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

Attn: Docket ID No. FWS-HQ-MB-2021-0105

Re: Comments on the Advanced Notice of Proposed Rulemaking: Migratory Bird Permits; Authorizing the Incidental Take of Migratory Birds: 86 Federal Register 54667, October 4, 2021.

Dear Fish and Wildlife Service Staff:

On behalf of American Municipal Power, Inc. and the Ohio Municipal Electric Association, we appreciate this opportunity to provide comments on the plan to issue a proposed regulation codifying the agency’s interpretation of the Migratory Bird and Treaty Act (MBTA) that prohibits incidental take and establishes a system of regulations to authorize the incidental take of migratory birds under certain conditions.

Background on AMP/OMEA

American Municipal Power, Inc. (AMP) is a nonprofit wholesale power supplier and services provider for 134-member municipal electric systems in the states of Ohio, Pennsylvania, Michigan, Virginia, Kentucky, West Virginia, Indiana, and Maryland and the Delaware Municipal Electric Corporation, a joint action agency with nine members headquartered in Smyrna, Delaware. AMP's mission is to serve members through public power joint action, innovative solutions, robust advocacy and cost-effective management of power supply and energy services.

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AMP offers a wide variety of services to help member communities improve the quality of municipal utility services to their customers. AMP provides these services on a cooperative, nonprofit basis for the mutual benefit of member communities.

AMP members receive their power supply from a diversified resource mix that includes wholesale power purchases through AMP and the open market, and energy produced at AMP and member-owned generating facilities utilizing fossil fuels, hydroelectric, wind, solar and other renewable resources. Assets include AMP Fremont Energy Center, natural gas combined cycle in Fremont, Ohio, a majority ownership stake in the coal-fired Prairie State Energy Campus, diesel, and natural gas peaking units, and hydroelectric, solar and wind projects throughout the region. AMP has actively worked over the past decade to diversify our power supply portfolio to include renewable resources and continues to explore additional opportunities for new renewable energy resources.

The Ohio Municipal Electric Association (OMEA) represents the Ohio and federal legislative interests of AMP and member Ohio municipal electric systems. Although closely aligned with AMP, the OMEA is a separate, nonprofit entity guided by a 16-member Board of Directors. However, subsequent "AMP" references herein also represent the interests and comments of OMEA.

In recognition of our unique position as both a wholesale power supplier and services provider, as well as the owner and operator of electric generating assets, AMP offers the following comments regarding this action.

Comments

The October 4, 2021 Advanced Notice of Proposed Rulemaking (ANPR) announced the Fish and Wildlife Service's intent (FWS) to issue a proposed regulation codifying its interpretation of the Migratory Bird Treaty Act (MBTA) as prohibiting the incidental take of migratory birds, while also authorizing, in limited circumstances, incidental take. FWS has outlined a possible three-tiered approach to authorizing incidental take:

1. Explicit exceptions to the MBTA's prohibition on incidental take (e.g., for noncommercial situations, such as homeowner actions).
2. A "General Permit" program authorizing certain types of activities (e.g., akin to the U.S. Army Corps of Engineers' nationwide permitting program under the Clean Water Act, with permit conditions for a specific activity or tailored to specific circumstances).
3. An individual permit program like FWS's existing migratory bird permitting program under 40 C.F.R. Subpart C.

One of the longstanding constants with the MBTA has been the uncertainty associated with the scope of the take prohibition. The Federal Courts of Appeal have split on the scope of the take prohibition. The Fifth and Eighth Circuits have held that the Act does not prohibit incidental take, while the Second and Tenth Circuits have held that it does. Geographic location

should not dictate which actions result in an enforceable take of migratory birds, and a program as suggested by FWS would address this inconsistency.

The current ANPR is similar to FWS's 2015 action to develop an incidental take permitting program,¹ an effort that ended in 2018 in light of the December 2017 Solicitor's opinion² concluding that the MBTA did not prohibit incidental take, and thus no permitting program was needed.³ The fact that FWS is circling back to this effort, along with the split the Federal Courts of Appeals decisions regarding the MBTA's take prohibition, underscores the uncertainty that surrounds the MBTA.

The MBTA has the distinction of being one of the oldest wildlife protection statutes in the U.S., making it a crime to "take" a migratory bird. However, the term "take" is defined broadly to include "pursue, hunt, shoot, wound, kill, trap, capture, or collect a migratory bird, or attempt to do so."⁴ AMP does not believe that it was the intent of the MBTA to prohibit incidental take, and in fact it was not until the 1970's that FWS expanded its interpretation and began pursuing incidental take of migratory birds. The origin of the MBTA was to avoid over hunting of migratory birds, not fatalities that result from an otherwise lawful activity (i.e., driving a car or operating a wind turbine). AMP recognizes the MBTA is a strict liability statute, but the actions listed in the statute all infer an affirmative action to take a migratory bird (i.e., "hunt" or "capture").

AMP encourages FWS to proceed in two phases. First, FWS should clearly and formally memorialize the agency's position that incidental take is prohibited under the MBTA through a rulemaking process. Second, if the rule prohibiting incidental take survives the review process, only then should the FWS proceed with developing appropriate permit programs and exceptions through a subsequent rulemaking process. This two-step approach resolves the current geographic inconsistency while avoiding time and effort related to establishing a permit program and issuance of permits that may later be deemed invalid if the rule prohibiting incidental take is overturned.

If FWS proceeds with establishing a permitting program to regulate incidental take under the MBTA without first memorializing a strict prohibition on incidental take, AMP supports the approach of a General Permit program for certain activities that share operational circumstances and characteristics that includes a common-sense approach to *de minimis* exemptions. Specifically, a General Permit program should establish reasonable limiting principals to the FWS's inclusion of incidental take, as are embedded in other mature programs such as the Clean Air Act (CAA) and Clean Water Act (CWA). For example, because rapid deployment of renewable energy generation will continue, municipally owned electric generation and distribution systems, and small scale solar and wind farms (e.g. less than five turbines) should be exempt. Similarly,

¹ 80 Fed. Reg. 30032 (May 26, 2015).

² Memorandum from Daniel H. Jorjani, Principal Deputy Solicitor, Dep't of the Interior, to Secretary et al., Dep't of the Interior, The Migratory Bird Treaty Act Does Not Prohibit Incidental Take, (Dec. 22, 2017), available at: [m-37050.pdf \(doi.gov\)](https://www.doi.gov/sites/doi.gov/files/m-37050.pdf).

³ 83 Fed. Reg. 24080 (May 24, 2018).

⁴ 50 C.F.R. 10.12.

individual motor vehicle strikes should be exempt. In other words, the FWS should focus its efforts and resources on activities that result in incidental take that have a significant and measured negative impact on migratory bird populations.

We appreciate FWS providing the opportunity to provide input to the agency in advance of developing an incidental take permitting regime under the MBTA and for its efforts to implement practical, workable rules to govern the MBTA regulatory process.

Respectfully Submitted,



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