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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.

Preface

The Ornithological Council previously submitted comments to this docket in February 2020 (in response to the scoping notice), July 2020 (in response to the Draft Environmental Impact Statement), and February 2021 (in response to the reopening of the comment period). In those comments, we emphasized 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.

We thank the Service for its proposal to revoke the January incidental take rule, and for the opportunity to provide comments on that proposal.

Responses to questions posed by the Service

In the Federal Register notice published on May 7, 2021, the Service asked for feedback on 4 questions:

1. Whether the Service should revoke the rule, and why or why not;
2. The costs or benefits of revoking the rule;
3. The costs or benefits of leaving the rule in place; and
4. Any reliance interests that might be affected by revoking the rule, or not revoking the rule.

The Ornithological Council has the following feedback to offer on the first three items.

1. Whether the Service should revoke the rule

As noted in our previously submitted comments, the Ornithological Council strongly recommends that the Service revoke the final rule and return to the previous interpretation of the MBTA. The environmental analysis performed on the possible effects of the incidental take rule was simply insufficient to provide a full understanding of the rule's effect. A change of this magnitude in the implementation of the MBTA simply must be accompanied by a scientifically defensible environmental review.

We encourage the Service to resume 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.

2. The costs or benefits of revoking the rule

The benefit to migratory birds themselves of revoking the incidental take rule is clear: invaluable protections will remain in place for our country's birds. We understand that one purpose of the incidental take rule was to provide additional regulatory certainty for industry and others; however, this must not come at the expense of migratory birds. The benefits to migratory birds of revoking the rule clearly outweigh any costs related to doing so.

3. The costs or benefits of leaving the rule in place

The cost of leaving the rule in place are equally evident. A blanket exemption for the classes or types of activities that would be covered by the incidental take rule, most of which are already known to cause substantial mortality, is clearly contrary to the Service's responsibility to conserve our nation's birds. As noted above, the environmental review of the incidental take rule was insufficient and so the magnitude of the true cost of leaving the rule in place cannot even be known.

Conclusion

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. We encourage you to reference those comments as you consider the path forward.

Thank you for proposing to revoke the incidental take rule and for 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