

1404 North 24th Street
Boise, Idaho 83702
February 4, 2020

Honorable Aurelia Skipwith
Director
U.S. Fish and Wildlife Service
U.S. Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

CERTIFIED MAIL

Dear Director Skipwith:

I request the prompt clarification, public disavowal, and immediate withdrawal of a U.S. Fish and Wildlife Service press release issued and posted online on January 30, 2020 by the agency's Washington Office regarding the opening of a public comment period for proposed changes in the Federal Migratory Bird Treaty Act ("U.S. Fish and Wildlife Service Solicits Public Input on Proposed Rule and Environmental Impact Statement for Migratory Bird Treaty Act," author unnamed).

Appended to the online posting of this official news release was an addendum of lengthy statements from 28 public officials and organizations in support of potential changes to the Migratory Bird Treaty Act, enumerated under the prominent, bold-faced headline, "What They Are Saying".

These "What They Are Saying" comments range from statements by the Governor of Alaska to the opinions of various state and county officials in Kansas, Utah, Arizona, Nevada, and Wyoming to the points-of-view of a selection of interest groups and lobbying associations, including the Pacific Legal Foundation, the American Farm Bureau Federation, the FreedomWorks Foundation, the National Association of Home Builders, and Americans for Limited Government. All of them support proposed modifications to the MBTA as initially outlined in your forthcoming proposed rule.

While all individuals and organizations are entitled to right of comment on formal Federal rule-making actions, typically such comment is accepted and maintained in the public record only during the formal 30-, 45-, or 90-day open public comment period. Soliciting and promoting a series of apparently orchestrated and one-sided comments **prior to the opening of a formal public comment period**, and posting them online within the context of an official Department of the Interior agency news release, is a serious breach of communications ethics, contrary to a traditional of impartiality and adherence to procedure that has been scrupulously maintained by your agency's Office of Public Affairs for decades. Further, it is legally actionable as a potential violation of the Federal Administrative Procedure Act (Public Law 79-404, 60 Stat. 237).

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The Administrative Procedure Act oversees the process by which various rule-making actions by the Federal Government are conducted, including the requirement of Federal agencies to inform the public; to provide for orderly, equitable, and fair public participation in those rule-making processes; and to set uniform standards by which any rule-making is pursued and adjudicated. The Act calls for scrupulous adherence to standards of fairness, access to information, equal treatment under the law, and full consideration of submitted comments, testimony, and public input.

Any attempt to inappropriately anticipate the potential outcomes of a rule-making process by skewing, steering, or otherwise influencing the nature of public comment, by unduly discouraging or limiting the submission of actual comments, or by manipulating public input to pre-determined conclusions, represents a serious potential violation of the intent of the Administrative Procedure Act.

By its pre-selection and promotion of a narrow number of public comments within the context of an official agency press release — all representing one viewpoint — prior to the formal February 3 opening of the official 45-day public comment period, the U.S. Fish and Wildlife Service has tainted the integrity of the process and raised the specter of a pre-decisional outcome to this rule-making process. As such, it represents an unnecessary, arbitrary, and capricious exercise of any agency's administrative rule-making authority, exposing the Service to potential future litigation.

Personally, in my 35-year professional career with the U.S. Fish and Wildlife Service's Office of Public Affairs, I have never witnessed a more blatant attempt to "steer" a rule-making action to a predetermined conclusion by the inappropriate use of an official public pronouncement, such as this agency press release. Stacking the opening of an agency rule-making public comment period with similarly-phrased statements by more than two dozen supportive entities is an ethical and administrative lapse of the highest magnitude, contradicting the "first step in an open and transparent public process" that this same press release claims is your agency's goal in this rule-making.

Preparatory to any attempt to modify or amend the Migratory Bird Treaty Act, I submit that it is no more appropriate to officially promote the views of 28 supportive elected officials and extractive industry groups and Washington lobbying organizations within the context of the initial rule-making announcement than it would be, in turn, to have promoted the personal and professional views of the 19 former Interior Department and U.S. Fish and Wildlife Service officials who signed their vigorous letter of objection to such changes in December 2017, at the time of the MBTA's legal re-interpretation by the Interior Department's Office of the Solicitor. Such unnecessary missteps demean the integrity of a fair and impartial administrative process.

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I ask for your immediate corrective action to restore a modicum of integrity and impartiality to the rule-making process on this proposal by promptly and publicly withdrawing the press release and issuing a clarifying statement of correction on the Web site of the U.S. Fish and Wildlife Service.

Any rule-making action should not be clouded or tainted by unnecessary, pre-decisional influencing — at the very opening step of the administrative process — for a weighty decision you later will be called upon to render after reviewing the body of comment and evidence put before you.

Thank you for your attention to this request. I will await your prompt disavowal of this lapse in adherence to the strict professional standards formerly practiced within the U.S. Fish and Wildlife Service's public affairs program when I served the Federal Government as spokesman for your agency.

Very truly yours,

David Klinger
(U.S. Fish and Wildlife Service/Office of
Public Affairs, 1977-2012)

Enclosure (FWS Press Release of 1/30/20)

cc.: Honorable David Bernhardt
Secretary of the Interior

Honorable Raul Grijalva
Chairman, House Committee on Natural Resources