-Opinion 37050. This is a simple solution, maintaining an approach that has stood the test of time, held up well in the courts, and remains consistent with Canada, the treaty partner. Another acceptable course could be Alternative B: Withdraw M-Opinion 37050 combined with promulgating regulations that define the scope of the MBTA to include incidental take. All this said, we believe there is no clear case that any change to regulations is required and that existing regulations have worked well.

In our view, no compelling case has been made that there is anything wrong with the long-standing protection the Migratory Birds Treaty Act has given birds. As the EIS points out, "Most federal courts have concluded this provision has no minimum *mens rea* requirement and should, therefore, be treated as a strict liability violation". The situation is completely analogous in Canada.

An important reference to the situation in Canada is recorded in the most recent significant court case on birds, heard before Judge P.L. Cumming in the Provincial Court of New Brunswick. The ruling on a Constitutional Motion was dated 9 June, 2008. The Applicant in this case, a major forestry company, questioned the word "take" and claimed that the sole purpose of the migratory birds legislation was to regulate hunting. This parallels the stance in the current proposal of the U.S. government. Judge Cumming said "to interpret the Act and the regulations so narrowly is to unrealistically restrict the ambit and purpose of the treaty." That decision clearly supported the appropriateness and utility of the strict liability interpretation.

Under strict liability, which is the way courts in both countries have seen the Migratory Birds Treaty as respects incidental take, there is no reason to expect nuisance prosecutions, and courts would quickly dismiss cases that were frivolous. Strict liability is not a blind approach, it offers the defense of due

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diligence, and there has been a great deal of work that sets the stage for sound conservation management for birds. Governments and organizations such as Birds Canada have done a tremendous amount of work on bird science, tracking populations and studying the [hazards](#) that are causing harm to birds. Countries have worked together to map out Bird Conservation Regions under the North American Bird Conservation Initiative, and to set out conservation targets. Industrial partners that want to mitigate their large impacts on birds have a wealth of science-based support. We enjoy mutually productive partnerships with such industrial partners that actually benefit birds in working landscapes. The status quo – strict liability – is a good scenario for management. It provides incentives for industry to use science for bird conservation on working landscapes and to partner with other land managers and stakeholders with an interest in conservation.

Contrast this good status quo with what is likely to happen if the unfortunate Alternative A goes ahead. In this case, less progressive players in the industry perceive a green light to simply ignore birds. There would be no requirement for even the most damaging industry players to gather science on bird populations, or to study the causes of bird declines. Bird populations will suffer. More progressive and constructive industry players must bear additional, voluntary costs to maintain management standards no longer required of poorer performers. Since the Treaty is strict liability legislation, those regulations with reduced scope would likely put the US government at odds with the Treaty, inviting actions under trade agreements and the Treaty itself.

It is very disappointing that industry groups have chosen to lobby the US government for absolution from responsibility for harm to birds, especially at a time when the status of most bird species we share is known to be threatened. [Three billion birds](#), 30% of all of North America's birds, have been lost over the last 50 years. Canada, the United States and Mexico have recently published status [reports](#) on birds that encourage responsible action, conservation partnership across borders, and due diligence in the language of strict liability. Instead, the proposed regulations simply withdraw protection from these beneficial and vulnerable animals, the birds, without adequate gain socially or economically to justify such a profound change.

The U.S. and Canada, along with Mexico, have a century of co-operation on migratory species and other environmental issues that is the envy of the world. We urge the 'No Action' alternative, modified to set aside the contentious M-Opinion 37050.

Yours sincerely,

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President

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