

February 11, 2020

The Honorable David Bernhardt
Secretary of the Interior
1849 C Street NW
Washington, DC 20240

Dear Secretary Bernhardt:

We are all conservation professionals who have formerly served the Department of the Interior, from 1971 to 2017: Deputy Secretaries, Assistant Secretaries, U.S. Fish and Wildlife Service Directors, and Migratory Bird Conservation Chiefs. We are former Senate-confirmed political appointees, of Republican and Democratic Presidents, and we are former career civil servants. We are, each and all, very concerned by the Interior Department's decision to codify the new legal interpretation of the Migratory Bird Treaty Act (MBTA) in a proposed rulemaking.

On December 22, 2017, the Department of the Interior issued a legal memorandum (M-37050) removing the incidental take of migratory birds from the purview of the MBTA. As we expressed in a previous letter to then-Secretary Zinke, this legal opinion is contrary to the long-standing interpretation of the law held by every administration (Republican and Democrat) since at least the 1970s. The proposed rule turns the MBTA's straightforward language into a conclusion that only the purposeful killing of migratory birds violates the Act. This is a new, contrived legal standard that creates a huge loophole in the law by allowing companies to engage in activities that routinely kill migratory birds so long as they were not intending to do so.

The Department's decision is particularly misguided considering the devastating findings of a new study published in *Science*, revealing that nearly 3 billion birds have disappeared from North America over the past half-century. This alarming decline is the equivalent of losing more than one in four birds in less than a single lifetime. It is now more urgent than ever that we implement policies to conserve our vanishing bird species rather than unraveling decades of progress and crippling the law that protects them.

Under the previous interpretation, the MBTA was successfully used to reduce gross negligence by companies that simply do not recognize the value of birds to society or the practical means to minimize harm. All the past administrations for which we have worked struck a balance and worked diligently and in good faith with industries that had significant impacts on birds, such as oil and gas, coal, electric utilities, commercial fishing, communications, transportation, and others to reasonably address unintended take. Career professionals and political leadership in the U.S. Fish and Wildlife Service, the Department of the Interior, and Department of Justice have always exercised sound judgment to ensure that the law is justly enforced.

Your proposal to codify the new interpretation of the MBTA not only needlessly undermines a history of great progress, but it subverts our nation's obligation to protect migratory birds that we have honored for over a century. We urge you to suspend this rulemaking and instead focus

on creating a sensible path forward that strikes a balance between development and conservation, such as the legislative solution that Congress has expressed an interest in pursuing. This approach would enable the United States to continue its proud record of leadership in conserving birds. We await your response.

Sincerely,

Lynn Scarlett
Deputy Secretary of the Interior
President George W. Bush

David J. Hayes
Deputy Secretary of the Interior
Presidents William Clinton and Barack Obama

Donald Barry
Assistant Secretary of the Interior for Fish and Wildlife and Parks
President William Clinton

Lyle Laverty
Assistant Secretary of the Interior for Fish and Wildlife and Parks
President George W. Bush

Lynn Greenwalt
U.S. Fish and Wildlife Service Director
Presidents Richard Nixon, Gerald Ford, and Jimmy Carter

John Turner
U.S. Fish and Wildlife Service Director
President George H. W. Bush

Jamie Rappaport Clark
U.S. Fish and Wildlife Service Director
President William Clinton

Steve Williams
U.S. Fish and Wildlife Service Director
President George W. Bush

Daniel M. Ashe
U.S. Fish and Wildlife Service Director
President Barack Obama

Rollin Sparrowe
U.S. Fish and Wildlife Service
Chief, Migratory Bird Management (1984-89)

Tom Dwyer
U.S. Fish and Wildlife Service
Chief, Migratory Bird Management (1989-93)

Paul Schmidt
U.S. Fish and Wildlife Service
Chief, Migratory Bird Management (1993-99)
Assistant Director Migratory Birds (2003-11)

Jon Andrew
U.S. Fish and Wildlife Service
Chief, Migratory Bird Management (1999-2002)

Robert Blohm
U.S. Fish and Wildlife Service
Chief, Migratory Bird Management (2006-11)

Brad Bortner
U.S. Fish and Wildlife Service
Chief, Migratory Bird Management (2011-17)

CC:

The Honorable Raúl Grijalva, Chairman, House Committee on Natural Resources
The Honorable Rob Bishop, Ranking Member, House Committee on Natural Resources
The Honorable John Barrasso, Chairman, Senate Committee on Environment and Public Works
The Honorable Tom Carper, Ranking Member, Senate Committee on Environment and Public Works
The Honorable Lisa Murkowski, Chairwoman, Senate Committee on Energy and Natural Resources
The Honorable Joe Manchin, Ranking Member, Senate Committee on Energy and Natural Resources
The Honorable Eliot Engel, Chairman, House Committee on Foreign Affairs
The Honorable Michael McCaul, Ranking Member, House Committee on Foreign Affairs
The Honorable Jim Risch, Chairman, Senate Committee on Foreign Relations
The Honorable Bob Menendez, Ranking Member, Senate Committee on Foreign Relations
The Honorable Nita Lowey, Chairwoman, House Committee on Appropriations
The Honorable Kay Granger, Ranking Member, House Committee on Appropriations
The Honorable Richard Shelby, Chairman, Senate Committee on Appropriations
The Honorable Patrick Leahy, Ranking Member, Senate Committee on Appropriations
Ms. Kate MacGregor, Deputy Secretary (exercising authority) of the U.S. Department of the Interior
Mr. Rob Wallace, Assistant Secretary, Fish and Wildlife and Parks, U.S. Department of the Interior
Ms. Aurelia Skipwith, Director of the U.S. Fish and Wildlife Service