July 27, 2015

Comments regarding the May 26, 2015 Notice of Intent to Prepare a Programmatic Environmental Impact Statement to Evaluate the Potential Environmental Impacts of a Proposal to Authorize Incidental Take of Migratory Birds

Submitted by:

Energy and Wildlife Action Coalition

Filed electronically to the attention of:

Public Comments Processing
Attn: FWS-HQ-MB-2014-0067
Division of Policy and Directives Management
U.S. Fish and Wildlife Service
5275 Leesburg Pike
MS:-PPM
Falls Church, VA 22041-3803

The Energy and Wildlife Action Coalition ("EWAC") submits these comments in response to the U.S. Fish and Wildlife Service ("Service") May 26, 2015 notice of intent ("Notice") to prepare a programmatic environmental impact statement ("PEIS") pursuant to the National Environmental Policy Act ("NEPA") to evaluate the potential environmental impacts of a proposal to authorize incidental take of migratory birds under the Migratory Bird Treaty Act ("MBTA"). EWAC is a national coalition formed in 2014 whose members consist of electric utilities, electric transmission providers, and renewable energy entities operating throughout the United States. The fundamental goals of EWAC are to evaluate, develop, and promote sound environmental policies for federally protected wildlife and closely related natural resources while ensuring the continued generation and transmission of reliable and affordable electricity. EWAC supports public policies, based on sound science, that protect wildlife and natural resources in a reasonable, consistent, and cost-effective manner.

Given the breadth of the species covered under the MBTA and the nationwide footprint of EWAC member operations, a potential MBTA incidental take permitting program would directly impact EWAC members. As important stakeholders in any potential permitting process that the Service may develop, EWAC and representatives of its members would like to be involved in discussions regarding development of such a permitting program as the Service continues to evaluate the alternatives identified in the Notice.

We provide our comments in greater detail below, but have summarized them here for your convenience:

- The Service should carefully consider the propriety and legality of a permit program.
- Any permitting program should be simple and streamlined to ensure that it is workable for the regulated community and does not overburden already limited Service resources.
- EWAC provides specific comments on alternatives being considered by the Service.

I. THE SERVICE SHOULD CAREFULLY CONSIDER THE PROPRIETY AND LEGALITY OF A PERMIT PROGRAM.

Before proceeding with its evaluation of approaches for authorizing incidental take under the MBTA, the Service should consider the propriety and legality of such a permitting program. It is not a foregone conclusion that MBTA extends to incidental take. The legislative history of the

MBTA does not expressly support the premise that incidental take is prohibited by the MBTA.[1] In fact, the MBTA take prohibition describes only intentional killing or capture of migratory birds, such as poaching.[2] As the Service is aware, various courts of appeal and district courts have taken different stances on the applicability of the MBTA take prohibition to incidental take. Below is a non-exhaustive list of how courts have evaluated incidental take under the MBTA:

- Courts in the Eighth Circuit have twice held that incidental take of migratory birds does not violate the MBTA's take prohibition. One Court of Appeals case involved migratory bird deaths associated with timber sales;[3] another district court case involved migratory bird deaths associated with oil pits in conjunction with oil and gas production.[4] In the latter, the court noted that "to extend the [MBTA] to reach other activities that indirectly result in the deaths of covered birds would yield absurd results . . . To be consistent, the government would have to criminalize driving, construction, airplane flights, farming, electricity, and wind turbines, which cause bird deaths and many other everyday lawful activities . . . the [MBTA] cannot reasonably be read to criminalize the legal operation of a reserve pit at an oil exploration site."[5]
- The Ninth Circuit has held similarly and refused to extend the MBTA to incidental take that occurs through habitat modification.[6] A recent district court case in the Ninth Circuit, analyzing MBTA claims related to BLM approvals of a wind energy facility notes that the Service itself has acknowledged that the "MBTA has no provision concerning 'incidental' takings," and reiterated that, "[i]n interpreting the word 'take' in the MBTA, the Ninth Circuit stated that the definition of 'take' in the MBTA was limited to conduct engaged in by hunters and poachers."[7]

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[1] *See* Newton County Wildlife Ass'n v. U.S. Forest Service, 113 F.3d 110, 114-11 5(8th Cir. 1997); *see also* U.S. v. Brigham Oil and Gas, L.P. 840 F.Supp. 2d 1202, 1212-1213 (D.ND. 2012).

[2] 16 U.S.C. 703; *See also Id.*

[3] Newton County Wildlife Association v. U.S. Forest Svc., 113 F.3d 110 (8th Cir. 1997);

[4] U.S. v. Brigham Oil and Gas, L.P. 840 F.Supp. 2d 1202 (8th Cir. 2012).

[5] *Id.* At 1212-1213.

[6] City of Sausalito v. O'Neill, 386 F.3d 1186 (9th Cir. 2004); Seattle Audubon Society v. Evans, 952 F.2d. 297 (9th Cir. 1991).

[7] Protect our Communities Foundation v. Salazar, 2013 WL 5947137, at 18 (S.D. Cali. 2013) (citing Seattle Audubon Society v. Evans).

- The Second Circuit has extended MBTA liability to incidental take where a chemical company was aware of "extrahazardous" chemicals existing on its property and did not properly prevent the extrahazardous chemicals from reaching a pond, leading to migratory bird deaths.[8]
- The Tenth Circuit has found incidental take regulated under the MBTA where oil and gas activities directly resulted in mortalities due to collisions with "heater-treater" equipment. The court's decision focused on those mortalities that occurred after the defendant had notice that its equipment would result in bird deaths as the Service had implemented an educational program in the region to minimize heater-treater mortalities.[9]
- A district court in the Fifth Circuit has extended MBTA to incidental take where, similar to the facts presented in the Second Circuit's *FMC Corp.* decision, the mortalities resulted from oil and gas activities that had been conducted unlawfully (in violation of the Clean Air Act)[10]; whereas another district court in the Fifth Circuit held that the MBTA did not extend to take that resulted from collisions with equipment that was being used in the course of lawful activity related to oil and gas operations.[11]

As evident, courts' application of MBTA to incidental take can vary from Circuit Court to Circuit Court and from circumstance to circumstance. How does the Service anticipate that permits will be issued or applied in the circuits where activities are already lawful under those courts' jurisdiction? Under what authority would the Service issue permits for activities that are already lawful under the MBTA – permits that would subject the voluntary permittees to new penalties if permit terms are violated and, perhaps, costly minimization and mitigation measures for no unlawful damage to migratory birds? The Eighth and Ninth Circuits alone include sixteen states. Given the widely varying scenarios in which courts have extended or declined to extend incidental take regulation under the MBTA, how will the Service couch permits in various judicial jurisdictions where the courts differ on whether there is incidental take depending on the circumstances?

[8] U.S. v. FMC Corp., 572 F.2d 902 (2d Cir. 1978).

[9] U.S. v. Apollo Energies, Inc., 611 F.3d 679 (10th Cir. 2010).

[10] U.S. v. Citgo Petroleum Corp., 893 F.Supp. 2d 841 (S.D. Tex. 2012).

[11] U.S. v. Chevron, 2009 WL 3645170 (W.D. La. 2009).

Moreover, the Service's current interpretation of what constitutes "take" is nearly unworkable. Not only are there differences in opinions between the courts, but the Service itself is inconsistent in its enforcement of the MBTA. While the current guidance for the electric transmission and wind energy industries (discussed in greater detail below) provides some level of tenuous predictability, the Service completely ignores other industries that cause many more migratory bird deaths. The Service itself notes the hundreds of millions of mortalities that result from commercial buildings.[12] However, we are unaware of any guidance being offered to or enforcement actions being brought against commercial buildings for their migratory bird deaths. Ironically, the transmission and wind industries which are adhering to guidance developed in cooperation with the Service have become the targets for enforcement by the Service and Department of Justice, while other industries that have not developed such guidance, and the migratory bird fatalities they produce, are seemingly ignored. And, our same industries which have such guidance are now becoming the focus of the proposed MBTA permit program, while the other industries are apparently being considered by the Service as free of any permit application obligations. Does the Service plan to extend a permitting program to all industries causing incidental take of migratory birds?

We also urge the Service to consider the propriety of seeking compensatory mitigation under a new MBTA permitting program. The MBTA itself does not directly authorize permits for incidental take of migratory birds, nor include language authorizing compensatory mitigation.[13] As referenced in the NOI, it appears the Service considers the imposition of compensatory mitigation for incidental take under the MBTA to be within the Service's purview. Of particular concern is the Service's authorization of incidental take (and requiring compensatory mitigation) for non-federal third parties through memoranda of understanding with federal agencies. This would seem to be a new and untested method of take authorization, and there do not appear to be similar authorizations in a natural resource context. We understand the Service may be relying on Executive Order 13186 for authority to impose compensatory mitigation on private parties. We are puzzled how the E.O. can be seen as providing such authority to the Service when burdening private parties with mitigation costs for migratory birds does not appear to be authorized by any act of Congress.

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[12] Migratory Bird Mortality, Many Human-Caused threats Afflict our Bird Population, January 2002, *available at* http://www.fws.gov/migratorybirds/CurrentBirdIssues/Hazards/Mortality-Fact-Sheet.pdf.

[13] In direct contrast, Endangered Species Act Section 10(a)(1)(B) expressly provides to the Service authority to issue permits and calls for a permit applicant to "minimize and mitigate."

II. ANY PERMITTING PROGRAM SHOULD BE SIMPLE AND STREAMLINED TO ENSURE THAT IT IS WORKABLE FOR THE REGULATED COMMUNITY AND DOES NOT OVERBURDEN ALREADY LIMITED SERVICE RESOURCES.

Candidly, EWAC is conflicted as to the benefits (both to the Service and industry) of promulgation of an MBTA incidental take permit program. EWAC appreciates the value of securing discrete regulatory assurances in lieu of reliance on the favorable exercise of enforcement discretion. However, EWAC remains skeptical of the Service's ability to fashion a permit process that is sufficiently streamlined as to be workable for the regulated community. The Service simply does not have the resources to effectively implement anything other than an exceptionally streamlined permitting program.

The Service arguably has a poor track record of implementing new (or existing) permit programs. We are fully aware of how costly and lengthy the incidental take permit process has become under the Endangered Species Act ("ESA") despite more than three decades of permitting experience and express policy desires to streamline the process. More recently, in the preambles to both the proposed and final rules establishing the programmatic take permit program under the Bald and Golden Eagle Protection Act ("BGEPA"), the Service asserted that the permit process would not be burdensome for permit applicants. Yet, the opposite has occurred. The process is indeed so burdensome that very few programmatic eagle take permits have been issued, and none under the December 2013 amendments to those BGEPA permitting rules. EWAC is concerned that, despite more statements of intent to the contrary, any MBTA permit program will be susceptible to the erection of costly hurdles of complex procedures and imposition of stringent conditions just as were the ESA and BGEPA permitting programs. Unless an MBTA permit program can be developed that reflects the issues noted in these comments, EWAC favors the status quo of guidance instead of a permitting program.

If a permitting program is implemented, the Service should ensure that the process is simple and streamlined. A permitting program must not only be commercially reasonable, but it cannot be so complicated that the Service is incapable of implementing it in timely fashion. EWAC has identified a number of aspects of a permitting program that warrant further consideration by the Service.

a. Voluntary and Functional.

Any permitting program developed should be voluntary and there should be value in the authorization sought for a potential permittee. The Service must understand industry practices and

existing guidance to ensure that a program will be utilized. Using the electric transmission and distribution industry as an example, if the Service were to develop a general permit for the electric transmission and distribution industry that extended MBTA take coverage to only those project segments in which all power poles are retrofitted, the program would miss the mark widely. While at first glance this approach would appear to be simple and streamlined, it does not comport with existing industry practices. The electric transmission and distribution industry, through APLIC and in partnership with the Service, has carefully developed three manuals to foster avian protection -- the Avian Protection Plan ("APP") Guidelines of 2005, Suggested Practices for Avian Protection on Power Lines: The State of the Art in 2006, and Reducing Avian Collisions with Power Lines: The State of the Art in 2012. These APLIC manuals call for a company to assess the risk of its projects to determine whether or not retrofitting and other avian protection practices are warranted on a given segment. If a company, consulting the APLIC manuals and its APP, determines the risk to avian species warrants further action, then it may elect to retrofit power poles to manage that risk. If a company finds that risk to avian species is sufficiently low for a given segment, it may choose not to retrofit, or place a lower priority on retrofitting, those power poles. Therefore, on any given existing transmission or distribution line project, there may be segments with retrofitted power poles and those without retrofitted power poles. If only retrofitted power poles are made eligible for inclusion in general permits, should a company seek the legal certainty of MBTA incidental take authorization over all or any of its lines it would then have to retrofit all power poles in its system or in the entire line to be eligible for coverage. Large utilities may have millions of poles and service areas that span several states. These companies would have to wait decades and incur costs that are heavy and unnecessary where risk is low to retrofit all existing utility poles to become eligible for a permit and take authorization. Similarly, small distribution utilities such as rural electric cooperatives have few consumers per mile of line to pay for retrofits to become eligible for coverage. Rural electric cooperatives own 43% of the distribution lines in the United States, average 7.4 customers per mile of line, and have much less revenue per mile of line than the rest of the industry. Most, if not all, would not be able to participate if retrofitting all power poles was made a requirement. While deceptively simple in concept, authorization based on completed power pole retrofits would not work. EWAC strongly believes that any permitting program applicable to the electric transmission and distribution industry should cover all projects of any company that certifies it is acting in accordance with the APLIC manuals. EWAC cannot overemphasize the importance of

the Service working with affected industries to understand their operations and existing best management practices to ensure that any approach will be functional.

b. Take calculation.

An MBTA permitting program cannot become mired in the process of calculating the take to be authorized. There is little value or benefit to calculating take per project, take per company, or take per species. These estimates would be invariably costly to perform and likely would be accompanied by additional costs for monitoring and mitigation. It is also unclear whether these estimates can be obtained with any degree of accuracy. This level of detail is unnecessary. Instead, any permitting program should operate as a permit-by-rule or self-certifying "general permit," akin to stormwater general permits or nationwide permit programs under the Clean Water Act.

c. No additional monitoring requirements for industries with existing best management practices.

The Service should not require any additional monitoring above and beyond what has already been established through industry-specific guidance developed by or with the participation or concurrence of the Service. For example, the Service's Voluntary Land-Based Wind Energy Guidelines[14] ("Guidelines") include one-year of post-construction mortality monitoring, and the APLIC manuals include avian mortality monitoring. A new permitting program should not try to reinvent the monitoring wheel or penalize permittees with additional monitoring burdens where workable practices already exist.

d. Conservation Program.

Any conservation component of an incidental take permitting program must be transparent and straightforward. Any mitigation or payment associated with a permit program must be easily computed (e.g. per MW generated or transmitted, per mile, or per acre, etc.) to ensure that industry can predict costs when planning projects. The Service should identify where any funds collected go and how they will be used. EWAC also encourages the Service to think broadly when considering acceptable conservation or mitigation. Payments for habitat conservation, BMP measures, power pole retrofits, and research should all be available as options.

[14] U.S. Fish and Wildlife Service Land-Based Wind Energy Guidelines, March 23, 2012, *available at* http://www.fws.gov/ecological-services/es-library/pdfs/WEG_final.pdf.

e. Scope of Coverage.

Any permit program developed for the MBTA should be all-encompassing in several respects. A permittee should be able to rely on a permit for all of its activities that may potentially result in take of migratory birds. Nest relocation, nest removal, carcass handling etc. should all be authorized under a single permit. If the Service does move forward with a permitting program, we suggest that the Service consider subsuming other permitting programs into this MBTA incidental take permitting program (e.g. Special Purpose Utility permits). Also, EWAC strongly favors a company-wide permit that would allow for companies to obtain authorization for all of their operations that may result in the incidental take of migratory birds.

f. Applicability throughout jurisdictions.

Given the legal issues outlined in Section I, any permitting program must be clear on how it applies in various regions given the split in federal Circuit Court rulings. Where Circuit Courts have refused to extend the MBTA take prohibition to incidental take (whether as a general rule or in specific circumstances), for private parties to seek incidental take authorization would not make sense or be appropriate. Seeking incidental take immunity should be appropriate only in Circuits that have been silent on, or found in favor of, incidental take as being regulated under the MBTA. The Service should be clear on how it expects to address these discrepancies so that stakeholders can plan accordingly.

g. Applicability throughout industries.

The Notice preliminarily identifies telecommunication, transmission, and oil and gas industries as candidates for a general permit program. EWAC believes that any permit program developed by the Service should be applicable to all industries at risk for incidental take of migratory birds. If a project faces liability exposure under the MBTA, it should have an avenue for authorization. Wind energy development, solar energy development and other industries should be able to minimize their liabilities and risks in an uncomplicated fashion just as those industries identified in the Notice. At a minimum, all industries that have developed, or been provided by the Service with, industry-wide BMPs for avian protection should be welcomed into a general permit program. We are unaware of any scientific data that support unequal treatment between industries resulting in migratory bird deaths.

h. Stakeholder Input.

Finally, we cannot emphasize enough that the Service should meaningfully engage with stakeholders prior to developing a proposed approach to permitting under the MBTA. The Service

should dedicate equal time to, and engage equally with, affected stakeholders in developing any MBTA permit program. Developing a workable, commercially reasonable program can only be accomplished by securing the views and participation of those who will use the program. We invite the Service to consider EWAC as a resource to vet approaches that may impact EWAC member industries. It is in the Service's and EWAC's mutual best interest that any permitting approach is functional at the outset.

III. EWAC Provides Specific Comments on Alternatives Being Considered by the Service.

EWAC has evaluated the alternatives provided in the Notice and suggests that the Service consider the following:

a. General Permits.

As stated in Section II, if the Service determines that a streamlined permitting program is achievable, then the general permit approach should be the path forward. To be administratively feasible within the Service and find support in the regulated community, a general permitting program must be voluntary, simple, and functional. A general permit program should be consistent among industries and be inclusive of all activities that may result in the incidental take of migratory birds.

Reliance on industry-specific standards should be the cornerstone on which a general permitting program is based. EWAC believes that its member industries should be treated equally by any permitting program established under the MBTA. EWAC member industries have industry-specific standards supported by the Service by which companies minimize risk to migratory birds. An electric transmission or distribution company's demonstrated adherence to the APLIC Suggested Practices (including the development of an Avian Protection Plan) should be sufficient to qualify it for protection under a general permit program. In that same vein, demonstrated adherence to the Guidelines (including the development of a Bird and Bat Conservation Strategy) should be sufficient to qualify a wind energy company for protection. Both the APLIC Standards and the Guidelines have been developed with industry input and include workable measures to avoid and minimize risk to migratory birds.

A general permit program should not attempt to categorize the risk of a particular project. The task of assessing individual project risk would be so complex as to be untenable given Service resources and project timelines. Determining whether to assess projects based on species-specific mortality risk, total mortality risk for all affected species, or all species' population-level risks is

unnecessary. Any additional monitoring needed to verify those assessments would be costly, and it is unclear whether those numbers can be accurately gauged. No corresponding conservation benefits would be derived from the expenditure of considerable funds and time on calculations of individual project risk. The costs and Service-resources could be better spent on habitat preservation and refuge programs. A more streamlined approach provides the best value to both the Service and permittees.

The general permit approach has other considerable advantages. A project or company-specific general permit authorization could be developed similar to the Clean Water Act stormwater permitting and nation-wide permit programs, assuring that the project or company authorizations do not constitute "federal actions" triggering NEPA or Endangered Species Act Section 7 review. This conserves significant resources both for the Service and for permittees.

The Notice identifies communication towers, electric transmission, and oil and gas as industries preliminarily identified for inclusion in a general permit program. EWAC strongly believes that all of its members' electric-generating activities should be included in a general permit program. Wind energy development and solar energy development should not be held to a higher standard than other sources of avian mortality, particularly when recent studies show that industries which have already been suggested for inclusion in the NOI (e.g. telecommunication towers) result in higher levels of mortality. EWAC members need uniformity and EWAC urges the Service to consider a "company-wide" permit that can be implemented across a company that has several forms of electricity generation (including wind, solar, hydro, gas, coal, nuclear, biomass) and electricity delivery (including transmission, distribution, substations).

With respect to the legality of a general permitting program, EWAC believes there are certain aspects of the general permit program that warrant further consideration. The MBTA itself does not seem to expressly contemplate general permits. MBTA Section 704(a) requires that any take authorization be "in order to carry out the purposes" of the treaties, have "due regard to zones of temperature...distribution, abundance, economic value, breeding habits, and times and lines of migratory flight of such birds," and "when, to what extent, if at all, and by what means it is compatible with the conventions." The underlying treaties (except Mexico and USSR) require any take authorization to be for "specific purposes." This suggests that permits might need to be not only bird-specific ("such birds"), activity specific ("by what means"), and site or region specific ("zones of temperature… breeding habits, and times and lines of migratory flight"). Given this

concern, EWAC believes that the Service should provide a sound legal explanation of the basis under the statute and the treaties for a general permit program.

b. Individual Permits.

EWAC strongly opposes an individual permit program. For all of the reasons stated in Sections II and III(a) a complex individual permit program is not the appropriate approach. Avian fatalities at any one site are not significant enough to warrant project-specific permitting and would have no population-level effects. Existing industry-specific best management practices developed with Service concurrence are effective at minimizing impacts to migratory birds. A more complicated process would produce more costs and delays and provide minimal additional conservation benefits in return.

Site-specific permits would be unworkable. The Service's resources are severely limited; it is unclear how the Service could afford to staff or process individual authorizations. Industries must be able to meet project timelines without delays in permit processing. An individual permit process would inevitably be time consuming given the site specific analyses, NEPA analyses, and Section 7 analyses that would be required. The time and costs to industry must be given serious consideration. We understand that the Service is already considering moving electric transmission into a general permit program. However, other industries such as wind energy and solar energy development should not be required to undergo a site-specific permit process. There is no scientifically demonstrable basis for singling out certain industries for individual permitting.

Finally, individual permitting would be inefficient for bird protection. Under a general permitting program, conservation measures could be realized upfront. If an individual permit process is required, more time would be spent on processing applications than funding and implementing immediate conservation measures. Any project-by-project approach limits and delays conservation activities.

c. Memoranda of Understanding with Federal Agencies.

EWAC does not perceive significant advantages to those needing incidental take authorizations under the "Memoranda of Understanding" ("MOU") approach. The applicability and benefits of this approach are extremely limited. As described in the Notice, an MOU would not authorize incidental take, thus MBTA liability exposure would remain for non-federal actions. Further, this approach may violate Executive Order 13186, as MOUs under the MBTA were explicitly prohibited from affecting non-federal third parties or giving right or benefit, substantive or procedural, to a party against the United States.

However, should the Service proceed with the MOU approach, development of the MOUs should include industry input to ensure that MOU provisions are commercially reasonable. It is unclear from the Notice how the MOU approach would allow for such input. Without an opportunity for notice and comment, if inter-agency MOUs provide non-federal third-party authorization for incidental take or otherwise impact non-federal third parties, this approach may violate the Administrative Procedure Act. EWAC does not believe this approach confers much benefit to the Service or those seeking authorization for incidental take under the MBTA.

d. Development of Voluntary Guidance.

With respect to EWAC member industries, the Service's fourth approach (Development of Voluntary Guidance) is the status quo. As we state at the outset, unless the Service can develop a truly simple and streamlined general permitting program that is all-inclusive of activities, EWAC favors the status quo. EWAC believes the Notice and its subsequent review period provide an excellent opportunity for the Service to become even more familiar with existing guidance such as the APLIC manuals and the Guidelines, meet with industry representatives to gain a better understanding of how those guidance documents function with industry practices, and coordinate across Service offices to ensure consistent application and predictable outcomes to reduce the risk of liability exposure.

IV. CONCLUSION.

EWAC would appreciate the Service's consideration of these recommendations as it continues to evaluate approaches to authorizing incidental take under the MBTA. We are eager to continue a dialogue with the Service to ensure that any path forward will be compatible with EWAC member industries. Please feel free to contact the following EWAC representatives should the Service seek assistance on aspects specific to EWAC member industries:

Richard J. Meiers, EWAC Policy Chair, jim.meiers@duke-energy.com, 980-373-2363

Alan M. Glen, Nossaman LLP, aglen@nossaman.com, 512-813-7943