

December 3, 2021

Jerome Ford
Assistant Director, Migratory Birds
U.S. Fish and Wildlife Service

Re: Advanced notice of proposed rulemaking and notice of intent to prepare a National Environmental Policy Act document, 56 Fed. Reg 54,667, Docket No. FWS-HQ-MB-2021-0105; submitted electronically via Federal eRulemaking Portal

Dear Mr. Ford:

On behalf of the undersigned organizations, we are grateful for the U.S. Fish and Wildlife Service (FWS) acting to reinstate protections for birds under the Migratory Bird Treaty Act (MBTA) and we support the Service moving forward to issue a proposed rule that would codify incidental take protections and establish an authorization program, including by developing an incidental take permitting framework.

Birds are an essential part of the fabric of our nation. They bring joy and wonder to millions of people, from enjoying backyard birds to witnessing the awe-inspiring migration of billions of birds on their annual journeys. During the COVID-19 pandemic, millions of people have found new and renewed comfort in their presence, further underscoring the significant cultural and spiritual value of such experiences. Birds also have important ecological value, supporting resilient ecosystems and acting as indicators of environmental health. And they contribute to our economy, providing ecosystem services such as insect control and pollination and adding more than \$100 billion each year to the economy through consumer spending on birdwatching activities.

Unfortunately, our bird populations are in serious peril. A 2019 report in the journal *Science* found that North America's bird populations have declined by 3 billion birds since 1970, representing a 29% decline overall¹. Grassland birds, shorebirds, seabirds, and aerial insectivores have faced particularly steep declines. Additionally, a report from National Audubon Society found that two-thirds of North America's bird species are at risk from the compounding impacts of climate change².

FWS has a core responsibility for managing and conserving migratory birds. The four bilateral migratory bird treaties and the MBTA provide the foundational authority and obligation to protect and conserve these species. FWS has made significant strides over the decades in expanding bird conservation efforts in partnership with states, non-governmental organizations, industry, and other nations. Essential to this work, and a primary purpose of the MBTA, is addressing bird mortality from human activity.

For decades, FWS has helped advance efforts to minimize the incidental take of birds from avoidable industrial hazards, helping to save millions of birds through the adoption of practices such as covering oil waste pits and marking power lines. FWS has also relied on the MBTA to help birds recover from

¹ Rosenberg, K. V. et al. 2019. Decline of the North American Avifauna. *Science* 365(6461). doi: 10.1126/science.aaw1313

² Wilsey, C, B Bateman, L Taylor, JX Wu, G LeBaron, R Shepherd, C Koseff, S Friedman, R Stone. *Survival by Degrees: 389 Bird Species on the Brink*. National Audubon Society: New York.

incidents such as oil spills, including the Deepwater Horizon spill, which led to a \$100 million fine that supported efforts to protect and restore habitat under the North American Wetlands Conservation Act.

However, these longstanding protections for birds were revoked in December 2017 with issuance of a Solicitor's Opinion (M-37050) by the Department of the Interior (DOI), followed by the January 2021 rule to codify it. The policy faced widespread opposition, including by more than 25 states, 30 tribes, the government of Canada, former senior DOI officials from Republican and Democratic administrations, numerous Members of Congress, and more than 400,000 members of the public.

We are glad to see that DOI has now rescinded the Solicitor's Opinion and revoked the final rule and that FWS has published an Advance Notice of Proposed Rulemaking (ANPR) to replace this rule. If we are going to succeed in recovering the 3 billion birds lost since 1970 and ensure resilient populations in the face of climate change, it is critical that we take action to strengthen and improve the tools necessary to protect and conserve birds.

The ANPR is an important step forward that would codify the longstanding prohibition of incidental take, while also proposing a sensible framework and options for developing an MBTA authorization rule. A permitting program for incidental take can enhance bird conservation by expanding the use of practices that avoid, minimize, and compensate for impacts to birds. At the same time, a permit can provide increased certainty under the law and establish clear and consistent guidelines for meeting MBTA obligations, while facilitating increased renewable energy production to mitigate the climate crisis that poses an existential threat to many bird species.

As our nation looks to make significant investments in infrastructure and a 21st century energy grid while tackling the climate and biodiversity crises, taking further steps to clarify and enhance the MBTA will be an important and valuable step to help achieve these goals. We urge you to move forward with this rulemaking to issue a proposed rule and draft Environmental Impact Statement, and to help build a lasting legacy that will help secure our bird populations for the future.

Sincerely,

American Bird Conservancy
Appalachian Trail Conservancy
Defenders of Wildlife
Environmental Defense Fund
Friends of the Earth
Humane Society Legislative Fund
National Audubon Society
National Parks Conservation Association
National Wildlife Federation
Natural Resources Defense Council
Ocean Conservancy
The Conservation Fund
The Humane Society of the United States
The Nature Conservancy
The Wildlife Society
World Wildlife Fund