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Ellen Paul
Executive Director
6512 East Halbert Road
Bethesda, MD 20817
Phone (301) 986-8568
Email: ellen.paul@verizon.net

24 July 2015

Public Comments Processing
Attention: FWS–HQ–MB– 2014–0067
Division of Policy and Directives Management
U.S. Fish and Wildlife Service
5275 Leesburg Pike, MS–PPM
Falls Church, VA 22041– 3803

Submitted via regulations.gov

Regarding: Incidental Take of Migratory Birds
Docket No. FWS–HQ–MB–2014–0067
80 FR 30032

The Ornithological Council is a consortium of 12 scientific societies of ornithologists; these societies span the Western Hemisphere and the research conducted by their members spans the globe. We appreciate the opportunity to comment on the proposed Programmatic Environmental Impact Statement (PEIS) and the specific regulations or policies that may be developed to address the incidental take of bird species protected under the Migratory Bird Treaty Act (MBTA). We take no position on the policy merits of the concept. We address:

A. Population impacts, including the nature and extent of the biological data, research, and monitoring that would be needed to establish take limits
B. Need for continued monitoring and research
C. Capacity of the USFWS Division of Migratory Bird Management to issue and manage these authorizations
D. Impact of this authorization policy on scientific research permits
E. Need for further opportunity for public review and comment as specific authorizations are developed

Note that we use the general term "authorizations" to include all forms of agency action that might be employed, including industry-wide authorizations, site- or company-specific permits, memoranda of understanding, or any other mechanism that might be used to limit the allowable level of incidental take, require mitigation measures, and impose restrictions or penalties.

Population level impacts

Since 1997, the U.S. Fish and Wildlife Service (USFWS) has attempted to finalize a policy for take limits for Migratory Bird Treaty Act scientific collecting permits. This activity entails the take of a

miniscule number of birds (Appendix A) and the permits ensure certainty as to the maximum number that can be taken. The draft policy limits range from five individuals per species per permit per year per USFWS region to 50 individuals (per permit per year per USFWS region) for the most abundant species. By contrast, the proposed incidental take policy would result in the take of an unknown number of birds of many, if not most, MBTA species per year. In contrast to the scientific collecting permits, which number no more than 100 per year (based on data provided by the USFWS for the years 1998-2002), the incidental take policy would cover thousands of facilities. Holders of scientific collecting permits must report actual take annually. It is unlikely that most authorized to take MBTA species under the incidental take policy would determine how many birds were taken.

We are confident that the USFWS has the requisite expertise or access to expertise to know how 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. We are concerned that the requisite information is 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.1. Baseline information about population status and trends, life history traits, migration routes and timing, habitat needs, and reproductive behavior

The PEIS should describe for each species the data currently available as to population status and trends, life history traits, migration routes and timing, habitat use, and reproductive behavior. The PEIS should include a detailed list of information needs where data are unavailable, incomplete, or not sufficiently current, and the manner in which the USFWS will obtain data adequate for the purpose of setting take limits.

The USFWS needs to determine the 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. That particular set of estimates was published over a decade ago and is probably out-of-date. The population trends for 400 species covered by the Breeding Bird Survey (BBS) are current. However, as of 1 November 2013, the MBTA protects 1,026 species (78 FR 65844 *et seq*). For many of the other 600+ species, current information about population status and trends is lacking. Further, the BBS trend estimates for many species have deficiencies because they are imprecise or because the species occur at low abundance or along few survey routes (see Regional

Credibility Measures, http://www.mbr-pwrc.usgs.gov/bbs/credhm09.html). The trend estimates may be too high or too low but in either case would make determination of the biologically sustainable level of take uncertain at best. 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.

A.2. Biologically meaningful population data and take limits

The PEIS should describe the biogeographical regions upon which population estimates and trends and take limits will be based and justify the use of those regions. 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 geographical unit.

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 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.

Biogeographical units other than BCRs might be used and in that case, 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.

A.3. Authorizations should be BCR-specific

Take limits and required mitigation and compensatory measures should be BCR-specific, reflecting the population status and trends of all species that occur in the BCR across the seasons.

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 BCR in which a given industry operates a facility. A species may be abundant in one BCR 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 BCRs 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.

A.4. Impact on habitat

The PEIS should describe how habitat loss associated with each authorization will be determined and used in setting take limits.

Although the MBTA does not protect habitat, the PEIS should explain how the habitat loss (actual loss, loss through change in vegetation, and loss of use through avoidance) will impact each BCR population of each species for each industry-specific take authorization. If it is asserted, in setting take limits, that the authorized activity will not cause habitat loss, peer-reviewed studies to support that assertion must be cited. If such studies do not exist for a particular activity, they should be conducted before issuance of the authorization. The PEIS should address what role the USFWS will play in assuring that such studies are done, including funding and peer review. It is important that the studies be done on a BCR-specific basis as conditions and bird use of habitat vary from place-to-place.

A.5. Impact on recruitment

The PEIS should describe how the take limits will reflect impact of the authorized activity on recruitment.

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. 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.

A.6. Methods used to set take limits

The PEIS should describe in detail the methods that will be 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 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 nonpurposeful 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.

The PEIS should address how take limits will be adjusted to reflect the use of the area covered by the authorization by breeding birds.

Take limits should 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.

A.7. Population impacts: Birds of Conservation Concern

The PEIS should explain how authorizations will take into account the presence in the BCR covered by the authorization of species included on the list of Birds of Conservation Concern for that BCR and with emphasis on the BCC focal species.

Even with the uncertainty about population size and trend, the USFWS has twice developed lists of "Birds of Conservation Concern" (BCC) as mandated by the 1988 amendments to the Fish and Wildlife Conservation Act.

§2912. Federal conservation of migratory nongame birds

(a) Conservation activities

The Secretary shall undertake the following research and conservation activities, in coordination with other Federal, State, international and private organizations, to assist in fulfilling his responsibilities to conserve migratory nongame birds under existing authorities provided by the Migratory Bird Treaty Act and Migratory Bird Conservation Act (16 U.S.C. 701–715) and section 8A(e) of the Endangered Species Act [16 U.S.C. 1537a(e)] implementing the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere:

(1) monitor and assess population trends and status of species, subspecies, and populations of all migratory nongame birds;

(2) identify the effects of environmental changes and human activities on species, subspecies, and populations of all migratory nongame birds;

(3) identify species, subspecies, and populations of all migratory nongame birds that, without additional conservation actions, are likely to become candidates for listing under the Endangered Species Act of 1973, as amended (16 U.S.C. 1531–1543);

(4) identify conservation actions to assure that species, subspecies, and populations of migratory nongame birds identified under paragraph (3) do not reach the point at which

the measures provided pursuant to the Endangered Species Act of 1973, as amended (16 U.S.C. 1531–1543) become necessary

The 2008 BCC list uses Bird Conservation Regions, which are biologically appropriate biogeographic units. The number of species listed for each BCR ranges from 10 to 53 species and cumulatively, the list encompasses 147 species. It is our understanding that a revision is underway and it would be surprising if the numbers of species does not increase in each region and overall.

Further, within the BCC list there are 57 species designated as "Focal Concern" species. Some encompass only certain subpopulations or subspecies. To select Focal Species, the Migratory Bird Program identifies species from the **Birds of Management Concern** list that need investment because they: 1) have high conservation need, 2) are representative of a broader group of species sharing the same or similar conservation needs, 3) act as a potential unifier for partnerships, and/or 4) have a high likelihood that factors affecting status can be realistically addressed. Particularly in the case of those listed because of high conservation need, it is especially important that the take limits reflect the population status of the species.

A.8. Adjustments in take limits during permit period

The PEIS should address the likely problem that populations will decline despite compliance with mitigation and compensatory measures required by the authorizations and address the way that take limits will be adjusted when new facilities are built or existing facilities increase in size.

The USFWS will have to face 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 Similar in concept to the non-attainment areas under the Clean Air Act, individual contributors in the region would be subject to further reductions in allowable take levels, even if their own facility is in compliance. It is not enough to set what is initially a somewhat arbitrary level of incidental take but then fail to adjust that authorized level 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 is likely to happen with wind energy – the number of wind energy facilities doubles or triples – how can new authorizations be issued? Or if the capacity of existing authorized facilities increases, the authorization would need to be amended to increase the level of authorized take. How would that affect other existing authorizations in the region?

A.9. Adequacy of mitigation and compensatory measures

The PEIS should address the manner in which scientifically defensible mitigation and compensatory measures to be included in the authorizations will be determined; authorizations should include an express condition that new requirements may be imposed on existing authorizations

The electric transmission industry has worked with the USFWS for over 25 years to develop measures to prevent avian mortality, with mixed but considerable success in terms of electrocutions but relatively little success in terms of collisions. Much has been made in recent years of the need for "proper siting" of wind energy facilities but little research has been done to determine what that means in the context of particular ecoregions or specific physiographic features such as water bodies or terrain or land cover types. It is difficult to understand how authorizations can be issued in the near-absence of a body of scientific research on these key issues. As discussed in Part B of these comments, immediately below, the real value of the incidental take authorization scheme, if initiated in the near future, is the 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 condition that the USFWS can amend existing authorizations to require the use of new mitigation and compensatory measures.

B. Need for continued, biologically appropriate monitoring and research in developing and implementing mitigation and compensation measures

Industry activities result in incidental take of MBTA species. That is simply a fact; it has motivated the USFWS and some industries to work together to develop practices to reduce the extent of this take. Some of these efforts have been more than others but in all cases, it is likely that some level of take will persist.

At this point, one key value of the authorization concept is the potential to engage each industry as a whole and each corporation to help promote meaningful, predictive research to identify successful ways to reduce the level of incidental take and to identify compensatory mitigation that actually counteracts the level of take. At the moment, there are 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. For instance, most of the wind energy studies comprise site-specific short-term presence-absence surveys conducted a year or two prior to construction of turbines and a year or two afterwards. In that time frame, the results could reflect nothing more than annual variation in population size, which is influenced by many factors, particularly for long-distance migratory species. It is also difficult to assess change in breeding productivity in so short a timespan. There are few long-term studies or predictive, landscape-level studies to guide "proper siting" of wind energy facilities. As the land-based wind energy guidelines (U.S. Fish and Wildlife Service Land-Based Wind Energy Guidelines, http://www.fws.gov/ecological-services/es-library/pdfs/WEG_final.pdf) state (p. 56), "Much uncertainty remains about predicting risk and estimating impacts of wind energy development on wildlife. Thus there is a need for additional research to improve scientifically based decision-making when siting wind energy facilities, evaluating impacts on wildlife and habitats, and testing the efficacy of mitigation measures. More extensive studies are needed to further elucidate the patterns and test hypotheses regarding possible solutions to wildlife and wind energy impacts." Unfortunately, since those Guidelines were originally issued (2008), little research has been conducted. A U.S. Geological Survey 2014 briefing document and an accompanying spreadsheet of wind energy-related research from 1979 to 2015 reveals that of the 67 wind energy projects, 29 are directly related to birds. Of these, most focus on eagles or sage-grouse. Federal research budgets

have been shrinking so it is unlikely that the critically needed research on mitigation and compensatory measures will be conducted without significant funding from industry. To date, however, industry, via the American Wind Wildlife Institute – an organization "committed to expanding the body of peer-reviewed science on wind-wildlife interactions by supporting and catalyzing research through its Research Program" - has funded only $138,000 in research (a total of six projects) in the years 2011-2013.

The electric transmission (power line) industry has worked since 1989 to develop methods to prevent avian collisions with power lines and electrocutions on utility poles. After decades of research, a number of successful devices to prevent electrocution have been developed but some mortality persists. Preventing collisions has proved more challenging. Even after 26 years of research, it is important that the research continue.

When the initial authorizations are issued, then, it is possible if not likely that there will be insufficient scientific information upon which to base mitigation requirements. Over the duration of a long-term authorization, as is likely to be issued under this program, it is critically important to assure that research will continue, or the authorization will essentially lock in older methods that may not prove effective, or as effective, as might later be developed.

B.1. Require permittees to allow scientists access to their properties to conduct research

The PEIS should address the need for access by scientists to facilities covered by the authorizations in order to conduct independent research

Assuring that research be conducted would also necessitate a requirement 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. Therefore, we encourage the USFWS to make this a standard, non-negotiable condition of any authorization.

Without these research findings, those with authorization may or may not be able to remain within the allowable take limits. If the authorization is then suspended or revoked because the limits were exceeded, then the stated purpose of these authorizations – to allow "greater certainty for entities that have taken efforts to reduce incidental take and significantly benefit bird conservation by promoting implementation of appropriate conservation measures to avoid or reduce avian mortality" would not be achieved. It might also serve as a disincentive to others to even apply for the authorizations.

B.2. Authorizations should require independent monitoring of facilities

The PEIS should address the need for independent monitoring of facilities to determine the extent of take and compliance with authorization mitigation and compensation requirements

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. Such investigation can, in turn,

suggest solutions. We therefore 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). Further, all data collected by independent monitoring efforts should be made publicly available.

B.3. Population monitoring is necessary and should be species, timing, and location specific

The PEIS should describe a population monitoring scheme that is specific to each species, the timing of the monitoring (i.e., migration, breeding, non-breeding), and the location.

The authorization take limits would need to be adjusted if populations of MBTA species decline. To determine population status and trends, monitoring is needed. The monitoring should be appropriate to each species and conducted during the migration and non-breeding seasons. We recognize that monitoring during the breeding season can be far more difficult and has the potential to disturb breeding birds but where possible, it should be conducted. Monitoring should be conducted within each BCR covered by authorizations.

All species on the BCC list within each BCR covered by an authorization should be monitored across the entire BCR .

B.4. Mandatory reporting of data and public access to data

The PEIS should address the need for public access to monitoring data and compliance data

The authorization should require that any reports or studies prepared by researchers on contract to the permittee or employed by the permittee must be 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).

B.5. Peer review of reports and studies

The PEIS should establish standards and practices for peer review of reports and studies conducted by researchers employed by or under contract to industries that will be covered by the authorizations

Many of the consulting firms that conduct research for the wind industry and others that will be covered by the authorizations have been exemplary in conducting research in an unbiased manner, in publishing their results, and holding themselves to high standards. However, many of the industry-funded publications are often not published in peer-reviewed literature. We suggest 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. We suggest that the PEIS establish the standards and practices that will be used for the peer reviews, including public access to the peer

reviews. However, consistent with federal guidelines, publication in a peer-reviewed journal may be deemed sufficient.

B.6. Annual contribution to research fund

Annual contributions to a research fund would advance the research needed to lessen impacts

Given that the strongest justification for the incidental take authorizations is the potential to advance the research needed to lessen impacts, requiring annual contributions to a research fund would have several distinct benefits. First, it 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. Second, it would 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. Third, 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 ranging from $2,600 to $15,600, paid every five years, depending on the duration of the permit [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. USFWS capacity to conduct or oversee monitoring to assure compliance and assess results

The PEIS should describe the current capacity of the USFWS to conduct or oversee monitoring to assure compliance and assess results; it should provide a detailed analysis of the staffing levels and funding needed to achieve adequate monitoring of authorized facilities and level of take.

Under a 1998 depredation order (50 CFR 21.47), the Service has permitted the lethal take, without a Federal permit, of Double-crested Cormorants at commercial freshwater aquaculture facilities and State-owned hatcheries in 12 southeastern states and Minnesota. The aquaculture farmers are required to submit annual reports of the extent of the take. Based on the responses to Freedom of Information Act requests filed by the Ornithological Council along with follow-up interactions with USFWS staff, it was evident that many aquaculture farmers were not submitting reports, the reports that were filed were generally incomplete, and the USFWS lacked both staffing and a mechanism to follow up to compel complete and accurate reporting. It had no means to spot-check the accuracy of the reports.

The cormorant depredation order entailed no limits on take and therefore carried no penalties for exceeding limits. In other words, there was no disincentive to report fully. Nonetheless, reports were not filed or were incomplete. If the USFWS could not assure complete and accurate reporting for a single industry in 13 states, where reporting carried no potential penalties, it is

highly unlikely that the USFWS will be able to ensure complete and adequate reporting for a multitude of facilities across multiple, disparate industries. The staffing levels of the USFWS has declined in the intervening years. Obviously, the USFWS could impose permit and monitoring fees of the magnitude (or greater) that it imposes on the 30-year nonpurposeful eagle take permits, which will allow the USFWS to increase staffing levels. However, we doubt that those fees will generate sufficient funding to hire enough staff to issue and manage these incidental take permits, much less conduct or fund the data collection and research needed to determine the cumulative impact of the permits.

It seems unlikely that the USFWS will have the capacity to collect and analyze the data submitted by permittees, much less independent data collection to assess impact, given the abysmal funding levels appropriated by Congress to the USFWS and the U.S. Geological Survey, it seems unlikely that 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.

Other agencies have been forced to refrain from instituting regulatory reform due to lack of capacity to implement the new rules. For instance, the Animal Care program of the USDA Animal and Plant Health Inspection Service has been unable to issue even a proposed regulation implementing a 2002 legislative change to the Animal Welfare Act. An advance notice of rulemaking was issued in 2004 but in 2012 the agency issued a stakeholder notice that it was attempting to determine the additional capacity needed to implement the eventual regulation, given that it would require many more inspections, personnel, and training. It serves no purpose to issue a new regulation if resource levels preclude thorough and competent implementation and enforcement. We suspect that will be the case with the incidental take policy and therefore urge the USFWS to include this an analysis of resource needs in the PEIS.

The PEIS should address the capacity of other federal agencies to set biologically defensible take limits

The FR notice hints that the USFWS might shift the authority to issue authorizations to other federal agencies via negotiated Memoranda of Understanding. If that is indeed what the USFWS is contemplating, then the PEIS should address the capacity of each such agency that might issue authorizations to set biologically defensible take limits. Some, such as the Forest Service, possess the requisite expertise but staffing limits would likely preclude the extensive data collection, modeling, monitoring, and periodic adjustment of limits. Others, such as the Federal Communications Commission, have neither expertise nor capacity. In 2008, the Bush administration proposed "counterpart regulations" under the Endangered Species Act, allowing other federal agencies (called "action agencies") to conduct their own biological assessments of the potential impacts of their activities on endangered species rather than consulting with the USFWS as then required by law. Reviews by the USFWS and National Marine Fisheries Service of the Forest Service counterpart biological assessments under the National Fire Plan left no doubt that

those assessments were scientifically inadequate in myriad ways. Those prepared by the Bureau of Land Management were even more deficient than were those prepared by the Forest Service.

Therefore, if the USFWS plans to delegate the issuance of authorizations to other federal agencies, the PEIS should describe fully the expertise and capacity of each such agency to set and adjust biologically defensible limits. The PEIS should also describe the extent of review the USFWS would give to the decisions made by other agencies to which these delegations have been made.

D. Potential impact on other MBTA permits

D.1. Take limits under research permits (such as scientific collecting permits)

Take limits under research permits (such as scientific collecting permits) should be determined independently of the take limits under the incidental take authorizations.

Seven of the scientific societies of ornithologists represented by the Ornithological Council are based in the United States and the majority of their members conduct research in the United States. In addition, the members of all 12 societies import and export research material derived from MBTA species to and from the United States. Almost all their work requires the issuance of permits.

We ask that the USFWS remember that scientific collecting by researchers provides information that is essential for effective conservation and management of bird species. The numbers of birds collecting annually is miniscule as demonstrated in Appendix A and will no doubt pale compared to the level of take authorized under the incidental take policy. We have already heard some discussion among USFWS permit staff that in issuing scientific collecting permits, they have to consider the overall level of take from all permits. We ask the USFWS to keep in mind that the purpose of scientific collecting is to generate knowledge that underlies conservation and management. In contrast, incidental take permits would be issued to benefit for-profit industries and corporations. Thus, in considering overall level of take from all permits, we ask that the USFWS recognize the value of scientific collecting and assess the allowable level independently of the level of take under other MBTA permits.

D.2. Permit issuance and management capacity

The PEIS should include a detailed assessment of the resources needed to process, analyze, issue, and manage incidental take authorizations.

Consistent with our concern about capacity to implement an incidental take policy in terms of monitoring authorized facilities, we are also very concerned about the capacity of the USFWS to issue and manage the actual authorizations. This new policy will require an enormous commitment of staff time by the same staff members who issue other permits. The capacity of the regional permits staffed is already stretched thin. Each region manages several thousand active permits and processes 1,000 or more new applications each year. There is simply no capacity to handle additional permits, much less the far more time-consuming authorizations that would be issued pursuant to the incidental take policy. The nonpurposeful eagle take permits are particularly time-

consuming and it is likely that the incidental take authorizations will be as time-consuming, if not more so.

We recognize that the USFWS imposes a permit fee of $36,000 for the nonpurposeful eagle take permits and is likely to impose a fee of similar magnitude for the incidental take permits or even more, if the authorizations cover all facilities within a BCR. 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. It is hard to predict how many applications will be filed or the timing of those applications so it would be difficult to allocate funding for permanent staffing with adequate academic credentials and experience, as described below, to analyze these applications and issue authorizations.

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; that has already occurred in some regions as a result of the applications for non-purposeful take permits for eagles. This might also be the case should unplanned short-term or long-term vacancies occur, as has happened with increasing frequency in recent years. Therefore, we ask that the PEIS include a detailed assessment of staffing and resource needs to analyze, issue, and manage these permits.

At no time should the USFWS divert the 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.

Further, 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, results of monitoring, and other aspects of the incidental take authorization program including posting monitoring data and associated information to a public website.

E. Allow public review and comment for each industry-specific authorization

This PEIS proposes to cover a number of very disparate industries, some unidentified, and so comment on this PEIS is necessarily broad and not specific to any particular industry. The PEIS should include a procedure that will give notice of the proposed issuance of industry-specific authorizations for one or more BCRs and provide an opportunity for comment.

The kinds of human-caused mortality of birds are many and varied. This PEIS proposes to establish a framework rather than actual authorizations. The application of the framework to a particular industry will have very different results from the application to other industries. Therefore, the comments submitted in response to this Notice of Intent are necessarily broad and non-specific. We do not think that is an adequate substitute for review of and comment on specific kinds of authorizations. In fact, we question whether a PEIS is actually appropriate to the complex set of industries, species, and locations to be covered by these authorizations. We strongly urge the USFWS to include in the PEIS a plan to give notice of the proposed issuance of industry-specific authorizations for one or more BCRs and to provide an opportunity for comment. This is

particularly important because an industry-wide authorization will need to be tailored to each BCR to be biologically defensible. Having an opportunity for input on specific authorizations affords those concerned about bird populations to assure that the fine-tuning for local conditions occurs. It also gives the ornithological community an opportunity to provide relevant research findings, identify monitoring needs, and provide an independent assessment of the biological soundness of the take limits and mitigation and compensatory measures under the proposed authorization.

Conclusion

Since 2002, the USFWS has regarded permits as a conservation tool. In the document entitled "Leaving a Lasting Legacy" the USFWS stated that "Permits provide a means to balance use and conservation by tracking and regulating human activities that affect wildlife." The vision statement in that document specifies that:

> We will consider the risks and benefits of proposed activities to species, and use the best available science and expertise to make our decisions.
>
> We will use permits to authorize and monitor activities consistent with the conservation, protection, and enhancement of wildlife, plants, and their habitats.

These same laudable pronouncements should guide the development and implementation of the incidental take policy.

We hope that these comments 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,

Ellen Paul
Executive Director

Appendix A: Take under scientific collecting permits, 1998-2002

(*Source: Freedom of Information Act request filed by the Ornithological Council to the USFWS Division of Migratory Bird Management*)

Number of permits:

- 1998 – 51 permits
- 1999 – 51 permits
- 2000 – 57 permits
- 2001 – 63 permits
- 2002 – 63 permits

Number of birds taken (nationwide): These species represent the highest numbers reported for all species, i.e., all other species were taken in numbers lower than the lowest number shown in this table

1998	**1999**	**2000**	**2001**	**2002**
Steller's Jay **135**	Steller's Jay **183**	Song Sparrow **143**	American Tree Sparrow **260**	Song Sparrow **159**
White-winged Dove **115**	Song Sparrow **132**	Steller's Jay **95**	Song Sparrow **102**	Steller's Jay **129**
Spotted Towhee **84**	Spotted Towhee **89**	Spotted Towhee **83**	Steller's Jay **91**	Rock Sandpiper **72**
Rock Sandpiper **69**	Hermit Warbler **67**	Rock Sandpiper **53**	Black-throated Blue Warbler **59**	Least Sandpiper **58**
Song Sparrow **59**	Townsend's Warbler **58**	Black-throated Blue Warbler **52**	Rock Ptarmigan **35**	Wilson's Phalarope **53**
Hermit Warbler **47**	Rock Sandpiper **47**	Lapland Longspur **33** Savannah Sparrow	Rock Sandpiper **34**	American Avocet **51**

1998	**1999**	**2000**	**2001**	**2002**
Sage Sparrow **40**	Lapland Longspur **45**	Winter Wren **33**	House Finch **31**	Pygmy Nuthatch **49** Savannah Sparrow
Black-throated Blue Warbler **35**	Snow Bunting **30**	Pelagic Cormorant **32**	Yellow-rumped Warbler **30**	Black-throated Blue Warbler **47**
Rock Ptarmigan **24**	Townsend's x Hermit **26**	Hermit Warbler **31**	Red-winged Blackbird **29** Winter Wren	Townsend's Warbler **38**
Snow Bunting **18**	Gray-crowned Rosy Finch **25** Winter Wren	Semipalmated Sandpiper **26** Yellow-rumped Warbler	Dark-eyed Junco **24** Swainson's Thrush	Lapland Longspur **37** Rock Ptarmigan Western Sandpiper