

McGREGOR & LEGERE

ATTORNEYS AT LAW, P.C.

15 COURT SQUARE – SUITE 500
BOSTON, MASSACHUSETTS 02108
(617) 338-6464
FAX (617) 338-0737

OLYMPIA A. BOWKER, ESQ.
E-mail: obowker@mcgregorlaw.com
(617) 338-6464 ext. 122

VIA EMAIL AND CERTIFIED MAIL RETURN RECEIPT REQUESTED

December 19, 2019

Scott Kahan
Regional Chief, National Wildlife Refuge System
U.S. Fish and Wildlife Service
Northeast Region
300 Westgate Center Dr.
Hadley, MA 01035
scott_kahan@fws.gov

**Re: Finding of No Significant Impact and Decision to Demolish Bri Mar Stable:
Violation of NEPA, FWS Department Manuals, and Migratory Bird Treaty Act**

Dear Mr. Kahan:

This Firm represents *Save Our Swallows*—a group of citizens, birders, scientists, and volunteers for the Fort River Division of the Silvio O. Conte National Fish and Wildlife Refuge (“Fort River Division”).

This letter serves as notification to the U.S. Fish and Wildlife Service (“FWS”) that the Finding of No Significant Impact (“FONSI”) for the Removal of Bri-Mar Stable, signed by Regional Chief Scott Kahan on December 3, 2019, does not comply with the applicable regulations, is illegal, and must be rescinded.

Among the issues discussed in this letter are how the Environmental Assessment (“EA”) process has been a ruse from the beginning: from the lack of support in the EA for the proposed action, to the unfeasibility of the alternatives discussed, to the dismissal of the science presented by the top scholars in their fields during the comment period, to the illegal relocation of protected migratory bird nests to support a study done by the proponent of the action in order to justify the action, and the illegal reliance on that study to justify a FONSI.

The FONSI must be annulled and the EA process started anew.

I. A FONSI Must Be Based on the Text of the EA—This One was Not

Department Manuals are official, department-wide policies and guidance, that include mandatory procedures. FWS adopted comprehensive procedures to supplement the National Environmental

Policy Act (“NEPA”) regulations on documenting and implementing decisions. These are found in 550 FW 3, which is aptly titled, “Documenting and Implementing Decisions.”^[1]

FWS’s Department Manual provides:

[The] EA serves as the basis for determining whether implementation of the proposed action would constitute a major Federal action significantly affecting the quality of the human environment. If a positive finding is made, an EIS is required. If a negative finding is made, a FONSI is prepared and signed. Either finding will be based on the information presented in the text of the EA. The text of the EA should provide sufficient factual material to support the finding.

To repeat, FWS’s own policy requires that a FONSI must be based on the information presented in the text of the EA.

To be blunt, the EA contains no support for the FONSI. FWS created a report after the EA was released and after the public comment period closed, and solely relies on that report to find ‘no significant impact.’ This is completely contrary to what is required by law.

A. The EA Concedes the Negative Impacts of Action on Barn Swallows

The Selected Action in the FONSI will impact the largest documented colony of Barn Swallows in Massachusetts—Barn Swallows, *Hirundo rustica*, are a native, declining species protected by the Migratory Bird Treaty Act (“MBTA”). Over a dozen ornithologists and scientists commented on the EA, raising the ecological importance and scientific significance of the species, and how it must be conserved.^[2]

The EA itself cedes that the now-Selected Action (Alternative C - Demolition of the Stable) will have “direct impacts to the colony of Barn Swallows” that nest in the Bri Mar Stable. EA, p. 15. Further, the EA also notes that Barn Swallows returning to the Bri Mar Stable could “negatively be impacted” if their nesting site was eliminated and there were limited alternative nesting sites. EA, p. 15.

^[1] <https://www.fws.gov/policy/550fw3.html>

^[2] Among the individual who wrote to FWS on the EA are: A senior government scientist based in France, who has studied Barn Swallows for almost 50 years, resulting in the publication of more than 200 scientific papers; A wildlife biologist and Executive Director of Bird Ecology and Conservation Ontario (BECO), who has been working on research, recovery, and conservation of bird species at risk in North American since 2006; A volunteer at the Fort River Refuge since 2009, with more than 400 hours donated predominantly to the Barn Swallow Project and leading birding walks. This volunteer has been birding at the property that is now the Fort River Refuge for nearly 20 years; A PhD Candidate in Ecology and Evolutionary Biology; A PhD and State Ornithologist for the Massachusetts Division of Fisheries and Wildlife; A PhD, FRSC1 at the Department of Biology and Environment and Climate Change Canada, at the University of Western Ontario; An Associate Professor at the Department of Ecology and Evolutionary Biology at the University of Colorado; and a Post-Doctoral Researcher at Acadia University.

The EA plainly says that the demolition of the Bri Mar Stable will harm the Barn Swallows. There is no evidence within the four corners of the document supporting otherwise.

As discussed above, the FWS Department Manual mandates that the FONSI “will be based on the information presented in the text of the EA.” 550 FW 3. Clearly, there is no text in the EA supporting a finding of no significant impact.

B. The Only Justification for this FONSI was Created After-the-Fact

The EA was prepared by Andrew C. French, Project Leader, from the Silvio O. Conte National Fish and Wildlife Refuge, and dated March 12, 2019. EA, pp. 3, 25. The public comment period on the EA ended on May 20, 2019.^[3] The FONSI heavily leans on a study and report (“FWS Report”) also authored by Mr. French and released in November 2019—long after the EA was released. The FONSI illegally uses the FWS Report to justify the Selected Action in the FONSI.

For example, page 3 of the FONSI cites the FWS Report to counter the fact that destruction of the Stable will eliminate the habitat of the colony of Barn Swallows. The FWS Report is the only documentation supporting FWS’s claim in the FONSI that the demolition of the Bri Mar Stable would be a “minor adverse impact.” FONSI, p. 5. This one document does little to combat the 751 public comments received by FWS on the EA, several of which were authored by independent experts in their field of ornithology.

Obviously, the self-authored study was not mentioned in the EA because it was created after the EA was released, and after the EA’s public comment period was closed. Nonetheless, the FONSI uses that study to make numerous assertions on the impact of the project on the birds’ habitat.

For example:

FWS and Mass Audubon predict that the swallows will relocate into the hot walker/boat house building or other suitable nearby locations (Atwood, Bronsan-Smith & French, 2019). FWS staff^[4] have identified barn swallows utilizing at least 10 other structures locally, including a colony with three structures at the UMASS that is comparable to the size...

^[3] The EA for the Bri Mar Stable is dated March 12, 2019, but wasn’t released to the public until March 15, 2019. The public comment period was scheduled to close on April 19, 2019. Only after a requested extension, FWS notified some individuals via personal email on April 19, 2019 that the public comment period on the EA would extend to May 10, 2019.

^[4] We note that “FWS Staff” referred to here appears to be two co-authors of the FWS Report, as the FWS Report states “we also conducted preliminary, ad hoc surveys of barns and similar structures in the general vicinity of Amherst and Hadley...At least ten structures were found within 4 miles of Bri Mar Stable in 2019 that appeared to be potential barn Swallow nesting sites, although a more thorough survey is definitely warranted.” FWS Report, p. 15.

FONSI, p. 3.

[The] selected alternative would remove a structure where approximately 40 pairs of barn swallows nested in 2019.

FONSI, p. 3

This after-the-fact FWS Report was used to claim the Selected Action would not impact the Barn Swallow colony in the Bri Mar Stable. FWS's decision in the EA was plainly not based on any actual study or science, emphasized by their scramble to justify their decision *after* the EA was drafted, and *after* the public comment period had closed.

For example, the FWS Report states that birds in the Bri Mar Stable were captured, banded, and then tracked on the following dates: May 28, June 13, June 28, July 9, July 19, July 25, August 1, and August 13 of 2019. Mass Audubon announced the release of the FWS Report on November 15, 2019—nearly six months after the public submitted their final comments on the EA, but coincidentally less than three weeks before the FONSI was issued.

Justifying a FONSI on information created by the agency, for the agency, after the EA was completed and all public criticism of the project received and likely reviewed, is a flagrant violation of the review processes laid out by law.

Among the many flaws making the FONSI legally insufficient, the only document FWS cites to negate scientifically supported assertions about the impact of the project was written by the Project Leader of the proposed action, after the EA was released, and after the public comment period had closed. This action is unacceptable, illegal, and nullifies the public process FWS has purported to take to date.

FWS's manipulation of this EA process and ludicrous post-hoc justification could not be clearer. FWS nonetheless pressing forward with the demolition of the Bri Mar Stable undermines whatever faith the American public has in FWS's stewardship of our lands and natural resources, and cannot stand.

In order for the FWS to rely on their self-drafted report as justification for a decision regarding the EA for removal of the Bri Mar Stables, the EA must be re-drafted to include the material cited, re-issued, and the EA process begun again, in its entirety.

The FWS Report, created and completed after the release of the EA, cannot be used to justify the actions proposed in the EA.

C. There is No Evidence in the EA of any Safety Issues at Bri Mar Stable

There is no evidence in the EA, nor the record, signifying the Bri Mar Stable is structurally compromised.

The EA and FONSI allege without support that the building has deteriorated to a point it has become a safety concern. FONSI, p. 2. FWS uses this as one of the three justifications for the decision to demolish the Stable.^[5]

The record submitted to FWS during the public comment period contained ample evidence contradicting the condition of the stable, notably a letter dated September 4, 2018 to Andrew French from a local contractor, noting Bri Mar Stable was “well built and structurally sound despite its post construction. Given a proper roof, it can be used for decades with very little annual maintenance.”

Further, internal documents from FWS obtained from a FOIA request found that FWS was actually pursuing mounting heavy solar panels on the roof of the Bri Mar Stable, until January 2018 when solar projects were “flushed from the construction account under the current administration.”

In addition, contrary to the FONSI’s statements about the compromised integrity of the stable, FWS and staff of Mass Audubon were accessing the Stable throughout the end of August (as evidenced by the dates and activities discussed in their “study”).

The EA contained no actual evidence as to the physical condition of the Stable. Any unsupported statement in the EA about the condition of the Stable was overblown, and contradicted by the FWS’s own actions in continuing to use the Stable through the fall of this year.

In sum, there is no evidence in the EA to support a conclusion that the Stable poses a safety risk.

D. There is No Evidence of the OMB Directive Applying to Bri Mar Stable

The EA lists a single purpose for the proposed action: a supposed mandate from the Office of Budget and Management (“OMB”), in a memorandum dated March 25, 2015, to reduce the amount of government buildings by 5% by 2020. *See* EA p. 5, “Purpose and Need for the Proposed Action”. (“March 25 OMB Memorandum”).

A 5% reduction mandate is conspicuously absent from the March 25 OMB Memorandum.

^[5] The FONSI lists the following as justifications for the chosen alternative: 1) there is a building safety issue (which is refuted by the evidence and FWS’s own actions); 2) demolition will comply with the OMB mandate for a footprint reduction (which has been debunked multiple times, most recently on December 6, 2019 when the OMB confirmed the stables were still not listed with their inventory and thus do not qualify for any footprint reduction credit); and 3) demolition will prevent the building from failing when the swallows are present.

The FONSI cites a different document, saying that the “Deputy Director of Fish and Wildlife Service released a memorandum on December 15, 2017” that supposedly contains the mandate. Diligent searches by *Save Our Swallows* have revealed no such memo, nor did the response to their pre-EA Freedom of Information Act (“FOIA”) request to FWS, specifically seeking “All correspondence, records, memoranda, email, and documents between FWS and the Office of Management and Budget relating to a reduction of real property by five percent by 2020.” FWS did not produce the memorandum that they rely on in the FONSI, even though the FOIA response was sent to *Save our Swallows* nearly 6 months prior to the FONSI’s release.

Further, if there was a footprint reduction mandate stemming from the March 25 OMB Memorandum, those reductions are relative to a baseline of properties in the Federal Real Property Portfolio (“FRRP”). The FRRP contains all the properties reported as “excess” and available for demolition. The FRRP is maintained by the General Services Administration (“GSA”).

The footprint reduction that FWS claimed in the EA as the basis for the demolition of the Bri Mar Stable would be calculated using the inventory in the FRRP. A reduction percentage is based on the number of properties in the FRRP that were standing at the beginning of the time frame, compared to the number of properties in the FRRP that were demolished by the end of the time frame.

If the Bri Mar Stable is not in the FRRP at all, it can’t count towards any footprint reduction policy. Oddly enough, the Bri Mar Stable is not, nor has it been, in the FRRP and therefore cannot possibly count towards any purported footprint reduction mandate. Only properties in the FRRP count towards any footprint reduction.

For example: *Save our Swallows* reviewed the FRRP for fiscal year 2017 and the Stable was not included at all.

The EA for the Bri Mar Stable, dated March 12, 2019, states that the Stable is subject to a footprint reduction mandate.

On March 13, 2019, a day after the EA was published, *Save our Swallows* received a letter from the GSA confirming that “GSA has not received a Report of Excess (ROE) from the U.S. Fish and Wildlife (FWS) for the property in question” and the Bri Mar Stable was not in the FRRP.

On Friday, December 6, 2019, *Save Our Swallows* received an email from John Kelly, Director of the Property Disposal Division of the GSA, yet again confirming that GSA has not received any correspondence or paperwork from FWS regarding excess or the proposed demolition of the Bri Mar Stable.

FWS’s assertion and reasoning for the EA, and the FONSI, are directly contrary to official statements from the authoritative agency on the issue of a footprint reduction.

II. FWS Scrambled to Justify the EA with an After-the-Fact Study, Violating the Migratory Bird Treaty Act

As discussed *supra*, the EA for the Bri Mar Stable was released to the public on March 15, 2019, with the public comment period on the EA closing on May 20, 2019.

Months after the release of the EA (which pursuant to NEPA, should contain all information necessary to make a decision on the preferred action and alternatives) FWS commenced a “study” with Mass Audubon on the very colony of Barn Swallows whose habitat would be destroyed by the preferred action in the EA. The study was memorialized in the FWS Report.

The FWS Report discusses the study’s methodology—birds were captured and banded, counted, and nests were tracked and observed. In addition, “18 seed nests” were installed in the ‘Boat House.’ The FWS Report properly notes the mandatory permits used for banding and tracking the swallows—permits held by senior author Jonathan Atwood of Mass Audubon. However, the study conspicuously omits the permits required to acquire the “seed nests” that were used.

According to the FWS Report, the study included “[d]eployment of 18 seed nests (nests built in previous years that were physically moved, prior to the 2019 nesting season) into a nearby structure....” FWS Report, p. 2.

Barn Swallows, *Hirundo rustica*, are a native species of migratory bird protected under the MBTA. The MBTA also protects migratory bird nests, eggs, and chicks. The MBTA explicitly prohibits the possession, transport, collection, or capture of birds, nest, eggs, and chicks. 50 C.F.R. § 10.12.

Individuals and agencies must apply for and receive permits to perform activities generally prohibited under the MBTA. The Regional Director of Regional 5 of FWS holds a Special Purpose Permit allowing her and explicitly authorized subordinates to perform specific activities typically prohibited under the MBTA. These activities are clearly listed on the face of the permit.

The general relocation of migratory bird nests is not one of them.^[6]

FWS’s general permit does not allow for the relocation of the 18 “seed nests” done for the study that FWS conducted to justify their FONSI.

Thus, FWS staff violated the MBTA in order to glean any sort of support for their FONSI. This renders the public process required under NEPA meaningless.

^[6] The Permit allows the Director to “relocate migratory birds, nests, and eggs...when the safety of the bird is at risk if the bird, nest, or eggs are not removed.” Safety of a bird is a mandatory prerequisite, as 50 C.F.R. § 13.42 mandates that “The authorizations on the face of a permit...are to be strictly interpreted and will not be interpreted to permit similar or related matters outside the scope of strict construction.”

III. A FONSI is Allowed under NEPA Only if No Environmental Impact Found

A FONSI may only be issued if the proposed action will not have a significant effect on the human environment. 40 C.F.R. § 1508.13.

Save Our Swallows submitted comprehensive legal comments during the public comment period on the EA. Specifically, those comments addressed the following legal deficiencies of the EA and proposed action:

- An Environmental Impact Statement is required because the project is a major federal action significantly affecting the quality of the human environment;
- The severity of the project effects must be (and were not) considered in an intensity analysis, pursuant to 40 C.F.R. § 1508.27(b);
- The EA fails to take the requisite “hard look” at the project pursuant to 42 U.S.C. § 4321;
- The proposed action doesn’t rely on the factors Congress intended FWS to consider;
- FWS failed to consider important aspects of the problem;
- FWS offered explanations that run counter to the evidence; and
- The decision to demolish the Bri Mar Stable is so implausible that it cannot be the result of differing viewpoints or the result of Agency Expertise.

None of these were addressed in the FONSI.

There is no evidence countering these issues, and therefore there cannot possibly be a finding that the proposed action will not have a significant effect on the human environment.

IV. A FONSI Must be Based on the Actual Record to be Legal Under NEPA

In addition to the FWS’s very clear internal directive that the FONSI be based on the information presented in the text of the EA, recent case law further reinforces that requirement.

In *Department of Commerce et al. v. New York et al.*, 139 S. Ct. 2551 (2018), the Supreme Court of the United States decidedly found, in short, that an agency’s rationale for doing something can’t be made up.

The Court found:

“Altogether, the evidence tells a story that does not match the Secretary’s explanation for his decision. Unlike a typical case in which an agency may have both stated and unstated reasons for a decision, here the VRA enforcement rationale—the sole stated reason—seems to have been contrived.” Id. at 2575.

The reasoned explanation requirement of administrative law is meant to ensure agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public. Id.

Reasoned decision-making under the Administrative Procedure Act calls for an explanation for agency action. What was provided here was more of a distraction. Id. at 2576.

If judicial review is to be more than an empty ritual, it must demand something better than the explanation offered for the action taken in this case. Id.

The situation the Court describes perfectly aligns with what is occurring with the NEPA process for the Bri Mar Stables.

The reasoned explanation requirement of administrative law is meant to ensure agencies offer genuine justifications for important decisions. How to proceed with the Bri Mar Stable, which is the habitat for the largest known colony in Massachusetts of a declining, protected migratory bird, is a prime example of a decision by FWS with no reasoned justification.

V. The Alternatives in the EA are Obsolete and Impossible for FWS to Execute

550 FW 1, § 2.4(A)(4) provides that an EA must “[e]nsure that the alternatives selected for detailed analysis are reasonable and implementable, are given equal treatment, and provide clear choices for the decisionmaker...”

The alternatives in the EA do no such thing. For example, several of the alternatives were infeasible simply by the timeframe they contemplated.

As context, the EA was released in mid-march of 2019. Historically, the Barn Swallows return to the barn for nesting season in mid-April.

Still, the EA listed as the Proposed Action, Alternative A, as “close the western third of the Stable prior to the 2019 nesting season, making it inaccessible to barn swallows for nesting...” This Alternative was unreasonable and unimplementable from the start due to the impossible timeline—even though it was the preferred alternative.

In addition, the action selected in the FONSI—Alternative C—was also not possible due to the unimplementable time frame. Alternative C was to “demolish and remove the stable in one phase after the 2019 Barn Swallow nesting season, repurpose and/or dispose of construction debris, and restore the footprint of the structure to native habitat by the end of 2019.

To be clear, it is December 2019. The FONSI was released for a 30-day review on December 4, 2019. The timeline of Alternative C is impossible.

The EA also dismissed two alternatives, which contained contradictory reasoning: The alternative to “Repair the Stable” was dismissed because “neither the refuge nor the Region have identified a need or use for the structure.” This is directly at odds with the other dismissed alternative, “Repair Root of Stable with Private Funds,” which would “allow the Stable to serve as a large artificial nest structure for barn swallows.”

The alternatives in the EA do not comply with the FWS Directives because they are not reasonable, the time frames are impracticable, and the contradictory justifications for dismissing certain alternatives certainly do not “provide clear choices for the decisionmaker.”

VI. The National Environmental Policy Act and FWS Directives Require an EIS

NEPA itself and the FWS directives promulgated pursuant to NEPA, both require that an EIS be prepared for the proposed project.

According to FWS Manual 550 FW 1, § 2.2(2), “The basic question under NEPA is: ‘Is the action a major Federal action significantly affecting the quality of the human environment?’; If the answer is ‘yes,’ then we must prepare an EIS...”

550 FW 3 explicitly lays out circumstances where an EIS is required in § 3.3(B)(2): *Criteria to Assist in Determining the Need to Prepare an EIS*.

That provision mandates an EIS when there is/are:

(a) Controversy over environmental effects (e.g., major scientific or technical disputes or inconsistencies over one or more environmental effects).

...

(g) Adverse effects on designated or proposed natural or recreation areas, such as wilderness areas, parks, research natural areas, wild and scenic rivers, estuarine sanctuaries, national recreation areas, habitat conservation plan areas, threatened and endangered species, fish hatcheries, wildlife refuges, lands acquired or managed with Dingell-Johnson/Pittman-Robertson funds, unique or major wetland areas, and lands within a 100-year floodplain.

FWS’s own post-EA Report notes, “...plans by the U.S. Fish and Wildlife Service (USFWS) for removal of an unused horse stable that supports a large breeding colony of Barn Swallows on the Fort River Division of the Silvio O. Conte National Fish and Wildlife Refuge in Hadley, Massachusetts, have raised controversial questions regarding the regional importance of this colony.” FWS Report, p. 2

If the study were in a vacuum, it alone would satisfy the criterion of “controversy” in 550 FW 3.3(B)(2). But it’s not. There were hundreds of other comments submitted on the EA urging FWS to maintain the Barn Swallow colony in the Bri Mar Stable based on their experience and research, notably including:

- A senior government scientist based in France who has studied Barn Swallows for 50 years, and has published more than 200 scientific papers;
- The Aerial Insectivore Program Manager at *Bird Studies Canada*;
- The Executive Director and a Wildlife Biologist at *Bird Ecology and Conservation Ontario*;
- Naturalist Director at *Nature Canada*; and
- An evolutionary biologist at the University of Boulder, Colorado who has studied Barn Swallows throughout North America for 20 years.

There is plainly controversy over the environmental effects of the proposed action. An EIS is required before this project can progress.

VII. Legal Review of a FONSI in Federal Court is Under the APA’s “Arbitrary and Capricious” Standard which the FWS here will Fail

A Federal agency’s decision under NEPA to issue a FONSI and not prepare an EIS is a factual determination that implicates agency expertise, and accordingly is reviewed under deferential “arbitrary and capricious” standard of review.

The above cacophony of disastrous and unfounded decisions and actions by FWS emphasizes the arbitrary and capricious nature of this action.

The federal agency whose “primary responsibility is management of fish and wildlife for the American public”^[7] is actively ignoring science and the applicable law, in order to demolish a scientifically and ecologically significant colony of a protected migratory bird, on a wildlife refuge.

This process has been a ruse from the beginning: from the lack of support in the EA for the proposed action, to the unfeasibility of the alternatives discussed, to the dismissal of the science presented by the top scholars in their fields during the comment period, to the illegal relocation of protected migratory bird nests to support a study done by the proponent of the action to justify the action, and the illegal reliance on that study to justify a FONSI.

The FONSI is arbitrary and capricious, and FWS’s decision to proceed with demolition of the Bri Mar Stable is not only illegal, but it undermines any faith that remains with the government stewards charged with protecting our natural resources.

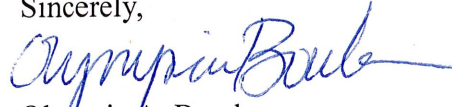
^[7] https://www.fws.gov/help/about_us.html

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To comply with the law, FWS should cancel the FONSI, and start the EA process over so it can be done right.

Please confirm receipt of this letter by replying in writing by Friday, December 27, 2019.

Sincerely,



Olympia A. Bowker