



A letter from the International Black-capped Petrel Conservation Group concerning the reopening of the proposed rule 83 FR 50560: **Endangered and Threatened Species: Status for Black-Capped Petrel with a Section 4(d) Rule**

1 June 2023

Attn:

FWS-R4-ES-2018-0043

U.S. Fish and Wildlife Service

MS: PRB/3W

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The International Black-capped Petrel Working Group (IBPCG) welcomes the reopening of comments on this rule, about which we had significant concerns. We refer you to our comments made in 2018; we believe these remain valid and relevant. They were:

1. We believe the classification of “endangered” (at risk of extinction throughout its range) is more appropriate than the proposed “threatened” (likely to become endangered within the foreseeable future throughout its range) given the best available science.
2. We are highly concerned that Service is choosing not to list the Black-capped Petrel’s primary foraging area as critical habitat, justifying the decision with an inaccurate statement that “the best available information indicates that the species' specific needs and preferences for these [foraging, resting, commuting] habitat elements are relatively flexible, plentiful, and widely distributed, and there are no habitat-based threats to the species in the foraging range.”
3. We disagree with the use of Section 4(d) to rule that adequate protections are provided under the Migratory Bird Treaty Act (MBTA) and the assertion that “the primary stressors to the species are occurring on the breeding grounds in Haiti and the Dominican Republic; therefore, prohibiting incidental take in the United States is not going to contribute meaningfully to the conservation of the species.”

In this letter, we share renewed concerns about the proposed rule, and recent developments affecting the research and conservation of the Black-capped Petrel. We also share corrections of inaccuracies and factual errors in the document accompanying the reopening of the comment period: Docket No. FWS–R4–ES–2018–0043; FF09E21000 FXES1111090FEDR 234 ([Appendix](#)).

1) Uncertainties in policy tools

Again, we view the policy decisions in the 2018 proposed rule to 1) withhold designation of critical habitat and to 2) rely on the Migratory Bird Treaty Act (MBTA) to provide adequate protection as imprudent given the political malleability of these policy tools.

Critical habitat designation is a controversial part of the ESA, as illustrated in recent years. A 2018 U.S. Supreme Court ruling resulted in a 2020 proposed rule to provide a definition of “habitat” in the case of the designation of critical habitat. The definition arguably would have narrowed species protections. Ultimately, USFWS decided to rescind that regulation. “[...] we now conclude that codifying a single definition [of “habitat”] in regulation could impede the Services' ability to fulfill their obligations to designate critical habitat based on the best scientific data available. For reasons further outlined below, we find that it is instead more appropriate, more consistent with the purposes of the Act, and more transparent to the public to determine what areas qualify as habitat for a given species on a case-by-case basis using the best scientific data available for the particular species.”¹ We feel that the decision to establish critical habitat for the Black-capped Petrel would be in keeping with the best scientific data available, and it would make use of a policy tool while in a strong state.

We also note the fluid nature of MBTA protections. When the proposed rule for Black-capped Petrel listing was released in 2018, the Department of Interior’s legal opinion was that MBTA did not apply to incidental take, a position put into rule on January 7, 2021. Then, on October 4, 2021, the Service published a final rule revoking the January 7, 2021, regulation that limited the scope of the MBTA. “With this final and formal revocation of the January 7 rule, the Service returns to implementing the MBTA as prohibiting incidental take and applying enforcement discretion, consistent with judicial precedent and long-standing agency practice prior to 2017”.² While this development bodes well for the Black-capped Petrel, it illustrates the vulnerabilities of relying on MBTA to protect the petrel from at-sea threats, which are largely incidental. We urge the USFWS to use the strength of ESA as intended for this species.

2) Recent developments on research and conservation of the Black-capped Petrel

In reopening the proposed rule for comments, the USFWS summarizes new information that will be contained in a revised, but still unpublished, Species Status Assessment (SSA)³. The new information

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<https://www.federalregister.gov/documents/2022/06/24/2022-13368/endangered-and-threatened-wildlife-and-plants-regulations-for-listing-endangered-and-threatened> and <https://www.federalregister.gov/d/2022-13368/p-13>, bottom

² <https://www.fws.gov/node/418586>: [Governing the take of migratory birds under the Migratory Bird Treaty Act](#)

³ Members of the IBPCG were given the opportunity to contribute information and provide peer-review in late summer 2022.

indicates that the Black-capped Petrel's exposures and threats are even greater than previously documented, further indicating that the designation of "threatened" is insufficient. Below we summarize the reports, field work, and analysis emerging in the last year that may not have been integrated into the revised SSA, and that also call for the more conservative designation of "endangered". Specifics on these developments can be provided by the IBPCG upon request. We also direct the USFWS to the recent revision of the Birds of the World account on the Black-capped Petrel (Satgé et al. 2023).

- a) Hispaniola is the only location where nests of Black-capped Petrels have been confirmed, in both the Dominican Republic and Haiti. Recent developments include:
 - Island-wide near-complete breeding failure in 2022, which was not caused by predation events but remains unexplained. Recent monitoring suggests a high rate of breeding failure in 2023 as well.
 - Increased clearing of Black-capped Petrel breeding habitat for agriculture and pasture in La Visite, Haiti. La Visite is the largest known nesting site globally ($\geq 45\%$ of breeding sites on Hispaniola, Wheeler et al. 2021). Besides direct disturbance to breeding, forest clearing also exposes petrels to higher predation from cats, dogs, and mongoose. No interventions are currently in place to address this threat in La Visite.
 - Seven additional nests have been found in Valle Nuevo, Dominican Republic, where mongoose remains a significant threat to breeding success. Although initial predator control has been implemented in 2022 and 2023, recent monitoring reports a near-complete breeding failure in both of these years, attributed to mongoose.

- b) The island of Dominica, in the Lesser Antilles, probably harbors a breeding population of Black-capped Petrels (Wheeler et al. 2021). However, recent developments include:
 - Surveys in 2020, 2022, and 2023 indicate that the Black-capped Petrel population is much smaller than described in the 2018 SSA and in the most recent Conservation Plan (Wheeler et al. 2021).
 - Construction for geothermal energy started in 2022 in presumed flight paths and near suspected petrel breeding areas. These construction areas are brightly lit at night and may impact adult petrels and fledging immatures through light attraction, and grounding.
 - Construction of an aerial tram is underway in suitable petrel breeding habitat, which presents a high risk of collision for flying petrels. Construction will also cause disturbance and may facilitate an ingress of non-native predators to remote areas.
 - Blueprints have been published for high-voltage power lines to cross multiple major flyways on the Caribbean side of the island. As in Kauai, Hawaii, and other areas globally, powerlines pose a high risk of collision for petrels and could greatly affect the species' viability (Raine et al. 2017).

- c) Critical Black-capped Petrel foraging and migratory habitat is present in the western North Atlantic. Recent developments affecting this area include:
 - Using satellite tracking data, Satgé et al. (2002; In Press) quantified that between 74% and 99% of the core use areas of light and dark phenotype Black-capped Petrel, respectively, occurred in the U.S. EEZ, therefore placing the major part of the species critical marine habitat under ESA jurisdiction.
 - In the Central Atlantic Outer Continental Shelf (CAOCS), the species has been assessed as having a high sensitivity to collision and displacement from offshore wind facilities, resulting in

- the highest population sensitivity across avian species using the area (Robinson Willmott et al. 2013, a report that might have been missed in the 2018 SSA). However, critical data are still lacking to reasonably assess the species' vulnerability to offshore wind energy facilities.
- In June and December 2022, the Bureau of Ocean Energy Management (BOEM) proposed wind energy lease areas in the CAOCS that overlap key petrel foraging areas (Randall et al. 2022, Satgé et al. 2022, Satgé et al. In Press). This overlap raises concern for the species' viability. See attached the letters the IBPCG sent to BOEM on this topic (IBPCG 2022a, 2022b).
- d) Critical foraging habitat is present offshore the Guajira Peninsula of Colombia and Venezuela, in the southern Caribbean Sea, an area consistently used by breeding Black-capped Petrels (Jodice et al. 2014, Satgé et al. 2019). There, petrel use areas overlap with offshore petroleum exploration and extraction areas (Satgé et al. 2019). Additionally, these offshore areas are also being considered by the Colombia Ministry of Mines and Energy (Ministerio de Minas y Energía) for offshore wind energy production (RCG 2023). These initial exploration areas for fixed and floating offshore wind also overlap with petrel use areas.
- e) Recent records show that Black-capped Petrels regularly use the northern Gulf of Mexico (Jodice et al. 2021). There, petrels have been observed on the continental shelf and slope, sometimes in close proximity to oil and gas platforms. In October 2022, BOEM proposed wind energy lease areas on the northwestern continental shelf offshore Texas and Louisiana (BOEM 2022). These wind energy areas are 40-50 miles to the closest Black-capped Petrel records in Jodice et al. (2021). In the coming decade, technological developments are expected to open the continental rise to wind energy production, which would affect Black-capped Petrels in the northern Gulf of Mexico.

The announcement to reopen comments came on the day the ESA turned 50 years old. We hope that the USFWS will stay true to the ESA's importance in preventing the extinction of a highly imperiled species, the Black-capped Petrel.

Thank you for the opportunity to comment and we look forward to continued partnership with the USFWS on the assessment, protection and recovery of the Black-capped Petrel.

Sincerely,

- Jennifer Wheeler, Chair, International Black-capped Petrel Conservation Group, BirdsCaribbean, Natick, MA, USA
- Yvan Satgé, Research Associate, Clemson University, Clemson, SC, USA
- Brad Keitt, Oceans and Islands Director, American Bird Conservancy, Washington, DC, USA
- Adam Brown, Program Director, Environmental Protection in the Caribbean, Green Cove Springs, FL, USA
- James Goetz, Caribbean Conservation Coordinator, Vermont Center for Ecostudies, Norwich, VT, USA
- Ernst Rupp, Project Leader, Grupo Jaragua, Dominican Republic
- Jaime Moreno, President, Sociedad Ornitológica de la Hispaniola, Conservación, Santo Domingo, Dominican Republic
- Ted Simons, Professor Emeritus, North Carolina State University, Raleigh, NC, USA

- Ruud van Halewijn, retired seabird researcher, Netherlands
- John A. Gerwin, Research Curator for Ornithology, NC Museum of Natural Sciences, Raleigh, NC, USA
- Patricia Bradley, retired, National Trust for the Cayman Islands, Grand Cayman, Cayman Islands
- Kara Fox, Director, Gulf Coast Restoration, National Audubon Society, Daphne, AL, USA

For questions or remarks about this letter, please contact Ms. Jennifer Wheeler at jennifer.wheeler@birdscaribbean.org.

Attachments:

- International Black-capped Petrel Conservation Group (2022). Comments from the International Black-capped Petrel Conservation Group on BOEM-2022-0023-0001. June 2022.
- International Black-capped Petrel Conservation Group (2022). Comments from the International Black-capped Petrel Conservation Group on BOEM-2022-0072. December 2022.

References

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- International Black-capped Petrel Conservation Group (IBPCG) (2022b). Comments from the International Black-capped Petrel Conservation Group on BOEM-2022-0072. December 2022.
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Satgé, Y., Brown, A., Wheeler, J.A., & Sutherland, K.E. (2023). Black-capped Petrel (*Pterodroma hasitata*), version 2.0. In Birds of the World (S. M. Billerman, Editor). Cornell Lab of Ornithology, Ithaca, NY, USA. <https://doi.org/10.2173/bow.bkcpet.02>

Satgé, Y.G., Keitt, B.S., Gaskin, C.P., Patteson, J.B., & Jodice, P.G.R. [In Press]. Spatial segregation between phenotypes of the diablotin black-capped petrel *Pterodroma hasitata* during the non-breeding period. Endangered Species Research <https://doi.org/10.3354/esr01254>

Wheeler, J., Satgé, Y., Brown, A., Goetz, J., Keitt, B., Nevins, H., & Rupp, E. (2021). Black-capped Petrel (*Pterodroma hasitata*) Conservation Update and Action Plan: Conserving the Diablotin. International Black-capped Petrel Conservation Group, BirdsCaribbean.

APPENDIX

Corrections of factual errors and inaccuracies in the document accompanying the reopening of the comment period: Docket No. FWS–R4–ES–2018–0043; FF09E21000 FXES1111090FEDR 234

Given the limited amount of funding available to study and conserve the Black-capped Petrel (*Pterodroma hasitata*), information on its ecology, biology, and conservation is scarce. Therefore, the International Black-capped Petrel Conservation Group is concerned that overlooked inaccuracies and factual errors may bring prejudice to the corpus of published information on the species. Here, we share corrections of inaccuracies and factual errors that we have identified in the document accompanying the reopening of the comment period. Comments are ordered by page number.

- 1) p 27428, column 1, paragraph 2: “[...] recent satellite tracking studies of individual black-capped petrels identified nearshore areas off the northern coast of Central and South America as areas where the species forages during the breeding season, and these areas may have previously been overlooked or underestimated (Leopold et al. 2019, entire).” This is inaccurate: satellite tracking has not identified nearshore areas off the northern coast of Central America. To date, one study collected data using satellite tracking in the Caribbean Sea (Jodice et al. 2015) and this dataset only shows Black-capped Petrels using nearshore areas off the southern coast of Central America (Panama) and the northern coast of South America (Colombia). Also, Leopold et al. (2019) provide a depiction of the satellite tracking data from Jodice et al. (2015) that is less spatially accurate. Therefore, it would have been more reasonable to cite both studies.
- 2) p 27428, column 1, paragraph 3: “*The currently known nesting areas include three in Haiti (Pic Macaya, Pic La Visite, and Morne Vincent) [...]*”. In their Black-capped Petrel Conservation Update and Action Plan, Wheeler et al. (2021) list Pic Macaya as a “probable” but not confirmed nesting area.
- 3) p 27428, column 2, paragraph 1: “*Pic La Visite in Haiti includes the most significant breeding colony of the black-capped petrel [...]*”. This area is referred to as “La Visite escarpment” in Wheeler et al. (2021). For consistency with published literature, and to avoid confusion with Pic de la Selle (a probable nesting area), we suggest using the name “La Visite escarpment”. The nesting area within the La Visite escarpment and monitored by Brown and Jean (2021, cited later in the same paragraph) is referred to as “Tet Opak”.
- 4) p 27428, column 2, paragraph 4: “*To date, 13 black-capped petrel nests have been identified within an area of approximately 35 ac (14 ha) (Wheeler et al. 2021, p. A2–81; IBPCG 2021, p. 4)*.” The number of nests in the nesting area discussed here (Valle Nuevo, Dominican Republic) is inaccurate. Although Wheeler et al. (2021), which uses data up to 2020, list 13 nests, the last sentence of this same paragraph in FWS–R4–ES–2018–0043 lists 17 nests in 2021 (cited as “*IBPCG 2021, p. 4*”).
- 5) p 27429, column 1, paragraph 2: “*Recent camera trapping in the Pic La Visite colony [...]*”. Per above comment, we suggest using “Tet Opak” as the name for this colony.

6) p 27429, column 1, paragraph 2: “Recent camera trapping in the Pic La Visite colony showed that a single dog depredated 18 of 35 known active nests in 2021 (Brown and Jean 2021, pp. 4–5). At least nine dogs also killed at least 11 adult black-capped petrels during the 2020–2021 breeding season (Brown and Jean 2021, p. 5; Satgé 2021, p. 2; Grupo Jaragua 2021, p. 2).” As written, the text makes it sound like the nine dogs were in the Tet Opak colony (listed as “La Visite”). The authors appear to confuse two independent events. Brown and Jean (2021) report on a single dog, at the Tet Opak colony (listed as “La Visite”) in Haiti. Nine dogs did kill at least 11 petrels during the 2020-2021 breeding season but this took place in Loma del Toro, Dominican Republic (Satgé 2021 and Grupo Jaragua 2021).

7) p 27429, column 3, paragraph 2: “An area currently proposed for development off the coast of North Carolina overlaps with the species’ core foraging area along the Gulf Stream and nutrient-rich waters (Avangrid 2022, p. 5).” The Avangrid (2022) report listed here discusses infrastructure needs for the Kitty Hawk wind farm, off North Carolina. It is unclear why this report is cited here since it does not discuss nor mention wildlife or Black-capped Petrels. Satgé et al. (2022), which is listed in the references used to inform FWS–R4–ES–2018–0043 but is not cited in the document, describes the core foraging habitat of Black-capped Petrels in the western North Atlantic and shows overlap with proposed wind energy areas in the Central Atlantic Outer Continental Shelf (CAOCS): this publication could have been cited here instead of Avangrid (2022). Furthermore, the authors write in FWS–R4–ES–2018–0043 that the North Carolina area is “currently proposed for development”, suggesting that overlap is predicted but not currently occurring. This is inaccurate: the Kitty Hawk wind farm is actively under development and overlap does exist between this wind energy area and observation records of Black-capped Petrels in the Atlantic Offshore Seabird Dataset Catalog (Sussman and U.S. Geological Survey 2014).

8) p 27429, column 3, paragraph 2: “An area currently proposed for development off the coast of North Carolina overlaps with the species’ core foraging area along the Gulf Stream and nutrient-rich waters (Avangrid 2022, p. 5).” This sentence is the only one mentioning wind energy areas in the western North Atlantic. In June and December 2022, the Bureau of Ocean Energy Management (BOEM) proposed wind energy lease areas in the CAOCS that overlap key petrel foraging areas (Randall et al. 2022, Satgé et al. 2022). As described in Satgé et al. (2022), Black-capped Petrel core use areas and home range overlap with the two main proposed wind energy areas in the CAOCS: area F, to the northeast of North Carolina (possibly the “area currently proposed for development” mentioned in FWS–R4–ES–2018–0043); and area F, east of Virginia and southern Maryland.

9) p 27429, column 3, paragraph 2: “Offshore oil and gas activity may also affect the species while on its foraging grounds at sea.” Here, the authors should cite Satgé et al. (2019), which discusses proximity between foraging chick-rearing adults and offshore oil and gas platforms in the southern Caribbean Sea.

10) p 27429, column 3, paragraph 2: “Extensive oil and gas activity occurs in the northern Gulf of Mexico.” While this is true and concerning for the Black-capped Petrel using the northern Gulf of Mexico, the authors should also mention the overlap and close proximity with offshore oil and gas activity in the southern Caribbean Sea observed in Satgé et al. (2019).

11) p 27429, column 3, paragraph 2: “*Extensive oil and gas activity occurs in the northern Gulf of Mexico. With the expansion of the species’ documented range to include this area, the species may be at greater risk of encountering impacts from oil and gas activities than previously described (Satgé et al. 2019, entire).*” Here the authors should be citing Jodice et al. (2021) instead of Satgé et al. (2019), which discusses overlap and proximity with offshore oil and gas activity in the southern Caribbean Sea.

Literature cited

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- Satgé, Y.G., Rupp, E., & Jodice, P.G.R. (2019). A preliminary report of ongoing research of the ecology of Black-capped Petrel (*Pterodroma hasitata*) in Sierra de Bahoruco, Dominican Republic – I: GPS tracking of breeding adults. Unpublished Report, South Carolina Cooperative Research Unit, Clemson University, Clemson, SC, USA. DOI: 10.5066/P9UHASY4
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