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Public Comments Processing
Attn: FWS-HQ-MB-2020-0023
U.S. Fish and Wildlife Service
MS: PRB/3W
5275 Leesburg Pike
Falls Church, VA 22041-3803

**Re: Permits for Incidental Take of Eagles and Eagle Nests
FWS-HQ-MB-2020-0023**

To Whom It May Concern:

The National Hydropower Association (“NHA”) and the Northwest Hydroelectric Association (“NWhA”) (together, the “Associations”) appreciate the opportunity to provide written comments in response to the U.S. Fish and Wildlife Service’s (the “Service”) proposed rule to amend the regulations authorizing the issuance of permits for eagle incidental take and eagle nest take under the Bald and Golden Eagle Protection Act (“Eagle Act”). 87 Fed. Reg. 59,598 (2022) (“Proposed Rule”). The Associations appreciate the Service’s consideration of these comments.

Hydropower is an important source of renewable energy that involves the management of large areas of property and is dependent on transmission and distribution systems to deliver carbon-free energy to customers. The hydropower industry understands the importance of protecting bald and golden eagles and commits tremendous resources to avian protection, including for eagles. This occurs as a result of conditions in operating licenses, agreements with stakeholders, implementation of avian protection plans (“APPs”), creation of eagle habitat, and close coordination with state and federal wildlife agencies. The Proposed Rule has direct and indirect impacts on operation and maintenance of hydropower facilities and associated power lines.

I. Background.

NHA is a national non-profit association dedicated to advancing the interests of the U.S. hydropower industry, including conventional, pumped storage and new marine and hydrokinetic technologies. NHA's membership consists of over 300 organizations, including consumer-owned utilities, investor-owned utilities, independent power producers, project developers, equipment manufacturers, environmental and engineering consultants, and attorneys.

NWHA is dedicated to the promotion of the Northwest region's waterpower as a clean, efficient energy source while protecting the fisheries and environmental quality that characterize the Northwest region. NWHA supports 125 members representing all segments of the hydropower industry: public and private utilities; independent developers and energy producers; manufacturers and distributors; local, state, and regional governments including water and irrigation districts; consultants; and contractors.

Members of the Associations have a long history in reducing risks to avian species related to their hydropower projects and associated poles and wires. In particular, many hydropower licensees have developed APPs for electric utility power lines and equipment. APPs are voluntary plans that the Service has recognized as reducing avian risk under the Eagle Act and the Migratory Bird Treaty Act ("MBTA"). Since the formation of the Avian Power Line Interaction Committee ("APLIC"), the electric utility industry and the Service have worked together to reduce avian electrocution and collision mortality. The Service worked with APLIC to develop its 2005 Avian Protection Plan Guidelines to reduce impacts to avian species. Many company-specific APPs implement avian-safe design standards for (1) constructing new power line facilities in areas identified as having high avian risk and (2) as practicable, retrofitting existing structures where bird mortalities have occurred.

Additionally, hydropower projects are often required in their operating license to implement protection, mitigation and enhancement measures, including developing species management plans to address species within their project area as appropriate. Such plans often include monitoring and other provisions specific to managing avian risks, including risks to eagles. Hydropower facilities and their surrounding landscapes may also provide a habitat benefit to eagles, particularly bald eagles.

With this long history of avian protection and conservation in mind, the Associations offer the following concerns and comments below.

II. The Proposed Rule Did Not Adequately Consider Other Impacted Operations, Such as Hydropower.

The Proposed Rule is focused on wind projects and power lines. It fails to consider how the proposed permitting scheme may trigger compliance obligations under the Eagle Act for other industries, including the hydropower industry. Prior to issuing a final rule, the Service should

consider how other industries may be impacted by the proposed permitting scheme and revise its final rule accordingly.

The need for streamlined eagle permitting is not specific to wind projects and power lines. The hydropower industry frequently interacts with bald and golden eagles in at least two ways: First, bald and golden eagles frequently occur in hydropower project areas, particularly because reservoirs may attract eagles. Hydropower developers, owners and operators already consider and minimize the potential for eagle interactions when constructing new hydropower projects, adding new facilities at existing hydropower projects, and conducting maintenance, repair and retrofitting of existing facilities. Second, transmission is a vital component of hydropower projects, which require electric transmission and distribution infrastructure to move carbon-free power generated at the hydropower facility to its ultimate end use. Hydropower operators manage their primary hydropower transmission lines to avoid and minimize potential eagle interactions.

Despite the hydropower industry's established efforts to conserve eagles and avoid potential interactions, the Proposed Rule creates general permits containing redundant, overlapping and onerous conditions that are unnecessary given hydropower's demonstrated commitment to minimizing disturbance to eagles and nests. There is no general permit specific to the hydropower industry. Two of the general permits (for bald eagle disturbance and bald eagle nest take) lack clarity and could be interpreted in a way that imposes a significant burden on both permit applicants and the Service in administering those permits, particularly in the context of hydroelectric projects.

Under the Proposed Rule, it appears that hydroelectric projects may not be able to rely on a single general permit for bald eagle disturbance and bald eagle nest take. Instead, if multiple eagles exist within a hydropower project boundary, the rule could be interpreted as requiring that separate general permits must be obtained for each eagle nest that may be disturbed, and for each nest that may be taken. *See, e.g.*, Disturbance General Permit Conditions Section A, "You are authorized to disturb bald eagles at one nest location as part of the covered activity described in your application;" *see also* Nest Take General Permit Conditions Section A, "You are authorized to take one bald eagle nest located at the location listed above." The alternative is to apply for a specific permit, without any details or guidance for what that would entail. The current specific permit is tailored to wind projects, and is not designed for hydropower projects.

Moreover, the Proposed Rule appears to require that projects will need to apply for, and pay for, several general nest take permits, even though the take will result from the same hazard, by specifying that "[g]eneral permits authorize bald eagle nest removal from the nesting substrate at the location requested and the location of any subsequent nesting attempts by the eagle pair within one-half-mile of the location requested for the duration of the permit" and requiring that "[t]ake of an additional eagle nest(s) more than one-half-mile away requires an additional permit(s) if the subsequent nest(s) re-create the emergency, safety, or functional hazard of the original nest." This unnecessarily complicated and inefficient application requirement should be

eliminated. The final rule should clearly indicate that a single general permit can be issued for more than one eagle and more than one nest, and over a period greater than one year. In other words, one permit should be issued for all bald eagle disturbance and nest take associated with a given activity for the five-year permit term.

It is also unclear from the regulations whether a general disturbance permit can authorize several types of disturbance or whether a separate general permit will be needed for each type of disturbance that could occur. The final rule should clarify that a single general disturbance permit may authorize take associated with several types of disturbance. It should also be clarified that certain routine Operation and Maintenance (O&M) activities do not require disturbance permits due to their short duration, low risk to eagles, and necessity for safe facility operations.

The questions raised above regarding the scope and applicability of the general permits demonstrates that the Proposed Rule creates a scenario where projects with minimal impacts on eagles will not qualify and will instead be forced to seek a specific permit, or will be required to hold multiple general permits. This creates burdensome and redundant application processes and could result in permits with inconsistent requirements and durations. Although the Proposed Rule contemplates that if an activity “require[s] more than one type of permit for an activity and the permits are issued by the same office, the issuing office may issue one consolidated permit authorizing take caused by the activity in accordance with §13.1” and that the applicant “may submit a single application in such cases,” it is not clear whether such a consolidated permit application would include the same terms and conditions of the proposed general permits.

Regardless, the Proposed Rule appears to require the payment of multiple fees for multiple permits, even if the permits are related to the same activity and are ultimately consolidated. In fact, the Service proposes “not to waive administration fees when multiple permits are consolidated into a single permit (50 CFR 13.11(d)(2)) or for government agencies (50 CFR 13.11(d)(3)).” In addition to expressly providing that a single permit can cover multiple eagle or nest interactions, the final rule should expressly provide one application and one administrative fee for each consolidated permit.

The hydropower industry is also concerned by the Service’s statement that it “may deny permit applications for disturbance take of eagles where we determine that disturbance is unlikely to occur.” 87 Fed. Reg. at 59,608. If a permit is denied, but disturbance occurs anyway, it is not clear what the enforcement ramifications to the permit applicant would be. The final rule should clarify that, if the permit is denied because the Service determines that disturbance is unlikely to occur, no enforcement action will be taken if disturbance nevertheless occurs. Similarly, as drafted, there is concern that this language suggests that companies must submit a disturbance permit application, even when disturbance is unlikely to occur, to obtain Service concurrence in that assessment.

While the above comments are specific to hydropower projects, they are likely equally applicable to other large scale infrastructure projects outside of wind projects and power lines. The Associations urge the Service to address these serious issues before finalizing the rule. Absent revisions to address these concerns, the final rule will not achieve the Service's stated goal of "reducing the administrative burden to the public and the Service..." 87 Fed. Reg. at 59,607. As a result, the Service's desire for increased industry participation in the permit process will not be met.

III. Industry Cannot Meaningfully Comment on the Proposed Rule until Proposed MBTA Permit Regulations are Also Issued.

As noted above, the Service worked with APLIC to develop its 2005 APP Guidelines, many of which implement company-specific avian-safe design standards for constructing new power line facilities and retrofitting existing facilities. APLIC guidelines not only aim to protect species with large wingspans such as eagles but all other migratory birds that may interact with the electrical system. This multi-species approach ensures that APPs are created to be protective of avian species while also being efficient and capable of being implemented. Unfortunately, the Proposed Rule is applicable only to eagles, leaving serious questions about potential future permitting expectations for other migratory birds.

As background, on October 4, 2021, the Service published an advance notice of proposed rulemaking ("NOPR") to better protect migratory bird populations under the MBTA. The NOPR indicated the Service's intent to provide more certainty to the regulated public by codifying the Service's interpretation that the MBTA prohibits incidental take of migratory birds and proposing a system of regulations to authorize incidental take of migratory birds under prescribed conditions (86 Fed. Reg. 54,667). The Service indicated in its MBTA NOPR that it is considering permit authorization for a number of activities, including electric infrastructure under the MBTA. 86 Fed. Reg. at 54,669.

Bald and golden eagles are protected species under both the Eagle Act and the MBTA. To ensure consistency and a coordinated regulatory approach between the MBTA and Eagle Act proposed rules – and meaningful public review and comment on both rules – the Service should provide for public review of both proposals in a coordinated fashion. Without such coordinated review, the regulated community cannot assess how the two permitting programs will relate to each other. It also makes it difficult for the regulated community to make recommendations to reconcile the two permitting programs. Specifically, the Service should provide for a second public comment period that allows for a comprehensive review of the permitting requirements for eagles under both statutes before the Service finalizes the Eagle Act rule.

IV. The Associations Share the Concerns About the General Permit for Wires.

Transmission and distribution are critical to distributing the energy from hydropower projects to the Associations' customers. We understand that several other trade associations (APLIC,

Edison Electric Institute, etc.) are submitting comments with concerns about the general permit for power line projects. We share those concerns and support those associations' request for revisions to the Proposed Rule.

V. Conclusion.

The hydropower industry recognizes the critical importance of protecting bald and golden eagles and takes its stewardship responsibilities seriously. Association members commit significant resources towards the protection of avian species, including eagles. Their projects provide benefits to other resources and are managed to achieve a balance of multiple public and environmental benefits and resources, such as flood control, water supply and recreation. However, the Associations have significant concerns about the potential impacts and unintended consequences of the Proposed Rule on the industry's ability to continue to deliver reliable, carbon-free power to customers.

Thank you for your consideration of these comments.

Sincerely,

/s/ Michael Purdie

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