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By FEDEX

Dear Dr. Millsap,

The Ornithological Council appreciates the opportunity to submit comments regarding the list of nonnative bird species to which the Migratory Bird Treaty Act does not apply. The Ornithological Council comprises 11 scientific societies of ornithologists in the Western Hemisphere. It is our mission, in part, to provide scientific information about birds to decision-makers whose actions will affect wild bird populations.

Validity of listings

The largest and oldest of our member societies is the American Ornithologists' Union, whose Taxonomic and Nomenclature Committee compiles the Check-list of North American birds, long considered the official source on the taxonomy of birds found in North and Middle America, including adjacent islands. The list, which is updated periodically, specifies those species that are found in the check-list area as the result of introductions. The most recent update – the fourth supplement to the seventh edition - was published in 2004 (Banks et al., 2004). We recommend that the Service continue to recognize the AOU check-list as the primary, authoritative source to document occurrence, together with peer-reviewed literature.

The geographic areas covered by the AOU checklist and the USFWS lists are not identical. The proposed USFWS list covers only the United States and its territories, whereas the AOU check-list area covers the biogeographical area described as North America. Sixteen species on the proposed list are considered native by the AOU check-list, but the Taxonomic and Nomenclature Committee confirms that they are native *outside* the 50 states and U.S. territories.

Therefore, the list appears to be entirely consistent with the best available ornithological science.

Validity of criteria

It is not accurate to state that the list is informational only. The Service is using criteria that have not been promulgated through the notice-and-comment process required by the Administrative Procedure Act. We recognize that these criteria appeared in two prior Federal Register notices (60 FR 24686, dated 9 May 1995 and 66 FR 52281, dated 12 October 2001) but no final rule has ever been issued. The Service did not request comments on the criteria, which were apparently detailed in the notices for informational purposes only; the Service was describing but not proposing, criteria that do not appear in the current regulation listing protected bird species (50 CFR 10.13). Because the criteria and their application have significant implications for bird conservation and management, these criteria should be developed through the notice-and-comment process, rather than presented as established policy. In other words, the criteria are substantive, not interpretive. The criteria clearly carry the “force and effect of law” in that inclusion triggers federal protection of the species and exclusion deprives the species of that protection.

The criteria are scientifically appropriate with regard to the exclusion of introduced, non-native species. It is consistent with the great weight of ecological scientific thought that non-native species have the potential to cause severe ecological damage, including the displacement of native species. We disagree with those who argue about the extent to which a given species has actually caused ecological damage, or argue that control should be exercised only when extensive ecological damage has already started to occur. The National Invasive Species Council, whose staff members include scientists with recognized expertise on invasive species, issued a National Management Plan in 2001 that calls for early detection and rapid response, not “wait and see if a problem develops.” There is no separate ecological rule for birds. The discussion about when control is appropriate occurs only because of the legal distinctions made with regard to birds, and it is for that reason that refinement to the law was necessary. The Service’s application of the standard established by the Congress is biologically appropriate.

Where we disagree with the criteria is the automatic exclusion of taxa that arrive on their own but that are not included in one of the four treaties. Nothing bars a country from protecting species that are not included in one of the four treaties. The Migratory Bird Treaty Act is silent about whether a country can protect taxa that are not included in one or more of the treaties. In practice, each country has some latitude about how to interpret the treaty. Indeed, Canada is electing to protect Mute Swans, or at least giving its provinces the option to do so, and yet apparently accedes to the U.S. decision not to protect Mute Swans. Nothing in the Migratory Bird Treaty Reform Act (MBTRA) bars the U.S. from protecting taxa that are not listed in one of the treaties. The focus of the MBTRA is exclusion of non-native species that are present as the result of introductions.

Species that arrive on their own, but that are not listed in one of the treaties, may be in need of protection. For instance, none of the treaties includes Psittacidae. Suppose a wild individual of a declining species arrives in the United States on its own. No U.S. law would prevent someone from capturing or killing this bird unless it happens to be listed on the Endangered Species List. It can be argued that any species that arrives on its own should be protected. We recognize, however, that doing so might be unreasonable, in that protection

would trigger time-consuming, expensive processes such as environmental assessments, management plans, and litigation every time any kind of control or management was proposed. We also recognize that it would trigger permitting requirements for scientific research.

Therefore, to accommodate the need to protect certain species without creating new and biologically unwarranted regulatory burdens, we propose that that the USFWS at least include taxa that are not included in one of the treaties if the species is:

- a) Listed in the IUCN Red List of Threatened *except for Least Concern, Data Deficient, or Not Evaluated*; or
- b) legally protected throughout or in part of its native range; or
- c) legally protected by CITES or the Wild Bird Conservation Act; or
- d) considered by one of the bird conservation initiatives (such as Partners in Flight or the U.S. Shorebird Plan) as a species in need of conservation action (e.g. the Partners in Flight Watchlist)

Doing so would be consistent with the intent of the MBTA and would be consistent with the science-based conservation plans that are now the foundation of bird conservation in this country. For instance, the Wrentit (*Chamaea fasciata*) is listed on the Partners in Flight continental watchlist. However, under the USFWS criteria, it would not be protected under the MBTA because the family (Timaliidae) is not included in any of the treaties. A biologically-based decision should consider the population status of a species, not the inclusion or exclusion of the family in one or more of the treaties.

Conclusion

The Service is to be commended for moving so promptly to implement the Migratory Bird Treaty Reform Act and for its careful adherence to authoritative ornithological information.

We hope these comments prove useful to the USFWS in finalizing and implementing this rule.

Sincerely,

Ellen Paul
Executive Director

Literature cited

Banks, Richard C., Carla Cicero, Jon L. Dunn, Andrew W. Kratter, Pamela C. Rasmussen, J. V. Remsen Jr., James D. Rising, and Douglas F. Stotz. 2004. Forty-fifth Supplement to the American Ornithologists' Union *Checklist of North American Birds*. *Auk* 121: 985-995