

December 3, 2021

Public Comments Processing
Attention: FWS-HQ-MB-2021-0105
U.S. Fish and Wildlife Service
5275 Leesburg Pike, MS-PRB/3W
Falls Church, VA 22041-3803

Re: Migratory Bird Permits; Authorizing the Incidental Take of Migratory Birds (Docket No. FWS-HQ-MB-2021-0105)

Submitted electronically at: <http://www.regulations.gov>

On behalf of the National Audubon Society and the Natural Resources Defense Council, and our millions of members and supporters, please accept and fully consider these comments on the U.S. Fish and Wildlife Service's (Service) Advanced Notice of Proposed Rulemaking (ANPR) to develop regulations to authorize the incidental take of migratory birds under the Migratory Bird Treaty Act (MBTA) and to prepare an associated draft environmental review, Docket No. FWS-HQ-MB-2021-0105.

Audubon and NRDC strongly support the Service's intent to establish an incidental take permitting program under the MBTA and appreciate the critical steps the administration is taking to prioritize the conservation of birds. For many years, our organizations have been deeply engaged in efforts to protect the resources under the jurisdiction of the Department of the Interior and animals and plants protected by federal laws and treaties. We have been particularly invested in safeguarding bird protections under the MBTA, one of our nation's oldest and most important bird conservation laws, and we incorporate by reference our numerous, previously submitted comments here.¹

This is a crucial turning point in implementing the MBTA. As we regain ground and reaffirm the bedrock protections under this century-old law, we must also recognize the increasing peril that birds are facing and the immediacy of losses that will continue to mount in the absence of durable and proactive regulatory action. While it will be no small feat to responsibly authorize incidental "take" for such a wide range of species—many of which there is little data and knowledge—there is no time more apt to capitalize on tangible conservation gains and greater certainty for migratory bird species and to recognize those industry actors employing best practices to avoid, reduce and offset impacts to migratory bird populations.

¹ See e.g. Comments on Regulations Governing Take of Migratory Birds, FWS-HQ-MB-2018-0090-18943 (June 7, 2021); National Audubon Society and NRDC, Petition to Reconsider Regulations Governing Take of Migratory Birds, Docket No. FWS-HQ-MB-2018-0090 (March 1, 2021); Comments on the U.S. Fish and Wildlife Service's delay of the effective date on regulations governing take of migratory birds, Docket No. FWS-HQ-MB-2018-0090, EIS No. 20200117 (February 9, 2021); National Audubon Society et al., Comments on the U.S. Fish and Wildlife Service's Draft Environmental Impact Statement for regulations governing take of migratory birds, Docket No. FWS-HQ-MB-2018-0090, EIS No. 20200117 (July 20, 2020); Natural Resources Defense Council et al., Comments on the U.S. Fish and Wildlife Service's proposed rule to redefine the scope of the Migratory Bird Treaty Act, Docket No. FWS-HQ-MB-2018-0090 (March 19, 2020); National Audubon Society and NRDC, Comments on Incidental Take of Migratory Birds, Docket No. FWS-HQ-MB-2014-0067 (July 27, 2015).

Need for Incidental Take Permit and Codification

As Congress and the executive branch recognized in the early 20th century with the signing of the migratory bird treaties and the passage of the MBTA, in order to sustain and recover migratory bird populations, it is essential to minimize bird mortality from human activity. And as the Supreme Court recognized in upholding the MBTA, at stake is a “national interest of very nearly the first magnitude...But for the treaty and the statute, there soon might be no birds for any powers to deal with.”² We urge the Service to meet this singular statutory directive to protect birds by codifying the current and previously longstanding interpretation that the MBTA prohibits incidental take, and by establishing an authorization program clarifying the regulatory process governing such prohibition.

While significant progress has been made in protecting birds due to the MBTA and the conservation efforts it inspired, the threats and challenges facing migratory birds continue to change and grow, and new approaches are necessary. The landmark 2019 study, “Decline of the North American Avifauna”, published in the journal *Science*, found that bird populations have declined by 3 billion birds since 1970, representing a 29% overall decline in 50 years.³ The study cites an “urgent need to address ongoing threats” including “direct anthropogenic mortality,” in order to “avert continued biodiversity loss and potential collapse of the continental avifauna.” Additionally, National Audubon Society released a study, “Survival By Degrees: 389 Species on the Brink”, which found that two-thirds of North America’s birds are at risk of extinction from climate change.⁴

The most efficient way to maintain and recover populations is to ensure that our living birds survive and reproduce. The first step in this goal is to limit preventable mortality. Every year, millions of birds succumb to mortality from avoidable harm, often in cases where we have existing practices and technology that could prevent it and where further progress can be made to advance these efforts. Although the MBTA has spurred important progress in developing, adopting, and improving beneficial practices, more progress is necessary to help recover the loss of 3 billion birds and ensure resilient populations in the face of climate change.

An incidental take permit program can provide a stronger and more certain mechanism for the development and use of beneficial practices that reduce bird mortality and conserve our bird populations *before* adverse impacts occur. A permit program can achieve these forward-looking outcomes while also furthering opportunities for improvements at existing facilities, and offering a public process to provide a more transparent and equitable process likely to lead to more consistent agency implementation. The lack of an incidental take permit has historically set the MBTA apart from other wildlife laws, such as the Endangered Species Act and Marine Mammal Protection Act, leaving reliance on enforcement discretion as the only option for entities following reasonable and established beneficial practices that avoid, minimize, and mitigate incidental take of protected birds.

An incidental take permit has been under consideration for many years by the federal government and stakeholders, including by the Service through a Notice of Intent in 2015. At the time, numerous comments were submitted by conservation and industry groups on the Service’s efforts to consider an

² [Missouri v. Holland](#), 252 U.S. 416 (1920).

³ Rosenberg, K. V. et al. 2019. Decline of the North American Avifauna. *Science* 365(6461). doi: 10.1126/science.aaw1313.

⁴ Wilsey, C, B Bateman, L Taylor, JX Wu, G LeBaron, R Shepherd, C Koseff, S Friedman, R Stone. Survival by Degrees: 389 Bird Species on the Brink. National Audubon Society: New York.

authorization program for incidental take. More than a dozen industry associations and entities from a variety of sectors expressed support for the concept of an incidental take permit under certain conditions.⁵ Before 2015, industry associations⁶ and legal experts called for an incidental take permit, arguing, for example, that “the implementation of an incidental take permit program would best provide certainty to industry and uphold the conservation ideals of the MBTA and its implementing treaties.”⁷

Support for Incidental Take Permit and Codification

There is strong support in the statute, Conventions, Executive Orders, and among the public for developing and implementing an incidental take permit and codifying incidental take protections. Our previous comments describe in detail why the plain language of the statute, as well as the Conventions, case law and more, dictates that incidental take is covered within the MBTA. The statutory prohibition states that all taking and killing of protected migratory birds is prohibited, “Unless and except as permitted by regulations”⁸ and outlines the authority of the Secretary “to determine when, to what extent, if at all, and by what means, it is compatible with the terms of the conventions to allow hunting, taking, capture, killing...of any such bird, or any part, nest, or egg thereof, and to adopt suitable regulations permitting and governing the same...”⁹

The underlying Conventions similarly provide broad authority for this approach, contemplating that authorizations will be considered for the taking and killing of birds. The 1995 Amendments to the Canada Convention include language on commitments to migratory bird protection that allow the nations to “regulate their take” and that the allowance of take may be considered for “specific purposes”.¹⁰ The proposed regulations must align with the Convention’s principles, including to “restore depleted populations of migratory birds”, “manage migratory birds internationally”, “ensure a variety of sustainable uses”, and more.¹¹ Additionally, as expanded on further below, this approach aligns with Executive Order 13186, as well as recent Executive Orders that call for further agency action to address the climate crisis and an approach that “conserves our lands, waters, and biodiversity”.¹² The Fish and Wildlife Service Manual implementing EO 13186 directs that the Service take actions “avoiding and minimizing adverse impacts on migratory bird resources”.¹³

⁵ See attachments for Natural Resources Defense Council, *Comments on U.S. Fish and Wildlife Service, Regulations Governing Take of Migratory Birds, Notice of Intent to Prepare an Environmental Impact Statement*, Docket No. FWS-HQ-MB-2018-0090 (March 19, 2020). Available at: <https://www.regulations.gov/document?D=FWS-HQ-MB-2018-0090>.

⁶ Development of a Permit Program for Incidental Take of Migratory Birds. Prepared for INGAA. Available at: <https://www.ingaa.org/File.aspx?id=11062>.

⁷ Alexander K. Obrecht, *Migrating towards an Incidental Take Permit Program: Overhauling the Migratory Bird Treaty Act to Comport with Modern Industrial Operations*, 54 Nat. Resources J. 107 (2014). Available at: <https://digitalrepository.unm.edu/nrj/vol54/iss1/6>.

⁸ 16 USC 703.

⁹ 16 USC 704.

¹⁰ Canada Treaty, 1995 WL 8771 99. Available at: <https://www.fws.gov/le/pdf/MigBirdTreatyCanada.pdf>.

¹¹ Ibid. A 2008 diplomatic exchange between US and Canada also directly discusses that an incidental take authorization program is contemplated by the Canada Convention. Diplomatic Note No. 0005 (July 2, 2008).

¹² Exec. Order No. 14008, 86 Fed. Reg. 7619 (Jan. 27, 2021).

¹³ 720 FW 2, Service Responsibilities to Protect Migratory Birds.

The previous administration's vast and unlawful overreach in reinterpreting the MBTA to not cover incidental take left birds officially unprotected from incidental take and avoidable industrial hazards, which was a devastating blow for bird populations and the millions of people that care about and benefit from birds. More than 25 states, 30 tribes, three flyway councils, dozens of Members of Congress, former senior Interior officials from Republican and Democratic administrations, the government of Canada, hundreds of non-governmental organizations, and over 400,000 people opposed this policy. At the same time, many entities and people called for a new approach that did not involve the removal of longstanding protections, including consideration of a permitting framework. We are grateful that the Service has revoked the previous administration's rule and is now considering whether and how to replace it with a legally and scientifically defensible approach. Developing an MBTA authorization program, including an incidental take permit, can and should improve implementation by offering further clarity and consistency under the law, and an opportunity to address legal liability and establish a more consistent nationwide policy.

This is the right time to address this issue. The Service has a critical window of opportunity to take action to modernize the MBTA's rules for the benefit of birds and people, and for the regulated community. The country is on the verge of making generational investments in infrastructure and clean energy development to improve our economy and tackle the climate crisis. The MBTA rules can go hand in hand with these efforts to clarify standards and liability when development occurs and at the same time, can help us tackle the growing biodiversity crisis and increase resilience in the face of climate change.

Codify and Build off Existing MBTA Guidance and Authorities

The sole purpose and intent of the MBTA is to protect migratory birds, and the origin of the statute to implement the international treaties signed for migratory bird conservation must not be overlooked.¹⁴ In 2001, President Clinton signed Executive Order 13186, *Responsibilities of Federal Agencies to Protect Migratory Birds*, which underscores the national importance of migratory birds and substantive treaty obligations that are implemented through the MBTA.¹⁵ Not only does this Executive Order recognize the critical importance of migratory bird species and the United States' obligations to conserve populations and their habitats, but it also defines and describes critical components of the MBTA as the primary mechanism carrying out these obligations.¹⁶

Executive Order 13186

Consider the principles outlined by the Executive Order for unintentional take, in this case directed at federal agency action and coordination,

¹⁴ 16 U.S.C. § 703 *et seq.*

¹⁵ Exec. Order No. 13186, 66 Fed. Reg. 3853 (Jan. 17, 2001). Conventions include the Convention for the Protection of Migratory Birds with Great Britain on behalf of Canada 1916, the Convention for the Protection of Migratory Birds and Game Mammals-Mexico 1936, the Convention for the Protection of Birds and Their Environment- Japan 1972, and the Convention for the Conservation of Migratory Birds and Their Environment-Union of Soviet Socialist Republics 1978.

¹⁶ *Id.* at 3853, 3855. The Executive Order states that "take" includes both "intentional" and "unintentional" take, and it purposefully underscores the importance of habitat conservation throughout—including defining "migratory bird resources" as migratory birds and the habitats upon which they depend, as well as directing agencies to inventory and monitor bird habitat and populations, promote research and information exchange related to the conservation of migratory bird resources, and provide training and information to staff on methods and means of avoiding or minimizing the take of migratory birds and conserving and restoring migratory birds habitat.

...identify where unintentional take reasonably attributable to agency actions is having, or is likely to have, a measurable negative effect on migratory bird populations, focusing first on species of concern, priority habitats, and key risk factors. With respect to those actions so identified, the agency shall develop and use principles, standards, and practices that will lessen the amount of unintentional take, developing any such conservation efforts in cooperation with the Service. These principles, standards, and practices shall be regularly evaluated and revised to ensure that they are effective in lessening the detrimental effect of agency actions on migratory bird populations. The agency also shall inventory and monitor bird habitat and populations within the agency's capabilities and authorities to the extent feasible to facilitate decisions about the need for, and effectiveness of, conservation efforts.¹⁷

Such a regime is equally applicable in the context considered under this ANPR, where actions considered for authorization of incidental take should be analyzed under the same step-wise process to assess population-level effects and conservation efforts to lessen and mitigate for the impact, with regularly-scheduled mechanisms for evaluation and revision. This will be a first step in determining how to categorize and prioritize authorizations across the wide-potential reach of the statute and could be the foundation for issuance of a general permit. As a side note, given that MOUs have now been signed across a majority of federal agencies under this Executive Order, an assessment and report out on the implementation and effectiveness of such action would be timely and cornerstone to authorization specific to federal agencies in this rulemaking.¹⁸

Director's Order No. 225: Incidental Take of Migratory Birds

We also urge the Service to consider codifying the definitions and policies in the recently issued Director's Order, which defines incidental take and beneficial practices and outlines the Service's use of enforcement discretion and applicable agency action.¹⁹ Providing for the current status quo where an activity is not specifically identified as an exception, or has not received or is not appropriate for a general or individual permit under the new rulemaking could provide a catch-all and helpful guidance as individual elements of the permitting program are established or revised. This would alleviate the need to comprehensively categorize all activities that may incidentally take migratory birds up-front and could allow for a more iterative process in both setting-up, implementing and adjusting aspects of the incidental take authorization program—including for example, accommodating collaborative stakeholder processes to analyze and dictate beneficial practices.

Nesting Guidelines

Similarly, the Service has previously issued specific and detailed guidance on the handling of nests under the MBTA. Of note, we urge the Service to immediately correct the nest destruction guidance memo

¹⁷ *Id.* at 3855.

¹⁸ The Executive Order states that agencies should “support the conservation intent of the migratory bird conventions by integrating bird conservation principles, measures, and practices into agency activities” and “restore and enhance the habitat of migratory birds, as practicable.” It also references the mitigation hierarchy when it directs agencies to avoid and minimize, to the extent practicable, adverse impacts on migratory bird resources. *Id.* at 3854.

¹⁹ U.S. Fish and Wildlife Service Director's Order No. 225, Incidental Take of Migratory Birds (October 5, 2021).

issued by the previous administration,²⁰ in accordance with this proposed rulemaking and the October 2021 final rule revocation and supporting documents. Updated nest destruction guidance or the guidance issued on April 15, 2003 should then be incorporated in the incidental take authorization framework, and could be established as a parallel mechanism for the handling of nests and eggs rather than allowing such activities to be subject to any blanket exceptions. The Service has a long history of being consulted on and proactively engaging in activities that may impact nests, including both commercial and non-commercial activity; while not necessarily being a high priority for enforcement or permitting per se, the Service should continue to explore mechanisms and guidance that will provide for careful and protective handling of nests and eggs.

Ensure that Enhancing Bird Conservation is the Top Priority for this Rulemaking

Given the long history of implementation of the MBTA, there have been significant efforts and guidance like the above that should be retained and built upon, rather than reinventing the wheel across the board in this proposed rulemaking. At a minimum and as a top priority, this rulemaking should enhance bird conservation actions and outcomes above the current status quo and establish transparent mechanisms for reassessing the conservation benefit of the program.

Baseline Analysis

We urge the Service to incorporate a careful analysis—and include such analysis in the rulemaking process and associated documents— of the requirements and/or voluntary actions across industries and jurisdictions that are currently undertaken to address MBTA implementation, including examples of specific monitoring and mitigation efforts. Such analysis should be considered a baseline and will be critical to understanding the additional conservation gain the authorization program will provide and if any existing conservation actions could potentially be negatively impacted or disincentivized by the proposed authorization framework.

Purpose and Need to Conserve Migratory Birds

Again, as the highest priority, the overarching purpose and conservation mandate of the MBTA must not be lost and any authorization or permitting program must first and foremost guarantee the conservation and protection of important migratory bird species. Audubon and NRDC have commented previously on applications for energy projects on public lands that the “Purpose and Need” should be aligned with the regulatory standard of the law under which the permit has been applied for. The Purpose and Need statement for these projects has been “to respond to an application.” In this environmental review, the “Purpose and Need” should focus on the overarching statutory mandate of the MBTA and be “to conserve migratory birds under the MBTA.” This environmental review should focus on the overarching conservation aim, and this “Purpose and Need” should be carried throughout all subsequent authorizations and analyses.

Adopt a Science-based Conservation Framework

Without a measurable conservation outcome, any permit authority would be meaningless and little more than a rubber-stamp approval. Incidental take permitting must provide a demonstrable and

²⁰ Destruction and Relocation of Migratory Bird Nest Contents (June 14, 2018). Available at: <https://www.fws.gov/policy/m0407.pdf>.

measurable conservation benefit to the species being impacted, and these benefits and measurements should be spelled out clearly. We urge the Service to adopt a science-based conservation framework for authorization, starting with the “Purpose and Need” and committing to measurable conservation outcomes resulting from any authorizations issued.

The Service should consider and analyze the use of mitigation funds and banks and aggregating compensatory mitigation dollars in order to achieve highest benefits and use for the species being impacted, in accordance with landscape-scale mitigation strategies and priorities. As proposed, we also agree that the use of a conservation fee could be a helpful addition to a general permit framework; however, we believe that such inclusion should not supersede the use of mitigation fees, which could be more appropriate and needed when dealing with species of concern or sensitive habitats, for example. Therefore, the distinction between and intended use of the two fees should be clearly delineated and described in the rulemaking process and environmental review documents.

Commit to Full Transparency and Public Engagement

As an overarching matter, we recommend ensuring mechanisms that enable states, tribes, local governments, and stakeholders to have meaningful and regular opportunities to coordinate and engage with the Service. The significant public engagement in recent years on the MBTA and overwhelming public support for upholding MBTA protections highlights the keen interest in and critical role that the public and other stakeholders can play in these issues. To facilitate and benefit from such engagement, the Service should commit to fully transparent processes for oversight, data gathering and decision-making, and incorporate clear adaptive management prescriptions to address changed circumstances and new information.

Incorporate 5-year Reviews and Publicly Accessible Databases and Registries

As a start, we recommend that the Service incorporate 5-year public reviews and updates for all MBTA authorizations and exceptions. This will allow public engagement at appropriate intervals to better understand and suggest revision, or consideration of new data or science, that would greatly benefit the overall implementation of the program and conservation outcomes. Similarly, the Service should adopt policies and procedures that facilitate real-time availability of submitted data, analyses and reports provided through the authorization program. A publicly accessible registry and other databases could be efficient and effective mechanisms for both collecting, collating, and reporting information on the authorization program—and could be helpful to both regulated and non-regulated entities.

Continue to Prioritize Collaborative Engagement

The Service should prioritize incorporating collaborative engagement in decision-making, oversight, and guidance for the MBTA authorization program and should consider formalizing such processes. The Service has a long history of working cooperatively with the regulated community as well as conservation organizations, states, tribes, and other interested stakeholders on MBTA implementation. This history should be recognized and more formally incorporated into the proposed rulemaking and permitting program. As an example, multi-stakeholder task forces and advisory committees could be engaged to establish and update criteria, best practices, and industry specific measures, and could be especially helpful in the consideration of exceptions, state agency and tribal coordination, and mitigation funds.

Establish a Science-Based Conservation Standard to Guide all Management Decisions

The Service must clarify the regulatory standard that it will follow in order to determine when authorizations are appropriate and sufficiently protective of migratory bird populations. Incidental take authorizations may reduce uncertainty by providing a clear and committed path to avoiding, minimizing and mitigating effectively for population-level impacts on sensitive species of birds. General permits may also provide a mechanism enabling the transparent sharing of data, increased stakeholder engagement, and legal certainty regarding liability for take of migratory birds. For these reasons and because this effort provides an opportunity to strengthen the overall framework for bird conservation, we are extremely supportive of the Service's efforts to clarify this regulatory authority under the MBTA.

However, incidental take authorizations cannot guarantee tangible and meaningful benefits for birds without adhering to a science-based conservation standard guiding all permitting and management decisions. The Service must articulate a regulatory standard for determining when authorizations are appropriate (or inappropriate) and ensure that decisions are sufficiently protective of migratory bird populations. Examples of regulatory standards in the context of other wildlife laws include the preservation standard under the Bald and Golden Eagle Act²¹ and the jeopardy standard under the Endangered Species Act.²²

We urge the Service to immediately establish a science-based conservation standard to guide all decisions on permitting and authorizations of incidental take under the MBTA. We suggest that the Service ensure that populations of Birds of Conservation Concern, and species or populations whose status may foreseeably change to a species of concern or candidate for listing under the ESA, remain stable or increasing. In adhering to such a standard, authorizations for incidental take should also provide a net benefit for all species being measurably impacted by the activity authorized. We must remember the core goal of the MBTA is to protect and maintain the abundance and diversity of all migratory birds, including keeping common birds common, and a net benefit standard for population-level impacts will help meet this aim.

Framework Tiers and Eligibility

The three-tiered framework described in the ANPR provides a sensible starting point for considering an authorization program. Overall, we support the prioritization of a general permit as part of the authorization program development and implementation. We also support the inclusion of specific permits and exceptions as part of the framework for consideration in a proposed rule. However, we caution against an overreliance on specific permits, due to the inherent challenges of implementation by the Service, and an overreliance on exceptions, due to the potential concerns on impacts to birds. A general permit provides an appropriate balance in conservation, implementation, and certainty, and we urge this system to be a focus for the Service in this program.

The development of this framework should be considered in an additive manner, building up from the status quo, rather than one that considers all activities at the outset that could theoretically cause incidental take and aims to fit them into these categories. Rather than making determinations about where a substantial number of activities would fall under each of these tiers at this stage, the Service should first set up the overarching permitting framework, and then prioritize next steps for permits and

²¹ 16 U.S.C. § 668a.

²² 16 U.S.C. §1536(a)(2).

exceptions based on need and benefit for achieving the goals of the rulemaking. For many activities, it is reasonable to predict that the status quo of enforcement discretion may continue. Over time, necessary additions to the program can be added with further rulemaking. The experience of other permitting programs, including the Nationwide Permits under the U.S. Army Corps of Engineers, demonstrate that further refinement can be developed on a regular basis to meet the purposes of the program and respond to conditions on the ground.

Prioritize Establishment of a General Permit Mechanism

As the ANPR describes, one of the key issues to consider in the development of an incidental take permit is the eligibility criteria for activities under a general permit, specific permit, or exception. These criteria have significant implications for birds and for regulated entities. The standards should be as clear as possible to ensure effective implementation. In general, eligibility for the authorization of take should be consistent with meeting a science-based conservation standard for the program. This will ensure that an authorized activity is meeting statutory obligations and the conservation intent of the Conventions, and will help meet the recommended purpose of this rulemaking to conserve migratory birds.

General permits should be reserved for categories of activities that are similar in nature—akin to the Army Corps Nationwide Permits model—that incidentally take birds, and for which we have reasonable impact estimates, as well as proven avoidance, minimization, and mitigation measures to address such impacts. The cumulative effect of the general permit program should ensure that there is a net benefit to birds. For unique circumstances that do not fit into the general permit framework, the Service should consider specific permits, which can provide greater individualized review and tailored terms and conditions that may not fit under a general permit.

As part this rulemaking and future rules and updates, the Service should determine which categories of activities could be considered for general permits. The current list of sectors considered in the ANPR is a reasonable starting point for a proposed rule and draft EIS. We would also encourage the consideration of pipelines as another sector for the general permit program.

Caution Against Overreliance on Exceptions

While we generally agree with the need to establish exceptions or categories of activities that would not be appropriate to include in an incidental take authorization program, we urge extreme caution in exempting too many categories of activities at this early stage of implementation. Those activities included should be accompanied by a detailed description and analysis of expected impacts as well as a rationale provided for how such exception provides the greatest conservation to birds. Perhaps most importantly, the Service should consider setting-up a clearly articulated and regular process for reexamining such determinations—both in terms of adding to or deleting actions—that allows public engagement and oversight.

Consider Staff Capacity and Additional Criteria for MOUs and Authorizations

With respect to specific permits, we agree that the Service should consider reserving use for limited and special circumstances—simply based on the extremely limited resources that the Service has dedicated to this program and the fact that resources may be better dedicated towards broader authorizations, with a larger impact, and/or oversight and monitoring of those activities.

In general, though, the Service must also provide a rational reason and science-based criteria for why certain activities and impacts may not be appropriate for certain types of authorizations. Limiting general authorization to only those industries with best management practices that have been approved for fully offsetting impacts is not a science-based criterion and may end up increasing the need for individual permits for those industries and impacts outside this narrow range.

The Service should also consider and evaluate on-going application of interagency MOUs, but it may not be an appropriate mechanism for authorization of take due to lack of enforcement capabilities and limited clarity on terms and conditions. There is less opportunity for the public to engage and understand the status of actions under this mechanism, and as an initial recommendation, the Service should define additional oversight, effectiveness monitoring, and transparency measures to allow for public engagement and access to information throughout the full duration of an activity. The Service should describe the staff resources and process dedicated to monitoring and oversight for this option.

Additional Components to Consider for the Rulemaking and Environmental Review

Each of the following components will be fundamental to any analysis for authorization of incidental take and we suggest that the Service focus on addressing these essential components in the rulemaking and environmental review. We note that effective analysis of the impacts, best management practices, and mitigation measures of various activities will be severely hindered without the establishment of a science-based framework and an overarching process to authorize “incidental take” under the MBTA—which should include a thorough analysis of the impacts of such a program on the current status of migratory birds, prioritization of conservation outcomes regarding population level impacts, and coordination with state wildlife agencies, tribes and local governments.

Updated Information on Population Trends and Status of Migratory Birds – The Service has an existing requirement to gather and evaluate information about nongame bird populations under the Fish and Wildlife Conservation Act (FWCA), including population trends and status.²³ The Service similarly gathers annual information on migratory game species under the MBTA,²⁴ and therefore should prioritize

²³ 16 U.S.C. § 2912. Federal conservation of migratory nongame birds. The Fish and Wildlife Conservation Act states: (a) Conservation activities—The Secretary shall undertake the following research and conservation activities, in coordination with other Federal, State, international and private organizations, to assist in fulfilling his responsibilities to conserve migratory nongame birds under existing authorities provided by the Migratory Bird Treaty Act and Migratory Bird Conservation Act (16 U.S.C. 701–715) and section 8A(e) of the Endangered Species Act [16 U.S.C. 1537a (e)] implementing the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere: (1) monitor and assess population trends and status of species, subspecies, and populations of all migratory nongame birds; (2) identify the effects of environmental changes and human activities on species, subspecies, and populations of all migratory nongame birds; (3) identify species, subspecies, and populations of all migratory nongame birds that, without additional conservation actions, are likely to become candidates for listing under the Endangered Species Act of 1973, as amended (16 U.S.C. 1531–1543); (4) identify conservation actions to assure that species, subspecies, and populations of migratory nongame birds identified under paragraph (3) do not reach the point at which the measures provided pursuant to the Endangered Species Act of 1973, as amended (16 U.S.C. 1531–1543) become necessary; and (5) identify lands and waters in the United States and other nations in the Western Hemisphere whose protection, management, or acquisition will foster the conservation of species, subspecies, and populations of migratory nongame birds, including those identified in paragraph (3).

²⁴ See U.S. Fish and Wildlife Service, *Issuance of Annual Regulations Permitting the Hunting of Migratory Birds, Final Environmental Impact Statement* (May 2013). Available at: <http://www.fws.gov/migratorybirds/PDFs/FSEIS%20Issuance%20of%20Annual%20Regulations%20Permitting%20the%20Hunting%20of%20Migratory%20Birds.pdf>.

including updated information in this environmental review as a basis and starting point for the overarching conservation framework—such information is a necessary precursor to establishing science-based conservation standards, assessing current and expected impacts, and proposing and approving meaningful mitigation measures. As part of any incidental take authorization program, the Service should further commit dedicated resources to a regular and transparent review of such information.

Baseline Impacts Analysis – Calculation of the baseline of current activities and estimated (mitigated and unmitigated) “take” of migratory birds that includes all sources, not just industries. These sources include but are not limited to human-introduced predators, current climate change impacts and models for the future,²⁵ loss of habitat, window collision and other impacts for which there are statistical or other data gathered or analyzed in a scientifically defensible methodology. The Service can provide this analysis using the “best available science” and existing information.

Oversight Capacity and Process for Review – Demonstration that the Service has not only the authority but also the capacity to assume the obligation to issue general industry authorizations as well as specific permits, where warranted, while also effectively overseeing and monitoring the compliance of the permit terms, adaptive management regimes, and mitigation strategies on a regular basis, and at least every 5 years. The Service must delineate a defined review process for all authorizations, permits and/or MOUs, which should include guarantees for public engagement and transparency, required reporting, and an ongoing process to consider and make changes based on changed circumstances or new information.

Conservation Plans for Guilds of Birds within Each Flyway – Rather than a scope that is general in nature (e.g. “all migratory birds”) the Service should frame the analysis regionally by the four flyways and/or Bird Conservation Regions, and by guilds of birds (seabirds, raptors, songbirds, etc.) in each. The Service should also consider linkages to other flyways outside of the continental United States, especially those of international treaty signatory countries. To support this effort, the Service should carry out its obligations under the FWCA to identify the lands and waters necessary to conserve migratory nongame birds. This will enable the Service to establish priorities for conservation and a conservation “plan” for each flyway and its priority species, with requisite population-level take limits for at-risk species and mitigation options for expected impacts. Each science-based conservation plan should incorporate a provision for updating that analysis in authorizations and/or permits that may tier off of the environmental review.

Population-level Impacts for Species of Concern – Analysis of a methodology for determining population-level impacts on species of birds that the Service has identified as Birds of Conservation Concern, and species or populations whose status may foreseeably change to a species of concern or candidate for listing under the ESA. Conservation of populations of these species, especially those not protected by other statutory authorities, should be prioritized in the analysis and in the authorizations, with regular reviews and updates. Population-level impacts on these species must be a priority for determining adaptive management or mitigation measures in any permitting regime, and avoidance of

²⁵ Audubon scientists have used hundreds of thousands of citizen-science observations from Christmas Bird Counts and Breeding Bird Surveys and sophisticated climate models to predict how birds in the U.S. and Canada will react to climate change. The work defines the climate conditions birds need to survive, then maps where those conditions will be found in the future as the Earth’s climate responds to increased greenhouse gases. These models should be included in the analysis of current and future impacts in the DEIS. Available at: www.climate.audubon.org.

those impacts must be prioritized. In addition, mitigation that provides for protection, creation, or restoration of habitat for species that are impacted on the population level in their breeding and wintering grounds should be analyzed and included in the environmental review. The Service should clearly define a “population” in light of recent advancements in defining distinct populations through genetics and isotopes.

Proven Conservation Measures and Process for Identifying New Measures – Identification of proven, science-based conservation measures that increase the viability of populations of birds protected under MBTA, especially Birds of Conservation Concern,²⁶ including protection, creation, or restoration of their wintering or breeding areas if they are migratory. Prioritization of measures should be analyzed, considering those with the highest conservation gains, and methods for ensuring that conservation measures are linked to the species being impacted.

Approved Mitigation Measures – Incorporation of a detailed list of mitigation measures with a science-based conservation benefit that are proven to provide a measurable conservation outcome by flyway and guilds of birds protected under the MBTA. Mitigation measures should include avoidance, minimization, and compensatory mitigation and discussion of determining appropriate use and relevance to particular scenarios (mitigation equivalency). Mitigation should be considered for all expected impacts, including direct mortality, collision, and habitat loss and degradation, and the scope of the mitigation requirements should correlate to the level of impact. Processes should also be established for updating and approving new mitigation measures, as well as conducting effectiveness monitoring.

Monitoring Requirements – While we agree with the assessment that monitoring should not be overly burdensome, or in other words commensurate with expected impacts, we also note that some degree of monitoring must be required to ensure that the conservation outcomes and standards are being met through each element of the authorization program. We suggest that the Service consider scientifically defensible pooled or regionally-based monitoring efforts at the flyway or landscape scale, with prioritization given to sensitive habitats and Birds of Conservation Concern.

Economic Benefits and Ecosystem Services – Incorporate analysis of economic benefits associated with migratory birds as part of the rulemaking and program. One of the primary rationales for the passage of the MBTA was the recognition that birds provide people with critical ecosystem services that benefit our communities, industries, and economy. As an example, birds benefit agriculture, forestry, and our communities through the consumption of vast number of insect pests, which provides a free service to farmers and foresters, reduces the need for pesticides, and improves the quality of life in our communities. Birds provide many additional benefits and ecosystem services, including invasive species control, seed dispersal, egg dispersal, pollination, scavenging, nutrient dynamics, and more. They also provide a valuable role for people by serving as indicators of ecosystem health.

In addition to the economic benefits that result from ecosystem services, the presence of birds contributes to our economy through recreational spending, consumer purchasing, subsistence, and more. Healthy populations support opportunities for birdwatchers and sportsmen, and greater spending on these activities. As FWS has documented, birdwatching is big business. According to the Service, birdwatching has a total economic output of \$107 billion and is associated with 666,000 jobs in total,

²⁶ U.S. Fish and Wildlife Service. *Birds of Conservation Concern 2021*. 48 pp. Available at: <https://www.fws.gov/migratorybirds/pdf/management/birds-of-conservation-concern-2021.pdf>.

resulting from direct expenditures of \$41 billion annually, and leading to \$31.4 billion in employment income, and \$13 billion in state and federal tax revenue.²⁷

Conclusion

Thank you for the opportunity to comment on this docket and for the Service's efforts to engage stakeholders and consider a range of approaches thus far. Our organizations are fully committed to working with the Service, industries, and other stakeholders to identify and incorporate a collaborative, legally sound, and scientifically credible framework for addressing authorizations for incidental take under the MBTA and to above all, provide meaningful benefits to migratory birds. Please do not hesitate to contact us for any additional information or clarifications.

Thank you for your consideration of these comments.

Sincerely,

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Natural Resources Defense Council

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²⁷ Birding in the United States: A Demographic and Economic Analysis Addendum to the 2011 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation. Available at: https://www.fws.gov/wsfrprograms/Subpages/NationalSurvey/nat_survey2016.pdf.