



December 3, 2021

Mr. Jerome Ford, Assistant Director, Migratory Birds,  
U.S. Fish and Wildlife Service  
5275 Leesburg Pike  
Falls Church, VA 22041-3803

**Re: TPI Comments – Migratory Bird Permits: Authorizing the Incidental Take of Migratory Birds; Docket No. FWS–HQ–MB–2021–0105.**

Dear Assistant Director Ford:

Thank you for considering The Permitting Institute’s (“TPI”) comments on the U.S. Fish and Wildlife Service’s (“Service”) Advanced Notice of Proposed Rulemaking (“ANPR”) regarding the authorization of incidental take of migratory birds. TPI strongly supports policies that protect the avian species in a way that allows America to build needed infrastructure projects and repair and modernize aging infrastructure. TPI submits these comments because its members help build, fund, and develop America’s infrastructure and have a vested interest in any policy or rule that imposes new permitting requirements or regulatory burdens on infrastructure deployment.

**Introduction:**

TPI is a Washington D.C.-based non-profit, non-partisan organization actively engaged nationwide at all levels of government that serves as a central resource and leading advocate for accelerating investment in rebuilding, expanding, and modernizing America’s aging infrastructure while preserving our environmental, biological, cultural, and historic resources. TPI believes permits and permitting process should conserve and protect cultural resources, the environment, and species while being more efficient than it is today. Current permitting processes are marred by contradictory and overlapping statutory and regulatory requirements, timelines, and policies that continue to cause avoidable process delays, cost overruns, and in some cases, project abandonment. These costs are simply too high and undermine new infrastructure initiatives in the Administration, Congress, states, cities, counties, Tribal Nations, and local communities across America. There is a better way, and TPI appreciates the opportunity to provide comments on the Service’s ANPR regarding the authorization of the incidental take of Migratory Bird Treaty Act (“MBTA”) species.

**Background:**

On October 4, 2021, the FWS published two rulemakings in the federal register; one was a final rule intended to interpret the MBTA as prohibiting incidental take and the second was an Advanced Notice of Proposed Rulemaking (“ANPR”) designed to seek public input on the development of regulations to permit the incidental take of MBTA species through exceptions to

the MBTA's purported prohibition against incidental take, general permits, and specific or individual permits. The FWS is further seeking public feedback and information that will help the FWS develop a program to permit the incidental take of MBTA species through both written comments and public listening sessions. TPI submits this letter to comment on the ANPR.

### **Comment Summary:**

TPI specializes in assisting its members with navigating complicated permitting issues and is therefore leveraging its experience to provide the following comments on the ANPR to help the FWS assess the technical impacts of an MBTA incidental take permit program on the existing federal infrastructure permitting process, particularly in light of this Administration's emphasis on building back better – on formally identified timeframes. TPI's comments will specifically address the Service's interpretation of incidental take and permitting uncertainty, permitting outcome associated with the Service's take program proposals, and the implications of application and conservation fees.

### **Regulatory Certainty and the MBTA:**

Infrastructure projects are subject to numerous statutes and regulations that govern both procedural and substantive permitting outcomes. Regulatory certainty can ensure that private investment dollars are deployed, jobs are created, and that critical roads, renewable energy projects, and communications facilities are built. Regulatory uncertainty, however, has the opposite effect. The MBTA uniquely requires regulatory certainty, above other permitting rules, due to the type of liability incurred for violating the statute.

When the United States congress passed the MBTA,<sup>1</sup> it made it unlawful, without a permit, to “hunt, take, capture, kill, attempt to take, capture or kill, possess, offer for sale, sell, offer to purchase, purchase, deliver for shipment, ship, cause to be shipped, deliver for transportation, transport, cause to be transported, carry or cause to be carried by any means whatever, receive for shipment, transportation or carriage, or export, at any time or in any manner, any migratory bird, any part, nest or egg of any such bird...” (“Take”).<sup>2</sup> The MBTA explicitly prohibits the purposeful or intentional Take of species protected under the statute. The wording of the statute and regulations, however, are silent at worst, and ambiguous at best, as to whether the accidental or incidental Take of a protected avian species violates the MBTA.

In the wake of the President signing the Infrastructure Investment and Jobs Act (IIJA), infrastructure development is poised to proliferate and be accompanied by a revolution in offshore and onshore wind and solar development and a renaissance in carbon capture and clean hydrogen technologies. Based on these facts, it is baffling the Service would now advance a regulatory position that will greatly increase potential civil and criminal risk for any entity seeking to build the projects just funded and supported by the IIJA. The Service's rulemaking also envisions the creation of an entirely new permitting system, which would take time to create and implement – leaving a gap between new regulatory requirements and a process to address them. This would appear to be at odds with the Administration's goals of meeting specific

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<sup>1</sup> 16 U.S.C. §§ 703–712.

<sup>2</sup> MBTA § 2 (codified as amended at 16 U.S.C. § 703).

renewable energy and emissions targets on a timeline that does not allow for these types of regulatory gaps, delays, and legal risks.

### **Conflicting Interpretations of Incidental Take and Permitting Uncertainty:**

Prior to 2016, whether American infrastructure developers were exposed to incidental Take liability under the MBTA depended upon where in the country the proposed project would be located. Infrastructure developers operating in the Fifth, Eighth, and Ninth Circuits were only liable for the intentional take of an MBTA species, while developers operating in the Second and Tenth Circuits were liable for incidental Take of an MBTA species. Companies and infrastructure developers operating within both jurisdictional frameworks ran the risk of being liable for incidental Take of an MBTA species in one jurisdiction and not in another.

In an attempt to address the extensive implementation inconsistencies among regulators and case law regarding incidental Take, and to correct the appellate circuit split, the U.S. Department of the Interior's Office of the Solicitor ("Solicitor") issued M-Opinion 37041 in January 2017 to interpret incidental Take as violating the MBTA. In December of the same year, the Solicitor issued M-Opinion 37050 to state that the MBTA does not apply to incidental Take.<sup>3</sup> In January 2021, the Service issued a final rule<sup>4</sup> codifying M-Opinion 37050 and, less than a year later, issued a rule rescinding the January 2021.<sup>5</sup> Now this ANPR, which is the subject of these comments, proposes a permit program for incidental take.

This amount of regulatory whiplash is counterproductive to the critical building, repairing, and investing in American infrastructure being promoted and prioritized by this Administration. Rather than providing additional clarity on recommended or required avoidance, minimization, or mitigation strategies to be used by permitting agencies, these latest changes and introduction of a yet-to-be created permitting program exposes solar, wind, road, rail, port, mine, and bridge developers to MBTA liability. TPI requests that the Service provide an explicit action plan and timeline for the development of any such permitting program, and recommended grandfathering provisions for projects already built, in progress, or entering the development process until renewable energy targets are met and the critically needed IJA funds and programs have been disbursed and/or completed.

### **Permitting Outcomes Associated with the Incidental Take Program Options:**

In its ANPR, the Service proposes three different MBTA permit programs that include excepting certain project types and activities from the incidental Take liability, general permits for certain activities, and specific or individual permits for certain activities.

As an alternative to creating a new permit program, TPI urges the Service to consider an MBTA incidental Take avoidance and minimization approach similar to that in the Fish and Wildlife Coordination Act ("FWCA").<sup>6</sup> To approximate the FWCA approach in the MBTA context, the

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<sup>3</sup> <https://www.doi.gov/sites/doi.gov/files/uploads/m-37050.pdf>

<sup>4</sup> 86 FR 1134.

<sup>5</sup> 86 FR 54642.

<sup>6</sup> 16 U.S.C. 661-667.

Service could provide consultation that Federal agencies must “strongly consider input received during consultation” to prevent loss of damage to avian species and recommend appropriate mitigation measures. This alternate approach to creating an entirely new permitting program would accomplish the key objective of the Service’s ANPR to better protect migratory birds without creating massive regulatory displacement and confusion in the midst of an “all of government” approach to “accelerating” renewable energy and transmission line development.<sup>7</sup> If the Service determines that it will continue to pursue an MBTA incidental Take permit program, we ask that it consider the following:

***Excepted Activities:***

The Service is proposing to except certain activities from an eventual incidental Take permit program if that activity is either “non-commercial” or is an project “where activity-specific beneficial practices or technologies sufficiently avoid and minimize incidental take.” Excepting as many infrastructure-related activities and projects from an eventual incidental Take permit program is the best way to ensure that building back better occurs and that technologies that would halt climate change are deployed.

TPI strongly encourages the Service to broadly and generously define and apply what it considers to be a beneficial practice or a minimization and/or avoidance technology. Examples include wind developers that paint turbine blades black so birds can see them better; mines that put nets over tailing, waste, or evaporation ponds to prevent avian interactions; acoustic deterrents; electric and communications utilities that retrofit powerlines and power poles with technologies that prevent perching and nesting. TPI encourages the Service to include each of these technologies, and many others like them, into its definitions of beneficial practices or avoidance and/or minimization technologies to ensure the essential infrastructure projects can be efficiently permitted.

TPI further encourages the Service to except from MBTA incidental take liability any infrastructure projects that do not normally interfere with MBTA species migration. A few project examples include railways, highways, pipelines, carbon capture facilities, mines, nuclear power plants, oil and gas facilities, traditional and renewable energy storage facilities, and solar facilities. These suggested inclusions into the definition of excepted activities dovetails with TPI’s proposed permitting pilot program that ensures the low or no carbon technologies can be deployed and that vital energy and infrastructure projects are able to be built while complying with the Service’s most recent interpretation of the MBTA.

***General Permit Program:***

While TPI’s preference is to except as many infrastructure activities as possible from the Service’s current interpretation of incidental Take, if the Service were to implement an MBTA incidental Take permit program, TPI would encourage the Service to implement a clear, simple, and transparent general permit program above any specific or individual permit regime.

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<sup>7</sup> 86 FR 7619; <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/27/fact-sheet-president-biden-takes-executive-actions-to-tackle-the-climate-crisis-at-home-and-abroad-create-jobs-and-restore-scientific-integrity-across-federal-government/>.

Particularly under the Clean Water Act (“CWA”), infrastructure developers are experienced in working with general permits in the form of the U.S. Army Corps of Engineers’ (“Corps”) Nationwide Permit (“NWP”) program. Depending on the activity type, and impacts to navigable waters, the NWP programs allow project developers to submit Pre-Construction Notifications (“PCN”) to the Corps to comply with the CWA when expected impacts on navigable waters will be minimal. PCNs are straight forward fill in the blank applications that only ask the applicant for pertinent information.<sup>8</sup> Utilities are also used to filling out simple Special Purpose Utility permits that possess the same equities as PCNs.<sup>9</sup>

The hallmarks of any general permit program that does not stand to be an impediment to infrastructure development necessarily includes flexibility, predictable costs, self-certification-based compliance, self-monitoring, and self-reporting. These hallmarks align with the Service’s desire to allow “permittees to report dead birds found during routine maintenance and operation activities rather than requiring an active monitoring program.”

Existing authorities on managing interactions with MBTA species include the Service’s Wind Energy Guidelines (“WEG”)<sup>10</sup> and the Avian Power Line Interaction Committee’s (“APLIC”) guidance and best-practices related to minimizing or avoiding species interactions with infrastructure projects.<sup>11</sup> APLIC’s guidelines include supporting utilities in the development of an Avian Protection Plan (“APP”) that is unique and flexible based on the utility, geography, facility type, avian species presence, and local avian behavior. APPs and PCNs further fit within the Service’s ANPR by allowing regulated parties to self-report, self-monitor, and self-certify under the terms of the respective permits. TPI encourages the Service to ensure that these sorts of self-monitoring and certification provision are included in any developed program and does not require regulated parties to monitor the entirety of a project’s footprint, particularly for linear projects, for MBTA species Take and that third-party monitoring not be required. If the Service proposed either format the cost of monitoring could prevent wind, solar, transmission lines, communications towers, and highways from being built. Accordingly, it is incumbent upon the Service to analyze the economic costs and impacts that small businesses and Tribes would incur to conduct additional, highly technical species analyses that will likely be required under an MBTA incidental Take permit program.

If the Service does implement a general permit program, TPI urges expansive grandfathering provisions for projects already underway and for projects funded under the IIJA. TPI further urges the Service to essentially adopt APLIC’s APP and the Corps’ PCN, in concept, and implement the APP and PCN concepts as the cornerstones of a general permit for the incidental take of MBTA species, regardless of activity type. This suggestion includes a presumption of approval upon submission of the general permit application so that basic permits are not held up by overwhelmed agency staff. This approach would provide the type of flexibility and

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<sup>8</sup> <https://www.saw.usace.army.mil/Portals/59/docs/regulatory/regdocs/Permits/PCN1-4-2009interactive-reader-enabled2013-06.pdf>

<sup>9</sup> <https://omb.report/icr/202001-1018-001/doc/98279601>

<sup>10</sup> [https://www.fws.gov/ecological-services/es-library/pdfs/weg\\_final.pdf](https://www.fws.gov/ecological-services/es-library/pdfs/weg_final.pdf)

<sup>11</sup> <https://www.aplic.org/documents>

predictability required to allow infrastructure developers to comply with the statute without being subject to incidental Take liability.

### ***Specific or Individual Permits:***

TPI does not recommend that the Service pursue the implementation of a specific or individual permit program. Based on lessons learned under the Bald and Golden Eagle Protection Act (“BGEPA”) permit programs, a specific or individual avian permit runs the risk of adding years and millions of dollars in studies to infrastructure projects without limiting the Take of eagle species. There is no apparent logical outgrowth from an MBTA specific or individual permit program that leads to any outcome other than cost overruns and additional project delays.

### **Incidental Take Program Fees:**

If the Service moves forward with a general or individual permit program, TPI and its members urge the Service to ensure that permit application fees are flat, low, and reasonable. Any permit fee should be a flat fee that does not change based on the proposed infrastructure project and does not exceed a few hundred dollars. This fee should be calculated and based exclusively on the amount of time it takes a Service employee to clerically file and process the permit application; which should not exceed more than an hour or two and should be based on the average permit handler’s Full-Time Equivalency rate. Further, TPI asks the Service to clarify its statutory authority to charge an application fee for an incidental Take permit.

The Service should ensure that any conservation fee levied in a permit program are structured as general conservation fees that directly benefits birds and does not take the form of compensatory migration. Conserving MBTA species is the right thing to do, but compensatory mitigation programs have and can prevent the development of infrastructure projects. TPI does not have specific recommendations for how a conservation fee should be calculated but believes that a per-Take charge would be inappropriate and will discourage the development of low to no carbon technologies, roads, and bridges at scale. TPI and its members also ask the Service to clarify how long it would take the Agency to establish a conservation fee program. The Federal Permitting Improvement has the explicit statutory authority to establish a separate fee program and is still several years away from having that program operational. The United States Forest Service also took a number of years to establish a cost recovery program. Fee programs take time, money, and staff resources to establish, and TPI asks the Service to provide a roadmap to setting up such a program.

Moreover, an examination of the MBTA calls into question whether the Service has the statutory authority to implement either an MBTA conservation fee or a compensatory mitigation program. Similar to permit application fees, TPI asks the Service to clarify its statutory authority to institute a conservation fee or compensatory mitigation program related to the MBTA.

### **Conclusion:**

TPI reiterates that it appreciates the opportunity to provide comments on the ANPR to ensure that any creation of an incidental Take permitting program results in a more efficient permitting

process that cuts regulatory red-tape and delay without sacrificing environmental, species, cultural, and historical stewardship. We stand ready to assist the FWS in developing its regulations and permitting program in a way that helps America Build Back Better – sooner rather than later - and meet our country's urgent infrastructure needs.

Sincerely,

A handwritten signature in black ink that reads "Ross V. Pilotte". The signature is written in a cursive style with a large initial "R".

Ross V. Pilotte  
Senior Vice President  
The Permitting Institute