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Chairman Huffman, Ranking Member McClintock, Members of the Subcommittee– thank you for the opportunity to participate in today's discussion on the Migratory Bird Protection Act of 2019.

I practice environmental and natural resources law as a partner at the law firm of Kelley Drye & Warren in Washington DC. I have represented, and continue to represent, a number of industries and companies regulated under environmental and natural resources laws, including the Migratory Bird Treaty Act ("MBTA"), but I am not here on any company's or industry's behalf. My testimony today represents my own thoughts and opinions, and not the positions of my clients or my firm. I am here because I believe this issue is important and because I hope I can modestly contribute to a constructive dialogue.

To begin with, I applaud Congressman Lowenthal for offering a legislative update to the MBTA and further applaud this Committee's decision to open a dialogue on that proposed legislation. Congress has made very few meaningful changes to environmental statures during my career so my practice has almost exclusively focused on regulations and other agency actions attempting to interpret and decades-old statutes in new contexts and even administratively expand agency authority in the face of congressional inaction.

Indeed, modern federal environmental policy has been almost exclusively shaped by the executive branch, and to some extent, the judicial branch. I believe Rep. Lowenthal's bill and today's dialogue reflects a recognition that the present situation is problematic – at least in the context of the MBTA. Unless Congress starts revising, updating, and reauthorizing our nation's environmental laws, federal environmental policy will continue to whipsaw back and forth on four to eight year cycles. And unless Congress acts to make its policy decisions clear and to more clearly prescribe the means by which agencies are to fulfill those goals, the executive branch will continue to step into the breach. And where you stand on any particular administration's exercise of discretion will probably depend on where you sit.

I recognize that it is no easy task to crack open and tinker with our nation's most important environmental laws, but I believe that everyone in this room understands the necessity. It all starts here, with the offering of an idea, and engagement in a constructive dialogue. Thank you, Congressman Lowenthal, Chairman Huffman, and Ranking Member McClintock for allowing that to happen.

While I believe that Congressman Lowenthal's draft bill addresses a real need to update the MBTA, I do not agree that the bill merely affirms "that the Migratory

Bird Treaty Act's prohibition on unauthorized take or killing of migratory birds includes incidental take by covered commercial activities." This bill would do more than simply "affirm" century-old congressional intent and clarify that incidental take has always been prohibited by the MBTA.

I believe that the text and structure of the MBTA clearly shows that Congress intended the Act to cover only affirmative impacts directed at migratory birds – not passive impacts from otherwise lawful activities. I believe that this interpretation is supported by the treaties that the MBTA implements, the legislative history of the Act, important textual differences between the MBTA and the Endangered Species Act ("ESA") and the Bald and Golden Eagle Protection Act, and the Fish & Wildlife Service's ("FWS's" or "the Service's") regulations and practices for decades.

Some of you likely disagree with my interpretation of the scope of the MBTA and that is fine. I think that the fact that we have a major circuit split on this very issue and two divergent solicitor opinions within a year is sufficient to show that the bill does not merely affirm the unambiguous intent of Congress in drafting and amending the MBTA.

But I also believe that, because the present discussion is about amending the MBTA, it matters less what Congress previously intended. It is important, however, to acknowledge as an initial matter that this bill would significantly change, and expand the scope of, the MBTA.

We know that the bill's inclusion of incidental take in the MBTA's criminal enforcement regime represents an expansion of the scope of the MBTA because the draft bill offers measures aimed at avoiding the more absurd consequences of an MBTA that criminalizes incidental take. While the bill adds "incidental take" to the scope of activities prohibited by the MBTA, it defines "incidental take" as "the killing or taking of migratory birds that directly and foreseeably results from, but is not the purpose of, a covered commercial activity." As such, under the draft bill, incidental take becomes prohibited only if the activity causing the take is commercial in nature.

The phrase "covered commercial activity" appears to limit the scope of activities subject to the bill's prohibition on "incidental take" but the definition of the phrase does not allow us to understand how the extent of the limit. "Covered Commercial Activity" and "Covered Commercial Activities" are defined as "an industry or type of commercial activity that the Secretary determines cause significant harm to migratory birds. . ." The definition then goes on to list five activities that the

Secretary should determine cause significant harm to migratory birds. In all other respects, the determination of what constitutes a "Covered Commercial Activity" is left to the agency. This is important. The draft bill criminalizes incidental takes only when they occur in those industries or activities deemed "Covered Commercial Activities." The bill would therefore give the Department of Interior broad authority to select which industries it wishes to expose to significant criminal liability and which industries it wishes to insulate from such criminal liability. In addition to concerns about the lack of standards for wielding this authority and the capriciousness of singling out specific industries for criminal liability, this proposed approach would present a major separation of powers issue. It is the legislature's obligation to determine which actions are crimes. A bill that seeks to delegate this function to the executive branch is therefore very likely to be challenged, and even if it is not challenged, would only serve to further the transfer of legislative functions to agencies.

Those five activities that the bill includes as "Covered Commercial Activities" subject to criminal liability for incidental takes are problematic as well. To begin with, these activities do not represent the activities that cause the most incidental takes of migratory birds. The bill provides no explanations or support for why these five specific activities, among countless more activities known to result in incidental take of migratory birds, were identified as causing significant harm. FWS and other agencies have been pretty successful in enhancing migratory bird protections through industry collaboration. I think everyone in this room believes that is a good thing. I would therefore urge caution in structuring the bill in a manner that appears to target specific industries without clear justification. At a minimum, this selective inclusion should be explained.

I have a few other concerns with the draft bill as well, which I herein discuss in summary fashion:

- The draft bill provides the Secretary of the Interior broad discretion without adequate standards for the exercise of that discretion. For instance, the bill provides only vague and subjective standards for determining which incidental takes to criminalize, establishing best management practices, drafting and revising general and individual permits, authorizing incidental take, defining "extraordinary risks;" identifying de minimis activities; and imposing fees. If the goal of this bill is to clarify the scope and implementation of the MBTA and to reassert Congress' role in setting federal environmental policy, I respectfully recommend that time be taken to prescribe more and defer less. Deference extended to agencies will sometimes

be wielded by administrations with whom we agree and will sometimes be wielded by administrations with whom we do not agree. Regardless of which side of the arc you are on, I think we would all like to see the regulatory pendulum swing a little less.

- Limiting the criminalization of incidental take to those activities that "directly and foreseeable result from, but are not the purpose of," the activity is not likely to be a meaningful limitation in practice. Given the MBTA's coverage of nearly 1,100 species of migratory birds, any number of otherwise lawful activities (like driving, flying, landscaping, constructing office buildings, or installing oversized windows) will arguably directly and foreseeably result in incidental take of a migratory birds.

- While the draft bill provides a mechanism to permit certain incidental takes that the bill criminalizes, it is not clear when the permit program will be in place to protect against criminal enforcement. Indeed, given the bill's directive that the Secretary assess the amount of allowable take, and assess mitigation measures, best management practices, compensatory mitigation measures, and fees, it seems quite likely that the bill would subject many to criminal liability well before there are mechanisms in place that would allow them to lawfully operate. This should be addressed, and it should be addressed within the bill so that it is not left to the Secretary or the whims of enforcement discretion.

Once again, I appreciate the opportunity to provide these high-level thoughts and concerns. I welcome Congress' examination of the MBTA, and I am grateful for this discussion. I came here with the intention of contributing to an important and constructive dialogue, and I hope I accomplished this or at least showed the earnestness of my interest. I am happy to answer any questions.