

**PETITION FOR RULEMAKING TO ALLOW PERMITS  
AUTHORIZING THE FORESEEABLE KILLING OF  
MIGRATORY BIRDS IN BUILDING COLLISIONS**



Submitted by  
Center for Biological Diversity

*Submitted via First Class Mail and E-mail*

September 4, 2024

Deborah Haaland, Secretary  
Department of the Interior  
1849 C Street, N.W.  
Washington, DC 20240  
exsec@ios.doi.gov

Re: Petition for Rulemaking to Allow Permits Authorizing the Foreseeable Killing of  
Migratory Birds in Building Collisions

Dear Secretary Haaland,

Collisions with buildings is a frequent cause of injury and death of migratory birds in violation of the Migratory Bird Treaty Act (MBTA).<sup>1</sup> According to the most recent data, U.S. buildings kill or otherwise “take”<sup>2</sup> more than 1 billion birds each year. Many species impacted by collisions are in overall population decline. Relieving pressure from collision-related mortality may be important for maintaining these species into the future.<sup>3</sup> Overall, North America has lost roughly net 3 billion birds since 1970 due to a variety of causes, reflecting a roughly 30% population decline.<sup>4</sup>

To reduce the high level of take from building collisions, forestall further bird declines, and ensure that the U.S. is complying with the MBTA, we hereby petition for a rulemaking that establishes the process, criteria, and conditions necessary for permitting the take of migratory birds caused by building collisions. This petition requests a permitting process for new construction of buildings with glass facades or other features that foreseeably lead to collisions and for existing commercial buildings with documented collisions.

In January 2021, the U.S. Fish and Wildlife Service finalized a rule that upended decades of enforcement of the MBTA. This unlawful reinterpretation failed to prohibit the foreseeable killing of migratory birds. In response to successful litigation by the Center for Biological Diversity (Center) and allies, in 2021, the Service revoked this rule and promised to issue regulations to address infrastructure known to cause bird deaths.<sup>5</sup> Instead, in December 2023, it

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<sup>1</sup> 16 U.S.C. §§ 703-712.

<sup>2</sup> The word “take” as used in this petition is intended to include capture, kill, and other MBTA prohibitions. 16 U.S.C. § 703.

<sup>3</sup> [Turning Off Your Lights Could Save Millions of Birds Each Year from Deadly Building Collisions | Smithsonian Voices | National Museum of Natural History Smithsonian Magazine](#); *see also* <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0306362> & <https://meridian.allenpress.com/wjo/article-abstract/136/1/113/498924/Evidence-consequences-and-angle-of-strike-of-bird?redirectedFrom=fulltext>.

<sup>4</sup> [Nearly 3 Billion Birds Gone | Birds, Cornell Lab of Ornithology](#)

<sup>5</sup> “We are not proposing replacement language at this time. However, we will propose to do so in the near future and continue to develop and publish policies and regulations that provide the public with greater certainty regarding compliance with the MBTA.” [Federal Register :: Regulations Governing Take of Migratory Birds; Revocation of Provisions](#)

withdrew much-needed draft migratory bird protection rules, claiming that it requires an indefinite amount of time to pursue the rulemaking and leaving billions of birds vulnerable to building and window collisions.

In a recent Director’s Order, the Service clarified that the “incidental take” of migratory birds is a violation of the MBTA and the agency will prioritize enforcement when conduct foreseeably results in the take of migratory birds and, where available, beneficial practices to avoid or minimize impacts to migratory birds have not been taken.<sup>6</sup> The Order further states that “common actions” that may result in “incidental take” of migratory birds include “infrastructure construction, operation, and maintenance.”

Despite this acknowledgment, the Service has not conducted any enforcement to address building collisions or taken any action to ensure widespread adoption of beneficial practices by commercial building owners. Instead, the Service has developed a database of beneficial practices, conservation measures, and decision support tools that most building owners are unaware of and, in any case, are not required to adopt.<sup>7</sup> This Petition seeks to remedy this deficit.

The Administrative Procedure Act (APA) allows for an interested party to petition for the “issuance, amendment, or repeal of a rule.”<sup>8</sup> This Petition asks the Service to codify the circumstances under which commercial building owners need a permit for foreseeable bird killings through collisions and to require measures to reduce collisions as a condition for a permit.

To fulfill its statutory obligation to implement the MBTA and ensure the survival and recovery of migratory birds, we urge the Service to start a rulemaking process immediately. Failure to respond to this Petition within a reasonable time will violate the Service’s duty under the APA.<sup>9</sup> Given the severe and ongoing impact of window collisions, 12 months to start the process would be a reasonable timeframe.

The Center for Biological Diversity is a national, nonprofit conservation organization with more than 1.7 million members and online activists dedicated to the protection of migratory birds, endangered species and wild places. The Center and its members are deeply concerned with the conservation of birds, and other organisms, and the effective implementation of the Migratory Bird Treaty Act, Endangered Species Act, and other applicable laws.

A more extensive justification for promulgation of the rule this Petition seeks is set forth immediately below in text that is hereby incorporated in and made a part of the Petition.

Sincerely,

Tara Zuardo  
Senior Advocate

Noah Greenwald  
Endangered Species Director

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<sup>6</sup> MBTA Directors Order\_10.4.21 at 3.

<sup>7</sup> <https://www.the Service.gov/library/collections/avoiding-and-minimizing-incidental-take-migratory-birds>

<sup>8</sup> 5 U.S.C. § 553(e).

<sup>9</sup> *Id.* § 555(e).

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CC: Jerome Ford, U.S. Fish and Wildlife Service

### **Introduction: The Need for a Rule**

The MBTA was first passed in 1918 and amended as recently as 1995 to implement international treaties and protect birds that face threats in the U.S., Mexico, Canada, Russia and Japan. Its primary purpose is to protect birds from death, injury, or harm by people. It currently protects

more than 1,000 species of birds and has saved a number of species from extinction, including Snowy Egrets and Sandhill Cranes.

Although recent studies indicate these losses are much higher, according to the Service, up to one billion birds collide with glass in the U.S. alone each year, making collisions one of the greatest threats to migratory birds in the country.<sup>10</sup> These collisions are a conservation crisis that is driving declines in warblers, sparrows, and many other birds, including a number of sensitive species. Accordingly, the conditions leading to these collisions require regulation under the MBTA.

Birds cannot see glass as a barrier and therefore cannot avoid it. Worse still, birds are often attracted to glass when they see natural reflections, such as clouds, trees, and/or indoor plants through windows. This does not just apply to buildings, but also glass breezeways between buildings. Birds are also attracted to and disoriented by lights from buildings, streetlights, and other sources, leading to further collisions.<sup>11</sup> As a result, commercial buildings with glass surfaces should be the subject of a permitting system.

When considered at the start of a project, architects and developers can make no-cost design choices that reduce a building's overall risk of bird window collisions. They can use bird-safe materials that often have energy efficiency and occupant comfort co-benefits. Owners of existing buildings can take many measures to reduce bird collisions, including applying films to windows or otherwise creating visual barriers, turning lights out at night, selecting window types that are more visible to birds, or relying on several other existing technologies.<sup>12</sup> These measures provide ready-made conditions for obtaining a permit.

The Service laid the groundwork for a rule like the one this Petition seeks in its October 2021 advance notice of proposed rulemaking (ANPR). The ANPR contemplated a nationwide, general permitting program and a system of regulations for authorizing "incidental take" of migratory birds. This included general permits for certain types of activities based on available best practices that reduce mortality. Consistent with the ANPR,<sup>13</sup> this Petition recognizes that the Service can allow exceptions to the prohibition on take caused by individual homeowners not engaged in commercial enterprise, although we encourage the Service to educate homeowners about measures they can take to avoid collisions.

The Service has demonstrated that it can regulate the issuance of permits for the foreseeable killing of birds in its recent final rule revising the regulations for the issuance of permits for foreseeable eagle killing and nest take.<sup>14</sup> The Service's stated purpose was to "increase the efficiency and effectiveness of permitting, improve clarity for the regulated community, and

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<sup>10</sup> [Migration: It's a Risky Journey! | U.S. Fish & Wildlife Service \(the Service.gov\)](#)

<sup>11</sup> *Id.*

<sup>12</sup> US FISH AND WILDLIFE SERVICE DIVISION OF MIGRATORY BIRD MANAGEMENT FALLS CHURCH, VIRGINIA. February 2021. *REDUCING BIRD COLLISIONS WITH BUILDINGS AND BUILDING GLASS BEST PRACTICES*. [reducing-bird-collisions-with-buildings.pdf \(fws.gov\)](#).

<sup>13</sup> [Federal Register :: Migratory Bird Permits; Authorizing the Foreseeable Killing of Migratory Birds](#)

<sup>14</sup> Docket No. FWS-HQ-MB-2020-0023; FF09M30000-234-FXMB12320900000.



increase the conservation benefit for eagles.”<sup>15</sup> In addition to continuing to authorize specific permits, the Service created general permits for certain activities under prescribed conditions, including general permit options for qualifying projects and activities that could disturb breeding birds and nest take.<sup>16</sup> This is exactly what is needed to make the foreseeable killing of migratory birds through building collisions MBTA-compliant.

## Legal Background

The origin of the MBTA reaches back to 1916, when the United States entered into an agreement with Great Britain, on behalf of Canada, to establish a “uniform system of protection” for migratory birds.<sup>17</sup> The Canada Convention addressed a “national interest of very nearly the first magnitude,” and “recited that many species of birds in their annual migrations traversed certain parts of the United States,” but “were in danger of extermination through lack of adequate protection.”<sup>18</sup>

Congress enacted the MBTA in 1918 to implement the Canada Convention “for the protection of migratory birds.”<sup>19</sup> Since then, the United States entered into additional treaties for the conservation of migratory birds with Mexico, Japan, and the former Soviet Union.<sup>20</sup> These treaties establish protections around the globe for migratory birds.

To implement these international obligations, the MBTA provides that: “[u]nless and except as permitted by regulations made as hereinafter provided in this subchapter, it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture or kill” migratory birds.<sup>21</sup> The MBTA’s misdemeanor provision provides that “any person, association, partnership, or corporation who shall violate any provisions of said conventions or of this subchapter, or who shall violate or fail to comply with any regulation made pursuant to this subchapter, shall be deemed guilty of a misdemeanor.”<sup>22</sup>

The Service has authority to enforce the MBTA’s prohibition on the taking of any migratory bird the Act protects,<sup>23</sup> except if the take occurs under the terms of a valid permit issued by the Secretary of the Interior.<sup>24</sup> The Secretary of the Interior issued regulations authorizing various

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> See Convention Between the United States and Great Britain for the Protection of Migratory Birds, Aug. 16, 1916, 39 Stat. 1702 (Canada Convention).

<sup>18</sup> *Missouri v. Holland*, 252 U.S. 416, 435, 431 (1920).

<sup>19</sup> Migratory Bird Treaty Act of July 3, 1918, ch. 128, 40 Stat. 755.

<sup>20</sup> See Convention for the Protection of Migratory Birds and Game Mammals, Feb. 7, 1936, 50 Stat. 1311 (Mexico Convention); Convention for the Protection of Migratory Birds and Birds in Danger of Extinction, and Their Environment, Mar. 4, 1972, 25 U.S.T. 3329, T.I.A.S. No. 7990 (Japan Convention); Convention Concerning the Conservation of Migratory Birds and Their Environment, Oct. 13, 1978, 29 U.S.T. 4647, T.I.A.S. No. 9073 (Russia Convention).

<sup>21</sup> 16 U.S.C. § 703(a).

<sup>22</sup> *Id.* § 707(a).

<sup>23</sup> *Id.* §§ 703–12; 50 C.F.R. § 10.1.

<sup>24</sup> *Id.* § 703(a).

types of exemptions to the MBTA, permitting the taking of migratory birds under certain circumstances.<sup>25</sup>

The MBTA imposes strict liability for killing migratory birds, without regard to whether the harm was intended. Its scope extends to harm occurring “by any means or in any manner,” and is not limited to, for example, poaching.<sup>26</sup> Indeed, the federal government has successfully prosecuted those who have unintentionally killed migratory birds under the MBTA’s criminal provisions.<sup>27</sup>

The MBTA applies to federal agencies and private persons.<sup>28</sup> The Service recently issued a Director’s Order confirming the agency’s position that the MBTA applies equally to federal and non-federal entities. The Order also asserts that “take of migratory birds by federal agencies is prohibited unless authorized pursuant to regulations promulgated under the MBTA.”

In October 2021, the Service published an advance notice of proposed rulemaking (ANPR) as an initial step in a process to achieve and manage the long-term conservation of migratory birds and provide regulatory certainty to the regulated community.<sup>29</sup> In doing so, the Service requested suggestions and information to include in the proposed rulemaking and environmental review. The notice also codified the Service’s interpretation that the MBTA prohibits the “incidental take” of migratory birds.<sup>30</sup>

In the ANPR, the Service specifically stated that it is “concerned that voluntary implementation of beneficial practices and prioritization of limited enforcement resources may be insufficient to conserve the species the Service is charged with protecting.”<sup>31</sup> To fulfill its conservation duties, the Service must issue a rule to prescribe conditions under which permits may authorize foreseeable killing of migratory birds in connection with collisions due to commercial activities.

## **Factual Background**

As the Service itself has recognized, “[o]ver the last 50 years, the total population of North American birds has declined by an estimated 3 billion birds,” and “[m]any of the 1,093 species of birds protected under the MBTA . . . are experiencing population declines due to increased threats across the landscape.”<sup>32</sup> Loss et al. (2015) estimate that more than 300 million to 1 billion birds are killed due to collisions with buildings each year, given that an estimated 60% of injured

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<sup>25</sup> See 16 U.S.C. § 704(a); 50 C.F.R. §§ 21.21-21.31.

<sup>26</sup> See e.g., *U.S. v. Moon Lake Electric Association*, 45 F.Supp. 2d 1070 (1999) and cases cited therein.

<sup>27</sup> E.g., *U.S. v. Corbin Farm Service*, 444 F. Supp. 510, 532-534 (E. D. Cal.), affirmed, 578 F.2d 259 (9th Cir. 1978); *U.S. v. FMC Corp.*, 572 F.2d 902 (2nd Cir. 1978); *U.S. v. Apollo Energies, Inc.*, 611 F.3d 679 (10th Cir. 2010).

<sup>28</sup> See *Humane Society v. Glickman*, No. 98-1510, 1999 U.S. Dist. LEXIS 19759 (D.D.C. July 6, 1999), affirmed, *Humane Society v. Glickman*, 217 F.3d 882, 885 (D.C. Cir. 2000) (“There is no exemption in § 703 for farmers, or golf course superintendents, or ornithologists, or airport officials, or state officers, or federal agencies.”).

<sup>29</sup> [Federal Register :: Migratory Bird Permits; Authorizing the Foreseeable killing of Migratory Birds](#)

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> 86 Fed. Reg. at 54,668.

birds die after rehab care,<sup>33</sup> making buildings second only to domestic cats as the leading cause of bird mortality.<sup>34</sup> Moreover, the number of birds killed from flying into buildings is increasing;<sup>35</sup> with more recent studies putting annual mortality at 1.28 billion–3.46 billion, or as high as 1.92 billion–5.19 billion in the United States,<sup>36</sup> placing a bright spotlight on the need for the rulemaking requested in this Petition.

In addition, of the 1,000-plus species protected under the MBTA, 89 are listed as either threatened or endangered under the U.S. Endangered Species Act (ESA), including a number that are subject to collisions and are thus at serious risk of extinction.<sup>37</sup> Several other species listed as national Birds of Conservation Concern are highly vulnerable to building collisions, including the Golden-winged Warbler (*Vermivora chrysoptera*), which is now listed under the ESA, Painted Bunting (*Passerina ciris*), Canada Warbler (*Cardellina canadensis*), Wood Thrush (*Hylocichla mustelina*), Kentucky Warbler (*Geothlypis formosa*), and Worm-eating Warbler (*Helmitheros vermivorum*).<sup>38</sup> Without stronger protections for birds from building collisions, birds will continue to decline and more will need ESA protection.

Birds provide important ecological functions, including pest control, pollination of plants, seed dispersal, and serve as food sources for other wildlife. They are also a source of recreation for millions of bird watchers and enthusiasts, who provide food and design backyard habitats to attract a variety of species throughout the year.<sup>39</sup> Their continued loss to collisions and other factors is a source of loss and sadness for millions of Americans, who are counting on the Service to take action. It also represents a significant economic loss in ecosystem benefits and recreational profits associated with birding and birdwatching.<sup>40</sup>

Birds die from building collisions all year, but migration during spring and fall represents a particularly vulnerable time, with one study finding that over 90 percent of bird collisions occurred during spring and fall migration.<sup>41</sup> Most birds migrate at night and when they migrate over major cities, lighted windows often lure them to their deaths.<sup>42</sup> This is perhaps most tragically exemplified by the death of roughly 3,000 birds in building collisions, including more than 1,000 birds at Chicago's McCormick Place alone, in a single night on October 4<sup>th</sup>, 2023, when birds migrated en masse due to favorable weather.

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<sup>33</sup> Kornreich, A., Partridge, D., Youngblood, M., & Parkins, K. (2024). Rehabilitation outcomes of bird-building collision victims in the Northeastern United States. *PloS one*, 19(8), e0306362. <https://doi.org/10.1371/journal.pone.0306362>.

<sup>34</sup> Loss, S.R., T. Will, P.P. Marra. (2015). Direct mortality of birds from anthropogenic causes. *Annu. Rev. Ecol. Evol. Syst.* 46:99–120

<sup>35</sup> [As More Birds Fly into Buildings, Scientists Study How to Limit Collision Deaths : NPR](#)

<sup>36</sup> [Evidence, consequences, and angle of strike of bird–window collisions \(bioone.org\)](#).

<sup>37</sup> [Federal Register :: General Provisions; Revised List of Migratory Birds](#)

<sup>38</sup> [Bird–building collisions in the United States: Estimates of annual mortality and species vulnerability](#)

<sup>39</sup> [The ecology, behavior, and conservation of migratory birds | U.S. Geological Survey \(usgs.gov\)](#)

<sup>40</sup> In the USA alone, birding and birdwatching is associated with \$96 billion in revenue, 782 000 jobs, and \$16 billion in taxes (2016), <https://digitalmedia.fws.gov/digital/collection/document/id/2252>.

<sup>41</sup> Borden, W.C. and O.M. Lockhart. 2010. Seasonal, Taxonomic, and Local Habitat Components of Bird-window Collisions on an Urban University Campus in Cleveland, OH. *OHIO J SCI* 110 (3): 44-52.

<sup>42</sup> [Why do migratory birds crash into buildings and how can it be prevented? | All About Birds All About Birds](#)

Horton et al. (2019) used remote sensing and satellite data combined with radar data to quantify where and when migrating birds are exposed to the most light pollution, finding that a “combination of large amounts of nocturnal illumination and their location in the most trafficked airspace across the US elevate metropolitan Chicago, Houston, and Dallas” as locations of significant risk of bird mortality to collisions.<sup>43</sup> Los Angeles was identified as the fourth most dangerous city for birds in the spring, but not the fall, while New York ranked as the fifth most dangerous city for birds in the fall, but ranked eighth most dangerous in the spring.<sup>44</sup> St. Louis and Atlanta also ranked amongst the top deadliest cities for birds.<sup>45</sup> The rulemaking requested in this Petition could help address the risk faced by birds when they migrate over major urban areas, while at the same time encouraging cities to take measures that would save energy with ancillary benefits.

Loss et al. (2019) compared 21 buildings in Minneapolis, finding that glass area, amount of surrounding vegetation near glass areas, and light emission at night, were all predictors of bird collisions with four buildings, including the city’s football stadium, dominating collisions.<sup>46</sup> This study shows that addressing buildings with glass surfaces could address a significant portion of the problem.

### **Best Management Practices to Reduce and Prevent Collisions**

The availability of best management practices (BMPs) – i.e. “general or activity-specific beneficial practices”<sup>47</sup> – to reduce or avoid migratory bird mortality is one of the best arguments for creating a permitting system for foreseeable killing of migratory birds. By identifying BMPs and conditioning commercial properties’ permits on the use of BMPs, the Service will reduce the take of migratory birds due to building collisions.

In 2021, the Department of the Interior released Director's Order No. 225, which provides a legal analysis of the MBTA and “incidental take” of migratory birds. The Order states that the Service interprets the MBTA “to prohibit the incidental take of migratory birds and will enforce the statute accordingly,” where “incidental take” is defined as “the taking or killing of migratory birds that results from, but is not the purpose of, an activity.”<sup>48</sup> The Order prioritizes the following types of conduct for enforcement:

- (1) Incidental take that is the result of an otherwise illegal activity; or
- (2) Incidental take that:
  - (i) results from activities by a public- or private-sector entity that are otherwise legal;
  - (ii) is foreseeable; and

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<sup>43</sup> Horton, K.G., C. Nilsson, B.M. Van Doren, F.A. La Sorte, A.M. Dokter, and A. Farnsworth. (2019). Bright lights in the big cities: migratory birds’ exposure to artificial light. *Front Ecol Environ* doi:10.1002/fee.2029.

<sup>44</sup> *Id.*

<sup>45</sup> [Bright lights in the big cities: migratory birds’ exposure to artificial light \(wiley.com\)](https://doi.org/10.1002/fee.2029)

<sup>46</sup> Loss, S.R., S. Lao, J.W. Eckles, A.W. Anderson, R.B. Blair, and R.J. Turner. (2019). Factors influencing bird-building collisions in a major North American city. *PLOS ONE* | <https://doi.org/10.1371/journal.pone.0224164>

<sup>47</sup> United States Department of the Interior, “Foreseeable killing of migratory birds” (Director's Order No. 225, Fish and Wildlife Service, Washington D.C., 2021).

<sup>48</sup> *Id.*

(iii) occurs where known general or activity-specific beneficial practices were not implemented.<sup>49</sup>

Beneficial practices are defined as “best management practices, conservation measures, best practices, mitigation measures, etc. an action implemented in an effort to avoid and minimize the incidental take of migratory birds.” The Order also states that “if an activity will foreseeably result in incidental take of migratory birds, Service personnel must develop and implement beneficial practices to avoid or minimize impacts to migratory birds.”<sup>50</sup>

The Service has identified a number of methods proven effective in reducing the impacts of building collisions on birds, such as applying patterns to the outside of windows, using parachute cords as visual barriers for birds, applying non-toxic tempura paint patterns to exterior glass, using external insect screens and netting, and the use of taps, decals, and external films.<sup>51</sup> To address lighting issues, lights out policies, particularly during migration, or curtains are known to be effective.<sup>52</sup>

These measures reduce bird-building collisions.<sup>53</sup> New York’s Jacob K. Javitz Convention Center, for example, implemented best management practices and, as a result, affected a 90 percent reduction in bird deaths due to collisions.<sup>54</sup> We thus recommend conditioning permits for foreseeable killing on the use of known effective best management practices for commercial buildings.

### **Petition for a Regulation for a Special Permit for Migratory Bird Take Incidental to Commercial Properties**

We respectfully petition the Secretary of Interior to promulgate regulations necessary for the conservation of migratory birds, while authorizing foreseeable killing in connection with commercial properties. To fulfill the conservation purpose of the MBTA, the regulation should condition permits for commercial buildings on the use of best management practices to avoid and reduce migratory bird take. These best management practices may include, for example, implementing a complete “lights out” policy during migration season, ensuring that blinds, shades and/or shutters are in place and closed to reduce nighttime light that attracts and confuses birds, taking immediate steps to cover portions of windows with parachute cords, using tempera paint, screens, netting, tape and/or decals to alert birds to the presence of glass during the daytime, committing to applying one of many well-tested permanent products that can be installed to remediate the building’s glass, including film or tape applied to the windows, or acid-etching, fritting, and/or frosting the windows, and other measures based on best available science.

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> [Threats to Birds: Collisions-Buildings & Glass | U.S. Fish & Wildlife Service \(the Service.gov\)](#)

<sup>52</sup> US FISH AND WILDLIFE SERVICE DIVISION OF MIGRATORY BIRD MANAGEMENT FALLS CHURCH, VIRGINIA. February 2021. *REDUCING BIRD COLLISIONS WITH BUILDINGS AND BUILDING GLASS BEST PRACTICES*. [reducing-bird-collisions-with-buildings.pdf \(fws.gov\)](#), pg. 11-12.

<sup>53</sup> [Daniel Klem Jr "Preventing Bird–Window Collisions," \*The Wilson Journal of Ornithology\* 121\(2\), 314-321, \(1 June 2009\).](#) <https://doi.org/10.1676/08-118.1>

<sup>54</sup> [To protect birds, more architects and local governments alter building designs - The Washington Post](#)

This Petition applies to all commercial properties with any façade covered by more than 30 percent glass and excludes all single-family residences. In place of covering residential homes, we encourage the Service to educate homeowners on minimizing risks to migratory birds and work with Congress to reward homeowners with tax credits for those that participate in efforts to reduce the death of migratory birds in connection with residential buildings.

Under these new regulations, the Service will authorize take using general permits and specific permits. General permits can be used for activities that present a risk to migratory birds, using well-established avoidance and minimization measures. General-permit applicants will self-identify eligibility and register with the Service. This includes providing required application information and fees and certifying that they meet eligibility criteria and will implement permit conditions and reporting requirements. The Service will audit general permits to ensure applicants are appropriately interpreting and applying eligibility criteria and complying with permit conditions. Audits will include reviewing submitted application materials and reports. The Service will also request and review any plans or strategies required by permit conditions, such as adaptive management plans.

Note that we have used the phrase “foreseeable killing” in place of “incidental take” in the regulatory language because that phrase supports the best single reading of the MBTA in terms of establishing this type of permitting regime.

## **Proposed Regulation**

50 CFR –Permit Provisions

50 C.F.R. § 21

- (a) *General permit requirement.*** A general permit is required to authorize the foreseeable killing of migratory birds in connection with new construction of commercial properties with facades that are covered by glass greater than 30 percent of the surface area. Commercial buildings are defined as buildings where commercial activities take place, including office buildings, retail space, warehouses, as well as public buildings, including universities, government (local, state and Federal). This also includes any breezeway structures connecting these buildings which are built with glass facade.
- (b)** General-permit applicants self-identify eligibility and register with the Service. This includes providing required application information and fees and certifying that they meet eligibility criteria and will implement permit conditions and reporting requirements.
- (c) *General permit conditions.*** In addition to the general conditions set forth, commercial property permits shall be subject to the following condition:

  - a. *Best Management Practices.*** Any authorized foreseeable killing in connection with a commercial property shall be conditioned on the use of best management practices to avoid and reduce migratory bird take. The best management practices shall be articulated in the permit itself and based on the specific area and building.

They may include, for example, lights out policies, use of streamers or tempura paint, and other measures based on the best available science.

**b. *Exceptions requiring a special permit:***

***i. Existing buildings with documented collisions.***

**(d) *Process for issuing special permits.*** After reviewing the application, the Service may require and issue permits for reasonable numbers of foreseeable killings in connection with commercial properties based on employment of best management practices, as defined by the criteria below.

**a. *Initial Determination.*** After evaluating the criteria below, the Service shall determine if authorized foreseeable killing is of a number of migratory birds that has a negligible impact on bird populations. The Service shall publish a notice of this initial determination in the *Federal Register* with a public comment period of at least 30 days.

**b. *Issuance of authorization.*** As soon as practicable after the end of the public comment period, the Service shall publish in the *Federal Register* a list of commercial properties for which it has finalized the determinations in subparagraph (a). This publication shall set forth the information used to make the determinations, including best management practices proposed by the commercial properties to reduce the take of migratory birds.

**c. *Negligible impact on bird populations.*** To ensure that permits are consistent with the conservation purpose of the Migratory Bird Treaty Act (MBTA), the Service shall only issue permits authorizing foreseeable killing of migratory birds amounting to negligible impacts to bird populations. In determining what level of foreseeable killing to authorize that will have a negligible impact, the Service shall use the best available science to ensure that foreseeable killing from commercial building collisions neither diminishes the ecosystem services provided by migratory birds nor negatively impacts migratory birds' population growth and recovery.

**(e) *Term of permit.*** A commercial property permit issued or renewed under this part expires on the date designated on the face of the permit, unless amended or revoked, but the term of the permit shall not exceed ten years from the date of issuance or renewal.

**(f) *Withdrawal, suspension, or revision.*** The Service shall withdraw, or suspend for a time certain, the permission to take migratory birds incidentally in if the Service finds that:

**a.** The permit conditions prescribed under paragraph (e) are not being substantially complied with by the property,

**b.** The estimate of foreseeable killings of migratory birds during the course of commercial operations exceeds the take authorized by the permit, or

- c. The taking allowed by the permit is having, or may have, more than a negligible impact on the migratory birds concerned.

**(g) *Effect of the permit.*** If the owner of a building maintains a valid permit and is in compliance with any regulations and terms or conditions required by the permit, the building owner shall not be subject to penalties set forth in this title for the incidental taking of migratory birds while engaged in commercial activities to which the special permit applies, if such foreseeable killing is reported in the manner required by the permit.

In cases where existing buildings are found to result in bird collisions, the Service will issue specific permits to remediate further collisions. Consistent with 50 CFR part 21 and part 22 permitting, Tribes or States may choose to be more restrictive than Federal regulations.

### **Conclusion**

This proposed rule and associated permits will allow the Service to implement mitigation measures and monitoring to appropriately assess and reduce the foreseeable killing of migratory birds due to building collisions and commercial properties for conservation purposes.