# [***Defenders of Wildlife: Congress Urges Interior Dept. to Abandon Reinterpretation of 100-Year-Old Law Protecting Migratory Birds***](https://advance.lexis.com/api/document?collection=news&id=urn:contentItem:6117-5PH1-JC11-12Y3-00000-00&context=1516831)

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**Body**

The ***Defenders of Wildlife issued*** the following news on Oct. 7:

Congressman Alan Lowenthal (D-CA), today, joined with House colleagues Brian Fitzpatrick (R-PA), Raul Grijalva (D-AZ), Francis Rooney (R-FL), and 48 other House Members in calling on the administration to abandon proposed regulatory rulemaking reinterpreting a century-old law protecting more than 1,000 species of migratory birds across North America.

Jamie Rappaport Clark, CEO and president of Defenders of Wildlife, said "Thank you to Reps. Alan Lowenthal (D-Calif.), Francis Rooney (R-FL), Brian Fitzpatrick (R-PA) and Raul Grijalva (D-AZ) and their colleagues for their commitment to protecting the nation's migratory birds."

Their letter to U.S. Department of the Interior (DOI) Secretary David Bernhardt follows a recent federal ruling that found the administration's reinterpretation efforts were unlawful. The administration's reinterpretation of the Migratory Bird Treaty Act (MBTA), based on a 2017 DOI Solicitor's Opinion, would remove the ability of the U.S. Fish and Wildlife Service (FWS) to mitigate incidental bird deaths due to industrial or commercial activities.

In the bipartisan letter to Secretary Bernhardt, the Members of Congress wrote that the federal court ruling, "...unambiguously found that the legal rationale and the outcome of the [DOI] Solicitor's Opinion does not align with the law that Congress passed and intended. Congress passed the MBTA, and the United States signed four bilateral migratory bird treaties, in order to broadly protect and conserve our nation's bird populations. Moving forward with a regulation that continues to avoid and undermine this obligation is not a viable path forward."

The MBTA has been used for decades to mitigate, through permitting of industrial and commercial activity, incidental bird deaths. Even when these deaths have not been avoided, the MBTA has been a critical tool to invest the penalties toward the recovery of impacted species. The MBTA fines from the Deepwater Horizon oil spill, which killed more than one million birds, resulted in $100 million for wetland restoration to benefit waterfowl and other birds through the North American Wetlands Conservation Act.

The members also point out, "We believe that there is fundamentally a lack of legal and stakeholder support for the current policy. It is not a sustainable position for the law, or for our bird populations. Fortunately, there is a better path forward. We do not have to choose between conservation or regulatory certainty. While we believe that the Fish and Wildlife Service (FWS) has struck a reasonable balance in implementing the law over the decades, FWS can pursue a framework for incidental take that aligns with the conservation intent and language of the MBTA, which provides additional legal certainty for entities."

Clark said, "Now that the courts have weighed in, Department of the Interior Secretary Bernhardt should drop its illegal attempt to eliminate Migratory Bird Treaty Act protections and, instead, pursue a rulemaking that conserves wildlife while providing regulatory certainty."

In addition to the 52 Congressional signatories, the letter was also supported by numerous conservation and wildlife groups.

\* \* \*

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

Dear Secretary Bernhardt:

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

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

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

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

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

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

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

\* Will FWS rescind its guidance memo, issued April 11, 2018, which implements the now-vacated Solicitor's Opinion?

\* Will FWS rescind its memo, issued June 14, 2018, titled "Destruction and Relocation of Migratory Bird Nest Contents", which relies on the now-vacated Solicitor's Opinion?

\* How is FWS responding to requests from ***tribes*** that it engage in government-to-government consultation before it advances a regulation any further?

\* How will FWS acknowledge and respond to the objections raised by Canada, states, and flyway councils, among other stakeholders, in regard to its proposed rule and draft EIS?

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

Sincerely,

See signatories here: [*https://lowenthal.house.gov/sites/lowenthal.house.gov/files/MBTA-Letter-to-DOI.pdf*](https://lowenthal.house.gov/sites/lowenthal.house.gov/files/MBTA-Letter-to-DOI.pdf)

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