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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 21

[Docket No. FWS–HQ–MB–2014–0067; FF09M29000-156-FXMB1232090BPP0]

RIN 1018–BA69

Migratory Bird Permits; Programmatic Environmental Impact Statement

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of intent.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service, us, or we), intend to prepare a programmatic environmental impact statement (PEIS) pursuant to the National Environmental Policy Act to evaluate the potential environmental impacts of a proposal to authorize incidental take of migratory birds under the Migratory Bird Treaty Act. We are considering rulemaking to address various approaches to regulating incidental take of migratory birds, including issuance of general incidental take authorizations for some types of hazards to birds associated with particular industry sectors; issuance of individual permits authorizing incidental take from particular projects or activities; development of memoranda of understanding with Federal agencies authorizing incidental take from those agencies' operations and activities; and/or development of voluntary guidance for industry sectors regarding operational techniques or technologies

that can avoid or minimize incidental take. The rulemaking would establish appropriate standards for any such regulatory approach to ensure that incidental take of migratory birds is appropriately mitigated, which may include requiring measures to avoid or minimize take or securing compensation. We invite input from other Federal and State agencies, tribes, nongovernmental organizations, and members of the public on the scope of the PEIS, the pertinent issues we should address, and alternatives to our proposed approaches for regulating incidental take.

DATES: To ensure consideration of written comments, they must be submitted on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: You may submit written comments by one of the following methods. Please do not submit comments by both methods.

- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments to Docket No. FWS–HQ–MB–2014–0067.
- U.S. mail or hand-delivery: Submit by U.S. mail to Public Comments Processing, Attention: FWS–HQ–MB–2014–0067; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 5275 Leesburg Pike, MS–PPM, Falls Church, VA 22041–3803.

Please note in your submission that your comments are in regard to Incidental Take of Migratory Birds. We will post all information received on *http://www.regulations.gov*. This generally means that we will post any personal

information you provide us (see the Public Availability of Comments section below for more information).

We will hold public Scoping Open Houses at the following times and locations:

- June 16, 2015 from 6:00 p.m. until 9:00 p.m. at Courtyard Sacramento CalExpo, 1782 Tribute Road Sacramento, CA, 95815;
- June 18, 2015 from 5:00 p.m. until 8:00 p.m. at Holiday Inn Denver East – Stapleton, 3333 East Quebec Street, Denver, CO, 80207;
- June 30, 2015 from 5:00 p.m. until 8:00 p.m. at Sheraton Westport Chalet, 191 Westport Plaza, St. Louis, MO 63146; and
- July 2, 2015 from 2:00 p.m. until 5:00 p.m. at Holiday Inn Arlington at Ballston, 4610 N. Fairfax Dr. Arlington, VA 22203.

In addition, we will present a public webinar on July 8, 2015. Additional information regarding these scoping sessions will be available on our website at <http://www.birdregs.org>.

FOR FURTHER INFORMATION CONTACT: Sarah P. Mott at 703–358–1910, or Sarah_P_Mott@fws.gov. Hearing or speech impaired individuals may call the Federal Relay Service at 800–877–8337 for TTY assistance.

SUPPLEMENTARY INFORMATION:

Background and Need for Action

In 1916, the United States and Great Britain (on behalf of Canada), signed a treaty to protect migratory birds. In 1918, Congress passed the Migratory Bird Treaty Act

(MBTA) (16 U.S.C. 703–711) to implement the treaty with Canada. Among other things, the MBTA, as enacted, prohibited unauthorized killing and selling of birds covered by the treaty. The United States later signed bilateral treaties with Mexico, Japan, and the Union of Soviet Socialist Republics to protect migratory birds. After each treaty was signed, Congress amended the MBTA to cover the species addressed in that treaty.

The MBTA makes it unlawful to take or kill individuals of most bird species found in the United States, unless that taking or killing is authorized pursuant to regulation 16 U.S.C. 703, 704. “Take” is defined in part 10 of title 50 of the Code of Federal Regulations (CFR) as “to pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to pursue, hunt, shoot, wound, kill, trap, capture, or collect” (50 CFR 10.12). “Migratory bird” means any bird protected by any of the treaties and currently includes 1,027 bird species in the United States (50 CFR 10.13), regardless of whether the particular species actually migrates.

Of the 1,027 currently protected species, approximately 8% are either listed (in whole or in part) as threatened or endangered under the Endangered Species Act (ESA) (16 U.S.C. 1531 et seq.) and 25% are designated (in whole or in part) as Birds of Conservation Concern (BCC). BCC species are those birds that, without additional conservation actions, are likely to become candidates for listing under the ESA. According to the State of the Birds reports by the North American Bird Conservation Initiative (NABCI), most bird guilds (groups of birds that use the same habitat) are experiencing population declines, especially those using arid lands, grasslands, and ocean environments. Based on number of species within each guild, more raptors and

waterbirds are on the ESA and BCC lists, respectively, with 43 percent and 41 percent of the species on these lists.

Many natural and anthropogenic sources (any activity, action, or component of a project, enterprise, or endeavor) cause bird mortality or otherwise contribute to declining populations. Bird habitat is lost or degraded every year due to urbanization, energy development, agriculture, and forestry practices. These rapidly accelerating impacts can be mitigated through a variety of approaches, such as voluntary incentives, habitat restoration or protection, and best management practices. In addition, millions of birds are directly killed by interaction with human structures and activities, such as collisions with manmade structures, electrocutions, chemicals, and fisheries bycatch. The cumulative effects of these sources of mortality are contributing to continental-scale population declines for many species (State of the Birds, NABCI 2009, 2010, 2011, 2013, 2014).

Many of these sources of avian mortality are becoming more prevalent across the landscape, and their impacts on bird populations are exacerbated by the effects of a changing climate. Birds in every habitat will likely be affected by anthropogenic sources and climate change, so conserving migratory bird populations will require a multifaceted, coordinated approach by governments, conservation organizations, industry, and the general public. An incidental take authorization program alone will not address all of the conservation needs of bird populations, but it could provide a framework to reduce existing human-caused mortality of birds and help avoid future impacts by promoting practical actions or conservation measures that will help industries and agencies avoid and minimize their impacts on birds. An authorization system created through

rulemaking could encourage implementation of appropriate conservation measures to avoid or reduce avian mortality, such as the technologies and best management practices identified in current Service guidance for certain industry sectors, and 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.

The Service has longstanding regulations found at 50 CFR part 21 that authorize the issuance of permits to take migratory birds. A number of migratory bird regulations authorize purposeful take for a variety of purposes, including bird banding and marking, scientific collection, bird rehabilitation, raptor propagation, and falconry. Consistent with 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, we also have authorized incidental take by the Armed Forces during military-readiness activities (50 CFR 21.15) and in certain situations through special use permits described in 50 CFR 21.27.

We are now considering establishing more general authority to permit incidental take through general authorizations, individual permits, or interagency memoranda of understanding. This regulatory process would provide greater certainty for entities that have taken efforts to reduce incidental take and significantly benefit bird conservation by promoting implementation of appropriate conservation measures to avoid or reduce avian mortality. The process would also create a regulatory mechanism to obtain meaningful compensatory mitigation for bird mortality that cannot be avoided or minimized through

best practices, risk management processes, or technologies. We are considering approaches that will minimize the administrative burden of compliance with this regulatory process for industry, other Federal agencies, and the Service, and will also consider continuation of our current efforts to work with interested industry sectors to develop voluntary guidance for avoiding or minimizing incidental take of migratory birds. These approaches will not affect 50 CFR 21.15, which was issued to allow the Armed Forces to incidentally take migratory birds during military-readiness activities.

We note that should we develop a permit system authorizing and limiting incidental take, we would not expect every person or business that may incidentally take migratory birds to obtain a permit, nor would we intend to expand our judicious use of our enforcement authority under the MBTA. The Service focuses its enforcement efforts under the MBTA on industries or activities that chronically kill birds and has historically pursued criminal prosecution under the Act only after notifying an industry of its concerns regarding avian mortality, working with the industry to find solutions, and proactively educating industry about ways to avoid or minimize take of migratory birds. Similarly, our permit program, if implemented, will focus on industries and activities that involve significant avian mortality and for which reasonable and effective measures to avoid or minimize take exist.

Need for Agency Action

We seek to provide legal clarity to Federal and State agencies, industry, and the public regarding compliance with the MBTA. At the same time, we have a legal responsibility under the MBTA and the treaties the Act implements to promote the

conservation of migratory bird populations. We are considering actions, therefore, that can provide legal authorization for incidental take of migratory birds where authorization is appropriate, will promote adoption of measures to avoid or minimize incidental take, and will provide for appropriate mitigation, including compensation, for that take.

NEPA Analysis of Potential Incidental Take Authorization Options

The National Environmental Policy Act (NEPA) (42 U.S.C. 4321–4347) requires Federal agencies to undertake an assessment of environmental effects of any proposed action prior to making a final decision and implementing it. NEPA requirements apply to any Federal project, decision, or action that may have a significant impact on the quality of the human environment. NEPA also established the Council on Environmental Quality (CEQ), which issued regulations implementing the procedural provisions of NEPA (40 CFR parts 1500–1508). Among other considerations, CEQ regulations at 40 CFR 1508.28 recommend the use of tiering from a broader environmental impact statement (such as a national program or policy statement). Subsequent narrower statements or environmental analyses (such as regional or site-specific statements) would incorporate by reference the general discussions of the previous broad EIS and concentrate solely on the issues specific to the narrower statement.

Consistent with this guidance, we intend to complete a programmatic environmental impact statement (PEIS) to consider a number of approaches to regulating incidental take of migratory birds. The PEIS will address the potential environmental impacts of a range of reasonable alternatives for regulating and authorizing incidental take; the effectiveness of best practices or measures to mitigate take of migratory birds

under the MBTA and adverse impacts to migratory bird resources; the potential for environmental impacts to non-bird resources, such as cultural resources, from measures to protect birds; the effects on migratory bird populations of sources of mortality other than incidental take; and the effects on migratory bird populations of impacts to migratory bird habitat, including, but not limited to, climate change. We will address our compliance with other applicable authorities in our proposed NEPA review.

Tribal Responsibilities

The Service has unique responsibilities to tribes including under the Bald and Golden Eagle Protection Act (16 U.S.C. 668–668d); the National Historic Preservation Act (16 U.S.C. 470 et seq.); the American Indian Religious Freedom Act (42 U.S.C. 1996); Native American Graves Protection and Repatriation Act (25 U.S.C. 3001); Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb et seq.); Secretarial Order 3206, American Indian Tribal Rights, Federal–Tribal Trust Responsibilities, and the ESA (June 5, 1997); Executive Order 13007, Indian Sacred Sites (61 FR 26771, May 29, 1996); and the Service’s Native American Policy. We apply the terms “tribal” or “tribe(s)” generally to federally recognized tribes and Alaska Native tribal entities. We will refer to Native Hawaiian Organizations separately when we intend to include those entities. The Service will separately consult with tribes and with Native Hawaiians on the proposals set forth in this notice of intent. We will also ensure that those tribes and Native Hawaiians wishing to engage directly in the NEPA process will have the opportunity to do so. As part of this process, we will protect the confidential nature of any consultations and other communications we have with tribes and Native Hawaiians.

Possible Actions

We are considering various approaches for authorizing incidental take of migratory birds. Each of these regulatory approaches would require us to promulgate new regulations under the MBTA, in compliance with applicable statutory and Executive Branch requirements for rulemaking. We will also consider, as an alternative to these regulatory approaches, a continuation of our practice of working with interested industry sectors to develop voluntary guidance that identifies best management practices or technologies that can effectively avoid or minimize avian mortality from hazards in those sectors. These approaches may be considered separately or in any combination. Therefore, the PEIS will consider the effects from each approach, and the effects from combined approaches.

General Conditional Authorization for Incidental Take Associated with Particular Industry Sectors

One possible approach would be to establish a general conditional authorization for incidental take by certain hazards to birds associated with particular industry sectors, provided that those industry sectors adhere to appropriate standards for protection and mitigation of incidental take of migratory birds. The standards would include conservation measures or technologies that have been developed to address practices or structures that kill or injure birds. We are considering developing authorizations under this approach for a number of types of hazards to birds that are associated with particular industry sectors, described below. We selected these hazards and sectors because we

know that they consistently take birds and we have substantial knowledge about measures these industries can take to prevent or reduce incidental bird deaths. We have a history of working with these industry sectors to address associated hazards to birds by issuing guidance and reviewing projects at the field level or by engaging in collaborative efforts to establish best management practices and standards.

- Oil, gas, and wastewater disposal pits can entrap birds that are attracted to a perceived source of water. Birds that land on or fall into the pit become covered with oil and may ultimately die from drowning, exhaustion, exposure, or effects of ingested oil. Closed containment systems or properly maintained netting prevents birds from entering these sites.

- Methane or other gas burner pipes at oil production sites and other locations provide a hazard to birds from burning, entrapment in pipes or vents, or direct mortality from flame flare. Removing perches, installing perch deterrents, and covering pipes and other small openings can minimize this take.

- Communication towers can have a significant impact on birds, especially birds migrating at night. Using recommended tower-siting practices and design features such as appropriate lighting, shorter tower heights, and eliminating or reducing the use of guy wires can minimize bird take caused by collisions with these structures.

- Electric transmission and distribution lines impact a variety of birds through electrocution and collision. To reduce electrocutions, poles can be made avian-safe through pole and equipment design or through post-construction retrofitting measures. Collisions are best minimized through appropriate siting considerations.

We may seek to develop additional general authorizations in this rulemaking for hazards to birds associated with other industry sectors. We are considering, for example, whether a general conditional authorization can be developed for hazards to birds related to wind energy generation, building on guidance we have developed jointly with that industry to address avian mortality. We seek input from the public and interested parties regarding the issues, environmental impacts, and mitigation techniques we should assess if we try to develop a general authorization for wind energy generation, and also on whether there are additional industry sectors for which general authorization of incidental take may be appropriate.

Individual Permits

A second possible approach would be to establish legal authority for issuing individual incidental take permits for projects or activities not covered under the described general, conditional authorization that present complexities or siting considerations that inherently require project-specific considerations, or for which there is limited information regarding adverse effects. We are considering ways to minimize the administrative burdens of obtaining individual incidental take permits for both applicants and the Service, such as combining environmental reviews for those permits with reviews being conducted for other Federal permits or authorizations. Our intention would be only to establish the authority and standards for issuance of individual permits in this rulemaking; we do not intend to issue any actual individual permits as part of this action. FWS will conduct site-specific NEPA reviews in connection with the future issuance of any such permit.

Memoranda of Understanding with Federal Agencies

A third possible approach would be to establish a procedure for authorizing incidental take by Federal agencies that commit in a memorandum of understanding (MOU) with us to consider impacts to migratory birds in their actions and to mitigate that take appropriately. We have negotiated MOUs with a number of Federal agencies under Executive Order 13186 (66 FR 3853, January 17, 2001), but we have not previously sought to authorize incidental take through those memoranda. Expanding existing MOUs and negotiating MOUs with additional Federal agencies could provide an efficient programmatic approach to regulating and authorizing incidental take caused by Federal agency programs and activities. We may also consider whether MOUs with Federal agencies might provide appropriate vehicles for authorizing take by third parties regulated by those agencies, even though the agencies themselves are not subject to the prohibitions of the MBTA when acting in their regulatory capacities.

The regulation we envision promulgating would not immediately authorize incidental take via existing MOUs, but would allow us to develop MOUs with interested agencies to authorize that take in the future. We will conduct appropriate NEPA analysis in connection with the development of any such memoranda if we pursue this option.

Development of Voluntary Guidance for Industry Sectors

We will also evaluate an approach that builds on our experience working with particular industry sectors to develop voluntary guidance that identifies best management practices or technologies that can be applied to avoid or minimize avian mortality

resulting from specific hazards in those sectors. Under this approach, we would continue to work closely with interested industry sectors to assess the extent that their operations and facilities may pose hazards to migratory birds and to evaluate operational approaches or technological measures that can avoid or reduce the risk to migratory birds associated with those hazards. We would not provide legal authorization for incidental take of migratory birds by companies or individuals that comply with any such guidance, but would, as a matter of law-enforcement discretion, consider the extent to which a company or individual had complied with that guidance as a substantial factor in assessing any potential enforcement action for violation of the Act.

Public Comments

We request information from other interested government agencies, Native American tribes, Native Hawaiians, the scientific community, industry, nongovernmental organizations, and other interested parties. We solicit input on the following:

- (1) The approaches we are considering for authorizing incidental take;
- (2) The specific types of hazards to birds associated with particular industry sectors that could be covered under general permits;
- (3) Potential approaches to mitigate and compensate for the take of migratory birds;
- (4) Other approaches, or combinations of approaches, we should consider with respect to the regulation and authorization of incidental take;
- (5) Specific requirements for NEPA analyses related to these actions;
- (6) Whether the actions we consider should distinguish between existing and new industry facilities and activities;

(7) Considerations for evaluating the significance of impacts to migratory birds and to other affected resources, such as cultural resources;

(8) Information regarding natural resources that may be affected by the proposal;

(9) Considerations for evaluating the interactions between affected natural resources;

(10) The benefits provided by current Federal programs to conserve migratory birds and the additional benefits that would be provided by a program to authorize incidental take;

(11) The potential costs to comply with the actions under consideration, including those borne by the Federal government and private sectors;

(12) The baseline for quantifying the costs and benefits of the proposal;

(13) Bird species having religious or cultural significance for tribes, bird species having religious or cultural significance for the general public, and impacts to cultural values from the actions being considered;

(14) Considerations for evaluating climate change effects to migratory bird resources and to other affected resources, such as cultural resources; and

(15) How to integrate existing guidance and plans, such as Avian Protection Plans, into the proposed regulatory framework.

You may submit your comments and materials by one of the methods described above under **ADDRESSES** at the beginning of this notice of intent.

Public Availability of Comments

Written comments we receive become part of the public record associated with this action. Your address, phone number, email address, or other personal identifying information that you include in your comment may become publicly available. You may ask us to withhold your personal identifying information from public review, but we cannot guarantee that we will be able to do so. All submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be made available for public disclosure in their entirety.

Authority

The authorities for this action are the MBTA, NEPA, and Executive Order 13186, Responsibilities of Federal Agencies to Protect Migratory Birds.

Dated: May 20, 2015.

Michael J. Bean,

Principal Deputy Assistant Secretary for Fish and Wildlife and Parks.

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