

Congress of the United States
Washington, DC 20515

October 6, 2020

The Honorable David Bernhardt
Secretary of the Interior
U.S. Department of the Interior
1849 C Street NW
Washington, D.C. 20240

Dear Secretary Bernhardt:

We are writing to follow up on previous letters regarding the Migratory Bird Treaty Act and the draft Environmental Impact Statement (EIS) and proposed regulation to codify the 2017 Solicitor's Opinion on incidental take. In light of a recent federal court ruling that vacated the Solicitor's Opinion, and the deep concerns raised by key stakeholders during the regulatory process, we urge you to abandon the effort to codify the Opinion, as the Department cannot lawfully codify an unlawful Solicitor's Opinion, and instead pursue a rulemaking that is consistent with the court decision and the MBTA.

On August 11, 2020, the U.S. District Court for the Southern District of New York vacated the Solicitor's Opinion. The court found that this interpretation and policy is "contrary to the plain meaning of the MBTA", "runs counter to the purpose of the MBTA", and concluded that the Opinion was "a solution in search of a problem". The decision unambiguously found that the legal rationale and the outcome of the Solicitor's Opinion does not align with the law that Congress passed and intended. Congress passed the MBTA, and the United States signed four bilateral migratory bird treaties, in order to broadly protect and conserve our nation's bird populations. Moving forward with a regulation that continues to avoid and undermine this obligation is not a viable path forward.

As demonstrated over recent months, there is deep and broad concern from across the country, and internationally, about the impacts of the policy and the process that the Department of the Interior has undertaken. Since issuing the proposed rule, representatives from more than 25 state governments have opposed the rule or requested another path forward. Numerous tribes have expressed opposition to the rule and requested government-to-government consultation on the regulation. The Government of Canada has submitted strong objections and concerns about how it impacts our bilateral treaty and shared migratory birds. Three flyway councils have continued to request that the Department of the Interior not move forward with the policy. And numerous individuals and organizations representing sportsmen, conservationists, and scientists have asked that you reverse course, joining more than 250,000 people in submitting comments against the regulation.

This is a significant moment for the history of this foundational conservation law, along with the billions of birds that it protects, and the recreation and tourist economy which rely on migratory bird populations. We believe that there is fundamentally a lack of legal and stakeholder support for the current policy. It is not a sustainable position for the law, or for our bird populations.

Fortunately, there is a better path forward. We do not have to choose between conservation or regulatory certainty. While we believe that the Fish and Wildlife Service (FWS) has struck a reasonable balance in implementing the law over the decades, FWS can pursue a framework for incidental take that aligns with the conservation intent and language of the MBTA, which provides additional legal certainty for entities.

We urge the Department of the Interior abandon its current rulemaking and consider an approach that not only regulates incidental take but establishes a general permitting framework to encourage the implementation and creation of best management practices by industry. Within the draft EIS, FWS listed such a framework under its “Alternatives Considered but Not Carried Forward for Further Review”. Further, the bipartisan Migratory Bird Protection Act of 2020 (H.R.5552) currently being considered in the House of Representatives, creates certainty for industry by building the framework for a general permitting program for industries as well as exempting industries with de minimis risk activities. All while providing greater protections for migratory birds and their habitat.

In light of the court decision and the draft EIS public comment concerns highlighted above, we request a response to the following questions by Friday, October 30, 2020:

- Will FWS rescind its guidance memo, issued April 11, 2018, which implements the now-vacated Solicitor’s Opinion?
- Will FWS rescind its memo, issued June 14, 2018, titled “Destruction and Relocation of Migratory Bird Nest Contents”, which relies on the now-vacated Solicitor’s Opinion?
- How is FWS responding to requests from tribes that it engage in government-to-government consultation before it advances a regulation any further?
- How will FWS acknowledge and respond to the objections raised by Canada, states, and flyway councils, among other stakeholders, in regard to its proposed rule and draft EIS?

Additionally, we request that this letter be posted to the rulemaking docket and included in the rulemaking record. Thank you for your attention to this matter and your prompt response to these questions.

Sincerely,



Alan Lowenthal
Member of Congress



Francis Rooney
Member of Congress



Brian Fitzpatrick
Member of Congress



Raúl M. Grijalva
Member of Congress

/S/
John Katko
Member of Congress

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Robert C. "Bobby" Scott
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