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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

Submitted via regulations.gov

Regarding: Incidental Take of Migratory Birds [Docket No. FWS-
HQ-MB-2018-0090]

The Ornithological Council is a consortium of 10 scientific societies of ornithologists; these societies span the Western Hemisphere and the research conducted by their members spans the globe. Their cumulative expertise comprises the knowledge that is fundamental and essential to science-based bird conservation and management.

We appreciate the opportunity to provide additional comments regarding the final rule defining the scope of the Migratory Bird Treaty Act (MBTA) published on 7 January 2021.

The Ornithological Council previously submitted comments to this docket in February 2020 (in response to the scoping notice) and in July 2020 (in response to the Draft Environmental Impact Statement). In those comments, we stressed that, regardless of any uncertainty around the scope of the MBTA as it pertains to incidental take, the fulfillment of the U.S. Fish and Wildlife Service's (hereafter Service) trust responsibility must favor protection of migratory birds unless the law clearly states otherwise. Certainly, nothing in the MBTA *prevents* the Service from taking measures to protect migratory birds from activities that may result in incidental take, especially given the Service's overarching responsibility under the Act to protect and conserve migratory birds.

Furthermore, the responsibility of protecting migratory birds does not derive from the MBTA alone, it is the Service's very mission: working with others, to conserve, protect and enhance fish, wildlife, and plants and their habitats for the continuing benefit of the American people.

Now that implementation of the final MBTA rule has been delayed for 30 days and the Service is soliciting additional comments on issues of fact, law, and policy raised by the rule, as well as feedback

regarding whether the rule should be amended, rescinded, delayed, or allowed to go into effect, we would like to take this opportunity to emphasize key points from our previous comments.

In our scoping comments, the Ornithological Council stressed the difficulty of truly assessing the impact of the new rule. To do so would require knowing how all possible activities affect each population of each migratory bird species across locations and times. This is an enormous amount of information to obtain and evaluate, and to update at regular and fairly frequent intervals. Established biological principles and methods would need to be used to determine how many birds of each species are likely to be killed by a particular type of activity in a given place. It is biologically meaningless to look at the impact of incidental take in the aggregate, i.e., as the total number of birds of all species or even of a single species that would be killed nationwide. Even if the overall number is a small fraction of the total number of migratory birds in the country, there will be differential impacts on various species, affecting both local and nation-wide populations of those species.

Simply put, for most species of birds protected under the MBTA, the Service does not have the information it needs to assess the impact of the MBTA rule. As we elaborated on in our July 2020 comment, the analysis contained in the Environmental Impact Statement was inadequate; it did not rely on reliable population data for our country's migratory birds and it did not sufficiently analyze the wide-ranging and deleterious effects that the proposal could have on birds.

Our previously submitted comments offer more detailed guidance about the types of information that would be required for a thorough environmental analysis of an incidental take policy. We encourage the Service to consider resuming the practice used by the agency prior to November 2016 that entailed interacting with industry to identify best practices to reduce or avoid avian mortality, conditioning avoidance of enforcement upon participation in the process and implementation of such practices. Our February 2020 comments provide further detail about this recommendation.

As the agency charged with protecting migratory bird populations, the Service must develop and implement policies that are scientifically defensible, and that can be evaluated and adjusted as needed. In our previous comments, we have outlined the information and analyses that will be essential to meeting these standards. We have also suggested an alternative that would give the Service and industry the opportunity to work together to reduce or eliminate avian mortality while affording the Service the means to assure compliance.

Thank you for delaying implementation of the MBTA rule and providing another opportunity for public comment. We hope that these comments prove useful to the Service in its effort to develop an incidental take policy that is biologically defensible and feasible.

Sincerely,

A handwritten signature in cursive script that reads "Laura M. Bies".

Laura M. Bies

Executive Director