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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

**Re: Comments on Notice of Intent on Migratory Bird Permits; Programmatic Environmental Impact Statement
Docket No. FWS–HQ–MB–2014–0067; FF09M29000–156–FXMB1232090BPP0**

This letter provides comments on behalf of the Western Urban Water Coalition (WUWC) on the U.S. Fish and Wildlife Service’s (FWS) Notice of Intent (NOI) to prepare a programmatic environmental impact statement (PEIS) pursuant to the National Environmental Policy Act, 42 §§ U.S.C. 4321-4347 (NEPA), to evaluate the potential environmental impacts of a proposal to authorize the incidental take of migratory birds under the Migratory Bird Treaty Act, 16 U.S.C. §§ 703-712 (MBTA). (See 80 Fed. Reg. 30032, May 26, 2015) (NOI). WUWC appreciates the opportunity to comment on the NOI.

Created in June 1992 to address the West’s unique water issues, WUWC consists of the largest urban water utilities in the West, serving over 35 million western water consumers in major metropolitan areas in five states. The membership of WUWC includes the following urban water utilities: Arizona – Central Arizona Project, City of Phoenix and Salt River Project; California –Eastern Municipal Water District, Los Angeles Department of Water and Power, the Metropolitan Water District of Southern California, San Diego County Water Authority, San Francisco Public Utilities Commission, and Santa Clara Valley Water District; Colorado – Aurora Water, Colorado Springs Utilities, and Denver Water; Nevada – Las Vegas Valley Water District, Southern Nevada Water Authority, and Truckee Meadows Water Authority; and Washington – Seattle Public Utilities.

WUWC is committed to presenting a new and different perspective on the management of water resources in the modern West. WUWC articulates the needs and values of Western cities to provide a reliable, high quality urban water supply for present and future generations, while preserving the unique environmental and recreational attributes of the West. WUWC is an

active public and legislative advocate for progressive water and resource management. It encourages water sharing and transfers, supports an adequate supply of water for environmental and recreational purposes, advances multi-purpose storage opportunities, promotes water conservation, and advocates for effective and practicable approaches to the implementation of environmental protection programs in a time when water is becoming more scarce and critical to the West's sustainability. Many WUWC members are at the forefront of water reuse, conservation and optimization. WUWC members consistently seek water supplies from non-traditional sources.

For the most part, the activities of WUWC members do not have impacts on migratory birds species. Incidental take is minimal, and the status quo program of judicious application of enforcement discretion under the MBTA has worked reasonably well. However, in some instances a permit option would be helpful to avoid confusion over MBTA compliance.¹ For this reason, WUWC supports an efficient MBTA permit program that is coupled with improved guidance on MBTA enforcement.

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 have been participants in all administrative reform initiatives to improve the implementation of the Endangered Species Act, including working as partners with DOI to develop and apply Secretary Babbitt's "five point" plan to remove the need for legislative action, and we have worked closely with this Administration on ESA policy and reform measures. 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. The NOI for MBTA incidental take authorization presents similar opportunities, if properly developed, and WUWC would be pleased to participate in a dialogue with DOI for this purpose.

WUWC agrees with the FWS that establishing a permit system for the incidental take of migratory birds 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 cautions that an incidental take permit system must 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.

The FWS MBTA permit program should make it clear that not every incidental take requires 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, should not require a permit and will be subject to clarified use of enforcement discretion. 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 threshold below which those engaged in these

¹ We note that the case law raises questions whether incidental take is prohibited by the MBTA. *Newton County Wildlife Ass'n v. U.S. Dep't of Agriculture*, 113 F.3d 110 (9th Cir. 1997); *Seattle Audubon Society v. Evans*, 952 F.2d 297 (9th Cir. 1991); *U.S. v. Brigham Oil and Gas, L.P.*, 840 F. Supp. 2d 1202 (D. ND 2012).

activities need not apply for an incidental take permit. Incidental takes coincident to activities that do not require a permit should not be subject to an enforcement action for violating the MBTA for failure to obtain a permit, and the FWS should clearly articulate this principle. At the very least, the FWS should issue enforcement guidance, developed in conjunction with the rulemaking that authorizes take permits, providing that certain incidental takes do not require a permit if the activity is conducted in accordance with reasonable standards of care that minimize the potential for take.

Obtaining an incidental take permit should not be imposed as a regulatory prerequisite to proceeding with a project. 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 the 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, FWS should not have the authority to require a permit for an entire project where only a portion of the project necessitates a permit.

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 covering activities that result in incidental take with population level impacts and provides for reasonable and cost-effective measures to avoid, minimize, and mitigate the impacts of incidental takes in an efficient and cost-effective manner and clear guidance for all other activities that could result in incidental take that clarifies the circumstances under which enforcement action would not be taken."

The NOI identifies three primary mechanisms the FWS is considering for an incidental take permit system: (1) general conditional authorizations for certain industries; (2) individual permits; and (3) memoranda of understanding (MOU) between the FWS and other federal agencies. The WUWC agrees that all of these mechanisms should be included as alternatives on the PEIS, subject to the following comments.

General Conditional Authorizations for Certain Industries. WUWC agrees with the FWS's suggested approach of issuing general conditional authorizations for certain development activities. At present, WUWC does not perceive the need for a general conditional authorization for the water-resource development activities in which its members are engaged. However, should the FWS proceed with this general-permit approach, WUWC 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.

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 (Plan) authorized under the MBTA and approved by FWS should be sufficient to allow any incidental takes that occur despite thorough and good faith implementation of the Plan. The Plan should serve as the incidental take permit without any need for revisiting the Plan, by operation of a general permit under this alternative. Any conclusion to the contrary would diminish the value of the Plans and would 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. 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.

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 other resources to review and issue individual permits. As a result, WUWC recommends that the FWS carefully craft the requirements for obtaining individual permits so that the process is as streamlined and efficient as possible. WUWC also recommends that the FWS consider a simplified, fast-track process for the review and issuance of permits involving activities that, while necessitating a permit, present circumstances where mitigation measures are already in place. 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 EA and EIS documents under NEPA.

Memoranda of Understanding with Federal Agencies. WUWC agrees with the concept of MOUs between 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 the FWS's resources for a separate incidental take permit.

In addition to these alternatives, the WUWC requests that the FWS provide clear guidance on the use of enforcement discretion. Not every take of an MBTA bird should trigger the use of this permitting system. It is a corollary of the establishment on a permit system intended to "provide greater certainty for entities that have taken efforts to reduce incidental take," 80 Fed. Reg. 30034, that clarity also must be provided for when permits are *not necessary*. Given the abundant and prolific nature of migratory birds, the strict liability nature of the MBTA, and the potential for take to occur at low levels in many situations, FWS should not limit its proposal to the permit system itself; a comprehensive program that defines all aspects of MBTA implementation is needed.

Thank you for your consideration of these comments.

Sincerely,

A handwritten signature in black ink, appearing to read "David Modeer". The signature is fluid and cursive, with a large initial "D" and "M".

David Modeer
Chair
Western Urban Water Coalition