SOUTHERN ENVIRONMENTAL LAW CENTER

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Via E-mail

Dr. Eric Kershner
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U.S. Fish and Wildlife Service
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Re: Docket No. FWS-HQ-MB-2018-0090, Final Environmental Impact Statement, Regulations Governing Take of Migratory Birds

Dear Dr. Kershner:

The Southern Environmental Law Center submits these comments on behalf of the 31 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") Final Environmental Impact Statement ("FEIS") regarding regulations governing take of migratory birds. Through these comments, we highlight the agency's legal violations and missteps in pushing forward this unsupported and illegal proposal to omit incidental take from the protections of the Migratory Bird Treaty Act ("MBTA"), supplementing the largely unaddressed comments we submitted on March 19, 2020,[1] on the agency's earlier Notice of Intent to prepare an environmental impact statement,[2] and July 20, 2020, on the agency's Draft Environmental Impact Statement ("DEIS").[3]

As we previously explained—and a federal court has now confirmed—FWS's proposal is illegal. FWS has proposed to insulate through this rulemaking its now defunct policy reversing course on decades of recognition that incidental take of protected migratory birds is prohibited under the MBTA. The fundamental purpose of an agency's environmental impact statement is to

[1] 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").

[2] 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).

[3] Those comments, which we incorporate by reference, are available here: Comments on Docket No. FWS-HQ-MB-2018-0090-8631, Draft Environmental Impact Statement, USFWS, Regulations Governing Take of Migratory Birds, https://www.regulations.gov/document?D=FWS-HQ-MB-2018-0090-14170.

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. Both the agency's DEIS, and its minimally altered FEIS, fail to fulfill this purpose.

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. The Service's illegal and irrational continued push to strip these increasingly at-risk bird species of critical protections would be especially detrimental here in the Southeast.

The many deficiencies with the Service's NEPA process include the following:

- The Service is attempting to make an illegal end-run around the judiciary by pushing forward with a proposal to codify a solicitor's opinion that a federal court has now vacated as contrary to the MBTA. The FEIS continues to misidentify the major federal action subject to review under NEPA as the proposed rule rather than the adoption and implementation of M-Opinion 37050, tainting the entire NEPA process.
- The Service's preferred alternative, to adopt a regulation cementing the illegal solicitor's opinion, violates NEPA and represents unlawful predetermined decisionmaking
- Contrary to the Service's identified purpose and need, the preferred alternative would create greater legal uncertainty by attempting to adopt an interpretation of the scope of the MBTA that a court has declared illegal.
- The Service continues with the same flawed and illegal baseline premised on implementing the now-vacated solicitor's opinion, thus grossly underestimating the true impacts of its proposal.
- The Service's arbitrary and contradictory treatment of mitigation efforts violates NEPA's requirements to document the full scope of impacts and to provide detail about possible mitigation efforts.
- In its FEIS, the Service barely altered the deficient analysis of impacts presented in the DEIS, doubling-down on its violation of NEPA's requirement to take a hard look at environmental impacts.
- The Service has failed to undergo consultation under the Endangered Species Act, based on the unsupported assumption that its proposed rule, that will impact billions of migratory birds, will not affect threatened and endangered species.

We discuss these and other shortcomings of the Service's NEPA process below.

I. The Service's Attempt to Codify the Now Vacated M-Opinion Is Illegal

Since the publication of the Service's DEIS, a federal court has vacated M-Opinion 37050 ("M-Opinion") as contrary to the clear language of the MBTA in violation of the Administrative Procedure Act ("APA"). *Nat. Res. Def. Council, Inc. v. U.S. Dep't of the Interior*, No. 18-CV-4596 (VEC), 2020 WL 4605235 (S.D.N.Y. Aug. 11, 2020). The court explained that "the statute's unambiguous text" controlled the case, *id.* at 8, and rejected the Department of Interior's attempts to rationalize its departure from that clear text, holding:

"[t]here is nothing in the text of the MBTA that suggests that in order to fall within its prohibition, activity must be directed specifically at birds. Nor does the statute prohibit only intentionally killing migratory birds. And it certainly does not say that only 'some' kills are prohibited." *Id*. at 13.

The court's reasoning applies equally to the Service's instant proposal which expressly seeks to codify the now-vacated M-Opinion. Yet, instead of returning to the drawing board in light of this judicial decree, the Service claims to "respectfully disagree with the district court's holding," and plows ahead, as if that is a viable option. FEIS at 3, 13. The Service goes on to claim "the vacatur of the M-Opinion does not directly affect our rulemaking process and effectively underscores the need to codify our official interpretation of the MBTA's application to incidental take." *Id.*

This is flat wrong. A decision codifying into regulation 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).

While the Service always should have adhered to the proper procedures for implementing such a groundshift in interpretation of the MBTA, *see* Scoping Comments at 9-11, DEIS Comments at 3-6,[4] the rulemaking process cannot insulate an otherwise illegal agency interpretation of the MBTA. Even a regulation that has gone through proper notice-and-comment violates the law when the agency's regulation is contrary to the plain, unambiguous language of the statute. *E.g. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). Here, the Service does not even pretend to have changed course in light of the court's decision in *NRDC*; instead, the FEIS continues to rely on the now-vacated M-Opinion, and all of its now rejected and defunct reasoning, in pushing forward with this proposal. If finalized, the Service's rule would suffer from the exact same deficiencies that led the *NRDC* court to vacate the M-Opinion[5]—plus the additional deficiency of being on notice of these flaws. Willfully ignoring this precedent would be the height of arbitrary and capricious, irrational decisionmaking. *See* 5 U.S.C. 706(2)(a).

Fundamentally, the Service appears to grossly misunderstand the role of the judiciary and our tripartite governmental system. "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177, 2 L. Ed. 60 (1803). Here, a federal court has already declared that interpreting the MBTA as proposed by the

[4] *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 like the M-Opinion to be analyzed in an EIS when they have significant impacts, including on migratory birds).

[5] As well as additional reasons we raised in response to the publication of the proposed rule itself, *see* Scoping Comments at 2-9.

Service—which explicitly imports the reasoning and interpretation of the vacated M-Opinion—violates the clear command of the statute and thus is illegal. The Service's "respectful disagreement" with the court does not empower it to do an end-run around the judiciary. The Department of Interior's appeal of that decision does not alter that current judgment of the district court absent a stay pending appeal (which we are not aware the Department has sought): the law of the land remains that the M-Opinion has been vacated. Even if the Service believes it will prevail on its appeal, it cannot move forward with codifying a statutory interpretation that has been found illegal without violating the APA. At a bare minimum, the Service must wait until its appeal is settled. Currently, the Service is needlessly rushing forward with a rulemaking that is "contrary to law."

II. The FEIS Does Not Analyze the Major Federal Action Properly Subject to Analysis Under NEPA

The FEIS fails to forthrightly assess the true major federal action at issue for NEPA purposes, despite our repeated comments raising this flaw. *See* Scoping Comments at 9-11, DEIS Comments at 3-4. This is not an inconsequential error, but an arbitrary and capricious violation of NEPA.

A NEPA analysis must identify the correct major federal action in order to comply with NEPA's mandate to assess and disclose the significant impacts of that action. *See* 42 U.S.C. § 4332(2)(C). In turn, this analysis and disclosure of impacts must be completed *prior* to actually undertaking that major federal 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)).

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.

At scoping, in the DEIS, and now again in the FEIS, the agency has sought to bury the true major federal action and agency decision of greatest consequence: FWS's reliance on Interior's M-Opinion to reverse course on decades of protections for migratory birds against incidental take. The FEIS maintains the fiction of claiming implementation of the M-Opinion as its No Action Alternative, using the exact same language as in the DEIS: "the Service would continue to implement the MBTA consistent with the direction given in M-Opinion 37050, which defines the scope of the MBTA to exclude incidental take." FEIS at 18; *see also* DEIS-FEIS Comparison at 18, Attachment 1. The Service's preferered "action alterantive" reaches this same outcome—it is not expected to "change the current implementation or enforcement of

the MBTA" as compared to the no-action alterantive. FEIS at 18-19. There is no difference between the No-Action Alternative and the Preferred Alternative, aside from going through a formal rulemaking process with the latter.

The agency instead appears set on doubling-down 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. In its responses to public comments on the DEIS, the Service asserts that its No Action alternative is based on the status quo and the environmental baseline under present-day practice. FEIS at 92. But under such an approach, agencies could always obfuscate and minimize environmental impacts by adopting a policy without undergoing NEPA analysis, then codifying that exact same policy based on a skewed baseline. This misses the point of NEPA entirely and entrenches a host of fatal errors throughout the FEIS. The major federal action that should have triggered NEPA was the Service's M-Opinion, and the Service should be comparing that action against a No Action, baseline alternative of the state of affairs *before* the adoption of that (illegal) policy that the agency seeks to cement through rulemaking.

III. The Analysis of Alternatives Remains Deficient

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).[6] The detailed 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 is intended to provide 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 FEIS's analysis of alternatives violates NEPA.

A. Selection of the Preferred Alternative Violates NEPA Because It Has Been Confirmed as Unlawful

As explained above, the agency's decision to attempt to codify M-Opinion 37050 violates the APA's rulemaking requirements because 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). The discussion of alternatives in the FEIS, and selection of the preferred alternative, also violates NEPA because it is unreasonable. Alternatives evaluation under NEPA is governed by a "rule of reason." *State of Cal. v. Block*, 690 F.2d 753, 767 (9th Cir. 1982). The "touchstone . . . is whether an EIS's selection and discussion of alternatives fosters informed decision-making and informed public participation." *Id*. (citation omitted).

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

It would be difficult to characterize the Service's selection of its preferred alternative as "informed." The Service acknowledges that its rulemaking is an attempt to codify M-Opinion 37050, which "a federal district court vacated" but then asserts that the "court's vacatur of the M-Opinion does not directly affect our rulemaking process and effectively underscores the need to codify our official interpretation." FEIS at 13. It is astounding that the Service would view a finding by a federal district court that its preferred MBTA interpretation is illegal as *underscoring* the need to codify that illegal interpretation. The Service appears to misapprehend the import of the court's ruling. This is neither reasonable nor informed and violates NEPA.

B. The Preferred Alternative Is Inconsistent with the Alleged Purpose and Need of Creating Legal Certainty

The purpose and need for an action defines the reasonable range of alternatives. *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. . . ."). Selecting a preferred alternative that does not accomplish the agency-provided purpose and need indicates one of two things: either the agency is arbitrarily choosing a preferred alternative that does not fulfill the purpose of the action, or the agency has wrongfully articulated the purpose of its action. This latter error is consequential because incorrectly defining an action's purpose limits consideration of viable alternatives under NEPA which might have been available *had* the agency correctly identified the purpose of its proposed action. Unfortunately for the Service, its preferred alternative does not fulfill the stated purpose of this action.

"A major purpose of the rule and EIS is to provide legal clarity to the regulated public." FEIS at 112; *see id*. at 18 (rejecting "no action" because it does not provide the requisite "legal certainty"); *see also* DEIS at 12; FEIS at 13 (defining purpose and need to include regulatory "consistency"). But the preferred alternative does the opposite. The Service's preferred alternative seeks to codify M-Opinion 37050 which has been vacated as inconsistent with the MBTA. Attempting to codify a specific, now-vacated M-Opinion provides not a modicum of legal certainty—it only muddies the waters. The agency effectively admits as much, acknowledging in its discussion of the no-action alternative (which is virtually the same as its preferred alternative) that "rely[ing] on an interpretation initiated by a since-vacated legal opinion does not provide the public with the same certainty as other action alternatives." FEIS at 48.

In truth, the purpose of this action is specifically and only to codify M-Opinion 37050.[7] Of course, such a narrow definition of project purpose creates other NEPA problems for the Service. Namely, it limits viable alternatives to only one: promulgating a regulation cementing M-Opinion 37050, and evidences a predetermined outcome—both of which violate NEPA. We explained this problem in our comments on the DEIS (at 5).

[7] And the effort at codification specifically may be driven less by a desire to provide clarity and more by a desire to influence judicial outcomes by recruiting "Chevron deference, [not] only Skidmore" to the Service's preferred interpretation. *See* Attachment 2.

Ironically, neither issuance of M-Opinion 37050, nor its formalization in a rulemaking, are necessary to provide legal "certainty" or "consistency." To the contrary, rescission in March 2017 of the prior M-Opinion articulating the agency's longstanding practice of applying the MBTA to incidental take "caused confusion" requiring the Service itself to "seek clarity" from the Secretary of the Department of the Interior. *See* Attachment 3. This was followed by instructions from the Deputy Secretary to remove from publicly accessible webpages agency guidance documents explaining the prohibition against incidental take under the MBTA. *See* Attachment 4. The Service's departure from its longstanding interpretation of the MBTA, as now being pursued through its rulemaking, appears to be the *source* of confusion, not its cure.

Altogether, "[p]rior to December 2017, the government viewed an action that directly and foreseeably resulted in the death of a migratory bird" as prohibited conduct under the MBTA. FEIS at 19. The agency's reversal of that position caused confusion. Now, in a rulemaking purportedly intended to provide legal clarity, the agency is seeking to codify a specific M-Opinion which has been vacated as an illegal interpretation of the MBTA. This will cause even more confusion. Choosing an alternative that does not fulfill the "legal clarity" purpose of the agency action evidences either an arbitrary choice or strongly suggests that the agency has erroneously defined the purpose of its action. The former violates the APA and the latter poisons the whole NEPA well because identification of reasonable alternatives turns, in part, on the purpose and need statement.

C. The FEIS's No Action Alternative Is Even More Flawed Than in the DEIS

In our comments on the DEIS we explained the numerous flaws in the agency's consideration of a baseline or "no action" alternative. *See* DEIS Comments, 18-26. The agency has now exacerbated those errors by continuing to insist that "[u]nder the No Action Alternative, the Service would continue to implement the MBTA consistent with the direction given in M-Opinion 37050," FEIS at 18, even after the M-Opinion has been vacated, *see Nat. Res. Def. Council, Inc.*, 2020 WL 4605235. To "vacate" means "to nullify or cancel; make void; invalidate." Black's Law Dictionary 1782 (10th ed. 2014). To wit, the Service can no longer implement its "nullified or cancelled, made void, invalidated" M-Opinion. To the contrary, the status quo reverts to the Service's pre-M-Opinion 37050 position that the MBTA prohibits incidental take—which it should have been using as its baseline all along. *See also* Attachment 3 (noting that "the suspension of the [previous] m-opinion does not change the government's longstanding interpretation of the MBTA").

To recap the timeline, since at least the 1970s the Service has enforced the MBTA prohibition against incidental take of migratory birds. FEIS at 20. This was true until "December 2017." *Id*. at 19. That month, the "Office of the Solicitor released M-Opinion 37050 . . . providing a legal interpretation that the MBTA does not prohibit incidental take of migratory birds." *Id*. at 13. Issuance of M-Opinion 37050 is *the act* that changed the Service's longstanding practice. That act has now been nullified. Without that practice-changing act, the status quo reverts to the Service's practice before M-Opinion 37050 which is the appropriate baseline to be considered in the no-action alternative.

The agency's earlier no-action analysis was incorrect; failing to forthrightly factor *Nat. Res. Def. Council, Inc*. into its FEIS analysis only compounds that error.

D. The FEIS Admits This Is a Predetermined Decision

NEPA prohibits agencies from conducting an environmental review simply to justify decisions already made. 40 C.F.R. § 1502.2 (g).[8] 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.

We explained in our comments on the DEIS that the agency was predetermining the outcome of its analysis in violation of NEPA. *See* DEIS comments at 5-6. The FEIS confirms as much. First, since publication of the DEIS the M-Opinion that is the "original basis," FEIS at 130, for the preferred alternative has been found illegal. Nevertheless, the Service is charging ahead with its attempt to enshrine in regulation the now-vacated M-Opinion as its chosen alternative. The agency has so thoroughly committed itself to this one alternative that it is willing to ignore the judicial branch in an effort to finalize its predetermined choice which it simultaneously reports to already be implementing.

Second, the FEIS rejects Alternative B as "inconsistent with the Department's current view of the law [so] adopting this alternative is dependent on that viewing changing." FEIS at 19. As explained in the no-action alternative, the Service's "current view of the law" is "consistent with the direction given in M-Opinion 37050." *Id*. at 18. We appreciate the Service's candor in explaining that it is going to reject any alternative, or judicial opinion for that matter, that strays from its view that codification of M-Opinion 37050 is the right outcome for this NEPA analysis. Unfortunately for the agency, that further confirms that its NEPA analysis is a charade intended to justify only one, predetermined outcome: codifying M-Opinion 37050.

E. Dismissal of Project Alternatives Is Contradictory, Inconsistent, and Illogical

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).[9] 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

[8] *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).

[9] *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)). 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).[10] 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).

The Service's dismissal of various project alternatives in the FEIS is so inconsistent that it is hard to track when the agency is embracing one line of reasoning to support its preferred alternative and when it is using the same reasoning to reject another alternative. For instance, the agency refuses to consider an alternative that would base MBTA liability on gross negligence because it would be "inconsistent with most case law and, therefore, would likely reduce legal certainty for the public." FEIS at 22. But as its preferred alternative, the agency proposes codifying M-Opinion 37050 which has been found illegal, and vacated, in the only case to consider its legality. On one hand, the agency rejects an alternative because it is inconsistent with case law and therefore its adoption would "reduce legal certainty for the public." And on the other it views inconsistent case law as underscoring the need to adopt its preferred interpretation *specifically to provide increased legal certainty*. There is no logical consistency in these explanations.

In another instance, the Service rejects an alternative suggested during the DEIS comment period as "not a viable option under the No Action Alternative and Alternative A." FEIS at 126. This reflects a serious misunderstanding of the Service's obligations related to NEPA alternatives analysis. If the alternative would fulfill the purpose and need for the action, and we see no reason why this particular alternative would not, the agency must consider it or risk violating NEPA. Rejecting a proposed alternative because it could not be implemented in conjunction with the agency's preferred alternative flies miles wide of the NEPA mark.

Finally, the agency's continued refusal to develop a general-permit alternative continues to suffer from numerous flaws. *See* DEIS Comments at 9. First, the agency assumes this alternative would require "M-Opinion 37050 [to] be withdrawn." FEIS at 73. The federal court for the Southern District of New York has already done that work for the Service—the M-Opinion has been vacated. Second, the Service eliminated the alternative because "developing a general-permit system would be a complex process." FEIS at 74.[11] A bare assertion of complexity, standing alone, is not a valid reason to dismiss alternatives under NEPA. Third, the

[10] *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)).

[11] The Service previously found that a permitting alternative would "provide legal authorization and certainty to entities that incidentally take migratory birds" which is the purported need for this rulemaking. *See* Attachment 5.

Service asserts that the proposed alternative "goes beyond the current purpose and need of simply providing regulatory certainty." *Id*. The key word here appears to be "simply." The Service is rejecting this "complex" alternative because it goes beyond the "simple" purpose and need for the action. The purpose and need for this action says not one word about simplicity. Even if valid bases exist to reject this alternative, the agency has supplied none.

IV. The FEIS's Discussion of Mitigation Efforts Is Contradictory and Violates NEPA

The FEIS makes no attempt to address the concerns we raised in our DEIS comments about the Service's contradictory and confusing discussion of mitigation efforts. DEIS Comments at 26-27. The Service persists in pointing to possible mitigation efforts in an attempt to dodge a full accounting of environmental impacts, in violation of NEPA.

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).[12] "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 FEIS repeats the DEIS's same muddled analysis of impacts and possible mitigation measures, that may or may not be implemented, in order to obscure the full extent of the likely impacts of its proposal. This violates the requirements to discuss and assess impacts, as well as the prohibition against relying on mitigation efforts to attempt to minimize the EIS's accounting of impacts. The FEIS continues with the same references to past and future "voluntary guidance" as the DEIS. FEIS at 30, 53; *see also* DEIS at 28, 50.[13] The FEIS continues with the same non-committal language about what, if anything, FWS would do in the future with regards to industry best practices. FEIS at 52; DEIS Comments at 27; FEIS-DEIS Comparison at 52, Attachment 1. The FEIS also contains the same admissions that under its proposed rule, "fewer entities would seek or implement guidance from the Service about ways to avoid or minimize adverse effects on migratory birds," FEIS at 53, and makes similar predictions about its No Action alternative. FEIS at 48-49 (noting "there is no regulatory requirement to implement beneficial practices for birds" and the no action alternative would result "in a reduced number of entities that implement best practices over time"). At the same time, the Service still has not made any attempt to identify which, if any, of these best practices or voluntary measures would continue to be employed under the different alternatives.

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

[13] Indeed, the Service did not alter the DEIS's discussion of mitigation at all in its FEIS. FEIS-DEIS Comparison at 30, 53, Attachment 1.

Despite repeatedly making clear that any mitigation efforts would be voluntary, the FEIS tries to distract from the damaging consequences of its preferred alternative by suggesting that if "voluntary measures are implemented, it may offset some of the potential reduction in protective measures as outlined within this EIS." FEIS at 52. The Service's responses to public comments fails to address any of these internal inconsistencies and misleading statements about "offsetting" impacts—instead, the only slightly-on-point response redirects to the Service's alleged inability to quantify which mitigation measures might voluntarily be implemented and their respective efficacy. FEIS at 95. The Service's response to comments further argues that "it is difficult to predict industry behavior under each alternative and little information or data is available to aid in predicting that behavior," and therefore FWS cannot "conduct analyses with any level of quantitative precision." FEIS at 107. But the FEIS still fails to conduct analysis with any level of *qualitative* comparison either, instead providing only general and unsupported conclusions.

The Service also continues to confusingly discuss state regulations relevant to incidental take of birds as though those regulations might mitigate the harmful effects of its proposal. *See* DEIS Comments at 27. The FEIS makes no effort to elaborate on the DEIS's superficial and flawed review of state regulations relevant to incidental take of migratory birds—regulations which are far from uniform and do not exist in every State—and the Service does not appear to respond to these raised concerns at all in its collection of responses to public comments.

V. The Service Still Has Not Taken the Necessary Hard Look at Impacts

NEPA requires agencies to "consider and disclose the actual environmental effects in a manner that will ensure that the overall process . . . brings those effects to bear on decisions to take particular actions that significantly affect the environment." *Baltimore Gas and Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 96 (1983). To do this, an agency must take "a 'hard look' at an action's environmental impacts, which, at the least, encompasses a thorough investigation into the environmental impacts of an agency's action and a candid acknowledgment of the risks that those impacts entail." *Nat'l Audubon Soc'y v. Dep't of Navy*, 422 F.3d 174, 185 (4th Cir. 2005). This "hard look" insures that: (1) the agency carefully considers 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. *Id.* at 184. One of the primarily goals of NEPA is to "prevent[] uninformed . . . agency action." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 333 (1989). To that end, NEPA requires that this information be analyzed "*before* decisions are made and *before* actions are taken." 40 C.F.R. § 1500.1(b) (emphases added); *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). A NEPA analysis that fails to take this hard look is arbitrary and capricious. *See Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437 (4th Cir. 1996) (holding that failure to take a hard look resulted in an arbitrary and capricious decision).

The FEIS in no way takes a "hard look" at the environmental impacts of this rulemaking. We pointed out in detail in our comments at scoping and on the DEIS the types of impact analysis that were missing from the DEIS. *See, e.g.*, DEIS Comments at 14-17. The FEIS has

not corrected these errors. We further provided high-quality and relevant scientific information on the significant effects of abandoning incidental take protections, with reference to specific industries and species. *See, e.g.*, Scoping Comments and attachments; DEIS Comments and attachments. The FEIS continues to ignore this relevant scientific information and the numerous flaws demonstrated in our comments, without adequate explanation. Those areas of missing information include, among others, the interaction of incidental take with other stressors, including climate change; the direct, indirect, and cumulative effects of incidental take of the rule to birds based on region and species; the economic impacts to ecosystem services performed by birds; and effects to the most vulnerable bird species protected by the MBTA.

The FEIS claims it already addressed at least some of these concerns in its response to comments, but the analysis in the FEIS itself remains largely unchanged. For example, we noted in our DEIS comments that, despite acknowledging the high economic value of birdwatching and associated tourism, FWS failed to address the economic impacts on that industry of allowing incidental take. The FEIS's response to comments claims that these issues are addressed in the "socioeconomics section of each alternative." FEIS at 111. But they are not. *See, e.g.*, FEIS Section 4.2.3.4. Worse still, documents obtained through a public records request show the Service had more information about the low economic "costs" to industry through historical incidental take enforcement actions relative to the high deterrent benefits, but this information is not candidly disclosed in the FEIS. *See* Attachment 6. And to the extent that these sections address other socioeconomic issues, like ecosystem services, the brief discussions provided do not attempt even to estimate the economic harms of the rule. *See, e.g.*, FEIS at 58 ("[D]ata are not readily quantifiable and available to determine the economic value of these changes in ecosystem services."). Given that this rule grounds itself in economic considerations, *see* DEIS Comments at 28, this lack of any meaningful economic analysis and comparison poses a serious shortcoming to the Service's flippant impacts analysis.

These "hard look" errors continue throughout the FEIS's cursory impacts analysis, making it impossible to compare the effects of different alternatives in any meaningful way. The Service's primary response to the lack of a hard look criticism is that "it is difficult to predict industry behavior under each alternative" because it has a "paucity of . . . data." FEIS at 108. Incomprehension of the effects its proposal will have is not a hard-look escape hatch. To the contrary, it begs the question why the Service is engaging in this effort in the first place.

The Service made an interpretive change in 2017 without undertaking the NEPA process required at that time. In the subsequent three years and even as that change was subjected to (and failed) judicial review, the Service has made no effort to address or understand how the change, and therefore this rule, has already affected and will continue to impact the environment. It acknowledges at a cursory and superficial level the general types of broad impact categories that will occur, but does not provide any more information. The FEIS is, in many ways, a list of some of the things that *should* be analyzed as part of an effort to inform the agency and the public about the environmental impacts of the rule. But it never performs that analysis. With it, the FEIS informs neither the agency nor the public about the impacts of this action, and therefore fails the "hard look" requirement.

These failures are fatal to the Service's NEPA review because the FEIS was developed on fundamentally flawed grounds—to codify a pre-determined interpretation regardless of any analysis, evidence, or findings the agency is legally required to make before it makes that determination. But NEPA is not a theatrical exercise to be performed before an agency announces whatever outcome it has decided ahead of time; it is a law, with substantive requirements that this FEIS entirely ignores. The agency has *never* undertaken the required analysis under NEPA of the environmental impacts of changing its interpretation to allow incidental take of migratory birds, which, as we have pointed out numerous times, is the actual action at issue here. That unanalyzed change in interpretation has now been vacated by a federal court, leaving this agency nothing to rely on as a basis for its no action alternative. If FWS wants to make that change in a rule, it *must* start back with M-Opinion 37041 and its pre-2017 interpretation of the MBTA, take the required "hard look" at that interpretive change in an EIS by considering all reasonable alternatives, environmental impacts, and the effectiveness of mitigation strategies, and only then come to a conclusion about what alternative best satisfies the identified purpose and need for this rulemaking to provide legal certainty.

VI. The Service Must Ensure its Proposal Is Not Likely to Jeopardize the Continued Existence of ESA-Protected Species

The Endangered Species Act ("ESA") prohibits any federal agency from taking action that is "likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat." 16 U.S.C. § 1536(a)(2). The prohibition is enforced through the consultation requirements under Section 7 of the ESA. Those require federal agencies to "review [their] actions at the earliest possible time to determine whether any action may affect listed species or critical habitat." 50 C.F.R. § 402.14(a). If a federal action "may affect" a listed species, formal Section 7 consultation is required. *Id*. Formal consultation concludes with a biological opinion explaining whether the action is likely to jeopardize species or adversely affect critical habitat. If jeopardy or adverse modification is found, the agency action may not move forward as proposed. *See Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv*., 524 F.3d 917, 925 (9th Cir. 2008).

These requirements apply when the Fish and Wildlife Service is the "action agency" as it is here. *See* 16 U.S.C. § 1536(a)(2) (applying Section 7 requirements to "each Federal agency").

For ESA purposes, "[a]ction means all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas" specifically including "the promulgation of regulations." 50 C.F.R. § 402.02. The proposed MBTA rulemaking is a relevant "action" for ESA purposes. If the action crosses the low "may affect" threshold for a protected species, the Service must go through Section 7 consultation.

To escape that outcome, the Service asserts that its proposed action has "no effect" on listed species. FEIS at 98. While the reasoning behind this determination will not be disclosed until the Service publishes its final MBTA rule, *see id*., it appears wholly unsupported by the agency record.

First, the Service clearly grasps that implementing its preferred alternative will result in more bird deaths. FEIS at 53, 91 ("The Service acknowledges in the final EIS that the preferred alternative could result in increased mortality of birds"), 8 (preferred alternative will "result[] in increased bird mortality"). The FEIS even provides some concrete examples: selecting the preferred alternative will "reduce[] incentives for netting oil pits in States that do not require them [which] is likely to result in more birds dying in uncovered pits." *Id*. Aside from death, under either the no-action or preferred alternative "migratory birds will likely experience increasing negative impacts over time as compared to current conditions; these impacts could be significant." *Id*. at 49. Selecting the preferred alternative will affect migratory birds by inflicting harm up to and including death.

Second, the protections of the MBTA currently extend to 1,093 bird species. *Id*. at 39. Presumably, the rulemaking will affect all of these species to some degree; the Service has never suggested that some will be affected and others will not (though that would be relevant to a "hard look" under NEPA). Of those 1,093 species, "102 also receive regulatory protection 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." *Id*. The Service's "no effect" determination assumes that while 991 bird species may see increased harm and mortality under the preferred alternative, a specific subset of 102 of those species—and those that are already likely the most at risk given their threatened or endangered statuses—somehow will see no effect whatsoever. There is no support for that conclusion.

Nevertheless, the Service runs out a series of unconvincing statements to defend its irrational choice. First, the Service suggests that "[b]ird species listed as threatened or endangered under the ESA would continue to receive the full protection of the ESA." *Id*. at 39. But the Service is denying those species the protections afforded through Section 7 consultation by refusing to engage in that process as part of *this very rulemaking*. Second, the Service suggests that "[b]ecause the ESA prohibits incidental take for all listed species, including those that are also protected under the MBTA, we do not expect any of the alternatives to codifying the scope of the MBTA as it relates to incidental take will have an effect on ESA-listed species." *Id*. at 91. To start, the ESA does not prohibit "incidental take for all listed species." Section 9 of the ESA prohibits unauthorized take for endangered species but incidental take can be allowed in certain circumstances following appropriate analysis. And the fact that the ESA prohibits unauthorized take does not factually establish that it does not occur such that no other action, including this rulemaking, could affect a protected species based on the mere existence of the take prohibition. The Service could perhaps garner more support for this conclusion if it continued to require measures to prevent incidental take in areas where threatened and endangered birds were present. That very alternative was suggested in comments on the DEIS and the Service rejected it. FEIS at 126. If the Service intends to facilitate through this rulemaking the rollback of actions taken to avoid incidental take of birds, in areas where endangered and threatened birds are present, then this action will affect those birds triggering Section 7 consultation requirements. The Service must initiate formal consultation before finishing this rulemaking.

VII. The Service Violated NEPA by Failing to Consider and Respond to the Conservation Group's Comments

The Service's responses to our comments on the DEIS are legally insufficient. Under NEPA, an agency must solicit comments on a DEIS, 40 C.F.R. § 1503.1(a) (1978); 40 C.F.R. § 1503.1(a) (2020), and must respond to substantive comments in the subsequent FEIS, 40 C.F.R. § 1503.4 (1978); 40 C.F.R. § 1503.4 (2020). The response must "discuss at appropriate points in the final statement any responsible opposing view which was not adequately discussed in the draft statement and shall indicate the agency's response to the issues raised." 40 C.F.R. § 1502.9(b) (1978); *see also* 40 C.F.R. § 1502.9(c) (2020); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 n.13 (1989). In its responses the agency may:

> (1) Modify alternatives including the proposed action.
> (2) Develop and evaluate alternatives not previously given serious consideration by the agency.
> (3) Supplement, improve, or modify its analyses.
> (4) Make factual corrections.
> (5) Explain why the comments do not warrant further agency response, citing the sources, authorities, or reasons which support the agency's position and, if appropriate, indicate those circumstances which would trigger agency reappraisal or further response.

40 C.F.R. § 1503.4(a) (1978); *see also* 40 C.F.R. § 1503.4(a) (2020). The procedural requirements prescribed in NEPA's implementing regulations must be "strictly interpreted 'to the fullest extent possible'" in accord with the policies implemented in NEPA. *California v. Block*, 690 F.2d 753, 769 (9th Cir. 1982) (quoting 42 U.S.C. § 4332). In order to fulfill this mandate, an agency must identify all opposing views raised in comments and provide a "good faith, reasoned analysis in response" to each. *Block*, 690 F.2d at 773 (quoting *Silva v. Lynn*, 482 F.2d 1282, 1285 (1st Cir. 1973)); *Sierra Club v. U.S. Army Corps of Engineers*, 701 F.2d 1011, 1030 (2d Cir. 1983) (same).

Moreover, agencies must respond explicitly and directly to opposing views in a way that addresses the underlying issue raised. *See Hughes River Watershed Conservancy v. Johnson*, 165 F.3d 283, 288 (4th Cir. 1999) (agency must give "careful scientific scrutiny and respond[] to all legitimate concerns that are raised"); *N. Carolina Wildlife Fed'n v. N. Carolina Dep't of Transp*., 677 F.3d 596, 600 (4th Cir. 2012) (faulting responses that "failed to address the underlying issue"); *Earth Island Inst. v. Carlton*, 626 F.3d 462, 472 (9th Cir. 2010) (agency must respond "explicitly and directly"); *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1167 (9th Cir. 2003). Agencies must candidly acknowledge information revealed in public comments. *N. Carolina Wildlife Fed'n, 677 F.3d at 603*; *see also Nat'l Audubon Soc'y*, 422 F.3d at 198 (explaining that NEPA requires "candid acknowledgement" of environmental harms).

As detailed throughout these comments, the Service's responses—or lack thereof—to our Scoping and DEIS Comments failed to satisfy its legal obligations to candidly acknowledge and respond to the concerns we raised. The Service selected only limited portions of our previous comments to respond to and ignored, misrepresented, or inadequately addressed a number of

significant concerns. The FEIS also fails to forthrightly disclose its own analyses of the comments received—which showed approximately 98% of the 8,398 comments received in response to its proposed rule *were opposed to the action.* Attachment 7.

The failure to respond to our concerns is yet another independent violation of NEPA.

VIII. Conclusion

Rather than going back to the drawing board and thoughtfully addressing concerns raised at scoping and on the DEIS, FWS has doubled-down on its legal violations in its barely updated FEIS. The Service's rulemaking and corresponding contrived NEPA analysis is illegal, and should be withdrawn.

We appreciate the opportunity to submit these comments.

Sincerely,

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