June 7, 2021

Public Comments Processing
U.S. Fish and Wildlife Service
5275 Leesburg Pike
Falls Church, VA 22041–3803

Re: Regulations Governing Take of Migratory Birds [FWS-HQ-MB-2018-0090-18943]

The undersigned organizations write in support of the U.S. Fish and Wildlife Service's proposal to reinstate the longstanding interpretation of the scope of the Migratory Bird Treaty Act in regards to incidental take. The proposed rule is an important step towards upholding obligations under the MBTA and the migratory bird treaties it implements, the missions of the Service and the Department of the Interior, and responsibilities to the diversity of stakeholders that benefit from a uniform approach to migratory bird conservation, especially in light of significant declines and threats facing the country's bird populations.

The U.S. Fish and Wildlife Service has a core responsibility to manage and conserve migratory birds on behalf of the American people and treaty partners. While our organizations strongly support an expedient revocation of the January final rule,[1] we also restate our request for additional regulatory action with respect to establishment of an incidental take permitting program. An effective permitting program will provide a conservation-based framework that expands the adoption of best management practices to minimize harm to birds while also increasing regulatory certainty for commercial entities and modernizing implementation of this critical bird protection law.

Our organizations have submitted detailed comments on this docket at each stage of the rulemaking process. We incorporate previous comments by reference here[2], and summarize a subset of such comments below.

In sum, the January final rule stands in clear contradiction to the MBTA's statutory mandate to protect and conserve birds, the broad conservation intent of the four bilateral treaties implemented by the MBTA, decades of administrative policy, the missions of the Service and its programs, the science that demonstrates bird populations are at significant risk, and the widespread public opposition to this policy.

---

[1] 86 Fed. Reg. 1134 (Jan. 7, 2021).

[2] 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); Comments on the U.S. Fish and Wildlife Service's Proposed Rule and Notice of Intent to Prepare an Environmental Impact Statement to redefine the scope of the Migratory Bird Treaty Act, Docket No. FWS–HQ–MB–2018–0090 (March 19, 2020); 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), 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).

Notably, the central legal basis on which it relies – the Jorjani Opinion – was declared unlawful and vacated by the U.S. District Court for the Southern District of New York in August 2020. The Court explained that the "statute's unambiguous text" is in "direct conflict with the Jorjani Opinion." Following this decision, in March 2021, the Interior Department formally rescinded the Jorjani Opinion.

The Trump administration made little attempt to address the multitude of concerns expressed by stakeholders before the publication of the January rule and consequently the rule and associated documents carried forward numerous fundamental flaws. In addition to hundreds of thousands of public comments – with more than 98% of the comments opposed to the rule – unresolved objections by more than 25 states, 30 tribes, three flyway councils, our treaty partner, Canada, and more remain on the record.

In its public webinars in March 2020, the Service informed the public it would consider an alternative that includes a permitting approach. The Service had previously issued a notice of intent to consider an incidental take permitting program in 2015, but the Service removed this alternative from consideration before publishing the DEIS and did not meaningfully consider such an approach or the previous docket for the final rule.[3] Our organizations supported the process in 2015, and numerous stakeholders – including industry representatives – signaled support for the concept of an incidental take permit. This record therefore provides a substantial starting point.

Additionally, permitting under the MBTA is authorized by the statute and an appropriate means to address regulatory certainty, and it would meet the purposes of Executive Order 13186, which directs agencies to address intentional and unintentional take of migratory birds and to avoid and minimize adverse impacts to birds.

Our organizations understand that in order to issue a rule relevant to incidental take permitting the January final rule must be revoked. In the interim, however, we request the Administration reinitiate or reopen the 2015 public scoping process on incidental take permitting, and consider issuing a Notice of Intent to prepare an Environmental Impact Statement on a permitting program.

---

[3] Such omission underlies the unlawfulness of the January final rule, and provides an independent basis for its revocation. Where an agency reverses a prior policy, as the Service did in the final rule, "its reasoned analysis must consider the 'alternative[s]' that are 'within the ambit'" of the prior policy. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020). The Service's January final rule acknowledged that the MBTA "contemplate[s] the issuance of permits," but then dismissed any incidental take permitting alternative on the sole basis that "[n]o regulations have been issued to create a permit scheme to authorize incidental take." 86 Fed. Reg. 1141, 1153. Noticeably lacking was a reasoned explanation for why the agency did not simply follow through with developing such a permitting program to address its purported concerns about regulatory certainty. The Service's failure to consider developing a permitting alternative "alone renders [the January final rule] arbitrary and capricious." *Dep't of Homeland Sec.*, 140 S. Ct. at 1913.

A public announcement of an intent to undergo rulemaking as described through an NOI and scoping period will provide the American public and non-federal stakeholders the time necessary to provide valuable comments and vet any potential obstacles to the success of a permitting program. Additionally, a publication relaying intent for rulemaking will allow members of the conservation community to work with the Administration on a robust framework for implementation of a permitting program and associated mitigation components.

Taking action to secure and improve the Migratory Bird Treaty Act can provide a lasting favorable impact in addressing our biodiversity crisis, while ensuring that there are reasonable and consistent standards for the industrial sector, including for our growing clean energy economy. We urge the Service to pursue regulatory approaches to the MBTA that fulfill its commitments to conservation and provides a durable path forward for the future of this bedrock law, the birds it protects, and the people that benefit from their continued presence.

We are fully committed to working with the Service and other stakeholders on a collaborative process with a strong scientific and legal basis to establish a path forward for addressing incidental take under the MBTA. Please do not hesitate to reach out to us for additional information.

Sincerely,

American Bird Conservancy
Defenders of Wildlife
Humane Society International
Humane Society Legislative Fund
National Audubon Society
Natural Resources Defense Council
The Humane Society of the United States
The Nature Conservancy
The Wildlife Society