



December 3, 2021

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Public Comments Processing
Attn: FWS–HQ–MB–2021-0105
U.S. Fish and Wildlife Service
MS: PRB/3W
5275 Leesburg Pike
Falls Church, VA 22041–3803

Re: Migratory Bird Permits; Authorizing the Incidental Take of Migratory Birds

Dear Sir/Madam:

Western Energy Alliance, the American Exploration & Production Council (AXPC), the Petroleum Alliance of Oklahoma (PAO), and the Petroleum Association of Wyoming (PAW) (collectively, the Trades) submit the following comments on the U.S. Fish & Wildlife Service's (FWS) notice of intent (NOI) to prepare a rule authorizing the incidental take of migratory birds through a permitting framework. The Trades support measures to protect migratory bird populations while also providing for responsible energy development. However, we do not think a permit system is necessary at this time, and have concerns with the notice of proposed rulemaking, as outlined below.

The Alliance represents 200 companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas in the West. Alliance members are independents, the majority of which are small businesses with an average of fourteen employees.

AXPC is a national trade association representing the largest independent oil and natural gas exploration and production companies in the United States. AXPC works with regulators and policymakers to better educate them on our operations so that they will be able to create sound fact-based public policies that result in the safe, responsible exploration and production of America's vast oil and natural gas resources.

PAW is the voice of Wyoming's primary economic driver, the oil and gas industry. Collectively, PAW's members produce over 90% of the State's oil and gas, generate more than \$5 billion in economic activity, and employ more than 18,000 of Wyoming's hardworking men and women.

The Petroleum Alliance of Oklahoma is the only trade association in Oklahoma to represent all sectors of the state's oil and natural gas industry. Representing more than 1,300 individuals and companies and their tens of thousands of employees, the Alliance's membership includes oil and natural gas producers, service providers to the oil and natural gas industry, midstream companies, refiners, and other associated businesses, and our members include companies of all sizes, ranging from small, family-owned companies to large, publicly traded corporations. The Alliance addresses industry issues of

concern and works toward the advancement and improvement of the domestic oil and gas industry. We support and advocate for legislative and regulatory measures designed to promote the well-being and best interests of the citizens of Oklahoma and a strong and vital petroleum industry within the state and throughout the United States.

In tandem with the release of this notice of proposed rulemaking, the FWS issued a final rule on the scope of the Migratory Bird Treaty Act (MBTA) that interprets the law as prohibiting incidental take of migratory birds. As the Trades have noted in [previous comments](#) regarding the scope of the MBTA, we disagree with this interpretation, which conflicts with several federal circuit court rulings. The FWS cannot override legal decisions in the federal circuits which found the MBTA does not apply to incidental take of lawful activities, and the split amongst federal courts on this question demonstrates the agency does not have clear statutory authority to engage in this rulemaking. Unless and until either Congress or the U.S. Supreme Court provide legal certainty on this issue, FWS should refrain from engaging in a time-consuming and costly rulemaking.

The oil and gas industry uses a variety of operational practices and conservation measures in the siting of facilities as well as protective measures at the facilities to manage potential impacts to bird species. These measures are dependent upon site specific considerations, and they're implemented on a case-by-case basis. Companies further undertake myriad best management practices voluntarily to limit or minimize interactions between migratory birds and facilities. Finally, projects must follow state regulations aimed at the protection of birds, including permit conditions requiring proactive mitigation and requirements to consult with state wildlife agencies. These provisions apply across all landownerships.

There is no data that suggests a new permitting program will benefit migratory birds over and above our industry's operational practices and conservation measures, while a new permitting program will provide yet another cost to our industry and unnecessarily delay development. Also, while we disagree with FWS's new interpretation of the MBTA, data shows our industry is not a large contributor to incidental take of migratory birds. The enforcement discretion currently afforded to FWS staff is preferable over a new, unknown permitting system.

The Trades understand that a permitting system may be preferable to other industries, and the FWS has the ability to craft a targeted rule specific to that industry; however, we do not support such action. We also have concerns about the capacity of the FWS to take on responsibility for a new permitting program, appreciating the FWS's existing resource issues. As such, the Trades do not think a permitting regime is necessary at this time, and request FWS make no change to the current system.

If the FWS proceeds ahead with the proposed permit, however, the Trades request a reasonable, equitable permitting program. The principal goals of this program should be protecting species covered by the MBTA while providing regulatory and legal certainty for companies who otherwise conduct lawful and responsible activities in the least costly manner that avoids delays. The FWS should avoid establishing a permitting program that simply adds to the regulatory burden or creates inconsistent federal restrictions, particularly those instituted by the Bureau of Land Management (BLM) on energy development, including wind, solar, and oil and natural gas projects.

Energy companies are already subject to myriad regulations involving migratory bird protections, including federal resource management planning (RMP) documents and the National Environmental Policy Act (NEPA) analysis process, which take migratory birds, their habitat, and the MBTA into careful consideration. The NEPA process for oil and natural gas development currently incorporates a review of the presence of migratory birds at a project site, and provides for protection of these birds via closed containment systems and netting over pits and pipes consistent with land use planning documents. In many cases, spatial and temporal restrictions are utilized to inhibit certain oil and gas activities proximate to migratory bird nests or important habitat.

In light of these regulations and best practices, any permitting system the FWS establishes through this rule should be narrowly tailored to provide legal certainty, and be applied broadly across the industry rather than as an additional requirement for individual projects. Specifically, we oppose the proposal in the NOI regarding “a compensatory mitigation approach, where mitigation is developed and implemented specific to a given project or activity.” Any rule that requires habitat conservation or mitigation as a condition of incidental take permitting, is not authorized by the MBTA and exceeds statutory authority.

We would urge the FWS to consider instead a general permitting system that functions similar to a permit by rule, where approvals are granted automatically provided certain conditions have been met, rather than a project- or site-specific permitting regime. This result would ensure that operators who comply with applicable federal and state regulations and implement reasonable best practices will not be subject to prosecutions under the MBTA. A general permitting system would also benefit the FWS by ensuring agency resources are not spent processing hundreds or thousands of individual permits, which could potentially create an unmanageable system.

New permit requirements should also be consistent with current regulations from BLM, and should not exceed those established in RMPs and project-level environmental impact statements across the country. These plans can provide the proper balance between protections for migratory birds and development on federal lands, and they have been proven effective over many years. A new system from the FWS that potentially conflicts with or unjustifiably adds to these requirements will only serve to layer on regulatory burdens without providing a benefit to covered species. Any potential general permit requirements should be carefully balanced with BLM’s existing temporal and spatial restrictions so that the combined regulatory burden remains reasonable and can be practically adhered to in order to achieve compliance with any permit requirements.

Finally, any permitting system for energy development should take into account the balance between the burden imposed by the system and the benefit to the birds protected by the new rule. The FWS has [publicly stated](#) that “vast numbers of birds are killed due to collisions with human structures and equipment, poisoning by pesticides and contaminants, and attacks by cats and other introduced predators.” In fact, [data compiled](#) by federal and state agencies show that approximately 2.4 billion bird deaths are caused by cats each year, and nearly 600 million deaths are attributable to collisions with building windows. This combined figure of around 3 billion deaths is more than 10 times the amount as the next most common threat, automobiles.

While energy development does contribute to avian mortality, the figures associated with oil and natural gas activities are miniscule in comparison to the three causes listed above. Therefore, the benefits to overall migratory bird populations from a permitting system for energy projects will be minimal at best. We urge the FWS to utilize a potential general permitting system to provide funding for education efforts on the major contributors to bird deaths, which will have a much more tangible and large-scale impact than new site-specific restrictions on energy development.

The Trades appreciate the opportunity to provide these comments, and look forward to engaging directly with the FWS on this rulemaking and continued protections for migratory birds. Please do not hesitate to contact us with any questions.

Sincerely,



Tripp Parks
Vice President of Government Affairs
Western Energy Alliance



Wendy Kirchoff
Vice President, Regulatory Policy
American Exploration & Production Council



Colin McKee
Regulatory Affairs Director
Petroleum Association of Wyoming



Angie Burckhalter
Sr. V.P. of Regulatory & Environmental Affairs
Petroleum Alliance of Oklahoma