

**ATTORNEYS GENERAL OF THE STATES OF NEW YORK, CALIFORNIA,
CONNECTICUT, ILLINOIS, MARYLAND, MINNESOTA, NEW JERSEY,
NEW MEXICO, OREGON, AND WASHINGTON, AND THE
COMMONWEALTH OF MASSACHUSETTS**

December 3, 2021

Jerome Ford
Assistant Director, Migratory Birds
Attention: FWS-HQ-MB-2021-0105
U.S. Fish and Wildlife Service
MS: PRB/3W
5275 Leesburg Pike
Falls Church, VA 22041-3803

Via Federal eRulemaking Portal

RE: Comments on advance notice of proposed rulemaking and notice of intent to prepare a National Environmental Policy Act document concerning “Migratory Bird Permits; Authorizing Incidental Take of Migratory Birds,” 86 Fed. Reg. 54,667 (Oct. 4, 2021)

Dear Assistant Director Ford:

The Attorneys General of New York, California, Connecticut, Illinois, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, Oregon, and Washington (the “State AGs”) welcome the opportunity to comment on the advance notice of proposed rulemaking and notice of intent to prepare a National Environmental Policy Act document concerning “Migratory Bird Permits; Authorizing Incidental Take of Migratory Birds,” 86 Fed. Reg. 54,667 (Oct. 4, 2021).

The states own and/or hold in trust for their citizenry the migratory birds that reside within or migrate across their borders. The states benefit from the specific ecological services migratory birds provide—including controlling insects and rodents, pollinating, and dispersing seeds—and the role migratory birds play in maintaining ecological balance generally, including as prey for other animals. Migratory birds also provide scientific, recreational, and aesthetic benefits to the states’ residents, including millions of birdwatchers and hunters. All of these benefits, which directly or indirectly generate economic activity and tax revenue for the states, are lost or diminished when bird numbers are depleted by activities or conditions that unintentionally or incidentally take or kill migratory birds.

For three years, the State AGs have been actively pressing the federal government to protect migratory birds from incidental take. In September 2018, seven of the State AGs brought a successful lawsuit challenging a December 2017 legal memorandum of the U.S. Department of the Interior, which asserted—

incorrectly—that the Migratory Bird Treaty Act (MBTA) applies only to “affirmative actions that have as their purpose the taking or killing of migratory birds, their nests or their eggs.” See *NRDC v. U.S. Dep’t of the Interior*, 478 F. Supp. 3d 469, 481 (S.D.N.Y. 2020) (holding that the memorandum was in “direct conflict” with the MBTA’s “clear language making it unlawful ‘at any time, by any means or in any manner, to . . . kill . . . any migratory bird.’” (quoting 16 U.S.C. § 703(a))). In January 2021, eleven of the State AGs, as well as the Commonwealth of Pennsylvania, brought a second lawsuit challenging a final rule that codified the same incorrect interpretation of the law at issue in the first lawsuit. See *Complaint, State of New York v. U.S. Dep’t of the Interior*, 21-CV-0452 (VEC) (S.D.N.Y. Jan. 19, 2021), Dkt. No. 1. On October 4, 2021, with the State AGs’ second lawsuit pending in federal court, the U.S. Fish & Wildlife Service (FWS) published a new rule restoring the agency’s longstanding interpretation that the MBTA prohibits incidentally taking or killing migratory birds and revoking the rule at issue in the lawsuit. See “Regulations Governing Take of Migratory Birds; Revocation of Provisions,” 86 Fed. Reg. 54,642 (Oct. 4, 2021).

The purpose of the present rulemaking is to provide clarity to the regulated public on liability for human-caused bird mortality by authorizing incidental take under prescribed conditions. FWS is considering using the following three mechanisms for authorizing incidental take: “(1) Exceptions to the MBTA’s prohibition on incidental take; (2) general permits for certain activity types; and (3) specific or individual permits.” 86 Fed. Reg. at 54,669. The State AGs support FWS in its effort to develop regulations that will “[1] better protect migratory bird populations and [2] provide more certainty for the regulated public.” *Id.* at 54,670. To achieve those two goals while also bearing in mind the important goal of combatting climate change, the State AGs offer the following recommendations.

First, as FWS works to develop regulations, the State AGs recommend that FWS actively consult with state fish and wildlife agencies early in the development of a proposed rule. This is particularly important to the extent FWS may rely on state agencies for assistance in permitting decisions and/or enforcement efforts. FWS should consult directly with individual state agencies as well as with regional and national associations, including the four Flyway Councils, regional fish and wildlife service associations, and/or the Association of Fish and Wildlife Agencies (AFWA), and should do so well before issuing a notice of proposed rulemaking (NPR).

Second, the State AGs recommend that FWS proceed in developing general-permit-authorization regulations only for activities that have well-developed, activity-specific best management practices (BMPs). *Id.* at 54,669. FWS should be mindful that general permits are not appropriate at this time for activities, such as offshore wind energy, that have the potential to significantly impact at-risk bird species but currently lack well-developed and well-vetted practices to mitigate

incidental take. For the time being, individual permits would be more practical for such activities. In the long term, however, the State AGs recognize the utility of developing BMPs and general permits for offshore wind energy and other emerging technologies to the extent the data show that certain practices can successfully mitigate incidental take, either in a particular geographic region or nationwide. The State AGs urge FWS to ensure that impacts on birds be closely monitored as new technologies are deployed at scale.

Third, to the extent individual or general permit authorizations are conditioned on adherence to BMPs, the prescribed practices should be as simple and easy to implement as practicable. In addition, the BMPs should be updated regularly to incorporate new knowledge and technologies that emerge over time. FWS should allow public comment on any specific existing BMPs before the rule is finalized to the extent this can be accomplished without materially delaying the publication of a proposed and final rule.

Fourth, the State AGs recommend that FWS make clear that states do not face liability when implementing a permitting system or otherwise acting in any regulatory capacity.

Fifth, the State AGs recommend that the NPR address the extent to which permitting decisions will involve provisions for compensatory mitigation to offset unavoidable adverse impacts. FWS should lay out options and describe how funds obtained for mitigation would be apportioned to states. FWS should specifically consider directing a portion of funds toward further development of BMPs to mitigate adverse impacts.

Sixth, the State AGs recommend that the NPR lay out options regarding permitting, potential exceptions, or other appropriate authorizations for habitat modification activities related to conservation, emergency management, and habitat restoration activities, including, but not limited to, controlled burns, mowing, and tree removal. On the one hand, onerous permitting requirements and conditions could disincentivize beneficial habitat management activities that ostensibly promote the conservation of migratory birds but may cause immediate incidental take. On the other hand, authorizing all habitat modification activities that have a beneficial purpose could create an exception that swallows the rule.

Seventh, the State AGs recommend that incidental take associated with actions covered by other federal permits, including, but not limited to, Endangered Species Act and Bald and Golden Eagle Protection Act permits, be considered for exemption.

Eighth, the State AGs recommend that FWS consider developing the regulations in question on an incremental and rolling basis. Under the status quo,

while resources for enforcement are limited, migratory birds enjoy substantial protections from incidental take. FWS must take care to ensure that any regulations authorizing incidental take under prescribed conditions are an improvement over the status quo, both in terms of impact to birds and regulatory certainty.

DATED: December 3, 2021

Respectfully submitted,

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