EWAC®
Energy and Wildlife
Action Coalition

December 3, 2021

Comments regarding:

October 4, 2021 Advance Notice of Proposed Rulemaking for Migratory Bird Permits: Authorizing the Incidental Take of Migratory Birds and Notice of Intent to Prepare a National Environmental Policy Act Document

Submitted by:

Energy and Wildlife Action Coalition

Filed electronically to the attention of:

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The Energy and Wildlife Action Coalition (EWAC)[1] submits these comments in response to the United States Fish and Wildlife Service's (Service) advance notice of proposed rulemaking (ANPR) published in the Federal Register on October 4, 2021, in which the agency stated its intention to codify an interpretation that the Migratory Bird Treaty Act (MBTA)[2] prohibits incidental take of migratory birds and seeking information to support the development of a proposed rule to authorize the incidental taking or killing of migratory birds.[3]

Summary of EWAC's Interest and Comments

EWAC's members are important drivers of the ongoing development of renewable energy and the upgrade and modernization of the electric grid that are central to the Administration's greenhouse gas objectives and its plans to transform America's energy sector.

While renewable energy has been slowly integrating into our national electric system since the 1970s, the transformation of the electric power industry began accelerating more than a decade ago. The mix of resources used to generate electricity in the United States has changed dramatically and is increasingly cleaner. While the shift to less carbon intensive electricity generation, including carbon free wind and solar generation, is accelerating, the Biden Administration has announced ambitious goals to decarbonize the electric power sector and address climate change impacts by 2035 and 2050, respectively. To achieve these goals, the highest one-year installation levels of renewable generation capacity achieved to date would need to be doubled to quadrupled on an annual basis going forward. Moreover, bringing that degree of installed capacity to market will necessitate the modernization and dramatic expansion of our transmission and distribution system.

The electric power sector is aggressively investing in new infrastructure for cleaner energy, which will further reduce carbon emissions. EWAC's members will play a significant role in developing, building, and operating land-based and offshore wind, solar, and energy storage, and expanding or modernizing electric transmission and distribution infrastructure over the coming decade in response to clean energy and climate goals.

Climate change also is an existential threat to migratory birds.[4] Accordingly, the steps that EWAC's members are taking to install new renewable generation capacity and transmission and distribution infrastructure, as well as the continuing operation of their existing facilities, benefits migratory birds by continuing the transition to less carbon intensive electricity generation.

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[1] 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, and related trade associations. 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. EWAC is a majority-rules organization and therefore specific decisions made by the EWAC Policy Committee may not always reflect the positions of every member.

[2] 16 U.S.C. §§ 703-711.

[3] 86 Fed. Reg. 54667 (October 4, 2021).

[4] Audubon's Birds and Climate Change Report, http://climate.audubon.org/sites/default/files/NAS_EXTBIRD_V1.3_9.2.15%20lb.pdf

Migratory bird conservation has long been important to EWAC members as they strive to meet future electricity needs. The electric power industry has worked for decades to understand and minimize its potential impacts on migratory birds. Arguably, the electric power industry has done more to minimize avian mortality than any other industry sector. Considering the industry's history of proactive measures to reduce bird mortality, EWAC questions the ANPR's apparent premise that requiring the electric power industry to obtain incidental take permits will materially advance migratory bird conservation.

Imposing an administratively burdensome or costly permit program on the electric power industry as it builds out renewable energy generation and the associated transmission and distribution lines that deliver energy to markets will slow progress toward achieving the Administration's clean energy goals and offer little meaningful gains for migratory bird conservation. Moreover, regulatory uncertainty, including as to what may be required to avoid criminal penalties under the MBTA, hinders investments that indirectly help migratory birds while advancing the ongoing transformation of the national electric system.

An incidental take permit program developed under current law falls short of regulatory certainty or durability, as:

- The MBTA provides only criminal penalties for any violation, including any permit violation, regardless of its severity;
- Any MBTA permit program may not survive legal challenges, since U.S. courts of appeals and district courts in the 5th, 8th, and 9th circuits have held that the MBTA does not apply to incidental take; and
- The MBTA provides no discernable direction regarding how to construct this program, and yet the incidental take permitting program contemplated by the Service could potentially cover a vast array of personal, commercial and governmental activities in the United States.

For the above reasons, instead of establishing a permit program at this time, EWAC encourages the Service to continue to rely on enforcement policy to address incidental take of migratory birds by the targeted industries, until such time as Congress clarifies the treatment of incidental take under the MBTA and removes criminal liability for all incidental take except for truly criminal actions such as incidents of gross negligence and willful misconduct. Rather than expending limited Service resources on developing and implementing a permitting program as described in the ANPR, we believe migratory bird conservation would be better served by the Service putting its efforts into voluntary or partnership programs that reduce migratory bird mortality across all sectors.

However, if the Service is intent on developing a permit program at this time, EWAC strongly encourages that it exempt the electric power industry or that it be structured as either a simple, streamlined general permit or sector-specific permit-by-rule. There should not be any individual permit component, or any provisions that grant the Service discretion to require a facility to obtain an individual permit. The Service also must clearly define the scope of the program as applicable to direct migratory bird mortality occurring incidental to operation of the covered facilities. The Service should not attempt to regulate construction activities or other forms of habitat modification, since the MBTA does not apply to indirect impacts on migratory birds.

Consistent with a general permit approach, and to avoid unreasonable administrative burdens, there should be:

- No evaluation or approval by the Service staff required to obtain coverage;
- Flexible scope of coverage that may be for specific activities or at a parent company level;
- Required beneficial practices must be objective and sector-specific and recognize that not all practices developed for an industry will be appropriate at all facilities in that industry;
- No take estimates should be required for individual facilities, either to obtain coverage or as part of ongoing compliance;
- Any monitoring should be limited to incidental observations by facility personnel during the course of normal business operations;
- Self-certification of compliance with general permit requirements; and
- Any fee required to obtain coverage should be a modest, flat general conservation fee.

Finally, EWAC had understood that the Service was considering alternatives to a permit program, such as permit-by-rule or long-term reliance on enforcement discretion. While not discussed in the ANPR, the Service should be considering those alternative approaches. The case for relying on enforcement discretion is set out above. If the Service insists on regulating incidental take at this time, then a permit-by-rule would accomplish as much as a general permit program but with less administrative burden (streamlined coverage process, short list of standard conditions stated in the rule).

A. The electric power industry has a long history of safeguarding migratory birds that will likely continue with or without an MBTA permit program.

EWAC's members have many reasons to employ measures that benefit migratory birds, unrelated to the MBTA. Many electric companies and renewable energy companies have a long history of wildlife and natural resource stewardship, which includes protection of migratory birds, and they have many reasons to continue those stewardship efforts regardless of the scope of criminal liability under the MBTA. Companies' reasons for employing measures that benefit migratory birds include safety, reliability, wildfire prevention, sustainability goals, and compliance with other conservation laws. The Endangered Species Act, the Bald and Golden Eagle Protection Act, state endangered species acts and other state wildlife laws, federal land management plan requirements, and conditions that result from environmental reviews conducted under the National Environmental Policy Act (NEPA) for other federal approvals may also require protection of bird species. These other regulatory obligations, as well as customer and investor expectations that electric power be increasingly environmentally friendly, in addition to being reliable and affordable, provide EWAC's members with ample requirements and incentives to reduce impacts on wildlife and other natural resources, including migratory birds.

The measures employed by EWAC's members to avoid, minimize, and mitigate for impacts on migratory birds include implementation of established industry practices, like those contained in the Avian Power Line Interaction Committee (APLIC) recommended practices and the Land-based Wind Energy Guidelines (WEGs). The threat of MBTA liability alone does not drive adherence to these practices.

B. The permit program described in the ANPR would not change the migratory bird safeguards employed by the electric power industry.

In the ANPR, the Service voices a concern that voluntary implementation of beneficial practices, along with prioritizing limited enforcement resources, "may be insufficient to conserve the migratory bird species that the Service is charged with protecting."[5] However, nothing in the ANPR and none of the information presented in the Administration's prior MBTA rulemaking (repeal of the definitional rule) supports that statement. As noted above, some of the industry sectors identified as potential permitting targets in the ANPR – wind power generation and electric transmission and distribution lines – have had beneficial practices to reduce migratory bird mortality in place for many years, and those practices are widely implemented. The Service points to no evidence that a permit program built around requiring use of those existing practices will produce anything more than a small, incremental change in migratory bird mortality.

But more fundamentally, the Service is focusing its limited resources where it is least likely to see meaningful returns. The Service notes that many bird populations remain in decline, despite existing voluntary beneficial practices,[6] but the industries that have developed and are implementing those practices are not responsible for the decline in migratory bird populations. The Service's website presents data on human-caused sources of migratory bird mortality (excluding the impacts of habitat loss).[7] About 95 percent of the reported human-caused mortalities are attributed to collisions with building glass, vehicle collisions and poisoning. The industries that the ANPR identifies as potential subjects for an MBTA permit program combine for less than 5 percent of mortalities in the Service data. The Service cannot reverse the decline in migratory bird populations by over-regulating less than 5 percent of the human causes of bird mortality, particularly when some of the targeted industries already deploy beneficial practices to reduce migratory bird mortality. For these reasons, EWAC urges the Service to focus the agency's limited resources on non-regulatory programs aimed at fostering beneficial practices, and forego regulating the electric power industry under the MBTA.

C. To reach a larger share of the sources of migratory bird mortality, the Service should focus its efforts on non-regulatory programs.

The agency's limited resources would be better spent on non-regulatory programs aimed at fostering beneficial practices across all sectors responsible for migratory bird mortality. For example, the Service has identified collisions with building glass as the most significant human-caused source of mortality. Simple practices have been identified that can reduce this threat: turning off lights at night and either changing glazing or making windows more visible to birds. Several American cities already are incorporating window glazing or marking practices into their building codes, so clearly there is a suite of beneficial practices available and a roadmap to achieving the implementation of those to reduce impacts from the commercial building sector, which would have a material impact in reducing migratory bird mortality. If the Service were to devote the resources required by this proposed permit program to promoting those practices, the benefits for migratory bird conservation would likely far outweigh any potential gains from a permit program.

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[5] 86 Fed. Reg. at 54668.
[6] 86 Fed. Reg. at 54668.
[7] USFWS, Top Threats to Birds.

D. Any permit program should await legislative changes to the MBTA.

The Service has reverted to its pre-2017 interpretation of the MBTA as prohibiting incidental take.[8] As a result, a company can adhere to industry practices appropriate to their project and location and yet still risk criminal liability for any migratory bird deaths that nevertheless occur. The law provides no effective means of avoiding liability and no alternative penalty. The statute provides no standards to guide the exercise of enforcement discretion, nor any means for those who incidentally take migratory birds to know whether they have done enough to avoid prosecution.[9]

The Service has responded to the resulting uncertainty by issuing Director's Order No. 225, which prioritizes enforcement of the MBTA against foreseeable incidental take occurring when known beneficial practices were not implemented. While EWAC believes that there should be a higher bar for criminal enforcement – (a) significant environmental harm, and (b) grossly negligent or willful misconduct – the Director's Order does provide some assurance that companies can limit their exposure to criminal charges by implementing known beneficial practices. With those changes, the enforcement policy should be sufficient to address incidental take by the targeted industries until the MBTA is modernized through new legislation.

The Service is contemplating developing a permit program around essentially the same test as the Director's Order: it would require covered industries to implement known beneficial practices. While a permit program may superficially appear more uniform and permanent than the Director's Order, in reality a permit program would be difficult to administer due to the inherent limitations of the MBTA, which largely stem from its antiquity and focus on preventing the criminal behavior of market hunting. Moreover, as noted previously, a permit program under current law, with the split national jurisprudence, is likely to be subject to immediate legal challenges, unlike the Director's Order.

The first difficulty presented by the contemplated permit program is that the only penalty the MBTA provides for any regulatory violation is criminal sanctions.[10] EWAC members are concerned that any deviation from permit requirements or conditions, regardless of significance or severity, would open a company to criminal charges. Potentially, failing to follow beneficial practices would be a crime, even if not practicable for the specific situation, as would the late filing of an annual report, or an error in recordkeeping. The only other sanction that the MBTA authorizes the Service to impose would be to terminate permit coverage. Setting aside the unfairness to the regulated community, the Service would find it challenging to effectively administer a permit program that has criminal penalties as its only enforcement tool.

This by itself should be enough of an obstacle to warrant postponing establishment of an incidental take permitting program until the MBTA is amended to authorize civil penalties for violations that are not willful or the result of gross negligence. But the permit program contemplated by the

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[8] 86 Fed. Reg. 54642 (Oct. 4, 2021) (revocation of MBTA rule defining take).

[9] Our treaty partner, Canada, has provided a complete defense to liability under its Migratory Bird Convention Act, for those who have exercised due diligence to prevent migratory bird fatalities. Migratory Bird Convention Act, 1994, Sec. 13.17. Under Canada's law, the only prohibited act is depositing a harmful substance in waters frequented by migratory birds. *Id*. at 5.1(1).

[10] 16 U.S.C. § 707(a).

ANPR may face other challenges because the MBTA lacks many of the common features of modern environmental statutes.

The MBTA authorizes the Secretary to determine when, to what extent, and by what means, migratory birds may be taken (or hunted, captured, or killed) and to adopt "suitable regulations" to permit and govern that take.[11] With this provision, the only direction Congress has provided is for authorized take to be "compatible with the terms of the conventions."[12] The statute provides so little guidance as to the content of any such rules that a broadly applicable permit program may run afoul of the delegation doctrine, which places a constitutional limit on the congressional delegation of legislative power.[13] The degree of agency discretion that is acceptable under the delegation doctrine varies according to the scope of the power congressionally conferred.[14] While Congress may not need to provide any direction to the Secretary in setting migratory bird hunting seasons and bag limits or issuing depredation permits for a few species of migratory birds, such limited congressional guidance may be an improper delegation of legislative authority for regulations covering all migratory birds and affecting wide swaths of the U.S. economy.[15]

The term "suitable" also provides no guidance regarding the typical administrative trappings of a permitting program, including permit duration, or common permit conditions, such as monitoring, reporting, or recordkeeping. Additionally, the MBTA authorizes warrantless arrests when an agency employee sees a violation in progress, but does not authorize standard inspections or information requests to regulated entities.[16] Further, while the statute authorizes criminal penalties for violations, nowhere does the MBTA expressly authorize the agency to collect fees from those the agency permits to take migratory birds.

In addition to the current law's nonexistent guidance for formulating and administering a widely applicable permitting program, there also is the question of whether the MBTA currently prohibits the incidental take of migratory birds. The Service presented its current justification for applying the MBTA to incidental take in its recent revocation of the January 7, 2021 MBTA definitional rule.[17] However, the courts remain split on this question. While the U.S. Courts of Appeals for the Second and Tenth Circuits, as well as some district courts within the Ninth and D.C. Circuits, have held that the MBTA prohibits the unintentional or incidental take of migratory birds,[18] the U.S. Courts of Appeals for the Fifth, Eighth and Ninth Circuits, as well as district courts in the Third and Seventh Circuits, have held that the MBTA's prohibition is limited to intentional conduct, directed at migratory birds.[19] It also is worth noting that the Second Circuit's 1978

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[11] 16 U.S.C. § 704(a).
[12] *Id*.
[13] *See Loving v. U.S*., 517 U.S. 748, 758-59 (1996).
[14] *Whitman v. American Trucking Associations*, 531 U.S. 457, 475 (2001).
[15] *Id*. (Congress "must provide substantial guidance on setting air standards that affect the entire national economy.")
[16] 16 U.S.C. § 706.
[17] 86 Fed. Reg. 54642.
[18] *U.S. v. FMC Corp*., 572 F.2d 902 (2nd Cir. 1978); *U.S. v. Apollo Energies, Inc*., 61 F.3d 679 (10th Cir. 2010); *U.S. v. Corbin Farm Service*, 444 F.Supp. 510 (E.D. Cal. 1978); *Ctr. For Biological Diversity v. Pirie*, 191 F.Supp.2d 161, 175 (D.D.C. 2002).
[19] *United States v. Citgo Petroleum Corp*., 801 F.3d 477 (5th Cir. 2016); *Newton County Wildlife Ass'n v. U.S.Forest Serv*., 113 F.3d 110 (8th Cir. 1997); *Seattle Audubon Soc'y v. Evans,* 952 F.2d 297 (9th Cir. 1991);

decision is much narrower than often represented: it held that an extra-hazardous activity warranted strict liability under the MBTA, but that doing so "did not dictate that every death of a bird will result in imposing strict criminal liability on some party."[20] Therefore, the fundamental question of whether the MBTA applies to incidental take will likely not be finally resolved until decided by the U.S. Supreme Court or by new legislation.

Given the weakness of the existing law as a vehicle for a permitting program, as well as the minimal[21] conservation gains that could come from the program contemplated by the ANPR, the Service should delay any permit program until Congress has acted to address all of the issues outlined above. In the meantime, the Service should strongly consider the continued reliance on the Director's Order and a further refined enforcement policy to address incidental take (but with a focus on gross negligence and willful misconduct, as noted above), in the areas of the country where such take is prohibited. Once again, the Service could then concentrate its efforts on regulatory or non-regulatory programs aimed at the most significant causes of migratory bird mortality, as well as habitat conservation programs.

In summary, EWAC stands ready to work with members of Congress to reform the MBTA in a way that answers this fundamental question of whether the MBTA prohibits incidental take; creates a civil enforcement pathway and reserves criminal sanctions for truly criminal acts; and most importantly, generates substantial, long-term conservation benefits to migratory birds.

E. If the Service is going to adopt new rules for incidental take, the program should impose minimal administrative burden.

As noted elsewhere in these comments, the conservation benefit produced by requiring the electric power industry to implement beneficial practices that already are in use will be minimal. EWAC also understands that the Service's migratory bird office is understaffed and stretched thin, with limited ability to take on a new permit program. Accordingly, the administrative burden associated with the program should likewise be minimal. This has several implications for an incidental take permitting program.

Exemption From Permitting Requirements. The ANPR contemplates exempting specified activities or facilities from the MBTA's prohibition on incidental take.[22] In deciding whether to exempt an activity or industry from permitting requirements, the Service should consider the amount of incidental take resulting from that activity. The Service should consider framing permitting exemptions broadly, to avoid having to catalog the wide variety of human activities that present a low risk of incidentally taking migratory birds. Applying the same criterion to the industries targeted in the ANPR should cause the Service to conclude that it should exempt several

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Mahler v. U.S. Forest Serv., 927 F.Supp.2d 1559 (S.D. Ind. 1996); *U.S. v. Brigham Oil & Gas, L.P*., 840 F.Supp.2d 1202 (D.N.D. 2012); *Curry v. U.S. Forest Serv*., 988 F.Supp. 541, (W.D. Pa. 1997).

[20] *U.S. v. FMC Corp*., 572 F.2d at 905.

[21] Because the Act imposes criminal liability and cannot provide certainty against prosecution, the Administration's interpretation may dissuade more renewable projects, and thus harm more migratory birds, than a permit program will protect. In short, the permit program may do more harm than good.

[22] 86 Fed. Reg. at 54669.

of those industries from any MBTA permitting program.[23] As mentioned earlier, the Service cannot reverse the decline in migratory bird populations by over-regulating less than 5 percent of the human causes of bird mortality, particularly when some of the targeted industries already deploy beneficial practices to reduce migratory bird mortality.

Solar Energy Generation

EWAC suggests that PV solar energy generation facilities be exempted, for several reasons: (1) PV solar panels are, practically speaking, stationary structures on the landscape and essentially no different from any other stationary structure such as buildings (with glass windows), billboards, grain bins, etc.; and (2) Fatality searches at utility scale PV solar projects in the southwestern U.S., where fatalities have garnered media attention, have primarily documented common ground-dwelling birds with species such as mourning dove, horned lark, western meadowlark as the most common fatalities.[24] At some PV facilities, waterbirds have been detected, indicating a possible attraction for certain species in certain geographic settings. However, waterbird fatalities were scarce and variable in 9 of 10 analyzed studies and impacts are not likely to affect the overall species' population level.

Further, Kosciuch et al. (2020) found that 54% of all observed fatalities were feather spots and cause of death could not be determined. Thus, it is possible that mortality was due to other causes (e.g., predation, disease, and other natural causes) and not collision with solar panels. For example, while evidence from reference areas at one PV solar site showed high numbers of mourning dove carcasses, similar fatality rates were estimated at both the project site and the reference site.

Wind Energy Generation

The Service should look closely at its own published data[25] on the impacts from wind energy projects. The Service estimates that less than 300,000 out of approximately 924 million human-caused bird fatalities are attributed to land-based wind energy. Offshore wind, while data is scarce, can be expected to have less impact, since offshore wind facilities are, and will be, located offshore and outside of continental flyways and not within the vast majority of bird habitat. Accordingly, the Service should consider exempting wind energy generation facilities.

Electric Transmission and Distribution Lines

The Service should consider exempting electric power lines from MBTA permit requirements. The Service's data indicate that about 3.3% of human-caused sources of incidental take are attributed to powerline collisions and electrocutions. The vast majority of the nation's powerlines have been on the landscape for many decades and there is no evidence that they are contributing to wide-spread population declines of migratory birds. Also, this industry has a built-in incentive

[23] Otherwise, the Service runs the risk of regulating industries that pose little harm and already undertake protective measures while exempting significant causes of mortality because solutions may be unpopular (buildings, autos, cats) with the result that it develops a permit program that is all costs and no benefits.

[24] Kosciuch K, Riser-Espinoza D, Gerringer M, Erickson W, A summary of bird mortality at photovoltaic utility scale solar facilities in the Southwestern U.S., PLoS ONE 15(4): e0232034 (2020): https://doi.org/10.1371/journal.pone.0232034

[25] https://www.fws.gov/birds/bird-enthusiasts/threats-to-birds.php

to reduce wildlife interactions with power lines in that such wildlife interactions, including bird interactions, can cause outages, wildfires and/or costly equipment damage, so from strictly a cost and reliability standpoint, powerline companies are compelled to implement measures to reduce these interactions.

Smaller Renewable Energy Facilities.

There is a wide range in the size of renewable energy generation facilities deployed across the United States. PV solar energy projects can vary considerably in size and scope, ranging from residential solar to community solar, commercial solar, and utility solar. Physical arrangements (residential and commercial rooftop, parking facilities, ground mounted, floating, fixed or tracker, etc.) and the size of each of these solar energy facilities in each of these categories varies widely as well, with considerable overlap. All PV solar generation should be exempted, for reasons discussed above, but if the Service will not exempt utility-scale solar, then smaller solar facilities should nevertheless be exempted. Note that distinctions based on type, size, scope, or arrangement nevertheless may be arbitrary, due to overlap across categories (e.g., residential rooftop panel installation, larger rooftop installations on commercial buildings, small community, municipal, or commercial facilities up to 20-50 acres, and commercial facilities covering up to 1,000 or more acres). For example, the construction of 500 homes with rooftop solar, while a residential solar project, could have the same panel surface area as a nearby utility-scale solar project. Based on the variability of facility size, ownership, etc., if the Service does not see fit to exempt all solar installations, it should work with the industry to specify which classifications and/or production capacity thresholds to exempt.

Similarly, wind generation also ranges in size, from individual kilowatt (kW) machines owned by farmers, schools, businesses, municipalities, etc. (i.e. "distributed wind," defined in the WEGs as 1 kW to 1 megawatt (MW)), to one or more MW-scaled turbines owned by municipalities or on a community-scale (i.e., "community wind," defined in the WEGs as 1 MW to 20 MW), to utility-scale (i.e., facilities larger than 20 MW). Even if the Service decides to issue a general permit for utility-scale wind energy facilities, the Service should exempt distributed wind and community wind.[26]

No Individual Permits. The ANPR indicates that the Service would reserve individual permits for "limited situations where case-by-case evaluation and customization is necessary and appropriate."[27] However, the Service also states that it "does not intend to use the number of birds found dead on a given project site as a criterion." Due to the heavy administrative burden that individual permits would require, there are essentially no circumstances under which they would be necessary or appropriate. The Service simply does not have the information about bird populations or current causes of mortality that it would need to develop and administer individual permits affecting almost 1,100 migratory bird species, let alone the resources to effectively and simply administer the program.

[26] Note that the WEGs encourage "small-scale" wind facilities (e.g., less than 20 MW) to perform tier 1 evaluation but those facilities are otherwise generally exempt from full adherence to the WEGs.
[27] 86 Fed. Reg. at 54669.

The example that the ANPR cites as potentially justifying individual permits actually adds to the case against their use in the electric power sector. The ANPR states that "there may be certain geographic areas which are known to have high volumes of migratory birds that might be specified for specific permits and might not qualify for general permits."[28] About 15 years ago, extensive and expensive conditions to protect migratory birds were imposed on wind energy projects on the Texas gulf coast, due to a (incorrect) belief that the projects would harm the large number of birds that migrate through that region. However, the potential bird impacts never materialized, and not due to the effectiveness of the expensive radar technology required for the sites. Rather, after several years of operations and extensive monitoring, it was determined the birds simply did not interact with the wind projects to the degree anticipated in that location. Under this scenario EWAC imagines that those facilities, if a migratory bird program existed at the time, would have needed to obtain individual permits – at significant cost, time, and energy to the project proponents, for no actual reason of value to migratory bird conservation.

This example clearly illustrates that the Service does not know enough to designate geographic zones where individual permits would be required based solely on the number of birds that migrate through the area. Furthermore, the assumption embedded in this example – that the number of birds in an area is somehow a surrogate for mortality or risk of mortality – contradicts the Service's statement that it "does not intend to use the number of birds found dead on a given project site as a criterion."[29]

Due to the number of migratory bird species that could be affected by a permitting program, the Service will necessarily be making decisions with limited information regarding the potential impacts of an individual project. Based on EWAC members' experiences with eagle permitting, we understand that the Service personnel are likely to react to that uncertainty by seeking more data before they make a permitting decision, or by making overly conservative decisions, like requiring facilities to obtain individual permits unnecessarily. After years of national data collection, there already is a collective understanding of the potential impact of renewable energy projects and transmission and distribution lines on migratory birds, as well as the beneficial practices that are available to reduce those impacts. Incidental take caused by the electric power industry is a small fraction of overall migratory bird mortality and is spread across a wide range of species, thereby limiting the impacts on any one species population. For the common bird species addressed by this permitting program, that collective understanding is an appropriate basis for adopting a general permit program. The conservation benefits that might result from leaving a door open to requiring individual electric power facilities to obtain individual permits would be minimal and cannot outweigh the associated administrative burden, nor the risk that a "narrow" exception would be routinely invoked, nullifying the benefits of a general permit program. For that reason, any MBTA permit program should not include any off-ramp that would allow the Service personnel to make the discretionary decision that an individual permit is required for any particular facility.

[28] 86 Fed. Reg. at 54669.
[29] 86 Fed. Reg. at 54669.

General Permits With Minimal Administrative Burden. If the electric power sector either wholly or partially is not exempted from the permit requirements, EWAC agrees with the basic administrative framework that the ANPR describes for a general permit program.[30]

Obtaining Permit Coverage.

EWAC supports the ANPR's description of how permit coverage should be obtained: "An entity would register, pay a required fee, and agree to abide by general permit conditions."[31] The described elements would minimize unnecessary administrative burdens. EWAC agrees that coverage should be initiated by an entity registering and agreeing to abide by permit conditions, such as through submission of a Notice of Intent. EWAC agrees that an applicant should not be required to estimate how many migratory birds will be incidentally taken at a covered facility, as any such requirement would be inconsistent with a general permit framework. EWAC also agrees that no review or approval by Service personnel should be required prior to obtaining coverage; again, requiring Service review of individual facility coverage would be inconsistent with the proposed permitting framework. EWAC also supports a modest, flat conservation fee, discussed in more detail below. As was stated in one of the webinars that the Service hosted on this ANPR, obtaining permit coverage could – and should – be much like buying a hunting license.

Required Beneficial Practices.

EWAC supports tailoring conditions to specific industries or activities, as outlined in the ANPR.[32] A general permit need not require specific beneficial practices. A better approach would be to require the owners or operators of covered facilities to develop a migratory bird plan and specify the subjects to be addressed within the plan. Applicants would not submit their plans to the Service. Rather, they would be required to provide them to the Service upon request. The Service could publish a list of beneficial practices appropriate for the specific industry sectors in an addendum guidance document to the sector-specific general permit, but it would be up to the covered facility to specify in their plans the practices that they would implement at the particular facility. This approach also would allow the Service to avoid locking in specific practices in regulation, which risks requiring use of outdated measures at future projects. Identification of a menu of potential beneficial practices in guidance that accompanies the regulation would leave the Service and regulated industries free to respond to rapidly evolving technology and practices designed to reduce migratory bird mortality.

If a list of beneficial practices is included within regulations or general permits, they should only relate to reducing migratory bird injury or mortality, since the MBTA does not apply to habitat impacts. Any such list also must serve as a menu and not as a mandate. While a particular practice may be practicable for many facilities or for certain types of facilities, that may not be true for some other facilities. Even if practicable, not all beneficial practices will be appropriate for a given project in a given location. Existing guidelines like the APLIC recommended practices and the WEGs have been developed with that understanding in mind. Any permitting program that requires implementation of established beneficial practices must likewise allow entities flexibility in selecting the appropriate measures for a particular project or facility from a suite of options. It

[30] 86 Fed. Reg. at 54669.
[31] 86 Fed. Reg. at 54669.
[32] 86 Fed. Reg. at 54669.

also must allow those decisions to be based upon site-specific conditions, cost-effectiveness, and technical feasibility.

Whether listed in a permit or in accompanying guidelines, beneficial practices should be limited to practices that are widely employed within the industry, supported by the best available science, practicable (i.e., typically low in cost and easily implemented), capable of being objectively evaluated, and demonstrated to be effective at reducing the take of migratory birds.

While the WEGs and APLIC recommended practices have been very successful, they were not developed to serve as regulatory standards and are not suited to that purpose. They contemplate a stepwise process to evaluate and reduce risk to migratory birds and their application often involves the sort of subjective decisions that are not conducive to a regulatory program. Given their nature, it would not be appropriate for a permit program to require adherence to the WEGs or APLIC recommended practices. Nor would the Service or the regulated community want to be locked into a set of practices that may evolve over time based on new knowledge or technological advancements.

Standard Conditions.

The ANPR suggests that permit conditions would not be customized to the applicant.[33] EWAC agrees that should be the case, while preserving the ability of the covered entity to select the appropriate beneficial practices for its facility, as discussed above.

Monitoring.

The ANPR suggests that monitoring requirements for a general permit would not be extensive.[34] EWAC supports the ANPR's example of limiting monitoring and reporting to dead birds found during routine maintenance and operation activities and not requiring an active monitoring program. EWAC also supports the ANPR's suggestion that neither the Service nor the covered entity would be required to estimate the type, number, or species of migratory birds that are killed at a covered facility.

Some EWAC members already report avian mortalities to the Service through existing online portals. A general permit program should allow continued use of those existing reporting channels and not require duplicative reporting.

Authorized Take.

The ANPR suggests that the Service would not specify the number or species of birds that a covered facility is authorized to take, but would assess the take likely to occur collectively across all covered facilities.[35] EWAC agrees that this would be the appropriate approach to authorizing take and evaluating its impacts. It is unlikely that the Service or an applicant would have the information needed to project the number or species of birds likely to be taken by an individual facility. It also would be antithetical to the concept of a general permit to attempt to engage in that

[33] 86 Fed. Reg. at 54669.
[34] 86 Fed. Reg. at 54669.
[35] 86 Fed. Reg. at 54669.

exercise, or to require facility-specific monitoring to demonstrate compliance with a facility-specific take estimate. However, information currently available regarding the electric power industry and some other industries should be adequate for the Service to make reasonable projections of the general level of take that is likely to occur across covered industries.

Special Purpose Utility Permits.

Many utilities and renewable energy companies maintain Special Purpose Utility (SPUT) permits. These allow holders of SPUT permits to collect, transport and temporarily possess migratory birds found on utility properties or under utility structures. From comments made by Service personnel during the public comment period,[36] EWAC understands that the Service intends to maintain SPUT permitting as a separate permit program because SPUT permits apply to purposeful actions rather than incidental take. However, if a general permit for incidental take is developed, the Service should allow entities the option of combined administration of their incidental take permit and SPUT permit. If SPUT and incidental take permits are maintained as separate permits, there is a significant risk of double counting of bird mortalities. For example, the Service currently requests reporting of incidentally observed bird mortalities in SPUT permit reports. Even if guidance is given to minimize duplicative reporting, the burden would fall on the environmental staff of regulated companies to differentiate and track information to be reported under a SPUT permit versus an incidental take permit. Combined administration would improve efficiencies and reduce the administrative burden for both the regulated community and the Service.

Environmental Review.

The ANPR contemplates conducting the environmental review required by NEPA for the general permit system, not a separate review for each individual permit authorization.[37] EWAC supports this approach, which is consistent with how other federal agencies have successfully conducted NEPA reviews for general permit programs that they administer.

Endangered Species Act.

The ANPR does not discuss how the Service intends to address Endangered Species Act (ESA) consultation regarding the permit program. It would be preferable for the Service to satisfy ESA requirements by consulting on general permits at a programmatic level, rather than deferring consultation to the individual facility level.

Duration of Coverage.

The ANPR requests comment on the duration of general permits.[38] An MBTA permit will apply to ongoing operations, which differentiates them from construction permits, like the nationwide permits issued by the U.S. Army Corps of Engineers. The Clean Water Act limits the duration of the Corps' general permits to five years.[39] In contrast, the MBTA does not specify a maximum

[36] Comments made on November 16, 2021, at a Small Business Roundtable hosted by the Small Business Administration.
[37] 86 Fed. Reg. at 54669.
[38] 86 Fed. Reg. at 54670.
[39] 33 U.S.C. §1344(e)(2).

permit duration. Facility construction happens during a specific window of time, making construction less sensitive to changes in permit terms between permit iterations. On the other hand, changing permit terms can significantly impact operating facilities, as they may not have the flexibility to accommodate changes. This favors a long duration for MBTA permits.

Predictability also is essential to energy project financing. For renewable energy generation projects in particular, a project's lifetime revenue stream is allocated when the project is constructed. It is very difficult to accommodate changes in regulatory requirements during the operating life of a project if those changes materially increase compliance costs. In addition to financial constraints, some changes also may not be technically feasible for existing facilities to implement mid-project life (see discussion of existing facilities, below). A short permit term (five years) provides an opportunity for frequent changes in permit requirements, and indeed suggests an expectation that changes will occur. Multiple opportunities for changing requirements over the operating life of a facility presents an unpredictable financial risk, which can affect project financing. To provide predictability, permits ideally would have a 30-year term, which would track typical financing assumptions. Alternatively, the Service could allow applicants to select a permit duration, up to 30 years.

EWAC understands that the Service may want a shorter term so that requirements – and in particular, beneficial practices – can be updated regularly to reflect technological advances or improved practices within industries and to update permit conditions. One way to address this would be to follow EWAC's suggestion above that the permits provide a framework for facility migratory bird plans but that the lists of beneficial practices be issued in guidance documents, which can be updated as changes to beneficial practices are demonstrated, rather than incorporating the lists in regulations or general permits.

Another alternative would be for the Service to implement a shorter permit reissuance schedule, but with the reissued permits applicable only to new applicants. Those facilities that obtained coverage under an earlier version of the general permit would remain subject to the terms and conditions of the earlier version from when coverage begins for the applicant-selected duration, up to a 30-year period. This would provide the level of predictability needed to foster the ongoing transition in the electric power industry, discussed elsewhere in these comments.

Finally, the general permit rules should include a simple mechanism for the facility owner or operator to terminate permit coverage, for example by submitting a notice of termination to the Service. This would be particularly helpful if the Service sets a long permit duration. A simple applicant-triggered termination process would facilitate notice to the Service if, for example, a covered facility stops operating. It also would help avoid confusion regarding potential lingering regulatory obligations.

Documenting Compliance.

The ANPR requests comment on how permit compliance should be documented and enforced. EWAC recommends that implementation of beneficial practices be documented through simple annual reports. This would provide the Service with the information it needs to administer the program while avoiding unnecessary administrative burdens for the Service and for covered facilities.

As discussed above, enforcement of the permit program will prove difficult under the MBTA, since the Act currently provides that any person who violates or fails to comply with any regulation made under the MBTA is subject to criminal charges.[40] The lack of alternative remedies should cause the Service to postpone any widely applicable permit program until the MBTA is amended to provide appropriate enforcement alternatives.

Existing Facilities.

The Service should consider exempting existing facilities or allow existing facilities and those that are currently under development to exclude beneficial practices that are not practicable for them to implement. Some existing facilities may not be able to implement beneficial practices that would be feasible for a new facility. It may be more expensive for an existing facility to implement certain beneficial practices than for a new facility to do so, or specific practices simply may not be economically feasible for an existing facility, for the same reasons discussed above in connection with the duration of coverage. Finally, renewable energy projects typically are developed on a tight schedule, with any delays presenting significant economic implications. Accordingly, the Service should keep in mind the potential impact of program elements on projects that are being developed when the program is adopted, so as to avoid delays.

Transferring Permit Coverage.

It is not unusual for renewable energy generation facilities to be sold at some point during their operating life. The sale of other types of electric power industry assets also occurs. Accordingly, any permit program should allow for transfer of permit coverage if and when ownership of the covered assets is transferred.

F. Entity Coverage.

While the ANPR does not specifically inquire about entity level coverage, EWAC offers the following for consideration. EWAC members are diverse in their size, type, and structure. Members include large investor-owned utilities (IOUs) with large utility service entities covering many states. These large IOUs may have different legal entity structures, and some have separate business units with non-regulated commercial renewable energy companies as subsidiaries. Further, some EWAC members are energy delivery (i.e., transmission and distribution system) only companies, including rural electric cooperatives, while other EWAC members are stand-alone renewable energy independent power producers. Each of these member classes have drastically different "corporate" structures and as such would likely require different approaches to facility or system coverage under the contemplated permit program.

Due to this diversity in size, type and structure, there is no "one size fits all" on what entity level should seek a permit. Some member companies typically have environmental permits held at the lowest level legal entity in the chain of corporate structure. Others may have their permits held by an intermediate corporate entity that is a parent to a number of project-specific entities. In light of this, we suggest a similar approach for a general permit program, whereby the applicant chooses what entity (or facilities) to cover under a single permit or notice of intent. For example, a wind energy developer or a utility may have dozens of operating wind projects spread across the county.

[40] 16 U.S.C. § 707(a).

Typically, each wind project is owned by a limited liability corporation (LLC) or another similar project-specific legal entity. The parent company may prefer to have permits held by the individual project LLC, or by an intermediate legal entity that owns several project-specific LLCs. Similarly, an IOU may have several franchised utility entities based on geography or the state in which they are located. In this case, we would envision each franchised utility entity to be the permit holder, not the IOU parent company. Conversely, to reduce the administrative burden to both the Service and regulated community, we suggest not requiring separate permit coverages for individual similar components or facilities within an entity (i.e. individual powerline circuits or individual wind turbines).

G. A General Conservation Fee is Superior to Attempting to Determine Compensatory Mitigation

The ANPR invites comment on the potential use of fees collected under the MBTA permit program to improve migratory bird conservation.[41] The ANPR also seeks input on whether the Service should consider a compensatory mitigation approach, where the amount of the fee or mitigation would be calculated for individual projects, or alternatively a general conservation fee structure, with funds directed to a specific, dedicated fund.

As a threshold matter, the Service should only collect fees for MBTA permits if they can be directed to funds that are dedicated to migratory bird conservation. The Service should not collect fees if the moneys will simply be directed to the general fund. The Miscellaneous Receipts Act provides that a government official "receiving money for the Government from any source shall deposit that money with the Treasury." 31 U.S.C. § 3302(b). OMB Circular A-25 states that "[u]nless a statute provides otherwise, user charge collections will be credited to the general fund of the Treasury as miscellaneous receipts, as required by 31 U.S.C. 3302." EWAC is not aware of any provision of the MBTA that would allow permit fees to be treated as anything other than miscellaneous federal receipts.

EWAC is concerned that the Service is likely to have difficulty implementing any such fee under the MBTA as currently enacted. Nothing in the current language of the statute authorizes the Service to collect conservation or mitigation fees from those who are authorized to take migratory birds. The only apparent legal basis would be the provision that authorizes "suitable regulations permitting and governing" take of migratory birds[42] In fact, the Service recognized that it could not require mitigation under the MBTA when it adopted a general mitigation policy in 2016.[43] The policy lists statutes and circumstances under which the Service may require mitigation, which do not include the MBTA.[44] In responding to comments on the draft of the mitigation policy, the Service discussed the enforcement discretion approach that was then in place to address incidental take of migratory birds. USFWS explained: "Under this approach, the Service recommends voluntary measures that can mitigate the direct take of migratory birds …."[45] The Service did go on to assert that it could adopt a rule to authorize incidental take under the MBTA that would

[41] 86 Fed. Reg. at 54670.
[42] 16 U.S.C. § 704(a).
[43] USFWS Mitigation Policy, 81 Fed. Reg. 83440 (Nov. 21, 2106).
[44] 81 Fed. Reg. at 83470-71.
[45] 81 Fed. Reg. at 83447.

require compensation for unavoidable take.[46] However, the agency did not point to any provision of the MBTA that would authorize such a regulatory requirement. Thus, the Service's legal authority to collect any fees, as well as its ability to avoid classifying those fees as miscellaneous receipts, appears to be in question.

Assuming the Service can dedicate the collected fees to migratory bird conservation, then EWAC supports charging a modest, flat, annual conservation fee to each covered entity or facility. There should be fee exemptions for small business, to the extent they are not exempted from the permit program altogether, and the fee schedule should discount the fee for a not-for-profit entity. The conservation fee should be small enough in any event that it would not impose a financial burden. As shared by Service staff during the Small Business Administration webinar on November 10th, one possible approach would be for the fee to be structured like a hunting permit fee (e.g., $25 duck stamp), where an annual amount is collected from permit holders regardless of how many birds are taken. EWAC supports this approach, noting that under a similar construct for the contemplated permit program, the total amount collected over a large number of facilities could be quite substantial and make a meaningful contribution to migratory bird conservation. EWAC also supports, assuming this can be accomplished lawfully, directing these funds to a specific, dedicated fund, which should be an existing fund dedicated to bird conservation purposes.[47]

A flat conservation fee is most consistent with a general permit approach and, as noted above, neither the Service nor the applicant is likely to have the information that would be needed to calculate a project-specific compensatory mitigation fee. Also complicating any attempt to calculate compensatory mitigation would be the large number of bird species covered by the permit. The cost and administrative burden of collecting that information would outweigh the potential benefits, particularly when the same conservation objectives can be achieved through collection of a flat fee from all covered facilities.

Conclusion

EWAC members are committed to conserving our nation's natural resources and supporting the communities we serve. The industry's efforts for migratory bird conservation are part of our culture and will continue regardless of the regulatory requirements under the MBTA. We have a responsibility to our stakeholders, including our customers, shareholders, investors, the general public, and future generations to implement sustainable business practices and to provide safe, reliable, affordable, and increasingly clean electricity while protecting the environment and the communities we serve. EWAC's members have a host of reasons to assure the safe and reliable operation of their facilities, avoid power outages and wildfires, and continue to provide affordable electricity to their customers. This is an existing commitment; no permit program is needed to spur it on.

The Service should recognize that the resources consumed by the contemplated permit program cannot be justified by the limited conservation gains it might potentially produce. EWAC has consistently pointed out several of the hurdles such a program would face since the organization's

[46] *Id*.
[47] North American Wetlands Conservation Fund established under the North American Wetlands Conservation Act (16 U.S.C. 4401 et seq.), or the Neotropical Migratory Bird Conservation Fund established by section 9 of the Neotropical Migratory Bird Conservation Act (16 U.S.C. 6108).

inception seven years ago, as well as its limited potential benefits. If the Service nevertheless decides to proceed with a permitting program, it should design the program to minimize administrative burdens as outlined in the preceding comments.

Alternatively, the Service could focus its efforts on encouraging Congress to enact new legislation that is better tailored to migratory bird conservation, and in the meantime work with stakeholders to identify economy-wide voluntary programs and partnerships to reduce impacts to and conservation of migratory birds. EWAC firmly believes that through a concerted effort by the public and private sectors that bipartisan legislation focused on avian conservation, and not regulation, could create a lasting funding mechanism to make significant advancements for migratory bird conservation and provide durable clarity to the legal uncertainties posed under the current MBTA.

EWAC and its members stand ready to work with the Service, the conservation community, and other stakeholders in advancing a solution that brings tangible and lasting conservation to migratory birds, and would welcome the opportunity to work with stakeholders to that end. In the meantime, the Service should rely on a clear MBTA enforcement policy and devote resources to encouraging bird-safe practices in the sectors that have the greatest impact on migratory birds.

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Brandt-Erichsen, Svend

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Document Type: Proposed Rule
Title: Migratory Bird Permits: Authorizing the Incidental Take of Migratory Birds
Document ID: FWS-HQ-MB-2021-0105-0001

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