

PETITION FOR RULEMAKING TO ALLOW PERMITS AUTHORIZING THE INCIDENTAL TAKE OF MIGRATORY BIRDS IN COMMERCIAL FISHERIES



Black-footed albatross with chick, Midway Atoll National Wildlife Refuge. (Credit: Wieteke Holthuijzen, USGS. Public domain.)

Submitted by

Center for Biological Diversity



Submitted via First Class Mail and E-mail

December 6, 2021

Deborah Haaland, Secretary
Department of the Interior
1849 C Street, N.W.
Washington, DC 20240
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Re: Petition for Rulemaking to Allow Permits Authorizing the Incidental Take of Migratory Birds in Commercial Fisheries

Dear Secretary Haaland,

U.S. commercial fisheries frequently catch and imperil migratory birds, violating the Migratory Bird Treaty Act (MBTA).¹ According to the most recent data available from the few fisheries that report seabird bycatch, U.S. fisheries capture, kill, or otherwise “take”² over 7,000 seabirds a year.³ We request a rulemaking that establishes the process, criteria, and conditions necessary to issue a permit for take of migratory birds incidental to commercial fishing operations in order to reduce this high level of take.

Such a rulemaking would resolve uncertainty and increase transparency with respect to the conservation impacts and legality (or lack thereof) of commercial fishing’s incidental take of migratory birds. These policy justifications have catalyzed various administrative actions in the past decade: in 2012, the issuance of a permit for incidental take in the Hawaii longline fishery; in 2017, the regulation that attempted to remove the prohibition on incidental take; and in 2021, the revocation of the 2017 regulation⁴ and related scoping notice. Because of this complicated, decade-long administrative history, it is important for migratory bird conservation that the Fish and Wildlife Service avoid further delay and efficiently promulgate a regulation establishing a process for authorizing take of migratory birds in commercial fisheries.

The petitioned-for proposed rule, discussed in more detail below, contains the following critical components necessary for the conservation of migratory birds while authorizing incidental take:

¹ 16 U.S.C. §§ 703-712.

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

³ See McCracken, M. and Cooper, B. PIFSC Data Report DR-20-004 (2020), <https://doi.org/10.25923/ckxr-vw68>; Krieger, J.R. and Eich, A.M. Seabird Bycatch Estimates for Alaska Groundfish Fisheries: 2020. U.S. Department of Commerce, NOAA Technical Memorandum NMFS-F/AKR-25 at 10 (2021); Jannot, J. E., et al. Seabird Bycatch in U.S. West Coast Fisheries, 2002–18. U.S. Department of Commerce, NOAA Technical Memorandum NMFS-NWFSC-165. (2021); Sigourney, D. et al. Estimates of seabird bycatch in commercial fisheries off the East Coast of the United States from 2015 to 2016, NOAA Technical Memorandum NMFS-NE-252 (2019) at 4; Benaka, L.R., et al. (editors). U.S. National Bycatch Report First Edition Update 3. 2019. U.S. Dept. of Commerce, NOAA. NOAA Technical Memorandum NMFS-F/SPO-190, 95 p.

⁴ 86 Fed. Reg. 24,573, 24,575 (May 7, 2021); *Regulations Governing Take of Migratory Birds; Revocation of Provisions*, Final Rule, 86 Fed. Reg. 54,542 (Oct. 4, 2021).

1. **Population assessments** – Prior to the issuance of a special commercial fishery permit, the Fish and Wildlife Service (FWS) shall prepare a draft assessment for each migratory bird population that is subject to incidental take in that commercial fishery.
2. **Thresholds** – Any incidental take authorization shall (i) be only for small numbers of migratory birds and (ii) have a negligible impact on the population and the ecosystem.⁵ These thresholds will ensure that the special commercial fishery permit is consistent with the conservation purpose of the MBTA, and neither diminishes the ecosystem services provided by migratory birds nor negatively impacts migratory birds’ population growth and recovery.
3. **Monitoring and Reporting** – FWS shall evaluate the adequacy of existing observer programs and condition the permit on the existence of an observer program if one does not exist or is inadequate to obtain statistically reliable estimates of incidental takes in the commercial fishery. The permit shall require reporting of all incidental takes.
4. **Best Management Practices** – Any authorized incidental take in a commercial fishery shall be conditioned on the use of best management practices to avoid and reduce migratory bird take. These best management practices may include, for example, changes to gear, use of streamers or blue-dyed bait, time and area closures, and other measures based on best available science.

Recent science that compares the overlap of tagged seabirds with commercial fisheries vessel traffic using Automatic Identification System (AIS) means that innovative, new ways to avoid seabird bycatch are on the horizon. A proposed rule that codifies the process for issuing authorizations for incidental take in commercial fisheries will result in reduced interactions. We urge FWS to start the rulemaking process immediately to fulfill its statutory obligation to implement the MBTA and ensure seabirds’ survival and recovery.

The Administrative Procedure Act (APA) allows for an interested person to participate in the regulatory process through the submission of a petition for the “issuance, amendment, or repeal of a rule.”⁶ Failure to respond to such a petition within a reasonable timeframe constitutes a violation of an agency’s duty under the APA.⁷ The Petitioner considers 12 months to be such a reasonable timeframe given the severe and ongoing impact of fishing on migratory birds and requests that the agency respond to the petition within that period.⁸

Sincerely,

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

⁵ See Rosenberg, Kenneth V., et al. “Decline of the North American avifauna.” *Science* 366.6461: 120-124 (2019).

⁶ 5 U.S.C. § 553(e).

⁷ *Id.* § 555(e).

⁸ The provisions of this Petition are severable. If any provision of this Petition is found to be invalid or unenforceable, the invalidity or lack of legal obligation shall not affect the other provisions of the Petition.

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 endangered species and wild places. The Center and its members are concerned with the conservation of seabirds, marine mammals, sea turtles, and other organisms, and the effective implementation of the Migratory Bird Treaty Act, Endangered Species Act, and other applicable laws.

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I. Introduction: The Need for a Rule Establishing a Special Permit for Commercial Fisheries

One of the greatest threats to seabirds across the globe is commercial fisheries.⁹ Attracted to commercial fishing vessels by bait, the fish harvest, discards, and offal, seabirds drown on submerged hooks, get tangled in nets, and are struck by cables. Seabird deaths in U.S. commercial fisheries add up to thousands each year.¹⁰ For migratory birds that are vulnerable to threats in multiple countries, thus protected by international treaty and federal law, this amounts to a conservation crisis. For long-lived, late-maturing seabirds like albatross, a thousand of which are caught in U.S. fisheries each year, the cumulative threats increase global extinction risk.

Establishing a regulation setting the conditions in which the Fish and Wildlife Service (FWS) authorizes the incidental take of migratory birds in commercial fisheries promises both conservation and good governance benefits. Regular population assessments of migratory birds that are caught in U.S. fisheries will increase our understanding of oceanographic trends and changes in ocean health. Requiring monitoring and reporting of incidental take will incentivize innovation in reducing incidental take of migratory birds. Increased transparency as to how commercial fisheries reduce and avoid incidental take of migratory bird can further research and funding to make U.S. fisheries more sustainable.

FWS has already laid the groundwork for such a regulation. The agency's Migratory Bird Program publishes a list of Birds of Conservation Concern, which proactively identifies populations at risk that could benefit from measures to mitigate threats so that they do not become endangered.¹¹ This publication contains a method to evaluate populations' vulnerability that could be helpful in evaluating the population-level impact of commercial fisheries incidental take prior to authorization. Further, FWS entered into a Memorandum of Understanding with the National Marine Fisheries Service, in effect from 2012 through 2017, that promoted collaboration to identify and assess seabird interactions with fishing gear.¹² Lastly, in 2012 FWS issued a permit for the Hawaii longline commercial fishery for take of albatross, with no immediate reduction in incidental take but with the long-term goal of eventual further reduction of seabird take in the fishery.¹³ That permit was invalidated in part due to a lack of criteria and procedures for issuing authorized incidental take permits.¹⁴

In sum, the promulgation of a rule to codify the process for issuing permits, including specific conservation benefits for migratory birds that will result from the permitting process, is long overdue. Efforts to reduce seabird mortality in commercial fisheries is even more urgent

⁹ Dias, Maria P., et al. "Threats to seabirds: a global assessment." *Biological Conservation* 237:525-537 (2019).

¹⁰ See, e.g., National Oceanic and Atmospheric Administration. Implementation of the U.S. National Plan of Action for Reducing the Incidental Catch of Seabirds in Longline Fisheries (fig. 2) (2014).

¹¹ U.S. FWS, Birds of Conservation Concern (2021).

¹² *Memorandum of Understanding Between the U.S. Department of Commerce National Marine Fisheries Service and U.S. Department of the Interior Fish and Wildlife Service*, effective July 16, 2012.

¹³ 77 Fed. Reg. 50,153 (Aug. 20, 2012).

¹⁴ *Turtle Island Restoration Network v. Dep't of Commerce*, 878 F.3d 725, 735 (9th Cir. 2017).

because of increasing threats to seabird populations from climate change.

II. Legal and Factual Background

Legal Background

The origin of the Migratory Bird Treaty Act (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.¹⁵ 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.”¹⁶

Congress enacted the MBTA in 1918 to implement the Canada Convention “for the protection of migratory birds.”¹⁷ Since then, the United States has entered into additional treaties for the conservation of migratory birds with Mexico, Japan, and the former Soviet Union.¹⁸ 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.¹⁹ 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.”²⁰

FWS has authority to enforce the MBTA’s prohibition on the taking of any migratory bird the Act protects,²¹ except if the take occurs under the terms of a valid permit issued by the Secretary of the Interior.²² The Secretary of the Interior has issued regulations authorizing various types of exemptions to the MBTA permitting the taking of migratory birds under certain circumstances.²³

¹⁵ See Convention Between the United States and Great Britain for the Protection of Migratory Birds, Aug. 16, 1916, 39 Stat. 1702 (Canada Convention).

¹⁶ *Missouri v. Holland*, 252 U.S. 416, 435, 431 (1920).

¹⁷ Migratory Bird Treaty Act of July 3, 1918, ch. 128, 40 Stat. 755.

¹⁸ 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).

¹⁹ 16 U.S.C. § 703(a).

²⁰ *Id.* § 707(a).

²¹ *Id.* §§ 703–12; 50 C.F.R. § 10.1.

²² *Id.* § 703(a).

²³ See 16 U.S.C. § 704(a); 50 C.F.R. §§ 21.21–21.31.

In 2012, FWS issued a Special Purpose Permit to the National Marine Fisheries Service (NMFS) under the MBTA and 50 C.F.R. § 21.27 for incidental take in the course of the commercial Hawaii longline fishery. NMFS applied for a special purpose permit that would allow the shallow-set longline fishery to take migratory seabirds while fishing for swordfish.²⁴ FWS issued a draft, then a final environmental assessment, and finding of no significant impact to seabird populations from any of the alternatives considered: denying the permit, granting the permit as requested, and granting the permit while requiring NMFS to conduct new research on additional ways to avoid seabird interactions.²⁵ FWS thus granted a three-year special purpose permit authorizing the shallow-set fishery to kill a maximum of 191 black-footed albatross, 430 Laysan albatross, 10 northern fulmars, 10 sooty shearwaters, and one short-tailed albatross.²⁶

Upon a challenge to the permit, the Ninth Circuit held that FWS's interpretation of 50 C.F.R. § 21.27 as authorizing it to grant an incidental take permit to NMFS did not conform to either the MBTA's conservation intent or the plain language of the regulation.²⁷ The court held that FWS's interpretation of a "special purpose activit[y]" exception as applying to basic commercial activities like fishing with no "special purpose" was inconsistent with the existing permitting scheme in FWS regulations.²⁸ The existing regulations did not allow permits for commercial fishing, and thus the FWS issuing a permit under section 21.27 was arbitrary and capricious.²⁹ Because the court's decision was based on the plain language of this regulation, allowing any incidental take in commercial fisheries necessitates a promulgation of a regulation that will also ensure conservation benefits to migratory birds.

Consistent with this decision that said the existing regulation for permits was unsuitable for permitting commercial fisheries incidental take, on October 4, 2021, FWS published advanced notice of proposed rulemaking to authorize incidental take "under prescribed conditions," and requested suggestions and information to include in the proposed rulemaking and environmental review.³⁰ The notice also codified the FWS's interpretation that the MBTA prohibits incidental take of migratory birds.³¹ FWS is concerned that the "voluntary implementation of beneficial practices and prioritization of limited enforcement resources may be insufficient to conserve the species the Service is charged with protecting."³² To fulfill its conservation duties, FWS must issue a rule to prescribe conditions under which permits may authorize incidental take of migratory birds in commercial fishing.

²⁴ *Special Purpose Permit Application; Draft Environmental Assessment; Hawaii-Based Shallow-Set Longline Fishery*, 77 Fed. Reg. 1,501 (Jan. 10, 2012).

²⁵ *Id.*; *Special Purpose Permit Application; Hawaii-Based Shallow-Set Longline Fishery; Final Environmental Assessment and Finding of No Significant Impact*, 77 Fed. Reg. 50,153 (Aug. 20, 2012).

²⁶ *Id.* at 50,154.

²⁷ *Turtle Island Restoration Network v. Dep't of Commerce*, 878 F.3d 725, 735 (9th Cir. 2017).

²⁸ *Id.* (quoting 50 C.F.R. § 21.27).

²⁹ *Id.* at 734.

³⁰ 86 Fed. Reg. 54,667, 54,668.

³¹ *Id.*

³² *Id.*

Factual Background

The decline in migratory birds requires a precautionary approach when permitting incidental take from commercial fisheries. As FWS 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.”³³ There are more than 300 species of seabirds world-wide, most protected under the MBTA.³⁴ A review of world-wide bycatch reports estimated that at least 400,000 birds die in gillnet fisheries each year.³⁵

Employing a precautionary approach to authorizing incidental take could buffer seabird populations from ubiquitous threats like ocean plastic pollution and climate change.³⁶ A precautionary approach is also warranted because of the lack of estimates of seabird bycatch from fisheries due to a lack of data collection.³⁷ Creating a permitting system for commercial fisheries incidental take will encourage better collection and analysis of fisheries bycatch data, like how the expired Memorandum of Understanding between NMFS and FWS created a responsibility for collecting fisheries bycatch data.³⁸

Seabirds are of particular conservation concern.

Establishing a process for regulating the incidental take of migratory birds in commercial fisheries is particularly important because the United States has more species of seabirds than any other country (fig. 1). The United States has only three single-country endemic breeding seabird species, but it shares 21 seabird species with Mexico or Canada.³⁹ The latter are the migratory birds that would benefit most from a rule that included conservation standards for incidental take in commercial fisheries.

Many seabird species found in the United States – more than 20 – are listed as endangered or vulnerable on the International Union for Conservation of Nature (IUCN) Red List.⁴⁰ These are species that the IUCN has assessed as threatened with global extinction. Thus, incidental take of these species by U.S. commercial fisheries requires special attention, including

³³ 86 Fed. Reg. at 54,668.

³⁴ NOAA Fisheries, Bycatch: Seabirds, <https://www.fisheries.noaa.gov/national/bycatch/seabirds>.

³⁵ Żydelis, Ramūnas, Cleo Small, and Gemma French. The incidental catch of seabirds in gillnet fisheries: a global review. *Biological Conservation* 162 (2013): 76-88.

³⁶ Costa, R. A., et al. “Prevalence of entanglements of seabirds in marine debris in the central Portuguese coast.” *Marine Pollution Bulletin* 161: 111746 (2020); Reynolds, Michelle H., et al. Will the effects of sea-level rise create ecological traps for Pacific island seabirds? *PLoS One* 10.9: e0136773 (2015).

³⁷ See, e.g., Benaka et al. (2019) at 30 (“The lack of estimates for other Southeast Region fisheries is due to lack of data and does not mean that the Atlantic and Gulf of Mexico HMS Pelagic Longline Fishery is the only fishery with seabird bycatch in the Southeast Region.”).

³⁸ NMFS/FWS MOU at 9 (“NMFS will: 1. Improve the collection of at-sea information and the sharing of biological information to assess the vulnerability of seabird species to fishing operations.”); see also Sigourney et al. (2019) (“Under the auspices of the MOU, NMFS is encouraged to conduct bycatch analyses of seabird species and coordinate with FWS to assess the population level effects.”).

³⁹ Croxall, John P., et al. “Seabird conservation status, threats and priority actions: a global assessment.” *Bird Conservation International* 22.1: 1-34 (2012) (fig. 6).

⁴⁰ *Id.* at fig. 6(c).

diligent monitoring and reporting of incidental take, and protection of important habitat, such as areas near breeding sites or foraging grounds.

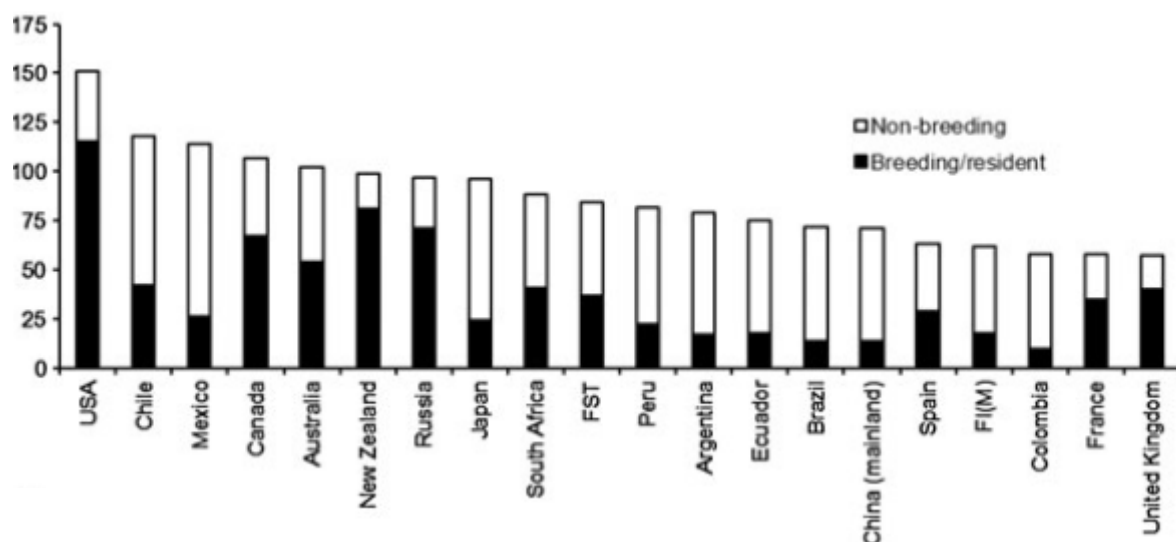


Figure 1. The number of seabird species by country.⁴¹

Of the seabird species, albatrosses are particularly a conservation concern, with more than 60 percent threatened with global extinction.⁴² Albatrosses are long-lived, slow to reach maturity, and have only a few babies, which makes them particularly susceptible to unchecked human-caused mortality. They are also well-studied top predators with a high metabolism that depends on consuming fish. Consequently, they are good indicators of the health of marine ecosystems.

Fisheries affect 95 percent of all albatross species, making fisheries the biggest threat to albatross.⁴³ Several U.S. commercial fisheries incidentally take albatross, with a combined total of 1,245 albatross caught in U.S. fisheries in the most recent year of data available.⁴⁴ The Hawaii deep-set and shallow-set longline fisheries combined caught an estimated 1,032 albatross in 2019 (786 black-footed albatross, 246 Laysan albatross).⁴⁵ Fisheries off Alaska in 2020 caught an estimated 124 albatross (82 black-footed albatross, 31 Laysan albatross, 11 short-tailed albatross).⁴⁶ West Coast fisheries also interact with all three albatross species; in 2018 – the most recent year data are available – an estimated 89 albatross were caught (88 black-footed albatross,

⁴¹ *Id.*

⁴² Dias et al. (2019) (fig. A4).

⁴³ *Id.*

⁴⁴ McCracken and Cooper (2020); Krieger and Eich (2021); Jannot, et al. (2021).

⁴⁵ McCracken and Cooper (2020) (Deep set: 231 Laysan albatross, 767 black-footed albatross; Shallow-set: 15 Laysan albatross, 19 black-footed albatross).

⁴⁶ This represents a decrease of 75 percent compared to the 2011 through 2019 average (499 birds per year). Krieger and Eich (2021).

less than 1 Laysan albatross).⁴⁷ The average estimated catch of short-tailed albatross in West Coast fisheries for most years is less than one individual per year.⁴⁸

There is international conservation concern for black-footed albatross (e.g., IUCN red list as Vulnerable). Summing the numbers above, nearly 956 black-footed albatrosses were caught in the most recent year data is available in Hawaii, Alaska, and the U.S. West Coast. The black-footed albatross's recovery from historically high mortality levels has stalled, likely constrained by adult mortality due to longline bycatch throughout its range.⁴⁹ The total breeding population of black-footed albatross numbers roughly 67,000 pairs, with 95 percent of the population nesting in the Northwestern Hawaiian Islands.⁵⁰

Fishing poses a significant direct threat to migratory birds.

Fisheries bycatch is one of the most significant threats to seabirds world-wide.⁵¹ A quantitative assessment of threats to all 359 seabird species found that bycatch in fisheries was number two, having the greatest average impact in terms of population decline, but affecting fewer species (100) than invasive alien species.⁵² Fisheries impact about a hundred seabird species (fig. 2).

The size of the fishery is correlated with how many species it affects, but not necessarily correlated with the severity of seabird population impacts.⁵³ Large-scale fisheries are causing declines of most species affected by bycatch (> 80), whereas fewer species are affected by small-scale fisheries.⁵⁴ Large- and small-scale fisheries are similar, however, in their scope (the percent of the population affected) and the severity (the rate of the population decline).⁵⁵

⁴⁷ Jannot et al. (2021).

⁴⁸ *Id.*

⁴⁹ Bakker, Victoria J., et al. The albatross of assessing and managing risk for long-lived pelagic seabirds. *Biological Conservation* 217: 83-95 (2018); Lebreton, J.-D., Veran, S.. Direct evidence of the impact of longline fishery on mortality in the Black-footed Albatross *Phoebastria nigripes*. *Bird Conservation International* 23, 25-35 (2013); Guy, T. et al. Overlap of North Pacific albatrosses with the U.S. West Coast groundfish and shrimp fisheries. *Fisheries Research* 147: 222-234 (2013); Veran, S., Gimenez, O., Flint, E., Kendall, W.L., Doherty, P.F., Jr., Lebreton, J.-D. Quantifying the impact of longline fisheries on adult survival in the black-footed albatross. *Journal of Applied Ecology* 44, 942-952 (2007).

⁵⁰ *Endangered and Threatened Wildlife and Plants; 12-Month Finding on a Petition To List the Black-footed Albatross as Endangered or Threatened*, 76 Fed. Reg. 62504, 62505, 62510 (Oct. 7, 2011).

⁵¹ Dias et al. (2019).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

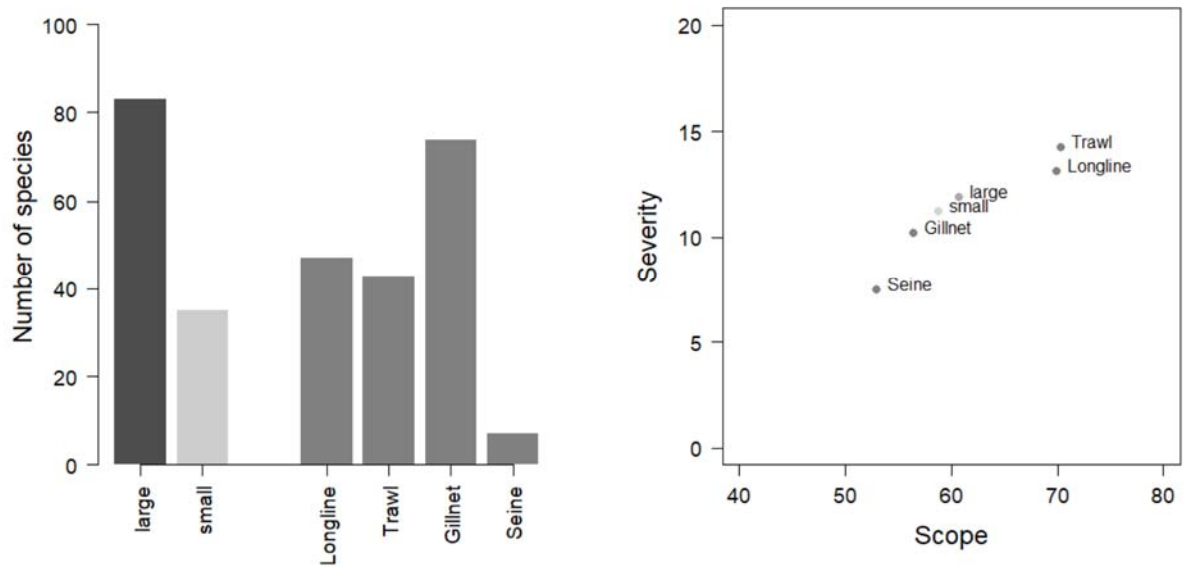


Figure 2. The left figure depicts the number of seabird species affected by fisheries (large-scale fisheries versus small-scale fisheries and different gear types). The right figure gives the mean scope (the percent of the population affected) and severity (the rate of the population decline) of large- and small-scale fisheries and of different 905 fishing gear types.⁵⁶

Longlines and trawls are the types of fishing gear that have the biggest impact on seabirds, especially albatrosses and large petrels/shearwaters.⁵⁷ In longline fishing, baited hooks attract seabirds, which can get caught and drown on the fishing lines.⁵⁸ In Alaska, major changes in fishing practices in 2002 lowered the number of seabirds caught (in 2000, 19,093 seabirds; in 2002, 4,109 seabirds).⁵⁹ Since then, the annual seabird catch in the fishery has fluctuated but has remained high, and is generally below 10,000 seabirds each year.⁶⁰

Trawl vessels tow a net that is connected by wires or cables to the vessel. Seabirds are attracted to the fish in the trawls and discarded scraps, and then vulnerable to injury when the nets are deployed. Birds may collide with the cables and wires, become entangled, and drown as the nets sink.⁶¹ Because drowned birds possibly sink to the bottom, observed mortality does not account for all seabird deaths attributable to trawl gear; the reported mortality includes only birds caught in the net and brought aboard the vessel.⁶² In fact, scientists found that most short-tailed

⁵⁶ *Id.* (fig. 6).

⁵⁷ *Id.*

⁵⁸ Løkkeborg, Svein. Best practices to mitigate seabird bycatch in longline, trawl and gillnet fisheries—efficiency and practical applicability. *Marine Ecology Progress Series* 435: 285-303 (2011).

⁵⁹ NOAA. Implementation of the U.S. National Plan of Action for Reducing the Incidental Catch of Seabirds in Longline Fisheries (fig. 2) (2014).

⁶⁰ *Id.*

⁶¹ Løkkeborg (2011).

⁶² Krieger and Eich (2021) at 11.

and black-footed albatross encounters were with trawlers, not longlines, by comparing the locations of tagged albatross with geographic information from vessels' AIS.⁶³ These associations increase the risk of unobserved fisheries mortality via warp-cable strikes.⁶⁴

The fishing gears that catch the most seabirds for each region are listed below with the most recent bycatch data:

- Alaska demersal longline gear accounted for 75 percent of the estimated seabird mortality in Alaska groundfish fisheries in 2020 (2,612 birds), while bycatch related to trawl gear constituted about 12 percent (403 birds).⁶⁵ For both Alaska demersal longline and trawl gear, most seabird bycatch in 2020 was of Northern fulmars (demersal longline: 1,599 birds; trawl: 391 birds). The total catch of seabirds off Alaska in the federal groundfish fishery in 2020 was 3,462.⁶⁶
- The Hawaii deep-set longline fishery had incidental takes of 1,002 seabirds in 2019.⁶⁷ The Hawaii shallow-set longline fishery had incidental takes of 34 seabirds in 2019.⁶⁸ Combined, these two fisheries in 2019 caught 1,036 seabirds.
- Off the U.S. West Coast, over the past six years hook-and-line fisheries accounted for 50–63 percent of seabird mortality (193 birds in 2018), followed by trawl fisheries at 31–45 percent (175 birds in 2018).⁶⁹ The hook-and-line gear catches mostly Black-footed albatross (84 in 2018), followed by Sooty shearwater (25 birds in 2018).⁷⁰ Trawl gear on the West Coast in 2018 caught the most Brandt's cormorant (84 birds), followed by Sooty shearwater (21 birds).⁷¹ The total estimated seabird catch in the West Coast groundfish fishery in 2018 is 385 birds.⁷²
- Seabird bycatch in the U.S. Atlantic and Gulf of Mexico highly migratory species pelagic longline fishery decreased after 2004, the year that circle hooks became mandatory.⁷³ The most-caught seabird was great shearwaters.⁷⁴ In 2015, 33 birds were caught in the fishery; the annual average seabird bycatch from 1992-2016 was 113 (CV = 26.52 percent).
- On the U.S. East Coast, fisheries that caught seabirds in 2016 include: gillnets (94 percent of all seabird bycatch) followed by sea scallop dredges, bottom otter

⁶³ Orben, Rachael A., et al. "Across borders: External factors and prior behaviour influence North Pacific albatross associations with fishing vessels." *Journal of Applied Ecology* (2021).

⁶⁴ *Id.*

⁶⁵ Krieger and Eich (2021) at at 10-11.

⁶⁶ *Id.* at 27, Table 2.

⁶⁷ McCracken and Cooper (2020).

⁶⁸ *Id.*

⁶⁹ Jannot et al. (2021) at x.

⁷⁰ *Id.* at 18 (Table 5).

⁷¹ *Id.* at 27 (Table 12).

⁷² *Id.* at 14 (Table 4).

⁷³ Benaka et al. (2019) at 30.

⁷⁴ *Id.*

trawls, and paired midwater trawls.⁷⁵ The majority of estimated bycatch was of great shearwaters (1,498)⁷⁶ followed by red-throated loons (553), herring gulls (121), common loons (115), Northern gannets (89), sooty shearwaters (81), great black-backed gulls (26), double-crested cormorants (20), common murrelets (16), and Northern fulmars (9).⁷⁷ In sum, this represents a total of 2,528 seabirds in 2016.

III. Examples of Best Management Practices to Reduce and Prevent Commercial Fishery Interactions

The availability of best management practices (BMPs) for commercial fisheries to reduce or avoid seabird mortality is one of the best arguments for permitting incidental take of migratory birds. By identifying BMPs and conditioning commercial fisheries' permits on the use of BMPs,⁷⁸ FWS will be able to achieve reduction in seabird interactions to an extent that they will hopefully approach zero.

In 2017 the Department of the Interior (Interior) released Opinion M-37041, which provided a comprehensive legal analysis of the MBTA and concluded that the "MBTA's broad prohibition on taking and killing migratory birds by any means and in any manner includes incidental take and killing."⁷⁹ The opinion pointed out that "[i]n many cases, simple, relatively low-cost methods have proven effective in reducing the impacts of these activities on migratory birds," including "employing streamer lines on longline fishing vessels to reduce seabird catch."⁸⁰ The opinion explained that modest measures could significantly reduce adverse impacts on migratory birds, thus reinforcing the importance of interpreting the MBTA, as Interior had for decades, as applying to foreseeable incidental killing and taking in appropriate circumstances.

Significant reductions in seabird bycatch in certain fisheries have been achieved already. One example of best practices implementation is the 2019 regulation in the U.S. West Coast groundfish fishery that required longline vessels to either use streamer lines (also called tori lines or bait savers) or night set (only deploying hooks between one hour after local sunset and one hour before local sunrise) when fishing north of 36° N. latitude.⁸¹ The purpose of the rule is to reduce interactions between seabirds – particularly the endangered short-tailed albatross – and groundfish longline gear.

⁷⁵ Sigourney et al. (2019) at 4.

⁷⁶ Despite bycatch of great shearwaters dominating the Northeast region's seabird bycatch most years since 1996, "[a]t present, we are not aware of any studies that have attempted to quantify the effect of bycatch on the population dynamics of Great Shearwaters." *Id.* at 5.

⁷⁷ *Id.*

⁷⁸ NMFS could implement the conditions that FWS requires to reduce seabird bycatch by issuing fishery management regulations, conditioning fishing licenses or permits, or other means. *See, e.g., Turtle Island Restoration Network v. National Marine Fisheries Service*, 340 F.3d 969, 976 (9th Cir. 2003) (holding that the High Seas Fishing Compliance Act grants NMFS discretion to condition high seas fishing permits for the benefit of conserving living marine resources).

⁷⁹ *Incidental Take Prohibited Under the Migratory Bird Treaty Act* (Jan. 10, 2017) (Tompkins Opinion) at 2.

⁸⁰ *Id.* at 1.

⁸¹ 50 C.F.R. § 660.21, Seabird Avoidance Program (2019).

Similar methods introduced in the Alaska longline fishery in 2002 saved about ten thousand seabirds each year.⁸² Longline vessels over 26 feet in length are required to use single or paired streamer lines of a specified standard, based on the vessel length, fishing gear used, and area fished.⁸³ Night-setting – an accepted best practice to reduce seabird bycatch in longlines globally – reduced seabird catch per unit effort overall, but increased the catch of Northern fulmar by 40 percent.⁸⁴ This demonstrates that best practice recommendations should be area and fishery specific.⁸⁵

Mitigation measures that take into account new science are needed to make meaningful reductions in catch of seabirds. Recent science suggests that oceanographic trends and conditions can predict the number of albatross sightings on fishing vessels because overlap between the fishery and the foraging grounds increases (see fig. 3).⁸⁶ This is a significant indicator of risk for seabirds, because seabirds near fishing vessels are more likely to be hooked, struck by cables, or otherwise injured.⁸⁷ In addition, around trawlers scavenging seabirds eat fishing vessels' discards, which modifies their natural foraging behavior and population biology.⁸⁸ Because environmental conditions influenced the amount of time the short-tailed albatross spent near fishing vessels, predictive models could alert fishers of high-risk areas to avoid.⁸⁹ Thus, incorporating oceanographic trends and data into seabird risk assessments should be standard practice. This will lead to new ways to reduce seabird and vessel interactions.

⁸² NOAA. Implementation of the U.S. National Plan of Action for Reducing the Incidental Catch of Seabirds in Longline Fisheries (fig. 2) (2014).

⁸³ *Id.*

⁸⁴ Melvin, Edward F., et al. Lessons from seabird conservation in Alaskan longline fisheries. *Conservation Biology* 33.4: 842-852 (2019).

⁸⁵ *Id.*

⁸⁶ Wren, Johanna LK, Scott A. Shaffer, and Jeffrey J. Polovina. "Variations in black-footed albatross sightings in a North Pacific transitional area due to changes in fleet dynamics and oceanography 2006–2017." *Deep Sea Research Part II: Topical Studies in Oceanography* 169: 104605 (2019) (finding that black-footed albatross interactions and sightings are correlated in the Hawaii deep-set longline fishery); Orben et al. (2021).

⁸⁷ Orben 2021; Wren 2019.

⁸⁸ Bartumeus, Frederic, et al. "Fishery discards impact on seabird movement patterns at regional scales." *Current Biology* 20.3: 215-222 (2010).

⁸⁹ Orben 2021; Wren 2019.

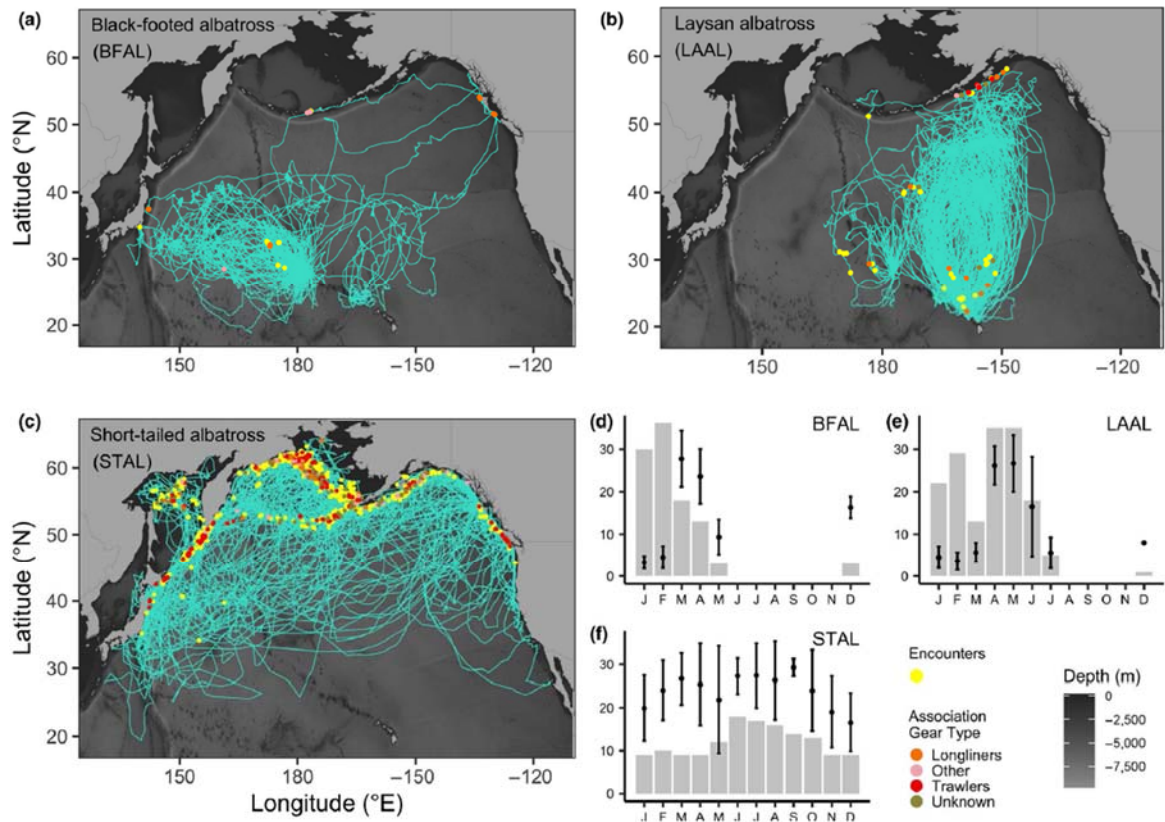


Figure 3. GPS tracks of albatrosses analyzed relative to global fishing watch data on fishing vessel distribution, and the locations of encounters (yellow dots) and associations by gear type for (a) black-footed albatrosses, (b) Laysan albatrosses, and (c) short-tailed albatrosses. Panels d-f show the number of birds tracked each month (gray bars) and the number of days tracked (mean and *SD*, black).⁹⁰

A recent study of hotspots of seabird interactions in the U.S. Atlantic pelagic longline fishery found that predictable patterns in Gulf Stream meanders could enable advanced planning of fishing fleet schedules and areas of operation to avoid seabirds.⁹¹ The authors' simulation showed that switching fishing fleets from bycatch hotspots to neighboring areas and/or different periods could be an efficient strategy to decrease seabird bycatch while largely maintaining fishers' catch.⁹² Bycatch hotspots are linked to the position of the Gulf Stream, which itself is correlated with the North Atlantic Oscillation index from two years prior.⁹³ Thus, environmental data from two years ago can be used to predict seabird bycatch hotspots for this fishery.

Preventive and predictive protections for foraging seabirds would greatly aid conservation throughout the seabird life cycle. For example, while seabirds within Cordell Bank

⁹⁰ Orben 2021 (fig. 1).

⁹¹ Bi, Rujia, Yan Jiao, and Joan A. Browder. Climate driven spatiotemporal variations in seabird bycatch hotspots and implications for seabird bycatch mitigation. *Scientific reports* 11.1: 1-15 (2021).

⁹² *Id.*

⁹³ *Id.*

and Greater Farallones National Marine Sanctuaries have protections for their nesting areas, the seabirds do not have protection for critical offshore foraging areas.⁹⁴ Additional time and area protections from fishing interactions would help recover vulnerable seabird populations, and thus should be considered an available BMP.

IV. Petition for a Regulation for a Special Permit for Migratory Bird Take Incidental to Commercial Fishing Activities

FWS must act promptly to protect migratory birds that are threatened by commercial fisheries. The MBTA was intended to address threats to migratory birds, and as described above commercial fishing is one of the gravest threats imperiling many birds. The incidental catch of migratory birds by commercial fisheries violates the MBTA, and therefore FWS can and should use its authority to promulgate regulations to ensure that any incidental catch promotes conservation and recovery of migratory birds. Therefore, we respectfully petition the Secretary of Interior to promulgate regulations necessary for the conservation of migratory birds while authorizing incidental take in commercial fisheries. To fulfill the conservation purpose of the MBTA, the regulation should require the following prescribed elements when issuing permits:

1. ***Population assessments*** – Prior to the issuance of a special commercial fishery permit, the Fish and Wildlife Service (FWS) shall prepare a draft assessment for each migratory bird population that is subject to incidental take in that commercial fishery.
2. ***Thresholds*** – Any incidental take authorization shall (i) be only for small numbers of migratory birds and (ii) have a negligible impact on the population and the ecosystem.⁹⁵ These thresholds will ensure that the special commercial fishery permit is consistent with the conservation purpose of the MBTA, and neither diminishes the ecosystem services provided by migratory birds nor negatively impacts migratory birds' population growth and recovery.
3. ***Monitoring and Reporting*** – FWS shall evaluate the adequacy of existing observer programs and condition the permit on the existence of an observer program if one does not exist or is inadequate to obtain statistically reliable estimates of incidental takes in the commercial fishery. The permit shall require reporting of all incidental takes.
4. ***Best Management Practices*** – Any authorized incidental take in a commercial fishery shall be conditioned on the use of best management practices to avoid and reduce migratory bird take. These best management practices may include, for example, changes to gear, use of streamers or blue-dyed bait, time and area closures, and other measures based on best available science.

FWS should promptly promulgate a regulation, such as the one proposed below or one that provides comparable protections to seabirds, under the MBTA.

⁹⁴ Studwell, Anna, et al. "Using habitat risk assessment to assess disturbance from maritime activities to inform seabird conservation in a coastal marine ecosystem." *Ocean & Coastal Management* 199: 105431 (2021).

⁹⁵ See Rosenberg, Kenneth V., et al. "Decline of the North American avifauna." *Science* 366.6461: 120-124 (2019).

V. Proposed Regulation

50 CFR Subpart C - Specific Permit Provisions

50 C.F.R. § 21.32. Special commercial fishery permit.

- (a) **Permit requirement.** A special commercial fishery permit is required to authorize the incidental take of migratory birds in a commercial fishery.
- (b) **Population Assessment.** Prior to the issuance of a special commercial fishery permit, the Fish and Wildlife Service (FWS) shall prepare a draft assessment for each migratory bird population that is subject to incidental take in that commercial fishery. FWS shall provide the applicant with information regarding:
- a. Migratory bird population status and trends,
 - b. Estimates of incidental take in commercial fishing,
 - c. At-sea-distribution data and observations,
 - d. Colonies,
 - e. Over-wintering areas,
 - f. Migration stopovers,
 - g. Important habitats (e.g., foraging, wintering, molting areas at sea),
 - h. Significant changes in condition or availability of key food resources, and
 - i. Any other applicable information as it becomes available and upon request.
- (c) **Application procedures.** The applicant shall -
- a. Review the draft population assessment prepared by FWS and identify any substantial new information,
 - b. Estimate the total number and, if possible, age and gender, of migratory birds that are being incidentally taken each year during the commercial fishing operation,
 - c. Specify the geographical region in which the commercial fishery operates,
 - d. Identify the best management practices for avoiding and preventing the incidental take of migratory birds in the commercial fishery,
 - e. Recommend regulatory measures for the reduction of incidental take of migratory birds in the commercial fishery,

- f. Describe a monitoring program that will obtain statistically reliable estimates of incidental take of migratory birds during the course of commercial fishing operations. The monitoring program may rely on observers on board vessels or alternative means of direct observation of fishing activities.
- (d) **Process for issuing permits.** After reviewing the application, FWS may issue permits for small numbers of incidental takes in commercial fisheries that will have a negligible impact on the migratory bird population, as defined by the criteria below.
 - a. **Initial Determination.** After evaluating the criteria below, FWS shall determine if the authorized incidental take (i) is of small numbers of migratory birds and (ii) has a negligible impact on the population. FWS shall publish a notice of the initial determination and draft population assessment described in paragraph (b) 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, FWS shall publish in the *Federal Register* a list of the fisheries for which it has finalized the determinations in subparagraph (a). This publication shall set forth the information used to make the determinations, including a final population assessment for each migratory bird population that is subject to incidental take in that commercial fishery.
 - c. **Small numbers.** To ensure that the special commercial fishery permit is consistent with the conservation purpose of the Migratory Bird Treaty Act (MBTA), FWS shall only issue permits authorizing the incidental take of small numbers of migratory birds. The authorized annual incidental take shall minimize take and not exceed 80 percent of the most recent five years' annual average of incidental take in the fishery after best management practices are implemented. For fisheries without five years' use of best management practices, the authorized annual incidental take shall not exceed 50 percent of the most recent five years' annual average of incidental take in the fishery.
 - d. **Negligible impact on the ecosystem and population.** In determining what level of incidental take to authorize that will have a negligible impact, FWS shall use the best available science. To ensure that incidental take from commercial fishing neither diminishes the ecosystem services provided by migratory birds nor negatively impacts migratory birds' population growth and recovery, FWS shall use the following criteria for making the negligible impact determination for the authorized incidental take:
 - i. If the abundance trend of the migratory bird's population is declining or uncertain, and the migratory bird is listed under the Endangered Species Act (ESA) or identified as a "Bird of Conservation Concern" by FWS, incidental take of no more than one individual over the duration of the permit may be authorized.

- ii. For all other migratory bird populations, FWS has discretion to authorize the incidental take of no more than small numbers of migratory birds.

(e) **Additional permit conditions.** In addition to the general conditions set forth in part 13 of this subchapter B, commercial fisheries permits shall be subject to the following conditions:

a. **Monitoring of incidental takes.** Each special commercial fishery permit shall include a requirement that the applicant implement a monitoring program. FWS shall evaluate the adequacy of the proposed monitoring program and if one does not exist or is inadequate, condition the permit's validity on the implementation of an observer program that will obtain statistically reliable estimates of incidental takes of migratory birds during the course of commercial fishing operations.

b. **Reporting of incidental takes.** The owner or operator of a commercial fishing vessel shall report all incidental take of migratory birds in the course of commercial fishing operations to FWS by certified mail or other means acceptable to FWS within 48 hours after the end of each fishing trip. The vessel owner or operator shall provide the following:

(1) The vessel name, and Federal, State, or tribal registration numbers of the registered vessel.

(2) The name and address of the vessel owner or operator.

(3) The name and description of the fishery.

(4) The species of each migratory bird incidentally taken, and the date, time, and approximate geographic location of such occurrence.

c. **Best Management Practices.** Any authorized incidental take in a commercial fishery shall be conditioned on the use of best management practices to avoid and reduce migratory bird take. These best management practices shall be articulated in the permit itself and based on the specific area and fishery. They may include, for example, changes to gear, use of streamers or blue-dyed bait, time and area closures, and other measures based on the best available science.

(f) **Term of permit.** A commercial fisheries 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 three (3) years from the date of issuance or renewal.

(g) **Withdrawal, suspension, or revision.** FWS shall withdraw, or suspend for a time certain the permission to take migratory birds incidentally in the course of commercial fishing operations if FWS finds, after notice and public comment, that –

- a. The permit conditions prescribed under paragraph (e) are not being substantially complied with by individuals engaging in the commercial fishery,

- b. The estimate of incidental takes of migratory birds during the course of commercial fishing 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.
- (h) *Effect of permit.*** If the owner of a vessel has obtained and maintains a current and valid fishing license for a fishery with a current and valid special commercial fishery permit and is in compliance with any regulations and terms or conditions of the fishing license required by the special commercial fishery permit, the owner of such vessel, and the master and crew members of the vessel, shall not be subject to the penalties set forth in this title for the incidental taking of migratory birds while engaged in the fishery to which the special commercial fishery permit applies, if such incidental take is reported in the manner required by the permit.

VI. Conclusion

FWS must urgently begin rulemaking as proposed above to implement the MBTA's conservation purposes in U.S. commercial fisheries. The MBTA prohibits the incidental take of migratory birds unless it is pursuant to the terms of a valid permit issued under the MBTA's regulations.⁹⁶ This rule and associated permits will allow FWS to implement mitigation measures and monitoring to appropriately assess and reduce the incidental take of migratory birds by commercial fishing operations for conservation purposes.

We request that FWS respond to this petition and initiate the petitioned-for rulemaking within 12 months, which is a reasonable timeframe given the severe and ongoing impact of commercial fisheries on seabirds. The failure to respond would constitute a dereliction of the agency's legal obligations and leave seabirds at risk of further population declines.

⁹⁶ 16 U.S.C. § 703(a).