

The Ornithological Council



PROVIDING
SCIENTIFIC
INFORMATION
ABOUT BIRDS

Association of Field Ornithologists

Birds Caribbean

CIPAMEX: Sociedad para el Estudio y
Conservación de las Aves en México

Neotropical Ornithological Society

North American Crane Working Group

Pacific Seabird Group

Raptor Research Foundation

Waterbird Society

Wilson Ornithological Society

Laura Bies
Executive Director
649 Morton Pl NE
Washington DC 20002
202-905-9141
laurabiesoc@gmail.com
BIRDNET.org

1 December 2021

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

Submitted via regulations.gov

The Ornithological Council is a consortium of scientific societies of ornithologists; these societies span the Western Hemisphere and the research conducted by their members spans the globe. We applaud the U.S. Fish and Wildlife Service for revoking the previous administration's interpretation of the Migratory Bird Treaty Act regarding incidental take and thank you for taking this first step to balance the long-term conservation of migratory birds while also providing needed certainty to the regulated community.

The Ornithological Council has commented extensively in the past on the regulation of incidental take under the MBTA and would like to take this opportunity to provide input to the USFWS that will assist the agency in develop a reasonable, feasible approach to authorizing incidental take of migratory birds. Below we provide comments on both the proposed regulation to authorize incidental take and the environmental review that will be needed to develop that regulation.

I. The proposed regulation of incidental take

The Federal Register notice asks for public input regarding whether and how the USFWS could authorize incidental take and under what conditions or circumstances. We strongly encourage the agency to move forward with developing a system of regulations for authorizing incidental take. The key value of the authorization concept is the potential to engage each industry as a whole and each corporation individually to promote meaningful, predictive research that will identify successful ways to reduce the level of incidental take and to identify compensatory mitigation that actually counteracts the level of take. There are currently significant gaps in our knowledge about the underlying causes of mortality associated with various activities and equally large gaps in our development and assessment of effective mitigation measures that need to be addressed.

A. USFWS capacity

We are concerned about the capacity of the USFWS to issue and manage the new authorizations. This new policy will require an enormous commitment of staff time by the same staff members who already issue other permits. The capacity of the regional permits staffed is already stretched thin. Each region manages several thousand active permits and processes thousands of new applications each year. To sustain an adequate staffing level to issue and manage these permits without affecting the issuance of other permits would necessitate the addition of several full-time, permanent employees. We worry that if the USFWS does not add a sufficient number of new staffers, the research permits needed for ornithological research will be delayed. At no time should the USFWS divert other permit staff to handle incidental take authorizations. The fees paid by researchers for their permits should not be used to support or subsidize the incidental take authorizations of for-profit industries.

We strongly urge the USFWS to hire dedicated, specially trained staff with advanced degrees in biology and specialized knowledge in population biology to issue and manage these permits. These staffers should work together across regions to assure that they remain current on research, the results of monitoring, and other aspects of the incidental take authorization program.

We are also concerned about the capacity of the USFWS to conduct or oversee the necessary monitoring to ensure compliance and assess results of mitigation measures. It seems unlikely that the USFWS will have the capacity to collect and analyze any data submitted by permittees, much less conduct independent data collection, given the current funding levels appropriated by Congress. It also seems unlikely that the USFWS will be able to fund contracts for data analysis or obtain those services from the U.S. Geological Survey. If the USFWS lacks the capacity to assure collection of complete, accurate data on level of take and associated matters and lacks the capacity to assure timely evaluation of the data, the level of take under the authorizations may prove to be biologically unsustainable. The USFWS should prepare a detailed analysis of the staffing levels and funding needed to achieve adequate monitoring of authorized facilities and level of take.

B. Conservation fee structure

The Ornithological Council notes that annual contributions to a research fund would advance the research needed to lessen impacts. Such a system could eliminate the actual bias or appearance of bias that results from industry-funded research because the funds would flow to a neutral intermediary, eliminating any potential influence by the funder. It would also help to direct funding to highest priority information needs. Though we have great respect for our colleagues in many of the consulting firms who conduct research under contract to industry, they cannot conduct research that industry does not wish to fund. As a result, there are gaps in the research, including a dearth of landscape-wide, predictive research that would help determine what “proper siting” actually means in the context of wind energy, for instance. Finally, the existence of a research fund could stimulate collaborative efforts among disciplines that might not otherwise work together. For instance, experts in avian perception might work with experts in engineering to develop systems that would help avert collisions. Precedent for this type of condition exists in the Bald and Golden Eagle 30-year permits, which carry an administrative fee of \$8,000, paid every five years [50 CFR 22.26]. If an administrative fee is imposed on the incidental take authorizations, some of this funding could be allocated to a research program or a separate research surcharge could be imposed.

C. **Public access to compliance and monitoring data**

We encourage the USFWS to ensure that any reports or studies prepared by researchers on contract to the permittee or employed by the permittee are submitted to the USFWS and made publicly available (subject to the redaction of the identity of specific sites or ownership of facilities, unless authorized by the permittee), perhaps through a standard condition on each authorization. All data collected by independent monitoring efforts should also be made publicly available.

D. **Peer review**

The Ornithological Council recommends that the USFWS, consistent with the peer review bulletin issued by the White House Office of Management and Budget (2004) and the USFWS peer review guidelines [2007; revised 2012], arrange to have all studies upon which it relies to establish take limits and mitigation and compensatory measures or any other aspect of the authorizations subjected to peer review.

E. **Conditions on authorizations**

Below we offer several suggestions for issues that should be considered in the context of developing standard conditions to accompany any authorizations for incidental take under the forthcoming policy.

1. **Access for research.** The USFWS should address the need for access by scientists to facilities covered by the authorizations in order to conduct independent research. We encourage the USFWS to require that permittees allow scientists access to their properties to conduct research on the efficacy of existing mitigation measures or to test new methods to reduce the impact of the activity on MBTA species, as a standard, non-negotiable condition of any authorization.
2. **Monitoring.** To determine if permit conditions are being met and to determine the extent of take, adequate monitoring is needed. Monitoring can also identify patterns that merit investigation, such as temporal changes in the number of birds or species killed. We therefore strongly urge the USFWS to include a standard condition that requires independent monitoring (similar to the NOAA Fisheries Observer program) with mandatory reporting of data and the public sharing of those data (subject to the redaction of the identity of specific sites or ownership of facilities, unless authorized by the permittee). The monitoring should be species-appropriate and conducted during both migration and non-breeding seasons. Monitoring during the breeding season can be far more difficult and has the potential to disturb breeding birds but where possible, it should also be conducted.
3. **Amendments and adjustments of take.** A new incidental take authorization scheme has the real potential to accelerate the research needed to determine effective mitigation and compensation measures. Given that most of these permits are likely to have a duration of decades, it is critical that they include a standard condition that the USFWS can amend existing authorizations to require the use of new mitigation and compensatory measures.

The USFWS will also have to address the fact that while any one holder of an authorization or even all authorized facilities may be complying fully with the conditions of the

authorization and may not have taken more birds than authorized, populations of one or more species in that region may decline to an extent that the overall level of take cannot be sustained. In those cases, it may be necessary to adjust authorized levels of take downward in order to protect populations. The same problem arises when additional authorizations are issued. Presumably, the overall level of take that is biologically sustainable (taking into account all sources of annual mortality) would be allocated among the authorization applicants over the first few years. If – as may happen with alternative energy – the number of facilities drastically increases, how then can new authorizations be issued? If the capacity of existing authorized facilities increases, the authorization may need to be amended to increase the level of authorized take. How would that affect other existing authorizations in the region?

II. The scope of the NEPA Review

In order for the USFWS to conduct the necessary environmental review of the proposed rule, as required by the National Environmental Policy Act, the agency must consider the population-level impacts on birds protected by the MBTA, including the nature and extent of the biological data, research, and monitoring that would be needed to establish take limits.

We are confident that the USFWS has the requisite expertise or access to expertise to set take limits based on population status and trends. Indeed, the USFWS has used that expertise for decades to establish annual hunting limits for the National Wildlife Refuges and jointly with the Flyway Councils to establish hunting limits for migratory birds. There is no doubt that the USFWS understands just how critical it is to have reliable population status and trends estimates and what kind of survey and monitoring work is needed to obtain that information. Further, the USFWS certainly appreciates the biological expertise needed to analyze those data and select appropriate models to determine a sustainable level of take of each hunted species each year in each flyway. Though the purpose of incidental take differs from the purpose for hunting, the information needs and process are largely the same.

Our purpose in reviewing that information here is to elucidate the type of information and the level of detail that the PEIS or specific authorizations should include. Although we are confident in the agency's ability to set take limits based on population status and trends, we remain concerned that the requisite information to set those limits is simply not available at this time. However, through cooperative efforts with the industries to be covered under this policy, it could be obtained through the authorization process.

A. Baseline information about population status and trends, life history traits, migration routes and timing, habitat needs, and reproductive behavior

To adequately protect migratory bird populations, the USFWS needs to determine the allowable level of take associated with each authorization. Doing so necessitates knowledge of overall population size and trend for each species in a given biogeographic region. For most species, that information is not available. The level of certainty of the population estimates (i.e., the Partners in Flight population estimates) is probably not adequate for most species. As of 1 December 2021, the MBTA protects 1,093 species. For many of these species, current information about population status and trends is lacking. The USFWS would need to set the overall level of take at the lowest level of take indicated by

potential biological removal (PRB) models in order to account for this uncertainty, allowing for all other sources of mortality for each species in each biogeographic region. However, in the context of setting take limits for scientific collecting permits, USFWS staff, as well as USGS biologists, have stated many times that they lack sufficient information to attempt the use of PRB models. That same lack of information would preclude the use of PRB models for incidental take.

In order to set biologically defensible take limits, there will almost certainly need to be fairly extensive data collection. The PEIS should describe how this data collection effort will be designed and funded. More significantly, the PEIS should explain how take limits can be set and the authorization issued before the data are obtained for each species that is found in the area covered by the authorization, particularly during the migration and breeding periods.

Further, the PEIS should state with specificity what life history data will be used for each species, including the source of the information, when setting take limits.

B. Biogeographical specificity

It would be biologically inappropriate to set nationwide take limits. In fact, it is for that very reason that the USFWS sets region-specific limits on scientific collecting permits, which entail a much lower level of take – by several orders of magnitude – than would be authorized under this incidental take policy. The limits on scientific collecting permits are based on USFWS regions, which have no biological significance. In setting take limits under the incidental take policy, it would be more appropriate to use the Bird Conservation Regions (BCR), which are biogeographical areas used by Partners in Flight, the North American Waterfowl Management Plan, the Waterbird Conservation Plan, Joint Ventures, and other bird conservation and management plans. If biogeographical units other than BCRs are used, the PEIS should describe those units and justify their use. Whatever the biogeographical unit used in setting take limits, the PEIS should state with specificity what population status and trend data the USFWS will rely upon in setting take limits by species *within each biogeographical unit*, including source of information, uncertainty associated with each source as to each species, and how it will set limits in cases where the data are insufficient for one or more species.

The USFWS apparently contemplates issuing industry-wide authorizations. In order for those industry-wide authorizations to be biologically defensible, they will have to be tailored to each geographic area in which a given industry operates a facility. A species may be abundant in one area within its range but uncommon or declining in another, perhaps to the point where no take can be sustained. For instance, the bird species found in the remnant prairie ecosystems of North America (most of the grassland birds, for instance) generally are already in such steep decline that no take should be allowed unless and until mitigation or compensatory measures have been shown through rigorous testing to be effective. Conversely, there are geographic areas where certain species are abundant and the populations can withstand a higher level of take. However, migration adds considerable complexity. For instance, the wintering range of the Mountain Plover (*Charadrius montanus*) encompasses most of the interior valleys of California. Activities that might be authorized in the summer, when Mountain Plovers are not present, would likely have to be curtailed once the Mountain Plovers arrive.

Take limits should also be fine-tuned to the specific site covered by a given authorization, particularly with regard to breeding populations. Activities that might be benign during the non-breeding season might have a significant detrimental impact on breeding birds. Direct mortality is an important part of

the equation but recruitment is just as important. If breeding populations avoid an area of otherwise suitable breeding habitat or if the authorized activities increase fragmentation/edge, attract predators, or otherwise depress breeding success, the impact is no less serious though perhaps harder to detect – in some species – for a number of years. For this reason, monitoring of breeding success (perhaps using the USGS BBIRD model and database) is essential to determine the effectiveness of mitigation measures required under the authorization.

C. Impact on recruitment and habitat

To date, discussions of incidental take have focused primarily on direct mortality (impacts, electrocutions, drownings). However, death is only one determinant of population size. Recruitment adds new reproductive animals to the population so is obviously a critical component of population growth. Habitat change and loss associated with industry activities impact recruitment in a number of ways including avoidance due to noise or overhead structures, additional mortality resulting from collisions with fences, road mortality, and increased predation. Loss of suitable vegetation and changes in microhabitat conditions also occur. Relatively little attention has been given to these impacts except in the case of ground-dwelling, highly sensitive species such as prairie chickens and sage-grouse. The PEIS should describe how habitat loss associated with each authorization will be determined and used in setting take limits. Because PBR models address only removal (here, mortality), take limits should be adjusted further on an industry-specific basis where the industry activities will impact habitat use, particularly during the breeding season.

D. Methods used to set take limits

If the USFWS intends to use Potential Biological Removal (PBR) models or other models for setting take limits, the PEIS should state with specificity the models to be used and the assumptions that will be made, for each species, as to population and trend data and life history traits. Each of these models should be made publicly available and subject to independent peer review that is made publicly available. Given the considerable uncertainty in population status and trend data for most species, the take limits should be set at the lowest level of take indicated by the results of the modeling.

The PEIS should also address the potential to set take thresholds of zero for some or all species, given the lack of key data and considerable uncertainty in available data. In its reply brief to the summary judgment motion filed in the lawsuit challenging the eagle non-purposeful take permits [Shearwater et al. v. Ashe et al., Civil 5:14-cv-02830 (U.S. District Court for the Northern District of California)], the government stated that, “Because FWS had limited data available on golden eagles at the time it issued the 2009 Rule, the EA set the regional thresholds at zero for all regions to ensure eagle preservation as required by the BGEPA. AR 241. FWS explained in the associated FONSI [finding of no significant impact] that permits could still be issued for programmatic take, but would require implementation of compensatory mitigation measures that completely offset predicted take resulting in a net take of zero by the authorized activity.” There is no reason to think that the USFWS has even as much information about the thousand-plus MBTA species as it does about Golden Eagles on a regional, much less local basis. Therefore, the take limits would necessarily have to be set at zero under the incidental take authorizations.

Even the zero-take threshold, however, has a significant flaw. It is premised on the idea that there exist adequate and effective mitigation measures that either reduce mortality and impacts on recruitment or

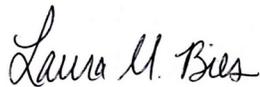
compensate for such losses such that they will “completely offset predicted take.” In fact, for most industries that might be covered under these authorizations, there has been a dearth of research to identify such mitigation practices, much less mitigation practices or compensatory measures that would result in complete offset (net take of zero). Further, given that these are wild populations that are very difficult to monitor and that these populations are affected by myriad factors – some outside the control of humans and some other man-made sources of mortality – it is hard to understand how the USFWS can be sure that these “bird-for-a bird” offsets are working.

Conclusion

We applaud the USFWS’ intention to codify an interpretation of the Migratory Bird Treaty Act which includes a prohibition against incidental take and we support the use of authorizations such as permits and exemptions to enforce such a prohibition. We encourage the USFWS to carefully consider its capacity to develop, implement, and enforce such a scheme and to plan accordingly. We also encourage the agency to carefully consider the data needed to develop such a scheme, the scale on which permits should be issued, and the conditions of any authorizations issued.

We hope that the comments above prove useful to the U.S. Fish and Wildlife 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