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MJB&A Permitting and Infrastructure Coalition Position Paper ■ June 8, 2017

Considerations for Revisions to Regulations for Eagle Incidental Take and Take of Eagle Nests

Bald eagles and golden eagles are protected by the Bald and Golden Eagle Protection Act (BGEPA), which prohibits knowingly taking, possessing, selling, or transporting any bald or golden eagle or any part, nest, or egg of such birds. On December 16, 2016, the U.S. Fish and Wildlife Service (FWS) published a final rule authorizing eagle incidental take permits and eagle nest take permits.[1] The MJB&A Permitting and Infrastructure Coalition strongly disagrees with this rule and urges the Trump Administration to rescind and revise it.[2]

Consistent with comments submitted by individual members of the coalition before the rule was finalized, we do not agree that Congress authorized FWS to require permits for injuries or mortalities caused by accidental collisions with energy infrastructure such as wind turbines or transmission lines. The interpretation found in the final rule is inconsistent with the statute's required *mens rea* of "knowing, or wanton disregard for the consequences of his act." Congress granted FWS the authority to issue permits to deliberately kill or move birds; however, it did not grant authority for the enforcement of accidental collisions under BGEPA.

Further, the final rule imposes excessive cost and time on industry with limited ecological benefit to eagles. We estimate that obtaining a permit will cost $3.2 million to $8.7 million and create significant delays.

The U.S. Fish and Wildlife Service Lacks Authority to Regulate Accidental Collisions under the Eagle Act

The term "take" does not include injuries or mortalities caused by accidental collisions with electric power system equipment including power lines and wind turbines. Courts have consistently found that the Services should not stretch the term "take" to include all activities including lawful activities such as construction, driving, flying, transmitting electricity, and operating wind turbines. Although most of the case law addresses "taking" under the Migratory Bird Treaty Act (MBTA), FWS stated in the December 2016 rule, that it "has no reason to conclude that courts would reach different conclusions for incidental take of eagles under the Eagle Act." For example, in *U.S. v. Brigham Oil & Gas*, 840 F.Supp. 2d 1202 (DND 2012), the District Court of North Dakota held that "the use of reserve pits in commercial oil development is [a] legal, commercially-useful activity that stands outside the reach of the federal Migratory Bird Treaty Act. Like timber harvesting, oil development and production activities are not the sort of physical conduct engaged in by hunters and poachers, and such activities do not fall under the prohibitions of the Migratory Bird Treaty Act." The Court recognized that "to extend the Migratory Bird Treaty Act to reach other activities that indirectly result in the deaths of covered birds would yield

[1] Eagle Permits; Revisions to Regulations for Eagle Incidental Take and Take of Eagle Nests. 81 FR 91494 (December 16, 2016). Of note, a rescission and revision to this rule would not directly affect the Endangered Species Act, which includes terms such as "harm" and "harass".

[2] MJB&A Permitting and Infrastructure Coalition member companies collectively engage the Administration and Agencies on potential permitting modernization as well as regulatory and legislative opportunities to ensure projects can proceed in a timely and cost-effective manner. The member companies sponsoring this position paper include: Dominion Energy, Entergy Corporation, and NextEra Energy.

absurd results." Extending criminal liability to commercial activity would "criminalize driving, construction, airplane flights, farming, electricity and wind turbines, which cause bird deaths, and many other everyday lawful activities."

In a separate case in the Eighth Circuit Court of Appeals (*Newton County Wildlife Ass'n v. U.S. Department of Agriculture*, 113 F.3d 110, 115 (8th Cir. 1997)), the Court noted that "[s]trict liability may be appropriate when dealing with hunters and poachers. But it would stretch this 1918 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."

Similarly, in *U.S. v. FMC Corp*, 572 F.2d 902 (2d Cir. 1978), the Court found that an interpretation that brings every killing within the statute ("such as deaths caused by automobiles, airplanes, plate glass modern office buildings or picture windows in residential dwellings into which birds fly") "would offend reason and common sense". Under *FMC*, the Second Circuit Court of Appeals extended liability under the MBTA to a scenario where a company was aware of "extrahazardous" circumstances on its property and those circumstances led to migratory bird deaths.

The same reasoning applies under the Eagle Act in that Congress did not intend every collision to impose strict liability. Rather, Congress enacted BGEPA in 1940 to prevent knowingly shooting eagles, and possessing and trafficking in any eagle parts, nest, or eggs. Congress amended the Eagle Act the year prior to the enactment of the Endangered Species Act (ESA), but choose not to add the word "harm", which was subsequently defined in the ESA. As the Ninth Circuit Court of Appeals explained in *Seattle Audubon Society v. Evans*, 952 F.2d 297 (9th Cir. 1991) "[t]he differences in the proscribed conduct under the ESA and the MBTA are 'distinct and purposeful'". As noted above, the FWS expects courts to interpret the MBTA and Eagle Act similarly, and the Eagle Act's express use of the phrase "knowingly, or with wanton disregard for the consequences of his act take…", makes clear that Congress did not intend to criminalize the citizens of the United States if an accidental eagle collision occurs at their home or business.

Contrary to FWS statements in the final rule, the Eagle Act has a *mens rea* for all violations. While there is no *mens rea* mentioned in the "Civil Penalties" section of BGEPA, the "prohibited acts" section speaks in terms of actions that are knowing or taken with "wanted disregard." The December 2016 rule cited the *Moon Lake* case (*U.S. v. Moon Lake Electric Association Inc.*, 45 F.Supp.2d 1070 (D. Colo. 1999)) as a legal justification for the application of the statute to bird deaths regardless of any *mens rea*. However, *Moon Lake* was only an opinion denying a motion to dismiss, and stands for the limited procedural proposition that "[w]hether Moon Lake took or killed protected birds knowingly or with wanton disregard for the consequences of its acts, is a question of fact for the jury's determination." *Moon Lake* lacks substantive precedential value given that it was never tried before a jury and the opinion denying the motion to dismiss was never appealed. Accidental collisions cannot be a violation of BGEPA and thus do not require a permit.

The Final Rule Imposes Significant Costs and Delays with Limited Benefit to Eagles

The Bayesian modeling relied on in the final rule to estimate mortality is not accurate or appropriate. We are concerned that under the current regulations flawed mortality modeling would technically require every wind facility in the U.S. to obtain an eagle take permit. The Bayesian model can overestimate site mortality, which FWS recognized in the final rule. If a model is to be used to estimate mortality, FWS should utilize methodologies similar to those used under the Endangered Species Act (ESA) and take into consideration the different behaviors and risk profiles of golden eagles and bald eagles.

The requirement to obtain an incidental take permit under BGEPA exacerbates regulatory delays and adds to permitting and operating costs. The rule provides protection from criminal enforcement in the event of incidental take of an eagle. However, obtaining a permit presently requires pre-construction eagle and nest surveys and monitoring and mitigation requirements that, in our members' experience, can cost $3.2 million to $8.7 million and have the potential to create significant permitting delays. Additionally, the rule requires post-construction monitoring, such as biological monitors, as well as the use of third-party monitors, which add significant costs while returning no discernible benefits. New requirements to evaluate population levels and determine mitigation using the Local Area Population methodology will further escalate costs. Without time limits or economic boundaries built into the rule, FWS has not issued eagle permits in a timely fashion, or in a way that balances the benefits of such permitting with the economic, environmental, and social interests of project construction and completion.

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