WESTERN URBAN WATER COALITION

December 3, 2021

Submitted via //www.regulations.gov/
(Docket No. FWS–HQ–MB–2021–0105)

U.S. Fish and Wildlife Service
MS: PRB/3W
5275 Leesburg Pike
Falls Church, VA 22041–3803

RE: Comments on Advanced Notice of Proposed Rulemaking, "Migratory Bird Permits; Authorizing the Incidental Take of Migratory Birds," 86 Fed. Reg. 54667 (Oct. 4, 2021), Docket No. FWS–HQ–MB–2021–0105

The Western Urban Water Coalition (WUWC) [1] appreciates this opportunity to comment on the U.S. Fish and Wildlife Service's (FWS) advanced notice of proposed rulemaking and notice of intent to propose regulations to authorize the incidental take of migratory birds under prescribed conditions and prepare a draft environmental review pursuant to the National Environmental Policy Act. 86 Fed. Reg. 54667 (Oct. 4, 2021).

Introduction

WUWC was established in 1992 to address the West's unique water supply and water quality challenges that threaten the economic sustainability and growth of the western population centers. WUWC consists of the largest urban water utilities in the West, which together serve more than 40 million urban water consumers in 18 major metropolitan areas across seven states. Some of these utilities also operate wastewater, stormwater, natural gas, and electric, including hydroelectric, facilities for their customers.

WUWC members are nonprofit public utilities dedicated to providing a reliable, high-quality urban water supply for present and future generations. As operators of urban water supply systems, WUWC members serve the health, environmental, and economic needs of their communities around the clock, every day of the year. WUWC advocates for effective and

[1] WUWC consists of the following members: **Arizona** (Central Arizona Project, City of Phoenix and Salt River Project); **California** (Eastern Municipal Water District, City of Los Angeles Department of Water and Power, The Metropolitan Water District of Southern California, San Diego County Water Authority, Santa Clara Valley Water District, and City and County of San Francisco Public Utilities Commission); **Colorado** (Aurora Water, Colorado Springs Utilities, and Denver Water); **Nevada** (Las Vegas Valley Water District, Southern Nevada Water Authority, and Truckee Meadows Water Authority); **New Mexico** (Albuquerque Bernalillo County Water Utility Authority); **Utah** (Salt Lake City Public Utilities); and **Washington** (Seattle Public Utilities).

practicable approaches to the implementation of environmental protection programs in a time when water supplies are becoming increasingly scarce, and the development of sustainable supplies is vital.

WUWC has historically been, and will continue to be, a supporter of the goals of the Migratory Bird Treaty Act (MBTA). For the most part, the activities of WUWC members do not have impacts on migratory bird species. Incidental take across the entire water supply utility sector is minimal. We are aware of the longstanding debate over whether the MBTA covers incidental take at all, and we expect that the legal debate over that question will continue until resolved by the courts or Congress. Our concerns at this time are pragmatic and driven by the goal of ensuring the efficient and cost-effective development and operation of water supply facilities while protecting the environment including migratory birds. In pursuing these objectives, one of the most important factors for water supply utilities is regulatory certainty, which has been lacking under the MBTA for many years due to the competing legal positions and the general uncertainty associated with an enforcement-only approach. We therefore believe that a carefully circumscribed and judiciously applied permit option would be helpful to avoid confusion over MBTA compliance. WUWC members are advocates for such predictability and are open to exploring an efficient and limited MBTA permit program that is coupled with improved guidance on MBTA enforcement.

WUWC has been active in the regulatory initiatives to define what constitutes an incidental take under the MBTA. In 2015, we commented on the FWS's notice of intent to evaluate the potential environmental impacts of a proposal to authorize the incidental take of migratory birds and establishment of a permit system. Our previously submitted comments expressed interest in the establishment of a permit system for the incidental take of migratory birds, as it would increase the water resource development community's ability to plan and undertake projects that adequately mitigate the incidental take of migratory birds, minimize the administrative burden of compliance, and ultimately benefit bird conservation efforts. WUWC suggested that an incidental take permit system should provide sufficient flexibility to ensure that obtaining permits is cost-effective and does not impose heavy administrative burdens on the applicant, the FWS, or other agencies. *See* Attachment, Comments of the Western Urban Water Coalition on Notice of Intent on Migratory Bird Permits; Programmatic Environmental Impact Statement (July 27, 2015) (FWS Docket No. FWS-HQ-MB-2014-0067). The comments we submit today are substantially similar to those we submitted in 2015.

WUWC has extensive experience working with the Department of the Interior (DOI) in establishing effective tools for applying wildlife conservation laws to resource development and management activities. We are strong proponents of encouraging non-federal participation in promoting species conservation initiatives and in using efficient and effective permitting and conservation programs for this purpose under other laws and programs, including the Endangered Species Act. The ANPR for authorizing incidental take under the MBTA presents similar opportunities, if properly developed, and WUWC would be pleased to participate in a dialogue with DOI for this purpose. Based on this extensive background, and our members' experience being on-the-ground partners with the federal agencies, WUWC is prepared to assist the FWS in this regulatory process, most specifically on how a new permitting system will impact water providers in the West. The comments set forth in this letter are in furtherance of these general goals.

Specific Comments

Obtaining an incidental take permit should not be imposed as a regulatory prerequisite to proceeding with a project, either as a requirement for project approval under federal law or as a potential litigation claim. Such a permit should be required only in connection with the onset of the activity that would result in the incidental take. The regulations should ensure that projects will not be stalled pending the submittal of an application for, or the issuance of, an incidental take permit. An applicant's decision to obtain an incidental take permit should be voluntary and dependent on the specific circumstances of the project, as identified by the applicant, that are likely to result in an incidental take above the threshold of regulatory concern. In addition, the applicant should have sufficient latitude to define the specific scope of the action that should be subject to the permit. Further, an applicant must be permitted to divide its project into segments and apply for an incidental take permit for only those segments the applicant determines are likely to result in a take. The FWS should not have authority to stall earlier segments of a project that do not require a permit pending an application for, or issuance of, a permit for a later segment. Likewise, the FWS should not have the authority to require a permit for an entire project where only a portion of the project necessitates a permit. Ultimately, as any permit system should make clear, the MBTA is a strict liability criminal enforcement tool, and project proponents and operators should have the choice whether to undertake permit application or seek to comply through their own measures.

Given that the FWS will be engaging in a programmatic EIS pursuant to NEPA and its implementing regulations, a purpose and need statement is necessary. WUWC proposes the following purpose and need statement: "Promote the administration of the Migratory Bird Treaty Act and the conservation of migratory bird species and populations through a voluntary incidental take program that includes both a permit mechanism and provides for reasonable and cost-effective guidance on how to avoid, minimize, and mitigate the impacts of incidental takes in an efficient and cost-effective manner to clarify the circumstances under which enforcement action would not be taken."

The ANPR identifies three primary mechanisms the FWS is considering for an incidental take permit system: (1) Exceptions to MBTA's prohibition on incidental take; (2) General permits for certain activity types; and (3) Specific or individual permits. WUWC agrees that all three mechanisms should be included as alternatives, subject to the following comments.

<u>Exceptions to MBTA's Prohibition on Incidental Take</u>

WUWC agrees with the FWS's suggestion that some activities should be exempt from seeking a permit. For example, the incidental take of very common species of birds that are not of conservation concern, or during activities that have only a minimal effect on bird populations, or where activity-specific beneficial practices or technologies, such as the installation of flashing lights, sufficiently avoid or minimize incidental take, should be authorized by rule without the need for a permit. A permit system should establish clear thresholds for activities that are not required to apply for an incidental take permit for reasons to be specified in the regulations. Thus, the FWS should include regulatory language identifying the thresholds below which those engaged in these activities need not apply for an incidental take permit, or the beneficial practices or technologies required for specific activities to be exempt from the permit system.

Incidental take coincident to activities that do not require a permit should be deemed authorized by the FWS under the MBTA and should not constitute a violation of the MBTA. We believe that many water facility activities should qualify under authorization by rule.

The Southern Nevada Water Authority (SNWA) has encountered multiple instances where such authorization by the FWS would be helpful to their management of water infrastructure. For example,

- At SNWA's water treatment facility, ravens nest on overhead treatment pipes which are built above walkways. Debris from the nests and birds collects in the walkway and creates a slipping hazard for staff. Anti-perch devices have helped mitigate the problem, but the ability to remove nests would be beneficial.
- Swallows tend to nest around the interior walls of surge tanks, under the catwalks. As water levels fluctuate within the tank, operation of the tank has the potential to disrupt nests. SNWA is currently testing a netting system to prevent birds from nesting inside the tanks.
- SNWA uses a 70-foot-tall crane for the maintenance of submersible pumps, as no alternative equipment exists. Deterrence devises are installed on the crane where bird activity is noticed, but the devices do not guarantee that a bird will not be nesting on the equipment when it is needed.

FWS should find that incidental take coincident to the removal of active nests is exempt from the permit system and authorized under the MBTA, when the nest is used by a common species, and: (1) debris from the nest and/or bird is causing a health and safety issue; (2) the nest is located inside infrastructure with fluctuating water levels, like surge tanks; and (3) the nest is located on or in equipment needed for emergency repair work.

General Permits for Certain Activity Types

WUWC agrees with the FWS's suggested approach of issuing general conditional authorizations for certain activity types. WUWC also supports a reporting system that does not require extensive or active monitoring.

Additionally, a new category of general permits is needed. Just as sectors with established guidelines should be covered, so should a category for individual projects that already have approved MBTA measures in place. For example, a project that has an Avian Protection Plan (APP) authorized under the MBTA and approved by the FWS should be sufficient to allow any incidental takes that occur despite thorough and good faith implementation of the APP. We expect that most WUWC member activities will not rise to the level of needing an APP, but should it be the case that such a voluntary step is taken, including before the implementation of a final permitting system (which is expected to take years) the MBTA rules should recognize the validity of the APP. In effect, the APP should serve as the incidental take permit without any need for revisiting the Plan, by operation of a general permit under this alternative, or even as authorized by the rule itself. Any conclusion to the contrary would diminish the value of APPs and impose additional administrative obligations and costs on the regulated community and on the FWS. Further, requiring the parties to revisit such a plan imposes the risk of a lengthy NEPA

review and potential litigation through the creation of a new federal action. The regulations should include a provision that essentially "grandfathers" through a general permit all plans developed to protect migratory birds that are part of a governmental process for the approval of the project or activity.

The same is true for existing projects that already have been approved through procedures, including NEPA, that considered impacts on bird species and, if necessary, provided for coverage of any impacts on these species through a project authorization process. In some cases, this will mean the impact was minimal and did not require further action. In other cases, the potential for incidental take may have been noted and covered through conditions included in the authorization, such as BLM rights-of-way. If that is the case, a general permit-type of authorization should cover all such activities so it is not necessary to seek an additional incidental take permit. This general authorization should cover all previously approved projects, as well as new projects. It is essential that the new permitting system *does not reopen* previously approved decisions nor subject such projects to new requirements.

Specific or Individual Permits

While the issuance of individual permits appears to be an appropriate mechanism for authorizing incidental takes that will involve significant numbers of birds or species of conservation concern, WUWC is concerned that the FWS may not have sufficient staff or resources to review and issue individual permits. WUWC supports the FWS's intent to reserve specific permit use to limited situations where case-by-case evaluation and customization is necessary and appropriate. WUWC recommends that the FWS carefully craft the requirements for obtaining individual permits so that the process is as streamlined and efficient as possible. Finally, the FWS should establish a procedure under which applicants can assume the responsibility for preparing documents that are necessary to move a permit review forward, similar to applicant preparation of biological assessments under the ESA and environmental assessment and EIS documents under NEPA.

Memorandum of Understanding with Federal Agencies

WUWC agrees with the concept of a memorandum of understanding (MOU) between the FWS and the federal agency responsible for approving an agency action for the purpose of handling the authorization of incidental takes. A successful MOU would establish the action agency's authority to approve the incidental take concurrently with its approval of the underlying agency action. In essence, the permit approving the underlying action would also constitute the incidental take authorization. The MOU would specify the conditions relating to incidental takes that the underlying permit should cover. Including incidental take authorization within the approval of the underlying action would promote the efficient processing of both the underlying action and the incidental take and avoid the unnecessary use of FWS's resources for a separate incidental take permit.

Use of Enforcement Discretion

WUWC urges FWS to provide regulatory clarity and certainty to the regulated community by providing comprehensive coverage of incidental take through its proposed three-tier system.

Individuals and entities that may be responsible for incidentally taking migratory birds should understand whether they are required to accede to coverage under a general permit, apply for an individual permit, or are exempted from the need for a permit. Enforcement should be focused on violations of permit requirements or failures to obtain permits, without a substantial gray area, as this is an area of concern at present, where an entity is unable to obtain a permit and is forced to rely upon the FWS's enforcement discretion. To the extent that some types of incidental take are not covered either by a general permit, an individual permit, or an exemption under the new permit system, however, WUWC requests that the FWS provide clear guidance on the use of enforcement discretion.

Conservation Fee Structure

WUWC recognizes the realities of the cost of an MBTA program, both for administering a permit system and for addressing bird population declines and habitat degradation. WUWC members are very committed to ensuring that their projects support environmental quality generally, and wildlife conservation in particular. They routinely make very significant expenditures for this purpose on a voluntary basis, as well as through project administration and permitting requirements. Investments of this nature should be recognized by FWS when they are applied to migratory birds, including through the extension of regulatory assurances.

As for the costs of administering the permit system, WUWC's general position is that these expenses are a federal cost to be accounted for under the FWS budget. We encourage DOI to take the steps necessary to ensure that the permit system is adequately funded. At the same time, we recognize that adequate funding cannot be guaranteed (and is probably unlikely) and that delays or inefficiencies in permitting will be adverse to permit applicants and holders. We therefore are open to a reasonable fee program that would be used cover the costs expected for application review and permit administration. In the ESA context, for example, WUWC has long advocated a system where a particular project can engage in cost-sharing or providing donated services and staff positions for FWS. The principle behind such donations and contributions is to provide the agencies with the funds and expertise they need for timely and efficient permit processing and decision-making. Such payments would have no strings attached, but they would instead be understood to be dedicated to the sector or the project that is the source of the funds.

WUWC also would be willing to explore the establishment of a general fund to pay for migratory bird conservation measures, provided that contributions to that fund could be used to cover mitigation or other bird protection measures that would be needed to achieve permit approval. While voluntary donations could be made to such a fund, its primary attraction to the water sector would be if a schedule of payments could be set under which incidental take authorization would be provided in exchange for donations to the fund. Targeted use of donations to a conservation fund of this nature is likely to result in more efficient and effective mitigation, because it could be direct to the areas of greatest need by FWS or a designated project administrator. Often, on-site mitigation or project-specific measures are not the best way to advance species or habitat conservation.

Both of these mechanisms would work well for individual permits, but, as noted above, WUWC does not anticipate that the water projects for our members will trigger such permitting very often, if at all. For a general permit that covers the water sector, such a funding tool could still be

used but on a scale that reflects the reduced impacts associated with covered activities. For example, parties that seek coverage under a general permit could be charged a standard administration fee and a cost for conservation purposes. Any such charges under a general permit should be very modest because, by definition, impacts on migratory birds are low and the programs would not require a significant amount of agency staff time.

Reviewing and Updating Requirements

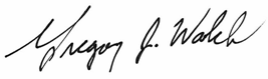
The MBTA permit system should balance the need for periodic review of existing permits to incorporate new information or respond to changed circumstances with the reliance interests of regulated parties, who need certainty regarding their regulatory requirements over a defined period in order to plan their investments and operations. Like many industries and government entities that are potentially subject to this rule, WUWC makes long-term investments in facilities and establishes long-term operational plans; its planning horizon for some of these activities may extend to 25 or 50 years or longer. To provide meaningful regulatory certainty, a permit system should provide certainty that the requirements of a general permit or individual permit will remain unchanged as they apply to existing permittees, subject to a mechanism such as the no surprises policy and rule that applies to incidental take permits under the ESA. That policy is a known quantity and has worked reasonably well, and it provides an escape valve of sorts for adjusting permits when necessary to do so as a result of changed and unforeseen circumstances.

WUWC also requests that the FWS include in the rulemaking a mechanism for obtaining in the future general conditional authorization for resource development sectors not specifically identified in the initial list of authorized industries. The initially-approved general conditional authorizations should not be the only general permits that the FWS ever issues. Instead, the regulations should describe the process by which an initially unlisted sector may request and obtain a general conditional authorization.

Conclusion

Thank you for the opportunity to provide these comments. If you have any questions regarding these comments, please contact me at 702-258-7166 or greg.walch@lvvwd.com, or the WUWC national counsel, Don Baur at 202-654-6234 or dbaur@perkinscoie.com.

Very truly yours,



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