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RE: Proposed Amendments to Migratory Bird Regulations, as published in Canada Gazette, Part I, Volume 153, Number 22: Migratory Birds Regulations, Regulatory Impact Analysis Statement (<http://gazette.gc.ca/rp-pr/p1/2019/2019-06-01/html/reg3-eng.html>)

Dear Ms. Ladanowski,

Thank you for the opportunity to comment on the proposed amendments to Canada's Migratory Bird Regulations (MBR). We are submitting this feedback in our capacities as Wildlife Conservation Society (WCS) Canada biologists. WCS Canada is a national non-government organization that aims to conserve Canada's wildlife and wild places through implementation and support of field research, promotion of science-based decision-making, and engagement with a broad array of stakeholders to develop solutions to complex conservation problems. We have been engaged in research and conservation of migratory birds in Canada since 2010.

We have reviewed the proposed amendments to the MBR and the accompanying Regulatory Impact Analysis Statement. Based on our knowledge and experience, our principle concerns are (1) the inconsistent and weak rationale for the species proposed for Schedule 1 and (2) the absence of amendments to address incidental take of active nests of migratory birds. We urge the federal government to assume its responsibility and authority for the protection of these vital components of biodiversity and prioritize a comprehensive modernization of the Migratory Birds Convention Act (MBCA) and Regulations that addresses the most critical threats to migratory bird populations - habitat loss and degradation, climate change, and pesticides and other pollutants.

Our comments are organized by the listed objectives in the Regulatory Impact Analysis Statement.

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1. Background: Bird Populations in Canada – Current Status and Threats

Of the 302 bird species with sufficient data to be tracked by the State of Canada's Birds (NABCI 2019), as many species have declining populations (115) as increasing (116) (NABCI 2019). Over the previous four decades, populations of birds of prey and waterfowl in Canada have made tremendous recoveries, with overall increases of 110% and 150% respectively. Fifteen of 17 birds of prey and 47 of 56 waterfowl species have increasing or stable populations. These conservation success stories are the result of active management of threats, including through hunting permits, habitat restoration and protection, and elimination of harmful pesticides. In contrast, 25 of 37 shorebirds, 17 of 25 grassland species, and 13 of 16 aerial insectivores have declining populations. These species groups have experienced overall declines of 40-60% since 1970 and require urgent conservation action. The majority of species in these latter three groups are protected by the MBCA.

The primary threats to bird populations in Canada are habitat loss and degradation, climate change, pesticides and other contaminants, and direct mortality resulting from human activities (NABCI 2019). An estimated 268 million birds are killed each year in Canada as a result of human activities, not including managed harvest (Calvert et al. 2013). Among the top causes of mortality are predation by cats and collisions with buildings, vehicles, and transmission lines. The number of active nests destroyed during human activities is unknown. Estimates of nest loss due to forestry alone in Canada ranges from 616 thousand to 2.09 million nests (Hobson et al. 2013) which translates to a loss of close to 1 million new individuals for recruitment into Canada's migratory bird populations annually.

2. Proposed Amendments to Migratory Bird Regulations

As stated in the Regulatory Impact Analysis Statement posted in Canada Gazette, Part 1, Volume 153, Number 22, the first 2 objectives of the amendments proposed by Environment and Climate Change Canada (ECCC) to the MBR are to:

- 1. Increase clarity and facilitate interpretation and compliance by updating outdated language, incorporating current legal standards, eliminating errors, inconsistencies and ambiguities, and restructuring the Regulations by placing related information into distinct parts;*
- 2. Ensure that the MBRs recognize Aboriginal and treaty harvesting rights according to section 35 of the Constitution Act, 1982; and*

We recognize the importance of objectives 1 and 2 and support them without comment.

The 3rd objective of the proposed amendments is to:

3. *Improve the ability to effectively manage migratory birds in Canada, in particular, by protecting nests when they have a conservation value for migratory birds, as well as clarifying and introducing provisions to support more effective migratory game bird hunting and hunting management.*

We support amendments to the MBR that update and clarify processes intending to improve management of migratory game bird hunting.

Below we detail our concerns with the proposed approach to the aspect of this objective aiming to protect nests of conservation value.

3. Proposed Amendment to Protect Nests of Conservation Value

3.1. Exception for unoccupied nests and rationale for species included on Schedule 1

With the proposed amendments to the MBR, ECCC is attempting to improve protection of migratory bird nests that are considered of conservation value. A regulatory framework is proposed under which nests of species listed on Schedule 1 are to be identified priority to land clearing or other disruptive activities and protected for a designated period of time, regardless of whether occupied or unoccupied. This is a modest improvement on the current regulations because it expands the protection of migratory bird nests for several species that reuse nests in multiple years. However, the current list of species on Schedule 1 is incomplete and the rationale for those species included is weak and contradictory.

According to the Regulatory Impact Analysis Statement, ECCC considered all species that ‘commonly or usually reuse their nests, cavities or burrows in subsequent years’ when they developed the list of species proposed for Schedule 1. Further, it states that protection of these unoccupied nests is ‘biologically significant, meaningful, consistent, and enforceable at any time of the year’. The rationale for the species listed on Schedule 1 is that only species whose nests are easy to detect and identify will be afforded protection outside the breeding season.

The rationale for species on Schedule 1 neglects species for which there is scientific knowledge of nest reuse between years and for which protection of unoccupied nest sites would have conservation value, notably several swallows, gulls, and cavity-nesting species. For example, Cliff Swallows (*Petrochelidon pyrrhonota*) reuse nests in subsequent years (Brown et al. 2017); Mew Gulls reuse old nests and display nest site fidelity (*Larus canus*) (Moskoff and Bevier 2002); and both intra- and inter-specific nest reuse occurs in Tree Swallows (*Tachycineta bicolor*) (Winkler et al. 2011). Difficulty in identifying nest sites outside the breeding season is not a sufficient argument for not protecting these nests. We agree with the guidance of ECCC that searching for active nests of all species at a site is unlikely to be successful given how difficult it is to locate nests of most species, and that it may result in more harm through disturbance or destruction of active nests

(<https://www.canada.ca/en/environment-climate-change/services/avoiding-harm-migratory-birds/reduce-risk-migratory-birds.html#toc4>). However, searches for active nests of species known to reuse their nests could be conducted by skilled and experienced observers with minimal disturbance to the nests of other migratory bird species. Protecting these nests through the non-breeding season would improve nesting success in subsequent years.

We recommend expanding Schedule 1 to include all species for which there is scientific evidence of nest reuse.

Some species reuse nest sites, such as a river bank or tree, but may not reuse the nest structure itself. This is unaddressed by the proposed amendments, yet protection of unoccupied nest sites outside the breeding season would have conservation value for these species. For example, Bonaparte's Gulls (*Chroicocephalus philadelphia*) display nest tree fidelity (Burger and Gochfeld 2002). Yellow-bellied Sapsuckers (*Sphyrapicus varius*) also display nest tree fidelity, and nest trees with multiple cavities are easily identified at all times of the year (Walter et al. 2002). When nest sites are easily identified during the breeding season, these locations should be marked (e.g. using tree tags) and protected during the non-breeding season as well. Traditional colony nest sites are reused repeatedly and are easily identified during the breeding season. For example, Cliff and Bank Swallows (*Riparia riparia*) nest repeatedly in traditional colony sites which are easy to identify throughout the year (Brown et al. 2017, COSEWIC 2013).

We recommend expanding the definition of nests in the Migratory Bird Regulations and the list of species on Schedule 1 to include species that have traditional or regularly-used nest sites, even if old nest structures are not themselves reused.

The rationale for including Pileated Woodpecker (*Hylatomus pileatus*) on Schedule 1 includes: ease of detection and identification of their nest cavities outside the breeding season; the importance of Pileated nest cavities to secondary cavity nesters that are unable to excavate their own cavity; a broad distribution across Canada; and, improved nesting success because existing nest cavities allow Pileateds to nest earlier. By this rationale, other woodpeckers should also be included in Schedule 1. In particular, nest cavities of Northern Flicker (*Colaptes auratus*) and Hairy Woodpecker (*Dryobates villosus*) are both relatively large and easy to identify (Jackson et al. 2018, Wiebe and Moore 2017) and their cavities are reused by secondary cavity nesters in multiple years (Cooke and Hannon 2011, Martin et al. 2004). Among woodpecker species, intraspecific reuse of existing cavities for nesting is most common in Northern Flicker (Wiebe and Moore 2017), and thus this species would benefit from protection of unoccupied cavities outside the breeding season. Finally, both species also have broad distributions in Canada. Cavity nest webs have only been described for a few of Canada's

ecoregions and forest types. Thus, there is insufficient information to identify the full suite of woodpecker species that function as important cavity excavators.

We recommend including Northern Flicker and Hairy Woodpecker on Schedule 1. We also recommend a precautionary approach to listing other woodpecker species on Schedule 1, which would entail listing all species for protection of unoccupied cavities until scientific information demonstrates they do not have conservation value.

In the Regulatory Impact Analysis Statement, ECCC argues that *‘the strong biological criteria that the Department has developed for choosing the species that are included in the proposed Schedule 1 is rooted in the precautionary principle’*. In the absence of a clear definition of how the precautionary principle was applied, this statement provides no additional clarity on how ECCC chose species for Schedule 1. With respect to environmental management and decision-making in Canada, general application of the precautionary principle is to not use the absence of scientific evidence as a reason for postponing measures that would avoid or minimize environmental damage (Birchall et al. 2017). Further, given the inconsistent application of the precautionary principle in Canadian legislation, we are unable to interpret how it was applied here. The objective of the Migratory Bird Convention Act and Regulations is to protect migratory birds, their nests, and eggs. Thus, we argue that application of the precautionary principle in this context would favour inclusion of more, not fewer, species on Schedule 1.

We recommend development of clear and comprehensive guidelines for identifying species to be listed on Schedule 1, including clarity on dealing with uncertainty due to the absence of sufficient scientific information.

3.2. Incidental Take of Nests

Incidental take is the unintentional killing of migratory birds and the destruction of their nests or eggs resulting from human activities. An unknown number of active nests are disturbed or destroyed annually due to human activity, such as land clearing, during the breeding season. It was our expectation that this amendment process would be an opportunity for ECCC to provide greater clarity on this issue, which would be to the benefit of all stakeholders. We are disappointed that ECCC has failed to propose a process and regulatory framework for managing the incidental take of active nests despite having the authority to do so. Instead, ECCC has opted to continue its policy of 'voluntary compliance' through education and decision-support tools (<https://www.canada.ca/en/environment-climate-change/services/avoiding-harm-migratory-birds.html>), in the face of abundant evidence that this approach is not working. The Regulatory

Impact Analysis Statement states that the proposed amendments to the MBR aim to improve nesting success in migratory bird populations by protecting ‘nests of conservation value’. Yet, ECCC has failed to even refer to, let alone seek to address, human disturbance and destruction of active nests, which clearly impacts nesting success.

In contrast to other natural resources, the federal government has responsibility for migratory birds. We understand the complication of potential conflict with provincial/territorial legislation and policies. We also recognize the challenge to stakeholders of enumerating active nests in an area proposed for land clearing or other activity during the breeding season, and agree with ECCC guidelines that nest searching should only be conducted by skilled observers due to the potential disturbance to nesting birds. An alternative approach is to estimate nesting densities by species based on known habitat relationships and the area to be impacted. We recognize this approach is hindered by gaps in knowledge regarding nesting habitat for many migratory bird species. However, none of these challenges should be reasons for the federal government to neglect its leadership role and responsibility for protecting migratory birds. The status of many of Canada’s migratory bird populations is dire, and while incidental take of nests is only one of many threats, the Migratory Bird Convention Act is the primary legislation by which the federal government has the authority to pass and enforce regulations to reduce this threat.

We urge the federal government to develop a regulatory framework to manage incidental take of active nests in Canada.

4. The Need for Modern Legislation and Regulations for Modern Threats to Migratory Birds

A century has passed since the original Migratory Bird Convention Act, and a quarter century since the updated MBCA of 1994. The proposed amendments aim to modernize the existing MBR, yet do little to enhance protection and restoration of migratory bird populations not managed for hunting. Modern threats to migratory birds require modern legislation and regulations. With protection limited to individual birds, their nests, and eggs, the existing MBCA and MBR and the proposed amendments do little to tackle the biggest threats – habitat loss and degradation, climate change, and pesticides and other pollutants. Protecting individual nests and nest sites is meaningless if the surrounding habitat is modified, degraded, or cleared to the point it lowers foraging opportunities, nest productivity, and overall survival. And, it is meaningless in the context of continued loss of nesting habitat, such as mature forests, wetlands, grasslands, and alpine areas, resulting from land clearing for development or ecosystem modification under climate change.

We know conservation actions targeting specific threats works. Conservation investments and partnerships have restored and protected waterfowl habitat, aiding in the 150% increase overall in waterfowl populations since 1970 (NABCI 2019). After elimination of the pesticide DDT, populations of birds of prey have increased 110% overall. Other groups of migratory birds deserve

the same targeted conservation efforts, and protection of nest sites in the absence of habitat protection and other measures to reduce threats neglects the original intent of the MBCA – to protect and restore Canada’s migratory bird populations. Migratory birds are a key component of Canada’s biodiversity and fulfill important ecosystem services. Unlike many components of biodiversity, we have legislation we can use for their protection. But it is only of value if it, and the regulations to enforce it, address the greatest current threats to migratory birds.

We urge the Government of Canada to elevate the MBCA and MBR in the agenda of the Canadian Council of Ministers of the Environment such that these statutes can be modernized in a collaborative fashion with provinces and territories to reflect current threats to migratory bird populations in Canada as a key element of biodiversity.

Sincerely,



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