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Public Comments Processing
Attn: FWS–HQ–MB–2018–0090
U.S. Fish and Wildlife Service
MS: JAO/3W
5275 Leesburg Pike
Falls Church, VA 22041-3803

Subject: Regulations Governing Take of Migratory Birds; Delay of Effective Date

Summary of Comments

The Western Section of The Wildlife Society (TWS) requests that the United States Fish and Wildlife Service (Service) rescind the Final Rule published January 7, 2021, regarding the Migratory Bird Treaty Act (MBTA). Allowing the Final Rule to go into effect is contrary to the intent of the MBTA, as evidenced by the court vacating Solicitor's Opinion M-37050 and decades of enforcement of incidental take protections. Allowing the Final Rule to go into effect would result in the significant loss of migratory birds and may violate the Migratory Bird Treaty agreements.

The Basis for Comments by the Western Section of the Wildlife Society

TWS, founded in 1937, is a non-profit professional society representing wildlife biologists, managers, and educators dedicated to excellence in wildlife stewardship through science and education. Our mission is to inspire, empower, and enable wildlife professionals to sustain wildlife populations and habitats through science-based management and conservation. The Western Section of TWS represents more than 1,000 professional wildlife biologists residing in Nevada, California, Hawaii, and Guam. Our members have extensive experience in addressing MBTA compliance for take of migratory birds under both the previous and current contested interpretations of the definition of take under the act. We believe that our professional training and experience provides a strong basis for evaluating the appropriateness of the Final Rule which would codify the court vacated Solicitor's Opinion M-37050 regarding prohibitions under the MBTA and the environmental consequences of implementing the Final Rule.

Responses to Specific Information Requested

USFWS specified information that it was seeking in considering the proposed regulatory changes to the MBTA. We have addressed many of these items in this and our previously submitted comments to the original proposed rule in March 2020 and in response to the related Draft Environmental Impact Statement in July 2020. Here we briefly summarize our specific response to these items.

Issues of fact, law, and policy raised by that rule

This and our 16 July 2020 comment letter address facts, laws, and policies in relation to the regulatory proposal. We believe that there are numerous factual errors of omission in the EIS prepared to support the Final Rule. We made a strong case that the law itself and its previous interpretation to address incidental take of birds was well-founded, as shown through successful court challenges to weakening efforts. Eliminating incidental take provisions is likely to create further legal uncertainty and resulting challenges. It also would create numerous policy issues, as its dramatic effects on bird populations will lead to the need for treatment of additional species under existing law (such as the federal Endangered Species Act) and/or development of new policy, in order to avoid or address further bird population declines.

Should the Final Rule go into effect, it would result in substantial declines in bird populations protected under the MBTA, as was acknowledged in the EIS analysis (85 FR 76077, November 27, 2020). Nonetheless, no mitigation measures were identified or analyzed that might avoid, reduce, or compensate for the potential impacts. The EIS stated that the negative effects of the Proposed Action, now Final Rule, promulgating M-Opinion 37050 would be mitigated if states voluntarily choose to pass legislation to protect migratory birds from incidental take. Assuming voluntary action by the states does not qualify as mitigation under the National Environmental Protection Act (NEPA) for federal actions, nor does it meet requirements of NEPA to assess potential mitigation of unavoidable adverse environmental impacts.

Whether the rule should be amended, rescinded, delayed pending further review by the agency, or allowed to go into effect.

We urge the USFWS to rescind the Final Rule, the long-standing interpretation of the MBTA to protect species from incidental take should remain in place. This interpretation is consistent with the outcome of legal challenges to Solicitor's Opinion M-37050 which would have redefined the act. Once the rule is rescinded, we recommend promulgation of incidental take protections and for the USFWS to identify and create a procedure for authorizing incidental take through a permit process and creation of standard measures to be implemented for those actions that would not substantially affect species' regional populations such as nationwide permits for certain low impact actions.

Scope of the MBTA as it applies to conduct resulting in the injury or death of migratory birds protected by the MBTA

The MBTA should apply to all activities that result in injury or mortality to migratory birds, both intentional or incidental. The MBTA originated from a conservation crisis in which migratory birds were being killed for feathered hats, for meat, and for other market goods. Many of the pressures migratory birds face today are not the same

market forces as those that resulted in the enactment of the 1918 MBTA. Today, a host of activities, including residential and commercial development, agricultural conversion, pesticide use, mining, energy and water development and operation, transportation infrastructure and other activities can be significant threats to migratory birds. These activities are certainly necessary to support modern society, but can cause problems for wildlife when regulatory safeguards are not in place. For decades, the MBTA has served to minimize impacts to bird populations while allowing development and other activities to proceed.

A recent comprehensive study led by Cornell University and published in the preeminent journal *Science* concluded that bird populations in the U.S. and Canada have declined by nearly one-third since 1970 (Rosenberg et al. 2019). Today's threats to migratory bird populations result primarily from habitat loss and degradation, as well as from incidental take that occurs under modern commercial activities. For example, an estimated 64 million birds are killed by power lines, five million birds are killed by communications towers, and nearly 600,000 birds are killed by wind energy operations each year as a result of what are otherwise considered legal business operations.

Neonicotinoids and pyrethroids, a new group of insecticides, are causing widespread environmental contamination and dramatically diminishing insect populations that are the food base for many birds, and directly affecting birds (Morrissey et al 2015, Forister et al 2016, Sanchez-Bayo and Wyckhuys 2019). This impact was not analyzed in the EIS, but we noted it in our 16 July 2020 comment letter on the Draft EIS. By relaxing restrictions on incidental take, the Final Rule would inhibit efforts to require safe use of existing harmful pesticides and prevent future regulation of new chemicals in regards to impacts to prey availability, since all effects on birds and other wildlife will be considered incidental.

The EIS acknowledges that adoption of the Preferred Alternative A (now Final Rule) would contribute to the continued decline in bird populations. The magnitude of this effect under Alternative A was not properly quantified or even qualitatively described, which is required to judge the effects of the proposed action. It is contrary to both the intent of the MBTA and the mission of the Service to adopt a program that further contributes to the decline of the North American avifauna when other options to meet the purpose and need are available that would result in less impact or benefits to birds.

The impact of the MBTA rule on our treaty partners

The MBTA of 1918 encompasses conservation treaties with Canada, Mexico, Russia, and Japan and it has been successfully implemented internationally for decades, to the benefit of all treaty partners. No provision in the MBTA distinguishes intentional acts from unintentional acts that kill migratory birds, nor does it limit protections only to those that are not incidental. The restriction of the scope under the Final Rule to remove incidental take protections in the United States will create discontinuities among partners in interpretation of the Treaty. Treaty partners will be harmed, as species that migrate to their lands will be affected by the relaxation of protections by the U.S. This has already led to disagreements among partners as evidenced by the 18 December 2020 public statement issued by Canada's Minister of Environment and Climate Change on behalf of Canada's Government in which they clearly stated that the Migratory Bird Treaty includes incidental take protections.

Therefore, the United States may violate the Migratory Bird Treaty by removing incidental take protections.

The impact of the MBTA rule on regulated entities

Implementing the Final Rule will allow those causing incidental mortality to avoid any responsibility for those effects. That effect on birds could be mitigated while streamlining treatment of incidental take, by carefully designing a permitting program that could provide authorization for incidental take (including nationwide permitting, as is done for Wetlands and Waters of the U.S. under the Clean Water Act). However, the EIS and Final Rule made no attempt to review or implement mitigation measures for the estimated increased impacts, including mortality of migratory bird species.

The effect of the pending litigation on the MBTA rule

Although we are biologists, not attorneys, it is clear that allowing the Final Rule to go into effect will lead to prolonged litigation since the Solicitor's Opinion on which it was based has already been vacated by the courts. That is why we support rescinding the Final Rule and revisiting the process, respecting the public comments received, and selecting an alternative which promulgates incidental take protections under the MBTA, and creation of a permitting process to authorize take that does not significantly affect regional or species populations. This route is likely to lead to cooperation among stakeholders and thereby minimize litigation.

The appropriateness of delaying the effective date of the MBTA rule beyond March 8, 2021.

We believe that delaying the effective date of the MBTA rule is prudent to review these additional comments. The fact that the proposed action did not change in any substantive way following public comment suggests that the comments were not fully considered. Given the widespread belief that the process was unduly influenced by commercial interests, we commend the USFWS for seeking more public input. We expect that there will be a large volume of additional public comments. Obviously under a new administration, the Service has discretion regarding what policies it chooses to pursue, and it should avail itself of this opportunity.

In short, the Service should take the time needed to appropriately review and address these comments. In order to do so, the effective date of the MBTA rule must be extended.

Summary

On behalf of the members of the Western Section of TWS, I ask you to rescind the Final Rule and uphold the spirit of the original treaty to ensure science-based conservation and management of migratory birds. As part of the review of this Final Rule, we also urge the Department of Interior to create and adopt a rule that allows the Service to issue permits for incidental take of migratory birds under the MBTA. Such a process would allow the weighing of the population impacts of proposed actions that result in incidental take; identification of reasonable measures to avoid, minimize, and mitigate for such take; and the issuance of permits that allow legal taking of migratory birds consistent with permit conditions. This should alleviate previous concerns of inflexibility on the incidental take prohibition that has created difficulties for commercial

interests which in some cases resulted in substantial disruptions to otherwise lawful activities even when impacts to migratory birds were of limited or *de minimus* importance. A migratory bird incidental take permitting process would provide both protections for migratory birds consistent with the MBTA and a streamlined process to allow permitted project actions to go forward. This was not properly considered as an alternative in the EIS for the Final Rule. Please see our comments regarding this and other inadequacies of the EIS analysis in our letter submitted on the Draft EIS; the submitted letter is attached.

The Western Section of TWS thanks you for the opportunity to submit comment on the delay and reevaluation of this Final Rule. Please contact Kelly Holland, CWB®, the Immediate Past President and the Conservation Affairs Committee Chair for the Western Section of The Wildlife Society (conservation@twswest.org), with any follow up questions regarding these comments.

Conclusion

I appreciate the opportunity to offer comments on behalf of the membership of the Western Section of TWS. We encourage you to seriously consider our suggestions, modify your proposed approach by fully developing a revised Alternative B, and revise the DEIS and recirculate it for review. We look forward to continuing our involvement in the process of protecting the birds of North America.

Sincerely,



Kelly Holland
Past-President, Conservation Affairs Committee Chair
Western Section, The Wildlife Society

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