



The Association of State Wetland Managers, Inc.

“Dedicated to the Protection and Restoration of the Nation’s Wetlands”

Executive Director

Marla J. Stelk
32 Tandberg Trail, Suite 2A
Windham ME 04062
(207) 892-3399

Chair

Mark Biddle
DE Dept. of Natural Resources
and Environmental Control
285 Beiser Boulevard, Suite 102
Dover, DE 19904
(302) 739-9939

Vice Chair

Jill Aspinwall
NJ Dept. of Environmental Protection
401 East State Street, 7th Floor
Trenton, NJ 08625
(609) 984-9736

Secretary

Amy Lounds
MI Dept. of Environment,
Great Lakes, and Energy
525 W. Allegan Street
Lansing, MI 48933
(517) 331-7966

Treasurer

Lauren Driscoll
WA State Dept. of Ecology
PO Box 47600
Olympia, WA 98504
(360) 407-7045

Past Chair

Collis Adams
Adams Environmental Consulting, LLC
110 Pattee Hill Road
Goffstown, NH 03045
(603) 660-9797

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MO Dept. of Natural Resources

Denise Clearwater
MD Dept. of the Environment

Andrew Robertson
Saint Mary's Univ. of Minnesota

Bill Ryan
OR Dept. of State Lands

Mary Ann Tilton
NH Dept. of Environmental Services

Jerome Ford

Assistant Director, Migratory Birds
U.S. Fish and Wildlife Service
MS: JAO/3W, 5275 Leesburg Pike
Falls Church, VA 22041-3803

Submitted via www.regulations.gov

Docket ID No: FWS-HQ-MB-2018-0090

May 28, 2021

RE: Migratory Bird Permits; Regulations Governing Take of Migratory Birds
(Docket ID No. FWS-HQ-MB-2018-0090)

Dear Mr. Ford:

These comments were prepared by the Association of State Wetland Managers (ASWM) in response to the May 7, 2021, Federal Register notice of proposed rulemaking for “Migratory Bird Permits; Regulations Governing Take of Migratory Birds” (Docket ID No. FWS-HQ-MB-2018-0090). ASWM strongly supports the proposed rule to revoke the January 7, 2021, final rule that defined the scope of the Migratory Bird Treaty Act (MBTA) to not prohibit incidental take. The January 7 rule is both contrary to legislative and legal history as well as inconsistent with existing international treaties.¹ ASWM supports the U.S. Fish and Wildlife’s (USFWS) proposed rule to revoke the January 7 rule and return to the longstanding implementation of the MBTA as prohibiting incidental take, consistent with judicial precedent.

ASWM is a nonprofit organization that supports the use of sound science, law, and policy in development and implementation of state and tribal wetland programs. Since 1983, the organization and its member states and tribes have had longstanding positive and effective working relationships with federal agencies in the implementation of regulatory programs designed to protect our nation’s aquatic resources. ASWM works with states and tribes that implement state, tribal, and federal wetland protection programs, including § 404 of the Clean Water Act (CWA), state water quality standards for wetlands, and § 401 of the CWA for certification of federal permits and licenses.

I. The Migratory Bird Treaty Act and wetlands

The loss and degradation of wetlands is a significant threat to the protection and management of migratory birds. Migratory birds rely upon wetlands for breeding, nesting, as a source of drinking water, and as a place to rear their young. Some wetland-dependent bird species require access to wetlands during their life cycle, while others preferentially use wetlands, but may be able to use other upland areas if they are not available. Approximately one-third of all North American bird species use wetlands for food, shelter, or breeding.²

¹ Natural Res. Def. Council v. U.S. Dep’t of the Interior, 478 F. Supp. 3d 469 (S.D.N.Y. 2020).

² Stewart, R. Technical Aspects of Bird Habitat. United States Geological Survey Water Supply Paper 2425. U.S. Geological Survey. Available online at <https://water.usgs.gov/nwsum/WSP2425/birdhabitat.html>.

The MBTA plays a critical role in the protection and management of migratory birds as well as of wetlands. The development of the National Wildlife Refuge System, following enactment of the MBTA, includes 200 national wildlife refuges that conserve wetlands for migratory birds.³ Although migratory bird wetland indicator species protected under the MBTA as a whole have increased 13 percent between 1970-2019, 47% of the species studied are in decline.⁴

II. Potential impacts to the protection and management of wetlands by states and tribes under the January 7, 2021, rule

The January 7 rule is inconsistent with decades of legal precedent and existing international treaties.⁵ Critically for tribal and state wetland managers, the January 7 rule removes an important source of liability for incidental takes of migratory birds that may result from pollution or other natural resource damage. Eliminating the incidental-take liability under the MBTA removes important incentives for companies to develop and implement best practices and technologies to safeguard protected birds. The January 7 rule also represents a potential loss in protection and restoration funding for wetland habitat to support migratory birds. For example, in the case of the Deepwater Horizon Gulf Oil Spill, the approximately \$100 million in fines related to the MBTA were deposited in the North American Wetland Conservation Fund “and used to protect and restore wetland habitat for migratory birds.”⁶ The USFWS should revoke the January 7 rule and return to the established implementation of the MBTA as prohibiting incidental take, consistent with judicial precedent.

III. The USFWS should revoke the January 7, 2021, rule

ASWM supports the proposed rulemaking to revoke the January 7 rule and return to implementation of the MBTA as prohibiting incidental take, subject to judicial precedent. The January 7 rule is inconsistent with longstanding agency practice and judicial history.

We appreciate the opportunity to comment on the Service’s proposed rulemaking for “Migratory Bird Permits; Regulations Governing Take of Migratory Birds” (Docket ID No. FWS-HQ-MB-2018-0090). Although these comments have been prepared by ASWM with input from the ASWM Board of Directors, they do not necessarily represent the individual views of all states and tribes. We encourage your full consideration of the comments of individual states and tribes and other state associations.

Sincerely,



Marla J. Stelk
Executive Director
Association of State Wetland Managers

³ U.S. Fish and Wildlife Service. Public Lands and Waters. Available online <https://www.fws.gov/refuges/about/public-lands-waters>.

⁴ Final Environmental Impact Statement: Regulations Governing Take of Migratory Birds. U.S. Fish and Wildlife Service. November 2020. p. 27.

⁵ Regulations Governing Take of Migratory Birds; Proposed Rule, U.S. Fish and Wildlife Service, 86 Fed. Reg. 87, 24573 (May 7, 2021).

⁶ Final Environmental Impact Statement: Regulations Governing Take of Migratory Birds. U.S. Fish and Wildlife Service. November 2020. p. 21.