



# THE WILDLIFE SOCIETY

*Leaders in Wildlife Science, Management and Conservation*

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

Re: Migratory Bird Permits; Authorizing the Incidental Take of Migratory Birds [FWS-HQ-MB-2021-0105]

Thank you for the opportunity to provide comments on the U.S. Fish and Wildlife Service's Advanced Notice of Proposed Rulemaking on the creation of an incidental take permitting program in alignment with the recently affirmed definition of "take" under the Migratory Bird Treaty Act.

Founded in 1937, The Wildlife Society and our network of affiliated chapters and sections represent over 15,000 wildlife biologists and managers, 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 habitat through science-based management and conservation.

The Migratory Bird Treaty Act is a critical tool for bird conservation. More than 3 billion birds have been lost in North America since 1970 and many populations face the risk of continued declines.<sup>1</sup> The MBTA successfully protected bird populations from unregulated commercial trade of the past. Now the Act must help address ongoing human-induced threats such as energy production and utility operations that can harm populations through direct mortality, fragmenting habitat, and disturbance along migratory corridors. The regulation of incidental take, and a permitting program for activities resulting in take, has potential to allow regulatory implementation of the Act that responds to current threats and provides a cooperative approach with federal, state, tribal, and industry partners.

## **General Permitting**

The Wildlife Society supports the U.S. Fish and Wildlife Service's determination that general permitting should be the main approach of an incidental take permitting program. By creating a

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<sup>1</sup> Rosenberg, K. V., Dokter, A. M., Blancher, P. J., Sauer, J. R., Smith, A. C., Smith, P. A., ... & Marra, P. P. (2019). Decline of the North American avifauna. *Science*, 366(6461), 120-124.

set of standards that can be broadly adapted to the needs of permit applicants, the Service will enable stakeholders to be proactive partners in conservation.

**Best Management Practices and NEPA rulemaking** - The compilation of best management practices associated with each general permit submitted should be an early part of the National Environmental Policy Act (NEPA) review process. When publishing its draft Environmental Impact Statement (DEIS), the Service should express an understanding of the potential impacts of the activity and desired effects of best management and mitigation practices for each permit. This should include comports with existing peer-reviewed literature and utilizing input and data from the regulated industry, state and tribal natural resources agencies, non-government organizations and other stakeholders.

The DEIS should also include a compilation of baseline data on affected bird populations, as well as proposed timeframes for update and review of this data as this program is implemented. The DEIS utilized to inform 2020 rulemaking on incidental take was inadequate in evaluating the impacts to migratory bird populations on the preferred action and alternatives.<sup>2,3</sup> In total, discussion on the population-level impacts to migratory bird populations for the preferred alternative amounted to only three paragraphs.

This baseline information, updated alongside each permit extension or renewal application, makes it possible to determine if migratory bird populations are being successfully conserved and that the permitting system is meeting desired outcomes. Government agencies, such as the U.S. Geological Survey and state and tribal wildlife agencies, will be key to compilation of this information.

### **Mitigation and conservation fee structure**

The Wildlife Society is supportive of the U.S. Fish and Wildlife Service evaluating the desired effects of both a mitigation and conservation fee structure for the conservation of migratory species through the NEPA process.

As noted in the Advanced Notice of Proposed Rulemaking (ANPR), the Service is seeking insight into the viability of requiring mitigation practices or the payment of a conservation fee for permit applicants. We recommend that **the evaluation of conservation fees not come at the expense of an opportunity to expand and streamline mitigation practices.** Ideally, mitigation

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<sup>2</sup> U.S. Fish and Wildlife Service. 2021. 50 CFR Part 10; Regulations Governing Take of Migratory Birds; Final Rule. Federal Register, Washington D.C. Docket No. FWS-HQ-MB-2018-0090

<sup>3</sup> TWS 2020 comments in reference to Docket No. FWS-HQ-MB-2018-0090

conducted firstly through avoidance and minimization of conflict with the resource of concern will be required to be outlined by any general permit applicant.

When determining how to request and assess mitigation practices, the Service will have a prime opportunity to evaluate mitigation practices alongside the agency's broader mitigation policy. **We strongly urge the Service to take advantage of this rulemaking process to coordinate an agency-wide review of the U.S. Fish and Wildlife Service's mitigation policy.**<sup>4</sup> A Service-wide review of existing policy will have the benefit of promoting both broader stakeholder engagement and regulatory certainty for those stakeholders already interacting with requirements associated with other laws such as the Endangered Species Act.

For many regulated industries, the most effective avoidance measures will revolve around establishing and enforcing limited operating periods, avoiding implementation of projects when birds protected by the MBTA are present. **However, this is not as simple in practice, as limited operating periods will need to be tailored to species, time, and place.** In complex systems there can be overlap in protection of nesting birds, migratory stopover use, and wintering birds to the extent that there is no feasible operation window. While preference should be given to avoidance and minimization through a limited operating period, **we recognize that other best management practices alongside the ability to pay an associated conservation fee may also be required.**

**Conservation fee structure** - Conservation fees collected from permit applicants should be set at a rate robust enough to ensure mitigation practices are firstly considered and adequate funds for migratory species conservation efforts are levied. **Such fees should not be used for research and monitoring of effectiveness of the program.** Instead, research and monitoring should be accounted for through the cost of a separate permit application fee.

### Permitting Exemptions

The Wildlife Society is supportive of certain exemptions to the permitting program to ensure the Service's ability to manage and appropriately scale the program. Apart from government operations, we consider all of the industrial activities outlined in the ANPR, such as solar power generation and communications infrastructure, to be of highest need, and support the Service evaluating the efficacy of these industry-specific permits through the NEPA process. Each year,

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<sup>4</sup> U.S. Fish and Wildlife Service. 1981. 46 FR 15. Mitigation Policy; Notice of Final Policy. Federal Register, Washington, D.C.

an estimated 64 million birds are incidentally killed by power lines, with an additional five million killed by communications towers and nearly 600,000 by wind energy operations.<sup>5</sup>

**Noncommercial activities** - The ANPR states the intent to evaluate the exemption of noncommercial activities from regulation. This is likely appropriate in individual activities such as homeowner operations. However, the definition of homeowner activities as outlined in the ANPR needs to be further refined in rulemaking. An individual household should generally not be regulated under permitting. However, a threshold should be determined as to when permitting becomes appropriate and applicable. This threshold can potentially be based on location (e.g. developed vs. undeveloped landscapes, or within a known migratory corridor) or size of operation (e.g. number of acres being affected). Any such exemptions should be determined with buy-in from state and tribal wildlife agencies and local governance structures, which will have a clearer understanding of on-the-ground conditions.

**Federally Funded Conservation Activities** - Federally funded and managed conservation activities, such as those coordinated by the USFWS Wildlife and Sport Fish Restoration Program and Farm Bill Title II Conservation programs managed by the U.S. Department of Agriculture's Natural Resources Conservation Service and Farm Service Agency, should be considered for exemption from take and associated permitting. These programs, conducted in partnership with state and tribal fish and wildlife agencies and voluntary enrollment by private operators, already provide eligibility and reporting requirements to determine effective use of program expenditures, and should not be considered a high priority for regulation. Other natural resource programming, particularly grant programming allocated under Function 300 budgeting, should also be evaluated to determine additional funding mechanisms appropriate for exclusion.

**Agency Activities** - The Wildlife Society is supportive of the Service evaluating direct consultation and Memoranda of Understanding (MOUs) with federal agencies apart from the general permitting framework as noted in the ANPR. Habitat management activities deployed by agencies such as the U.S. Department of the Interior, U.S. Department of Agriculture and the National Oceanic and Atmospheric Administration already provide for evaluation of impacts through the NEPA process and existing permitting programs. The NEPA process also allows for the use of categorical exclusions, an extremely time sensitive tool that can allow agencies to quickly address natural resource challenges such as emerging invasive species or spread of an infectious disease.

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<sup>5</sup> Loss, S. R., Will, T., & Marra, P. P. 2014. Refining estimates of bird collision and electrocution mortality at power lines in the United States. *PLoS one*, 9(7), e101565.

Activities conducted or fiscally supported by state and tribal fish and wildlife agencies should also be considered for direct consultation and MOUs. State and tribal fish and wildlife agencies are intimately involved in the management of wildlife populations and their habitat. These agencies should not be deterred from having their desired management impact for fish and wildlife species as a result of conformance to general permitting.

Habitat restoration and management activities conducted at the state and tribal level are also of direct impact and benefit to many MBTA-listed species. Of these species, many states have considered overlapping conservation protections and associated regulations. An approach that allows for flexibility in interacting with state and tribal wildlife agencies will ensure broader stakeholder engagement and expertise that allows for expanded vetting of desired conservation outcomes.

### **Reporting Requirements**

In the Advanced Notice of Proposed Rulemaking, the Service states that they "could require permittees to report dead birds found during routine maintenance and operation activities rather than requiring an active monitoring program." The Wildlife Society urges reassessment of the viability of an active monitoring program and the inclusion of associated reporting requirements in implementation of general and specific permits.

Underlying data will be required in order to "assess the efficacy of permits provided" as outlined in the ANPR. **For both individual and general permits, reporting of take that occurred and adherence to monitoring practices outlined in the permit should be provided in order to renew a permit type.** This information should not be required at the time of the original permit application in order to provide stakeholders time to set up monitoring. This baseline information should instead be derived from coordination with the U.S. Geological Survey, state and tribal wildlife agencies, and peer reviewed literature as outlined above.

To better incentivize an active monitoring program, which may be cost-prohibitive to some permittees, the Service can consider an incentive-based approach that cuts costs of compliance elsewhere in the permitting process when permittees follow monitoring guidelines as provided by the Service. These guidelines can include desired qualifications of personnel conducting monitoring, as well as uniform guidance on collecting and sharing data with the Service and relevant state and tribal wildlife agencies.

**However, any incentive should not come at the cost of mitigation requirements or conservation fees assessed.** A reduced permit application fee is one potential avenue. Any

reduction in cost for an applicant can be factored into the overall cost of conducting the Service's program in order to ensure the Service is fully recouping costs. As mentioned above, the permit fee should also account for the cost of wide-scale monitoring of the efficacy of permit implementation.

**Enforcement** - Though broad-scale monitoring and enforcement of permit requirements may not be logistically or financially feasible, the Service should ensure resources are available to follow-up on complaints of non-compliance prior to the expiration of a permit. Cost of enforcement should also be assessed and included within the cost of permit fees.

In order to create an enforcement program capable of overseeing compliance, state conservation law enforcement programs should be consulted and coordinated with. The Service's on-the-ground law enforcement capacity and presence will vary by region, and state-based conservation enforcement will be vital to ensuring adequate coverage. Discussions such as these can be included in larger agency-to-agency coordination through the utilization of MOUs discussed above.

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The Wildlife Society thanks the U.S. Fish and Wildlife Service for the opportunity to comment on the Advanced Notice of Proposed Rulemaking and for their work in crafting regulations to meet the needs of migratory species of birds and the professionals that work to conserve them. We look forward to further engagement on this rulemaking, particularly in the drafting and advancement of the draft Environmental Impact Statement set for next year. Given the scope of this permitting program, we encourage the Service to provide adequate time for DEIS review and evaluation, with a comment period of at least 90 days.

Any questions on these comments can be directed to Caroline Murphy, government relations manager, at [cmurphy@wildlife.org](mailto:cmurphy@wildlife.org) or 301-968-1903.

Sincerely,



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President, The Wildlife Society