



20 July 2020

Public Comments Processing  
Attn: FWS–HQ–MB–2018-0090-8631  
U.S. Fish and Wildlife Service  
MS: PRB (JAO/3W)  
5275 Leesburg Pike  
Falls Church, VA 22041–3803

Subject: Comments on “Regulations Governing Take of Migratory Birds Draft Environmental Impact Statement”

To the U.S. Fish and Wildlife Service:

With this letter, the Pacific Seabird Group is submitting comments on the Draft Environmental Impact Statement (DEIS) “Regulations Governing Take of Migratory Birds” and the associated proposed change to the definition of “acceptable take.” While we agree with the value of clarifying legal standards for the meaning of incidental take, we are opposed to the preferred alternative advanced by the US Fish and Wildlife Service (USFWS) because of its acknowledged likely negative impacts not just on birds, but also other biological resources, cultural resources and ecosystem services. Given that, the Pacific Seabird Group supports Alternative B, which is the only biologically defensible alternative presented, and the withdrawal of M-Opinion 37050.

The Pacific Seabird Group (PSG) is an international, non-profit, scientific organization that was founded in 1972 to promote the knowledge, study, and conservation of Pacific seabirds. It has a membership drawn from the entire Pacific basin. Among PSG's members are biologists and scientists who have research interests in Pacific seabirds, government officials who manage seabird refuges and populations, and individuals who are interested in marine conservation. PSG members serve as scientific experts and conservation leaders within their local communities, nationally and around the world.

After reviewing the DEIS, we provide the following comments:

1. Under the current List of Migratory Birds (10.13), 188 species of seabirds from 15 families and 7 different orders are included. The list includes a number of federally and globally listed threatened and endangered species, such as Marbled and Kittlitz’s murrelets *Brachyramphus marmoratus* and *B. brevirostris*, respectively, Short-tailed Albatross *Phoebastria albatrus*, Band-

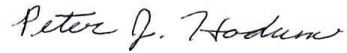
rumped Storm-petrel *Hydrobates castro*, Abbott's Booby *Papasula abbotti*, and the Bermuda Petrel *Pterodroma cahow*, among others.

2. Seabirds are among the most threatened groups of birds in the world, with their global conservation status deteriorating faster than it is for other groups of birds. The principal threats at sea include fisheries bycatch, overfishing and pollution, including oil spills and chronic exposure to contaminants, while on land they are threatened by invasive predators, habitat degradation and human disturbance<sup>1</sup>. With the development of wind energy facilities in marine environments, there is growing concern that wind turbines may also have a significant impact on seabirds in the future. In addition, a recent study concluded that two-thirds of North American birds are threatened by climate change<sup>2</sup>.
3. None of the above information about threats to seabirds was included in analyses of the impacts of the proposed regulation. As such, PSG considers the analysis of the impacts, which are never presented in a quantitative form, and its range of alternatives to be worryingly inadequate and incomplete.
4. Furthermore, despite the explicit acknowledgment that their preferred alternative would likely lead to the great harm to migratory birds, the USFWS did not include a detailed analysis or methodology for describing how bird populations will be impacted, let alone the impacts on other biological resources and ecosystem services. It is scientifically indefensible that no such analyses of impacts have been conducted. Given the expertise of many PSG members, we make ourselves available to the USFWS to help develop the necessary and appropriate analyses of impacts of the proposed alternatives.
5. The proposed standard would limit the application of the incidental take to actions that result in the intentional or purposeful "taking" of migratory birds, their nests or eggs. Under that definition, none of the principal threats posed to seabirds would be covered, effectively meaning that migratory seabirds would be left completely unprotected under the MBTA. The absence of enforcement of "incidental take" under the law would significantly undermine our capacity to conserve seabirds.
6. The Draft Environmental Impact Statement (DEIS) explicitly acknowledges that the only alternative with a "likely positive" assessment in the category of "Effects on Migratory Birds" is Alternative B. This is also the only alternative with predicted favorable effects on other biological resources, cultural resources and ecosystem services. Alternative B is the only one of the three alternatives assessed to likely decrease cumulative anthropogenic effects on birds. Alternative B is the only option consistent with the original intent of the Migratory Bird Treaty Act.
7. Given the above, PSG recommends that the Office of the Solicitor's interpretation of the MBTA, as stated in M-Opinion 37050, be withdrawn, that enforcement of "incidental take" be retained and that Alternative B be adopted. The scope of the MBTA must be defined to include incidental take.

PSG is mindful of the challenges that natural resource managers face in dealing with conflicts—either real or perceived—associated with the incidental take of migratory birds. However, recent studies suggest that the number of birds in the United States and Canada has declined by 3 billion individuals, or 29%, over the past half-century<sup>3</sup>, with impacts documented across the avian diversity of North America. In this context, any weakening of protective legislation designed to conserve birds and their habitats is simply indefensible biologically and ethically.

We appreciate the opportunity to provide feedback on the proposed incidental take standard and DEIS. Please let us know if we can provide additional information.

Sincerely,

A handwritten signature in cursive script that reads "Peter J. Hodum".

Peter Hodum

Vice-Chair for Conservation

<sup>1</sup> Croxall, J.P., S.M. Butchart, B. Lascelles, A.J. Stattersfield, B. Sullivan, A. Symes and P. Taylor. 2012. Seabird conservation status, threats and priority actions: a global assessment. *Bird Conservation International* 22: 1-34.

<sup>2</sup> Bateman, B.L., L. Taylor, C. Wilsey, J. Wu, G.S. LeBaron and G. Langham. 2020. Risk to North American birds from climate change-related threats. *Conservation Science and Practice* (<https://doi.org/10.1111/csp2.243>)

<sup>3</sup> Rosenberg, K.V., A.M. Dokter, P.J. Blancher, J.R. Sauer, A.C. Smith, P.A. Smith, J.C. Stanton, A. Panjabi, L. Helft, M. Parr and P.M. Marra. 2019. Decline of the North American avifauna. *Science* 366: 120-124.