WESTERN ENERGY ALLIANCE

PETROLEUM ASSOCIATION of WYOMING

July 27, 2015

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

Re: Migratory Bird Permits: Programmatic Environmental Impact Statement, Docket No. FWS–HQ–MB–2014–0067

Dear Sir/Madam:

Western Energy Alliance and the Petroleum Association of Wyoming (PAW, together the Associations) support measures to protect migratory bird populations while also providing for responsible energy development, including efforts to provide legal assurances for incidental take of migratory birds. However, we do not believe the rulemaking proposed by the Fish and Wildlife Service (FWS) within this Programmatic Environmental Impact Statement (PEIS) is appropriate or advisable, for the reasons discussed below.

Western Energy Alliance represents over 450 members involved in all aspects of environmentally responsible exploration and production of oil and natural gas in the West. The Alliance represents independents, the majority of which are small businesses with an average of fifteen employees.

PAW is Wyoming's largest and oldest oil and gas organization dedicated to the betterment of the state's oil and gas industry and public welfare. PAW members, ranging from independent operators to integrated companies, account for approximately ninety percent of the natural gas and eighty percent of the crude oil produced in Wyoming.

Statutory Authority

There is a split among federal circuit courts over whether the Migratory Bird Treaty Act (MBTA) applies to the incidental take of migratory birds. Before we can even consider the merits of a proposed rulemaking, we believe this presents FWS with a threshold issue that must be addressed: does MBTA grant the Service authority to propose rulemaking on incidental take? The Associations do not believe the statute grants said authority, and therefore any rulemaking would exceed the scope of MBTA.

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Beyond this threshold question of statutory authority, the Associations are concerned that any permitting program established by this rulemaking would simply add to the regulatory burden on oil and natural gas operations. Operators are already subject to myriad regulations, including federal land management planning documents and the National Environmental Policy Act (NEPA) process, which takes migratory birds and the MBTA into consideration. Adding additional steps to the permitting process will only serve as a further burden on operators, with no discernable benefit.

The Associations do not believe the Notice of Intent addresses the fundamental issues affecting migratory bird populations. Simply put, oil and natural gas operations have almost no impact on these populations as compared to the true drivers of avian mortality: cats and collisions with building windows. Statistics show that these two factors are more likely to cause bird deaths by several orders of magnitude as compared to industrial actions, yet the oil and natural gas industry, along with several similar industries, have been singled out by the Notice of Intent. We cannot support a rulemaking that increases the regulatory burden on industry without addressing the true threats to migratory birds. FWS has an obligation to address real threats, not to just divert attention to impacts that are convenient to regulate but not major threats.

MBTA was enacted by Congress in 1918 as a criminal statute in order to address hunting and poaching of migratory birds. According to MBTA, it is unlawful "at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture or kill, possess, offer for sale, . . . [or transport] any migratory bird, any part, nest, or egg of any such bird."[1] This language clearly applies to actions that are intended to harm a migratory bird. It is not apparent, however, that Congress meant to endorse "the Service's longstanding position that the MBTA applies to take that occurs incidental to, and which is not the purpose of, an otherwise lawful activity."[2]

This uncertainty as to incidental take and the MBTA has been a question for the courts on numerous occasions. The statute fails to provide a mens rea requirement, leaving it to the courts to determine statutory intent, and this has produced a split amongst federal courts.

The Tenth Circuit Court of Appeals has upheld FWS's interpretation of the Act, finding that the "take" and "kill" prohibitions apply to any activity that results in harm to migratory birds, regardless of intent.[3] However, the Eighth and Ninth Circuits have strongly disagreed. According to a unanimous panel of the Eighth Circuit in *Newton County Wildlife Ass'n v. U.S. Dep't of Agriculture*:

> MBTA's plain language prohibits conduct directed at migratory birds—"pursue, hunt, take, capture, kill, possess," and so forth. . . . It would stretch this 1918

[1] 16 U.S.C. § 703.
[2] 80 Fed. Reg. at 30,034.
[3] *United States v. Moon Lake Elec. Ass'n Inc.*, 45 F. Supp. 2d 1070 (D. Colo. 1999); *United States v. Apollo Energies, Inc.*, 611 F.3d 679 (10th Cir. 2010).

> statute far beyond the bounds of reason to construe it as an absolute criminal prohibition on conduct, such as timber harvesting, that indirectly results in the death of migratory birds.[4]

The Ninth Circuit similarly held, in *Seattle Audubon Society v. Evans*, that the MBTA does not apply to adverse habitat modification, finding that the Act does not prohibit "indirect, unintended bird killings."[5] Finally, the most recent case involving MBTA and incidental take comes from the Federal District Court for the District of North Dakota. In *United States v. Brigham Oil and Gas, L.P.*, the Court held that MBTA "only covers conduct directed against wildlife . . . lawful commercial activity which may indirectly cause the death of migratory birds does not constitute a federal crime."[6]

Ultimately, the split amongst federal courts demonstrates that FWS does not have clear statutory authority to engage in rulemaking on incidental take under MBTA. Unless and until either Congress or the courts provide legal certainty on this issue, FWS should refrain from engaging in time-consuming and costly rulemaking.

Regulatory Burden

The oil and natural gas industry is currently subject to stringent environmental regulations that add substantial burdens to the permitting process. These burdens are especially prominent on federal and tribal lands, where applications for permits to drill (APD) can spend years languishing in the approval process.

One of the chief culprits for these wait times is the NEPA process, under which operators must submit to regulatory oversight by numerous federal agencies. The NEPA process 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. Projects must also follow state regulations aimed at the protection of birds. The Associations are concerned that any additional permitting requirements are redundant and will simply add to the regulatory burden and the length of the wait time for APDs.

In a similar vein, we are concerned FWS may *require* oil and gas operators to conduct habitat conservation or mitigation in order to obtain an incidental take permit under the MBTA. The Notice of Intent suggests a rule "could create a regulatory mechanism to obtain meaningful compensatory mitigation for bird mortality that cannot be avoided or minimized through best practices or technologies. Compensatory mitigation for incidental take, especially on a watershed or landscape basis, can provide conservation benefits through funding of habitat replacement, restoration, or, in certain circumstances, acquisition."

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[4] 113 F.3d 110, 115 (8th Cir. 1997).
[5] *Seattle Audubon Soc'y v. Evans*, 952 F.2d 297 (9th Cir. 1991).
[6] *Id.* at 1214.

Any rule that requires habitat conservation or mitigation as a condition of incidental take permitting is not authorized by the MBTA and undoubtedly exceeds FWS's authority. Therefore, if FWS develops a regulatory scheme for incidental take permitting, the decision of whether to obtain a permit and implement compensatory habitat mitigation in return for protection from prosecution must be entirely at the discretion of the operator.

Any final rule adopted by FWS should seek to minimize the regulatory burdens associated with permit issuance, not add to it. However, in light of the protections which are already in place for migratory birds at oil and natural gas project sites, we ultimately do not believe it is appropriate to conduct a rulemaking process for permitting under MBTA.

Effect on Migratory Bird Populations

The Associations are not opposed to sensible regulations that protect migratory bird populations. However, any rule must take into account the balance between the burden imposed by the rule and the benefit to the birds protected by the rule. In this case, the Notice of Intent does not provide the proper balance because the industries singled out in the Notice have minimal effect on the bird populations compared to the true culprits.

FWS has publicly stated that "[v]ast 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."[7] In fact, recent 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.[8] This combined figure of around 3 billion deaths is more than 10 times the amount as the next most common culprit: 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, leading to a clear conclusion: establishing a permitting process for energy development will have little to no effect on overall migratory bird populations. It would of course be absurd to attempt to regulate cats and building windows, but it would be no more sensible to extend MBTA to incidental take in order to protect bird populations with the knowledge that human activities play so little a role in determining those populations.

[7] *See* U.S. FISH & WILDLIFE SERVICE, MIGRATORY BIRD MORTALITY, MANY HUMAN-CAUSED THREATS AFFLICT OUR BIRD POPULATIONS (2002).

[8] *North American Bird Conservation Initiative, U.S. Committee. 2014. The State of the Birds 2014 Report. U.S. Department of Interior, Washington, D.C. Page 11.*

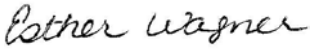
Conclusion

For the reasons addressed above, we do not believe it is appropriate for FWS to engage in a rulemaking process relating to incidental take permits under the MBTA. Instead, FWS should focus its efforts on extending the current approach of working with industry sectors to establish best practices that will minimize avian mortality. This approach recognizes the proper scope of MBTA, while preserving for FWS the opportunity to limit bird deaths caused by energy development.

We appreciate the opportunity to provide these comments to FWS, and respectfully request you take these comments into full consideration before proceeding with a rulemaking.

Sincerely,

Kathleen Sgamma
Vice President of Government & Public Affairs
Western Energy Alliance



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