SOUTHERN ENVIRONMENTAL LAW CENTER

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March 27, 2020

*Via FERC's eFiling System*

Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426

**Re: Migratory Bird Requirements for the Atlantic Coast Pipeline and Supply Header Projects, Docket Nos. CP15-554-000 et seq., CP15-555-000 et seq.**

Dear Secretary Bose:

On March 15, 2020, annual restrictions that prevent tree-clearing in Virginia to protect nesting migratory songbirds took effect for the Atlantic Coast Pipeline (ACP) project. Similar restrictions to protect migratory birds in West Virginia and North Carolina start on April 1 and last through the end of August 2020.[1] These are among measures ACP must follow to minimize incidental takes of migratory birds under its Certificate of Public Convenience and Necessity, 161 FERC ¶ 61,042 (Certificate), and as required to comply with the Migratory Bird Treaty Act (Act).[2]

In February 2020, the Fish and Wildlife Service (FWS) announced that it was proceeding with a rulemaking to rollback protections for incidental takes against migratory birds. Under the sweeping change, measures to protect against the killing of birds that happen incidental to, but not as the subjective purpose of, an activity would no longer be prohibited.

We submitted comments last week opposing that rulemaking, joined by over fifty organizations working in our region. Most problematically, the FWS's proposed rule aims to cement a Department of Interior (Interior) policy change announced in December 2017 that purported to abandon protections for migratory birds against incidental take under the Act. As we explain in our comments, that policy change cannot be squared with the Act's language, treaty obligations, or decades of interpretation and practice by the agency. Along with the rulemaking, the FWS also announced its intent to conduct an environmental review under the National Environmental Policy Act (NEPA). The NEPA process forecasts an analysis, however,

[1] To avoid direct impacts on nesting birds, right-of-way clearing must occur outside of the general migratory bird nesting season. Atlantic Coast Pipeline, LLC, Implementation Plan, Migratory Bird Plan (Sept. 2017) (ACP Plan) at 28, FERC eLibrary Accession No. 20171018-5002; Final Environmental Impact Statement (July 2017) at 4-182, FERC eLibrary Accession No. 20170721-4000.

[2] *See, e.g.*, ACP Plan at 2.

that will not analyze the biggest impacts of rolling back the Act, which stem from the 2017 reversal of policy and not the current policy's codification. ACP is among the projects we highlight in our comments, attached here, [3] that would have far greater environmental impacts than analyzed by federal agencies, in the hypothetical event that the agencies allow ACP to back out of measures to protect migratory birds, like time of year restrictions, which are mandatory conditions of the project's approvals.

ACP tried to do this once already. In March 2018, ACP asked FERC to allow it to bypass tree clearing restrictions,[4] which we opposed,[5] and FERC correctly denied that request.[6] Later, in May 2018, the FWS indicated to ACP that the mitigation measures required to protect against incidental takes of migratory birds are "purely voluntary."[7] That purported reversal was based on the 2017 Interior policy change that is now the subject of the proposed rulemaking.

For the ACP, however, the Interior policy change and the proposed rule to codify that change do not alter the mandatory nature of mitigation measures required in its project approvals. First, the new interpretation advanced by Interior is unlawful and vulnerable to challenge.[8] Second, as we pointed out in 2018, the mitigation measures detailed in ACP's Migratory Bird Plan have been incorporated into FERC's certificate[9] and its environmental impact analysis, as well as the analysis and approvals of other federal agencies that relied upon

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[3] We have not included the voluminous attachments to the comments submitted to Interior, but documents related to ACP have a corresponding FERC eLibrary docket number for reference.

[4] Letter from Matthew Bley, Dominion Energy, to K. Bose, FERC (Mar. 15, 2018), FERC eLibrary Accession No. 20180316-5008.

[5] Letter from G. Buppert, SELC, to K. Bose, FERC (Mar. 17, 2018), FERC eLibrary Accession No. 20180319-5029.

[6] Letter from FERC to ACP (Mar. 28, 2018), FERC eLibrary Accession No. 20180328-3069 (denying ACP's request to modify time-of-year requirements).

[7] Letter from FWS to ACP (May 31, 2018), FERC eLibrary Accession No. 20190530-5117.

[8] The 2017 policy change is under review in federal district court already. *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.).

[9] FERC's Certificate recognizes for example: "Atlantic and DETI developed a Migratory Bird Plan to minimize impacts on bird species, and have agreed to conduct tree clearing outside of state-specific migratory bird nesting seasons." Certificate Order ¶ 242. Environmental Condition 19 of the Certificate Order also incorporates the Migratory Bird Plan. FERC was equally clear when denying ACP's March 2018 request to bypass time of year restrictions that the "time-of-year tree felling restrictions . . . mitigation measure is one of many that the Commission considered in its Order when granting Certificates." *Supra* n. 5.

FERC's EIS for their own review.[10] The conditions and assumptions of those underlying approvals about impacts to migratory birds cannot be automatically ignored based on the policy reversal of a single agency.[11] By December 2018, ACP's representative recognized as much in a court filing, noting that by the coming March 15, 2019, time of year restrictions would again prohibit tree felling. *See* Declaration of Leslie Hartz ¶ 6 (Dec. 14, 2018).[12] These remain mandatory conditions of approval for the ACP today. Any renewed request to FERC to bypass these measures in the future would have to be denied for the same reasons we stated in 2018 and for additional reasons raised in the attached comments.

Sincerely,

/s/ Gregory Buppert
Gregory Buppert
Amelia Burnette
Southern Environmental Law Center

Cc: *via email only*

Pam Toschik (FWS) – Pamela_Toschik@fws.gov
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[10] For example, the U.S. Forest Service's Record of Decision and Special Use Permit for the ACP to cross the Monongahela and George Washington National Forests incorporated the same measures.

[11] An agency must prepare a supplemental draft EIS, for example, when the agency "makes substantial changes in the proposed action that are relevant to environmental concerns" or there are "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1).

[12] Exhibit 1 to ACP's Motion Expedite Briefing & Oral Argument, *Defenders of Wildlife et al. v. U.S. Fish and Wildlife Service* (No. 18-2090, ECF No. 48-1), attached.

# ATTACHMENT A

SOUTHERN ENVIRONMENTAL LAW CENTER

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March 19, 2020

**BY ELECTRONIC SUBMISSION**
Via Federal eRulemaking Portal
www.regulations.gov

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, Notice of Proposed Rulemaking: Regulations Governing Take of Migratory Birds, and Notice of Intent to Prepare an Environmental Impact Statement**

Please accept the following comments on behalf of over fifty 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") 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) ("Notice").[1]

As regional organizations involved in preserving the environment of the Southeast, we have witnessed firsthand the benefits of the Migratory Bird Treaty Act ("MBTA") in mitigating industrial impacts to migratory birds. The southeastern United States is one of the fastest growing areas of the country,[2] a region in which the "influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances," 42 U.S.C. § 4331(a), often create conflict with conservation values and resources important to local communities. That development often has an outsized impact due to the Southeast's diversity and complexity of environmental resources. Our region contains more remaining wetlands than anywhere else in the country[3] and among the few remaining blocks of

[1] On February 24, 2020, we requested a 30-day extension to the comment deadline because of the significant environmental and legal consequences of the rulemaking. Additional time would be necessary for the public to thoroughly and fairly evaluate the extent of ramifications from this far-reaching change in implementing the MBTA. We submit these comments to facilitate the agency's review in the limited window of time provided.

[2] *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.

[3] 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.

un-fragmented forest in the eastern United States, supporting "very high densities of forest breeding birds."[4]

Our work would be adversely affected by this Proposed Rule, as it would codify the elimination of important protections for migratory bird species that we rely on to ensure projects and industrial operations do as little damage to these resources as possible. It would entrench those changes even though they have never been scrutinized in the NEPA process. For the reasons below, the Service should withdraw the Proposed Rule, which reflects neither a legal nor sensible strategy for ensuring protections for migratory birds under the MBTA.

## I. The Proposed Regulation Governing Take of Migratory Birds Is Arbitrary and Capricious and Contrary to Law

### A. The Interpretation in the Proposed Rule Is Not Supported by the Statute

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 FWS recognized that the Act's broad language encompasses both purposeful and incidental direct killing of migratory birds. Under that authority, FWS has developed practices to mitigate migratory bird deaths from industrial activities, to rectify harm to migratory birds where it has occurred, and to penalize the worst instances of migratory bird take, like the *Deepwater Horizon* oil spill.[5]

In 2015, FWS published a Notice of Intent to develop a regulatory permitting program under § 703(a) for incidental take of migratory birds during otherwise lawful activity, and in January 2017 the Department of the Interior ("Interior") published Solicitor's Opinion M-37041, explaining in detail why the MBTA prohibits incidental take based on the language of the statute and underlying treaties, FWS's long history of agency practice, and a majority of court opinions. M-37041 was immediately suspended by the new acting Interior Secretary in February 2017, and was "permanently withdraw[n] and replace[d]" on December 22, 2017, by Opinion M-37050.

M-37050 is a complete reversal of the policy outlined in M-37041 and decades of practice by FWS. The hasty issuance of M-37050 was not the result of any reasoned rulemaking, but instead essentially adopts the reasoning of a single opinion from the Fifth Circuit Court of Appeals, *United States v. CITGO Petroleum Corp.*, 801 F.3d 477 (5th Cir. 2015).[6] The Fifth

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[4] 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.

[5] *See, e.g.*, Solicitor's Opinion M-37041 (Jan. 10, 2017), 12-14 (discussing past enforcement and development of practices to reduce incidental take).

[6] The Proposed Rule argues that a circuit split creates "inconsistency and uncertainty" necessitating the rulemaking. 85 Fed. Reg. at 5922. But the Proposed Rule exaggerates this, stating that "Courts of Appeals in the Fifth, Eighth, and Ninth Circuits" have "indicated" that the MBTA does not prohibit incidental take, in contrast to several other circuits that have held the opposite. *Id.* at 5923. However, in the decision cited by the Proposed Rule, the Ninth

Circuit, in departing from the majority of circuits to interpret the MBTA, found that the MBTA does not prohibit direct, incidental take of migratory birds. This Proposed Rule, like Opinion M-37050, adopts that view by declaring the MBTA's "prohibitions . . . apply only to affirmative actions that have as their purpose the taking or killing of migratory birds, their nests, or their eggs." M-37050 at 2, 85 Fed. Reg. at 5916. This interpretation strips FWS of authority to regulate incidental take under the MBTA, allowing industry to kill protected birds without any legal repercussion, so long as subjective intent to harm is not the main purpose of its actions. For example, as FWS's own memo attempts to explain, the *same activity*—removal of migratory bird nests from a bridge before painting—violates the MBTA if the intent was to remove the nests, but does not violate the MBTA "[i]f the intent was to simply paint the bridge. . . . *All that is relevant* is that the [actor] undertook an action that did not have the killing of [migratory birds] as its purpose."[7] This result is baffling and entirely disjointed from the Act's purpose—migratory bird conservation. M-37050 is currently under review in the Southern District of New York.[8]

The interpretation adopted in M-37050 and that FWS now seeks to cement through a rulemaking is contrary to the language of the MBTA and congressional intent to provide broad protections to migratory birds. 16 U.S.C. § 703(a) contains "broad and unqualified language"[9] restricting "take" and "kill[ing]" of migratory birds "at any time, by any means or in any manner." This language ascribes no "purpose" for the killing or taking in order for the MBTA's prohibitions to come into effect, as the Proposed Rule argues.[10] Instead it is a broad restriction on pursuing, harming, taking, capturing, killing, or attempting any of these actions against protected migratory birds, "at any time, by any means and in any manner." *Id.*

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Circuit only held the MBTA does not prohibit *indirect* take via habitat modification and did not address *direct* incidental take. *See Seattle Audubon Soc'y v. Evans*, 952 F.2d 297, 303 (9th Cir. 1991). Subsequent Ninth Circuit decisions which the Proposed Rule omits from discussion have held that foreseeable take caused by industry activity is prohibited by the MBTA. *See, 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) (analyzing MBTA incidental take permit). In the Eighth Circuit decision cited by the Proposed Rule, the court similarly held that habitat modification is insufficient alone to constitute a take under the MBTA. *Newton County Wildlife Ass'n v. U.S. Forest Serv.*, 113 F.3d 110, 115 (8th Cir. 1997). The only Court of Appeals that has held direct, incidental killings of protected birds are not prohibited by the MBTA is the Fifth Circuit.

[7] *See* FWS, Guidance on the recent M-Opinion affecting the Migratory Bird Treaty Act, Att. at numbered questions 1a, 1c (emphasis added), https://fws.gov/chesapeakebay/PDF/osprey/m-opinion_memo-signed_4_11_18.pdf.

[8] *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.).

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

[10] The Proposed Rule argues a common law definition of take supports its view that, regardless of the breadth of a phrase like "by any means and in any manner," only activities "directed immediately against a particular animal" are prohibited. 85 Fed. Reg. at 5917. It purports to draw this definition from a dissenting opinion in a case involving the Endangered Species Act, where Justice Scalia defines common law take in that instance: "when applied to wild animals, [take] means to reduce those animals, by killing or capturing, to human control." *Id.* (quoting *Sweet Home*, 515 U.S. at 717 (Scalia, J., dissenting)). Even that metric for take does not require *purposeful intent* to "reduce" an animal to "human control." A migratory bird killed because it lands on a pond directly contaminated through human action (or inaction) has just as much been reduced to human control as one that is killed when shot with a rifle.

The new interpretation also contravenes Congress's view of the MBTA. Actions by Congress since passage of the MBTA confirm that its prohibitions apply without regard to the intent or purpose of the action that results in take or killing of protected birds. In 1986 and 1998, Congress amended parts of the MBTA to add requirements for a specific level of purposeful intent by the actor in limited instances: prosecutions under the Act's felony provisions and enforcement related to baiting. Congress did not make a similar update to § 703(a) at either of those times, nor has it ever modified that section to suggest any level of purposeful intent requirement for prosecution under the MBTA.[11]

Further, in 2002, Congress passed a law temporarily relieving military-readiness activities from incidental take prohibitions and directing FWS to promulgate regulations to authorize take for military-readiness purposes under § 703(a).[12] This action was necessary precisely because, as recognized by Congress, the MBTA covers incidental take—contrary to the Proposed Rule's interpretation. Congress has no need to allow incidental take for certain activities (wholly unrelated to hunting birds or similar actions) if incidental take is not prohibited by the MBTA. The 2002 law would be meaningless under Interior's Proposed Rule.

Similarly, in 1988 Congress directed Interior to identify and develop conservation measures to protect against the "effects of environmental changes and human activities" on protected migratory birds as part of the agency's "responsibilities to conserve migratory nongame birds under existing authorities provided by the Migratory Bird Treaty Act."[13] Congress could not have directed Interior to develop conservation measures to protect from "environmental changes" if it did not understand Interior to have the power under the MBTA to prohibit take that occurred incident to those "environmental changes and human activities."

Further reinforcing Congress's view, in 1989, congressional action directed money FWS was already collecting from incidental take enforcement into a wetlands conservation fund. *See* 16 U.S.C. § 4406(b).[14] Again, this is an action Congress would take only because it understood FWS to have authority for that incidental take enforcement in the first place. The inescapable conclusion from Congressional choices and actions over time is that Congress understood the

[11] Similarly, Congress has indicated in other legislative action that the treaties underlying the MBTA require broad protections for migratory birds. For example, the North American Wetlands Conservation Act states at 16 U.S.C. § 4401(a)(9) that "the migratory bird treaty obligations of the United States with Canada, Mexico, and other countries require protection of wetlands that are used by migratory birds for breeding, wintering, or migration and are needed to achieve and to maintain optimum population levels, distributions, and patterns of migration."

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

[13] Pub. L. No. 100-653, § 802, 102 Stat. 3825, 3833 (1988); *see also* Pub. L. No. 101-233, § 2(a)(10), 103 Stat. 1968, 1968 (1989) (codified at 16 U.S.C. § 4401(a)(10)) (reiterating similar direction from Congress).

[14] The Proposed Rule attempts to conflate the protection of lands in the Migratory Bird Conservation Act, passed in 1929, with coverage exercised in the now-withdrawn Opinion M-37041. The Migratory Bird Conservation Act, 16 U.S.C. § 715 *et seq.*, provides "the authority to purchase or rent land for the conservation of migratory birds." 85 Fed. Reg. at 5918. The Proposed Rule argues that the Conservation Act would have been "superfluous" if "the MBTA was originally understood to protect migratory bird habitats from incidental destruction." *Id.* However, this is beside the point because the interpretation in M-37041 did not cover indirect action, like habitat modification. Further, there is a fundamental difference between protecting migratory birds from being killed "at any time, by any means or in any manner" and providing the ability to create wholly protected areas of land for migratory bird conservation.

MBTA to prohibit incidental take and viewed FWS prosecuting violators for incidental take consistent with its MBTA authority.

B. The Interpretation in the Proposed Rule Is Not Supported by Treaties Relating to the MBTA

In addition to running counter to plain language in the MBTA, the Proposed Rule would also cause the United States to fall short of its international obligations under the four separate migratory bird treaties animating the MBTA. Opinion M-37050 and the Proposed Rule ignore the broader context, and fixate instead on the primary threat to migratory birds in the late 1800s and early 1900s when the first migratory bird treaty was ratified—hunting for food and for the feather industry. *See* M-37050 at 2-3; 85 Fed. Reg. at 5917. M-37050 and the Proposed Rule then argue that because hunting was the primary issue of concern when the United States entered the Canada[15] and Mexico[16] Conventions, and the MBTA was first passed in 1918, only hunting, poaching, or activities with the equivalent subjective intent to kill birds are prohibited by the Act.[17] But that interpretation ignores all subsequent history, including two additional treaties with Japan[18] and Russia[19] in the 1970s, updates to the Canada Convention in the 1990s, and a history of amendments to the Act that saw no need to expand its language to carry out much broader treaty obligations. Even if the Solicitor's assumptions that the MBTA as passed in 1918 was concerned *exclusively* with hunting were correct, which it is not, the expansive, protective language ratified in the conventions with Japan and Russia contemplate a much broader plan and purpose for protecting migratory birds.[20]

The 1972 convention with Japan prohibits "[t]he taking of the migratory birds or their eggs," Japan Convention, Art. III, and emphasizes that "[e]ach Contracting Party shall endeavor

[15] Convention between the United States and Great Britain for the protection of Migratory Birds, 39 Stat. 1702 (Aug. 16, 1916) ("Canada Convention").

[16] Convention between the United States of America and Mexico for the Protection of Migratory Birds and Game Mammals, 50 Stat. 1311 (Feb. 7, 1936) ("Mexico Convention").

[17] *See* 85 Fed. Reg. at 5916 ("The operative verbs ('pursue, hunt, take, capture, kill') 'are all affirmative acts . . . which are directed immediately and intentionally against a particular animal—not acts or omissions that indirectly and accidentally cause injury to a population of animals.'" (quoting *Babbitt v. Sweet Home Chapter of Cmtys. For a Greater Or.*, 515 U.S. 687, 719–20 (1995) (Scalia, J., dissenting))).

[18] 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) ("Japan Convention").

[19] 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) ("Russia Convention").

[20] As the Proposed Rule states, Federal prosecutors began applying the MBTA to incidental take in the early 1970s. 85 Fed. Reg. at 5920. The Proposed Rule argues that the "only contemporaneous changes to section 2 of the MBTA were technical updates recognizing the adoption of a treaty with Japan," suggesting that because the MBTA amendment incorporating the Japan Convention did not result in some very clear amendment related to incidental take, the protective language of the treaty does not matter. It ignores entirely that the broad language of the MBTA is sufficient to prohibit a range of actions that result in takings of protected birds, including actions for which the taking is incidental, and therefore already complies with the scope of the Japan and Russia Conventions. And once Congress amended the MBTA to recognize the Japan Convention, prosecutors began enacting the broad protections intended by that treaty by prohibiting incidental take.

to take appropriate measures *to preserve and enhance the environment* of birds protected under Articles III and IV," specifically "*prevent[ing] damage* to such birds and their environment, including, *especially, damage resulting from pollution* of the seas." Japan Convention, Art. VI and VI(a) (emphases added). Similarly, the 1978 convention with Russia prohibits generally "the taking of migratory birds, the collection of their nests and eggs and the disturbance of nesting colonies." Russia Convention, Art. II, Section 1. It also specifically directs the parties to "undertake measures necessary to protect and enhance the environment of migratory birds *and to prevent and abate the pollution or detrimental alteration* of that environment." Russia Convention, Art. IV, Section 1 (emphasis added).

The United States ratified and adopted both of these treaties, and passed conforming legislation amending the MBTA to incorporate them.[21] That legislation provided no amendment to the prohibitions of the MBTA, despite the broad language and protective purpose of the Japan and Russia Conventions to prohibit take of migratory birds, protect their environments from pollution, and actually enhance migratory bird environments. As a result of the sufficient breadth of § 703(a), no such amendment was necessary to allow the United States to fulfill its greater obligations under these conventions.

Further, the Canada Convention was updated in 1995.[22] The Proposed Rule and M-37050 discuss only one aim of the amendment—to bring the language of the treaty in line with Canadian practices permitting hunting and take of migratory birds by indigenous groups for subsistence purposes. 85 Fed. Reg. at 5919; M-37050 at 8-9. But the Protocol did more. Relevant here, it updated the language of the treaty itself, expanding the commitment of the signatories "to the long-term conservation of shared species of migratory birds . . . through a more comprehensive international framework that involves working together to cooperatively manage their populations, regulate their take, protect the lands and waters on which they depend, and share research and survey information." *See* Canada Protocol, Preamble. Amendments to Article II and III of the Convention strengthened commitments to protect migratory bird habitat.[23] And Article IV amendments added similar language to the Japan and Russia treaties, including direction that both countries "seek means to prevent damage to such birds and their environments, *including damage resulting from pollution*," and "pursue cooperative arrangements *to conserve habitats* essential to migratory bird populations." *Id.*, Art. IV (emphases added). This broad language clarified both parties' obligations to protect migratory

[21] Pub. L. No. 93-300, § 1, 88 Stat. 190 (1974); Pub. L. No. 101-233, § 15, 103 Stat. 1977 (1989).

[22] *See* 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) ("Canada Protocol"). The Mexico Convention was also amended in 1997 because certain changes made in the 1995 Protocol with Canada could not be carried out without the United States coming into conflict with the Mexico Convention. *See* Protocol between the Government of the United States of America and the Government of the United Mexican States Amending the Convention for Protection of Migratory Birds and Game Mammals, Sen. Treaty Doc. 105-26 (May 5, 1997). The language of the Mexico Convention was not otherwise updated.

[23] The Protocol amended Article II of the Convention to focus on certain conservation principles, including the need "[t]o provide for and protect habitat necessary for the conservation of migratory birds." Canada Protocol, Art. II. Article III was amended to call for regular meetings between the two parties to discuss "issues important to the conservation of migratory birds, including . . . the status of important migratory bird habitats." *Id.*, Art. III.

birds from modern threats and is more in line with the United States' obligations under the Japan and Russian Conventions.

Opinion M-37050 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, under the theory that the historical record's lack of discussion about "specific protective mechanisms beyond regulation of hunting and preservation of habitat" is determinative to the scope of the MBTA. M-37050 at 30-31; *see also* 85 Fed. Reg. at 5920. But a discussion of "specific protective mechanisms" in the MBTA is not required for the United States to in fact have conservation obligations under these treaties. And the broad language already contained in the MBTA did not need to be updated because it already contains the authority needed to implement the treaties.

And indeed, as the opinion acknowledges in a footnote, the historical record *does* contain specific discussion indicating that at minimum, regulation of incidental take is consistent with the Convention.[24] Consistent with the provisions of the 1995 Protocol amending the 1916 treaty, according to embassy notes,

> the Parties have specifically reviewed the issues of the incidental take of migratory birds, nests or eggs, caused by activities including, but not limited to, forestry, agriculture, mining, oil and gas exploration, construction, and fishing activities, and concluded that these issues have increasingly become a concern for the long-term conservation of migratory bird populations in accordance with Article II of the Convention.

*Id.*[25] In the context of treaty interpretation, the Supreme Court recognizes that "the opinions of our sister signatories are entitled to considerable weight." *Abbott v. Abbott*, 560 U.S. 1, 16 (2010) (quoting *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 176 (1999) (internal quotations omitted)). The Proposed Rule directly opposes Canada's interpretation of the treaty, without addressing the rules of comity and international law that govern agreements between nations.[26] And it never accounts for how the United States can meet its obligations

[24] *See* Note No. 0005 from Canadian Embassy to United States Department of State, 2 (July 2, 2008) ("Note No. 0005").

[25] The note goes on to propose a system by which Canada intends to permit incidental take so long as specific conservation measures are followed, and states that "[b]oth Parties have concluded that this management approach is consistent with the Convention, and in particular, Article II." Note No. 0005 at 2. M-37050 argues that because "[t]he United States did not respond" to Note 0005, "[t]he fact that Canada may view regulation of incidental take as consistent with the Canada Convention says nothing about the legal definition of the terms in the MBTA under United States law." M-37050 at 30, n.165. However the language in the Note demonstrates that the United States participated in and agreed with the interpretation advanced by Canada.

[26] *See, e.g.*, Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 332, 340 ("1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. . . . 3. There shall be taken into account, together with the context: (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation . . . ."). The United States signed the Vienna Convention on the Law of Treaties on April 24, 1970, but it has not been ratified. However, "[t]he United States considers many of the provisions of the Vienna Convention on the Law of Treaties to constitute customary international law on the law of

under treaties that include broad, protective language specifically highlighting the need to protect migratory birds from pollution and environmental hazards, if Interior limits agency authority to prosecuting purposeful and direct killing of migratory birds under the statute.

C. Proximate Cause Limits the Reach of Strict Liability Under the MBTA

The Proposed Rule argues that the mere existence of authority under the MBTA to regulate incidental take of migratory birds would go too far and provide unlimited prosecutorial discretion, such that any person could be subject to liability any time a single protected bird is accidentally killed. 85 Fed. Reg. at 5920-21 ("[A]n attempt to impose liability for acts that are not directed at migratory birds raises . . . constitutional concerns."). However, inherent in the concept of strict liability for incidental take is the concept of foreseeability and the doctrine of proximate cause. *See Sweet Home*, 515 U.S. at 712 (O'Connor, J., concurring) ("Strict liability means liability without regard to fault; it does not normally mean liability for every consequence, however remote, of one's conduct."). And indeed, courts have limited the reach of the MBTA on foreseeability grounds. *See, e.g. United States v. Apollo Energies, Inc.*, 611 F.3d 679, 690 (10th Cir. 2010) (declining to find liability where defendant could not foresee danger of equipment to migratory birds).

Moreover, the past decades contradict Interior's fear of a slippery slope of severe prosecutions under the MBTA. Prior to Opinion M-37050's counterintuitive interpretation, FWS generally understood the MBTA to prohibit incidental take—and the agency and prosecutors did not abuse that authority. The Proposed Rule provides an array of hypothetical opportunities for enforcement overreach under the M-37041 interpretation, including "driving a car, allowing a pet cat to roam outdoors, or erecting a windowed building." 85 Fed. Reg. at 5917. But it provides no examples of times FWS actually enforced MBTA liability for these kinds of activities. To the extent MBTA enforcement "has historically relied on prosecutorial discretion," 85 Fed. Reg. at 5921, that discretion has been exercised judiciously.[27]

If FWS and Interior wish to create sideboards on prosecutorial discretion and provide specific guidelines for specific industries, 85 Fed. Reg. at 5921, the agency can follow the mechanism allowed in the MBTA itself and develop a system to regulate incidental take with the purpose of protecting migratory birds. Such mechanisms would comport with the nation's treaty obligations, as suggested by Canada's similar efforts to develop conservation measures that protect migratory bird species and allow some limited form of incidental take.[28] The Proposed Rule seems to suggest that because "[n]o regulations have been issued to create a permit scheme to authorize incidental take" under § 703(a), it must interpret the MBTA as not providing "any authority . . . to require minimizing or mitigating actions that balance the environmental harm from the taking of migratory birds." 85 Fed. Reg. at 5922. This makes no sense; the statute creates authority under which the agency *could* issue regulations limiting incidental take.

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treaties." U.S. Dep't of State, Vienna Convention on the Law of Treaties, *archived page available at* https://2009-2017.state.gov/s/l/treaty/faqs/70139.htm (last visited Mar. 18, 2020).

[27] *See* Opinion No. M-37041 at 18-22 (discussing history of cases examining foreseeability of harm from actions that directly or indirectly harmed migratory birds).

[28] *See* Note No. 0005 at 2.

What Interior and FWS cannot do is adopt a rule that effectively amends a statute, the MBTA, and worse, does so in a way that is inconsistent with international treaties and commitments. Interior and FWS must withdraw Opinion M-37050 and the Proposed Rule, and, if the agencies wish to provide a system for permitting incidental take that comports with the conservation purpose of the MBTA, start over with a rulemaking properly developed under the APA and NEPA.

## II. FWS's Scoping Notice Previews an Environmental Analysis That Shortcuts the Agency's Obligations Under NEPA

Interior's new interpretation, which FWS now proposes to codify through a rulemaking, misconstrues the MBTA and is unlawful. Should Interior and FWS choose to charge ahead and take their chances with the proposed rulemaking, the agencies must properly address the significant impacts, including direct, indirect, and cumulative impacts of abandoning decades of protection to migratory birds from incidental takes, under the National Environmental Policy Act ("NEPA").

As the "basic national charter for protection of the environment," NEPA compels preparation of an EIS for a major federal action with significant impacts to the human environment. 40 C.F.R. § 1500.1(a); 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1508.18. Major federal actions include policy changes like Opinion M-37050.[29] Right out of the gate, Interior's Scoping Notice sets the agency up to violate NEPA, deepening the legal errors it has already committed.

### A. The Notice Fails to Forthrightly Disclose the Major Federal Action Properly Subject to Analysis Under NEPA and Forecasts a Predetermined Outcome

FWS attempts to insulate through a rulemaking a previous change in policy that undermines key protections of the MBTA. For decades, FWS 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 interpretation.

The rulemaking adopts this new policy. By framing the proposed action as a mere 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 environmental consequences of the underlying sweeping policy change, which occurred in Opinion M-37050, have never been held up to the mandates of NEPA.

Although the rulemaking could set out to correct that error, FWS appears intent on shortcutting that required analysis, positing instead a narrow action with an incremental purpose

[29] "Major federal actions" include, among other things, "new or revised agency rules, regulations, plans, policies, or procedures." 40 C.F.R. § 1508.18(a). This encompasses the "[a]doption of official policy," including "formal documents establishing an agency's policies which will result in or substantially alter agency programs." *Id*. § 1508.18(b)(1); *see also* 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).

and need: simply moving Interior's M-37050 policy into a regulation that implements the Department's unanalyzed interpretation. Assuming codification of a policy as the purpose, without inquiring about the effects of that policy in the first place, would cause a cascade of NEPA errors.

Foremost, NEPA requires "that environmental information is available to public officials and citizens *before* decisions are made and *before* actions are taken." 40 C.F.R. § 1500.1(b) (emphasis added). CEQ's regulations require agencies to "commence preparation of an environmental impact statement as close as possible to the time the agency is developing or is presented with a proposal . . . so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made." 40 C.F.R. § 1502.5.

Here, Interior made the decision to eliminate incidental takes of migratory birds from MBTA coverage in December 2017, with issuance of Opinion M-37050, more than two years before the agency started this environmental review. NEPA carries implicit considerations of timing: 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 v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989); *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.").[30]

But the die *has* been cast. With the proposed action leading to a foregone conclusion (adopting the policy into a regulation),[31] FWS looks for another plausible justification for the rulemaking: to "eliminate public uncertainty" about application of the MBTA. 85 Fed. Reg. at 5914. Of course, certainty alone does not compel adopting the M-37050 Opinion that ignores incidental takes of migratory birds. A rule that prohibits incidental takes of migratory birds, consistent with decades of agency interpretation, would also "eliminate public uncertainty" and would "provide an official regulatory definition of the scope of the statute as it relates to incidental take." 85 Fed. Reg. at 5914. But this is not really about certainty.

Instead this action is more about entrenching a decision already made to limit the MBTA as an end in itself, than it is about reaching an informed decision through a rulemaking. Information solicited in the Proposed Rule and Scoping Notice reinforces this conclusion. For example, commenters are invited to provide information on "direct" and "indirect costs" of mitigation measures previously used to address incidental take of migratory birds, before Opinion M-37050 (*e.g.*, costs from risk of prosecution, insurance). 85 Fed. Reg. at 5915. Commenters are encouraged to provide information on the continued use of those mitigation

[30] "[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) (emphasis in original)). 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 v. Sierra Club*, 442 U.S. 347, 350-51 (1979) (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).

[31] For example, in describing need, Interior commits to an approach that "aligns with and implements the Department's interpretation of the MBTA in M-37050." 85 Fed. Reg. at 5914.

measures notwithstanding the policy change, an apparent effort to support the fanciful notion that industry will, by and large, continue to mitigate harm to migratory birds on a purely voluntary basis. No category of requested information aims to elicit information to quantify 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 notice incongruously names as an objective assessing "the effects on migratory bird populations of mortality resulting from incidental take," 85 Fed. Reg. at 5914, the agency is not soliciting information that would provide data on that issue, which is the primary, unanalyzed environmental effect of the 2017 policy change that the rule sets out to codify. These effects, as compared to indirect costs of insurance related to possible liability for activities that kill migratory birds incidental to industrial activities, should be the focus of any assessment of environmental consequences of codifying Interior's sweeping policy change.

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. That change occurred in December 2017 and has never been analyzed under NEPA. The proposed NEPA process here, rife with its own procedural issues, does not fix those legal errors. Ascertaining impacts to migratory bird species is the crux of assessing the environmental consequences of the proposed rule, and as such, that is the focus of these comments.

B. The Agency Should Reset the Analysis of Alternatives

If FWS maintains a purpose and need myopically focused on solidifying Opinion M-37050, and carries out an effects analysis that shortchanges the greatest environmental impacts of that choice, the analysis of alternatives is destined to be unsound.

NEPA "places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action . . . and ensures that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process." *Baltimore Gas & Elec., Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983). To fulfill this mandate, NEPA requires federal agencies to consider "alternatives to the proposed action." 42 U.S.C. § 4332(c)(iii). Consideration of alternatives is the "heart" of the NEPA process. 40 C.F.R. § 1502.14; *Cowpasture River Preservation Ass'n v. Forest Service*, 911 F.3d 150, 170 (4th Cir. 2018). The agency's analysis "should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public." 40 C.F.R. § 1502.14. The agency must "[r]igorously explore and objectively evaluate all reasonable alternatives." 40 C.F.R. § 1502.14(a); *see N. Carolina Wildlife Fed'n v. N. Carolina Dep't of Transp.*, 677 F.3d 596, 602 (4th Cir. 2012). Those alternatives must be devoted "substantial treatment" so "reviewers may evaluate their comparative merits." 40 C.F.R. § 1502.14(b).

FWS's Scoping Notice invites public input on alternatives to its proposed approach for implementing the MBTA. Although the Notice itself does not identify what alternative courses of action the agency has in mind, FWS's public webinars confirm that the agency's consideration of alternatives suffers from the same infirmity as its purpose and need. It skips over the question

of *whether* to adopt the policy shift effected by Opinion M-37050, and instead assumes the policy is already in place and is the relevant baseline. Actions to be evaluated are *codifications* of that policy choice, or alternatives to codifying that policy, although no alternative displaces the Opinion.[32] Eliminating any doubt is FWS's description of the "no action" alternative: continue to implement Opinion M-37050.

For FWS to properly analyze the major federal action embodied in its rulemaking, the agency would have to engage a NEPA process without its predetermined outcome of "codifying the Solicitor's Opinion, M-37050." 85 Fed. Reg. at 5914. This would allow a decision informed by an analysis that should have precipitated environmental review in the first place: the major federal action of adopting Opinion M-37050 in December 2017, alternatives to that action, and public participation and scrutiny *before* committing to a particular course of action.

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

NEPA requires FWS to take a "hard look" at the environmental impacts of its proposed action. *Nat'l Audubon Soc'y v. Dep't of the Navy*, 422 F.3d 174, 184 (4th Cir. 2005). This "hard look" insures 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. *Id.*; *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 (citations omitted).

A complete evaluation of effects of Interior's policy change, which removes protections for incidental takes, must consider both the effects to protected birds and the context of the action. The agencies announced their 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.[33] This widespread trend in declining bird populations holds true for migratory birds in the Southeast, including neotropical migrant bird species that depend on intact mature forests for breeding and those that utilize wetland and riparian environments in their life cycles.[34] While scientists highlight an "urgent need to address threats to avert future

[32] FWS, *Public Involvement*, https://www.fws.gov/regulations/mbta/public-involvement (last visited Mar. 18, 2020).

[33] *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; Kenneth V. Rosenberg et al., *Decline of the North American avifauna*, SCI. (Oct. 4, 2019), https://science.sciencemag.org/content/366/6461/120, abstract attached.

[34] *See* Mark Anderson et al., *supra* note 4; *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) (As exurban development expands in the southern Appalachians, interior forest species and Neotropical migrants are likely to decline.), attached.

avifaunal collapse and associated loss of ecosystem integrity, function, and services,"[35] this rulemaking commits to do the opposite.

Eliminating incentives to avoid killing birds incidental to industrial activities, cumulatively, along 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.[36] These losses will not be limited to the migratory birds themselves; 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 services that organisms provide to their environment."[37] Current data suggest that avian declines will likely continue without targeted conservation action.[38] The proposed rulemaking must assess how much worse avian declines will be with action that is targeted instead at eroding protections that were in place for decades under the MBTA. In other words, what is the ecological consequence and cost of taking action targeted at undoing conservation measures?

FWS also must acknowledge and consider site-specific impacts of its policy change. Some of these impacts have occurred already in the shadow of Opinion M-37050, some are imminent, and some are likely to occur in the future. FWS should consider unique threats facing migratory birds by region and species. Below we offer information relative to a selection of projects and species in Southeast. FWS's analysis also must extend to indirect effects, which includes the loss of ecosystem services provided by migratory birds, as well as cumulative effects.

A. Specific Projects That Compel Protections for Migratory Birds Due to Foreseeable Impacts

- **Atlantic Coast Pipeline**

The Atlantic Coast Pipeline ("ACP") is a 600-mile natural gas pipeline project that would stretch from West Virginia, through the Southern Appalachians and piedmont of Virginia, and into North Carolina. Authorized in October 2017 by the Federal Energy Regulatory Commission ("FERC"),[39] the project has been on hold for over a year following the loss of several key federal permits, and only six percent of the pipeline has been constructed. If the pipeline goes forward, construction requires clearcutting a 125-foot right-of-way for most of the 600-mile distance to bury the 3.5-foot diameter pipeline several feet below ground, directly impacting 11,775 acres of land.[40] In addition to clearing trees and vegetation for hundreds of miles, construction will require blasting steep ridgetops down by as much as 20 feet to make flat work areas, and

[35] Rosenberg et al. at 1.

[36] *Id*. at 3.

[37] *Id*. at 1 (citations omitted).

[38] *Id*.

[39] *Atlantic Coast Pipeline, LLC*, 161 FERC ¶ 61,042 (Oct. 13, 2017) ("Certificate Order"), FERC eLibrary Accession No. 20171013-4003.

[40] FERC Final Environmental Impact Statement (July 2017) ("ACP FEIS"), 2-15, FERC eLibrary Accession No. 20170721-4000, excerpts attached.

trenching the pipeline will require additional digging and blasting to eight feet deep.[41] The project includes construction of 11 new communication towers to support operation of the ACP.

All of these activities will cut, blast, and dig through thousands of acres of important migratory bird habitats. For this reason, federal agencies required ACP to prepare a plan detailing measures they would take "to avoid and minimize the potential for unintentional take of migratory birds" to comply with the MBTA.[42] That plan is incorporated into FERC's approval for the project.[43]

The ACP's potential impacts to migratory birds are significant. The project cuts through the Atlantic Flyway, a major migratory route for birds in spring and fall. "A variety of migratory bird species, including both songbirds and raptors, use vegetation communities like those identified along the proposed pipeline route as part of their migratory route."[44] Several of these species are in decline.[45] The ACP will impact nine Important Bird Areas ("IBA") in West Virginia, Virginia, and North Carolina—sites identified by the National Audubon Society that provide essential habitat for one or more species of birds.[46] One such area, the Upper Blue Ridge Mountains IBA, serves as "one of the most significant fall raptor flyways in Virginia," provides "important stopover habitat for hundreds of thousands of migrating passerines," and supports "significant populations of Neotropical migrant[]" birds, including "likely the largest population of cerulean warblers in Virginia."[47] All told, 47 birds of conservation concern may occur in the project area.[48] Birds of conservation concern are species of migratory nongame birds that "without additional conservation actions, are likely to become candidates for listing" under the Endangered Species Act ("ESA").[49]

ACP recognizes tree-clearing along the 600-mile right-of-way as the activity with the greatest potential for impacts to protected migratory birds "if conducted during the nesting season."[50] Pipeline construction also "may disturb and displace nesting adults, potentially leading to mortality of eggs and nestlings due to nest abandonment and interrupted or decreased feeding at the nest."[51] The 11 communication towers also pose dangers: "[m]igratory birds are

[41] ACP FEIS at 4-45, 2-34.

[42] *See, e.g.*, Atlantic Coast Pipeline, LLC, Implementation Plan, Migratory Bird Plan (Sept. 2017) ("ACP Plan"), 2, FERC eLibrary Accession No. 20171018-5002, attached.

[43] Certificate Order, Condition 19 (incorporating the Migratory Bird Plan).

[44] ACP Plan at 2.

[45] *See, e.g.*, Natureserve species profiles for wood thrush, cerulean warbler, golden-winged warbler, *available at* https://explorer.natureserve.org/ (last visited Mar. 18, 2020).

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

[47] ACP FEIS at 4-180 to 4-181, Table 4.5.3-1; ACP Plan at 17.

[48] ACP Plan at 22 (discussing the ACP and related Supply Header Project).

[49] ACP Plan at 3.

[50] ACP Plan at 18.

[51] ACP FEIS at 4-181.

known to collide with towers during migration; they can be confused and disoriented by lighting or fly directly into the tower during nighttime migrations."[52]

ACP's Migratory Bird Plan contains 15 pages of conservation measures to mitigate and minimize impacts to migratory birds in order to carry out its obligations under the MBTA.[53] To avoid direct impacts on nesting birds, right-of-way clearing must occur "outside of the general migratory bird nesting season prescribed by the FWS (see Table 5.2.1-2), avoiding direct impacts on nesting birds."[54] ACP will buffer raptor and eagle nests and rookeries along the pipeline construction corridor to avoid and minimize impacts to protected species.[55] The communication towers include a number of design features to reduce risks to birds, like using self-supporting structures without guide wires, location requirements away from wading bird rookeries, and installing lighting to reduce nighttime bird attraction.[56] These and other measures detailed in the Plan have been fully incorporated into FERC's project approval[57] and environmental impact analysis, as well as the analysis and approvals of other federal agencies that relied upon FERC's EIS for their own review.[58] 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.

What seemed certain when the ACP EIS was issued in 2017 has since been cast into doubt by FWS, due to the Interior's mid-stream reversal about incidental takes. Following Interior's issuance of Opinion M-37050, FWS declared these mandatory measures "purely voluntary" for the ACP.[59] ACP has yet to successfully bypass these measures on the ground, but that is not for lack of trying.[60] And looking ahead, although the ACP presently lacks eight federal permits, the project proponents assert they will pursue new permits in a bid to restart the project. Given FWS's abandonment of its authority to regulate incidental take under the MBTA for migratory birds, ACP may again attempt to bypass migratory bird protection requirements in these important bird habitats. However, even if exempting these foreseeable acts that take and kill protected migratory birds were legal under the MBTA (and it is not for reasons explained

[52] ACP Plan at 22.

[53] ACP Plan at 28-43.

[54] ACP Plan at 28. FERC's FEIS requires ACP to clear "vegetation outside of the state-specific migratory bird [time-of-year requirements] (see table 4.5.3-2), and implement[] no-activity buffers around active nests for certain species of raptors and rookeries." That time-of-year-limitation in Virginia, for example, is as follows: "Avoid clearing vegetation during the primary nesting season for most native birds March 15-August 15." ACP FEIS at 4-182.

[55] ACP Plan at 22, Table 3.1.1-1.

[56] ACP Plan at 35.

[57] FERC's Order recognizes for example: "Atlantic and DETI developed a Migratory Bird Plan to minimize impacts on bird species, and have agreed to conduct tree clearing outside of state-specific migratory bird nesting seasons." Certificate Order ¶ 242.

[58] For example, the U.S. Forest Service's Record of Decision and Special Use Permit for the ACP to cross the Monongahela and George Washington National Forests incorporated the same measures.

[59] Letter from FWS to ACP (May 31, 2018), FERC eLibrary Accession No. 20190530-5117, attached.

[60] Letter from FERC to ACP (Mar. 28, 2018), FERC eLibrary Accession No. 20180328-3069 (denying ACP's request to modify time-of-year requirements), attached.

above), those same mitigation measures have been factored into the environmental analyses of multiple federal agencies. As a consequence, for purposes of its NEPA review, FERC would have to re-open and supplement its EIS to account for *far greater* impacts to migratory birds along the 600-mile route than analyzed originally, and would have to allow public notice and comment.[61]

Instead of providing certainty, the Interior opinion has upset the status quo for ongoing projects like ACP, and would require additional environmental impact analysis by federal permitting authorities, who once relied on the certainty of inter-agency MOUs and industry best practices.[62] Taking ACP as an example, as permitted the pipeline will already cause "fragmentation effects" to migratory bird habitat, crossing "some of the few remaining intact core forests in the eastern US."[63] ACP's analysis recognized that several species "such as the broad-winged hawk, Swainson's warbler, and cerulean warbler require large intact interior forest habitats" and that "[f]ragmentation and loss of interior forest habitats have contributed to the decline of some of these species."[64] In light of the long-term impacts to forest interior birds from fragmentation from the project, minimizing "direct mortality" by not felling trees in breeding season is particularly important.[65] Removing these and other protections would increase the scope and intensity of impacts to migratory birds in the path of the pipeline. For the 47 birds of conservation concern that will be potentially impacted by the project, the consequences could be particularly devastating and contribute to listing additional species under the ESA.

For purposes of the NEPA analysis for this rulemaking, FWS will have to analyze these types of significant impacts to migratory birds for any projects that no longer incorporate conservation measures that were developed to protect migratory birds based on decades of experience.

- **Mountain Valley Pipeline**

The Mountain Valley Pipeline ("MVP") is a 304-mile natural gas pipeline that will travel from Wetzel County, West Virginia, to Pittsylvania County, Virginia.[66] As with the ACP, pipeline construction removes trees and vegetation and levels the surface of a 125-foot-wide right-of-way along its path, including through forest interior habitats and the Jefferson National Forest.[67] These activities have significant, long-term impacts on forests crossed by the

[61] Measures to protect migratory birds are also incorporated into FERC's Certificate Order approving the project, but these comments focus on environmental analysis.

[62] ACP Plan at 2, 34 (incorporating FWS Nationwide Standard Conservation Measures for migratory birds), https://www.fws.gov/migratorybirds/pdf/management/nationwidestandardconservationmeasures.pdf .

[63] Letter from Lesley P. Bulluck, Ornithologist, Virginia Commonwealth University, to Greg Buppert & Jonathan Gendezier, Southern Environmental Law Center (Mar. 23, 2018), attached.

[64] ACP FEIS at 4-172.

[65] Letter from Lesley P. Bulluck to Greg Buppert (emphasis added).

[66] MVP, Final Environmental Impact Statement (June 2017) ("MVP EIS"), ES-2, FERC eLibrary Accession No. 20170623-4000, excerpts attached.

[67] MVP EIS at 2-23, 2-27, 2-37.

pipeline.[68] FERC's EIS for the project recognized that a "variety of migratory birds and birds of conservation concern use or could use the habitats affected by the MVP . . . for resting (stopover), sheltering, foraging, breeding, and/or nesting."[69] The MVP overlaps the breeding range of 32 birds of conversation concern—at risk of listing under the ESA without conservation measures—and passes through "globally recognized" IBAs, including the Southern Allegheny Plateau Forest Block Complex IBA and the Allegheny Mountain IBA.[70]

MVP developed a Migratory Bird Conservation Plan in coordination with FWS to address "avoidance, minimization, restoration, and/or mitigation measures for the impacts on migratory birds."[71] That plan recognizes that pipeline construction involves clearing of forests and other vegetation that could cause "direct impacts" like mortality and nest abandonment, as well as "indirect impacts . . . via habitat loss and fragmentation."[72] FERC's environmental analysis found that the "temporary and permanent loss and conversion of forested habitat (fragmentation and edges) could specifically affect forest dependent [birds of conservation concern] species, such as the cerulean warbler, golden-winged warbler, Kentucky warbler, Louisiana waterthrush, northern saw-whet owl, whip-poor-will, wood thrush, and worm eating warbler."[73] Cerulean warblers are a bird of conservation concern, and a Species of Greatest Conservation Need in West Virginia, that have steadily declined for decades, with clearing occurring in "over 50 percent of historical forests. . . . The conversion of interior forest habitat to edge habitat as a result of the MVP could significantly affect the cerulean warbler population."[74]

To protect migratory birds in the path of the pipeline, MVP committed to several avoidance and minimization measures developed in coordination with FWS, and incorporated into project approvals.[75] This includes largely conducting 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.[76] FERC's approval for the MVP, as with its EIS, relied on these

[68] MVP EIS at 5-2.

[69] MVP EIS at 4-194.

[70] MVP EIS at 4-196. These IBAs are recognized "for the significant amount of contiguous forest each contains, an important feature for a number of forest-dependent neotropical migrants, including the cerulean warbler." MVP Migratory Bird Conservation Plan (May 2017) ("MVP Plan"), 13, https://eplanning.blm.gov/epl-front-office/eplanning/planAndProjectSite.do?methodName=dispatchToPatternPage&currentPageId=112990 (last visited Mr. 18, 2020).

[71] MVP EIS at 4-207; MVP Plan.

[72] MVP Plan at 13.

[73] MVP EIS at 4-206.

[74] *Id.*

[75] FERC Order Issuing Certificates And Granting Abandonment Authority, 161 FERC ¶ 61,043 (October 13, 2017) ("FERC MVP Order"), ¶ 206, https://www.ferc.gov/CalendarFiles/20171013192058-CP16-10-000.pdf.

[76] MVP EIS at 4-205, 4-206.

measures as a predicate to finding that the project "would not result in population-level impacts on migratory bird species."[77]

The Proposed Rulemaking and M-37050 would purposefully throw out the authority of FWS to require these types of measures in future projects to mitigate impacts to migratory birds from direct and foreseeable impacts of pipeline construction—on the sole rationale that a pipeline project does not set out to kill the migratory birds or destroy nests and eggs as its subjective purpose. Under M-37050 and the Proposed Rule, FWS does not have the authority to ensure the kinds of impacts from projects like MVP would be avoided. As such, 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 any similar infrastructure projects that failed to utilize these types of conservation measures.

- **Hampton Roads, Virginia**

The Hampton Roads Bridge Tunnel project along the Virginia coast is finally progressing—but not without serious consequences to an enormous migratory bird colony left largely unprotected in the wake of M-37050. The project will expand the existing Hampton Roads Bridge Tunnel stretching from Settlers Landing in Hampton Roads to I-564 in Norfolk. Doing so entails boring two new tunnels, each with two lanes, along the existing crossing.

For several decades, a colony of 25,000 migratory birds has called the South Island of the existing Hampton Roads Bridge Tunnel home.[78] The colony comprises eight different species of birds, including Gull-billed terns, Sandwich terns, royal terns, and black skimmers.

Originally, in adherence with the understanding that the MBTA prohibited incidental take, the Hampton Roads Bridge Tunnel project included consideration of measures to minimize impacts to the migratory birds—including building a new island for the birds to nest on while the new tunnels were being constructed.[79] The state's efforts to pursue this option were significantly hindered by the issuance of Opinion M-37050, because the subjective purpose of the project was not to destroy protected bird habitat, but to construct the tunnel, and thus it was not a prohibited take under the new interpretation. Since M-37050 was issued, the Virginia Department of Transportation has already paved over the South Island to use as a staging area for construction, but without a new island or other sufficient mitigation measures in place.[80]

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[77] FERC MVP Order ¶ 206.

[78] Press Release, *Governor Northam Announces Plans to Protect Migratory Birds* (Feb. 14, 2020), https://www.governor.virginia.gov/newsroom/all-releases/2020/february/headline-851832-en.html, attached.

[79] William H. Leighty, A *Virginia Solution for Protecting Migratory Birds*, RICHMOND TIMES-DISPATCH (Jan. 20, 2020), https://www.richmond.com/opinion/columnists/william-h-leighty-column-a-virginia-solution-for-protecting-migratory/article_31da0d78-ec54-58d1-a352-369225f8beac.html, attached.

[80] *Id.* Ironically, this left the Virginia Department of Transportation in a strange position once the migratory birds returned to the island. If the agency were to take any actions with the purpose of moving the birds off of the agency's staging area, such actions would be prohibited as direct take even under the M-37050 interpretation.

Eventually, after pressure from conservation groups, Governor Northam of Virginia intervened in an attempt to address the gap left by the M-37050 interpretation.[81] On February 14, 2020, the Governor released a plan to preserve an alternate, nearby nesting site for the 25,000 displaced migratory birds.[82] Specifically, the Virginia Department of Game and Inland Fisheries is tasked with transforming nearby Fort Wool, an artificial island owned by the state Department of Conservation and Recreation, into a suitable nesting site. Preparing the island for migratory birds will be a substantial undertaking for a cash-strapped agency, requiring the Department of Game and Inland Fisheries to eradicate rats, clear all trees, and ship in massive amounts of sand and gravel, among other actions.

The Governor's plan also requires additional planning and preparation for a more long-term solution to create a separate artificial island to support the migratory birds, as well as requirements for the Hampton Roads Bridge Tunnel project team to develop a bird management plan and for the Virginia Department of Transportation to restore some of the previous South Island nesting habitat after the project is completed. In the interim, barges will be placed in the project area to create a few acres of temporary additional habitat.

The Department of Game and Inland Fisheries has also started developing a state regulation to fill the void left by M-37050; the regulation will establish a permitting system for incidental take caused by commercial, industrial, and construction projects in the state. There is no guarantee that Virginia's regulation will fill the large gaps left by M-37050 for protections of migratory birds; it is just as likely that some incidental take that was previously prohibited for decades under federal authority will be allowed under the future state regulation.

The Hampton Roads Bridge Tunnel serves as a prime example of the ad-hoc, chaotic status of migratory bird protections in the wake of the interpretation in Opinion M-37050, proposed to be codified by FWS in its proposed rulemaking. Once migratory bird protections became voluntary according to M-37050, the need for project proponents to mitigate impacts was substantially weakened and key mitigation strategies were ultimately abandoned, demonstrating that predictions in the Proposed Rule that project proponents will voluntarily mitigate migratory bird impacts are unfounded. By the time the Virginia Governor stepped in to protect the birds at Hampton Roads, irrevocable damage had already been done to the bird colony, with only limited and reactionary attempts to mitigate that damage a possibility, rather than the thoughtful, proactive solutions the MBTA previously required. The actions proposed by Governor Northam, while better than allowing 25,000 protected birds to lose their nesting habitat without any minimization of harm under M-37050 and the Proposed Rule, may yet prove infeasible and will certainly fall short of the previous protections afforded migratory birds before Interior's 2017 policy change.

Even if Governor Northam's plan succeeds in protecting the Hampton Roads bird colony, the time, cost, and energy required to enact it shows how ill-advised it would be to expect every

[81] Wavy Web Staff, *Northam Releases Plan to Protect Migratory Birds That Flock to Hampton Roads Bridge-Tunnel*, WAVY.COM (Feb. 14, 2020, 12:19 PM EST), https://www.wavy.com/news/local-news/norfolk/northam-releases-plan-to-protect-migratory-birds-that-flock-to-hampton-roads-bridge-tunnel/, attached.

[82] Press Release, *Governor Northam Announces Plans to Protect Migratory Birds* (Feb. 14, 2020), https://www.governor.virginia.gov/newsroom/all-releases/2020/february/headline-851832-en.html, attached.

state to step in to address projects on an individual basis. Additionally, each state is not likely to develop its own incidental take regulations, much less in a way that provides uniformity and regulatory certainty for interstate projects. Even for states that would elect to pursue such programs, it will take years to establish them, leaving migratory birds without necessary protections in the interim.

- **Wind Energy Development**

Interior must analyze the consequences of removing protections for migratory birds in the context of wind energy. Responsible development of substantial wind energy resources in the United States is important for a comprehensive solution to the threat of climate change, which is a significant threat to birds and other wildlife. Wind turbines, however, can have significant impacts on birds if planned, constructed, or operated irresponsibly. The MBTA has helped to ensure that wind power facilities are sited, constructed, and operated in ways that minimize harm to birds and other wildlife. Federal guidelines encourage siting of wind facilities to avoid areas with large bird populations. FWS has summarized the intersection of renewable energy objectives for wind energy development and wildlife conservation as follows:

> As the United States moves to expand wind energy production, it also must maintain and protect the Nation's fish, wildlife, and their habitats, which wind energy production can negatively affect. As with all responsible energy development, wind energy projects should adhere to high standards of environmental protection. With proper diligence paid to siting, operations, and management of projects, it is possible to mitigate for adverse effects to fish, wildlife, and their habitats.[83]

Onshore, birds are at risk of colliding with turbine blades or being displaced from key feeding areas or migratory pathways.[84] In 2011, for example, Pantego Wind Energy proposed to build an 11,000-acre, 56-turbine wind energy farm next to Pocosin Lake Wildlife Refuge in northeastern North Carolina. The wildlife refuge was established in 1963 specifically to preserve habitat for migratory birds, including tundra swans and snow geese. The project area for the proposed wind development serves as foraging habitat for tens of thousands of migratory waterfowl, eagles and other raptors, and other birds. The Southern Environmental Law Center and Audubon North Carolina voiced concerns about the likely significant amount of bird mortality that could be caused by the project unless appropriate avoidance and other mitigation measures were implemented, as required by the MBTA. Ultimately, the project stalled out after studies confirmed that it would result in high bird mortality.

In offshore environments, the MBTA's longstanding prohibition against incidental take has encouraged development of smart turbine designs and other best management practices to avoid, minimize, and mitigate any impacts, including siting wind farms to avoid areas particularly important to migratory birds. Scientific research shows promise of reducing

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[83] FWS, *Land-Based Wind Energy Guidelines*, U.S. DEP'T OF THE INTERIOR (DOI) (Mar. 23, 2012), https://www.fws.gov/ecological-services/es-library/pdfs/WEG_final.pdf.

[84] *See, e.g.*, Tiago Laranjeiro et al., *Impacts of onshore wind energy production on birds and bats: Recommendations for future life cycle impact assessment developments*, INT'L J LIFE CYCLE ASSESSMENT (Feb. 2, 2018), attached.

collision-caused bird mortality, which is particularly important to imperiled species.[85] The MBTA's protections have served as an important safeguard to migratory birds as the use of offshore wind energy expands, and FWS must assess the impact of undoing those protections in future projects. Ultimately, abandoning sensible guidelines for wind energy development is a disservice both to migratory birds and the wind energy industry.

- **Atlantic Pelagic Longline Fisheries**

Bycatch in longline fisheries is a significant threat facing many seabird populations. Seabirds can scavenge bait or become entangled by commercial longlines, resulting in drowning, mortality, and associated population decline. Seabird populations are particularly vulnerable to such impacts due to late maturity and low reproduction rates.[86] The U.S. Atlantic Pelagic Longline Fishery operates offshore from Maine to Texas, and targets tuna, swordfish, and sharks. Throughout the entire fishery, anywhere from an estimated 100 to 330 seabirds are killed each year.[87] Seabird bycatch rates are particularly high off the Mid- and South Atlantic coasts, which may be due to high seabird activity and diversity in this region.[88] Birds that are most often caught include shearwaters, storm petrels, pelicans, gannets, and gulls.[89] All of these species are included in the list of migratory birds protected by the MBTA.

According to the Fish and Wildlife Services' policy statement on seabird bycatch,

> the [MBTA] legally mandates the protection and conservation of migratory birds. Avian conservation is of significant concern to many in the United States. Substantial numbers of waterbirds (especially seabirds, but also waterfowl, shorebirds, and other related wading species) are killed annually in fisheries, making waterbird bycatch a serious conservation issue and a violation of the underlying tenets of the MBTA. The goal of the U.S. Fish and Wildlife Service is the elimination of waterbird bycatch in fisheries.[90]

Various gear modifications and mitigation measures are available and capable of achieving this goal of reducing interactions between seabirds and longline fishing. While gear modifications are currently not being used for Atlantic Pelagic longlines, the National Marine Fisheries Service reports that they have been able to minimize seabird take in the fishery by setting lines at night

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[85] *See, e.g.*, Wallace P. Erickson et al., *Avian collisions with wind turbines: A summary of existing studies and comparisons to other sources of avian collision mortality in the United States*, NAT'L WIND COORDINATING COMM. (Aug. 2001), https://www.osti.gov/servlets/purl/822418.

[86] Yan Li et al., *Assessment of seabird bycatch in the US Atlantic pelagic longline fishery, with an extra exploration on modeling spatial variation*, ICES J. MARINE SCI. (Jul. 19, 2016), attached.

[87] *See id.*; Orea R.J. Anderson et al., *Global seabird bycatch in longline fisheries*, ENDANGERED SPECIES RES. (Jun. 8, 2011), attached; Nigel P. Brothers et al., *The incidental catch of seabirds by longline fisheries: Worldwide review and technical guidelines for mitigation*, U.N. FOOD & AGRIC. ORG. (1999), http://www.fao.org/tempref/docrep/fao/005/w9817e/W9817e00.pdf.

[88] Li et al., *supra* note 86.

[89] *Id.*

[90] Nat'l Marine Fisheries Serv. (NMFS), *United States National Plan of Action for Reducing the Incidental Catch of Seabirds in Longline Fisheries*, DOC (Feb. 2001), App. IV, https://repository.library.noaa.gov/view/noaa/19479.

and fishing in areas where birds are largely absent.[91] Under the Proposed Rule, migratory bird mortality will likely increase unless these and other avoidance and mitigation measures continue to be developed and implemented. Interior must analyze the consequences of increasing takes of protected migratory bird species in longline fisheries throughout the United States.

- **Cape Hatteras National Seashore and Off-Road Vehicles**

Congress first recognized the special significance and beauty of the North Carolina Outer Banks in 1937 when it established Cape Hatteras National Seashore as the first national seashore park in the country. Today, the Seashore stretches nearly 70 miles from Nags Head to Ocracoke, encompassing huge swaths of beaches that provide habitat for a variety of migratory birds. Indeed, the beaches and barrier island habitats encompassed by the Seashore represent approximately 21% of the entire barrier island coastline of North Carolina. The Seashore is a critical link in the migratory pathway of 22 species of shorebirds and 15 species of waterbirds, providing habitat essential to sustaining wintering waterbird and shorebird populations. Threatened and endangered bird species like the piping plover and red knot, along with American oystercatchers, sanderlings, whimbrels, marbled godwits, and other migratory birds, use the Seashore for stopover and wintering habitat. In 2004, the Seashore was recognized as a globally significant Important Bird Area by the American Bird Conservancy and the National Audubon Society, for migrant and wintering shorebirds.

However, in the mid-2000s, bird populations at the Seashore suffered as off-road vehicle use escalated. Off-road vehicles can destroy nests and eggs, run over foraging habitat, and otherwise disturb nesting bird colonies. In a relatively short period of time, the Seashore went from one of the most important places for waterbirds and shorebirds to one of the most threatened, partially due to habitat loss resulting from lack of adequate protection from off-road vehicles and associated anthropogenic disturbances. In the worst nesting season on record for colonial waterbirds, less than 250 pairs of all colonially nesting waterbird species nested at the Seashore in 2007, down from as many as 1,508 nests per season in 1997.[92] From 1997 to 2007, nests of common terns declined 97%, least terns declined 42%, gull-billed terns declined 100%, and black skimmers declined 100%. In 2007, black skimmers failed to nest and gull-billed terns disappeared from the Seashore. Threatened piping plovers breeding on the Seashore declined from 16 pairs in 1989 to only 6 pairs in 2007. Likewise, the number of breeding pairs of American oystercatchers declined by 50% from 1999 to 2007. These declines corresponded with increased popularity of off-road vehicle driving at Cape Hatteras National Seashore.

In the face of such drastic declines, conservation groups became increasingly concerned with off-road vehicle use at Cape Hatteras National Seashore and ultimately filed suit against the National Park Service in 2007.[93] The conservation groups raised a variety of claims, including

[91] NMFS, *Consolidated Atlantic Highly Migratory Species Management Plan*, DOC (Jul. 2006), 3-157, https://www.fisheries.noaa.gov/management-plan/consolidated-atlantic-highly-migratory-species-management-plan#:~:text=The%20purpose%20of%20Amendment%205b,rebuild%20the%20dusky%20shark%20stock.

[92] Species Rebounding Under Consent Decree Graphs (Nov. 15, 2010), https://www.southernenvironment.org/news-and-press/press-releases/conservation-groups-seek-responsible-off-road-vehicle-management-within-nat, attached.

[93] Amend. Compl., *Defenders of Wildlife et al. v. Nat'l Park Svc. et al.*, 2:07-CV-45 (ECF No. 27, Dec. 19, 2007), attached.

one under the MBTA related to incidental take of migratory birds.[94] The parties in the lawsuit eventually came to an agreement in 2008 to develop a plan for managing off-road vehicle use, including minimizing impacts to migratory birds.[95] The MBTA's regulation of incidental take was key to recognizing and addressing the threat posed by off-road vehicle use. After reaching an agreement and implementing the plan, bird populations at the Seashore rebounded. Should FWS choose to continue down the path of its Proposed Rule, FWS must analyze the impacts of relinquishing these types of protections to migratory waterbirds facing similar threats.

B. FWS Must Assess Impacts to Species Particularly Vulnerable to Incidental Takes

The FWS must examine the consequences of the proposed rulemaking in the context of migratory bird species in the Southeast that are at risk for listing or depend on conservation measures under the MBTA to protect against incidental takes for their long-term recovery. Research shows that species respond faster to wildlife protections when their populations are still healthy, rather than waiting until they reach endangered status.[96] This more successful response rate occurs because a species that generally has higher population numbers when protections are put in place requires a relatively shorter time to recover.[97] Further, implementation of conservation actions like those required under the MBTA increases educational awareness of protected species, which is positively associated with population growth.[98] Thus, the importance of broad protections afforded to birds by the MBTA, consistent with its interpretation for decades, cannot be underscored enough.

In particular, several at-risk species in the Southeast still depend upon the prohibition against incidental take under the MBTA for long-term viability, even though they have been removed from the ESA list due to recovery (*e.g.*, brown pelican and Kirtland's warbler). The brown pelican, an iconic Southeast marine species once endangered by hunting and pesticide poisoning, has made a full recovery and was removed from the ESA list in 2009. Although brown pelicans are now a common sight along the Southeast coast, the birds still remain threatened by fisheries bycatch and sea level rise, among other pressures. The Kirtland's warbler was delisted due to recovery in 2019, yet protections here remain critical for its long-term population health, as the birds' wintering grounds in the Bahamas are at extreme risk from sea level rise.

The least tern is another example of a migratory bird at a pivotal moment in its recovery that stands to be impacted by the loss of incidental take protections under the MBTA. In October of last year, FWS issued a proposed rule to remove the interior population of the least tern from

[94] *Id.*

[95] Consent Order, *Defenders of Wildlife et al. v. Nat'l Park Svc. et al.*, 2:07-CV-45 (ECF No. 56-1, Apr. 16, 2008), attached.

[96] *See, e.g.*, Chris S. Elphick et al., *Correlates of population recovery goals in endangered birds*, CONSERVATION BIOLOGY (Oct. 2001), attached.

[97] *Id.*

[98] David Luther et al., *Conservation action implementation, funding, and population trends of birds listed on the Endangered Species Act*, BIOLOGICAL CONSERVATION (Mar. 18, 2016), attached.

the Federal List of Endangered and Threatened Wildlife.[99] This migratory seabird has historically nested in the summer along sand and gravel bars throughout the Lower Mississippi and its major tributaries.[100] It was listed as endangered in 1985 because much of that nesting range was eliminated or under threat due to dam construction and other forms of river engineering, as well as predation from animals like cats and raccoons.[101] Over the course of three decades of collaboration and active management, the interior population of the least tern recovered significantly, with the U.S. Army Corps of Engineers ("Corps"), in particular, playing a key role in recovery efforts.[102]

The Corps' adjustment of dikes to control water flows, keeping predators off sandbars with nesting chicks, was one of the techniques used to aid the least tern's recovery.[103] Although the least tern's comeback seems to be a heartening success story for the ESA,[104] the five-year review of the least tern that formed the scientific basis for the proposed delisting explicitly states that the MBTA, along with other federal statutes, had evolved over the years to emphasize "the protection and restoration of ecosystem function and quality."[105] This backdrop of protection was noted as the reason to believe that habitat management actions and other regulatory measures important for the long-term recovery success of the least tern would continue to be undertaken, even in the absence of the protections of the ESA.[106] Mitigation measures necessary to prevent incidental take would be unlikely to continue, however, under the FWS's Proposed Rule.

Similarly, recovery for species like the whooping crane may depend on protections from incidental take under the MBTA in order to be delisted under the ESA. As few as 667 whooping cranes live in wild populations.[107] In 2000, FWS began efforts to reintroduce an experimental population of whooping cranes into a 20-state area along the eastern United States.[108] The reintroduction has grown from seven released whooping cranes in 2001 to around 85 as of the

[99] 84 Fed. Reg. 56977 (Oct. 24, 2019).

[100] *Id.*; 84 C.F.R. § 56979-80.

[101] 84 C.F.R. § 56984.

[102] FWS, Least Tern (Interior Population) *Sterna antillarum* Fact Sheet, https://www.fws.gov/midwest/endangered/birds/leasttern/intleastternfactsheet.html (last updated Oct. 23, 2019).

[103] Rise of the Interior Least Tern, AM. BIRD CONSERVANCY (2020), https://abcbirds.org/result/rise-of-the-interior-least-tern/.

[104] Seth Borenstein, *It was Endangered for Decades, but this 'Tough Little' Bird Species is Ready to Fly Free*, ASSOCIATED PRESS (2019), https://www.usatoday.com/story/news/2019/10/23/least-tern-bird-species-ready-come-off-endangered-list-us/4069591002/, attached.

[105] FWS, Interior Least Tern (*Sternula antillarum*) 5-Year Review, 42 (2013) https://www.regulations.gov/document?D=FWS-R4-ES-2018-0082-0004, attached.

[106] *Id.* at 43, 47, 69.

[107] Infographic, International Crane Foundation, *All the Whooping Cranes in the World* (2019), https://www.savingcranes.org/species-field-guide/whooping-crane/, attached.

[108] Whooping Crane Eastern Partnership (2019), https://www.bringbackthecranes.org/.

end of 2019.[109] The population had previously reached more than 100, but increased mortality in recent years has taken a toll. While the special rule governing this reintroduction under the ESA exempts incidental take resulting from an otherwise legal activity, the whooping crane is still protected under the MBTA. 50 C.F.R. § 17.84(h)(2).[110] Thus, narrowing the scope of the MBTA's take prohibitions also narrows the scope of protections for this incredibly rare bird. Given that whooping cranes are particularly susceptible to collisions with powerlines,[111] protections against incidental take could play a pivotal role in this species' recovery.

In addition, there are a number of species protected under the MBTA in the Southeast that are awaiting ESA protections (*e.g.*, the eastern black rail and black-capped petrel). It can take ten years or more for agencies to list species due to backlog and limited resources.[112] In the meantime, the type of incidental take protections previously afforded to birds under the MBTA can prevent further population decline, 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. Any NEPA analysis for the Proposed Rule would need to thoroughly examine how choosing not to require protections for species at risk could affect their status and recovery opportunities.

C. FWS Must Analyze the Loss of Ecosystem Services and Economic Benefits of Birds in the Southeast

Healthy bird populations perform vital ecosystem services, and help to sustain important sectors of the economy, including hunting and ecotourism. Species protected under the MBTA in the Southeast, including neotropical migrant songbirds, raptors, waterfowl, shorebirds, coastal seabirds, and others, provide important ecosystem services (including likely benefits to agriculture) and support the outdoor recreation economy. The impacts of reversing course on longstanding protections for migratory birds from incidental takes is not limited to the migratory birds themselves, but will extend across ecosystem integrity and threaten ecosystem services.

Ecosystem services may be divided into four categories: (1) provisioning services (natural products used directly by humans for food, clothing, medicine, etc.); (2) cultural services (recreational opportunities, inspiration for the arts, and spiritual value); (3) regulating services (pest control and carcass removal); and (4) supporting services (seed dispersal, pollination, and nutrient cycling).[113] While some provisioning and cultural services (birdwatching, hunting) and certain supporting services (pollination of crops) can more easily be quantified and assigned

[109] Infographic, International Crane Foundation, *All the Whooping Cranes in the World* (2019), https://www.savingcranes.org/species-field-guide/whooping-crane/, attached.

[110] *See also* Establishment of a Nonessential Experimental Population of Whooping Cranes in the Eastern United States, 66 Fed. Reg. 33903, 33913 (June 26, 2001) (noting the population is still protected by the MBTA).

[111] Yaw et al. *Postmortem Evaluation of Reintroduced Migratory Whooping Cranes (*Grus Americana*) in Eastern North America*, J. WILDLIFE DISEASES, 56(3), 2020 (preprint), attached (powerline and vehicle collisions accounted for 20 of 77 studied mortalities).

[112] Emily E. Puckett et al., *Taxa, petitioning agency, and lawsuits affect time spent awaiting listing under the US Endangered Species Act*, BIOLOGICAL CONSERVATION (Jul. 4, 2016), attached.

[113] Wenny et al., *The Need to Quantify Ecosystem Services Provided by Birds*, THE AUK 128(1):1-14, 1 (Jan. 2011), attached.

market value, the full scope of the value of other critically important ecosystem services provided by birds (*e.g.*, insect pest control, seed dispersal, and other functions of bird foraging behavior) is more difficult to quantify.[114] Some ecosystem services provided by birds may be difficult to assign direct market value, and even monetizable ecosystem services may have significant nonmonetizable effects.[115]

Fifty percent of bird species are predominantly insectivorous, and up to seventy-five percent eat insects on some occasions; birds' role in controlling pest insect outbreaks is well-established.[116] Studies have shown that reduction of herbivorous insects by bird predation has correlated to increased plant growth and crop yields; conversely, the Chinese campaign to exterminate tree sparrows in the late 1950s appears to have led to insect outbreaks, not increased crop yields, contributing to famine.[117] Other studies have suggested that providing perches near fields increases the presence of birds of prey and accompanying rodent predation, though the full extent of the value to agriculture of rodent predation by birds has not been assessed.[118] The mere presence of barn owls may reduce rodent activities.[119] Long distance migrants such as shorebirds and waterfowl disperse seeds and even invertebrates; these ecological interactions warrant additional study.[120]

Often, bird species have mutualistic relationships with plant species, with 33% of bird species performing seed dispersal, and a smaller number performing pollination services.[121] Many bird species also play important roles in connecting ecosystems, nutrient cycling, and altering physical ecosystem structure (burrowing or tree cavity excavation) in ways consequential for ecosystem function and for the success of other species.[122]

Important economic sectors are supported by the provisioning and cultural services provided by birds. The southeastern United States contains numerous destinations for both birdwatching and migratory bird hunting, including: Mattamuskeet National Wildlife Refuge in North Carolina (tundra swan and other waterfowl wintering grounds), the Ernest F. Hollings ACE Basin National Wildlife Refuge in South Carolina (birding and waterfowl hunting), Kiptopeke State Park in Virginia (migrant shorebirds and songbirds, and seabirds), and raptor migration watch sites up and down the southern Appalachians.

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[114] *Id.* at 2.

[115] Whelan et al., *Why birds matter: from economic ornithology to ecosystem services*, J. OF ORNITHOL. 156 (Suppl. 1): S227-S238, at S230 (May 2015), attached.

[116] Wenny et al. at 2.

[117] *Id.*; *see also* Whelan et al., *Ecosystem Services Provided by Birds*, ANN. N.Y. ACAD. SCI. 1134: 25-60, at 30 (2008), attached.

[118] *Id*.

[119] Whelan et al., *Why birds matter*, at S230-S231.

[120] Whelan et al., *Ecosystem Services Provided by Birds*, at 39.

[121] Wenny et al. at 2-4.

[122] *Id.* at 4-5; Whelan et al., *Ecosystem Services Provided by Birds*, at 44 (woodpeckers, as primary cavity excavators, are keystone species).

According to a recent survey by FWS of fishing, hunting, and wildlife-associated recreation, more than 45 million people watch birds around their homes and away from home, with 16.3 million people watching birds away from home.[123] Wildlife watchers (including birdwatchers) spent over $75 billion on trip-related and equipment expenses in 2016.[124] This includes more than 86 million wildlife watchers nationwide, an increase from about 71 million in 2011.[125] A 2011 FWS study found that Alabama birders spent, on average, 129 days a year birdwatching, above the national average of 110 days – making Alabama birders the sixth most avid in the nation.[126] Residents of Tennessee, Georgia, and North Carolina participated in birdwatching at rates above the national average of 20%.[127]

In addition, the National Survey estimated that migratory bird hunters in 2016 spent over $2.25 billion on trip-related (*e.g.*, food, lodging, transportation, guide and land use fees) and equipment (*e.g.*, firearms, ammunition, decoys, clothing) expenses, at an average of $958 per hunter.[128]

D. FWS Must Consider the Consequences of its Rulemaking in the Context of Climate Change

The avian ecosystems of the Southeast face multiple threats from human activity. Habitat destruction and degradation are the leading causes of species imperilment and extinction, both in the United States and around the world.[129] The impacts of human presence on habitats in the Southeast are becoming increasingly problematic. Eleven of the 20 fastest-growing metropolitan areas in the nation are found in the Southeast.[130] As these cities expand, urban sprawl is contributing significantly to the fragmentation and destruction of natural bird habitats.[131] These changes can introduce a host of negative impacts to birds, such as by interrupting predator-prey relationships and by diminishing the quality of foraging habitat.

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[123] FWS and U.S. Census Bureau, National Survey of Fishing, Hunting, and Wildlife-Associated Recreation, FHW/16-NAT, 38 (April 2018), https://www.fws.gov/wsfrprograms/Subpages/NationalSurvey/nat_survey2016.pdf, attached.

[124] *Id.* at 90.

[125] *Id*. at 6.

[126] FWS, Birding in the United States: A Demographic and Economic Analysis, Addendum to the 2011 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation, Report 2011-1, 10 (Dec. 2013), https://www.fws.gov/southeast/pdf/report/birding-in-the-united-states-a-demographic-and-economic-analysis.pdf, attached.

[127] *Id*. at 7.

[128] National Survey of Fishing, Hunting, and Wildlife-Associated Recreation at 78.

[129] *See, e.g.*, Stuart L. Pimm et al., *The biodiversity of species and their rates of extinction, distribution, and protection*, SCI. (May 30, 2014), attached; David S. Wilcove et al., *Quantifying threats to imperiled species in the United States: Assessing the relative importance of habitat destruction, alien species, pollution, overexploitation, and disease*, BIOSCIENCE (Aug. 1998), attached.

[130] U.S. Census Bureau, *supra* note 2.

[131] Adam J. Terando et al., *The southern megalopolis: Using the past to predict the future of urban sprawl in the Southeast U.S.*, PLOS ONE (Jul. 23, 2014), attached.

Of significant concern are population declines from climate change. In North America, 37 percent of birds are already at a high risk of extinction from climate change.[132] The Southeast will be particularly vulnerable to these threats. Scientists predict that 56 percent of the roughly 250 Southeastern migratory bird species are moderately or highly vulnerable to climate change.[133] Of these, over 100 will lose more than half of their range under a worst-case warming scenario.[134] Almost all of these species are *only* federally protected by the MBTA.

Because of climate change, several habitats in the Southeast are predicted to transform significantly in the foreseeable future, introducing additional threats to bird species and habitats in the region.[135] There has been a substantial increase in the severity of Atlantic hurricane activity since the 1980s, and further increases are projected.[136] In addition, researchers predict that areas in southwestern portion of the Southeast region may experience drier conditions, while the northeastern areas may experience wetter conditions.[137] Warmer temperatures could also increase the frequency and intensity of wildfires, as well as outbreaks of damaging forest pests, including the hemlock woolly adelgid.[138] Coastal bird populations and ecosystems in the Southeast are also threatened by sea level rise—currently as much as two inches per decade and accelerating in some places along our coast—which will erode shorelines, inundate wetlands, and allow saltwater intrusion.[139] Changing ocean currents are predicted to alter the distribution of many offshore prey species.[140] Studies have indicated that birds will be particularly affected by the changing climate.[141]

Removing protections for migratory birds in the face of climate-change, as currently proposed, will only exacerbate the pressures already faced by migratory bird species and must be considered in this proposed action.

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[132] North American Bird Conservation Initiative, *State of North America's Birds*, U.S. DOI (Apr. 16, 2016), https://www.stateofthebirds.org/2016/wp-content/uploads/2016/05/SoNAB-ENGLISH-web.pdf.

[133] *See* Chad B. Wilsey et al., *Survival by degrees: 389 bird species on the brink*, AUDUBON (2019), https://www.audubon.org/sites/default/files/climatereport-2019-english-lowres.pdf.

[134] *Id.*

[135] Jennifer Costanza et al., *Assessing climate-sensitive ecosystems in the Southeastern United States*, U.S. GEOLOGICAL SURVEY (2016), https://pubs.er.usgs.gov/publication/ofr20161073 (last visited Mar. 18, 2020).

[136] *See, e.g.*, Kevin J.E. Walsh et al., *Tropical cyclones and climate change*, WIREs CLIMATE CHANGE (Feb. 21, 2015), attached.

[137] Jerry M. Melillo et al., *Climate change impacts in the United States: The Third National Climate Assessment*, U.S. GLOB. CHANGE RES. PROGRAM (2014), https://nca2014.globalchange.gov/report/regions/southeast (last visited Mar. 18, 2020).

[138] *Id*.

[139] NAT'L OCEANIC & ATMOSPHERIC ADMIN., *Sea Level Trends* (2018), https://tidesandcurrents.noaa.gov/sltrends/ (last visited Mar. 18, 2020).

[140] James W. Morley et al., *Projecting shifts in thermal habitat for 686 species on the North American continental shelf*, PLOS ONE (May 16, 2018), attached.

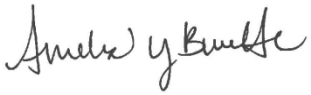
[141] Michela Pacifici et al., *Species' traits influenced their response to recent climate change*, NATURE CLIMATE CHANGE (Feb. 13, 2017), attached.

## IV. Conclusion

Reversing course on decades of protections under the MBTA has already caused, and will continue to cause, impacts of significant consequence to migratory birds across the Southeast and the United States. Migratory birds are in steep decline from multiple stressors; many are already at risk of extirpation and face an uphill road to recovery, even *with* protections against incidental take in place under the MBTA. FWS's proposed rulemaking will hasten the decline of migratory birds and cannot be squared with the broad protections afforded by the MBTA. Rather than continue with this rulemaking, we urge Interior 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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# ATTACHMENT B

# Exhibit 1

# DECLARATION OF LESLIE HARTZ

I, Leslie Hartz, declare:

1. I am currently employed by Dominion Energy Services, Inc., where I hold the position of Vice President – Engineering & Construction. My responsibilities include permitting and constructing the Atlantic Coast Pipeline ("ACP").

2. I make this declaration in support of Atlantic Coast Pipeline, LLC's Motion to Expedite Briefing and Oral Argument. I declare that the following statement is true to the best of my knowledge, information, and belief, and if called upon to testify, I could and would testify competently thereto.

3. Delaying the completion of the ACP has had—and will continue to have—a severe negative financial effect on Atlantic Coast Pipeline, LLC.

4. The stay issued by the Fourth Circuit has required Atlantic Coast Pipeline, LLC to halt all construction of the ACP—a status known as a "stop work."

5. The approximate cost of this stop work to Atlantic is $20 million per week.

6. Moreover, if Atlantic is unable to commence work in time to fell the remaining trees before March 15, the project would be further delayed up to a year

as time-of-year restrictions prohibit tree-felling after that date. This would increase the overall cost of the stop work dramatically.

7. If the Fourth Circuit were to narrow the scope of the Stay to the four species at issue in Petitioners' briefs—as requested in Atlantic's Emergency Motion to Clarify or, In The Alternative, Reconsider the Scope of the Stay Order—the cost of the stop work would be reduced but would still remain significant.

8. In addition, delaying the completion of the ACP also poses a risk to Atlantic's ability to meet the revised projected in-service date of mid-2020. If Atlantic were unable to meet this target date, many of its natural gas customers will face significant shortages that may impact their ability to meet the natural-gas requirements of their residential, commercial, industrial, and military customers. Delaying completion beyond this date would also threaten the ability of those customers to meet their own electricity generation needs and requirements, thereby threatening operations and reliability, impeding growth and development, and increasing the risk of potential outages and curtailments.

9. Of particular concern, some natural gas customers would face potential shortages at critical times of the year, when temperatures are dropping and the need for natural gas is most pressing.

10. Approximately 140 miles of the project right-of-way contain trees that have been felled, but where clearing now cannot be completed due to the stay of implementation of the 2018 Biological Opinion and Incidental Take Statement.

a. In 90% of this mileage, the trees have been felled for 9 to 10 months. This has impacted the usefulness of the timber, much of which will now be ground and disposed of as chips rather than removed from the right-of-way as usable timber.

b. In addition, the delay in tree clearing has exposed right-of-way landowners to a disruption on their property for a longer period of time.

11. Approximately 100 miles of the project right-of-way currently has some form of land disturbance.

a. Within the 100 miles, there are approximately 22 miles of open trenches on the project and 13 miles of pipe staged along the right-of-way.

b. The stay issued by the Fourth Circuit is preventing the completion of work in these locations and delaying the full restoration of the right-of-way per FERC's Plans and Procedures.

c. This delay in restoration further exposes the right-of-way landowners to construction disturbance on their property for longer periods of time.

12. Full construction was previously underway on approximately 300 miles of right-of-way in both West Virginia and North Carolina, with approximately 3,000 construction workers employed.

a. Due to construction delays resulting from the stay, Atlantic Coast Pipeline, LLC will be unable to continue employing all of these workers and most will be released from the project.

13. The ACP is a major project, and as such, has provided significant local spend in the states of West Virginia, Virginia and North Carolina.

a. To date, the ACP has directly accounted for expenditures in the following amounts:

- Approximately $51M in local labor;
- Approximately $34M in local materials;
- Approximately $5.2M in local equipment purchases or leases;
- Approximately $91M in local services;
- Approximately $33.7M in local living accommodations;
- Approximately $17.5M in products and services from diverse business owners.

b. These positive impacts do not account for indirect economic benefits, such as increased spending at local restaurants, laundromats, apartments and rental homes, gas stations, and other local businesses.

c. The loss of approximately $215M in local economic benefits will have a significant negative effect on the local communities within the ACP region.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, and that I executed this declaration on December 14, 2018, in Richmond, Virginia.

By: 

Leslie Hartz

Document Content(s)