

Pacific Seabird Group



DEDICATED TO THE STUDY AND CONSERVATION OF PACIFIC SEABIRDS AND THEIR ENVIRONMENT

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December 4, 2000

Mr. George Frampton, Chairman
President's Council on Environmental Quality
Eisenhower Executive Office Building
Executive Offices of the President
Washington, DC 20503

Re: Comments on Draft Executive Order on the Migratory Bird Treaty Act

Dear Mr. Frampton::

These are the Pacific Seabird Group's (PSG) comments on the draft Executive Order on the Migratory Bird Treaty Act that is being considered by the President. PSG is an international organization that was founded in 1972 to promote knowledge, study and conservation of Pacific seabirds. PSG draws its members from the rim of the entire Pacific Basin, including the United States, Canada, Mexico, Japan, China, Australia, New Zealand, and Russia. Among PSG's members are biologists who have research interests in Pacific seabirds, state and federal officials who manage seabird populations and refuges, and individuals with interests in marine conservation. Over the years we have advised and worked cooperatively with government agencies to further these interests. PSG has been especially active with regard to the Migratory Bird Treaty Act, and has been working with each administration on this issue since the Reagan era.

PSG is a member of the American Bird Conservancy's (ABC) Policy Council, and endorses the comments that ABC filed last week. We believe that promulgating the version of the Executive Order that we have reviewed would be a major mistake, and lead to further litigation and confusion. It would fail to implement the goals of the Migratory Bird Treaty Act or the conventions with Canada, Mexico, Japan and Russia which the Migratory Bird Treaty Act implements.

As you know, the D.C. Circuit in *HSUS v. Glickman*, 217 F.3d 882 (D.C. Cir. 2000) ruled this past summer that employees of federal agencies must obtain a Migratory Bird Treaty Act permit to take birds under the Migratory Bird Treaty Act. This ruling conflicts with rulings in the 11th and 8th Circuits, and if the federal government disagreed with the decision of the D.C. Circuit it should have

petitioned the U.S. Supreme Court for certiorari. The Court takes virtually every case where there is a split of circuits concerning the interpretation of a federal statute. To pretend that the requirements of the Migratory Bird Treaty Act are unsettled for federal agencies is simply irresponsible. Federal agencies invariably have their legal headquarters in Washington, D.C., and any federal agency that relies on the draft Executive Order which contravenes the law of the D.C. Circuit is likely to be sued there because that circuit has venue to review the actions of any federal agency throughout the world. We expect that sanctions, including punitive damages, could be imposed against any agency that relies on an illegal Executive Order.

While we may agree that some of the provisions in the draft Executive Order might be advisable, the overall approach undermines the enforcement of the Migratory Bird Treaty Act, contravenes its express language, and contravenes *HSUS v. Glickman*. Under these circumstances, PSG urges you to decline finalizing the Executive Order in its current form. We would gladly work with Congress and future administrations to amend the Migratory Bird Treaty Act to make it more flexible while protecting this nation's wild avian resources. If the current version is promulgated by the President, we will work with the new administration to have it rescinded as soon as possible.

PSG thanks you for this opportunity to comment on the draft Executive Order.

Sincerely,

Craig S. Harrison
Vice Chair for Conservation

cc: Secretary Bruce Babbitt
Jamie Clark, FWS
Dinah Bear, CEQ