United States Senate
WASHINGTON, DC 20510

October 15, 2020

The Honorable David Bernhardt
U.S. Department of the Interior
1849 C Street N.W.
Washington D.C. 20240

Secretary Bernhardt:

We are writing to follow up regarding the Department of Interior's implementation of the Migratory Bird Treaty Act. Specifically, we continue to have concerns with the draft Environmental Impact Statement (EIS) and proposed regulation to codify the 2017 Solicitor's Opinion on incidental take. Considering the recent federal court ruling that vacated the Solicitor's Opinion and the ongoing concerns raised by a diverse set of stakeholders during the regulatory process, we urge you to abandon the effort to codify the Opinion.

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. Moving forward with a regulation that continues to avoid and undermine these obligations is not a viable path forward.

As consistently demonstrated since the Department of the Interior first announced the 2017 Solicitor's Opinion, there is deep and broad concern from across the country, and internationally, about the impacts of this Administration's position on incidental take and the processes 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 objects to the rule and has raised 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. 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 bedrock conservation law, along with the billions of birds that it protects and the economies that rely upon healthy migratory bird populations. We believe a choice between conservation and regulatory certainty is a false choice. We urge the Department of the Interior to comply with the federal court ruling, and consider an alternate approach that both regulates incidental take and encourages the creation and implementation and of best management practices by industry. We stand prepared to work with you on such an alternate approach.

In light of the court decision and the draft EIS public comment concerns highlighted above, we also request a response to the following questions by Friday, October 23, 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?

In conclusion, 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.

Signed,

/s/ Chris Van Hollen
United States Senator

/s/ Tom Carper
United States Senator

/s/ Dianne Feinstein
United States Senator

/s/ Tom Udall
United States Senator

/s/ Edward J. Markey
United States Senator

/s/ Cory A. Booker
United States Senator

/s/ Mazie K. Hirono
United States Senator

/s/ Benjamin L. Cardin
United States Senator

/s/ Christopher A. Coons
United States Senator

/s/ Gary C. Peters
United States Senator

/s/ Tina Smith
United States Senator

/s/ Jeffrey A. Merkley
United States Senator

/s/ Ron Wyden
United States Senator

/s/ Sheldon Whitehouse
United States Senator

/s/ Martin Heinrich
United States Senator

/s/ Robert Menendez
United States Senator

/s/ Kirsten E. Gillibrand
United States Senator

/s/ Bernard Sanders
United States Senator

/s/ Patrick Leahy
United States Senator

/s/ Richard Blumenthal
United States Senator