



Bringing back the birds

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U.S. Fish and Wildlife Service Public Comments Processing
Attn: FWS-HQ-MB-2021-0105
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Dear Jerome:

Thank you for the opportunity to comment on this notice of proposed rulemaking to further the conservation of migratory birds. We offer our full and enthusiastic support for enshrining coverage of MBTA for incidental take, and initiation of an associated permitting system. We greatly appreciate the leadership of the U.S. Fish and Wildlife Service in advancing these important protections.

We fully support the Service expeditiously developing regulations authorizing an incidental take permitting system for industrial activities known to cause significant bird mortality. Beneficial management practices (BMPs) to reduce bird mortality have been developed for many such industries, and we recommend that application of these beneficial management practices be a requirement to receive a general permit under a two-tiered permitting structure.

A permitting program for incidental take can enhance bird conservation by expanding the use of beneficial practices that avoid, minimize, and compensate for impacts to birds. A permitting system can also provide industry increased certainty under the law without substantial administrative burden, and establish clear and consistent guidelines for meeting obligations under the MBTA.

Specific / individual permits for large-scale developments that fall outside of the general permit framework are also needed. To address that, we commend and support the process for specific permits described by the Service in the notice of proposed rulemaking. Creation of additional general permits, such as one that addresses lighting impacts to birds, may alleviate the need for some individual permits.

We recommend both general and individual permits include a “best available technology” or “best available science” requirement for operational beneficial practices to ensure that permittees utilize the most effective technologies available to avoid or minimize take and to account for technological improvements.

Exceptions to MBTA's prohibition on incidental take should be limited to individual non-commercial activities such as driving a car. As the Service notes, as new beneficial practices are developed, there may be additional opportunities to reduce incidental take through the general permit process.

In regard to exceptions question (b), rather than allowing exceptions for established practices, we recommend providing general permits for these established activities to ensure that beneficial practices are actually being used and implemented, and to be eligible for improvement as improved practices are developed over time. We support the Service's proposed outline for general permits which:

"could be authorized through a registration system. An entity would register, pay a required fee, and agree to abide by general permit conditions. These permit conditions may be activity-specific (i.e., certain industries would have their own specific general permit with conditions tailored to that industry) and require certain beneficial practices. A general permit would be effective upon submission of the request and would not require Service staff review prior to being effective. General permit conditions would not be customized to the applicant. The general permit would include reporting requirements."

In general, we agree that the Service should not need to specify a number of birds authorized or specify species of birds authorized in the permit conditions for the registration system. However, additional permit standards and monitoring requirements should be required for specific instances. For example, specific activities that would negatively impact migratory bird populations of conservation concern like eastern Golden Eagles and seabirds at times of season where large numbers of birds are present and vulnerable to impacts.

Infrastructure designs and technologies already exist that effectively reduce incidental take, like turning off the steady burning lights on communications towers. These could be appropriate criteria for a general permit. Attached is American Bird Conservancy's 2020 DEIS comment that provides recommendations regarding towers, power lines, and wind energy development, and a joint letter with National Audubon Society regarding seabird bycatch reduction.

We also wish to bring to your attention the attached letter from the Edison Electric Institute, International Brotherhood of Electrical Workers, and a coalition of conservation groups including American Bird Conservancy. As the letter indicates, there is agreement that a general permitting system can and should advance bird conservation as well as support the expansion of renewable energy.

For example, the available beneficial practices for power lines found in the Avian Power Line Interaction Committee guidelines, and for wind energy in the U.S. Fish and Wildlife Service Land-Based Wind Energy Guidelines offer a solid foundation with which to address incidental take from renewable energy development through incidental take permits. For tall towers, guidance from the Federal Communications Commission and U.S. Fish and Wildlife Service is already being implemented at considerable cost-savings to tower operators who simply need to replace steady-burning lights with flashing red lights.

We disagree with the Service's proposal to except Federal agencies with a current, signed Memorandum of Understanding (MOU) with the Service for the conservation of migratory birds from needing a permit for most activities. While the content of the existing MOUs are effective guidelines, they are not required internally by the agencies, and are therefore used on an inconsistent

basis, and in some cases not at all. Given the ongoing declines of birds and the potentially significant impacts of federal activities, these proposed exceptions should not be granted.

Any permitting program should consider the take of birds, nests, and eggs. This may require permitting decisions of some activities reasonably certain to take nests and eggs even if those actions may not lead to individual bird deaths or takes. Additional general permits to consider analyzing in a draft environmental impact statement are airport management, vegetation management, and mining claim markers which can entrap birds and other wildlife.

We support the Service implementing a conservation fee structure to fund programs to benefit birds as part of a tiered system. Activities with smaller levels of harm (i.e., those under a general permit) could be addressed through the conservation fee, and permittee-responsible compensatory mitigation provided for specific / individual permits. Conservation fee funds could be administered through Neotropical Migratory Bird Conservation Act grants, or a renewable energy compensatory mitigation fund administered by National Fish and Wildlife Foundation. Funding levels should be based standardized formulas based on anticipated impacts.

There are some instances where mitigation banking may be the appropriate means of providing compensation. These include:

- Offshore wind energy facilities, where facilities are in many instances clustered, making it difficult to separate impacts and project-specific compensation measures;
- Bald and Golden Eagles –Mitigation banks must be expanded to provide in-population incidental take compensation, e.g., for the eastern Golden Eagle;
- For energy development on public lands, including renewables, where goals for development capacity have been established without commensurate protections and compensation for impacts to wildlife.

Finally, we appreciate that the Service is anticipating the need for regular review of permit conditions and regulations. New beneficial practices that reduce bird mortality, which often result in increased efficiencies and associated cost-savings to regulated sectors, will continue to be developed.

We recommend that every five years the Service conduct a status assessment on existing general permits and that the term of general permits be at least ten years to provide regulated sectors a reasonable expectation about what beneficial practices are to be required. We recommend a process allowing new general permits to be petitioned for by the public, or initiated through a notice of proposed rulemaking and public meetings by the Service.

Thank you again for this opportunity to comment. We look forward to working with the Service on a proposed rule to establish general incidental take permits.

Sincerely,

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