The Wildlife Society
Western Section
P.O. Box 6756
Albany, CA 94706
www.tws-west.org

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

Subject: Comments on the Advanced Notice of Proposed Rulemaking and Notice of Intent to Prepare a National Environmental Policy Act Document for Authorizing the Incidental Take of Migratory Birds (FWS-HQ-MB-2021-0105)

Summary of Comments

The Western Section of the Wildlife Society (TWS) applauds the United States Fish and Wildlife Service (Service) for listening to public comment submitted during previous actions regarding take of migratory birds, including by the Western Section of TWS. We welcome that the Service is embarking upon efforts to clarify that incidental take is prohibited by the Migratory Bird Treaty Act (MBTA); codifying the prohibition on incidental take of migratory birds; and developing authorization regulations for the incidental take of migratory birds as a result of specific activities and actions. We look forward to actively participating in the National Environmental Policy Act (NEPA) process. In the following sections, we provide a summary of comments we have submitted on past relevant actions and present information that we request to be included in your preparation of the NEPA document. Specifically, we outline our professional experience with best management practices (BMPs) to avoid and minimize incidental take, present suggestions for permit criteria, support the collection of conservation for incidental take, and make recommendations for analysis under NEPA.

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

TWS was founded in 1937 and 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 over 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. Our professional training and experience provide

a strong basis for providing comments regarding authorization for incidental take of migratory birds, in particular the effectiveness of current BMPs for avoidance and minimization.

Codify Incidental Take Prohibition Under the MBTA

We continue to support codifying incidental take under the MBTA, as evidenced by our public comments on the prior Draft Environmental Impact Statement (DEIS) and Final Rule *Regulations Governing Take of Migratory Birds*. The MBTA clearly states that, "except as permitted by regulations as herein provided,… it shall be unlawful…to "pursue, take, capture, [or] kill... any migratory bird, nest, or egg". No provision in the MBTA distinguishes intentional acts from unintentional acts that kill migratory birds, or limits protections only to those that are not incidental. Codifying this interpretation will provide consistency in application and enforcement of the MBTA.

Regulation of Incidental Take

A General Permit Framework to regulate incidental take is consistent with the goal of the MBTA and would achieve clarity and consistency in enforcement of the MBTA, provide a higher level of protection for bird populations, and could contribute critical funds for improved management and research of migratory birds. A carefully defined and administered system for authorizing incidental take should be beneficial for migratory birds but requires science-based adaptive management to achieve, and demonstrate, success. One consideration for implementation of this program is how the federal nexus is viewed for regulation of the Endangered Species Act. Specifically, will the requirement of a General or Special Permit under the MBTA be considered a federal nexus and allow Section 7 consultation? If so, then the economic analysis should include an evaluation of how this may result in an increase in consultation, which may impact both the permittees as well as the Service.

In the scoping meetings, a 5-year review cycle of the General Permit criteria, BMPs, thresholds, etc. was presented. A commenter in the November 10, 2021, public scoping meeting suggested that at the start of the program the reviews be conducted more frequently, every 2-3 years, to allow for quicker reaction to fine tune the program, then moving to a 5-year interval when the program is established. We support this idea and request that the Service examine this idea further.

We request that the Service compile baseline data on bird populations to detect change as this program is implemented. Without this baseline information, it will be difficult, if not impossible, to determine if populations are being adequately protected and gauge the influence of the permit system. Because birds are conspicuous and easy to identify and count, reliable records of their occurrence have been gathered over many decades in many parts of the world (Rosenberg et al. 2019). A meta-analysis of citizen science data (e.g. eBird and iNaturalist), peer-reviewed publications, and ongoing monitoring data (e.g. MAPS stations, hawk migration counts, and Christmas bird count) could be used for an initial measure and to help identify data gaps.

Best Management Practices to Avoid and Minimize Incidental Take

There are numerous industry standards currently in practice to avoid and minimize incidental take. Some are more effective than others, so scrutiny of BMPs is warranted as part of the analysis.

One of the most effective avoidance measures is to establish and enforce limited operating periods (i.e., avoiding implementation of discrete projects when MBTA-protected birds are present or breeding). However, this is complex in practice since limited operating periods must be species- and geography-specific. Overlap in the protection of nesting birds, migratory stopover use, and wintering birds can result in no, or essentially no, feasible construction window. While preference should be given to avoidance through a limited operating period, we recognize that other BMPs must also be available to address these situations, as well as ongoing sources of incidental take, such as infrastructure. Therefore, we request that the use of limited operating periods be further analyzed as part of permit conditions.

Other BMPs that should be considered for inclusion in the permit conditions are: limits on noise; limits on lighting during and after construction; use of lights to alert birds to obstacles; pre-construction nesting bird surveys paired with no disturbance buffers on nests, roosts, or other sensitive locations; and establishment of protected areas, following the example set by the United States Forest Service's Protected Area Centers.

Avoidance and minimization measures that rely upon deterrents or exclusion of birds covered by the MBTA are standard practice but do not consistently succeed in their stated goals. Therefore, if these approaches are included as activity-specific BMPs in permit conditions, they should be required to be monitored for effectiveness, including take of non-target birds and other wildlife. In addition, they should not be accepted in isolation, but rather implemented in concert with other methods, when feasible.

For this program to be successful, there should be a minimum qualification requirement for personnel conducting field surveys and making determinations. The Service does not necessarily need to review qualifications of personnel; however, minimum qualifications should be defined in the permit or regulations. In addition, permit conditions should include requirements for documenting survey results for submission to the Service to provide data on effectiveness of measures. A lack of post-project (or annual, for ongoing disturbances) monitoring and accountability are short falls of many current practices. Incorporating solutions to rectify a lack of long-term accountability of program success should be investigated during this process.

Criteria for a Permit Exception, General Permit, or Specific Permit

The best available science should be used to inform the criteria that determine if a project qualifies for a permit exception, general permit, or specific permit. We suggest that criteria based upon thresholds of take and activity type be investigated. Thresholds should focus on levels of take as these relate to potential for population declines. Criteria can vary by activity type and location, especially areas in known flyways or habitat types important for wintering or

breeding birds. Monitoring requirements for all levels of permits should be analyzed for cost to project applicants versus the data quality received and its usefulness to the Service for program management. Monitoring data is important for improvement in practices; however, it is acknowledged that the cost of monitoring is high and there are staffing limitations of Service personnel to collect or review all project data. We request the Service review the focus of monitoring data to be collected, ensure that monitoring requirements will be consistent with the stated purpose for data analysis and project types, and consider creation of a web portal to allow for ease in submittal and Service review or analysis of results.

Exemptions should be limited to activities that are not likely to result in levels of take of migratory birds which cause significant population declines, and we recommend this include declines at the local or regional levels. We agree that individual household activities should typically not be subject to permits or fees, but we recommend analyzing where this threshold may change. This could be based on acreage of work to be conducted with a maximum limit (clearing of less than 1 acre versus 20 acres) or location (e.g. infill in urban environments, rural undeveloped habitats, or within a known flyway). However, urban environments shouldn't be dismissed by being categorized as exempt because high-rise buildings or those on waterfronts (especially on migratory pathways) can result in high numbers of bird deaths. Therefore, project type should also be considered in the designations. Projects that fall into the exemption category should clearly have no or extremely low levels of take such that bird populations will not be impacted.

For General Permits, we recommend that projects within this threshold be limited to activities that are known to result in the incidental take of birds but at levels which are not known to cause significant population declines and/or for which implementation of BMPs can minimize take to levels not likely to result in significant population declines. Although the intent of the three permit categories is clear, it may be beneficial to create two classes within the General Permit process. Therefore, we recommend a two-tier General Permit system be analyzed as an alternative. We recommend the first tier include smaller and standard projects for which the minimization measures are clear and known to reduce take. This would be the streamlined, self-registering process that was explained during the public scoping meetings. However, for projects that *may* meet the criteria, but it is not obvious, then review with the Service should be required. This second tier could include projects that are not standard but are small-scale, or occur within known flyways or other sensitive habitats (geographic). Either of these categories may require a short review by the Service to concur with measures. This second tier would be projects for which the Service currently does not require involved project discussion for design, measures, or mitigation. Importantly, for such projects, the Service and not the applicant should make (or concur with) a determination on take levels after implementation of minimization measures. An example distinguishing the two tiers may be a small building near a waterfront undergoing an exterior remodel that can be completed outside of a limited operating period (first tier General Permit), but demolition of that same structure and construction of a new high rise building in the same location would need higher level of scrutiny or measures and fall into the second tier General Permit. We understand that this process will require an additional fee since the Service

must recoup administrative costs, and recommend analyzing two fee levels as part of a two-tier General Permit system.

We recommend analyzing restoration projects as part of the General Permit program regardless of scale, as these should result in a net benefit to migratory birds even if there may be a shift in species composition or short-term impacts during active restoration activities. If a two-tier system is implemented, restoration projects should be considered as part of the first tier to promote streamlined approval.

Location of a project in known flyways, migratory corridors, or sensitive wintering grounds should also be reviewed for general permit status. Projects in these areas during limited operating periods may require a General Permit, but the same activity outside of the limited operating period would be exempt due to implementation of an avoidance-based BMP (i.e. limited operating period) resulting in the lack of potential for significant take.

Specific Permits are recommended to be reserved for those projects that are known or have the potential to result in high levels of take or may significantly contribute to population decline of one or more species. These will require coordination with the Service to find project-specific measures to minimize take, necessitate monitoring to track take levels, and require adoption of an adaptive management plan to allow for adjustments of measures based on monitoring results. Analysis for this permit type should include a fee amount that, at a minimum, ensures the Service can recoup the cost for permit review and incidental take monitoring, and that the fee will still contribute to funding for migratory bird conservation efforts, as activities in this category are most likely to result in high levels of take.

The Service should also investigate the potential to use the permit authorizations to promote proactive actions to avoid and minimize take of birds protected by the MBTA. Perhaps the permit structure could incentivize use of technologies, materials, etc. that minimize incidental take but cannot be required by the regulatory process. For example, a project may require a Specific Permit based upon the developed decision check-list, but voluntary use of materials or design may allow discretionary authority to proceed with a General Permit based upon lowering the predicted incidental take to levels below the Specific Permit thresholds. The permittee would be required to show the Service that their proposal will result in incidental take below the set threshold, collect monitoring data during project activities to substantiate the claims, and the discretionary decision would lie with the Service. Other ideas can be found in our response to “How the Conservation Fee Could be Used to Improve Bird Conservation” below.

<u>Whether the Service Should Consider Compensatory Mitigation or General Conservation Fee</u>
The Service should consider the use of a General Conservation Fee for General and Specific Permits for incidental take of migratory birds. A General Conservation Fee is more appropriate for take of individuals, as compensatory mitigation can replace habitat but not individuals and may result in a piecemeal effort that is less effective for meeting conservation goals. A General Conservation Fee would be able to use collected funds to target conservation actions or

population monitoring at a more appropriate and effective scale. Please also see the following section regarding positive investment of the collected fees.

When developing the General Conservation Fee, we request alternatives be studied using a cost-benefit analysis. We understand that a minimum fee must be charged to cover administrative costs of the program. Additional fees that may be collected should be directed towards benefitting bird conservation, as presented during the public scoping meetings and discussed in the following section. The amount collected to fund additional programs should balance the need to provide the desired conservation impact, and inform program management, but not so great that it becomes a burden on permittees, or that it discourages people from applying for permits.

How a Conservation Fee Could be Used to Improve Bird Conservation

The conservation fee program should place a priority on funding actions that will provide the data necessary to inform a science-based, adaptive management approach to protecting bird populations. First and foremost, baseline data should be compiled for bird population status and trends (see the “Regulation of Incidental Take” section above for example resources). This information is critical for determining the impacts of incidental take. The conservation fees should be used to fund research to answer management questions and to specifically inform “is the program working?” and “is it meeting the stated goals?” It should also be used to promote innovation to reduce incidental take of migratory birds, to further the goals of the program.

As part of the Conservation Fee structure, the Service should explore the opportunity to award credits for voluntary actions to incentivize additional conservation actions. This could be similar to how insurance companies calculate the cost of a policy: there are standard fees for coverage but then discounts are applied for decreasing their risk. This model could be adopted in the calculation of Conservation Fees by awarding credits for voluntary actions that will decrease the likelihood, or amount, of incidental take of migratory birds. For example, construction of a building will require the contractor to obtain a General Permit and pay the associated Conservation Fee. However, the building design specifies that bird safe glass will be used throughout the structure, which cannot be required by the Service but has shown to decrease bird mortality. To encourage the use of this technology, the permittee would receive a credit to be applied toward their Conservation Fee. Of course, if the Conservation Fee is nominal then this credit will not be seen as an incentive, so feasibility needs to be explored in more depth as the fees are established.

Bird conservation could also be improved through the conservation fee program by using a percentage of the funds to create a grant program focused on development of new technologies and methodologies for avoiding and minimizing take of birds. This may further incentivize industry to innovate. The fees could also be used to fund monitoring programs run by the Service to understand impacts of certain industry or project types if monitoring is not to be a requirement for permits. Monitoring is necessary to understand impacts and success of minimization or avoidance measures, and ultimately, the permitting program.

How the Service Should Consider Authorizing Government Entities

When the government entity is a landowner and employs qualified biologists, then the Service should analyze the impacts of delegating authority to the government entity (Federal, State, or Local) to determine if a project is exempt or requires a General Permit. Under the proposed two-tier General Permit system, this delegated authority would extend to self-issuance of permits under both tiers, but reporting to the Service would still be required. The requirement of a qualified biologist is critical for any different treatment of government entities.

Other Economic Information Useful for Setting Required Compensatory Mitigation or a Conservation Fee

As stated previously, we support the collection of a Conservation Fee that balances funding the program, including collection and analysis of population data, without creating an undue burden on applicants. However, if the Conservation Fee is lower than the voluntary implementation of best practices, then the outcome will be counter to the purpose: applicants will choose to pay the lower fee instead of implementing the more expensive avoidance and minimization measures. In addition, the Conservation Fee should be able to provide enough funding to support conservation actions, grants, or monitoring programs to benefit migratory birds. Fees on the lower scale may only be sufficient to cover administrative costs.

We also recommend that a structure for fines be analyzed for non-compliance of permit conditions.

Additional Alternatives to be Presented in the NEPA Document

We encourage the Service to present robust alternatives for analysis in the next phase of the NEPA process.

The alternatives in relation to accountability and population monitoring should include metrics that can meet those goals. For example, the Notice of Intent posting on the Federal Register notes, in the Purpose of Document section, that “the Service could require permittees to report dead birds found during routine maintenance and operation activities rather than requiring an active monitoring program.” We recommend that, in this case, the Service present at least three alternatives for determining incidental take of birds. In the example provided, it would be 1) self-reported dead birds found during routine maintenance and operation activities, 2) high level of effort for active monitoring by qualified personnel, and 3) low level of effort for active monitoring by qualified personnel. We are concerned that relying upon reporting of incidental observations by maintenance and operations staff during routine operations will result in under reporting, but acknowledge that a high scientific survey effort will be cost prohibitive. Perhaps monitoring criteria should be industry specific; for example, incidental take of birds associated with oil pits and ponds may be well documented during routine maintenance and operation activities but studies have shown that it is more difficult to accurately quantify this take at solar and wind energy generation facilities.

The Service presented an industry-specific model in the scoping meetings. We encourage the alternatives to assess other models as well. In our public comment letter in response to the

DEIS for New Regulations Governing Take of Migratory Birds (FWS-HQ-MB-2018-0090-8411) we included the following, which we would appreciate being incorporate here as well:

> Rather than having the process be industry and activity-based, the approach could focus on the magnitude of impacts to affected bird species and the sensitivity of the species to the expected impacts. Species could be assigned to sensitivity classes based on their legal or administrative status (e.g., listed under federal or state Endangered Species Acts), population status (e.g., Service-designated or state lists of Species of Special Concern [e.g., Shuford and Gardali 2008]), and population size and status (e.g., Rich et al. 2004, Pardieck et al. 2019). Criteria could be developed for the acceptable amounts of take that could be sustained for various species, and these levels of take could be covered by regional or nationwide permits (similar to the Nationwide permitting process used in the Clean Water Act). Certain activities could be covered in their entirety or to some threshold level of take in nationwide permits.

Conclusion

The Western Section of TWS thanks you for the opportunity to provide comments regarding the intent of the Service to codify incidental take protections under the MBTA and develop a permitting system. Please contact Kelly Holland, CWB®, the immediate Past-President and the Conservation Affairs Committee Chair for the Western Section of TWS (conservation@tws-west.org), with any follow up questions regarding these comments.

Sincerely,

Kelly Holland, CWB
Immediate Past President and Conservation Affairs Committee Chair
Western Section, The Wildlife Society

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