UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 14-55666 (consolidated with No. 14-55842)

BACKCOUNTRY AGAINST DUMPS, et al.,

Plaintiffs and Appellants,

v.

SALLY JEWELL, et al.,

Defendants and Appellees,

and

TULE WIND LLC,

Intervenor-Defendant-Appellee.

APPEAL FROM THE SOUTHERN DISTRICT OF CALIFORNIA
NO. 3:13-cv-00575-JLS-JMA

APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellants BACKCOUNTRY AGAINST DUMPS and DONNA TISDALE submit the following disclosure statement.

Appellants Backcountry Against Dumps and Donna Tisdale do not have any parent corporations and do not issue stock. Therefore, no parent corporation or publicly held corporation owns any interest in appellants' stock.

Dated: October 1, 2014

Respectfully submitted,

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INTRODUCTION

This public interest lawsuit seeks to enforce environmental laws that protect our nation's public lands and wildlife from ill-considered private development. Appellants Backcountry Against Dumps and Donna Tisdale (collectively "Backcountry") seek reversal of the district court's Judgment of dismissal and underlying Order denying their motion for summary judgment in their action against appellees Sally Jewell, *et al*. (collectively, the Bureau of Land Management or "BLM"). Excerpts of Record ("ER") 1-37. As shown below, BLM violated the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq*., the Migratory Bird Treaty Act ("MBTA"), 16 U.S.C. § 701 *et seq*., the Bald and Golden Eagle Protection Act ("Eagle Act"), 16 U.S.C. §§ 668-668d, and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, when it approved the Tule Wind Energy Facility (the "Project") by granting its Right-of-Way ("ROW") application for use of BLM lands and approving its Environmental Impact Statement ("EIS").

STATEMENT OF APPELLATE JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §§ 1291 and 1294(1). The district court had jurisdiction over Backcountry's claims under 28 U.S.C. §§ 1331 (action arising under the laws of the United States), 1346 (United States as defendant), 1361 (action to compel officers of the United States to perform their duties), 2201-2202 (power to issue declaratory judgments in cases of actual controversy); and 5 U.S.C. §§ 701-706 (APA). The district court had proper venue under 28 U.S.C. § 1391 because BLM officially resides, Backcountry's causes of action arose, and all of the lands involved are located in that district. This Court has jurisdiction over this appeal under 28 U.S.C. § 1291 because this

appeal is from a final Judgment filed March 25, 2014, disposing of all claims. ER36-37. Backcountry timely filed its Notice of Appeal on April 24, 2014. ER38; FRAP 3(a).

STATEMENT OF ISSUES

1. Whether BLM violated NEPA because its EIS is inadequate as it (a) improperly dismisses the distributed generation alternative, (b) fails to take a hard look at the Project's impacts, (c) fails to specify a public purpose and actual need for the Project as opposed to less-impactful alternatives, and (d) improperly defers mitigation?

2. Whether BLM violated the MBTA by failing to secure authorization from the U.S. Fish and Wildlife Service ("FWS") before approving the Project?

3. Whether BLM violated the Eagle Act by failing to secure authorization from FWS before approving the Project?

ADDENDUM

Pursuant to Circuit Rule 28-2.7, pertinent statutes and regulations are included within the Addendum to this Brief.

STATEMENT OF THE CASE

On December 19, 2011, BLM issued its Record of Decision ("ROD") "approv[ing] the construction, operation, maintenance, and decommissioning" of, and granting an ROW to Tule Wind, LLC ("Tule") for, the Project. ER693 (quote), 599-732. BLM amended its ROD on March 7, 2013, and Backcountry timely filed its Complaint on March 12, 2013. ER514-583. After BLM completed its Administrative Record, Backcountry moved for summary judgment on August 23, 2013. ER1765. Tule and BLM filed cross-motions for summary judgment on October 24 and 25, 2013, respectively. ER1766. On March 3, 2014, the district

court heard oral argument on these motions. ER2. On March 25, 2014, the court denied Backcountry's motion and granted Tule's and BLM's motions, and entered Judgment thereon. ER1-37. On April 24, 2014, Backcountry timely filed its Notice of Appeal. ER38.

STATEMENT OF FACTS

Tule proposes to transform a pristine wilderness area with a high density of golden eagles and other migratory bird species into an industrial zone in which hundreds of these birds will be needlessly killed. It would construct and operate 62 enormous wind turbines[1] – up to 492 feet high – on 12,360 acres of scenic, rugged and wildlife-rich public open space managed by BLM in eastern San Diego County. ER687-732, 738. The area's mountains and broad valleys boast an abundance of wildlife including golden eagles, Cooper's hawks, California condors, burrowing owls, northern harriers, loggerhead shrikes, gray vireos, yellow warblers, Vaux's swifts, tricolored blackbirds and multiple species of owls, flycatchers and sparrows. ER891-902. Based on raptor mortalities observed at other wind projects, the turbines are expected to kill up to 37 raptors each year, or more than 1100 eagles, hawks and other birds of prey over the Project's 30-year life. ER695 (30-year life), 833 (up to 0.2 deaths per year per megawatt ("MW")

[1] The approved Project was originally a combination of two alternatives considered in the EIS, Tule Wind Alternative 5 (reduction in turbines from 128 to 62) and Tule Wind Alternative 2 (gen-tie route 2 underground with collector substation and operations and maintenance facility on Rough Acres Ranch), but BLM later modified the Project gen-tie line's route and approved its construction above ground. ER545-546, 722-726. Tule plans to install up to 27 additional wind turbines on the adjacent ridges within the Ewiiaapaayp Reservation and adjacent California State Lands Commission-managed land as Phase II of this Project. ER693, 696. BLM approved an ROW grant for Phase II ancillary facilities on January 17, 2014. BLM Project website, www.blm.gov/ca/st/en/fo/elcentro/nepa/tule.html (last updated 9-19-14); ER696.

times Project's 186 MW). And that high number of avian deaths does not even include the song birds and many other birds that the Project would likely kill. ER831-838, 848, 851-853.

The Project would severely degrade this pristine mountain and desert landscape. It would bulldoze 18.81 miles of new access roads, widen or reconfigure 11.08 miles of existing roadways, build a 5-acre collector substation, grade twelve 2-acre construction sites and a 10-acre parking and staging area, install numerous overhead and underground 34.5 kV transmission lines, string a 138 kV gen-tie line, construct a 5-acre operations and maintenance building, erect three permanent meteorological towers, and generate up to 186 MW of electricity. ER600, 696, 723. In addition to hundreds of avian strikes, long-term operational impacts include noise, electric and magnetic field ("EMF") pollution, and drawing down the area's scarce groundwater. ER848 (high risk of birds colliding with or being electrocuted by Project structures, and "potential loss of nesting birds" from construction), 829-838 (same), 851-853 (same), 857 (significant and unmitigable noise impacts), 865 (same), 936 ("potential for adverse health effects" from stray voltage), 696 (groundwater use). The Project's electricity would be routed through San Diego Gas and Electric's ("SDG&E's") East County Substation Project ("ECO Substation") and Southwest Powerlink transmission line to San Diego. ER735, 739.

In December 2009, BLM and the California Public Utilities Commission ("CPUC") began scoping for the Project's Draft Environmental Impact Report/Draft Environmental Impact Statement ("DEIS"). ER1617-1618. Backcountry objected to the Project's many adverse impacts. ER1544-1592, 1596-1616.

BLM and CPUC issued the DEIS in December 2010. ER736, 1541. Backcountry objected to the DEIS' failure to adequately address the Project's impacts. ER1086-1105 (attachments: 1319-1539), 1044-1085 (attachments: 1216-1218), 1027-1042, 1122-1129; *see also* ER883, 914.

In October 2011, BLM and CPUC issued their FEIS, and closed public comment. ER733-734. Despite the public's grave concerns – which remained largely ignored – on December 19, 2011, BLM approved the Project. ER599-732. BLM issued the ROW grant (CACA-049698) on April 10, 2012 (ER559), and Notice to Proceed ("NTP") allowing pre-construction studies on September 17, 2012. ER586-598. No NTP allowing construction has issued.

On March 7, 2013, BLM amended its ROD to "allow[] construction of an overhead gen-tie line whereas the previously approved Gen-Tie Route 2 was underground." ER540. Overhead lines pose far greater fire hazards and aesthetic impacts than underground lines. ER745 ("Increased fire hazards can be reduced with undergrounding"), 753 (undergrounding "would reduce visual resource and fire impacts"), 755 (undergrounding "would reduce long-term visual impacts"). The Project as thus amended would significantly degrade this mountainous area's scenery and exacerbate the already extremely high fire danger. *Id.*

SUMMARY OF ARGUMENT

In approving the Project, BLM violated NEPA, the MBTA, the Eagle Act and the APA. BLM's EIS violates NEPA in four respects. First, it fails to study the feasible and environmentally preferable distributed generation alternative. Second, it fails to take a hard look at the Project's impacts, including (a) harms to avian species, (b) harm to human health from wind turbine-generated inaudible infrasound and low-frequency noise, (c) electric and magnetic field pollution, and

(d) global warming. Third, its statement of purpose and need merely parrots Tule's *private* objectives rather than identifying *BLM's* purpose, and fails to show any actual need for the Project as opposed to less impactful alternatives. Fourth, it improperly defers formulation of mitigation measures.

BLM violated the MBTA and the Eagle Act because it approved construction *and operation* of the Project notwithstanding its *known* lethal impacts on golden eagles and other migratory birds, and despite BLM's failure to obtain – or require Tule to obtain – the take permits these statutes require before any such migratory bird takes may occur.

STANDARD OF REVIEW

This Court reviews the grant of summary judgment *de novo*. *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 891 (9th Cir. 2002); *Akiak Native Community v. U.S. Postal Service*, 213 F.3d 1140, 1144 (9th Cir. 2000). It "must 'view the case from the same position as the district court' and apply the same standards." *Brower v. Evans,* 257 F.3d 1058, 1065 (9th Cir. 2001). This Court examines the record to ascertain "whether any genuine issue of material fact exists precluding summary judgment and whether the district court correctly applied the substantive laws." *Idaho Sporting Congress, Inc. v. Rittenhouse,* 305 F.3d 957, 964 (9th Cir. 2002).

Backcountry alleges violations of NEPA, the MBTA and Eagle Act, which are reviewed under the APA. *Western Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 481 (9th Cir. 2011). Under the APA the court must "hold unlawful and set aside" agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A), (D). In applying the arbitrary and capricious standard, the court must "engage in a substantial

inquiry" and conduct a "thorough, probing, in-depth review." *Oregon Natural Resources Council Fund v. Brong*, 492 F.3d 1120, 1125 (9th Cir. 2007). The court must not "rubber stamp" agency decisions, and may uphold them only if they are "fully informed and well considered." *Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846, 859 (9th Cir. 2005); *Sierra Club v. Bosworth*, 510 F.3d 1016, 1023 (9th Cir. 2007).

Because this Court's review is *de novo*, it may order summary judgment to either party. *Pit River Tribe v. U.S. Forest Service*, 469 F.3d 768, 778 (9th Cir. 2006).

STANDING

Backcountry provided ample evidence of its standing below, which the district court did not question. ER284-468. Therefore its standing is established.

ARGUMENT

I. BLM VIOLATED NEPA

Before carrying out or approving any "major . . . actions significantly affecting the quality of the human environment," BLM must prepare an EIS that details:

> (i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided . . ., (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources . . . .

42 U.S.C. § 4332(2)(C)(i)-(v); 40 C.F.R. §§ 1508.9, 1508.11. The EIS must identify the "purpose and need" of the proposed action to guide the agency's selection and evaluation of a reasonable range of alternatives. 40 C.F.R. §§ 1502.13, 1502.14; *National Parks & Conservation Association v. U.S. Bureau of*

Land Management ("*NPCA v. BLM*"), 606 F.3d 1058, 1071 (9th Cir. 2010). It must also evaluate mitigation measures that would avoid or reduce the action's environmental impacts, and assure the highest "professional" and "scientific integrity" in its analyses. 40 C.F.R. § 1502.24.

Contrary to these mandates, BLM's EIS fails to (1) consider a reasonable range of alternatives, (2) adequately examine the Project's impacts, (3) identify a public purpose and need for the Project, and (4) formulate and analyze all mitigation measures, as shown below.

A. The EIS Fails to Analyze and Improperly Dismisses the Distributed Generation Alternative.

An EIS must "[r]igorously explore and objectively evaluate all reasonable alternatives" – including options "not within the jurisdiction of the lead agency" – so that "reviewers may evaluate their comparative merits." 40 C.F.R. § 1502.14 (quoted); *Alaska Wilderness Recreation & Tourism Association v. Morrison* ("*Alaska Wilderness*"), 67 F.3d 723, 729 (9th Cir. 1995) (same); *Sierra Club v. Lynn* ("*Lynn*"), 502 F.2d 43, 62 (5th Cir. 1974) ("appropriate alternatives" "may be outside [the agency's] jurisdiction").

BLM may not eliminate a proposed alternative from consideration on the grounds it is "similar to alternatives actually considered, or . . . 'infeasible, ineffective, or inconsistent with the basic policy objectives for the management of the area,'" *unless* it provides a "reasoned explanation in the EIS." *Northern Alaska Environmental Center v. Kempthorne*, 457 F.3d 969, 978 (9th Cir. 2006) (first quote); *Southeast Alaska Conservation Council v. Federal Highway Administration* ("*SEACC*"), 649 F.3d 1050, 1059 (9th Cir. 2011) (second quote). An alternative that is consistent with the project's policy goals and *potentially*

feasible must not be "preliminarily eliminated" from in-depth review. *Muckleshoot Indian Tribe v. U.S. Forest Service* ("*Muckleshoot*"), 177 F.3d 800, 813 (9th Cir. 1999).

Instead, an EIS must study alternatives that "may partially or completely meet the proposal's goal and must evaluate their comparative merits." *Natural Resources Defense Council, Inc. v. Callaway* ("*Callaway*"), 524 F.2d 79, 93 (2d. Cir. 1975); *North Buckhead Civic Association v. Skinner*, 903 F.2d 1533, 1542 (11th Cir. 1990) (alternatives that "would only partly meet the goals of the project" but "have a less severe . . . environmental impact" should be studied in detail); *Natural Resources Defense Council v. Morton*, 458 F.2d 827, 834–835 (D.C. Cir.1972). The existence of a single "viable but unexamined alternative renders an [EIS] inadequate." *Friends of Yosemite Valley v. Kempthorne* ("*Friends of Yosemite*"), 520 F.3d 1024, 1038 (9th Cir. 2008).

Contrary to this settled law, BLM declined to study the feasible, less environmentally-damaging distributed generation alternative, which includes "but [is] not limited to residential and commercial rooftop solar panels, biofuels, hydrogen fuel cells, and other renewable distributed energy sources." ER9-13, 795. BLM concedes that "this alternative . . . would result in a significant net reduction in . . . impacts . . . and would contribute directly to meeting state and federal renewable energy resource goals." *Id*. Yet BLM rejected this alternative, claiming that (1) BLM "has no authority or influence over the installation of distributed generation systems, other than on its own facilities," (2) the alternative "fails to meet several of the basic project objectives," and (3) it is "infeasible from a technical and commercial perspective." ER795-797.

Because BLM excluded this alternative without reasoned explanation and

support, it violated NEPA. 40 C.F.R. § 1502.14; *Alaska Wilderness*, 67 F.3d at 729.

1. BLM May "Not Limit Its Attention to Just Those" Alternatives "It Can Provide"

BLM relied upon its lack of "authority or influence over the installation of distributed generation systems, other than on its own facilities," to justify its preliminary elimination of the distributed generation alternative. ER796. Whether BLM itself can singlehandedly achieve a distributed generation alternative does not define whether it is reasonable. 40 C.F.R. § 1502.14(c); *Alaska Wilderness*, 67 F.3d at 729. BLM may "not limit its attention to just those [alternatives] it can provide." *Lynn*, 502 F.2d at 62. By rejecting this otherwise reasonable alternative, BLM violated NEPA. *Id.*

2. The Distributed Generation Alternative Is Consistent with BLM's Objectives

The distributed generation alternative "would *contribute directly* to meeting state and federal renewable energy resource goals" – the primary Project objective. ER795 (emphasis added). Yet BLM claims that this alternative's "fail[ure] to meet several of the basic project objectives" justifies eliminating it from further study. *Id*. Not so.

While the EIS states that "BLM is *compelled* to evaluate utility-scale renewable energy development rather than distributed generation by the applicable federal orders and mandates," BLM was under no such obligation. ER796 (emphasis added) (citing 2005 Energy Policy Act ("EPAct") § 211 (P.L. 109-58) and Secretarial Order 3285A1); ER12-13. Section 211 of EPAct merely relates that "[i]t is the sense of Congress that the Secretary . . . should [by 2015] seek to have approved non-hydropower renewable energy projects located on the public

lands with a generation capacity of at least 10,000 megawatts of electricity." *Id.* It does not mandate that the "renewable energy projects" must be "utility-scale," as the EIS claims. ER796. Although distributed generation could help meet section 211's suggested 10,000-megawatt goal, the EIS dismisses it wholesale. *Id.*

Nor does section 211 *mandate* that the energy be generated on the public lands. To the contrary, it uses the softer precatory encouragement that it is the "*sense* of Congress . . . that the Secretary . . . *should* seek" approval of such projects. *Id.* (emphasis added). Furthermore, even had Congress mandated that all such projects be on the public lands, that would not foreclose distributed energy. BLM gave no consideration to siting distributed energy on the myriad federal lands administered by the Interior Secretary – including urban enclaves such as portions of the Presidio in San Francisco and developed areas within Yellowstone, Yosemite and other national parks and monuments – nor federal lands used as military reservations.

The EIS also incorrectly relies on Secretarial Order 3285A1, wrongly asserting that it "*requires* . . . BLM . . . to undertake multiple actions to facilitate large-scale *solar* energy production." ER796 (emphasis added). The Order does not actually *require* development of *any* specific type of energy-generation facilities. Its *lone* mandate to BLM is to "work collaboratively [within the Interior Department], and with other Federal agencies, departments, states, *local communities, and private landowners* to encourage the timely and responsible development of renewable energy and associated transmission while protecting and enhancing the Nation's water, wildlife, and other natural resources." Secretarial Order 3285A1 § 4 (emphasis added). The distributed generation alternative would allow BLM to do exactly that.

Furthermore, even if BLM were hypothetically required to "facilitate large-scale *solar energy* production," which it is not, that would not provide grounds for dismissing the distributed generation alternative. ER796 (emphasis added). Because the approved Project is a solely *wind*-based energy generation project, it is *even less* responsive to such a goal than the distributed generation alternative, which *includes solar energy generation facilities*. *See SEACC*, 649 F.3d at 1057 (holding that the agency's rejection of an alternative on cost and other grounds violated NEPA in part because "all of the alternatives . . . considered in the EIS . . . posed the same risks").

BLM was also wrong in claiming that rooftop solar's eligibility for renewable energy credit ("REC") trading was speculative. ER796. Rooftop solar was and is eligible for tradable renewable energy credits to meet California's renewable portfolio standard. ER204-283, 1595; SB 107, Stats. 2006, ch. 464; California Public Resources Code § 25741 (December 2011).

In sum, the distributed generation alternative "would contribute directly" to – and is therefore consistent with – the primary Project objectives of meeting state and federal renewable energy goals. ER795. Furthermore, it "would result in a significant net reduction in project impacts as compared with the Proposed P[roject]." ER795. Thus, BLM was required to analyze it in detail. *Muckleshoot*, 177 F.3d at 813; *Callaway*, 524 F.2d at 93.

3. The Distributed Generation Alternative Is Technically and Commercially Feasible

BLM claims that "rooftop solar" – a component of the distributed generation alternative – is "infeasible from a technical and commercial perspective." ER12-13, 797. But the EIS fails to provide the requisite "reasoned

explanation" to substantiate this claim, and the record rebuts BLM's assertions. *SEACC*, 649 F.3d at 1059.

The EIS states that "undefined technical hurdles associated with high levels of [photovoltaic ("PV")] development" justify rejecting this alternative. ER797. But a reference to "undefined technical hurdles" is not a substantive justification. *SEACC*, 649 F.3d at 1059. Furthermore, the record shows that distributed generation sources such as solar photovoltaics and combined heat and power plants are actually *more* cost effective than most other generation sources. ER1368-1372 (¶¶ 11-17). "[T]hese projects can get built quickly and without the need for expensive new transmission lines." ER1370. Distributed generation also minimizes the vulnerability of the electrical grid to fires and other natural disasters. ER1368-1373 (¶¶ 11, 14). These factors render this alternative *preferable* rather than undesirable.

The *feasible* distributed generation alternative would thus help achieve BLM's objectives and goals for the Project. As a result, and because the EIS fails to substantiate its contrary assertions, BLM's failure to fully analyze this alternative violates NEPA. *SEACC*, 649 F.3d at 1056-1059; *Friends of Yosemite Valley*, 520 F.3d at 1038; *Muckleshoot*, 177 F.3d at 813; *Callaway* 524 F.2d at 93.

B. The EIS Fails to Take a "Hard Look" at Significant Environmental Impacts

An EIS must take a "hard look" at a project's environmental impacts to "'foster [] informed decision-making and . . . public participation.'" *NPCA v. BLM*, 606 F.3d at 1072 (quoting *State of California v. Block* ("*Block*"), 690 F.2d 753, 761 (9th Cir. 1982)); 40 C.F.R. § 1502.1. An agency must obtain information that "is incomplete or unavailable" in the EIS, so long as the costs of doing so are

not "exorbitant." 40 C.F.R. § 1502.22; *Oregon Environmental Council v. Kunzman*, 614 F.Supp. 657, 663 (D.Or. 1985). NEPA's purpose is to eliminate "speculation by insuring that available data is gathered and analyzed prior to" project approval. *Foundation for North American Wild Sheep v. U.S. Department of Agriculture* ("*Wild Sheep*"), 681 F.2d 1172, 1179 (9th Cir. 1982). BLM's EIS fails the "hard look" test.

1. The EIS Fails to Take a Hard Look at Impacts to Avian Species

BLM's EIS violates NEPA's "hard look" requirement because it fails to (1) account for noise impacts on avian species, and (2) conduct nighttime bird surveys, thereby ignoring nocturnal species. *NPCA v. BLM*, 606 F.3d at 1072; *Block*, 690 F.2d at 761.

a. The EIS Ignores the Project's Noise Impacts on Birds

The Project's construction and operational noise will greatly exceed the threshold for significant negative impacts on numerous sensitive avian species thought to inhabit the Project area, including the horned lark, loggerhead shrike, least Bell's vireo, and southwestern willow flycatcher. ER885-911, 1487, 1497-1500. For example, a "reasonable threshold based on similar species for least Bell's vireo and southwestern willow flycatcher would be *40 dB(A) or below*." ER1499 (emphasis added). The Project's construction and operational noise levels (up to 94 dBA and 50 dBA, respectively) will greatly *exceed* these thresholds. ER859 (the Project's "8-hour average construction noise levels [will] range up to 94 dBA at . . . nearby properties"), 861 (operational noise will be as high as 111 dBA, with noise levels exceeding 50 dBA at nearly 1,000 feet from the nearest turbine).

Despite evidence that Project-generated noise will harm sensitive bird species, the EIS *entirely fails to discuss* these impacts. Instead, it merely notes that "indirect loss . . . from noise" will "be adverse under NEPA," but would be lessened by various mitigation measures. ER825-826. However, only *one* of the thirteen measures listed specifically addresses *birds*: BIO-7j attempts to "avoid the potential for project-related nest abandonment and failure of fledging, and minimize any disturbance to nesting behavior." ER821, 825-826. And *none* addresses impacts to activities other than nesting. *Id.*; ER809-811, 816-820. Furthermore, BLM's failure to conduct nighttime avian surveys, as discussed below, precluded meaningful analysis of the Project's noise impacts on nocturnal species. Because the Project's constant loud noise greatly exceeds the quieter nighttime background levels that owls and other nocturnal species require for hunting, this impact should have been studied.

The EIS' failure to provide this essential analysis violates NEPA's hard look standard. *NPCA v. BLM*, 606 F.3d at 1072. BLM's separate Avian and Bat Protection Plan ("ABPP") fails to remedy this failure. ER1130-1215. Rather, it simply confirms the presence of avian species, repeats the EIS' vague mitigation measures, and asserts without supporting analysis that the Project will "meet the current no-net loss standard" for eagles and "reduce the level of impacts to the maximum extent practicable." ER1134, 1140-1142, 1175-1183. Without a "full and fair discussion" of these impacts and specific mitigation measures, neither BLM nor the public can assess the Project's impact. *Id.*

b. BLM Failed to Conduct *Any* Nighttime Bird Surveys

BLM violated NEPA by *entirely failing* to conduct *any* nighttime bird surveys, leaving the public and decisionmakers to "speculate" about the Project's

impacts on burrowing owls, long-eared owls and other nocturnal bird species. ER968; *Wild Sheep*, 681 F.2d at 1179; *Oregon Environmental Council*, 614 F.Supp. at 663. "Recent published scientific reports indicate that greater than 10% of nocturnal migrating songbirds migrating over ridges fly at elevations putting them within the area of rotating turbines." ER1114. Nocturnal migrants are thus at high risk of collision and death, and numerous commenters alerted BLM to this risk and the EIS' critical omission of nocturnal surveys. ER1114 (noting that "[n]octurnal bird migration was not studied" and recommending methods to gather data), 1016. Yet contrary to NEPA, BLM simply "ignored [and] shunted aside" this critical data gap. *Wild Sheep*, 681 F.2d at 179. BLM left the public and decisionmakers in the dark as to nocturnal bird impacts.

The few incidental observations of nocturnal species[2] during the *daytime* avian surveys provide no data on the types, behaviors, and prevalence of nocturnal bird species, making it impossible to properly analyze the Project's impacts on them. *NPCA v. BLM*, 606 F.3d at 1072; *Wild Sheep*, 681 F.2d at 179; *Oregon Environmental Council*, 614 F.Supp. at 663.

Rather than conduct nighttime bird surveys, BLM improperly relied on *daytime* bird surveys and studies of nocturnal bird migration in *other* regions, to speculate that "nocturnal bird use is thought to be low in the project area and night-migrating birds are thought to be migrating at higher altitudes than the proposed turbine heights." ER968; *Wild Sheep*, 681 F.2d at 1179. BLM's speculation violated NEPA. *Wild Sheep*, 681 F.2d at 1179.

[2] *E.g.*, the "[l]ong-eared owl was observed *incidentally* during the studies during the 2007-2008 [daytime] survey; however, there was no information regarding encounter rates or flight direction." ER835 (emphasis added).

2. The EIS Fails to Take a Hard Look at the Project's Inaudible Infrasound and Low Frequency Noise Impacts

The Project's industrial-scale wind turbines will produce substantial infrasound and low-frequency noise ("ILFN").[3] Indeed, studies show that "wind turbine noise [is] dominated by infrasound components." ER1442. ILFN is "not generally assessed in analyses of environmental noise . . . because it cannot be heard." ER929. But "what you *can't* hear can *also* hurt you." ER1457 (emphasis added). "[T]here is increasingly clear evidence that" inaudible ILFN produced by wind turbines "is sufficiently intense to cause extreme annoyance and inability to sleep . . . in individuals living near them." *Id*.; ER1442 ("the [ear's cochlear outer hair cells ('OHCs')] are stimulated at levels that are not heard").

Despite this evidence, the EIS dismisses the "hypothesis that [inaudible ILFN] from wind turbines . . . [has] potential to annoy or impart adverse health effects." ER928. But it did so based on speculation that because "the body is full of sound and vibration at infrasonic and low frequencies" from *internal* sources such as "the beating heart," that "any effect from wind turbine noise" will be "'lost' in the existing background noise and vibration." ER925 (quotes), 928, 935, 964.

Contrary to BLM's speculation, "there *is* . . . [a] valid mechanism by which infrasound produced by turbines could affect the human body . . . differently than other infrasound produced within the body." ER927 (emphasis added). The Salt and Hullar (2010) study, cited in Backcountry's DEIS comments, explains that

[3] "Infrasound" includes frequencies less than 20 hertz ("Hz"), and "low-frequency" sound ranges between 20 Hz and 200 Hz. ER929. "[T]he human ear can most easily recognize sounds in the middle of the audible spectrum, which is ideally between [1,000 to 4,000 Hz]." *Id*. Except at very high decibel ("dB") levels, ILFN is generally below the normal range of human hearing. *Id*.

"[i]nfrasound entering the ear through the ossicular chain" – *i.e.*, *externally* generated noise – "is likely to have a greater effect on the structures of the inner ear than is sound generated *internally*." ER1437 (emphasis added).

Because Backcountry's "evidence and opinions directly challenge the scientific basis" of the EIS's claim that Project-generated inaudible ILFN will be benign, BLM was required to "disclose and respond to [that evidence and] viewpoint[] in the [EIS]" using "high quality information, including accurate scientific analysis." *Center for Biological Diversity v. U.S. Forest Service*, 349 F.3d 1157, 1167 (9th Cir. 2003) (quotes); *Seattle Audubon Society v. Espy*, 998 F.2d 699, 704 (9th Cir. 1993). BLM did not do that. The EIS fails to even *mention* Salt and Hullar (2010), let alone analyze and respond to its demonstration that *externally* generated inaudible ILFN has a "greater effect on the structures of the inner ear than . . . sound generated *internally*." ER1437 (emphasis added). Consequently, BLM violated NEPA.

3. The EIS Fails to Take a Hard Look at the Public Health Impacts of Electric and Magnetic Field Pollution

"Wind turbines" and other associated power generation and transmission facilities "create" substantial "electromagnetic fields" ("EMF") that are propagated into the surrounding environment in many ways, including as stray voltage. ER936. There is ample evidence that exposure to such EMF pollution can cause a host of negative health impacts, including cancer. ER866-868, 870. As the EIS admits, "stray voltage [from the turbines] has the potential for adverse health effects." ER936.

The EIS nonetheless concludes that "no health effects would be anticipated to occur from [wind turbine] stray voltage" because "[a]s part of the

commissioning of the project, turbines will be . . . properly grounded." *Id*. But the EIS *entirely ignores* the fact that its purported mitigation measure – grounding – is actually a medium by which stray voltage may be *introduced* into homes and other vulnerable locations. As Backcountry demonstrated, "dirty electrical current produced by [wind turbines is often] propagated as a ground current" that enters the earth "through grounding rods extending from neutral conductor wires." ER1472 (first quote), 1471 (second quote).

BLM's attempt to pass off a serious Project *impact* as "*mitigation*" violates NEPA's "hard look" requirement. To "'ensure that environmental consequences have been fairly evaluated,'" an EIS must "discuss mitigation measures[] with 'sufficient detail.'" *South Fork Band Council of Western Shoshone of Nevada v. U.S. Department of Interior* ("*South Fork*"), 588 F.3d 718, 727 (9th Cir. 2009) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 353 (1989)). BLM failed to do that here. The EIS not only fails to analyze grounding as a means of *exposing* the public to stray voltage, it also fails to specify what grounding measures would be used and how they would "confirm that there are no stray voltage issues through the life of the project." ER936.

In sum, BLM violated NEPA by failing to take a hard look at the impacts of propagating wind turbine-generated stray voltage through the ground, and by failing to evaluate "the effectiveness of" grounding as a "mitigation measure[]." *South Fork*, 588 F.3d at 727.

4. The EIS Fails to Take a Hard Look at Global Warming

The EIS' discussion of global warming is wholly inadequate. It estimates the Project will produce approximately 650 metric tons of CO2-equivalent emissions annually, yet speculates it would "potentially decreas[e] overall

emissions . . . in California," because wind is a renewable energy source. ER875-876. BLM's EIS fails to provide data to support this claim. Indeed, "[t]he [EIS] does not definitively state that there would be *any* resulting fossil fuel shut-down and GHG emission reduction as a result of the project." ER940 (emphasis added). Furthermore, the EIS fails to provide a Project life cycle assessment, which is necessary to accurately estimate the Project's greenhouse gas ("GHG") emissions. By failing to "provide the data on which it base[d] its environmental analysis," BLM violated NEPA. *Northern Plains Resource Council, Inc. v. Surface Transportation Board*, 668 F.3d 1067, 1083 (9th Cir. 2011).

The EIS admits that "[a]nalysis of emissions sources should take account of all phases and elements of the proposed action over its expected life," yet here it did not. ER873, 937 ("emissions associated with manufacturing of wind turbines, concrete ingredients, and other construction materials are not assessed in the [EIS]"). It ignored "GHG emissions of manufacturing the turbines, pads, anchors, etc. including the effects of the cement mixing and use, or emissions related to the release of carbon through habitat conversion." ER875-876, 937 (quote). It claimed that "[b]ecause manufacturers of wind turbines, cement for concrete, and other construction materials fabricate products for [other] projects . . . the emissions associated with such manufacturing would not necessarily be 'caused' by the" Project. ER937. This assertion defies logic. If the Project were not built, it would cause no GHG emissions. If an alternative such as rooftop solar that requires no industrial-scale turbines, no high tension lines, and no huge transmission towers, is selected instead, GHG emissions will be *less*.

BLM was required to provide data to support its analysis, and conduct a life-cycle assessment of the Project's GHG emissions. Its failure to do so

prevented the public and decisionmakers from making an informed decision.

C. The EIS Fails to Specify a Public Purpose and Demonstrate an Actual Need for the Project.

An EIS must "specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action." 40 C.F.R. § 1502.13. Even when the action is "externally generated," the purpose and need statement "'must describe the BLM purpose and need, *not an applicant's or external proponent's purpose and need.*'" *NPCA v. BLM*, 606 F.3d at 1071, n. 9 (9th Cir. 2010); ER585. While BLM's statement incorporates broad renewable energy objectives, it fails to show that the Project is needed to meet them. ER790-791. Without that showing, the EIS fails to "include the information" that is "essential to a reasoned choice among alternatives." 40 C.F.R. § 1502.22. This violates NEPA.

BLM stated it was responding to *Tule's* application for a right-of-way grant, but failed to establish *BLM's* purpose and need independent of Tule's application. ER788. BLM never explained how Tule's Project would achieve the objectives in Executive Order ("EO") 13212, Secretarial Order 32851A, and EPAct section 211 better than *other* renewable options, like rooftop or utility-scale solar. ER787-788. BLM also failed to identify any energy demand for Tule's Project. ER787-788. BLM thus failed to "specify the underlying purpose and need" for the Project, violating NEPA. 40 C.F.R § 1502.13; *NPCA v. BLM*, 606 F.3d at 1071.

D. The EIS Improperly Defers Specification and Analysis of Mitigation Measures

NEPA mandates that the EIS include "'sufficient detail [regarding the project's impact mitigation measures] to ensure that environmental consequences have been fairly evaluated.'" *City of Carmel-by-the-Sea v. U.S. Department of*

Transportation ("*Carmel*"), 123 F.3d 1142, 1154 (9th Cir. 1997). The EIS must also assess a mitigation measure's likely effectiveness to "evaluat[e] whether anticipated environmental impacts can be avoided." *South Fork*, 588 F.3d at 727. "'[A] mere listing of mitigation measures is insufficient.'" *Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1380 (9th Cir. 1998).

NEPA prohibits deferring both formulation *and* analysis of mitigation measures. *South Fork*, 588 F.3d at 727 (deferring mitigation measure analysis because "'[f]easibility and success of mitigation would depend on site-specific conditions and details of the mitigation plan'" violates NEPA).

Here, the EIS improperly defers formulation and analysis of the Project's proposed habitat restoration plan and site-specific noise mitigation plan. ER862-863, 871. No such plans are provided. Instead, the EIS calls for *future* plans to address these impacts. ER831, 862-863, 871. But an EIS must provide "site-specific conditions" and "sufficient detail" needed to evaluate the effectiveness of proposed mitigations. *South Fork*, 588 F.3d at 727; *Carmel*, 123 F.3d at 1154; ER871 (mitigation measure FF-7 requiring future plan "to restore native habitat" provides no site-specific standards). Without *any specifics*, decision-makers and the public cannot assess the mitigation measures' effectiveness, contrary to NEPA. *Carmel*, 123 F.3d at 1154; *South Fork*, 588 F.3d at 727.

II. BLM VIOLATED THE MBTA

The MBTA directs that

> [u]nless and except as permitted by regulations [promulgated hereunder] . . . , it shall be unlawful at any time, by any means or in any manner, to . . . take [or] kill . . . any migratory bird . . . nest, or egg of any such bird . . . included in the terms of the conventions [with the signatory nations] . . . .

16 U.S.C. § 703. This mandate applies to federal agencies:

> As [16 U.S.C.] § 703 is written, what matters is whether someone has killed or is attempting to kill or capture or take a protected bird, without a permit . . . . Nothing in § 703 turns on the identity of the perpetrator. *There is no exemption in § 703 for . . . federal agencies*.

Humane Society of the U.S. v. Glickman ("*Glickman*"), 217 F.3d 882, 884-888 (D.C.Cir. 2000) (emphasis added); *American Bird Conservancy, Inc. v. F.C.C.* ("*ABC*"), 516 F.3d 1027, 1031-1032 (D.C.Cir. 2008). As here, citizens can enforce the MBTA against federal agencies. *Id*.; *City of Sausalito v. O'Neill* ("*Sausalito*"), 386 F.3d 1186, 1203-1204 (9th Cir. 2004) (citing 5 U.S.C. § 702 and *Clarke v. Securities Industry Association*, 479 U.S. 388, 399 (1987)); *Hill v. Norton*, 275 F.3d 98, 103 (D.C.Cir. 2001).

The MBTA thus requires BLM to "seek authorization from the Secretary" of the Interior before approving activities – such as the Project – that directly kill migratory birds. *Sausalito*, 386 F.3d at 1225; *Mahler v. U.S. Forest Service*, 927 F. Supp. 1559, 1573 (S.D.Ind. 1996); *Glickman,* 217 F.3d at 885 (D.C.Cir. 2000); *Robertson v. Seattle Audubon Society* ("*Robertson*"), 503 U.S. 429, 438-439 (1992) (Congressional waiver of MBTA required to allow Forest Service approval of timber sales); EO 13186, "Responsibilities of Federal Agencies to Protect Migratory Birds," 66 Fed.Reg. 3853 (Jan. 17, 2001) (federal agencies must obtain permission from the Interior Secretary before allowing take of migratory birds).

Accordingly, FWS regulations require "prior authorization from [FWS]" for any take of protected birds, and provide for "special use permits" for this purpose. 50 C.F.R. §§ 21.12, 21.27. Take permits are available, for example, for "special purpose activities related to migratory birds," such as where the applicant demonstrates a "compelling justification" for the activity. 50 C.F.R. § 21.27.

According to FWS, this required justification might exist where "take of migratory birds could result as an *unintended consequence*" of an activity. 72

Fed.Reg. 8931, 8947 (Feb. 28, 2007) (emphasis added). Thus, FWS recognizes – as it must consistent with the MBTA's plain language – that a permit is required for any take of migratory birds, whether intentional or "*unintended*." *Id.* (emphasis added). Consequently, FWS has issued such "special use permits" to allow federal agencies to authorize private parties such as Tule to take migratory birds as an *incidental* consequence of otherwise lawful activities. *See*, *e.g.*, 77 Fed.Reg. 50153 (Aug. 20, 2012) (allowing the National Marine Fisheries Service ("NMFS") to authorize long-line ocean fishing that results in the incidental take of seabirds).

Yet BLM failed to seek FWS authorization or to require Tule to do so (ER759, 843, 848, 978), even though it admitted that such a permit might be needed, as the MBTA clearly requires. ER792; 16 U.S.C. § 703. BLM's ABPP does not excuse this omission. It is neither a permit nor an authorization, and does not reduce migratory bird mortality to zero. ER843 (neither the ABPP nor FWS' concurrence "will . . . in and of [themselves] authorize take of golden eagles or determine that no take will occur"), 1130-1215 (ABPP). Hence the MBTA's requirement for a take permit remains unfulfilled.

Involvement of a third party, such as Tule, does not excuse BLM from its duty to itself obtain, or require Tule to obtain, a take permit. In *Glickman*, the Agriculture Department approved "various measures such as harassment" of migratory birds by third party "Virginia state agencies." 217 F.3d at 884. The court ruled the Agriculture Department's approval unlawful because the Department "did not obtain a permit from the Department of the Interior" as required by "§ 703 of the [MBTA]." *Id*. at 888. Here, as in *Glickman*, the foreseeable actions of a third party applicant, Tule, will kill migratory birds during

the Project's construction and operation. ER833 (Project will kill up to 37 raptors annually at estimated rate of up to 0.2 deaths per MW), 848 (Project will cause "potential loss of nesting birds (violation of the [MBTA]) . . . . [and] electrocution of, and/or collisions by, listed or sensitive bird or bat species"), 829 (bird loss even after mitigation), 845 (violation of MBTA for maintenance), 852 (even after mitigation "the risk of mortality due to collision with operating turbines by golden eagle remains adverse;" "the identified impact cannot be mitigated" as "the remaining turbines would continue to present [collision] risk"), 853 ("[o]perations and maintenance-related disturbance or direct mortality of special-status wildlife species would remain adverse"), 854 (transmission lines and wind turbines pose unmitigable risk to birds).

Migratory birds at risk include special-status bird species such as the golden eagle, the burrowing owl, the northern harrier, the loggerhead shrike, the gray vireo, the southwestern willow flycatcher, the long-eared owl, and the Vaux's swift. ER891-902 (species observed), 759 (project impacts), 779 ("adverse and unmitigable impacts (Class I) to golden eagles . . . from collision with operating turbines"), 829 (construction impacts may violate MBTA), 833 (up to 37 raptors killed annually at estimated rate of up to 0.2 deaths per MW), 837 (adverse golden eagle impact), 838 (adverse Vaux's swift impact), 848 (electrocution and collision), 1026 (Tule admits turbines kill birds).

This substantial loss of migratory birds even if "unintended," is nonetheless a foreseeable, indeed "inevitable," consequence of "the operation of wind energy facilities." Andrew G. Ogden, *Dying for a Solution: Incidental Taking Under the Migratory Bird Treaty Act*, 38 Wm. & Mary Envtl. L. & Policy Rev. 1, 33 (2013). Numerous studies confirm that wind turbines kill birds. ER1683-1696 (Drewitt

(2006)), 1664-1672 (de Lucas (2008)), 1673-1682 (Mabee (2006)), 1697-1763 (Erickson (2001)). The FWS has "estimated that wind turbines cause as many as 440,000 bird deaths per year" and "wind turbines located at Altamont Pass . . . are estimated to kill . . . 1,766 birds annually, including between 881 and 1330 raptors." R. Kyle Evans, *Wind Turbines and Migratory Birds: Avoiding a Collision Between the Energy Sector and the Migratory Bird Treaty Act*, 15 N.C.J.L. & Tech. On. 32 (2014), 46 & n. 86 (first quote), 48 & n. 95 (second quote). At the San Gorgonio wind project north of the Project, "[r]esearchers estimated 6,800 birds were killed annually . . . based on 38 dead birds found while monitoring nocturnal migrants." ER1714.

The MBTA's plain language forbids activities that foreseeably kill migratory birds whether by intentional or incidental means. "Where the statute's language is plain, the sole function of the courts is to enforce it according to its terms." *Int'l Ass'n of Machinists, Etc. v. B.F. Goodrich, Etc.*, 387 F.3d 1046, 1051 (9th Cir. 2004) quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992). Thus, its prohibition on killing or attempting to kill migratory birds without authorization is not dependent on defendants' intent. *Sausalito*, 386 F.3d at 1203 (citing 16 U.S.C. §§ 701, 703, 704; 50 C.F.R. § 21.27). Thus, courts have found MBTA violations where the defendants did *not* intend to kill birds. *U.S. v. Apollo Energies, Inc.*, 611 F.3d 679, 682-696 (9th Cir. 2010) (oil drilling equipment); *U.S. v. Corbin Farm Service*, 444 F.Supp. 510 (E.D.Cal. 1978) (pesticide spraying); *U.S. v. FMC Corp.*, 572 F.2d 902 (2d Cir. 1978) (toxic waste ponds); *U.S. v. Moon Lake Electric Association, Inc.,* 45 F.Supp.2d 1070 (D.Colo. 1999) (transmission lines); *U.S. v. CITGO Petroleum Corporation* ("*CITGO*"), 893 F.Supp.2d 841 (S.D.Texas 2012) (refinery waste). Indeed, BLM conceded

below that the MBTA's prohibitions against take may apply to foreseeable, albeit "unintentional," take. ER112, n. 18.

Cases involving habitat modification are not relevant here[4] because the Project's spinning turbine blades, towers and lines will kill birds *directly* rather than only indirectly through habitat modification. As the Ninth Circuit explained in *Seattle Audubon Society v. Evans* ("*Seattle Audubon*") 952 F.2d 297, 303 (9th Cir. 1991) "direct, though unintended" killing *does* constitute a take for MBTA purposes, even if habitat destruction that only *indirectly* kills birds does not. EO 13186, 66 Fed.Reg. 3,853. The MBTA bars both intentional *and* unintentional take, unless permitted.

Other cases excusing MBTA non-compliance do not avail BLM. In *Center for Biological Diversity v. Pirie* ("*Pirie*"), 201 F.Supp.2d 113, 120 (D.D.C. 2002), the Defense Department's duty to obtain a "valid permit from [FWS]" was excused only because an act of Congress authorized "incidental taking of migratory birds during military readiness activities." Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub.L. No. 107-314, § 315 (2002); *Center for Biological Diversity v. England*, 2003 WL 179848 (D.C.Cir. 2003) (vacating *Pirie* as moot). In *Native Songbird Care and Conservation v. LaHood*, No. 13-cv-02265-JST, 2013 WL 33555657 (N.D.Cal. July 2, 2013), the court dismissed plaintiffs' MBTA claim because it was barred by the statute of limitations. The Eighth Circuit's "tentative" conclusions about the "apparent" scope of the MBTA

[4] BLM never claimed that the MBTA did not apply to its decision to issue the ROW, and therefore has waived that defense. ER792; *Securities and Exchange Commission v. Chenery Corporation*, 318 U.S. 80, 87 (1943) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based").

in *Newton County Wildlife Association v. U.S. Forest Service*, 113 F.3d 110, 115 (8th Cir. 1997) were reached before the D.C. Circuit decided *Glickman* and failed to acknowledge the Supreme Court's contrary ruling in *Robertson* applying the MBTA to federal agencies. *Id.*, 490 U.S. at 438-439. *ABC*, 516 F.3d at 1031-1032, is inapposite because the agency there was developing compliance measures, rendering the lawsuit premature.

This Court may enforce BLM's compliance with the MBTA. The APA directs that this Court "*shall* . . . hold unlawful and set aside agency action . . . found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (D) (emphasis added). The MBTA requires that a take permit be obtained *before* BLM may approve activities that will directly kill migratory birds. 16 U.S.C. § 703; *Sausalito*, 386 F.3d at 1225; *Glickman*, 217 F.3d at 885-888; EO 13186. Since (1) the Project will directly kill migratory birds, (2) approving activities that kill migratory birds without an MBTA permit is "without observance of procedure required by law," and (3) BLM approved the Project despite its lack of a take permit for the resulting bird deaths, under the APA (4) this Court "shall . . . set aside" BLM's unlawful action. *Id*.

This Circuit has enforced the APA in this manner in similar contexts. *Anderson v. Evans*, 371 F.3d 475, 502 (9th Cir. 2002) (agency's issuance of grey whale harvest quota to tribe without compliance with statutory procedures is "not in accordance with law" and therefore must be set aside under the APA); *The Wilderness Society v. U.S. Fish & Wildlife Service*, 353 F.3d 1051, 1059-1067 (9th Cir. 2003) (FWS issuance of use permit for fish hatchery project in Wilderness Area set aside as "not in accordance with law" under the APA).

BLM's past failures to obtain or require such a permit do not excuse its duty to comply with the MBTA. Prior violation of the law never justifies continued illegal behavior. *Sierra Club v. Union Oil Company of California*, 813 F.2d 1480, 1491 (9th Cir. 1987). The MBTA should be strictly enforced because Congress determined that protection of migratory birds was "a national interest of very nearly the first magnitude." *State of Missouri v. Holland*, 252 U.S. 416, 435 (1920).

By approving the taking of migratory birds without the permit Congress has mandated, BLM has failed to "observ[e] the procedure required by law." 5 U.S.C. § 706(2)(D). BLM's game of "close enough" invades territory constitutionally reserved to Congress, and this Court. *Calvert Cliffs' Coordinating Committee, Inc. v. U.S. Atomic Energy Commission*, 449 F.2d 1109, 1111 (D.C.Cir. 1971) (judicial "duty, in short, is to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy").

III. BLM VIOLATED THE EAGLE ACT

It is undisputed that Project operation is likely to kill and injure golden eagles. ER830, 833, 837, 852, 878. The Eagle Act makes it unlawful to "take . . . in any manner . . . any golden eagle." 16 U.S.C. § 668(b). "'[T]ake' includes . . . *wound*, *kill*, . . . *molest* or *disturb*." 16 U.S.C. § 668(c) (emphasis added); 50 C.F.R. § 22.3. Unlike the MBTA, Eagle Act regulations include "molest" and "disturb" as additional "take" criteria. 50 C.F.R. § 22.3; *cf. Seattle Audubon*, 952 F.2d at 302 (emphasizing exclusion of "harm" from "take" definition under MBTA). Therefore, the Eagle Act, like the Endangered Species Act, 16 U.S.C. § 1532(19), *does* apply to habitat destruction. Thus, the Project also violates the

Eagle Act because it will disturb – as well as kill and injure – golden eagles in the area. ER798-799 (habits, habitat, and location), 800-802 (admitting "adverse impacts" and likely collision risks), 852-853 (adopted mitigation insufficient to eliminate adverse impacts).

FWS has confirmed that Eagle Act "[p]ermits are available to Federal, State, municipal, or tribal governments," and even provides a programmatic take permit *specifically for wind farm operators*. ER1626-1627 (74 Fed.Reg. at 46,842-46,843 (Sept. 11, 2009)). "Utilities that kill eagles through collisions and electrocutions from contact with power lines" are also required to obtain an Eagle Act permit. *Id.* Indeed, FWS is "currently unaware of *any* measures that would eliminate eagle mortalities when turbines are sited in golden eagle habitat (including migration corridors)." ER1626 (emphasis added). According to FWS, *if* mitigation "can be developed to significantly reduce the take [of eagles], the operator may qualify for a programmatic take permit, since the ongoing mortalities are the direct result of the operation of the turbines." *Id*. Neither BLM nor Tule has obtained this required permit. ER759, 843, 848, 978. Without it, BLM's approval of the Project violates the Eagle Act.

The United States' interpretation of the Eagle Act is accorded weight if it comports with the statutory language and Congressional intent. *U.S. v. Mead Corp.*, 533 U.S. 218, 227-228 (2001). Its recent prosecution of four wind energy facilities in Wyoming alleges that bird kills from these wind turbine operations violate the MBTA and the Eagle Act. ER124-126 (U.S. Attorney's Information charges that wind turbine bird kills violated the MBTA); 130 (Plea Agreement ¶ 6 ("Admission of Guilt")). There, the guilty wind turbine operator was required to obtain an Eagle Act permit. ER134-136 (Plea Agreement ¶ 15(b)(i)-(ii)). In

return, the United States agreed "not to prosecute the defendant under the MBTA or [the Eagle Act] for unpermitted takings of migratory birds or other avian wildlife." *Id*. at ¶ 16, p. 10-11. The Project likewise threatens unpermitted take.

By approving the Project despite its *unpermitted* take of golden eagles, BLM violated the Eagle Act and thus failed to proceed in accordance with law.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed and judgment should be entered for Backcountry.

Dated: October 1, 2014

Respectfully submitted,

/s/ *Stephan C. Volker*
STEPHAN C. VOLKER
Attorney for Plaintiffs and Appellants
Backcountry Against Dumps and Donna Tisdale

STATEMENT OF RELATED CASES

On August 28, 2014, the briefing and hearing of this case was coordinated with *Protect Our Communities Foundation v. Jewell,* No. 14-55842; there are no related cases pending in this Court.

Dated: October 1, 2014

Respectfully submitted,

/s/ *Stephan C. Volker*
STEPHAN C. VOLKER
Attorney for Plaintiffs and Appellants
Backcountry Against Dumps and Donna Tisdale

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), Appellants' Opening Brief is in at least 14-point proportional type and contains 8458 words.

Dated: October 1, 2014

Respectfully submitted,

/s/ *Stephan C. Volker*
STEPHAN C. VOLKER
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Backcountry Against Dumps and Donna Tisdale

ADDENDUM OF PERTINENT LAWS

TABLE OF CONTENTS

5 U.S.C. § 701

§ 701. Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that--

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter--

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include--

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49; or sections 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

CREDIT(S)

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392; Pub.L. 103-272, § 5(a), July 5, 1994, 108 Stat. 1373; Pub.L. 111-350, § 5(a)(3), Jan. 4, 2011, 124 Stat. 3841.)

5 U.S.C. § 702

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

CREDIT(S)
(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392; Pub.L. 94-574, § 1, Oct. 21, 1976, 90 Stat. 2721.)

5 U.S.C. § 703

§ 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

CREDIT(S)
(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392; Pub.L. 94-574, § 1, Oct. 21, 1976, 90 Stat. 2721.)

5 U.S.C. § 704

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

CREDIT(S)
(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392.)

5 U.S.C. § 705

§ 705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

CREDIT(S)
(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.)

5 U.S.C. § 706

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to

be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

CREDIT(S)
(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.)

16 U.S.C. § 668

§ 668. Bald and golden eagles

(a) Prohibited acts; criminal penalties

Whoever, within the United States or any place subject to the jurisdiction thereof, without being permitted to do so as provided in this subchapter, shall knowingly, or with wanton disregard for the consequences of his act take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import, at any time or in any manner, any bald eagle commonly known as the American eagle, or any golden eagle, alive or dead, or any part, nest, or egg thereof of the foregoing eagles, or whoever violates any permit or regulation issued pursuant to this subchapter, shall be fined not more than $5,000 or imprisoned not more than one year or both: *Provided*, That in the case of a second or subsequent conviction for a violation of this section committed after October 23, 1972, such person shall be fined not more than $10,000 or imprisoned not more than two years, or both: *Provided further*, That the commission of each taking or other act prohibited by this section with respect to

a bald or golden eagle shall constitute a separate violation of this section: *Provided further,* That one-half of any such fine, but not to exceed $2,500, shall be paid to the person or persons giving information which leads to conviction: *Provided further,* That nothing herein shall be construed to prohibit possession or transportation of any bald eagle, alive or dead, or any part, nest, or egg thereof, lawfully taken prior to June 8, 1940, and that nothing herein shall be construed to prohibit possession or transportation of any golden eagle, alive or dead, or any part, nest, or egg thereof, lawfully taken prior to the addition to this subchapter of the provisions relating to preservation of the golden eagle.

(b) Civil penalties

Whoever, within the United States or any place subject to the jurisdiction thereof, without being permitted to do so as provided in this subchapter, shall take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import, at any time or in any manner, any bald eagle, commonly known as the American eagle, or any golden eagle, alive or dead, or any part, nest, or egg thereof of the foregoing eagles, or whoever violates any permit or regulation issued pursuant to this subchapter, may be assessed a civil penalty by the Secretary of not more than $5,000 for each such violation. Each violation shall be a separate offense. No penalty shall be assessed unless such person is given notice and opportunity for a hearing with respect to such violation. In determining the amount of the penalty, the gravity of the violation, and the demonstrated good faith of the person charged shall be considered by the Secretary. For good cause shown, the Secretary may remit or mitigate any such penalty. Upon any failure to pay the penalty assessed under this section, the Secretary may request the Attorney General to institute a civil action in a district court of the United States for any district in which such person is found or resides or transacts business to collect the penalty and such court shall have jurisdiction to hear and decide any such action. In hearing any such action, the court must sustain the Secretary's action if supported by substantial evidence.

(c) Cancellation of grazing agreements

The head of any Federal agency who has issued a lease, license, permit, or other agreement authorizing the grazing of domestic livestock on Federal lands to any person who is convicted of a violation of this subchapter or of any permit or regulation issued hereunder may immediately cancel each such lease, license, permit, or other agreement. The United States shall not be liable for the payment of any compensation, reimbursement, or damages in connection with the cancellation of any lease, license, permit, or other agreement pursuant to this section.

CREDIT(S)
(June 8, 1940, c. 278, § 1, 54 Stat. 250; June 25, 1959, Pub.L. 86-70, § 14, 73 Stat.

143; Oct. 24, 1962, Pub.L. 87-884, 76 Stat. 1246; Oct. 23, 1972, Pub.L. 92-535, § 1, 86 Stat. 1064.)

16 U.S.C. § 668a

§ 668a. Taking and using of the bald and golden eagle for scientific, exhibition, and religious purposes

Whenever, after investigation, the Secretary of the Interior shall determine that it is compatible with the preservation of the bald eagle or the golden eagle to permit the taking, possession, and transportation of specimens thereof for the scientific or exhibition purposes of public museums, scientific societies, and zoological parks, or for the religious purposes of Indian tribes, or that it is necessary to permit the taking of such eagles for the protection of wildlife or of agricultural or other interests in any particular locality, he may authorize the taking of such eagles pursuant to regulations which he is hereby authorized to prescribe: *Provided*, That on request of the Governor of any State, the Secretary of the Interior shall authorize the taking of golden eagles for the purpose of seasonally protecting domesticated flocks and herds in such State, in accordance with regulations established under the provisions of this section, in such part or parts of such State and for such periods as the Secretary determines to be necessary to protect such interests: *Provided further*, That bald eagles may not be taken for any purpose unless, prior to such taking, a permit to do so is procured from the Secretary of the Interior: *Provided further*, That the Secretary of the Interior, pursuant to such regulations as he may prescribe, may permit the taking, possession, and transportation of golden eagles for the purposes of falconry, except that only golden eagles which would be taken because of depredations on livestock or wildlife may be taken for purposes of falconry: *Provided further*, That the Secretary of the Interior, pursuant to such regulations as he may prescribe, may permit the taking of golden eagle nests which interfere with resource development or recovery operations.

CREDIT(S)

(June 8, 1940, c. 278, § 2, 54 Stat. 251; Oct. 24, 1962, Pub.L. 87-884, 76 Stat. 1246; Oct. 23, 1972, Pub.L. 92-535, § 2, 86 Stat. 1065; Nov. 8, 1978, Pub.L. 95-616, § 9, 92 Stat. 3114.)

16 U.S.C. § 668b

§ 668b. Enforcement provisions

(a) Arrest; search; issuance and execution of warrants and process

Any employee of the Department of the Interior authorized by the Secretary of the Interior to enforce the provisions of this subchapter may, without warrant, arrest any person committing in his presence or view a violation of this subchapter or of any permit or regulation issued hereunder and take such person immediately for examination or trial before an officer or court of competent jurisdiction; may execute any warrant or other process issued by an officer or court of competent jurisdiction for the enforcement of the provisions of this subchapter; and may, with or without a warrant, as authorized by law, search any place. The Secretary of the Interior is authorized to enter into cooperative agreements with State fish and wildlife agencies or other appropriate State authorities to facilitate enforcement of this subchapter, and by said agreements to delegate such enforcement authority to State law enforcement personnel as he deems appropriate for effective enforcement of this subchapter. Any judge of any court established under the laws of the United States, and any United States magistrate judge may, within his respective jurisdiction, upon proper oath or affirmation showing probable cause, issue warrants in all such cases.

(b) Forfeiture

All bald or golden eagles, or parts, nests, or eggs thereof, taken, possessed, sold, purchased, bartered, offered for sale, purchase, or barter, transported, exported, or imported contrary to the provisions of this subchapter, or of any permit or regulation issued hereunder, and all guns, traps, nets, and other equipment, vessels, vehicles, aircraft, and other means of transportation used to aid in the taking, possessing, selling, purchasing, bartering, offering for sale, purchase, or barter, transporting, exporting, or importing of any bird, or part, nest, or egg thereof, in violation of this subchapter or of any permit or regulation issued hereunder shall be subject to forfeiture to the United States.

(c) Customs laws applied

All provisions of law relating to the seizure, forfeiture, and condemnation of a vessel for violation of the customs laws, the disposition of such vessel or the proceeds from the sale thereof, and the remission or mitigation of such forfeitures, shall apply to the seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this subchapter, insofar as such provisions of law are applicable and not inconsistent with the provisions of this subchapter: *Provided*, That all powers, rights, and duties conferred or imposed by the customs laws upon any officer or employee of the Treasury Department shall, for the purposes of this subchapter, be

exercised or performed by the Secretary of the Interior or by such persons as he may designate.

CREDIT(S)
(June 8, 1940, c. 278, § 3, 54 Stat. 251; Oct. 17, 1968, Pub.L. 90-578, Title IV, § 402(b)(2), 82 Stat. 1118; Oct. 23, 1972, Pub.L. 92-535, § 3, 86 Stat. 1065; Dec. 1, 1990, Pub.L. 101-650, Title III, § 321, 104 Stat. 5117.)

16 U.S.C. § 668c

§ 668c. Definitions

As used in this subchapter "whoever" includes also associations, partnerships, and corporations; "take" includes also pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, molest or disturb; "transport" includes also ship, convey, carry, or transport by any means whatever, and deliver or receive or cause to be delivered or received for such shipment, conveyance, carriage, or transportation.

CREDIT(S)
(June 8, 1940, c. 278, § 4, 54 Stat. 251; Oct. 23, 1972, Pub.L. 92-535, § 4, 86 Stat. 1065.)

16 U.S.C. § 668d

§ 668d. Availability of appropriations for Migratory Bird Treaty Act

Moneys now or hereafter available to the Secretary of the Interior for the administration and enforcement of the Migratory Bird Treaty Act of July 3, 1918 [16 U.S.C.A. § 703 et seq.], shall be equally available for the administration and enforcement of this subchapter.

CREDIT(S)
(June 8, 1940, c. 278, § 5, 54 Stat. 251.)

16 U.S.C. § 701

§ 701. Game and wild birds; preservation

The duties and powers of the Department of the Interior include the preservation, distribution, introduction, and restoration of game birds and other wild birds. The Secretary of the Interior is authorized to adopt such measures as may be necessary to carry out the purposes of this Act, and to purchase such game birds and other wild birds as may be required therefor, subject, however, to the laws of the various States

and Territories. The object and purpose of this Act is to aid in the restoration of such birds in those parts of the United States adapted thereto where the same have become scarce or extinct, and also to regulate the introduction of American or foreign birds or animals in localities where they have not heretofore existed.

The Secretary of the Interior shall from time to time collect and publish useful information as to the propagation, uses, and preservation of such birds.

And the Secretary of the Interior shall make and publish all needful rules and regulations for carrying out the purposes of this Act, and shall expend for said purposes such sums as Congress may appropriate therefor.

CREDIT(S)
(May 25, 1900, c. 553, § 1, 31 Stat. 187; 1939 Reorg.Plan No. II, § 4(f), eff. July 1, 1939, 4 F.R. 2731, 53 Stat. 1433.)

16 U.S.C. § 702

§ 702. Importation of eggs of game birds for propagation

The Secretary of the Interior shall have the power to authorize the importation of eggs of game birds for purposes of propagation, and he shall prescribe all necessary rules and regulations governing the importation of eggs of said birds for such purposes.

CREDIT(S)
(June 3, 1902, c. 983, 32 Stat. 285; 1939 Reorg. Plan No. II, § 4(f), eff. July 1, 1939, 4 F.R. 2731, 53 Stat. 1433.)

16 U.S.C. § 703

§ 703. Taking, killing, or possessing migratory birds unlawful

(a) In general

Unless and except as permitted by regulations made as hereinafter provided in this subchapter, it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird, any part, nest, or egg of any such bird, or any product, whether or not manufactured, which consists, or is composed in whole or part, of any such bird or any part, nest,

or egg thereof, included in the terms of the conventions between the United States and Great Britain for the protection of migratory birds concluded August 16, 1916 (39 Stat. 1702), the United States and the United Mexican States for the protection of migratory birds and game mammals concluded February 7, 1936, the United States and the Government of Japan for the protection of migratory birds and birds in danger of extinction, and their environment concluded March 4, 19721 and the convention between the United States and the Union of Soviet Socialist Republics for the conservation of migratory birds and their environments concluded November 19, 1976.

(b) Limitation on application to introduced species

(1) In general

This subchapter applies only to migratory bird species that are native to the United States or its territories.

(2) Native to the United States defined

(A) In general

Subject to subparagraph (B), in this subsection the term "native to the United States or its territories" means occurring in the United States or its territories as the result of natural biological or ecological processes.

(B) Treatment of introduced species

For purposes of paragraph (1), a migratory bird species that occurs in the United States or its territories solely as a result of intentional or unintentional human-assisted introduction shall not be considered native to the United States or its territories unless--

(i) it was native to the United States or its territories and extant in 1918;

(ii) it was extirpated after 1918 throughout its range in the United States and its territories; and

(iii) after such extirpation, it was reintroduced in the United States or its territories as a part of a program carried out by a Federal agency.

CREDIT(S)
(July 3, 1918, c. 128, § 2, 40 Stat. 755; June 20, 1936, c. 634, § 3, 49 Stat. 1556; June 1, 1974, Pub.L. 93-300, § 1, 88 Stat. 190; Dec. 13, 1989, Pub.L. 101-233, § 15, 103 Stat. 1977; Dec. 8, 2004, Pub.L. 108-447, Div. E, Title I, § 143(b), 118

stat. 3071.)

16 U.S.C. § 704

§ 704. Determination as to when and how migratory birds may be taken, killed, or possessed

(a) Subject to the provisions and in order to carry out the purposes of the conventions, referred to in section 703 of this title, the Secretary of the Interior is authorized and directed, from time to time, having due regard to the zones of temperature and to the distribution, abundance, economic value, breeding habits, and times and lines of migratory flight of such birds, to determine when, to what extent, if at all, and by what means, it is compatible with the terms of the conventions to allow hunting, taking, capture, killing, possession, sale, purchase, shipment, transportation, carriage, or export of any such bird, or any part, nest, or egg thereof, and to adopt suitable regulations permitting and governing the same, in accordance with such determinations, which regulations shall become effective when approved by the President.

(b) It shall be unlawful for any person to--

(1) take any migratory game bird by the aid of baiting, or on or over any baited area, if the person knows or reasonably should know that the area is a baited area; or

(2) place or direct the placement of bait on or adjacent to an area for the purpose of causing, inducing, or allowing any person to take or attempt to take any migratory game bird by the aid of baiting on or over the baited area.

CREDIT(S)
(July 3, 1918, c. 128, § 3, 40 Stat. 755; June 20, 1936, c. 634, § 2, 49 Stat. 1556; 1939 Reorg. Plan No. II, § 4(f), eff. July 1, 1939, 4 F.R. 2731, 53 Stat. 1433; Oct. 30, 1998, Pub.L. 105-312, Title I, § 102, 112 Stat. 2956.)

16 U.S.C. § 1532

§ 1532. Definitions

For the purposes of this chapter--

(1) The term "alternative courses of action" means all alternatives and thus is not limited to original project objectives and agency jurisdiction.

(2) The term "commercial activity" means all activities of industry and trade,

including, but not limited to, the buying or selling of commodities and activities conducted for the purpose of facilitating such buying and selling: Provided, however, That it does not include exhibition of commodities by museums or similar cultural or historical organizations.

(3) The terms "conserve", "conserving", and "conservation" mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

(4) The term "Convention" means the Convention on International Trade in Endangered Species of Wild Fauna and Flora, signed on March 3, 1973, and the appendices thereto.

(5)(A) The term "critical habitat" for a threatened or endangered species means--

(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and

(ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

(B) Critical habitat may be established for those species now listed as threatened or endangered species for which no critical habitat has heretofore been established as set forth in subparagraph (A) of this paragraph.

(C) Except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species.

(6) The term "endangered species" means any species which is in danger of extinction throughout all or a significant portion of its range other than a species of the Class Insecta determined by the Secretary to constitute a pest whose protection under the provisions of this chapter would present an overwhelming and overriding

risk to man.

(7) The term "Federal agency" means any department, agency, or instrumentality of the United States.

(8) The term "fish or wildlife" means any member of the animal kingdom, including without limitation any mammal, fish, bird (including any migratory, nonmigratory, or endangered bird for which protection is also afforded by treaty or other international agreement), amphibian, reptile, mollusk, crustacean, arthropod or other invertebrate, and includes any part, product, egg, or offspring thereof, or the dead body or parts thereof.

(9) The term "foreign commerce" includes, among other things, any transaction--

(A) between persons within one foreign country;

(B) between persons in two or more foreign countries;

(C) between a person within the United States and a person in a foreign country; or

(D) between persons within the United States, where the fish and wildlife in question are moving in any country or countries outside the United States.

(10) The term "import" means to land on, bring into, or introduce into, or attempt to land on, bring into, or introduce into, any place subject to the jurisdiction of the United States, whether or not such landing, bringing, or introduction constitutes an importation within the meaning of the customs laws of the United States.

(11) Repealed. Pub.L. 97-304, § 4(b), Oct. 13, 1982, 96 Stat. 1420.

(12) The term "permit or license applicant" means, when used with respect to an action of a Federal agency for which exemption is sought under section 1536 of this title, any person whose application to such agency for a permit or license has been denied primarily because of the application of section 1536(a) of this title to such agency action.

(13) The term "person" means an individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State, or of any foreign government; any State, municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States.

(14) The term "plant" means any member of the plant kingdom, including seeds,

roots and other parts thereof.

(15) The term "Secretary" means, except as otherwise herein provided, the Secretary of the Interior or the Secretary of Commerce as program responsibilities are vested pursuant to the provisions of Reorganization Plan Numbered 4 of 1970; except that with respect to the enforcement of the provisions of this chapter and the Convention which pertain to the importation or exportation of terrestrial plants, the term also means the Secretary of Agriculture.

(16) The term "species" includes any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.

(17) The term "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands, Guam, and the Trust Territory of the Pacific Islands.

(18) The term "State agency" means any State agency, department, board, commission, or other governmental entity which is responsible for the management and conservation of fish, plant, or wildlife resources within a State.

(19) The term "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

(20) The term "threatened species" means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.

(21) The term "United States", when used in a geographical context, includes all States.

CREDIT(S)
(Pub.L. 93-205, § 3, Dec. 28, 1973, 87 Stat. 885; Pub.L. 94-359, § 5, July 12, 1976, 90 Stat. 913; Pub.L. 95-632, § 2, Nov. 10, 1978, 92 Stat. 3751; Pub.L. 96-159, § 2, Dec. 28, 1979, 93 Stat. 1225; Pub.L. 97-304, § 4(b), Oct. 13, 1982, 96 Stat. 1420; Pub.L. 100-478, Title I, § 1001, Oct. 7, 1988, 102 Stat. 2306.)

28 U.S.C. § 1291

§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the

Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

CREDIT(S)
(June 25, 1948, c. 646, 62 Stat. 929; Oct. 31, 1951, c. 655, § 48, 65 Stat. 726; July 7, 1958, Pub.L. 85-508, § 12(e), 72 Stat. 348; Apr. 2, 1982, Pub.L. 97-164, Title I, § 124, 96 Stat. 36.)

28 U.S.C. § 1294

§ 1294. Circuits in which decisions reviewable

Except as provided in sections 1292(c), 1292(d), and 1295 of this title, appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals as follows:

(1) From a district court of the United States to the court of appeals for the circuit embracing the district;

(2) From the United States District Court for the District of the Canal Zone, to the Court of Appeals for the Fifth Circuit;

(3) From the District Court of the Virgin Islands, to the Court of Appeals for the Third Circuit;

(4) From the District Court of Guam, to the Court of Appeals for the Ninth Circuit.

CREDIT(S)
(June 25, 1948, c. 646, 62 Stat. 930; Oct. 31, 1951, c. 655, § 50(a), 65 Stat. 727; July 7, 1958, Pub.L. 85-508, § 12(g), 72 Stat. 348; Mar. 18, 1959, Pub.L. 86-3, § 14(c), 73 Stat. 10; Aug. 30, 1961, Pub.L. 87-189, § 5, 75 Stat. 417; Nov. 6, 1978, Pub.L. 95-598, Title II, § 237, 92 Stat. 2667; Apr. 2, 1982, Pub.L. 97-164, Title I, § 126, 96 Stat. 37.)

28 U.S.C. § 1331

§ 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

CREDIT(S)
(June 25, 1948, c. 646, 62 Stat. 930; July 25, 1958, Pub.L. 85-554, § 1, 72 Stat. 415; Oct. 21, 1976, Pub.L. 94-574, § 2, 90 Stat. 2721; Dec. 1, 1980, Pub.L. 96-486, § 2(a), 94 Stat. 2369.)

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28 U.S.C. § 1346

§ 1346. United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 7104(b)(1) and 7107(a)(1) of title 41. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b)(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(2) No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an

agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act (as defined in section 2246 of Title 18).

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of any civil action or claim for a pension.

(e) The district courts shall have original jurisdiction of any civil action against the United States provided in section 6226, 6228(a), 7426, or 7428 (in the case of the United States district court for the District of Columbia) or section 7429 of the Internal Revenue Code of 1986.

(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

(g) Subject to the provisions of chapter 179, the district courts of the United States shall have exclusive jurisdiction over any civil action commenced under section 453(2) of title 3, by a covered employee under chapter 5 of such title.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 933; Apr. 25, 1949, c. 92, § 2(a), 63 Stat. 62; May 24, 1949, c. 139, § 80(a), (b), 63 Stat. 101; Oct. 31, 1951, c. 655, § 50(b), 65 Stat. 727; July 30, 1954, c. 648, § 1, 68 Stat. 589; July 7, 1958, Pub.L. 85-508, § 12(e), 72 Stat. 348; Aug. 30, 1964, Pub.L. 88-519, 78 Stat. 699; Nov. 2, 1966, Pub.L. 89-719, Title II, § 202(a), 80 Stat. 1148; July 23, 1970, Pub.L. 91-350, § 1(a), 84 Stat. 449; Oct. 25, 1972, Pub.L. 92-562, § 1, 86 Stat. 1176; Oct. 4, 1976, Pub.L. 94-455, Title XII, § 1204(c) (1), Title XIII, § 1306(b) (7), 90 Stat. 1697, 1719; Nov. 1, 1978, Pub.L. 95-563, § 14(a), 92 Stat. 2389; Apr. 2, 1982, Pub.L. 97-164, Title I, § 129, 96 Stat. 39; Sept. 3, 1982, Pub.L. 97-248, Title IV, § 402(c) (17), 96 Stat. 669; Oct. 22, 1986, Pub.L. 99-514, § 2, 100 Stat. 2095; Oct. 29, 1992, Pub.L. 102-572, Title IX, § 902(b)(1), 106 Stat. 4516; Apr. 26, 1996, Pub.L. 104-134, Title I, § 101[(a)][Title VIII, § 806], 110 Stat. 1321-75; renumbered Title I May 2, 1996, Pub.L. 104-140, § 1(a), 110 Stat. 1327; amended Oct. 26, 1996, Pub.L. 104-331, § 3(b)(1), 110 Stat. 4069; Jan. 4, 2011, Pub.L. 111-350, § 5(g)(6), 124 Stat. 3848; Pub.L. 113-4, Title XI, § 1101(b), Mar. 7, 2013, 127 Stat. 134.)

28 U.S.C. § 1361

§ 1361. Action to compel an officer of the United States to perform his duty

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

CREDIT(S)
(Added Pub.L. 87-748, § 1(a), Oct. 5, 1962, 76 Stat. 744.)

28 U.S.C. § 1391

§ 1391. Venue generally

(a) Applicability of section.--Except as otherwise provided by law--

(1) this section shall govern the venue of all civil actions brought in district courts of the United States; and

(2) the proper venue for a civil action shall be determined without regard to whether the action is local or transitory in nature.

(b) Venue in general.--A civil action may be brought in--

(1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located;

(2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or

(3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action.

(c) Residency.--For all venue purposes--

(1) a natural person, including an alien lawfully admitted for permanent residence in the United States, shall be deemed to reside in the judicial district in which that person is domiciled;

(2) an entity with the capacity to sue and be sued in its common name under applicable law, whether or not incorporated, shall be deemed to reside, if a

defendant, in any judicial district in which such defendant is subject to the court's personal jurisdiction with respect to the civil action in question and, if a plaintiff, only in the judicial district in which it maintains its principal place of business; and

(3) a defendant not resident in the United States may be sued in any judicial district, and the joinder of such a defendant shall be disregarded in determining where the action may be brought with respect to other defendants.

(d) Residency of corporations in States with multiple districts.--For purposes of venue under this chapter, in a State which has more than one judicial district and in which a defendant that is a corporation is subject to personal jurisdiction at the time an action is commenced, such corporation shall be deemed to reside in any district in that State within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate State, and, if there is no such district, the corporation shall be deemed to reside in the district within which it has the most significant contacts.

(e) Actions where defendant is officer or employee of the United States--

(1) In general.--A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which (A) a defendant in the action resides, (B) a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (C) the plaintiff resides if no real property is involved in the action. Additional persons may be joined as parties to any such action in accordance with the Federal Rules of Civil Procedure and with such other venue requirements as would be applicable if the United States or one of its officers, employees, or agencies were not a party.

(2) Service.--The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.

(f) Civil actions against a foreign state--A civil action against a foreign state as defined in section 1603(a) of this title may be brought--

(1) in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated;

(2) in any judicial district in which the vessel or cargo of a foreign state is situated, if the claim is asserted under section 1605(b) of this title;

(3) in any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state as defined in section 1603(b) of this title; or

(4) in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.

(g) Multiparty, multiforum litigation--A civil action in which jurisdiction of the district court is based upon section 1369 of this title may be brought in any district in which any defendant resides or in which a substantial part of the accident giving rise to the action took place.

CREDIT(S)
(June 25, 1948, c. 646, 62 Stat. 935; Oct. 5, 1962, Pub.L. 87-748, § 2, 76 Stat. 744; Dec. 23, 1963, Pub.L. 88-234, 77 Stat. 473; Nov. 2, 1966, Pub.L. 89-714, §§ 1, 2, 80 Stat. 1111; Oct. 21, 1976, Pub.L. 94-574, § 3, 90 Stat. 2721; Oct. 21, 1976, Pub.L. 94-583, § 5, 90 Stat. 2897; Nov. 19, 1988, Pub.L. 100-702, Title X, § 1013(a), 102 Stat. 4669; Dec. 1, 1990, Pub.L. 101-650, Title III, § 311, 104 Stat. 5114; Dec. 9, 1991, Pub.L. 102-198, § 3, 105 Stat. 1623; Oct. 29, 1992, Pub.L. 102-572, Title V, § 504, 106 Stat. 4513; Oct. 3, 1995, Pub.L. 104-34, § 1, 109 Stat. 293; Nov. 2, 2002, Pub.L. 107-273, Div. C, Title I, § 11020(b)(2), 116 Stat. 1827; Pub.L. 112-63, Title II, § 202, Dec. 7, 2011, 125 Stat. 763.)

28 U.S.C. § 2201

§ 2201. Creation of remedy

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

(b) For limitations on actions brought with respect to drug patents see section 505 or 512 of the Federal Food, Drug, and Cosmetic Act, or section 351 of the Public

Health Service Act.

CREDIT(S)
(June 25, 1948, c. 646, 62 Stat. 964; May 24, 1949, c. 139, § 111, 63 Stat. 105; Aug. 28, 1954, c. 1033, 68 Stat. 890; July 7, 1958, Pub.L. 85-508, § 12(p), 72 Stat. 349; Oct. 4, 1976, Pub.L. 94-455, Title XIII, § 1306(b)(8), 90 Stat. 1719; Nov. 6, 1978, Pub.L. 95-598, Title II, § 249, 92 Stat. 2672; Sept. 24, 1984, Pub.L. 98-417, Title I, § 106, 98 Stat. 1597; Sept. 28, 1988, Pub.L. 100-449, Title IV, § 402(c), 102 Stat. 1884; Nov. 16, 1988, Pub.L. 100-670, Title I, § 107(b), 102 Stat. 3984; Dec. 8, 1993, Pub.L. 103-182, Title IV, § 414(b), 107 Stat. 2147; Mar. 23, 2010, Pub.L. 111-148, Title VII, § 7002(c)(2), 124 Stat. 816.)

28 U.S.C. § 2202

§ 2202. Further relief

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

CREDIT(S)
(June 25, 1948, c. 646, 62 Stat. 964.)

42 U.S.C. § 4321

§ 4321. Congressional declaration of purpose

The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

CREDIT(S)
(Pub.L. 91-190, § 2, Jan. 1, 1970, 83 Stat. 852.)

42 U.S.C. § 4332

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and

administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall--

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on--

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by

a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by subchapter II of this chapter.

CREDIT(S)
(Pub.L. 91-190, Title I, § 102, Jan. 1, 1970, 83 Stat. 853; Pub.L. 94-83, Aug. 9, 1975, 89 Stat. 424.)

BOB STUMP NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2003

Public Law 107–314, December 2, 2002, 116 Stat 2458

SEC. 315. INCIDENTAL TAKING OF MIGRATORY BIRDS DURING MILITARY READINESS ACTIVITIES.

(a) INTERIM AUTHORITY FOR INCIDENTAL TAKINGS.—During the period described in subsection (c), section 2 of the Migratory Bird Treaty Act (16 U.S.C. 703) shall not apply to the incidental taking of a migratory bird by a member of the Armed Forces during a military readiness activity authorized by the Secretary of Defense or the Secretary of the military department concerned.

(b) IDENTIFICATION OF MEASURES TO MINIMIZE IMPACT OF ACTIVITIES.—During the periods described in subsections (c) and (d), the Secretary of Defense shall, in consultation with the Secretary of the Interior, identify measures—

(1) to minimize and mitigate, to the extent practicable, any adverse impacts of authorized military readiness activities on affected species of migratory birds; and

(2) to monitor the impacts of such military readiness activities on affected species of migratory birds.

(c) PERIOD OF APPLICATION FOR INTERIM AUTHORITY.—The period described in this subsection is the period beginning on the date of the enactment of this Act and ending on the date on which the Secretary of the Interior publishes in the Federal Register a notice that—

(1) regulations authorizing the incidental taking of migratory birds by members of the Armed Forces have been prescribed in accordance with the requirements of subsection (d);

(2) all legal challenges to the regulations and to the manner of their promulgation (if any) have been exhausted as provided in subsection (e); and

(3) the regulations have taken effect.

(d) INCIDENTAL TAKINGS AFTER INTERIM PERIOD.—**(1)** Not later than the expiration of the one-year period beginning on the date of the enactment of this Act, the Secretary of the Interior shall exercise the authority of that Secretary under section 3(a) of the Migratory Bird Treaty Act (16 U.S.C. 704(a)) to prescribe regulations to exempt the Armed Forces for the incidental taking of migratory birds during military readiness activities authorized by the Secretary of Defense or the Secretary of the military department concerned.

(2) The Secretary of the Interior shall exercise authority under paragraph (1) with the concurrence of the Secretary of Defense.

(e) LIMITATION ON JUDICIAL REVIEW.—An action seeking judicial review of regulations prescribed pursuant to this section or of the manner of their promulgation must be filed in the appropriate Federal court by not later than the expiration of the 120–day period beginning on the date on which such regulations are published in the Federal Register. Upon the expiration of such period and the exhaustion of any legal challenges to the regulations pursuant to any action filed in such period, there shall be no further judicial review of such regulations or of the manner of their promulgation.

(f) MILITARY READINESS ACTIVITY.—(1) In this section the term "military readiness activity" includes—

(A) all training and operations of the Armed Forces that relate to combat; and

(B) the adequate and realistic testing of military equipment, vehicles, weapons, and sensors for proper operation and suitability for combat use.

(2) The term does not include—

(**A)** the routine operation of installation operating support functions, such as administrative offices, military exchanges, commissaries, water treatment facilities, storage facilities, schools, housing, motor pools, laundries, morale, welfare, and recreation activities, shops, and mess halls;

(B) the operation of industrial activities; or

(C) the construction or demolition of facilities used for a purpose described in subparagraph (A) or (B).

ENERGY POLICY ACT OF 2005

Public Law 109–58, August 8, 2005, 119 Stat 594

SEC. 211. SENSE OF CONGRESS REGARDING GENERATION CAPACITY OF ELECTRICITY FROM RENEWABLE ENERGY RESOURCES ON PUBLIC LANDS.

It is the sense of the Congress that the Secretary of the Interior should, before the end of the 10–year period beginning on the date of enactment of this Act, seek to have approved non-hydropower renewable energy projects located on the public lands with a generation capacity of at least 10,000 megawatts of electricity.

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40 C.F.R. § 1502.1

§ 1502.1 Purpose.

The primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government. It shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment. Agencies shall focus on significant environmental issues and alternatives and shall reduce paperwork and the accumulation of extraneous background data. Statements shall be concise, clear, and to the point, and shall be supported by evidence that the agency has made the necessary environmental analyses. An environmental impact statement is more than a disclosure document. It shall be used by Federal officials in conjunction with other relevant material to plan actions and make decisions.

SOURCE: 43 FR 55994, Nov. 29, 1978, unless otherwise noted.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), Sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and Executive Order 11514 (Mar. 5, 1970, as amended by Executive Order 11991, May 24, 1977).

Current through Sept. 18, 2014; 79 FR 56215.

40 C.F.R. § 1502.13

§ 1502.13 Purpose and need.

The statement shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.

SOURCE: 43 FR 55994, Nov. 29, 1978, unless otherwise noted.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), Sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and Executive Order 11514 (Mar. 5, 1970, as amended by Executive Order 11991, May 24, 1977).
Current through Sept. 18, 2014; 79 FR 56215.

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40 C.F.R. § 1502.14

§ 1502.14 Alternatives including the proposed action.

This section is the heart of the environmental impact statement. Based on the information and analysis presented in the sections on the Affected Environment (§ 1502.15) and the Environmental Consequences (§ 1502.16), it should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public. In this section agencies shall:

(a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.

(b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.

(c) Include reasonable alternatives not within the jurisdiction of the lead agency.

(d) Include the alternative of no action.

(e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.

(f) Include appropriate mitigation measures not already included in the proposed action or alternatives.

SOURCE: 43 FR 55994, Nov. 29, 1978, unless otherwise noted.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), Sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and Executive Order 11514 (Mar. 5, 1970, as amended by Executive Order 11991, May 24, 1977).

Current through July 24, 2014; 79 FR 43161.

40 C.F.R. § 1502.22

§ 1502.22 Incomplete or unavailable information.

When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is incomplete or unavailable information, the agency shall always make clear that such information is lacking.

(a) If the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.

(b) If the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known, the agency shall include within the environmental impact statement:

> **(1)** A statement that such information is incomplete or unavailable; **(2)** a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment; **(3)** a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment, and **(4)** the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community. For the purposes of this section, "reasonably foreseeable" includes impacts which have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason.

(c) The amended regulation will be applicable to all environmental impact statements for which a Notice of Intent (40 CFR 1508.22) is published in the Federal

Register on or after May 27, 1986. For environmental impact statements in progress, agencies may choose to comply with the requirements of either the original or amended regulation.

Credits
[51 FR 15625, April 25, 1986]

SOURCE: 43 FR 55994, Nov. 29, 1978, unless otherwise noted.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), Sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and Executive Order 11514 (Mar. 5, 1970, as amended by Executive Order 11991, May 24, 1977).
Current through Sept. 18, 2014; 79 FR 56215.

40 C.F.R. § 1502.24

§ 1502.24 Methodology and scientific accuracy.

Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements. They shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement. An agency may place discussion of methodology in an appendix.

SOURCE: 43 FR 55994, Nov. 29, 1978, unless otherwise noted.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), Sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and Executive Order 11514 (Mar. 5, 1970, as amended by Executive Order 11991, May 24, 1977).

Current through July 24, 2014; 79 FR 43161.

40 C.F.R. § 1508.9

§ 1508.9 Environmental assessment.

Environmental Assessment:

(a) Means a concise public document for which a Federal agency is responsible that serves to:

(1) Briefly provide sufficient evidence and analysis for determining whether to

prepare an environmental impact statement or a finding of no significant impact.

(2) Aid an agency's compliance with the Act when no environmental impact statement is necessary.

(3) Facilitate preparation of a statement when one is necessary.

(b) Shall include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

SOURCE: 43 FR 56003, Nov. 29, 1978, unless otherwise noted.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and Executive Order 11514 (Mar. 5, 1970, as amended by Executive Order 11991, May 24, 1977).

Current through July 24, 2014; 79 FR 43161.

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40 C.F.R. § 1508.11

§ 1508.11 Environmental impact statement.

Environmental impact statement means a detailed written statement as required by section 102(2)(C) of the Act.

SOURCE: 43 FR 56003, Nov. 29, 1978, unless otherwise noted.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and Executive Order 11514 (Mar. 5, 1970, as amended by Executive Order 11991, May 24, 1977).

Current through Sept. 18, 2014; 79 FR 56215.

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50 C.F.R. § 21.12

§ 21.12 General exceptions to permit requirements.

Effective: November 5, 2007

The following persons or entities under the following conditions are exempt from the permit requirements:

(a) Employees of the Department of the Interior (DOI): DOI employees authorized to enforce the provisions of the Migratory Bird Treaty Act of July 3, 1918, as amended (40 Stat. 755; 16 U.S.C. 703–(711), may, without a permit, take or otherwise acquire, hold in custody, transport, and dispose of migratory birds or their parts, nests, or eggs as necessary in performing their official duties.

(b) Employees of certain public and private institutions:

(1) State game departments, municipal game farms or parks, and public museums, public zoological parks, accredited institutional members of the American Association of Zoological Parks and Aquariums (AAZPA) and public scientific or educational institutions may acquire by gift or purchase, possess, transport, and by gift or sale dispose of lawfully acquired migratory birds or their progeny, parts, nests, or eggs without a permit: *Provided*, That such birds may be acquired only from persons authorized by this paragraph or by a permit issued pursuant to this part to possess and dispose of such birds, or from Federal or State game authorities by the gift of seized, condemned, or sick or injured birds. Any such birds, acquired without a permit, and any progeny therefrom may be disposed of only to persons authorized by this paragraph to acquire such birds without a permit. Any person exercising a privilege granted by this paragraph must keep accurate records of such operations showing the species and number of birds acquired, possessed, and disposed of; the names and addresses of the persons from whom such birds were acquired or to whom such birds were donated or sold; and the dates of such transactions. Records shall be maintained or reproducible in English on a calendar year basis and shall be retained for a period of five (5) years following the end of the calendar year covered by the records.

(2) Employees of Federal, State, and local wildlife and land management agencies; employees of Federal, State, and local public health agencies; and laboratories under contract to such agencies may in the course of official business collect, possess, transport, and dispose of sick or dead migratory birds or their parts for analysis to confirm the presence of infectious disease. Nothing in this paragraph authorizes the take of uninjured or healthy birds without prior authorization from the Service. Additionally, nothing in this paragraph authorizes the taking, collection, or possession of migratory birds when circumstances indicate reasonable probability that death, injury, or disability was caused by factors other than infectious disease and/or natural toxins. These factors may include, but are not limited to, oil or chemical contamination, electrocution, shooting, or pesticides. If the cause of death of a bird is determined to be other than natural causes or disease, Service law enforcement officials must be contacted without delay.

(c) Licensed veterinarians: Licensed veterinarians are not required to obtain a Federal migratory bird permit to temporarily possess, stabilize, or euthanize sick and injured migratory birds. However, a veterinarian without a migratory bird rehabilitation permit must transfer any such bird to a federally permitted migratory bird rehabilitator within 24 hours after the bird's condition is stabilized, unless the bird is euthanized. If a veterinarian is unable to locate a permitted rehabilitator within that time, the veterinarian must contact his or her Regional Migratory Bird Permit Office for assistance in locating a permitted migratory bird rehabilitator and/or to obtain authorization to continue to hold the bird. In addition, veterinarians must:

(1) Notify the local U.S. Fish and Wildlife Service Ecological Services Office immediately upon receiving a threatened or endangered migratory bird species. Contact information for Ecological Services offices can be located on the Internet at http://offices.fws.gov;

(2) Euthanize migratory birds as required by § 21.31(e)(4)(iii) and § 21.31(e)(4)(iv), and dispose of dead migratory birds in accordance with § 21.31(e)(4)(vi); and

(3) Keep records for 5 years of all migratory birds that die while in their care, including those they euthanize. The records must include: the species of bird, the type of injury, the date of acquisition, the date of death, and whether the bird was euthanized.

(d) General public: Any person may remove a migratory bird from the interior of a building or structure under certain conditions.

(1) You may humanely remove a trapped migratory bird from the interior of a residence or a commercial or government building without a Federal permit if the migratory bird:

(i) Poses a health threat (for example, through damage to foodstuffs);

(ii) Is attacking humans, or poses a threat to human safety because of its activities (such as opening and closing automatic doors);

(iii) Poses a threat to commercial interests, such as through damage to products for sale; or

(iv) May injure itself because it is trapped.

(2) You must use a humane method to capture the bird or birds. You may not use adhesive traps to which birds may adhere (such as glue traps) or any other

method of capture likely to harm the bird.

(3) Unless you have a permit that allows you to conduct abatement activities with a raptor, you may not release a raptor into a building to either frighten or capture another bird.

(4) You must immediately release a captured bird to the wild in habitat suitable for the species, unless it is exhausted, ill, injured, or orphaned.

(5) If a bird is exhausted or ill, or is injured or orphaned during the removal, the property owner is responsible for immediately transferring it to a federally permitted migratory bird rehabilitator.

(6) You may not lethally take a migratory bird for these purposes. If your actions to remove the trapped migratory bird are likely to result in its lethal take, you must possess a Federal Migratory Bird Permit. However, if a bird you are trying to remove dies, you must dispose of the carcass immediately unless you have reason to believe that a museum or scientific institution might be able to use it. In that case, you should contact your nearest Fish and Wildlife Service office or your State wildlife agency about donating the carcass.

(7) For birds of species on the Federal List of Threatened or Endangered Wildlife, provided at 50 CFR 17.11(h), you may need a Federal threatened or endangered species permit before removing the birds (see 50 CFR 17.21 and 50 CFR 17.31).

(8) You must have a permit from your Regional migratory bird permits office to remove a bald eagle or a golden eagle from a building (see 50 CFR Part 22).

(9) Your action must comply with State and local regulations and ordinances. You may need a State, Tribal, or Territorial permit before you can legally remove the bird or birds.

(10) If an active nest with eggs or nestlings is present, you must seek the assistance of a federally permitted migratory bird rehabilitator in removing the eggs or nestlings. The rehabilitator is then responsible for handling them properly.

(11) If you need advice on dealing with a trapped bird, you should contact your closest Fish and Wildlife Service office or your State wildlife agency.

Credits

[50 FR 8638, March 4, 1985; 54 FR 38151, Sept. 14, 1989; 68 FR 61137, Oct. 27, 2003; 72 FR 56928, Oct. 5, 2007]

SOURCE: 39 FR 1178, Jan. 4, 1974; 54 FR 38150, Sept. 14, 1989; 64 FR 71237, Dec. 20, 1999; 68 FR 58034, Oct. 8, 2003, 68 FR 61137, Oct. 27, 2003; 71 FR 45986, Aug. 10, 2006; 73 FR 59465, Oct. 8, 2008; 78 FR 35152, June 12, 2013; 78 FR 65864, Nov. 1, 2013, unless otherwise noted.

AUTHORITY: Pub.L. 65–186, 40 Stat. 755 (1918) (16 U.S.C. 703–712), as amended.

Current through Sept. 18, 2014; 79 FR 56215.

50 C.F.R. § 21.27

§ 21.27 Special purpose permits.

Permits may be issued for special purpose activities related to migratory birds, their parts, nests, or eggs, which are otherwise outside the scope of the standard form permits of this part. A special purpose permit for migratory bird related activities not otherwise provided for in this part may be issued to an applicant who submits a written application containing the general information and certification required by part 13 and makes a sufficient showing of benefit to the migratory bird resource, important research reasons, reasons of human concern for individual birds, or other compelling justification.

(a) Permit requirement. A special purpose permit is required before any person may lawfully take, salvage, otherwise acquire, transport, or possess migratory birds, their parts, nests, or eggs for any purpose not covered by the standard form permits of this part. In addition, a special purpose permit is required before any person may sell, purchase, or barter captive-bred, migratory game birds, other than waterfowl, that are marked in compliance with § 21.13(b) of this part.

(b) Application procedures. Submit application for special purpose permits to the appropriate Regional Director (Attention: Migratory bird permit office). You can find addresses for the Regional Directors in 50 CFR 2.2. Each application must contain the general information and certification required in § 13.12(a) of this subchapter, and the following additional information:

> **(1)** A detailed statement describing the project or activity which requires issuance of a permit, purpose of such project or activity, and a delineation of the area in which it will be conducted. (Copies of supporting documents, research proposals, and any necessary State permits should accompany the application);

(2) Numbers and species of migratory birds involved where same can reasonably be determined in advance; and

(3) Statement of disposition which will be made of migratory birds involved in the permit activity.

(c) Additional permit conditions. In addition to the general conditions set forth in part 13 of this subchapter B, special purpose permits shall be subject to the following conditions:

(1) Permittees shall maintain adequate records describing the conduct of the permitted activity, the numbers and species of migratory birds acquired and disposed of under the permit, and inventorying and identifying all migratory birds held on December 31 of each calendar year. Records shall be maintained at the address listed on the permit; shall be in, or reproducible in English; and shall be available for inspection by Service personnel during regular business hours. A permittee may be required by the conditions of the permit to file with the issuing office an annual report of operation. Annual reports, if required, shall be filed no later than January 31 of the calendar year following the year for which the report is required. Reports, if required, shall describe permitted activities, numbers and species of migratory birds acquired and disposed of, and shall inventory and describe all migratory birds possessed under the special purpose permit on December 31 of the reporting year.

(2) Permittees shall make such other reports as may be requested by the issuing officer.

(3) All live, captive-bred, migratory game birds possessed under authority of a valid special purpose permit shall be physically marked as defined in § 21.13(b) of this part.

(4) No captive-bred migratory game bird may be sold or bartered unless marked in accordance with § 21.13(b) of this part.

(5) No permittee may take, purchase, receive or otherwise acquire, sell, barter, transfer, or otherwise dispose of any captive-bred migratory game bird unless such permittee submits a Service form 3–186A (Migratory Bird Acquisition/Disposition Report), completed in accordance with the instructions on the form, to the issuing office within five (5) days of such transaction.

(6) No permittee, who is authorized to sell or barter migratory game birds pursuant to a permit issued under this section, may sell or barter such birds to any person unless that person is authorized to purchase and possess such migratory game birds under a permit issued pursuant to this part and part 13, or

as permitted by regulations in this part.

(d) Term of permit. A special purpose permit issued or renewed under this part expires on the date designated on the face of the permit unless amended or revoked, but the term of the permit shall not exceed three (3) years from the date of issuance or renewal.

Credits
[54 FR 38152, Sept. 14, 1989; 63 FR 52637, Oct. 1, 1998]

SOURCE: 39 FR 1178, Jan. 4, 1974; 54 FR 38150, Sept. 14, 1989; 64 FR 71237, Dec. 20, 1999; 68 FR 58034, Oct. 8, 2003, 68 FR 61137, Oct. 27, 2003; 71 FR 45986, Aug. 10, 2006; 73 FR 59465, Oct. 8, 2008; 78 FR 35152, June 12, 2013; 78 FR 65864, Nov. 1, 2013, unless otherwise noted.

AUTHORITY: Pub.L. 65–186, 40 Stat. 755 (1918) (16 U.S.C. 703–712), as amended.
Current through Sept. 18, 2014; 79 FR 56215.

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50 C.F.R. § 22.3

§ 22.3 Definitions.

Effective: November 10, 2009

In addition to the definitions contained in part 10 of this subchapter, and unless the context otherwise requires, in this part 22:

Advanced conservation practices means scientifically supportable measures that are approved by the Service and represent the best available techniques to reduce eagle disturbance and ongoing mortalities to a level where remaining take is unavoidable.

Area nesting population means the number of pairs of golden eagles known to have a resting attempt during the preceding 12 months within a 10–mile radius of a golden eagle nest.

Communal roost site means an area where eagles gather repeatedly in the course of a season and shelter overnight and sometimes during the day in the event of inclement weather.

Cumulative effects means the incremental environmental impact or effect of the proposed action, together with impacts of past, present, and reasonably foreseeable future actions.

Disturb means to agitate or bother a bald or golden eagle to a degree that causes, or is likely to cause, based on the best scientific information available, (1) injury to an eagle, (2) a decrease in its productivity, by substantially interfering with normal breeding, feeding, or sheltering behavior, or (3) nest abandonment, by substantially interfering with normal breeding, feeding, or sheltering behavior.

Eagle nest means any readily identifiable structure built, maintained, or used by bald eagles or golden eagles for the purpose of reproduction.

Export for the purpose of this part does not include the transportation of any dead bald or golden eagles, or their parts, nests, or dead eggs out of the United States when accompanied with a valid transportation permit.

Foraging area means an area where eagles regularly feed during one or more seasons.

Import for the purpose of this part does not include the transportation of any dead bald or golden eagles, or their parts, nests, or dead eggs into the United States when accompanied with a valid transportation permit.

Important eagle-use area means an eagle nest, foraging area, or communal roost site that eagles rely on for breeding, sheltering, or feeding, and the landscape features surrounding such nest, foraging area, or roost site that are essential for the continued viability of the site for breeding, feeding, or sheltering eagles.

Inactive nest means a bald eagle or golden eagle nest that is not currently being used by eagles as determined by the continuing absence of any adult, egg, or dependent young at the nest for at least 10 consecutive days immediately prior to, and including, at present. An inactive nest may become active again and remains protected under the Eagle Act.

Indirect effects means effects for which a proposed action is a cause, and which may occur later in time and/or be physically manifested beyond the initial impacts of the action, but are still reasonably likely to occur.

Maximum degree achievable means the standard at which any take that occurs is unavoidable despite implementation of advanced conservation practices.

Necessary to ensure public health and safety means required to maintain society's well-being in matters of health and safety.

Nesting attempt means any activity by golden eagles involving egg laying and incubation as determined by the presence of an egg attended by an adult, an adult in incubation posture, or other evidence indicating recent use of a golden eagle nest for incubation of eggs or rearing of young.

Person means an individual, corporation, partnership, trust, association, or any other private entity, or any officer, employee, agent, department, or instrumentality of any State or political subdivision of a State.

Practicable means capable of being done after taking into consideration, relative to the magnitude of the impacts to eagles, the following three things: the cost of remedy compared to proponent resources; existing technology; and logistics in light of overall project purposes.

Programmatic permit means a permit that authorizes programmatic take. A programmatic permit can cover other take in addition to programmatic take.

Programmatic take means take that is recurring, is not caused solely by indirect effects, and that occurs over the long term or in a location or locations that cannot be specifically identified.

Resource development or recovery includes, but is not limited to, mining, timbering, extracting oil, natural gas and geothermal energy, construction of roads, dams, reservoirs, power plants, power transmission lines, and pipelines, as well as facilities and access routes essential to these operations, and reclamation following any of these operations.

Safety emergency means a situation that necessitates immediate action to alleviate a threat of bodily harm to humans or eagles.

Take means pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, destroy, molest, or disturb.

Territory means an area that contains, or historically contained, one or more nests within the home range of a mated pair of eagles.

Transportation into or out of the United States for the purpose of this part means that the permitted item or items transported into or out of the United States do not change ownership at any time, they are not transferred from one person to another in the pursuit of gain or profit, and they are transported into or out of the United States for Indian religious purposes, or for scientific or exhibition purposes under the conditions and during the time period specified on a transportation permit for the items.

Credits

[48 FR 57300, Dec. 29, 1983; 64 FR 50472, Sept. 17, 1999; 72 FR 31139, June 5,

2007; 74 FR 46876, Sept. 11, 2009]

SOURCE: 39 FR 1183, Jan. 4, 1974; 64 FR 50472, Sept. 17, 1999; 73 FR 29083, May 20, 2008, unless otherwise noted.

AUTHORITY: 16 U.S.C. 668–668d; 16 U.S.C. 703–712; 16 U.S.C. 1531–1544.

Current through Sept. 18, 2014; 79 FR 56215.

Federal Register
Vol. 66, No. 11
Wednesday, January 17, 2001

Presidential Documents

Title 3—

The President

Executive Order 13186 of January 10, 2001

Responsibilities of Federal Agencies To Protect Migratory Birds

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in furtherance of the purposes of the migratory bird conventions, the Migratory Bird Treaty Act (16 U.S.C. 703–711), the Bald and Golden Eagle Protection Acts (16 U.S.C. 668–668d), the Fish and Wildlife Coordination Act (16 U.S.C. 661–666c), the Endangered Species Act of 1973 (16 U.S.C. 1531–1544), the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4347), and other pertinent statutes, it is hereby ordered as follows:

Section 1. *Policy.* Migratory birds are of great ecological and economic value to this country and to other countries. They contribute to biological diversity and bring tremendous enjoyment to millions of Americans who study, watch, feed, or hunt these birds throughout the United States and other countries. The United States has recognized the critical importance of this shared resource by ratifying international, bilateral conventions for the conservation of migratory birds. Such conventions include the Convention for the Protection of Migratory Birds with Great Britain on behalf of Canada 1916, the Convention for the Protection of Migratory Birds and Game Mammals-Mexico 1936, the Convention for the Protection of Birds and Their Environment- Japan 1972, and the Convention for the Conservation of Migratory Birds and Their Environment-Union of Soviet Socialist Republics 1978.

These migratory bird conventions impose substantive obligations on the United States for the conservation of migratory birds and their habitats, and through the Migratory Bird Treaty Act (Act), the United States has implemented these migratory bird conventions with respect to the United States. This Executive Order directs executive departments and agencies to take certain actions to further implement the Act.

Sec. 2. *Definitions.* For purposes of this order:

(a) "Take" means take as defined in 50 C.F.R. 10.12, and includes both "intentional" and "unintentional" take.

(b) "Intentional take" means take that is the purpose of the activity in question.

(c) "Unintentional take" means take that results from, but is not the purpose of, the activity in question.

(d) "Migratory bird" means any bird listed in 50 C.F.R. 10.13.

(e) "Migratory bird resources" means migratory birds and the habitats upon which they depend.

(f) "Migratory bird convention" means, collectively, the bilateral conventions (with Great Britain/Canada, Mexico, Japan, and Russia) for the conservation of migratory bird resources.

(g) "Federal agency" means an executive department or agency, but does not include independent establishments as defined by 5 U.S.C. 104.

(h) "Action" means a program, activity, project, official policy (such as a rule or regulation), or formal plan directly carried out by a Federal agency. Each Federal agency will further define what the term "action" means with respect to its own authorities and what programs should be included

in the agency-specific Memoranda of Understanding required by this order. Actions delegated to or assumed by nonfederal entities, or carried out by nonfederal entities with Federal assistance, are not subject to this order. Such actions, however, continue to be subject to the Migratory Bird Treaty Act.

(i) "Species of concern" refers to those species listed in the periodic report "Migratory Nongame Birds of Management Concern in the United States," priority migratory bird species as documented by established plans (such as Bird Conservation Regions in the North American Bird Conservation Initiative or Partners in Flight physiographic areas), and those species listed in 50 C.F.R. 17.11.

Sec. 3. *Federal Agency Responsibilities.* (a) Each Federal agency taking actions that have, or are likely to have, a measurable negative effect on migratory bird populations is directed to develop and implement, within 2 years, a Memorandum of Understanding (MOU) with the Fish and Wildlife Service (Service) that shall promote the conservation of migratory bird populations.

(b) In coordination with affected Federal agencies, the Service shall develop a schedule for completion of the MOUs within 180 days of the date of this order. The schedule shall give priority to completing the MOUs with agencies having the most substantive impacts on migratory birds.

(c) Each MOU shall establish protocols for implementation of the MOU and for reporting accomplishments. These protocols may be incorporated into existing actions; however, the MOU shall recognize that the agency may not be able to implement some elements of the MOU until such time as the agency has successfully included them in each agency's formal planning processes (such as revision of agency land management plans, land use compatibility guidelines, integrated resource management plans, and fishery management plans), including public participation and NEPA analysis, as appropriate. This order and the MOUs to be developed by the agencies are intended to be implemented when new actions or renewal of contracts, permits, delegations, or other third party agreements are initiated as well as during the initiation of new, or revisions to, land management plans.

(d) Each MOU shall include an elevation process to resolve any dispute between the signatory agencies regarding a particular practice or activity.

(e) Pursuant to its MOU, each agency shall, to the extent permitted by law and subject to the availability of appropriations and within Administration budgetary limits, and in harmony with agency missions:

(1) support the conservation intent of the migratory bird conventions by integrating bird conservation principles, measures, and practices into agency activities and by avoiding or minimizing, to the extent practicable, adverse impacts on migratory bird resources when conducting agency actions;

(2) restore and enhance the habitat of migratory birds, as practicable;

(3) prevent or abate the pollution or detrimental alteration of the environment for the benefit of migratory birds, as practicable;

(4) design migratory bird habitat and population conservation principles, measures, and practices, into agency plans and planning processes (natural resource, land management, and environmental quality planning, including, but not limited to, forest and rangeland planning, coastal management planning, watershed planning, etc.) as practicable, and coordinate with other agencies and nonfederal partners in planning efforts;

(5) within established authorities and in conjunction with the adoption, amendment, or revision of agency management plans and guidance, ensure that agency plans and actions promote programs and recommendations of comprehensive migratory bird planning efforts such as Partners-in-Flight, U.S. National Shorebird Plan, North American Waterfowl Management Plan, North American Colonial Waterbird Plan, and other planning efforts, as well as guidance from other sources, including the Food and Agricultural

Organization's International Plan of Action for Reducing Incidental Catch of Seabirds in Longline Fisheries;

(6) ensure that environmental analyses of Federal actions required by the NEPA or other established environmental review processes evaluate the effects of actions and agency plans on migratory birds, with emphasis on species of concern;

(7) provide notice to the Service in advance of conducting an action that is intended to take migratory birds, or annually report to the Service on the number of individuals of each species of migratory birds intentionally taken during the conduct of any agency action, including but not limited to banding or marking, scientific collecting, taxidermy, and depredation control;

(8) minimize the intentional take of species of concern by: (i) delineating standards and procedures for such take; and (ii) developing procedures for the review and evaluation of take actions. With respect to intentional take, the MOU shall be consistent with the appropriate sections of 50 C.F.R. parts 10, 21, and 22;

(9) identify where unintentional take reasonably attributable to agency actions is having, or is likely to have, a measurable negative effect on migratory bird populations, focusing first on species of concern, priority habitats, and key risk factors. With respect to those actions so identified, the agency shall develop and use principles, standards, and practices that will lessen the amount of unintentional take, developing any such conservation efforts in cooperation with the Service. These principles, standards, and practices shall be regularly evaluated and revised to ensure that they are effective in lessening the detrimental effect of agency actions on migratory bird populations. The agency also shall inventory and monitor bird habitat and populations within the agency's capabilities and authorities to the extent feasible to facilitate decisions about the need for, and effectiveness of, conservation efforts;

(10) within the scope of its statutorily-designated authorities, control the import, export, and establishment in the wild of live exotic animals and plants that may be harmful to migratory bird resources;

(11) promote research and information exchange related to the conservation of migratory bird resources, including coordinated inventorying and monitoring and the collection and assessment of information on environmental contaminants and other physical or biological stressors having potential relevance to migratory bird conservation. Where such information is collected in the course of agency actions or supported through Federal financial assistance, reasonable efforts shall be made to share such information with the Service, the Biological Resources Division of the U.S. Geological Survey, and other appropriate repositories of such data (e.g, the Cornell Laboratory of Ornithology);

(12) provide training and information to appropriate employees on methods and means of avoiding or minimizing the take of migratory birds and conserving and restoring migratory bird habitat;

(13) promote migratory bird conservation in international activities and with other countries and international partners, in consultation with the Department of State, as appropriate or relevant to the agency's authorities;

(14) recognize and promote economic and recreational values of birds, as appropriate; and

(15) develop partnerships with non-Federal entities to further bird conservation.

(f) Notwithstanding the requirement to finalize an MOU within 2 years, each agency is encouraged to immediately begin implementing the conservation measures set forth above in subparagraphs (1) through (15) of this section, as appropriate and practicable.

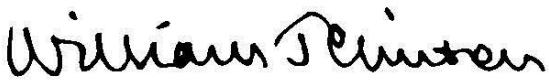
(g) Each agency shall advise the public of the availability of its MOU through a notice published in the **Federal Register**.

Sec. 4. *Council for the Conservation of Migratory Birds.* (a) The Secretary of Interior shall establish an interagency Council for the Conservation of Migratory Birds (Council) to oversee the implementation of this order. The Council's duties shall include the following: (1) sharing the latest resource information to assist in the conservation and management of migratory birds; (2) developing an annual report of accomplishments and recommendations related to this order; (3) fostering partnerships to further the goals of this order; and (4) selecting an annual recipient of a Presidential Migratory Bird Federal Stewardship Award for contributions to the protection of migratory birds.

(b) The Council shall include representation, at the bureau director/administrator level, from the Departments of the Interior, State, Commerce, Agriculture, Transportation, Energy, Defense, and the Environmental Protection Agency and from such other agencies as appropriate.

Sec. 5. *Application and Judicial Review.* (a) This order and the MOU to be developed by the agencies do not require changes to current contracts, permits, or other third party agreements.

(b) This order is intended only to improve the internal management of the executive branch and does not create any right or benefit, substantive or procedural, separately enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.



THE WHITE HOUSE,
January 10, 2001.

[FR Doc. 01–1387
Filed 1–12–01; 8:45 am]
Billing code 3195–01–P

Federal Register / Vol. 66, No. 99 / Tuesday, May 22, 2001 / Presidential Documents 28357

Presidential Documents

Executive Order 13212 of May 18, 2001

Actions To Expedite Energy-Related Projects

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to take additional steps to expedite the increased supply and availability of energy to our Nation, it is hereby ordered as follows:

Section 1. *Policy.* The increased production and transmission of energy in a safe and environmentally sound manner is essential to the well-being of the American people. In general, it is the policy of this Administration that executive departments and agencies (agencies) shall take appropriate actions, to the extent consistent with applicable law, to expedite projects that will increase the production, transmission, or conservation of energy.

Sec. 2. *Actions to Expedite Energy-Related Projects.* For energy-related projects, agencies shall expedite their review of permits or take other actions as necessary to accelerate the completion of such projects, while maintaining safety, public health, and environmental protections. The agencies shall take such actions to the extent permitted by law and regulation, and where appropriate.

Sec. 3. *Interagency Task Force.* There is established an interagency task force (Task Force) to monitor and assist the agencies in their efforts to expedite their review of permits or similar actions, as necessary, to accelerate the completion of energy-related projects, increase energy production and conservation, and improve transmission of energy. The Task Force also shall monitor and assist agencies in setting up appropriate mechanisms to coordinate Federal, State, tribal, and local permitting in geographic areas where increased permitting activity is expected. The Task Force shall be composed of representatives from the Departments of State, the Treasury, Defense, Agriculture, Housing and Urban Development, Justice, Commerce, Transportation, the Interior, Labor, Education, Health and Human Services, Energy, Veterans Affairs, the Environmental Protection Agency, Central Intelligence Agency, General Services Administration, Office of Management and Budget, Council of Economic Advisers, Domestic Policy Council, National Economic Council, and such other representatives as may be determined by the Chairman of the Council on Environmental Quality. The Task Force shall be chaired by the Chairman of the Council on Environmental Quality and housed at the Department of Energy for administrative purposes.

Sec. 4. *Judicial Review.* Nothing in this order shall affect any otherwise available judicial review of agency action. This order is intended only to improve the internal management of the Federal Government and does not create any right or benefit, substantive or procedural, enforceable at law

or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

THE WHITE HOUSE,
May 18, 2001.

[FR Doc. 01–13117
Filed 5–21–01; 10:19 am]
Billing code 3195–01–P

subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, or impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104–4). Nor does it require any special considerations under Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994); or OMB review or any Agency action under Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note). Since tolerances and exemptions that are established on the basis of a petition under section 408(d) of FFDCA, such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply. In addition, the Agency has determined that this action will not have a substantial direct effect on States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, entitled *Federalism*(64 FR 43255, August 10, 1999). Executive Order 13132 requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' This final rule directly regulates growers, food processors, food handlers, and food retailers, not States. This action does not alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of section 408(n)(4) of FFDCA. For these same reasons, the Agency has determined that this rule does not have any ''tribal implications'' as described in Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 6, 2000). Executive Order 13175, requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' ''Policies that have tribal implications'' is defined in the Executive order to include regulations that have ''substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and the Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.'' This rule will not have substantial direct effects on tribal governments, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified in Executive Order 13175. Thus, Executive Order 13175 does not apply to this rule.

VII. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of this final rule in the **Federal Register**. This final rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: February 16, 2007.

James Jones,

Director, Office of Pesticide Programs.

■ Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. Section 180.625 is added to read as follows:

§180.625 Orthosulfamuron; tolerances for residues.

(a) *General.* Tolerances are established for residues of orthosulfamuron 1-(4,6-dimethoxypyrimidin-2-yl)-3-[2-(dimethylcarbamoyl)- phenylsulfamoyl] urea) *per se* in or on the following commodities:

Commodity	Parts per million
Rice, grain	0.05
Rice, straw	0.05

(b) *Section 18 emergency exemptions.* [Reserved]

(c) *Tolerances with regional registrations.* [Reserved]

(d) *Indirect and inadvertant residues.* [Reserved]

[FR Doc. 07–898 Filed 2–23–07; 2:13 pm]

BILLING CODE 6560–50–S

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 21

RIN 1018–AI92

Migratory Bird Permits; Take of Migratory Birds by the Armed Forces

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: The Migratory Bird Treaty Act (MBTA) prohibits the taking, killing, or possessing of migratory birds unless permitted by regulations promulgated by the Secretary of the Interior. While some courts have held that the MBTA does not apply to Federal agencies, in July 2000, the United States Court of Appeals for the District of Columbia Circuit ruled that the prohibitions of the MBTA do apply to Federal agencies, and that a Federal agency's taking and killing of migratory birds without a permit violated the MBTA. On March 13, 2002, the United States District Court for the District of Columbia ruled that military training exercises of the Department of the Navy that incidentally take migratory birds without a permit violate the MBTA.

On December 2, 2002, the President signed the 2003 National Defense Authorization Act (Authorization Act). Section 315 of the Authorization Act provides that, not later than one year after its enactment, the Secretary of the Interior (Secretary) shall exercise his/her authority under Section 704(a) of the MBTA to prescribe regulations to exempt the Armed Forces for the

incidental taking of migratory birds during military readiness activities authorized by the Secretary of Defense or the Secretary of the military department concerned. The Authorization Act further requires the Secretary to promulgate such regulations with the concurrence of the Secretary of Defense. The Secretary has delegated this task to the U.S. Fish and Wildlife Service (Service).

In passing the Authorization Act, Congress itself determined that allowing incidental take of migratory birds as a result of military readiness activities is consistent with the MBTA and the treaties. With this language, Congress clearly expressed its intention that the Armed Forces give appropriate consideration to the protection of migratory birds when planning and executing military readiness activities, but not at the expense of diminishing the effectiveness of such activities. This rule has been developed by the Service in coordination and cooperation with the Department of Defense and the Secretary of Defense concurs with the requirements herein.

Current regulations authorize permits for take of migratory birds for activities such as scientific research, education, and depredation control (50 CFR parts 13, 21 and 22). However, these regulations do not expressly address the issuance of permits for incidental take. As directed by Section 315 of the Authorization Act, this rule authorizes such take, with limitations, that result from military readiness activities of the Armed Forces. If any of the Armed Forces determine that a proposed or an ongoing military readiness activity may result in a significant adverse effect on a population of a migratory bird species, then they must confer and cooperate with the Service to develop appropriate and reasonable conservation measures to minimize or mitigate identified significant adverse effects. The Secretary of the Interior, or his/her designee, will retain the power to withdraw or suspend the authorization for particular activities in appropriate circumstances.

DATES: This rule is effective March 30, 2007.

ADDRESSES: The final rule and other related documents can be downloaded at *http://migratorybirds.fws.gov*. The complete file for this rule is available for inspection, by appointment, during normal business hours at the Division of Migratory Bird Management, U.S. Fish and Wildlife Service, 4401 North Fairfax Drive, Arlington, Virginia 22203, telephone 703–358–1714.

FOR FURTHER INFORMATION CONTACT: Robert Blohm, Chief, Division of Migratory Bird Management, U.S. Fish and Wildlife Service, telephone 703–358–1714.

SUPPLEMENTARY INFORMATION:

Background

Migratory birds are of great ecological and economic value and are an important international resource. They are a key ecological component of the environment, and they also provide immense enjoyment to millions of Americans who study, watch, feed, or hunt them. Recognizing their importance, the United States has been an active participant in the internationally coordinated management and conservation of migratory birds. The Migratory Bird Treaty Act (16 U.S.C. 703–712) (MBTA) is the primary legislation in the United States established to conserve migratory birds. The U.S. Fish and Wildlife Service (Service), is the Federal agency within the United States responsible for administering and enforcing the statute.

The MBTA, originally passed in 1918, implements the United States' commitment to four bilateral treaties, or conventions, for the protection of a shared migratory bird resource. The original treaty upon which the MBTA was based was the Convention for the Protection of Migratory Birds, signed with Great Britain in 1916 on behalf of Canada for the protection "of the many species of birds that traverse certain parts of the United States and Canada in their annual migration." The MBTA was subsequently amended after treaties were signed with Mexico (1936, amended 1972, 1997), Japan (1972), and Russia (1976), and the amendment of the treaty with Canada (1995).

While the terms of the treaties vary in their particulars, each treaty and subsequent amendments impose substantive obligations on the United States for the conservation of migratory birds and their habitats. For example, the Canada treaty, as amended, includes the following conservation principles:

- To manage migratory birds internationally;
- To ensure a variety of sustainable uses;
- To sustain healthy migratory bird populations for harvesting needs;
- To provide for, maintain, and protect habitat necessary for the conservation of migratory birds; and
- To restore depleted populations of migratory birds.

The Canada and Mexico treaties protect selected families of birds, while the Japan and Russia treaties protect selected species of birds. All four treaties provide for closed seasons for hunting game birds. The list of the species protected by the MBTA appears in title 50, section 10.13, of the Code of Federal Regulations (50 CFR 10.13).

Under the MBTA, it is unlawful "by any means or in any manner, to pursue, hunt, take, capture, [or] kill" any migratory birds except as permitted by regulation (16 U.S.C. 703). The Secretary is authorized and directed, from time to time, having due regard to the zones of temperature and to the distribution, abundance, economic value, breeding habits, and times and lines of migratory flight of such birds to adopt suitable regulations permitting and governing the take of migratory birds when determined to be compatible with the terms of the treaties (16 U.S.C. 704). Furthermore, the regulations at 50 CFR 21.11 prohibit the take of migratory birds except under a valid permit or as permitted in the implementing regulations. The Service has defined "take" in regulation to mean to "pursue, hunt, shoot, wound, kill, trap, capture, or collect" or to attempt these activities (50 CFR 10.12).

On July 18, 2000, the United States Court of Appeals for the District of Columbia ruled in *Humane Society* v. *Glickman,* 217 F.3d 882 (D.C. Cir. 2000), that Federal agencies are subject to the take prohibitions of the MBTA. The United States had previously taken the position, and two other courts of appeals held or suggested, that the MBTA does not by its terms apply to Federal agencies. See *Sierra Club* v. *Martin,* 110 F.3d 1551, 1555 (11th Cir. 1997); *Newton County Wildlife Ass'n* v. *U.S. Forest Service,* 113 F.3d 110, 115 (8th Cir. 1997). Subsequently, on December 20, 2000, we issued Director's Order 131 to clarify the Service's position that, pursuant to *Glickman,* Federal agencies are subject to the permit requirements of the Service's existing regulations.

Because the MBTA is a criminal statute and does not provide for citizen-suit enforcement, a private party who violates the MBTA is subject to investigation by the Service and/or prosecution by the Department of Justice. However, the Administrative Procedure Act (5 U.S.C. 551 et seq.) (APA) allows private parties to file suit to prevent a Federal agency from taking "final agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" (5 U.S.C. 706(2)(A)). If the prohibitions of the MBTA apply to Federal agencies, private parties could seek to enjoin Federal actions that take migratory birds, unless such take is authorized pursuant to regulations developed in

accordance with 16 U.S.C. 704, even when such Federal actions are necessary to fulfill Government responsibilities and even when the action poses no threat to the species at issue.

In *Center for Biological Diversity* v. *Pirie,* a private party obtained an injunction prohibiting live-fire military training exercises of the Department of the Navy that had the effect of killing some migratory birds on the island of Farallon de Medinilla (FDM) in the Pacific Ocean. On March 13, 2002, the United States District Court for the District of Columbia ruled that the Navy activities at FDM resulting in a take of migratory birds without a permit from the Service violated the MBTA and the APA (191 F. Supp. 2d. 161 and 201 F. Supp. 2d 113). On May 1, 2002, after hearing argument on the issue of remedy, the Court entered a preliminary injunction ordering the Navy to apply for a permit from the Service to cover the activities, and preliminarily enjoined the training activities for 30 days. The United States Court of Appeals for the District of Columbia Circuit stayed the District Court's preliminary injunction pending appeal. The preliminary injunction, and associated stay, expired on May 31, 2002. A permanent injunction was issued by the District Court on June 3, 2002. The Circuit Court also stayed this injunction pending appeal on June 5, 2002. On December 2, 2002, the President signed the Authorization Act creating an interim period during which the prohibitions on incidental take of migratory birds would not apply to military readiness activities. During the interim period, Congress also directed the Secretary of the Interior to develop regulations that exempt the Armed Forces from incidental take during authorized military readiness activities. The Department of Defense must concur with the regulations before they take effect. The Circuit Court subsequently dismissed the *Pirie* case as moot. In light of the *Glickman* and *Pirie* decisions, the authorization that this rule provides is essential to preserving the Service's role in determining what military readiness activities, if any, create an unacceptable risk to migratory bird resources and therefore must be modified or curtailed.

The Armed Forces are responsible for protecting the United States from external threats. To provide for national security, they engage in military readiness activities. ''Military readiness activity'' is defined in the Authorization Act to include all training and operations of the Armed Forces that relate to combat, and the adequate and realistic testing of military equipment, vehicles, weapons, and sensors for proper operation and suitability for combat use. It includes activities carried out by contractors, when such contractors are performing a military readiness activity in association with the Armed Forces, including training troops on the operation of a new weapons system or testing the interoperability of new equipment with existing weapons systems. Military readiness does not include (a) the routine operation of installation operating support functions, such as: administrative offices; military exchanges; commissaries; water treatment facilities; storage facilities; schools; housing; motor pools; laundries; morale, welfare, and recreation activities; shops; and mess halls, (b) the operation of industrial activities, or (c) the construction or demolition of facilities listed above.

Section 315 of the 2003 National Defense Authorization Act (Pub. L. 107–314, 116 Stat. 2458, Dec. 2, 2002, *reprinted in* 16 U.S.C. 703 note) (hereinafter ''Authorization Act'') requires the Secretary of Defense, in consultation with the Secretary, to identify ways to minimize, mitigate, and monitor take of migratory birds during military readiness activities and requires the Secretary to prescribe, with the concurrence of the Secretary of Defense, a regulation that exempts military readiness activities from the MBTA's prohibitions against take of migratory birds. With the passage of the Authorization Act, Congress determined that such regulations are consistent with the MBTA and the underlying treaties by requiring the Secretary to promulgate such regulations. Furthermore, Congress clearly expressed its intention that the Armed Forces give appropriate consideration to the protection of migratory birds when planning and executing military readiness activities, but not at the expense of diminishing the effectiveness of such activities. Any diminishment in effectiveness could impair the ability of the Armed Forces to fulfill their national security mission. Diminishment could occur when military training or testing is modified in ways that do not allow the full range of training methods to be explored.

This rule authorizes the Armed Forces to take migratory birds incidental to military readiness activities, subject to certain limitations and subject to withdrawal of the authorization to ensure consistency with the provisions of the migratory bird treaties. The authorization provided by this rule is necessary to ensure that the work of the Armed Forces in meeting their statutory responsibilities can go forward. This rule is also appropriate and necessary to ensure compliance with the treaties and to protect a vital resource in accordance with the Secretary's obligations under Section 704 of the MBTA as well as under Section 315 of the Authorization Act. This rule will continue to ensure conservation of migratory birds as the authorization it provides is dependent upon the Armed Forces conferring and cooperating with the Service to develop and implement conservation measures to minimize or mitigate significant adverse effects to migratory birds. This rule has been developed by the Service in coordination and cooperation with the Department of Defense, and the Secretary of Defense concurs with the requirements herein.

Executive Order 13186

Migratory bird conservation relative to activities of the Department of Defense and the Coast Guard other than military readiness activities are addressed separately in Memoranda of Understanding (MOUs) developed in accordance with Executive Order 13186, Responsibilities of Federal Agencies to Protect Migratory Birds, signed January 10, 2001. The MOU with the Department of Defense was published in the **Federal Register** August 30, 2006 (Volume 71, Number 168). Upon completion of the MOUs with additional Federal agencies, and in keeping with the intent of the Executive Order for Federal agencies to promote the conservation of migratory bird populations, the Service may issue incidental take authorization to address specific actions identified in the MOUs.

Responses to Public Comment

On June 2, 2004, we published in the **Federal Register** (69 FR 31074) a proposed rule to authorize the take of migratory birds, with limitations, that result from Department of Defense military readiness activities. We solicited public comment on the proposed rule for 60 days ending on August 2, 2004.

By this date, we received 573 comments in response to the proposed rule; 24 were from identified organizations or agencies. The following text discusses the substantive comments received and provides our response to those comments. Additionally, it provides an explanation of significant changes from the proposed rule. We do not specifically address the comments that simply opposed the rule unless they included recommendations for revisions. Comments are organized by topic.

To more closely track the language in the Authorization Act and to clarify that the rule applies to the incidental taking

of a migratory bird by a member of the Armed Forces during a military readiness activity, we have replaced the ''Department of Defense'' with ''Armed Forces,'' where applicable.

Violation of the Migratory Bird Treaty Act and the Four Migratory Bird Treaties

Comment: The statement that the rule allows take only in ''narrow instances'' of military readiness activities goes against the spirit and letter of the MBTA, which forbids the take of migratory birds and thus abrogates the MBTA.

Service Response: The MBTA regulates, rather than absolutely forbids, take of migratory birds. The Secretary is authorized and directed, from time to time, having due regard to the zones of temperature and to the distribution, abundance, economic value, breeding habits, and times and lines of migratory flight of such birds to adopt suitable regulations permitting and governing the take of migratory birds when determined to be compatible with the terms of the treaties (16 U.S.C. 704). In the Authorization Act, Congress directed the Secretary to utilize his/her authority to permit incidental take for military readiness activities. Furthermore, Congress itself by passing the Authorization Act determined that allowing incidental take of migratory birds as a result of military readiness activities is consistent with the MBTA and the treaties. Thus, this rule does not abrogate the MBTA.

Comment: Citing broad take authorization language in the current text of the treaty with Canada, concern was expressed regarding the analysis in the proposed rule that the treaty with Canada has a narrower focus than the treaties with Japan and Russia.

Service Response: We agree with the commenter that the Canada treaty, as amended by the 1995 Protocol, now includes broad exception language similar to that in the Japan and Russia treaties. We have expanded upon and added additional clarification in the section ''Is the rule consistent with the MBTA?'' discussing compatibility of this rule with the MBTA and the four treaties.

Authorization of Take Under § 21.15(a)

Comment: The Department of Defense should avoid take of migratory birds by avoiding areas inhabited by migratory birds including restricting construction and active use of airfields in the vicinity of wildlife refuges, prohibiting military operations over wildlife refuges or sensitive migratory bird habitat areas, and avoiding areas where migratory birds nest, breed, rest, and feed.

Service Response: Military lands often support a diversity of habitats and their associated species, including migratory birds; thus it would be difficult for the Armed Forces to completely avoid areas inhabited by birds or other wildlife species. When determining the location for a new installation, such as an airfield, the applicable Armed Force must prepare environmental documentation in accordance with the National Environmental Policy Act (42 U.S.C. 4321 et seq.) (NEPA) that gives due consideration to the impacts of the proposal on the environment, including migratory birds. With respect to wildlife refuges, Congress in the 2000 amendments to the National Wildlife Refuge System Administration Act noted specifically that the provisions of the Act relating to determinations of the compatibility of a use would not apply to overflights above a refuge (Pub. L. 106–580; December 29, 2000). Nevertheless, as noted in this rule, the Armed Forces have made significant investments in acquiring data on the distribution of bird populations and identification of migration routes, as well as the use of military lands for breeding, stopover sites, and over-wintering areas, to protect and conserve these areas. The Armed Forces actively utilize radar ornithology to plan new construction and testing and training operations in areas and times of least constraints. The Armed Forces also have a strong interest in avoiding bird/aircraft conflicts and use this type of information to assist range planners in selecting training times when bird activity is low.

In accordance with the Sikes Act (included in Pub. L. 105–85), the Department of Defense must provide for the conservation and rehabilitation of natural resources on military installations. Thus, potential conflicts with natural resources, including migratory birds, should be addressed in Integrated Resource Management Plans (INRMP), where applicable. Although the Sikes Act does not apply to the Coast Guard, they are also starting to encourage applicable bases to develop INRMPs.

Comment: Provision should be included that the Department of Defense cannot ignore scientific evidence and proceed on a course of action where take is inevitable.

Service Response: None of the four treaties strictly prohibit the taking of migratory birds without exception. Furthermore, the Service acknowledges that regardless of the entity implementing an activity, some birds may be killed even if all reasonable conservation measures are implemented. With the passage of the Authorization Act, Congress directed the Secretary to authorize incidental take by the Armed Forces. Thus, they will be allowed to take migratory birds as a result of military readiness activities, consistent with this rule. This rule, however, will continue to ensure conservation of migratory birds as it requires the Armed Forces to confer and cooperate with the Service to develop and implement conservation measures to minimize or mitigate adverse effects to migratory birds when scientific evidence indicates an action may result in a significant adverse effect on a population of a migratory bird species.

As stated in the Principles and Standards section of this rule, the Armed Forces will use the best scientific data available to assess through the NEPA process, or other environmental requirements, the expected impact of proposed or ongoing military readiness activities on migratory bird species likely to occur in the action areas.

Comment: The Department of Defense should not have the sole authority/responsibility to determine whether the survival of the species is threatened, and only then initiate consultation with the Service.

Service Response: We assume that, despite the commenter's use of the term ''consultation'', this is a reference to the requirement under § 21.15(a)(1) to ''confer and cooperate,'' and not to the requirement of ''consultation'' under section 7 of the Endangered Species Act (ESA), 16 U.S.C. 1536. Section 21.15(a)(1) does condition the requirement to ''confer and cooperate'' on a determination by the Armed Forces that a military readiness activity may result in a significant adverse effect on a population of a migratory birds species. However, we expect that the Armed Forces will notify the Service of any activity that even arguably triggers this requirement. In addition, putting aside the requirements of this regulation, the Armed Forces would, as a matter of course share such information in a number of circumstances.

First, NEPA, and its regulations at 40 CFR 1500–1508, require that Federal agencies prepare environmental impact statements for ''major Federal actions significantly affecting the quality of the human environment.'' These statements must include a detailed analysis of the impacts of an agency's proposed action and any reasonable alternatives to that proposal. NEPA also requires the responsible Federal official to ''consult

with and obtain comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved.''

Second, the Sikes Act (16 U.S.C. 670a-670o), as amended in 1997, requires the development of INRMPs by the Department of Defense that reflect the mutual agreement of the Department of Defense, the Service, and the appropriate State wildlife agency. The Sikes Act has provided the Service, as well as the public, with an opportunity to review natural resources management on military lands, including any major conflicts with migratory birds or their habitat. NEPA documentation is also completed on new or revised INRMPs. Department of Defense policy requires installations to review INRMPs annually in cooperation with the Service and State resource agencies. Annual reviews facilitate adaptive management by providing an opportunity for the parties to review the goals and objectives of the plans and to evaluate any new scientific information that indicates the potential for adverse impacts on population of a migratory bird species from ongoing (or new) military readiness activities.

Third, if the military readiness activity may affect a species listed under the ESA, the Armed Forces would communicate with the Service to determine whether formal consultation is necessary under section 7 of the ESA.

If, as a result these formal processes or by any other mechanism the Service obtains information which raise concerns about the impacts of military readiness on migratory bird populations, the Service can request additional information from the Armed Services. Under section 21.15(b)(2)(iii), failure to provide such information can form the basis for withdrawal of the authorization to take migratory birds. In any case, based on this information, the Service can, under appropriate circumstances, suspend or withdraw the authorization even if the Armed Forces do not themselves determine that a military readiness activity may result in a significant adverse effect on a population of a migratory bird species.

Comment: The threshold for requiring the Department of Defense to confer with the Service when a ''significant adverse effect on the sustainability of a population of migratory bird species of concern'' is too high. This could allow significant damage to resources that could be avoided with criteria that are more stringent.

Service Response: We agree. We have modified the threshold to ''significant adverse effect on a population of migratory bird species.'' The definitions of ''population'' and ''significant adverse effect'' have also been modified accordingly in this rule.

Comment: The provision that the rule must be promulgated with the concurrence of the Secretary of Defense requires the regulator to get permission of the regulated agency.

Service Response: The 2003 Defense Authorization Act required that the regulation be developed with the concurrence of the Secretary of Defense. However, as indicated in § 21.15(b), we have the authority to withdraw authorization if it is determined that a proposed military readiness activity may be in violation of any of the migratory bird treaties or otherwise is not being implemented in accordance with this regulation.

Comment: Encourage more emphasis on upfront planning and evaluation of minimum-impact alternatives to foster more opportunities to avoid or mitigate impacts.

Service Response: As stated in this rule, the Department of Defense currently incorporates a variety of conservation measures into their INRMP documents to address migratory bird conservation. Additional measures will be developed in the future with all the Armed Forces in coordination with the Service and implemented where necessary to avoid, minimize, or mitigate significant adverse effects on migratory bird populations. This rule also indicates the Armed Forces shall engage in early planning and scoping and involve agencies with special expertise in the matters related to the potential impacts of a proposed action.

Comment: The proposed rule grants the Department of Defense greater authority to take and kill migratory birds than authorized in the Defense Authorization Act, which is the only statutory authority for the proposed rule and requires that the Department of Defense minimize and mitigate impacts to migratory birds.

Service Response: We do not agree that the rule provides greater authority to take birds than authorized in the Defense Authorization Act. What this rule does is provide clarity regarding the processes the Armed Forces are required to initiate to minimize and mitigate adverse impacts of authorized military readiness activities on migratory birds while ensuring compliance with the migratory bird treaties and meeting the Secretary's obligations under Section 704 of the MBTA.

Comment: The rule should require mitigation options be formally assessed and evaluated prior to undertaking the activity and that mitigation be commensurate with the extent of the impact.

Service Response: We agree that mitigation can be very complex both from the perspective of replicating all the ecosystem components that a species needs to successfully survive and reproduce regardless of whether mitigation is ex-situ or in-situ.

The Service's Mitigation Policy (Fish and Wildlife Service Manual, 501 FW 2) is designed to assist the Service in the development of consistent and effective recommendations to protect and conserve valuable fish and wildlife resources to help ensure that mitigation be commensurate with the extent of the impact.

In addition, as indicated in this rule, the Armed Forces will confer and cooperate with the Service to develop and implement conservation measures when an ongoing or proposed activity may have a significant adverse effect on a population of migratory bird species. The public, and the Service, also have the opportunity to review and comment on proposed military readiness activities in accordance with NEPA.

Comment: Section 21.15(a) of the proposed regulation must be revised to provide a system of oversight by the Service both in determining whether Department of Defense military readiness activities would likely adversely impact a migratory bird population and in setting a timeline for the implementation of conservation measures.

Service Response: As previously indicated, the Service and the public have the opportunity to review and comment on proposed military readiness activities in accordance with NEPA or other environmental review. Thus, we will be provided an opportunity to evaluate whether a proposed activity may have an adverse effect on migratory bird populations.

Comment: Pursuant to authority granted by 10 U.S.C. 101 and 14 U.S.C. 1, the U.S. Coast Guard is a branch of the armed forces of the USA at all times. Under this authority, the Coast Guard engages in military readiness activities. Furthermore, under the definition of ''Secretary of Defense,'' the Department of Homeland Security is included with respect to military readiness activities of the U.S. Coast Guard. The rule should be revised accordingly to reflect this.

Service Response: Section 315 of the Authorization Act provides for the Secretary ''to prescribe regulations to exempt the Armed Forces for the incidental taking of migratory birds during military readiness activities authorized by the Secretary of Defense or the Secretary of the military department concerned.'' We agree that

''Armed Forces'' includes the Coast Guard.

Comment: In order for potential impacts of the implementation of this rule to be effectively analyzed, the rule should not be categorically excluded. A full NEPA analysis should be conducted for the rule.

Service Response: Because of the broad spectrum of activities, activity locations, habitat types, and migratory birds potentially present that may be affected by this rule, it is not foreseeable or reasonable to anticipate all the potential impacts in a meaningful manner of military readiness activities conducted by the Armed Forces on the affected environment; thus it is premature to examine potential impacts of the rule in accordance with NEPA. We have determined that any environmental analysis of the rule would be too broad, speculative, and conjectural.

Part 516 Departmental Manual 2.3 A (National Environmental Policy Act Part 1508.4) allows an agency (Bureau) in the Department of Interior to determine if an action is categorically excluded from NEPA. We have made the determination that the rule is categorically excluded in accordance with 516 Departmental Manual 2, Appendix 1.10. This determination does not diminish the responsibility of the Armed Forces to comply with NEPA. Whenever the Armed Forces propose to undertake new military readiness activities or to adopt a new, or materially revised, INRMP where migratory bird species may be affected, the Armed Forces invite the Service to comment as an agency with ''jurisdiction by law or special expertise'' upon their NEPA analysis. In addition, if the potential for significant effects on migratory birds makes it appropriate, the Armed Forces may invite the Service to participate as a cooperating agency in the preparation of their NEPA analysis. Moreover, authorization under this rule requires that if a proposed military readiness activity may result in a significant adverse impact on a population of migratory bird species, the Armed Forces must confer and cooperate with the Service to develop and implement appropriate measures to minimize or mitigate these effects. The environmental consequences of the proposed military readiness activity, as well as the potential of any such measures to reduce the adverse impacts of the proposed activity, would be covered in NEPA documentation prepared for the proposed action.

Comment: Section 21.15(a) of the proposed regulation is unclear as to who is to determine that ongoing or proposed activities are likely to result in significant adverse effects.

Service Response: We have revised § 21.15(a) to clarify that this responsibility initially lies with the action proponent, i.e., the Armed Forces. Just as the Armed Forces make the initial determination that consultation is required under similar statutes, such as the Endangered Species Act (16 U.S.C. 1531 et seq.) (ESA) or the National Historic Preservation Act (16 U.S.C. 470), the action proponent will consider the likely effects of its proposed action and whether such effects require that it confer with the Service to develop and implement appropriate conservation measures to minimize or mitigate potential significant adverse effects. Where significant adverse impacts are likely, existing requirements under NEPA for federal agencies to prepare environmental documentation will ensure that both the public and the Service have an opportunity to review a proposed action and the Armed Force's determination with respect to migratory birds.

The Service and State wildlife agencies (and the general public if plan revisions are proposed) also have an opportunity to review the Department of Defense's management of installation natural resources, including the impacts of land use on such resources, during the quintennial review of INRMPs for Department of Defense lands. Consultation under the Endangered Species Act offers yet another opportunity for the Service to provide input on the potential effects of a proposed military readiness activity on federally listed migratory birds.

Comment: The document uses both the terms ''may'' affect migratory birds and ''likely'' to affect migratory birds. ''May'' should be used to be consistent with the NEPA threshold for impacts on the environment.

Service Response: The Service has intentionally established different standards for when the Armed Forces are required to confer with the Service and for when we may propose withdrawal of authorization. We have established a broad standard for triggering when the Armed Forces must notify the Service of potential adverse effects on migratory birds. We agree that requiring the Armed Forces to confer with the Service when applicable activities ''may'' result in a significant adverse effect is consistent with the analysis threshold utilized in NEPA. The Secretary determined that the more restrictive threshold of suspending or withdrawing authorization was warranted when a military readiness activity likely would not be compatible with one or more of the treaties or is likely to result in a significant adverse effect on a migratory bird population.

Withdrawal of Take Authorization § 21.15(b)

Comment: The Department of Defense is given too much decision power in the rule. Concern was expressed that the final decision regarding whether a military readiness activity is authorized or not is made by political appointees rather than unbiased career employees.

Service Response: Our political system is based upon a structure whereby policy decisions are made by political appointees rather than career employees. To address what may be perceived as too much power by the Armed Forces, it is the Secretary of the Interior who has, and retains, the final determination regarding whether an activity is authorized under the MBTA, not the Secretary of Defense.

Comment: The rule should require sufficient monitoring to detect significant impacts and provide for diligent oversight by the Department of the Interior to head off problems well before jeopardy is near and withdrawal of authorization is suspended or proposed to be withdrawn.

Service Response: We concur that monitoring can play a key role in providing valuable data needed to evaluate potential impacts of activities, inform conservation decisions, and evaluate effectiveness of conservation measures. For monitoring to be relevant, it should focus on specific objectives, desired outcomes, key hypotheses, and conservation measures. As stated in § 21.15(b)(2)(ii) of the rule, in instances where it is appropriate, the Armed Forces are required to ''conduct mutually agreed upon monitoring to determine the effects of military readiness activity on migratory bird species and/or the efficacy of the conservation measures implemented by the Armed Forces.'' This rule also states that the Armed Forces will consult with the Service to identify techniques and protocols to monitor impacts of military readiness activities. We have also added additional text clarifying the monitoring requirements of the Armed Forces.

Comment: The procedure for withdrawal of the authority is so cumbersome and subject to so many exclusions as to make the withdrawal procedure non-functional.

Service Response: We have clarified the procedures for when the Secretary may propose withdrawing authorization in § 21.15(b)(2), (4) and (5).

Comment: The statutory language of the Defense Authorization Act says

nothing about requiring input from the State Department prior to suspending authorization. Thus, the rule needlessly goes beyond its statutory authority.

Service response: In accordance with the MBTA (16 U.S.C. 704), the Secretary of the Interior has the authority to ''determine when, and to what extent, if at all, and by what means, it is compatible with the terms of the conventions to allow hunting, taking, capture, killing * * * and to adopt suitable regulations permitting and governing the same.'' The Defense Authorization Act does not limit that authority. Requiring the input of the State Department is within the standards of § 704.

Comment: The provision that the Secretary must seek the view of the Department of Defense prior to suspending authorization due to a violation with any of the treaties it affects permits the Department of Defense to itself determine its compliance with the migratory bird treaties. The statutory language of the Defense Authorization Act did not address this in any way.

Service Response: Section 21.15(b)(1) of this regulation provides that the Secretary retains the discretion to make the ultimate determination that incidental take of migratory birds during a specific military readiness activity would be incompatible with the treaties. Although the Defense Authorization Act required the Secretary to promulgate a regulation, it did not mandate the specific text or all of the conditions in this regulation. This regulation is consistent with the Defense Authorization Act as well as with 16 U.S.C. 704. Moreover, seeking the views of the Armed Forces is appropriate given the possible impacts that suspension of the take authorization could have on national security. Similarly, consulting with the State Department on issues of treaty interpretation is appropriate because of the State Department's expertise and authority in this area as well as its responsibility for maintaining the relationship of the United States with its treaty partners.

Comment: The Secretary should not have unilateral power to suspend or withdraw take authorization as the Defense Authorization Act states the Secretary must exercise authority with the concurrence of the Secretary of Defense.

Service Response: In accordance with § 315(d)(1) and (2) of the Authorization Act, the regulation ''to exempt the Armed Forces for the incidental take of migratory birds during military readiness activities'' shall be developed by the Secretary of the Interior with the concurrence of the Secretary of Defense. However, the Defense Authorization Act does not restrict or limit our authority in 16 U.S.C. 704 and 712 relative to administering and enforcing the MBTA and complying with the four migratory bird treaties.

Definitions § 21.3

Comment: Incidental take is not defined in the rule or the Defense Authorization Act. Concern was expressed that the Department of Defense being authorized to take migratory birds incidental to military readiness activities without ''incidental'' being defined will result in the Department of Defense reading this as the ability to actively kill migratory birds and destroy their habitat in anticipation of the potential for such problems.

Service Response: Current regulations authorize permits for take of migratory birds for activities such as scientific research, education, and depredation control (50 CFR parts 13, 21 and 22). However, these regulations do not expressly address the issuance of permits for incidental take. ''Incidental take of migratory birds'' is not defined under the MBTA or in any subsequent regulation, and the Service does not anticipate having a regulatory definition for ''incidental take'' in the short term. Neither the MBTA, the Defense Authorization Act, nor this rule authorize the take of migratory birds simply in anticipation of the potential for future problems, i.e., removing the potential source of problems before any conflicts may arise with military readiness activities.

Comment: Blanket exemption for any and all military readiness activities should not be authorized. In particular, those activities that involve acquisition of new land and construction of facilities in sensitive migratory bird habitat areas should not be authorized. Authorization to take birds should only include those types of activities that are too time or mission-sensitive for thorough evaluation, and where incidental take is unavoidable.

Service Response: As defined in the 2003 Defense Authorization Act, military readiness activities include all training and operations of the Armed Forces that relate to combat, and the adequate and realistic testing of military equipment, vehicles, weapons, and sensors for proper operation and suitability for combat use. Military readiness does not include (a) routine operation of installation operating support functions, such as: administrative offices; military exchanges; commissaries; water treatment facilities; storage facilities; schools; housing; motor pools; laundries; morale, welfare, and recreation activities; shops; and mess halls, (b) operation of industrial activities, or (c) construction or demolition of facilities listed above.

Acquisition of lands by the Armed Forces is not covered by this authorization as the acquisition itself does not take birds even when the land is being acquired for implementing future military readiness activities. In accordance with NEPA, environmental analysis of any major Federal agency action, which may include land acquisition and future proposed activities on these lands, must be addressed prior to the action occurring. Likewise, construction of facilities in sensitive migratory bird habitat would be addressed through NEPA.

Comment: The rule covers all military branches of service and includes contractors and agents. These should be clearly delineated in order to minimize the number of exempt entities.

Service Response: The rule applies to contractors only when such contractors are performing a military readiness activity in association with the Armed Forces—i.e., the contractors are performing a federal function. For example, a contractor training troops on the operation of a new weapons system or testing its interoperability with existing weapons systems would be covered. The regulation does not cover routine contractor testing performed at an industrial activity that is privately owned and operated.

Comment: The Defense Authorization Act does not limit applicability of minimization and mitigation measures to just ''species of concern'' but applies to all ''affected species of migratory birds.'' In addition, concern was expressed that this level of threshold could result in avoidable impacts to species that are not included in the ''species of concern lists'' but are nevertheless valuable public resources.

Service Response: We agree that the Defense Authorization Act is not specifically limited to species of concern, nor did we envision that the rule prevents the Armed Forces from addressing adverse impacts on all affected species of migratory birds through the NEPA process, including those that are locally endemic or otherwise have limited distribution within a State. The rule has been modified by requiring the Armed Forces to confer with the Service when they determine an action may result in a significant adverse effect on the

population of any migratory bird species.

Comment: Use of population status at the Bird Conservation Region (BCR) level as a criterion for action could reduce consideration of locally important bird resources, concentrations of birds and special habitats, and populations that do not coincide closely with BCRs.

Service Response: We have revised the definition of population so that it is not based upon species distribution or occurrence within a Bird Conservation Region and thus eliminates the concerns expressed above. As used in the rule, a population is defined as ''a group of distinct, coexisting (conspecific) individuals of a single species, whose breeding site fidelity, migration routes, and wintering areas are temporally and spatially stable, sufficiently distinct geographically (at some time of the year), and adequately described so that the population can be effectively monitored to discern changes in its status.''

What constitutes a population for the purposes of determining potential effects of military readiness activities will be scientifically based. A population could be defined as one that occurs spatially across a geographically broad area, such as the Western Atlantic red knot population that migrates along the Atlantic seaboard, to a more geographically limited species, such as breeding population of Bicknell's thrush whose breeding range is limited to mountain tops in the northeastern U.S. and southeastern Canada. When requested, the Service will provide technical assistance to the Armed Forces in identifying specific populations of migratory bird species that may be affected by a military readiness activity.

Comment: The definition of conservation measure does not adequately recognize international treaty obligations and the right of the Secretary of the Interior to withdraw take authorization should the treaties be violated. In the definitions, after the words ''while allowing for completion of the action in a timely manner,'' insert ''if such action would be consistent with the international treaties underlying the MBTA.''

Service Response: If conservation measures implemented by the Armed Forces in accordance with the rule are not sufficient to render the action compliant with the treaties, the Secretary will suspend the authorization. Failure to implement conservation measures is not the sole criterion for proposing withdrawal.

Comment: ''Conservation measures'' is defined to include monitoring when it has the potential to produce data relevant to substantiating impacts, validating effectiveness of mitigation, or providing other pertinent information. However, in the absence of a monitoring requirement, this provision is unworkable.

Service Response: Monitoring is required in § 21.15(b)(ii) of the rule. This section indicates that the Department of Defense's failure ''to conduct mutually agreed upon monitoring to determine the effects of military readiness activity on migratory bird species and/or the efficacy of the conservation measures implemented by the Department of Defense'' is potential cause for the Secretary to propose withdrawing authorization. However, as indicated in the response below, reference to monitoring has been removed from the definition of conservation measures.

Comment: Monitoring should not be considered a conservation measure, rather it should be conducted separately and apart from any necessary and reasonable mitigation actions.

Service Response: Although monitoring can play a key role in the continued growth of bird conservation by providing the information needed to inform conservation decisions and evaluate their effectiveness, we have removed it from the definition of conservation measures.

Comment: The threshold of ''significant adverse effect on the sustainability of a population'' is too high.

Service Response: The threshold for when the Armed Forces will be required to confer with the Service and implement appropriate conservation measures has been modified to when a ''significant adverse effect on a population of migratory bird species'' may result from an ongoing or proposed military readiness activity. The definition of significant adverse effect has also been accordingly revised in the rule.

Comment: The rule has a different standard than what was indicated by Congress in the Defense Authorization Act. The Act indicates measures are to be identified that minimize and mitigate ''any adverse impacts'' not just ''significant adverse effects.'' The Service is inserting thresholds of both likelihood and significance that are not any way implied by the statute.

Service Response: As indicated in Section 315(b) of the Authorization Act, the identification of measures to minimize and mitigate *any adverse impacts* of authorized military readiness activities pertains to the period of interim authority. The standard for authorization of take is established by the Secretary's authority under § 704 of the MBTA, whereby in exercising this authority he/she may prescribe regulations that exempt the Armed Forces for the incidental taking of migratory birds during military readiness activities. As indicated in the rule, the Secretary established thresholds for granting authority to incidentally take migratory birds. For those military readiness activities that would not have a significant adverse effect on migratory bird species populations take is authorized without conferring with the Service, subject to the withdrawal provision of § 21.15(b)(1). If a proposed or ongoing activity may result in a significant adverse effect, the Armed Forces must confer and cooperate with the Service. Take authorization would be suspended or withdrawn only when a military readiness activity likely would not be compatible with one or more of the treaties or is likely to result in a significant adverse effect on a migratory bird population.

Comment: Conservation measures that are project designs or mitigation activities should be changed from those that are ''reasonable and feasible'' to ''reasonable and necessary.'' This will result in a conservation measure that is appropriate to its purpose and essential to conservation.

Service Response: This revision has been made to the definition of conservation measures.

Comment: ''Conservation measures'' fails to place any restrictions or requirements on the amount of time that the Department of Defense would be given to apply the mitigation actions. The phrase ''over time'' implicitly grants the Department of Defense the ability to ignore the need for immediate action to counter adverse impacts.

Service Response: ''Over time'' was deleted from the definition.

Supplementary Information Section

Many comments were received on the Supplementary section of the proposed rule which did not pertain to any recommended revisions to § 21.15. These were taken into consideration in the final rule.

Comment: Ambiguous terms such as ''should,'' ''encourage,'' ''anticipates,'' etc., relative to Department of Defense activities contributing towards the conservation of migratory birds should be replaced with stronger terms such as ''require.''

Service Response: The **SUPPLEMENTARY INFORMATION** text has no

regulatory force and thus use of stronger terms has no regulatory weight. However, this comment was given due consideration and several revisions were made to strengthen the measures the Armed Forces are currently undertaking to address migratory bird conservation. These terms are not applicable in the actual rule, and therefore, no revisions were made relative to the authorization in this regard.

Comment: Integrated Natural Resources Management Plans (INRMPs) as informal mechanisms may not provide prompt and diligent efforts to minimize permitted take of birds. State wildlife agencies encourage more rigorous and thorough planning requirements and offer their considerable expertise and assistance.

Service Response: The Sikes Act Improvement Act of 1997 (included in Pub. L. 105–85) requires the development and implementation of INRMPs for relevant Department of Defense installations and mandates that plans be prepared in cooperation with the Service and State fish and wildlife agencies. The purpose of INRMPs is to plan natural resource management activities within the capabilities of the biological setting to support military training requirements. Although the Sikes Act does not apply to the Coast Guard, the Coast Guard is also starting to encourage their bases to address natural resource activities through INRMPs. The Service has been and continues to be committed to expanding partnerships with the Department of Defense. Updated Department of Defense guidance stresses that installations shall work in cooperation with the Service and States while developing or revising INRMPs. Each installation will invite annual feedback from the Service and States concerning how effectively the INRMP is being implemented. Installations have also established and maintain regular communications with the Service and State fish and wildlife agencies to address issues concerning natural resources management including migratory birds.

The Sikes Act also offers opportunities beyond the INRMP process for States and the Service to offer their expertise and assistance on military lands and with respect to migratory birds. For example, under the Sikes Act, the Department of Defense can enter into cooperative agreements with the Service, States, and nonprofit organizations to benefit birds and other species. Programs such as the Chesapeake Bay Program, Coastal America, and Partners In Flight also offer opportunities to partner with States and to share information and advice.

Comment: If the Service must rely on INRMPs for monitoring and mitigation of bird take, we recommend a requirement to complete, revise, and update plans to address bird monitoring and assessment of military readiness impacts and that migratory bird conservation activities receive adequate funding.

Service Response: The Sikes Act and Department of Defense guidance provide mechanisms to address emerging needs related to bird monitoring and assessment of military readiness impacts. The Sikes Act requires INRMPs to be reviewed, and revised as necessary, as to operation and effect by the parties (i.e., the Service and State resource agencies) on a regular basis, but not less often than every 5 years. In October 2004, the Department of Defense issued supplemental guidance for implementation of the Sikes Act relating to INRMP reviews. Department of Defense policy requires installations to review INRMPs annually in cooperation with the Service and State resource agencies. Annual reviews facilitate adaptive management by providing an opportunity for the parties to review the goals and objectives of the plans and to establish a realistic schedule for undertaking proposed actions. During annual reviews of the INRMPs, the Department of Defense will also discuss with the Service conservation measures implemented and the effectiveness of these measures in avoiding, minimizing, or mitigating take of migratory birds.

This rule relies on the Armed Forces utilizing the NEPA process to determine whether any ongoing or proposed military readiness activity is likely to result in a significant adverse effect on a population of a migratory bird species. The rule requires the Armed Forces to develop and implement appropriate conservation measures if a proposed action may have a significant adverse effect on a population of migratory bird species. To ensure that such conservation measures adequately address impacts to migratory birds, the rule also requires the Armed Forces to monitor the effects of such military readiness activities on migratory bird species taken during the military readiness activities at issue, and to retain records of these measures and monitoring data for 5 years from the date the Armed Forces commence their action.

Comment: We do not believe that impacts addressed by this rule can be adequately monitored or remedied without commitment of more resources to gather new bird data, conduct additional efforts to monitor impacts, or spend more money.

Service Response: Although the rule requires the Armed Forces to conduct mutually agreed upon monitoring to determine the effects of a military readiness activity on migratory bird species and the efficacy of the conservation measures implemented by the Armed Forces, we cannot require the Armed Forces to provide additional funding or resources towards monitoring. However, we do agree that monitoring is an important component of activities the Armed Forces undertake to address migratory bird conservation. We have expanded the monitoring discussion under ''Rule Authorization'' below.

Comment: Concern was expressed that the proposed broad exemption will be perceived as precluding the need for full NEPA consideration for covered activities.

Service Response: As stated in this rule, the Armed Forces will continue to be responsible for being in compliance with NEPA, and all other applicable regulations, and ensuring that whenever they propose to undertake new military readiness activities or to adopt a new, or materially revised, INRMP and migratory bird species may be affected, the Armed Forces invite the Service to comment as an agency with ''jurisdiction by law or special expertise'' upon their NEPA analysis. In addition, if the potential for significant effects on migratory birds makes it appropriate, the Armed Forces may invite the Service to participate as a cooperating agency in the preparation of their NEPA analysis. Moreover, authorization under this rule requires that if a proposed military readiness activity may result in a significant adverse impact on a population of migratory bird species, the Armed Forces must confer and cooperate with the Service to develop and implement appropriate measures to minimize or mitigate these effects. The environmental consequences of the proposed military readiness activity, as well as the potential of any such measures to reduce the adverse effects of the proposed activity, would be covered in NEPA documentation prepared for the proposed action.

Comment: The Department of Defense should be required to demonstrate that all ''practicable'' means of avoiding the ''take'' of migratory birds have been considered prior to the implementation of a new readiness program or construction of a new installation.

Service Response: The Armed Forces will be addressing ''take'' in a variety of ways. As stated above, through the NEPA process, the environmental consequences of their proposed military readiness activities will be evaluated, as well as any measures to reduce take of migratory birds. In addition, the INRMPs currently incorporate conservation measures to address migratory bird conservation. The Service will continue to work with the Armed Forces to develop additional measures in the future.

Comment: Nowhere does the rule mention how and when the Department of Defense will assess current, ongoing activities for which NEPA compliance is complete. The rule should be amended to require, within a specified time period of 90–120 days, a report by the Department of Defense to the Secretary on the impacts of their current military readiness activities on migratory birds.

Service Response: As a preliminary matter, it is important to note that where NEPA compliance has been completed, that compliance should have included consideration of the impacts on migratory birds. Since the enactment of NEPA, the Service has been notified of, and provided the opportunity to comment on, proposed military readiness activities that have the potential for significant impacts on the environment, including significant impacts on migratory birds. Nevertheless, it is possible that ongoing military readiness activities might in the future be determined to meet the threshold for the requirement under § 21.15(a)(1) to ''confer and cooperate.'' There are at least three mechanisms in place that require the Armed Forces to address environment impacts of ongoing activities for which NEPA is complete; supplementary statements under NEPA, INRMP reviews, and the monitoring requirements in the rule.

In accordance with NEPA Part 1502.9, an agency shall prepare a supplement to either a draft or a final environmental impact statement whenever: (1) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or (2) the agency learns of significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. This rule relies on the Armed Forces to use the NEPA process to determine whether an ongoing military readiness activity may result in a significant adverse effect on a population of a migratory bird species.

The Sikes Act (16 U.S.C. 670a–670o), enacted in 1960, has required cooperation among the Department of Defense, the Service, and State wildlife agencies. The 1997 amendments to the Sikes Act require the development of INRMPs that reflect the mutual agreement of the Department of Defense, the Service, and the appropriate State wildlife agency. The Sikes Act provides the Service, as well as the public, an opportunity to review natural resources management on military lands, including any potential effects on migratory birds or their habitat. NEPA documentation is prepared to support new or revised INRMPs. Department of Defense policy requires installations to review INRMPs annually in cooperation with the Service and State resource agencies. Annual reviews facilitate adaptive management by providing an opportunity for the parties to review the goals and objectives of the plans and to evaluate any new scientific information that indicates the potential for adverse impacts on migratory birds from new or ongoing military readiness activities. In addition, during annual INRMP reviews, the Department of Defense, the Service and the State resources agency evaluate the conservation measures implemented and the effectiveness of these measures in avoiding, minimizing, or mitigating take of migratory birds.

This rule requires the Armed Forces to develop and implement appropriate conservation measures if a proposed action may have a significant adverse effect on a population of migratory bird species. When conservation measures implemented in accordance with § 21.15(a)(1) require monitoring, the Armed Forces must retain records of these measures and monitoring data for 5 years from the date the Armed Forces commence their action.

Comment: We disagree with the interpretation of the statute that Congress ''signaled that the Department of Defense should give appropriate consideration to the protection of migratory birds when planning and executing military readiness activities, but not at the expense of diminishing the effectiveness of such activities.'' This suggests a diminishment of protection for migratory birds. It was Congress's intent that the Department of Defense should not be forced to halt these activities but rather should modify them to minimize impacts, or, if such activities cannot be practicably altered to minimize impacts, that mitigation measures must be in place to ensure conservation of migratory birds.

Service Response: This rule will not diminish the protection of migratory birds. Rather, by requiring the Armed Forces to confer with the Service to develop and implement conservation measures when a military readiness activity may significantly affect a population of a migratory bird species, a greater benefit to birds will result than the current status operandi. Increased coordination and technical assistance between the Service and the Armed Forces will reduce the number of migratory birds that are incidentally taken as a result of military readiness activities.

Measures Taken by the Armed Forces To Minimize and Mitigate Takes of Migratory Birds

As the basis for this rule, under the authority of the MBTA and in accordance with Section 315 of the Authorization Act, the Armed Forces will consult with the Service to identify measures to minimize and mitigate adverse impacts of authorized military readiness activities on migratory birds and to identify techniques and protocols to monitor impacts of such activities. The inventory, avoidance, habitat enhancement, partnerships, and monitoring efforts described below illustrate the efforts currently undertaken by the Armed Forces to minimize or mitigate adverse impacts to migratory birds from testing and training activities to maintain a ready defense. Additional conservation measures, designed to minimize and mitigate adverse impacts of authorized military readiness activities on affected migratory bird species, with emphasis on species of concern, will be developed in joint coordination with the Service when evaluation of specific military readiness activities indicates the need for additional measures.

We have a long history of working with natural resources managers at Armed Forces installations through our Field Offices to develop and implement these conservation initiatives. Many of the conservation measures detailed below represent state-of-the-art techniques and practices to inventory, protect, and monitor migratory bird populations. In accordance with provisions of the Sikes Act, as amended, these conservation measures are detailed in Department of Defense INRMPs for specific installations and endorsed by the Service and State fish and wildlife agencies. Additional conservation measures may be incorporated into future revisions of the INRMPs if determined necessary during their quintennial review.

Bird Conservation Planning. The Department of Defense prepares INRMPs for most Department of Defense installations. Under the Sikes Act, the Department of Defense must provide for the conservation and rehabilitation of natural resources on military

installations. To facilitate the program, the Secretary of Defense prepares and implements an INRMP for each military installation in the United States on which significant natural resources are found. The resulting plans must reflect the mutual agreement of the military installation, the Service, and the appropriate State fish and wildlife agency on conservation, protection, and management of fish and wildlife resources. The importance of a cooperative relationship among these parties is also stressed in Department of Defense and Service guidances concerning INRMP development and review. In accordance with the Department of Defense guidance, each installation will invite annual feedback from the Service and States concerning how effectively the INRMP is being implemented. Installations also maintain regular communications with the Service and State fish and wildlife agencies to address issues concerning natural resources management including migratory birds. Although the Sikes Act does not apply to the Coast Guard, they are also starting to encourage applicable bases to develop INRMPs.

INRMPs incorporate conservation measures addressed in Regional or State Bird Conservation Plans to ensure that the Department of Defense does its part in landscape-level management efforts. INRMPs are a significant source of baseline conservation information and conservation initiatives used to develop NEPA documents for military readiness activities. This linkage helps to ensure that appropriate conservation measures are incorporated into mitigation actions, where needed, that will protect migratory birds and their habitats.

To-date, over 370 INRMPs have been approved. Through cooperative planning in the development, review and revision of INRMPs, the Department of Defense, the Service and the States can effectively avoid or minimize adverse impacts on migratory bird populations. Through this process, the Service and the Department of Defense will continue to work together to design and develop monitoring surveys that effectively evaluate population trends and cumulative impacts on installations.

The Fish and Wildlife Conservation Act of 1980, as amended in 1988, directs the Secretary of the Interior to ''identify species, subspecies, and populations of all migratory non-game birds that, without additional conservation action, are likely to become candidates for listing under the Endangered Species Act of 1973.'' This list is prepared and updated at 5-year intervals by the Service's Division of Migratory Bird Management. The current list of the ''Birds of Conservation Concern'' is available at *http://migratorybirds.fws.gov/reports/bcc2002.pdf.*

''Birds of Conservation Concern 2002'' includes species that are of concern because of (a) documented or apparent population declines, (b) small or restricted populations, or (c) dependence on restricted or vulnerable habitats. It includes three distinct geographic scales: Bird Conservation Regions, Service Regions, and National. The Service Regions include the seven Service Regions plus the Hawaiian Islands and Puerto Rico/U.S. Virgin Islands.

Bird Conservation Regions (BCRs), adopted by the North American Bird Conservation Initiative (NABCI), are the most basic geographical unit by which migratory birds are designated as birds of conservation concern. The BCR list includes certain species endemic to Hawaii, the Pacific Island territories, and the U.S. Caribbean Islands that are not protected by the MBTA, and thus are not subject to this rule. These species are clearly identified in the list. The complete BCR list contains 276 species. NABCI is a coalition of U.S., Canadian, and Mexican governmental agencies and private organizations working together to establish an inclusive framework to facilitate regionally based, biologically driven, landscape-oriented bird conservation partnerships. A map of the NABCI BCRs can be viewed at *http://www.nabci-us.org.*

The comprehensive bird conservation plans, such as the North American Waterfowl Management Plan, the U.S. Shorebird Conservation Plan, Partners in Flight (PIF) Bird Conservation Plans, and the North American Waterbird Conservation Plan, are the result of coordinated partnership-based national and international initiatives dedicated to migratory bird conservation. Each of these initiatives has produced landscape-oriented conservation plans that lay out population goals and habitat objectives for birds. Additional information on these plans and their respective migratory bird conservation goals can be found at:

North American Waterfowl Management Plan (*http://birdhabitat.fws.gov/NAWMP/nawmphp.htm*).

North American Waterbird Conservation Plan (*http://www.waterbirdconservation.org*).

U.S. Shorebird Conservation Plan (*http://shorebirdplan.fws.gov/*).

Partners in Flight (*http://www.partnersinflight.org*).

Conservation Partnerships. The Department of Defense has entered into a number of conservation partnerships with nonmilitary partners to improve habitats and protect avian species. In 1991, the Department of Defense, through each of the military services, joined the PIF initiative. The Department of Defense developed a PIF Strategic Plan in 1994, and revised it in 2002. The Department of Defense PIF program is recognized as a model conservation partnership program. Through the PIF initiative, the Department of Defense works in partnership with over 300 Federal and State agencies and nongovernmental organizations (NGOs) for the conservation of neotropical migratory and resident birds and enhancement of migratory bird survival. For example, bases have worked with NGOs to develop management plans that address such issues as grazing and the conversion of wastewater treatment ponds to wetlands and suitable habitat. Universities use Department of Defense lands for migratory bird research and, on occasion, re-establish nesting pairs to take advantage of an installation's hospitable habitat. The Department of Defense PIF program tracks this research and provides links between complementary research on different installations and service branches.

The Authorization Act included a provision that allows the Department of Defense to provide property at closed bases to conservation organizations for use as habitat and another provision that, in order to lessen problems of encroachment, allows the Department of Defense to purchase conservation easements on suitable property in partnership with other groups. Where utilized, these provisions will offer further conservation benefits to migratory birds.

Bird Inventories. The most important factor in minimizing and mitigating takes of migratory birds is an understanding of when and where such takes are likely to occur. This means developing knowledge of migratory bird habits and life histories, including their migratory paths and stopovers as well as their feeding, breeding, and nesting habits.

The Department of Defense implements bird inventories and monitoring programs in numerous ways. Some Department of Defense installations have developed partnerships with the Institute for Bird Populations to Establish Monitoring Avian Productivity and Survivorship (MAPS) stations. The major objective of

the MAPS program is to contribute to an integrated avian population monitoring system for North American land birds by providing annual regional indices and estimates for four populations and demographic parameters for select target species in seven different regions of North America. The MAPS methodology provides annual regional indices of adult population size and post-fledgling productivity from data on the numbers and proportions of young and adult birds captured; annual regional estimates of adult population size, adult survivorship, and recruitment into the adult population from capture-recapture data on adult birds; and additional annual estimates of adult population size from point-count data collected in the vicinity of MAPS stations. Without these critical data, it is difficult or impossible to account for observed population changes. The Department of Defense is helping to establish a network of MAPS stations in all seven biogeographical regions and build the program necessary to monitor neotropical migratory bird population changes nationwide. Approximately 20% of the continental MAPS network involves military lands.

Since the early 1940s, radar has been used to monitor bird migration. The newest weather surveillance radar, WSR–88D or NEXRAD (for Next Generation Radar), is ideal for studies of bird movements in the atmosphere. This sophisticated radar system can be used to map geographical areas of high bird activity (e.g., stopover, roosting and feeding, and colonial breeding areas). It also provides information on the quantity, general direction, and altitudinal distribution of birds aloft. Currently, the United States Air Force is using NEXRAD, via the U.S. Avian Hazard Advisory System (AHAS), to provide bird hazard advisories to all pilots, military and civilian, in an attempt to warn air traffic of significant bird activity. The information is publicly available for the contiguous United States on line at *http://www.usahas.com* and will soon be available for the State of Alaska.

NEXRAD information is critically important for the protection of habitats used by migratory birds during stopover periods. This information is vital to Department of Defense land managers who protect stopover areas on military land. The data is also particularly important to land managers of military air stations where bird/aircraft collisions threaten lives and cost millions of dollars in damages every year. The Department of Defense established a partnership with the Department of Biological Sciences at Clemson University to collect, analyze, and use the biological information from the NEXRAD network to identify important stopover habitat in relation to Department of Defense installations. Initial efforts were concentrated in the Southeast to complement existing radar data from the Gulf Coast. This partnership has enabled the collection and transfer of radar data from all NEXRAD sites, via modem, to one remote station at Clemson University, where the data can be archived and analyzed.

The Department of Defense uses bird inventory and survey information in connection with the preparation of INRMPs. The Department of Defense also uses bird inventory and survey information when undertaking environmental analyses required under the NEPA. An environmental assessment or an environmental impact statement is used to determine the potential effects of any new, planned activity on natural resources, including migratory birds.

The Department of Defense PIF program is currently developing a database of migratory bird species of concern that are likely to occur on each installation utilizing the Service's published list of Birds of Conservation Concern (*http://migratorybirds.fws.gov/reports/bcc2002.pdf*); priority migratory bird species documented in the comprehensive bird conservation plans (North American Waterbird Conservation Plan (*http://www.waterbirdconservation.org*), United States Shorebird Conservation Plan (*http://shorebirdplan.fws.gov*), Partners in Flight Bird Conservation Plans (*http://www.partnersinflight.org/*); species or populations of waterfowl identified as high, or moderately high, continental priority in the North American Waterfowl Management Plan; listed threatened and endangered bird species in 50 CFR 17.11; and Migratory Bird Treaty Act-listed game birds below desired population sizes (*http://migratorybirds.fws.gov/reports/reports.html*).

Avoidance. Avoidance is the most effective means of minimizing takes of migratory birds. Where practicable, the Department of Defense avoids potentially harmful use of nesting sites during breeding and nesting seasons and of resting sites on migratory pathways during migration seasons. Avoidance sometimes involves using one area of a range rather than another. On some sites in which bombing, strafing, or other activities involving the use of live military munitions could affect birds in the area, the Department of Defense may conduct an initial, benign sweep of the site to ensure that any migratory birds in the area are dispersed before live ordnance is used. Another tool used by the Department of Defense to deconflict flight training activities is the U.S. Air Force Bird Avoidance Model (BAM). This model places breeding bird and Christmas count data into a Geographic Information Systems model to assist range planners in selecting training times when bird activity is low. The BAM is available online at the *http://www.usahas.com* Web site.

Pesticide Reduction. Reducing or eliminating pesticide use also benefits migratory birds. The Armed Forces maintain an integrated pest management (IPM) program that is designed to reduce the use of pesticides to the minimum necessary. The Department of Defense policy requires all operations, activities, and installations worldwide to establish and maintain safe, effective, and environmentally sound IPM programs. IPM is defined as a planned program, incorporating continuous monitoring, education, record-keeping, and communication to prevent pests and disease vectors from causing unacceptable damage to operations, people, property, material, or the environment. IPM uses targeted, sustainable (i.e., effective, economical, and environmentally sound) methods, including education, habitat modification, biological control, genetic control, cultural control, mechanical control, physical control, regulatory control, and the judicious use of least-hazardous pesticides. Department of Defense policy mandates incorporation of sustainable IPM philosophy, strategies, and techniques in all aspects of Department of Defense pest management planning, training, and operations, including installation pest-management plans and other written guidance to reduce pesticide risk and prevent pollution.

Habitat Conservation and Enhancement. Habitat conservation and enhancement generally involve improvements to existing habitat, the creation of new habitat for migratory birds, and enhancing degraded habitats. Improvements to existing habitat include wetland protection, maintenance and enhancement of forest buffers, elimination of feral animals (in particularly feral cats) that may be a threat to migratory birds, and elimination of invasive species that crowd out other species necessary to migratory bird survival. Examples of the latter include control and elimination of brown tree snake, Japanese honeysuckle, kudzu, and brown-headed cowbirds.

Efforts to eliminate invasive species are being undertaken in association with natural resources management under Sikes Act INRMPs. For example, at one site, grazing was reduced from more than 60,000 to about 23,000 acres, and has become a management tool to enhance the competitive advantage of native plants, especially perennial grasses. Special projects are under way on Department of Defense property to control exotic plants and to remove unused structures that occupy potentially valuable habitat or unnaturally increase predator populations. At some locations, native forest habitat is being reestablished.

The preparation of INRMPs continues to offer opportunities to consider such land management measures as converting to uneven-age and/or other progressive forest management that enhances available habitat values, establishing native warm-season grasslands, maintaining and enhancing bottomland hardwood forests, and promoting positive water-use modifications to improve hydrology and avian habitat in arid areas. Department of Defense installations are active in promoting the use of nest boxes and, where appropriate, the use of communications towers for nesting. In addition, the Department of Defense PIF program has prepared fact sheets addressing such issues as communications towers and power lines, West Nile virus, wind energy development, the Important Bird Areas program, and bird/aircraft strike hazards (BASH).

Other. At a few sites where the potential for migratory bird take is more severe, the Department of Defense has implemented extensive mitigation measures. In such instances, the responsible military service has taken practicable measures to minimize the impacts of its operations on protected migratory birds. Such measures include limiting the type and quantity of ordnance; limiting target areas and activities to places and times that protect key nesting areas for migratory birds; implementing fire-suppression programs or measures where wildfire can potentially damage nesting habitat; conducting environmental monitoring; and implementing mitigation measures, such as predator removal, on the site or nearby.

Monitoring the Impacts of Military Readiness Activities on Migratory Birds

The Authorization Act requires the Armed Forces to identify measures to monitor the impacts of military readiness activities on migratory birds. For military lands where migratory bird data may be lacking, monitoring may include the collection of baseline demographic, population, or habitat-association data. Where feasible, the Armed Forces will conduct agreed-upon monitoring to determine the level of take from military readiness activities.

Monitoring provides important data regarding the impacts of military readiness on migratory birds. It also contributes valuable information where data on species of migratory birds may be limited. In addition, monitoring data assists the Armed Forces in guiding their decisions regarding migratory bird conservation, particularly in developing or amending INRMPs.

The Department of Defense monitors bird populations that may be affected by military readiness activities in numerous ways. In addition to the MAPS program discussed above, Department of Defense facilities participate in the Breeding Biology Research and Monitoring Database (BBIRD) program to study nesting success and habitat requirements for breeding birds. Many installations also engage in Christmas bird counts, migration counts (Point, Circle, Area, or Flyover Counts), standardized and/or customized breeding and wintering point counts, grassland-bird flush counts, NEXRAD (discussed above) and BIRDRAD studies, point count surveys, hawk watches, overflight surveys, and/or rookery surveys. At sites where bird takes are a concern, such as Farallon de Medinilla in the Northern Marianas, the Department of Defense engages in more extensive monitoring, including overflight and rookery surveys several times a year, so that it can monitor trends in bird populations.

The Department of Defense is not alone in monitoring the status of birds on its installations. Much of its monitoring is done through formal partnerships with conservation organizations. In addition, Watchable Wildlife programs provide opportunities for the public to provide feedback on the numbers and types of birds they have observed from viewing sites on Department of Defense installations.

The Armed Forces can use clear evidence of bird takes, such as the sight of numerous dead or injured birds, as a signal that it should modify its activities, as practicable, to reduce the number of takes. With respect to the problem of bird/aircraft collisions, the Department of Defense undertakes intensive, bird-by-bird monitoring. The U.S. Air Force Safety Center's Bird/Wildlife Aircraft Strike Hazard team at Kirtland Air Force Base, NM, and the Navy Safety Center at Norfolk, VA, track aircraft/wildlife (bird and mammal) collisions because of the danger such collisions represent to pilots, crews, and aircraft. By focusing on local, regional, and seasonal populations and movements of birds, pilots and airport personnel have been better able to avoid collisions, in many cases by modifying those conditions at airfields that are attractive to birds.

What Are the Provisions of the Rule?

National Environmental Policy Act (NEPA) Considerations

NEPA, and the Council on Environmental Quality's (CEQ) NEPA implementing regulations at 40 CFR 1500–1508, require that Federal agencies prepare environmental impact statements for ''major Federal actions significantly affecting the quality of the human environment.'' These statements must include a detailed analysis of the impacts of an agency's proposed action and any reasonable alternatives to that proposal. NEPA requires the responsible Federal official to ''consult with and obtain comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved'' (42 U.S.C. 4332(2)(C)). NEPA also provides for public involvement in the decision-making process. The CEQ's regulations implementing NEPA emphasize the integration of the NEPA process with the requirements of other environmental laws. The CEQ regulations at 40 CFR 1500.2 state: ''Federal agencies shall to the fullest extent possible * * * integrate the requirements of NEPA with other planning and environmental review procedures required by law or by agency practice so that all such procedures run concurrently rather than consecutively.'' Regulations at 40 CFR 1502.25 state: ''To the fullest extent possible, agencies shall prepare draft environmental impact statements concurrently with and integrated with environmental impact analyses and related surveys and studies required by * * * other environmental review laws and executive orders.''

In keeping with this emphasis, the rule relies on the Armed Forces utilizing the NEPA process to determine whether any ongoing or proposed military readiness activity is ''likely to result in a significant adverse effect on the population of a migratory bird species.'' More particularly, the Armed Forces prepare NEPA analyses whenever they propose to undertake a new military readiness activity that may significantly affect the quality of the human environment; propose to make a substantial change to an ongoing military readiness activity that is

relevant to environmental concerns; learn of significant new circumstances or information relevant to the environmental concerns bearing on an ongoing military readiness activity; or prepare or revise an INRMP covering an area used for military readiness activities. During the preparation of environmental impact statements analyzing the effects of proposed military readiness activities on migratory bird species, the Armed Forces consult with the Service as an agency with ''jurisdiction by law and special expertise.'' If the Armed Forces identify a significant adverse effect on migratory birds during the preparation of a NEPA analysis, this rule requires the Armed Forces to confer and cooperate with the Service to develop and implement appropriate conservation measures to minimize or mitigate any such significant adverse effects. The Armed Forces will continue to be responsible for ensuring that military readiness activities are implemented in accordance with all applicable statutes including NEPA and ESA.

Endangered Species Act Consideration

Section 7(a)(1) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*) (ESA), provides that, ''[t]he Secretary [of the Interior] shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act.'' Furthermore, section 7(a)(2) requires all Federal agencies to insure that any action authorized, funded, or carried out is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of critical habitat. We completed an Intra-Service Consultation on the proposed rule and we have determined that this rule to authorize take under the MBTA will have no effect on listed species. The rule does not authorize take under the ESA. If a military readiness activity may affect a listed species, the Armed Forces retains responsibility for consulting with the Service under section 7(a)(2) of the ESA. Similarly, if a military readiness activity is likely to jeopardize the continued existence of a species proposed for listing, the Armed Forces retain responsibility for conferring with the Service in accordance with section 7(a)(4) of the ESA.

Rule Authorization

This rule authorizes the Armed Forces to take migratory birds as an incidental result of military readiness activities. The Armed Forces must continue to apply for and receive an MBTA permit for scientific collecting, control of birds causing damage to military property, or any other activity that is addressed by our existing permit regulations (50 CFR part 13, 21, 22). These activities may not be conducted under the authority of this rule. If any activity of the Armed Forces falls within the scope of our existing regulations, we will consider, when processing the application, the specific take requested as well as any other take authorized by this rule that may occur.

Authorization of take under this rule applies to take of migratory birds incidental to military readiness activities, including (a) all training and operations of the Armed Forces that relate to combat, and (b) the adequate and realistic testing of military equipment, vehicles, weapons, and sensors for proper operation and suitability for combat use. Authorization of take does not apply to (a) routine operation of installation operating support functions, such as: administrative offices; military exchanges; commissaries; water treatment facilities; storage facilities; schools; housing; motor pools; laundries; morale, welfare, and recreation activities; shops; and mess halls, (b) operation of industrial activities, or (c) construction or demolition of facilities listed above.

The authorization provided by this rule is subject to the military service conducting an otherwise lawful military readiness activity in compliance with the provisions of the rule. To ensure the Service maintains the ability to manage and conserve the resource, the Secretary retains the authority to withdraw or suspend authorization of take with respect to any specific military readiness activity under certain circumstances.

With respect to a military readiness activity of the Armed Forces likely to take migratory birds, the rule authorizes take provided the Armed Forces are in compliance with the following requirement:

> If the Armed Forces determine that ongoing or proposed activities may result in a significant adverse effect on the population of a migratory bird species, the Armed Forces must confer and cooperate with the Service to develop and implement appropriate conservation measures to minimize or mitigate such significant adverse effects.

The Armed Forces will continue to be responsible for addressing their activities other than military readiness through a MOU developed in accordance with Executive Order 13186, ''Responsibilities of Federal Agencies to Protect Migratory Birds,'' January 10, 2001.

When Is Take Not Authorized?

If a proposed or an ongoing action may have a significant adverse effect on a population of a migratory bird species, as that term is defined in Section 21.3, the Armed Forces must confer with the Service so that we may recommend conservation measures. In certain circumstances, the Secretary must suspend the take authorization with respect to a particular military readiness activity; in other circumstances, the Secretary has the discretion to initiate a process that may result in withdrawal. We will make every effort to work with the Armed Forces in advance of a potential determination to withdraw take authorization in order to resolve migratory bird take concerns and avoid withdrawal. With respect to discretionary withdrawal, the rule provides an elevation process if the Secretary of Defense or other national defense official appointed by the President and confirmed by the Senate determines that protection of national security requires continuation of the activity.

The Secretary will immediately suspend authorization for take if continued authorization likely would not be compatible with any one of the migratory bird treaties. Withdrawal of authorization may be proposed if the Secretary determines that failure to do so is likely to result in a significant adverse effect on a population of a migratory bird species and one or more of the following circumstances apply:

> (A) The Armed Forces have not implemented conservation measures that (i) are directly related to protecting the migratory bird species affected by the proposed military readiness activity; (ii) would significantly reduce take of migratory birds species affected by the military readiness activity, (iii) are economically feasible, and (iv) do not limit the effectiveness of military readiness activities.
>
> (B) The Armed Forces fail to conduct mutually agreed upon monitoring to determine the effects of a military readiness activity on migratory bird species and/or the efficacy of the conservation measures implemented by the Armed Forces.
>
> (C) The Armed Forces have not provided reasonably available information that the Secretary has determined is necessary to evaluate whether withdrawal of take authorization for the specific military readiness activity is appropriate.

The determination as to whether an immediate suspension of authorization is warranted (i.e., whether the action likely would not be compatible with a migratory bird treaty), or withdrawal of an authorization is proposed will be made independent of each other. Regardless of whether the circumstances of paragraphs (A) through (C) above

exist, there will be an immediate suspension if the Secretary determines, after seeking the views of the Secretary of Defense and after consulting with the Secretary of State, that incidental take of migratory birds during a specific military readiness activity likely would not be compatible with one or more of the migratory bird treaties.

Proposed withdrawal of authorization will be provided in writing to the Secretary of Defense including the basis for the determination. The notice will also specify any conservation measures or other measures that would, if the Armed Forces agree to implement them, allow the Secretary to cancel the proposed withdrawal of authorization. Any take incidental to a military readiness activity subject to a proposed withdrawal of authorization will continue to be authorized by this regulation until the Secretary of the Interior, or his/her delegatee, makes a final determination on the withdrawal.

The Secretary may, at his/her discretion, cancel a suspension or withdrawal of authorization at any time. A suspension may be cancelled in the event new information is provided that the proposed activity would be compatible with the migratory bird treaties. A proposed withdrawal may be cancelled if the Armed Forces modify the proposed activity to alleviate significant adverse effects on a population of a migratory bird species or the circumstances in paragraphs (A) through (C) above no longer exist. Cancellation of suspension or withdrawal of authorization becomes effective upon delivery of written notice from the Secretary to the Department of Defense.

Request for Reconsideration

In order to ensure that the action of the Secretary in not authorizing take does not result in significant harm to the Nation, any proposal to withdraw authorization under 50 CFR 21.15(b)(2) will be reconsidered by the Secretary or his/her delegatee who must be an official nominated by the President and confirmed by the Senate, if, within 45 days of the notification with respect to a military readiness activity, the Secretary of Defense, or other national defense official, who also must be an official nominated by the President and confirmed by the Senate, determines that protection of the national security requires continuation of the action.

Scope of Authorization

The take authorization provided by the rule applies to military readiness activities of the Armed Forces, including those implemented through contractors of the Armed Forces and their agents.

Principles and Standards

As discussed above, the only condition applicable to the authorization under this rule is that the Armed Forces confer and cooperate with the Service if the Armed Forces determine that a proposed or an ongoing military readiness activity may result in a significant adverse effect on a population of a migratory bird species. To avoid this threshold from being reached, as well as to provide for migratory bird conservation, it is in the best interest of the Armed Forces to address potential migratory bird impacts from military readiness activities by adopting the following principles and standards.

To proactively address migratory bird conservation, the Armed Forces should engage in early planning and scoping and involve agencies with special expertise in the matters relating to the potential impacts of a proposed action. When a proposed action by the Armed Forces related to military readiness may result in the incidental take of birds, the Armed Forces should contact the Service so we can assist the Armed Forces in addressing potential adverse impacts on birds and mitigating those impacts. As stated in this rule, the Armed Forces must confer with the Service when these actions may have a significant adverse effect on a population of a migratory bird species.

The Armed Forces will, in close coordination with the Service, develop a list of conservation measures designed to minimize and mitigate potential adverse impacts of authorized military readiness activities on affected migratory bird species. A cooperative approach initiated early in the project planning process will have the greatest potential for successfully reducing or eliminating adverse impacts. Our recommendations will emphasize avoidance, minimization, and rectifying adverse impacts. The Armed Forces should consider obvious avoidance measures at the outset of project planning, such as siting projects to avoid important nesting areas or to avoid collisions of birds with structures, or timing projects to avoid peak breeding activity. In addition, models such as the AHAS and BAM should be used to avoid bird activity when planning flight training and range use. The Armed Forces will consider these conservation measures for incorporation in new NEPA analyses, INRMPs, INRMP revisions, and base comprehensive or master plans, whenever adverse impacts to migratory birds may result from proposed military readiness activities.

''Conservation measures'' are project designs or mitigation activities that are technically and economically reasonable, and minimize the take of migratory birds and adverse impacts while allowing for completion of an action in a timely manner. When appropriate, the Armed Forces should adopt existing industry guidelines supported by the Service and developed to avoid or minimize take of migratory birds. We recognize that implementation of conservation measures will be subject to the availability of appropriations.

The Armed Forces should promote the inclusion of comprehensive migratory bird management objectives from bird conservation plans into the planning documents of the Armed Forces. The bird conservation plans, available either from the Service's Regional Offices or via the Internet, include: North American Waterfowl Management Plan, PIF, and the U.S. Shorebird Conservation Plan. The North American Waterbird Conservation Plan, the newest planning effort, addresses conservation of seabirds, wading birds, terns, gulls, and some marsh birds, and their habitats. The Armed Forces should also work collaboratively with partners to identify, protect, restore, and manage Important Bird Areas, Western Hemisphere Shorebird Reserve Network sites, and other significant bird sites that occur on Department of Defense lands. The Department of Defense should continue to work through the PIF program to incorporate bird habitat management efforts into INRMPs.

In accordance with the Authorization Act and the 2002 revised Sikes Act guidelines, the annual review of INRMPs by the Department of Defense, in cooperation with the Service and State fish and wildlife agencies, will include monitoring results of any migratory bird conservation measures.

The Armed Forces will use the best available databases to determine which migratory bird species are likely to occur in the area of proposed military readiness activities. This includes species likely to occur in the project area during all phases of the project.

The Armed Forces will use the best scientific data available to assess, through the NEPA process or other environmental requirements, the expected impact of proposed or ongoing military readiness activities on migratory bird species likely to occur in action areas. Special consideration will be given to priority habitats, such as important nesting areas, migration stop-over areas, and wintering habitats.

The Armed Forces will adopt, to the maximum extent practicable, conservation measures designed to minimize and mitigate any adverse impacts of authorized military readiness activities on affected migratory bird species. The term ''to the maximum extent practicable'' means without limiting the subject readiness activities in ways that compromise the effectiveness of those activities, and to the extent economically feasible.

At the Department of Defense's request, the Service will provide technical assistance in identifying the migratory bird species and determining those likely to be taken as a result of the proposed action, assessing impacts of the action on migratory bird species, and identifying appropriate conservation measures to mitigate adverse impacts.

Is this rule consistent with the MBTA?

Yes. This issue has two components. First is the question of whether the MBTA prohibits promulgation of regulations authorizing incidental take of migratory birds pursuant to military readiness activities. Second is the question of whether the details of this rule, individually and collectively, conflict with the MBTA in some way.

The starting point for answering both questions is the fact that Sections 704 and 712(2) of 16 U.S.C. provide us with broad authority to promulgate regulations allowing for the take of migratory birds when compatible with the terms of the migratory bird treaties. We find the take that is authorized in this rule is compatible with the terms of the treaties and consistent with the purposes of the treaties.

Regarding the first question, whether any such regulations are permissible under the MBTA, Congress itself by passing the Authorization Act determined that such regulations are consistent with the MBTA and the underlying treaties by requiring us to promulgate such regulations. Even in the absence of the Authorization Act, regulations authorizing take incidental to military readiness activities are compatible with the terms of the treaties, and therefore authorized by the MBTA.

The MBTA implements four treaties: a 1916 treaty with Great Britain on behalf of Canada that was substantially amended by a 1995 protocol; a 1936 treaty with Mexico, amended by a 1997 protocol; a 1972 treaty with Japan; and a 1978 treaty with the former Soviet Union. These international agreements recognize that migratory birds are important for a variety of purposes. They provide a food resource, insectivorous birds are useful to agriculture, they provide recreational benefits and are useful for scientific and educational purposes, and they are important for aesthetic, social, and spiritual purposes. Collectively, the treaties require the Unites States to provide mechanisms for protecting the birds and their habitats, and include special emphasis on protecting those birds that are in danger of extinction.

The Japan and Russia treaties each call for implementing legislation that broadly prohibits the take of migratory birds. At the same time, those treaties allow the implementing legislation to include exceptions to the take prohibitions. The treaties recognize a variety of purposes for which take may be authorized, including scientific, educational, and propagative purposes; the protection of persons or property; and hunting during open seasons. The treaties also contemplate authorizing takings ''for specific purposes not inconsistent with the objectives [or principles]'' of the treaties. The Canada treaty, since adoption of the 1995 Protocol, now includes similar language: ''the taking of migratory birds may be allowed * * * for * * * specific purposes consistent with the conservation principles of this Convention.''

In contrast, the take prohibitions required by the 1936 Mexico treaty have a narrower focus than the later treaties. The Mexico treaty is more clearly directed at stopping the indiscriminate killing of migratory birds by hunting and for commercial purposes through the establishment of closed seasons. In addition, even the language of the Mexico treaty that addresses the need for domestic regulation prohibiting certain activities with respect to migratory birds is subject to the objective ''to satisfy the need set forth in * * * Article[I].'' Article I provides: ''In order that the species may not be exterminated, the high contracting parties declare that it is right and proper to protect birds denominated as migratory, whatever may be their origin, which in their movements live temporarily in the United States of America and the United Mexican States, by means of adequate methods which will permit, in so far as the respective high contracting parties may see fit, the utilization of said birds rationally for purposes of sport, food, commerce and industry.'' Therefore, to the extent that the Mexico treaty is interpreted to have application to take beyond hunting and the like, that treaty must also be interpreted to allow the parties to authorize take that is consistent with the needs set forth in Article I.

The broad language of the exceptions in the Japan, Russia, and Canada treaties clearly indicate that the intent of the parties was not to prohibit all take of migratory birds. Just as clearly, the take of large absolute numbers of birds (e.g. millions of birds taken in sport hunting) is allowable under the treaties, so long as that take is ultimately limited in a way that is consistent with the conservation principles and objectives of the treaties. Thus, allowing for take incidental to military readiness activities is, as a general matter, consistent with the conservation principles and objectives of all three of these treaties.

The Mexico treaty does not require the parties to prohibit incidental take, and therefore allowing take incidental to military readiness activities cannot conflict with the terms of that treaty. And even if that treaty was read to apply more broadly, it is clear that the parties intended it only to require the rational regulation of take, not an absolute prohibition. Allowing take incidental to military readiness activities is consistent with the needs set forth in Article I. More broadly, we conclude that any incidental take allowed under the broad exceptions of the other three treaties is consistent with the Mexico treaty.

Turning to the second question, whether this particular rule governing take incidental to military readiness activities is consistent with the treaties (and therefore the MBTA), the take that is authorized here is for a special purpose consistent with the principles and objectives of the treaties. The authorization allows take of birds only in limited instances—take that results from military readiness activities. Furthermore, the rule expressly requires the Armed Forces to develop conservation measures to minimize or mitigate impacts where such impacts may have a significant adverse effect on a population of a migratory bird species. Moreover, the Secretary must suspend the take authorization if he/she concludes that a specific military readiness activity likely would not be compatible with the migratory bird treaties and may withdraw the authorization if he/she is unable to obtain from Armed Forces the information needed to assure compliance. Thus, the authorization in this rule in effect incorporates a safeguard that provides for compliance with the requirements of the treaties.

It is not entirely clear what level of effect on a migratory bird population would be required to constitute a violation of any of the treaties. It is clear, however, that the relatively minor

(at a population level) amount of take caused by military readiness activities is exceedingly unlikely to constitute a possible violation, even in the absence of any safeguards. When combined with the procedural safeguards set forth in this rule, there is no reasonable chance that a violation of the treaties will occur under this rule. In these circumstances, the take that would be authorized by this rule is thus compatible with the terms of the treaties and consistent with the purposes of those treaties.

The rule's process of broad, automatic authorization subject to withdrawal is particularly appropriate to military readiness activities. First, as noted above, we expect that military readiness activities will rarely, if ever, have the broad impact that would lead to a significant adverse effect on a population of migratory bird species, even absent the conservation measures that the Armed Forces undertake voluntarily or pursuant to another statute, such as the ESA. Second, the Armed Forces, like other federal agencies, have a special role in ensuring that the United States complies with its obligations under the four migratory bird treaties, as evidenced by the Migratory Bird Executive Order 13186 (January 10, 2001). Like other Federal agencies, the Armed Forces strive not only to lessen detrimental effects of their actions on migratory birds but to actively promote the conservation of the resource and integrate conservation principles and practices into agency programs. Numerous internal programs and collaborative ventures among Federal agencies and non-Federal partners have contributed significantly to avian conservation. These efforts are grounded in the tenets of stewardship inherent in our treaty obligations. Third, given the importance of military readiness to national security, it is especially important not to create a complex process that, while perhaps useful in other contexts, might impede the timely carrying-out of military readiness activities.

Why does the rule apply only to the Armed Forces?

This rule was developed in accordance with the Authorization Act, which created an interim period, during which the prohibitions on incidental take of migratory birds would not apply to military readiness activities, and required the development of regulations authorizing the incidental take of migratory birds associated with military readiness activities. This rule carries out the mandates of the Authorization Act. This rule authorizes take resulting from otherwise lawful military readiness activities subject to certain limitations and subject to withdrawal of the authorization to ensure consistency with the provisions of the treaties.

Required Determinations

Regulatory Planning and Review (E.O. 12866). In accordance with the criteria in Executive Order 12866, this rule is a significant regulatory action. OMB makes the final determination of significance under Executive Order 12866.

a. Analysis indicates this rule will not have an annual economic effect of $100 million or adversely affect an economic sector, productivity, jobs, the environment, or other units of government. This rule is intended to benefit the Department of Defense, and all of its branches of the Armed Forces, by providing a mechanism to comply with the MBTA and the treaties. A full cost-benefit and economic analysis is not required.

This rule will not affect small businesses or other segments of the private sector. It applies only to the Armed Forces. Thus, any expenditure under this rule will accrue only to the national defense agencies. Our current regulations allow us to permit take of migratory birds only for limited types of activities. This rule authorizes take resulting from the military readiness activities of the Armed Forces, provided the Armed Forces comply with certain requirements to minimize or mitigate significant adverse effects on a population of a migratory bird species.

Analysis of the annual economic effect of this rule indicates that it will have de minimis effects for the following reasons. Without the rule, the Armed Forces could be subject to injunction by third parties via the APA for lack of authorization under the MBTA for incidental takes of migratory birds that might result from military readiness activities. This rule will enable the Armed Forces to alleviate costs associated with responding to litigation as well as costs associated with delays in military training. Furthermore, the rule is structured such that the Armed Forces are not required to apply for individual permits to authorize take for every individual military readiness activity. The take authorization is conveyed by this rule. This avoids potential costs associated with staff necessary to prepare and review applications for individual permits to authorize military readiness activities that may result in incidental take of migratory birds, and the costs that would be attendant to delay.

The principal annual economic cost to the Armed Forces will likely be related to costs associated with developing and implementing conservation measures to minimize or mitigate impacts from military readiness activities that may have a significant adverse effect on a population of a migratory bird species. However, we anticipate that this threshold of potential effects on a population has a low probability of occurring. The Armed Forces are already obligated to comply with a host of other environmental laws, such as NEPA, which requires them to assess impacts of their military readiness activities on migratory birds, endangered and threatened species, and other wildlife. Most of the requirements of this rule will be subsumed by these existing requirements.

With this rule, the Armed Forces will have a regulatory mechanism to enable the Armed Forces to effectively implement otherwise lawful military readiness activities. Without the rule, the Armed Forces might not be able to complete certain military readiness activities that could result in the take of migratory birds pending issuance of an MBTA take permit or resolution of any lawsuits.

b. This rule will not create serious inconsistencies or otherwise interfere with the actions of the Armed Forces, including those other than military readiness. The Armed Forces must already comply with numerous environmental laws intended to minimize impacts to wildlife.

c. This rule will not materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients. This rule does not have anything to do with such programs.

d. This rule raises novel legal or policy issues. This rule raises a novel policy issue in that it implements a new area of our program to carry out the MBTA. Under 50 CFR 21.27, the Service has the authority to issue special purpose permits for take that is otherwise outside the scope of the standard form permits of section 21. Special purpose permits may be issued for actions whereby take of migratory birds could result as an unintended consequence. However, the Service has previously issued such permits only in very limited circumstances.

Regulatory Flexibility Act. For the reasons discussed under Regulatory Planning and Review above, I certify that this rule will not have a significant economic effect on a substantial number of small entities as defined under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.). A final Regulatory Flexibility Analysis is not required. Accordingly, a

Small Entity Compliance Guide is not required.

Small Business Regulatory Enforcement Fairness Act. This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule:

a. Will not have an annual effect on the economy of $100 million or more.

b. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.

c. Will not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

Unfunded Mandates Reform Act. In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501, et seq.):

a. This rule will not ''significantly or uniquely'' affect small governments. A Small Government Agency Plan is not required. We have determined and certified pursuant to the Unfunded Mandates Reform Act, 2 U.S.C. 1502 et seq., that this rulemaking will not impose a cost of $100 million or more in any given year on local or State government or private entities.

b. This rule will not produce a Federal mandate of $100 million or greater in any year, i.e., it is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act.

Takings. In accordance with Executive Order 12630, the rule does not have significant takings implications. A takings implication assessment is not required. The only effect of this rule is to authorize incidental takes of migratory birds by the Armed Forces as a result of military readiness activities. This rule will not result in the physical occupancy of property, the physical invasion of property, or the regulatory taking of any property.

Federalism. In accordance with Executive Order 13132, and based on the discussions in Regulatory Planning and Review above, this rule will not have significant Federalism effects. A Federalism assessment is not required. Due to the migratory nature of certain species of birds, and given the Federal Government's responsibility to implement the migratory bird treaties, Congress assigned the Federal Government responsibility over these species when it enacted the MBTA. This rule will not have a substantial direct effect on fiscal capacity, change the roles or responsibilities of Federal or State governments, or intrude on State policy or administration.

Civil Justice Reform. In accordance with Executive Order 12988, the Office of the Solicitor has determined that this rule will not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order. The intent of the rule is to relieve the Armed Forces and the judicial system from potential litigation resulting from potential take of migratory birds during military readiness activities. The Department of the Interior has certified to the Office of Management and Budget that this rule meets the applicable standards provided in Sections 3(a) and 3(b)(2) of Executive Order 12988.

Paperwork Reduction Act. This rule will not require any new information collections under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.). Under the Paperwork Reduction Act, we do not need to seek Office of Management and Budget (OMB) approval to collect information from current Federal employees, military personnel, military reservists, and members of the National Guard in their professional capacities. Because this rule will newly enable us to collect information only from employees of the Armed Forces in their professional capacity, we do not need to seek OMB approval under the Paperwork Reduction Act. In other cases, Federal agencies may not conduct or sponsor, and members of the public are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act. We have determined that this rule is categorically excluded under the Department of the Interior's NEPA procedures in Part 516 of the Departmental Manual, Chapter 2, Appendix 1, Categorical Exclusion 1.10. Categorical Exclusion 1.10 applies to: ''policies, directives, regulations, and guidelines of an administrative, financial, legal, technical or procedural nature and whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case.''

Military readiness activities of the Armed Forces occur across a broad geographic area covering a wide diversity of habitat types and potentially affecting a high diversity of migratory birds. Potential impacts on migratory birds will also vary spatially and temporally across the landscape. In addition, the specific type of military readiness activity will vary significantly among the Armed Forces, and the biological and geographical spectrum across which these activities may occur is potentially unique. Because of the broad spectrum of activities, their locations, habitat types, and migratory birds potentially present that may be affected by this rule, the potential impacts of military readiness activities conducted by the Armed Forces on the affected environment are too broad, speculative and conjectural to lend themselves to meaningful analysis. Thus, it is premature to examine potential impacts of the rule.

However, this determination does not diminish the responsibility of the Armed Forces to comply with NEPA and individual military readiness activities at issue will be subject to the NEPA process by the Armed Forces to evaluate any environmental impacts. Whenever the Armed Forces propose to undertake new military readiness activities or to adopt a new, or materially revised, Integrated Natural Resources Management Plan, and migratory bird species may be affected, the Armed Forces will consult with and obtain comments from the Service, an agency with ''jurisdiction by law or special expertise,'' upon their NEPA analysis. The NEPA analysis will include cumulative effects where applicable. In addition, if the potential for significant effects on migratory birds makes it appropriate, the Armed Forces may invite the Service to participate as a cooperating agency in the preparation of their NEPA analysis. Moreover, authorization under this rule requires that if a proposed military readiness activity may result in a significant adverse impact on a population of migratory bird species, the Armed Forces must confer and cooperate with the Service to develop and implement appropriate measures to minimize or mitigate these effects. The environmental consequences of the proposed military readiness activity, as well as the potential of any such measures to reduce the adverse effects of the proposed activity, would be covered in NEPA documentation prepared for the proposed action.

We have also determined that this authorization would not result in ''extraordinary circumstances'' whereby actions cannot be categorically excluded pursuant to 516 DM 2.3A(2). This rule only authorizes the incidental take of migratory birds (with limitations) as a result of military readiness activities. We are not authorizing the Armed Forces to implement military readiness activities that may have significant adverse impacts on natural resources, have highly controversial environment effects, or result in significant cumulative impacts. If an individual

military readiness action by the Armed Forces or the cumulative impacts of multiple activities may result in such an impact, then the Armed Forces will be responsible for completing an environmental analysis in accordance with NEPA. We are also not authorizing the take of a federally listed or proposed species. The Armed Forces must still comply with the Endangered Species Act.

Furthermore, we expect that military readiness activities will rarely, if ever, have the broad impact that would lead to a significant adverse effect on a population of a migratory bird species, even absent the conservation measures that the Armed Forces undertakes voluntarily or pursuant to another statute. The Armed Forces also have an important role in ensuring that the United States complies with the four migratory bird treaties, the Endangered Species Act, and other applicable regulations for individual ongoing or proposed military readiness activities.

A copy of the Service's Categorical Exclusion determination is available upon request at the address indicated in the **ADDRESSES** section of this rule.

Government-to-Government Relationship with Tribes. In accordance with the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951), E.O. 13175, and 512 DM 2, we have evaluated possible effects on federally recognized Indian tribes and have determined that there are no effects. This rule applies only to military readiness activities carried out by the Armed Forces that take migratory birds. It will not interfere with the Tribes' ability to manage themselves or their funds.

Energy Effects. On May 18, 2001, the President issued Executive Order 13211 on regulations that significantly affect energy supply, distribution, or use. This Executive Order requires agencies to prepare Statements of Energy Effects when undertaking certain actions. As this rule is not expected to significantly affect energy supply, distribution, or use, this action is not a significant energy action, and no Statement of Energy Effects is required.

List of Subjects in 50 CFR Part 21

Exports, Hunting, Imports, Reporting and recordkeeping requirements, Transportation, Wildlife.

■ For the reasons described in the preamble, we amend title 50, chapter I, subchapter B of the Code of Federal Regulations as follows:

PART 21—[AMENDED]

■ 1. The authority citation continues to read as follows:

Authority: Migratory Bird Treaty Act, 40 Stat. 755 (16 U.S.C. 703); Public Law 95–616, 92 Stat. 3112 (16 U.S.C. 712(2)); Public Law 106–108, 113 Stat. 1491, Note following 16 U.S.C. 703.

■ 2. Amend § 21.3 by adding the following definitions, in alphabetical order:

§ 21.3 Definitions.

* * * * *

Armed Forces means the Army, Navy, Air Force, Marine Corps, Coast Guard, and the National Guard of any State.

* * * * *

Conservation measures, as used in § 21.15, means project design or mitigation activities that are reasonable from a scientific, technological, and economic standpoint, and are necessary to avoid, minimize, or mitigate the take of migratory birds or other adverse impacts. Conservation measures should be implemented in a reasonable period of time.

* * * * *

Military readiness activity, as defined in Pub. L. 107–314, § 315(f), 116 Stat. 2458 (Dec. 2, 2002) [Pub. L. § 319 (c)(1)], includes all training and operations of the Armed Forces that relate to combat, and the adequate and realistic testing of military equipment, vehicles, weapons, and sensors for proper operation and suitability for combat use. It does not include (a) routine operation of installation operating support functions, such as: administrative offices; military exchanges; commissaries; water treatment facilities; storage facilities; schools; housing; motor pools; laundries; morale, welfare, and recreation activities; shops; and mess halls, (b) operation of industrial activities, or (c) construction or demolition of facilities listed above.

Population, as used in § 21.15, means a group of distinct, coexisting, conspecific individuals, whose breeding site fidelity, migration routes, and wintering areas are temporally and spatially stable, sufficiently distinct geographically (at some time of the year), and adequately described so that the population can be effectively monitored to discern changes in its status.

* * * * *

Secretary of Defense means the Secretary of Defense or any other national defense official who has been nominated by the President and confirmed by the Senate.

* * * * *

Significant adverse effect on a population, as used in § 21.15, means an effect that could, within a reasonable period of time, diminish the capacity of a population of migratory bird species to sustain itself at a biologically viable level. A population is ''biologically viable'' when its ability to maintain its genetic diversity, to reproduce, and to function effectively in its native ecosystem is not significantly harmed. This effect may be characterized by increased risk to the population from actions that cause direct mortality or a reduction in fecundity. Assessment of impacts should take into account yearly variations and migratory movements of the impacted species. Due to the significant variability in potential military readiness activities and the species that may be impacted, determinations of significant measurable decline will be made on a case-by-case basis.

■ 3. Amend part 21, subpart B, by adding a new § 21.15 as follows:

§ 21.15 Authorization of take incidental to military readiness activities.

(a) *Take authorization and monitoring.*

(1) Except to the extent authorization is withdrawn or suspended pursuant to paragraph (b) of this section, the Armed Forces may take migratory birds incidental to military readiness activities provided that, for those ongoing or proposed activities that the Armed Forces determine may result in a significant adverse effect on a population of a migratory bird species, the Armed Forces must confer and cooperate with the Service to develop and implement appropriate conservation measures to minimize or mitigate such significant adverse effects.

(2) When conservation measures implemented under paragraph (a)(1) of this section require monitoring, the Armed Forces must retain records of any monitoring data for five years from the date the Armed Forces commence their action. During Integrated Natural Resource Management Plan reviews, the Armed Forces will also report to the Service migratory bird conservation measures implemented and the effectiveness of the conservation measures in avoiding, minimizing, or mitigating take of migratory birds.

(b) *Suspension or Withdrawal of take authorization.*

(1) If the Secretary determines, after seeking the views of the Secretary of Defense and consulting with the Secretary of State, that incidental take of migratory birds during a specific military readiness activity likely would not be compatible with one or more of

the migratory bird treaties, the Secretary will suspend authorization of the take associated with that activity.

(2) The Secretary may propose to withdraw, and may withdraw in accordance with the procedures provided in paragraph (b)(4) of this section the authorization for any take incidental to a specific military readiness activity if the Secretary determines that a proposed military readiness activity is likely to result in a significant adverse effect on the population of a migratory bird species and one or more of the following circumstances exists:

(i) The Armed Forces have not implemented conservation measures that:

(A) Are directly related to protecting the migratory bird species affected by the proposed military readiness activity;

(B) Would significantly reduce take of the migratory bird species affected by the military readiness activity;

(C) Are economically feasible; and

(D) Do not limit the effectiveness of the military readiness activity;

(ii) The Armed Forces fail to conduct mutually agreed upon monitoring to determine the effects of a military readiness activity on migratory bird species and/or the efficacy of the conservation measures implemented by the Armed Forces; or

(iii) The Armed Forces have not provided reasonably available information that the Secretary has determined is necessary to evaluate whether withdrawal of take authorization for the specific military readiness activity is appropriate.

(3) When the Secretary proposes to withdraw authorization with respect to a specific military readiness activity, the Secretary will first provide written notice to the Secretary of Defense. Any such notice will include the basis for the Secretary's determination that withdrawal is warranted in accordance with the criteria contained in paragraph (b)(2) of this section, and will identify any conservation measures or other measures that would, if implemented by the Armed Forces, permit the Secretary to cancel the proposed withdrawal of authorization.

(4) Within 15 days of receipt of the notice specified in paragraph (b)(3) of this section, the Secretary of Defense may notify the Secretary in writing of the Armed Forces' objections, if any, to the proposed withdrawal, specifying the reasons therefore. The Secretary will give due consideration to any objections raised by the Armed Forces. If the Secretary continues to believe that withdrawal is appropriate, he or she will provide written notice to the Secretary of Defense of the rationale for withdrawal and response to any objections to the withdrawal. If objections to the withdrawal remain, the withdrawal will not become effective until the Secretary of Defense has had the opportunity to meet with the Secretary within 30 days of the original notice from the Secretary proposing withdrawal. A final determination regarding whether authorization will be withdrawn will occur within 45 days of the original notice.

(5) Any authorized take incidental to a military readiness activity subject to a proposed withdrawal of authorization will continue to be authorized by this regulation until the Secretary makes a final determination on the withdrawal.

(6) The Secretary may, at his or her discretion, cancel a suspension or withdrawal of authorization at any time. A suspension may be cancelled in the event new information is provided that the proposed activity would be compatible with the migratory bird treaties. A proposed withdrawal may be cancelled if the Armed Forces modify the proposed activity to alleviate significant adverse effects on the population of a migratory bird species or the circumstances in paragraphs (b)(2)(i) through (iii) of this section no longer exist. Cancellation of suspension or withdrawal of authorization becomes effective upon delivery of written notice from the Secretary to the Department of Defense.

(7) The responsibilities of the Secretary under paragraph (b) of this section may be fulfilled by his/her delegatee who must be an official nominated by the President and confirmed by the Senate.

Dated: July 25, 2006.

Matt Hogan,

Acting Assistant Secretary for Fish and Wildlife and Parks.

Dated: April 10, 2006.

Philip W. Grone,

Deputy Under Secretary of Defense (Installations and Environment).

This document was received at the Office of the Federal Register on February 23, 2007.

[FR Doc. E7–3443 Filed 2–27–07; 8:45 am]

BILLING CODE 4310–55–P

the public of our intention to conduct detailed planning on this refuge.

Background

The CCP Process

The National Wildlife Refuge System Administration Act of 1966 (16 U.S.C. 668dd–668ee) (Administration Act), as amended by the National Wildlife Refuge System Improvement Act of 1997, requires us to develop a CCP for each national wildlife refuge. The purpose of developing a CCP is to provide refuge managers with a 15-year plan for achieving refuge purposes and contributing to the mission of the National Wildlife Refuge System (NWRS), consistent with sound principles of fish and wildlife conservation, legal mandates, and our policies. In addition to outlining broad management direction on conserving wildlife and their habitats, CCPs identify wildlife-dependent recreational opportunities available to the public, including opportunities for hunting, fishing, wildlife observation and photography, and environmental education and interpretation. We will review and update the CCP at least every 15 years in accordance with the Administration Act.

Each unit of the NWRS was established for specific purposes. We use these purposes as the foundation for developing and prioritizing the management goals and objectives for each refuge within the NWRS, and to determine how the public can use each refuge. The planning process is a way for us and the public to evaluate management goals and objectives that will ensure the best possible approach to wildlife, plant, and habitat conservation, while providing for wildlife-dependent recreation opportunities that are compatible with each refuge's establishing purposes and the mission of the NWRS.

Our CCP process provides participation opportunities for Federal, Tribal, State, and local governments, agencies, organizations, and the public. Throughout the process, we will have formal comment periods and hold public meetings to gather comments, issues, concerns, ideas, and suggestions for the future management of Plum Tree Island NWR. You may also send comments during the planning process by mail, email, or fax (see **ADDRESSES**).

We will conduct the environmental review of this project and develop an EA in accordance with the requirements of the National Environmental Policy Act of 1969, as amended (NEPA) (42 U.S.C. 4321 *et seq.*); NEPA regulations (40 CFR parts 1500–1508); other appropriate Federal laws and regulations; and our policies and procedures for compliance with those laws and regulations.

Plum Tree Island National Wildlife Refuge

Plum Tree Island NWR is one of four refuges that comprise the Eastern Virginia Rivers NWR Complex. The 3,502-acre refuge is located along the Atlantic Flyway in the city of Poquoson, VA. It was established in 1972 to conserve wetlands and important migratory bird habitat in the lower Chesapeake Bay. The refuge's salt marsh, scrub-shrub, and forest habitats support a variety of native wildlife species, including waterfowl, marshbirds, and shorebirds. The refuge's beaches are also home to the federally threatened northeastern beach tiger beetle (*Cicindela dorsalis dorsalis*).

The U.S. Department of Defense previously administered the refuge lands and used all but the refuge's 200-acre Cow Island Tract as a gunnery and bombing range. Extensive unexploded ordnance remains on the refuge, posing serious safety concerns. Most of the refuge is closed to public access. The only public use offered is an annual, permit-only, waterfowl hunt on the Cow Island Tract.

Scoping: Preliminary Issues, Concerns, and Opportunities

We have identified several preliminary issues, concerns, and opportunities that we intend to address in the CCP. These include the following:

- Unexploded ordnance on the refuge and its implications for refuge management and public access;
- The potential for climate change to impact refuge resources;
- The potential for land acquisition and conservation easements within the existing, approved boundary;
- Opportunities to collaborate with partner organizations for off-refuge interpretation and education programming.

We expect that members of the public, our conservation partners and Federal, State, Tribal, and local governments may identify additional issues during public scoping.

Public Meetings

During the planning process, we will hold public meetings for individuals, organizations, and agencies to provide comments, issues, concerns, and suggestions about refuge management. When we schedule formal comment periods and public meeting(s), we will announce them in the **Federal Register**, local news media, and on our refuge planning Web site at *http://www.fws.gov/northeast/plumtreeisland/refuge_planning.html.*

You can also obtain the schedule from the planning team leader or project leader (see **FOR FURTHER INFORMATION CONTACT**).

Public Availability of Comments

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: December 5, 2011.

Salvatore M. Amato,

Acting Regional Director, Northeast Region, U.S. Fish and Wildlife Service.

[FR Doc. 2012–293 Filed 1–9–12; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R1–MB–2011–N256; FXMB12310100000P2–123–FF01M01000]

Special Purpose Permit Application; Draft Environmental Assessment; Hawaii-Based Shallow-Set Longline Fishery

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability; request for comments.

SUMMARY: We, the Fish and Wildlife Service, have received an application under the Migratory Bird Treaty Act of 1918, as amended (MBTA), from the Pacific Islands Regional Office of the National Marine Fisheries Service (NMFS), Department of Commerce, for a permit for the incidental take of migratory birds in the operation of the Hawaii-based shallow-set longline fishery that targets swordfish (*Xiphias gladius*). If issued, the permit would be the first of its kind under our Special Purpose permitting regulations. We invite public comment on the draft environmental assessment (DEA), which evaluates alternatives associated with this permit application.

DATES: To ensure consideration, please send your written comments by February 9, 2012.

ADDRESSES: You may download a copy of the DEA on the Internet at *http://*

www.fws.gov/pacific/migratorybirds/nepa.html. Alternatively, you may use one of the methods below to request a hard copy or a CD–ROM. Please specify the ''DEA for the NMFS MBTA Permit'' on all correspondence.

Submitting Comments: You may submit comments or requests for copies or more information by one of the following methods.

- *Email: pacific_birds@fws.gov.* Include ''DEA for the NMFS MBTA Permit'' in the subject line of the message.
- *U.S. Mail:* Please address written comments to Michael Green, Acting Chief, Division of Migratory Birds and Habitat Programs, Pacific Region, U.S. Fish and Wildlife Service, 911 NE 11th Ave., Portland, OR 97232.
- *Fax:* Michael Green, Acting Chief, Division of Migratory Birds and Habitat Programs, (503) 231–2019; Attn.: DEA for the NMFS MBTA Permit.

FOR FURTHER INFORMATION CONTACT: Michael Green, Acting Chief, Division of Migratory Birds and Habitat Programs, Pacific Region, U.S. Fish and Wildlife Service, (503) 231–2019 (phone); *pacific_birds@fws.gov* (email, include ''DEA for the NMFS MBTA Permit'' in the subject line of the message). If you use a telecommunications device for the deaf (TDD), please call the Federal Information Relay Service (FIRS) at (800) 877–8339.

SUPPLEMENTARY INFORMATION:

Introduction

The U.S. Fish and Wildlife Service (Service) has received an application from NMFS for a special purpose permit under the Migratory Bird Treaty Act of 1918 (16 U.S.C. 703–711) (MBTA). The permit, if issued, would authorize incidental take of migratory birds, principally two species of albatross, by NMFS in its regulation of the shallow-set longline fishery based in Hawaii. This fishery targets swordfish and operates on the high seas and within the United States Exclusive Economic Zone (EEZ). The migratory birds incidentally taken in the fishery are predominantly Laysan and Black-footed Albatross (*Phoebastria immutabilis* and *P. nigripes*). One individual each of Sooty Shearwater (*Puffinus griseus*) and Northern Fulmar (*Fulmarus glacialis*) have been reported taken in the fishery. The endangered Short-tailed Albatross (*Phoaebastria albatrus*) occurs in the area where the fishery operates and has been observed from Hawaii-based longline fishing vessels, but no take of this species has been reported. Consultation under section 7(a)(2) of the Endangered Species Act is in progress to assess the impacts of this fishery on the Short-tailed Albatross.

The Draft Environmental Assessment (DEA) analyzes the alternatives associated with this permit application in light of our permitting regulations in the Code of Federal Regulations (CFR) in 50 CFR 21.27 under the MBTA. If we issue the permit at issue in this environmental assessment, it will be the first permit under these regulations issued to authorize incidental take of migratory birds by an agency regulating a commercial, non-conservation activity.

Background

Regulations under the MBTA allow the Service to issue permits to take migratory birds for various reasons, such as depredation and scientific collecting. One of those regulations, 50 CFR 21.27, allows the Service to issue special purpose permits in circumstances not addressed by specific permit regulations. An application for a special purpose permit must meet the general permitting conditions set forth in 50 CFR 13 and make a ''sufficient showing'' of:

- Benefit to the migratory bird resources,
- Important research reasons,
- Reasons of human concern for individual birds, or
- Other compelling justification.

We will issue a special purpose permit only if we determine that the take is compatible with the conservation intent of the MBTA. Standard conditions for permit issuance include those described in 50 CFR 13.21(e) and 21.27(c).

The Hawaii-based longline fishery that targets swordfish is a pelagic or open-ocean fishery that began in the late-1980s and has since been managed under the Fishery Management Plan for the Pelagic Fisheries of the Western Pacific Region. Shallow-set longlining consists of deploying a mainline 18 to 60 nautical miles in length with floats at 360-meter (m) intervals. The mainline depth is 25 to 75 m. About four branchlines, 10 to 20 m in length, with baited hooks and artificial light sticks to attract swordfish, are suspended between floats, for a total of approximately 700 to 1,000 hooks per deployment. The line is deployed, or ''set,'' after sunset, left in the water overnight, and retrieved, or ''hauled,'' in the morning. Seabirds, as well as sea turtles and other non-target species, can be killed or injured during either deployment or retrieval of the lines, when they are unintentionally hooked or entangled in fishing gear.

The shallow-set sector of the Hawaii-based longline fishery operates under NMFS regulations requiring the use of measures to avoid and minimize the injury and death of seabirds (67 FR 34408, 69 FR 17329, 70 FR 75075). These regulations were in place when the fishery was reopened in 2004 following a court-ordered closure in 2001 that addressed concerns about endangered sea turtles. Between 2004 and 2010, the fishery has taken (killed or injured) an estimated total of 332 Laysan and 118 Black-footed albatrosses, an annual average of roughly 55 and 20 birds of each species, respectively. These levels of take are expected to continue, and are not thought to pose a risk of population-level impacts or change in conservation status for either species.

The Pacific Islands Regional Office of NMFS manages and regulates this fishery under the Fishery Management Plan, which was developed by the Western Pacific Regional Fishery Management Council and approved by the Secretary of Commerce, in accordance with the Magnuson-Stevens Act (16 U.S.C. 1801 *et seq.*) (MSA). Under the MSA, Fishery Councils are vested with the authority to propose amendments to Fishery Management Plans. NMFS may approve or partially approve proposed amendments; approvals are codified as Federal regulations. In 2010, regulations went into effect to implement an amendment that removed the restriction on fishing effort (annual number of sets) in this fishery that had been in place since 2004. Because fishing effort never reached the limit that has now been removed, and effort is increasing only slowly, NMFS anticipates that total effort in the fishery will not increase substantially between 2011 and 2014, the period that would be covered by a permit under the MBTA.

Applicant's Proposal

NMFS proposes to continue operation of the shallow-set fishery under current regulations that require the use of measures to avoid and minimize take of migratory birds. In addition to continued implementation of these regulations, NMFS proposes to analyze the high proportion of the total observed take in this fishery that occurs as injured birds. Specifically, NMFS would examine the role of untended or ''lazy'' lines, offal discards, and other practices in making hooks and gear available to seabirds and possibly attracting and habituating seabirds to longline vessels, especially during gear retrieval. The results of these assessments would be reported to the Service, and reports

would include any new information that could further reduce the take of seabirds in the fishery or point to research needed to achieve reduction. If new analyses and qualitative assessments lead to identification of means to reduce take of migratory birds, NMFS would develop these remedies so that they could be incorporated into NMFS regulatory processes in a timely fashion. If new information does not lead to modified or new practices that could reduce take of migratory birds in the fishery, NMFS would develop study plans for needed research and/or a proposal or proposals to offset the unavoidable take in the fishery in a manner that would not affect operation of the fishery. These additional activities were described in materials submitted as part of the permit application, and if we issue the permit after completion of the National Environmental Policy Act (NEPA) process, then these commitments would become conditions of the permit.

The Service independently evaluated the estimated total and average number, and the nominal rate, of seabirds taken in the fishery. This evaluation, in relation to the existing avoidance and minimization measures, proposed new activities, and potential offsetting conservation measures, is discussed in the DEA, along with the implications for direct, indirect, and cumulative effects under three alternatives.

Next Steps

The public process for the proposed Federal permit action will be completed after the public-comment period, at which time we will evaluate the permit application and comments submitted on the DEA and determine whether the application meets the permitting requirements under the MBTA and applicable regulations. Upon completion of that evaluation we will select our course of action among the three alternatives identified in the DEA. We then will either issue a final environmental assessment and a Finding of No Significant Impact or initiate the preparation of an Environmental Impact Statement.

Public Comments

We invite public comment on the DEA. You may submit comments by any one of the methods discussed above under **ADDRESSES**.

Public Availability of Comments

Before including your address, phone number, email address, or other personal identifying information in your comments, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority

We provide this notice under section 668a of the Act (16 U.S.C. 668–668c) and NEPA regulations (40 CFR 1506.6).

Dated: December 23, 2011.

Richard Hannan,

Deputy Regional Director, Pacific Region, Portland, Oregon.

[FR Doc. 2012–192 Filed 1–9–12; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R5–R–2011–N221; BAC–4311–K9–S3]

Massasoit National Wildlife Refuge, Plymouth, MA

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of intent to prepare a comprehensive conservation plan and environmental assessment; request for comments.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), intend to prepare a comprehensive conservation plan (CCP) and environmental assessment (EA) for Massasoit National Wildlife Refuge (the refuge, NWR) in Plymouth, Massachusetts. We provide this notice in compliance with our CCP policy to advise other Federal and State agencies, Tribes, and the public of our intention to conduct detailed planning on this refuge.

DATES: We will announce opportunities for public input throughout the CCP process in the **Federal Register,** local news media, and on our refuge planning Web site at *http://www.fws.gov/northeast/planning/Eastern%20Mass%203/ccphome.html.*

ADDRESSES: Send your comments or requests for more information by any of the following methods.

Email: northeastplanning@fws.gov. Include ''Massasoit CCP'' in the subject line of the message.

Fax: Attn: Carl Melberg, (978) 443–2898.

U.S. Mail: Eastern Massachusetts National Wildlife Refuge Complex, U.S. Fish and Wildlife Service, 73 Weir Hill Road, Sudbury, MA 01776.

In-Person Drop-off: You may drop off comments during regular business hours at the address above.

FOR FURTHER INFORMATION CONTACT: Carl Melberg, Planning Team Leader, (978) 443–4661 extension 32 (telephone), or Libby Herland, Project Leader, (978) 443–4661 extension 11 (telephone), or *fw5rw_emnrw@fws.gov* (email).

SUPPLEMENTARY INFORMATION:

Introduction

With this notice, we initiate our process for developing a CCP for Massasoit NWR, in Plymouth, Massachusetts. This notice complies with our CCP policy to advise other Federal and State agencies, Tribes, and the public of our intention to conduct detailed planning on this refuge.

Background

The CCP Process

The National Wildlife Refuge System Administration Act of 1966 (16 U.S.C. 668dd–668ee) (Administration Act), as amended by the National Wildlife Refuge System Improvement Act of 1997, requires us to develop a CCP for each national wildlife refuge. The purpose for developing a CCP is to provide refuge managers with a 15-year plan for achieving refuge purposes and contributing toward the mission of the National Wildlife Refuge System (NWRS), consistent with sound principles of fish and wildlife management and conservation, legal mandates, and our policies. In addition to outlining broad management direction on conserving wildlife and their habitats, CCPs identify wildlife-dependent recreational opportunities available to the public, including opportunities for hunting, fishing, wildlife observation and photography, and environmental education and interpretation. We will review and update the CCP at least every 15 years in accordance with the Administration Act.

Each unit of the NWRS was established for specific purposes. We use these purposes as the foundation for developing and prioritizing the management goals and objectives for each refuge within the NWRS, and to determine how the public can use each refuge. The planning process is a way for us and the public to evaluate management goals and objectives that will ensure the best possible approach to wildlife, plant, and habitat conservation, while providing for wildlife-dependent recreation opportunities that are compatible with each refuge's establishing purposes and the mission of the NWRS.

Our CCP process provides participation opportunities for Tribal, State, and local governments, agencies,

A permit granted by us under section 10(a)(1)(A) of the Act authorizes the permittee to conduct activities (including take or interstate commerce) with respect to U.S. endangered or threatened species for scientific purposes or enhancement of propagation or survival. Our regulations implementing section 10(a)(1)(A) of the Act for these permits are found at 50 CFR 17.22 for endangered wildlife species, 50 CFR 17.32 for threatened wildlife species, 50 CFR 17.62 for endangered plant species, and 50 CFR 17.72 for threatened plant species.

Application Available for Review and Comment

We invite local, State, and Federal agencies, and the public to comment on the following application. Please refer to the appropriate permit number for the application when submitting comments.

Documents and other information submitted with this application are available for review by request from the Endangered Species Program Manager at the address listed in the **ADDRESSES** section of this notice, subject to the requirements of the Privacy Act (5 U.S.C. 552a) and Freedom of Information Act (5 U.S.C. 552).

Permit Number: TE–80538A

Applicant: H. T. Harvey & Associates, Los Gatos, California.

The applicant requests a permit to take (capture, tissue sample, radio-tag, and release) the Hawaiian hoary bat (*Lasiurus cinereus semotus*) in conjunction with monitoring and population studies in Hawaii for the purpose of enhancing the species' survival.

Public Availability of Comments

All comments and materials we receive in response to this request will be available for public inspection, by appointment, during normal business hours at the address listed in the **ADDRESSES** section of this notice.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority

We provide this notice under section 10 of the Act (16 U.S.C. 1531 *et seq.*).

Dated: August 9, 2012.

Richard R. Hannan,

Acting Regional Director, Pacific Region, U.S. Fish and Wildlife Service.

[FR Doc. 2012–20364 Filed 8–17–12; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R1–MB–2012–N167; FXMB12320100000P2–123–FF01M01000]

Special Purpose Permit Application; Hawaii-Based Shallow-Set Longline Fishery; Final Environmental Assessment and Finding of No Significant Impact

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability.

SUMMARY: We, the Fish and Wildlife Service, announce the availability of a final environmental assessment (FEA) and finding of no significant impact (FONSI) in our analysis of permitting actions in response to an application under the Migratory Bird Treaty Act of 1918, as amended, from the Pacific Islands Regional Office of the National Marine Fisheries Service (NMFS), Department of Commerce. NMFS applied for a permit for the incidental take of migratory birds in the operation of the Hawaii-based shallow-set longline fishery, which targets swordfish. After evaluating several alternatives in a draft environmental assessment (DEA), we have determined that issuing a permit will not result in significant impacts to the human environment.

ADDRESSES: You may download a copy of the FEA and FONSI on the Internet at *http://www.fws.gov/pacific/migratorybirds/nepa.html.* Alternatively, you may use one of the methods below to request a hard copy or a CD–ROM. Please specify the "FEA/FONSI for the NMFS MBTA Permit" on all correspondence.

- *Email: pacific_birds@fws.gov.* Include "FEA/FONSI for the NMFS MBTA Permit" in the subject line of the message.
- *U.S. Mail:* Please address requests for hard copies of the documents to Nanette Seto, Chief, Division of Migratory Birds and Habitat Programs, Pacific Region, U.S. Fish and Wildlife Service, 911 NE. 11th Ave., Portland, OR 97232.
- *Fax:* Nanette Seto, Chief, Division of Migratory Birds and Habitat Programs, 503–231–2019; Attn.: FEA/FONSI for the NMFS MBTA Permit.

FOR FURTHER INFORMATION CONTACT: Nanette Seto, Chief, Division of Migratory Birds and Habitat Programs, Pacific Region, U.S. Fish and Wildlife Service, 503–231–6164 (phone); *pacific_birds@fws.gov* (email; include "FEA/FONSI for the NMFS MBTA Permit" in the subject line of the message). If you use a telecommunications device for the deaf (TDD), please call the Federal Information Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Introduction

After receiving the permit application from NMFS, we provided a public notice and summary background information and solicited public comments on the DEA in January 2012 (77 FR 1501). We have now considered comments, finalized our analysis, and selected an alternative that meets the purpose and need of our action (issuance of a permit under the MBTA). We have determined that issuing a permit will not result in significant impacts to the human environment.

We evaluated several alternatives for the proposed issuance of a permit under the Migratory Bird Treaty Act (MBTA) for incidental take of seabirds in the shallow-set longline fishery based in Hawaii. The analysis of alternatives is documented in a final environmental assessment (FEA), which is available to the public on our Web site or by request (see **ADDRESSES**). Our need in conducting this evaluation was to address an application received from NMFS for a permit to authorize take of migratory birds (seabirds) in the shallow-set longline fishery based in Hawaii. The purposes of our permitting action include: (1) Ensuring that any permit issued meets the criteria established in our regulations under MBTA and does not violate our statutory responsibility to conserve migratory birds; (2) ensuring the Service and NMFS meet their responsibilities under Executive Order 13186 to protect migratory birds and avoid and minimize adverse impacts of our actions to these birds; (3) identifying the mechanisms underlying the take of migratory birds in the fishery; developing, in cooperation with the Service, measures for NMFS and the fishery to implement that would reduce that take or otherwise improve conservation benefit for birds; and (4) minimizing unnecessary costs or burdens on the fishery itself, or on NMFS in its role as regulator.

We analyzed three alternatives in the FEA:

1. No action. Under the No Action alternative, we would deny the permit application and not issue a permit to NMFS. We rejected consideration of a separate alternative of literally taking no action, and not even responding to the permit application, because it is our policy to process all applications received as quickly as possible (50 CFR 13.11(c)).

2. Issue permit as requested (*selected alternative*). The permit would reflect the current operation of the fishery, including the seabird-deterrent measures currently required by NMFS regulations and the Service's Biological Opinion for the impacts of this fishery to the endangered Short-tailed Albatross (*Phoebastria albatrus*), with no changes, regulatory or otherwise, to the operation of the fishery during the permit period. No new regulations governing the operation of the fishery would be proposed. The permit would authorize the observed and reported take of specific numbers of each species, and would include conditions requiring NMFS to analyze observer data and fishery practices to elucidate how and when take is occurring now and identify measures that could reduce this take in the future. In addition, NMFS would be required to provide instruction regarding the importance of seabird-data collection to observers and include specific discussion at Protected Species Workshops for fishers of how and when seabird interactions occur during shallow-set fishing. The permit would specify requirements for reporting the progress on data analysis and identification of additional potential measures for reducing take and the extent of training and information-exchange activities. Reporting would also describe research, if any is identified, needed to help identify measures that could reduce this take in the future. Compliance with these requirements would be considered in a future permit renewal.

3. Issue permit with additional conditions to conduct research and to increase conservation benefit to seabirds. Rather than analyze existing and future observer data and elicit additional information from observers and fishers (as in Alternative 2), Alternative 3 would require research and field trials of new deterrent methods and technologies or those already in use in the industry to develop means to reduce take in the fishery during the 3-year term of the permit. Alternative 3 is otherwise the same as Alternative 2.

Internal Scoping and Public Involvement

We solicited comments on an internal draft of the EA from other programs within the Service, and provided responses in a final draft EA (DEA) that was available to the public from January 10 through February 9, 2012 (77 FR 1501). During the public comment period, we received a total of eight comment letters: One from a federal agency, one from a Fishery Management Council, one from a fishery industry organization, two from conservation organizations, and three from private citizens. The final EA incorporates minor changes to address technical comments and provides narrative responses to substantive comments. Some of these comments touch on policy and legal questions that are raised or implied by, but that do not themselves affect, our permitting action. However, none of the commenters provided additional information that (1) changed the outcome of our analysis or (2) required a finding that our action would have a significant impact.

Impact Analysis

The Impacts Analysis in the EA considered direct, indirect, and cumulative effects of the alternatives on seabirds, the fishery and economic environment, and cultural resources. We found that none of the alternatives would have significant impacts to any of these aspects of the human environment. The alternatives would not have significant adverse impacts to seabirds, because the take of seabirds in this fishery is low. Laysan and Black-footed albatrosses comprise roughly 99 percent of all take of migratory birds in the fishery. The projected take of these species in each year of the 3-year term of a permit, and the slightly greater amount of annual take that would be authorized in a permit (a total of no more than 191 Black-footed and 430 Laysan albatrosses over the 3-year permit term), would constitute less than 1 percent of the total estimated breeding population of each species each year. This level of take does not contribute substantially to the cumulative total take of these seabirds estimated to occur each year in all North Pacific longline fisheries. The other three seabird species analyzed in the FEA are the Sooty Shearwater, Northern Fulmar, and the endangered Short-tailed Albatross. The shearwater and fulmar are represented by one individual bird each in the data on observed take in the fishery. We would authorize take of no more than 10 birds annually of each of these two species. Although no Short-tailed Albatrosses have been reported taken in the fishery, impacts of the fishery to this species have been evaluated under the Endangered Species Act, and take at a rate of one bird every 5 years has been authorized in the Service's Biological Opinion.

The beneficial impacts of the action involve only seabirds. These beneficial impacts are minor. Although either Alternative 2 or 3 would result in improved information about sources of take in the fishery and means of reducing take, neither would result in an additional reduction in take in the fishery during the 3-year permit term. However, the long-term goal of this (and any subsequent) permitting action is the eventual further reduction of seabird take in this fishery.

The alternatives do not have a significant impact on the fishery or economic environment. Although the alternatives variously may result in slight changes in costs to NMFS (for example, to analyze data or conduct field trials), none of the alternatives would result in any major change in the operation of the fishery. No cultural resources as defined under the National Historic Preservation Act are significantly affected by the alternatives because the fishery operates in the 200-mile U.S. Exclusive Economic Zone and on the high seas, far from historic sites.

Determination

Alternative 2 will meet fully the purposes and needs of the proposed permitting action described above (and described in more detail in Chapter 1 of the FEA). This alternative also represents initial steps toward the long-term goal of reducing take of seabirds in this fishery. We determine that implementation of Alternative 2 does not constitute a major Federal action significantly affecting the quality of the human environment under the meaning of section 102(2)(c) of the National Environmental Policy Act of 1969 (as amended). As such, an environmental impact statement is not required.

Authority

We provide this notice under section 668a of the Act (16 U.S.C. 668–668c) and NEPA regulations (40 CFR 1506.6).

Dated: July 20, 2012.

Jason Holm,

Acting Regional Director, Pacific Region, Portland, Oregon.

[FR Doc. 2012–20327 Filed 8–17–12; 8:45 am]

BILLING CODE 4310–55–P

Secretarial Order 3285A1

THE SECRETARY OF THE INTERIOR
Washington

ORDER NO. 3285, Amendment No. 1 ***(Amended material italicized)***

SIGNATURE DATE: February 22, 2010

Subject: Renewable Energy Development by the Department of the Interior

Sec. 1 **Purpose**. This Order establishes the development of renewable energy as a priority for the Department of the Interior and establishes a Departmental Task Force on Energy and Climate Change. This Order also amends and clarifies Departmental roles and responsibilities to accomplish this goal.

Sec. 2 **Background**. The Nation faces significant challenges to meeting its current and future energy needs. Meeting these challenges will require strategic planning and a thoughtful, balanced approach to domestic resource development that calls upon the coordinated development of renewable resources, as well as the development of traditional energy resources. Many of our public lands possess substantial renewable resources that will help meet our Nation's future energy needs while also providing significant benefits to our environment and the economy. Increased production of renewable energy will create jobs, provide cleaner, more sustainable alternatives to traditional energy resources, and enhance the energy security of the United States by adding to the domestic energy supply. As the steward of more than one-fifth of our Nation's lands, and neighbor to other land managers, the Department of the Interior has a significant role in coordinating and ensuring environmentally responsible renewable energy production and development of associated infrastructure needed to deliver renewable energy to the consumer.

Sec. 3 **Authority**. This Order is issued under the authority of Section 2 of Reorganization Plan No. 3 of 1950 (64 Stat. 1262), as amended, and pursuant to the provisions of Section 211 of the Energy Policy Act of 2005 (P.L. 109-58).

Sec. 4 **Policy**. Encouraging the production, development, and delivery of renewable energy is one of the Department's highest priorities. Agencies and bureaus within the Department will work collaboratively with each other, and with other Federal agencies, departments, states, local communities, and private landowners to encourage the timely and responsible development of renewable

energy and associated transmission while protecting and enhancing the Nation's water, wildlife, and other natural resources.

Sec. 5 **Energy and Climate Change Task Force**. A Task Force on Energy and Climate Change is hereby established in the Department. ***The Task Force reports to the Energy and Climate Change Council.*** The Deputy Secretary and the Counselor to the Secretary shall serve as Co-Chairs. ***At the discretion of the Co-chairs, the Task Force may draw on separate bureau and Assistant Secretary representation, as appropriate, to concentrate on the renewable energy agenda.*** The Task Force on Energy and Climate Change shall:

a. develop a strategy that is designed to increase the development and transmission of renewable energy from appropriate areas on public lands and the Outer Continental Shelf, including the following:

(1) quantifying potential contributions of solar, wind, geothermal, incremental or small hydroelectric power on existing structures, and biomass energy;

(2) identifying and prioritizing the specific locations in the United States best suited for large-scale production of solar, wind, geothermal, incremental or small hydroelectric power on existing structures, and biomass energy (e.g., renewable energy zones);

(3) identifying, in cooperation with other agencies of the United States and appropriate state agencies, the electric transmission infrastructure and transmission corridors needed to deliver these renewable resources to major population centers;

(4) prioritizing the permitting and appropriate environmental review of transmission rights-of-way applications that are necessary to deliver renewable energy generation to consumers;

(5) establishing clear roles and processes for each bureau/office;

(6) tracking bureau/office progress and working to identify and resolve obstacles to renewable energy permitting, siting, development, and production;

(7) identifying additional policies and/or revisions to existing policies or practices that are needed, including possible revisions to the Geothermal, Wind, and West-Wide Corridors Programmatic Environmental Impact Statements and their respective Records of Decisions; and

(8) working with individual states, tribes, local governments, and other interested stakeholders, including renewable generators and transmission and

distribution utilities, to identify appropriate areas for generation and necessary transmission;

b. develop best management practices for renewable energy and transmission projects on the public lands to ensure the most environmentally responsible development and delivery of renewable energy;

c. establish clear policy direction for authorizing the development of solar energy on public lands; and

d. recommend such other actions as may be necessary to fulfill the goals of this Order.

Sec. 6 **Responsibilities**.

a. Program Assistant Secretaries. Program Assistant Secretaries overseeing bureaus responsible for, or that provide assistance with, the planning, siting, or permitting of renewable energy generation and transmission facilities on the public lands and on the Outer Continental Shelf, are responsible for:

(1) establishing and participating in management structures that facilitate cooperation, reporting, and accountability across agencies, including the Task Force on Energy and Climate Change;

(2) establishing joint, single-point-of contact offices that consolidate expertise to ensure a coordinated, efficient, and expeditious permitting process while ensuring appropriate siting and compliance with the National Environmental Policy Act, the Endangered Species Act, and all other applicable laws; and

(3) working collaboratively with other departments, state, and local authorities to coordinate and harmonize non-Federal permitting processes.

b. Assistant Secretary – Policy, Management and Budget. The Assistant Secretary – Policy, Management and Budget is a member of the Task Force and shall:

(1) ensure that investments associated with Interior managed facilities meet Federal standards for energy efficiency and greening applications; and

(2) coordinate with the Energy and Climate Change Task Force, as appropriate.

c. Bureau Heads. Each bureau head is responsible for designating a representative to the Task Force on Energy and Climate Change.

Sec. 7 **Implementation**. The Deputy Secretary is responsible for ensuring implementation of this Order. This responsibility may be delegated as appropriate.

Sec. 8 **Effective Date**. This Order is effective immediately and will remain in effect until its provisions are converted to the Departmental Manual or until it is amended, superseded, or revoked, whichever comes first.

/s/ Ken Salazar
Secretary of the Interior

SO#3285A1 2/22/10

California Public Resources Code § 25741

§ 25741. Definitions

Effective: December 10, 2011 to December 31, 2012

As used in this chapter, the following terms have the following meaning:

(a) "Renewable electrical generation facility' ' means a facility that meets all of the following criteria:

(1) The facility uses biomass, solar thermal, photovoltaic, wind, geothermal, fuel cells using renewable fuels, small hydroelectric generation of 30 megawatts or less, digester gas, municipal solid waste conversion, landfill gas, ocean wave, ocean thermal, or tidal current, and any additions or enhancements to the facility using that technology.

(2) The facility satisfies one of the following requirements:

(A) The facility is located in the state or near the border of the state with the first point of connection to the transmission network of a balancing authority area primarily located within the state. For purposes of this subparagraph, "balancing authority area" has the same meaning as defined in Section 399.12 of the Public Utilities Code.

(B) The facility has its first point of interconnection to the transmission network outside the state, within the Western Electrcity Coordinating Council (WECC) service area, and satisfies all of the following requirements:

(i) It commences initial commercial operation after January 1, 2005.

(ii) It will not cause or contribute to any violation of a California environmental quality standard or requirement.

(iii) It participates in the accounting system to verify compliance with the renewables portfolio standard once established by the commission pursuant to subdivision (b) of Section 399.25 of the Public Utilities Code.

(C) The facility meets the requirements of clauses (ii) and (iii) in subparagraph (B), but does not meet the requirements of clause (i) of subparagraph (B) because it commenced initial operation prior to January 1, 2005, if the facility satisfies either of the following requirements:

(i) The electricity is from incremental generation resulting from expansion or repowering of the facility.

(ii) Electricity generated by the facility was procured by a retail seller or local publicly owned electric utility as of January 1, 2010.

(3) If the facility is outside the United States, it is developed and operated in a manner that is as protective of the environment as a similar facility located in the state.

(b) "Municipal solid waste conversion,' ' as used in subdivision (a), means a technology that uses a noncombustion thermal process to convert solid waste to a clean-burning fuel for the purpose of generating electricity, and that meets all of the following criteria:

(1) The technology does not use air or oxygen in the conversion process, except ambient air to maintain temperature control.

(2) The technology produces no discharges of air contaminants or emissions, including greenhouse gases as defined in Section 38505 of the Health and Safety Code.

(3) The technology produces no discharges to surface or groundwaters of the state.

(4) The technology produces no hazardous wastes.

(5) To the maximum extent feasible, the technology removes all recyclable materials and marketable green waste compostable materials from the solid waste stream prior to the conversion process and the owner or operator of the facility certifies that those materials will be recycled or composted.

(6) The facility at which the technology is used is in compliance with all applicable laws, regulations, and ordinances.

(7) The technology meets any other conditions established by the commission.

(8) The facility certifies that any local agency sending solid waste to the facility diverted at least 30 percent of all solid waste it collects through solid waste reduction, recycling, and composting. For purposes of this paragraph, "local agency" means any city, county, or special district, or subdivision thereof, which is authorized to provide solid waste handling services.

(c) "Renewable energy public goods charge" means that portion of the nonbypassable system benefits charge required to be collected to fund renewable energy pursuant to the Reliable Electric Service Investments Act (Article 15 (commencing with Section 399) of Chapter 2.3 of Part 1 of Division 1 of the Public Utilities Code).

(d) "Report" means the report entitled "Investing in Renewable Electricity Generation in California" (June 2001, Publication Number P500-00-022) submitted to the Governor and the Legislature by the commission.

(e) "Retail seller" means a "retail seller" as defined in Section 399.12 of the Public Utilities Code.

Credits

(Added by Stats.2003, c. 666 (S.B.183), § 2. Amended by Stats.2006, c. 464 (S.B.107), § 3; Stats.2008, c. 558 (A.B.3048), § 4; Stats.2011-2012, 1st Ex.Sess., c. 1 (S.B.2), § 6, eff. Dec. 10, 2011.)

Senate Bill No. 107

STATS. 2006, CHAPTER 464

An act to amend Sections 25620.1, 25740, 25741, 25742, 25743, 25746, and 25751 of, to add Sections 25470.5 and 25744.5 to, and to repeal Sections 25745 and 25749 of, the Public Resources Code, and to amend Sections 387, 399.11, 399.12, 399.13, 399.14, and 399.15 of, to add Article 9 (commencing with Section 635) to Chapter 3 of Part 1 of Division 1 of, to add and repeal Section 2854 of, and to repeal and add Section 399.16 of, the Public Utilities Code, relating to energy.

Approved by Governor September 26, 2006. Filed with Secretary of State September 26, 2006.

LEGISLATIVE COUNSEL'S DIGEST

SB 107, Simitian. Renewable energy: Public Interest Energy Research, Demonstration, and Development Program.

(1) Existing law expresses the intent of the Legislature, in establishing the Renewable Energy Resources Program, to increase the amount of renewable electricity generated per year, so that it equals at least 17% of the total electricity generated for consumption in California per year by 2006.

This bill would revise and recast that intent language so that the amount of electricity generated per year from eligible renewable energy resources is increased to an amount that equals at least 20% of the total electricity sold to retail customers in California per year by December 31, 2010. The bill would make conforming changes related to this provision.

(2) The Public Utilities Act imposes various duties and responsibilities on the California Public Utilities Commission (CPUC) with respect to the purchase of electricity and requires the CPUC to review and adopt a procurement plan and a renewable energy procurement plan for each electrical corporation pursuant to the California Renewables Portfolio Standard Program. The program requires that a retail seller of electricity, including electrical corporations, community choice aggregators, and electric service providers, but not including local publicly owned electric utilities, purchase a specified minimum percentage of electricity generated by eligible renewable energy resources, as defined, in any given year as a specified percentage of total kilowatthours sold to retail end-use customers each calendar year (renewables portfolio standard). The renewables portfolio standard requires each electrical corporation to increase its total procurement of eligible renewable energy resources by at least an additional 1% of retail sales per year so that 20% of its retail sales are procured from eligible renewable energy resources no later than December 31, 2017.

This bill would instead require that each retail seller, as defined, increase its total procurement of eligible renewable energy resources by at least an additional 1% of retail sales per year so that 20% of its retail sales are procured from eligible renewable energy resources no later than December 31, 2010.

(3) Existing law requires the State Energy Resources Conservation and Development Commission (Energy Commission) to certify eligible renewable energy resources, to design and implement an accounting system to verify compliance with the renewables portfolio standard by retail sellers, and to allocate and award supplemental energy payments to cover above-market costs of renewable energy.

This bill would require the Energy Commission, if it provides funding for a regional accounting system to verify compliance with the renewables portfolio standard by retail sellers, to recover all costs from user fees. The bill would require the Energy Commission to develop tracking, accounting, verification, and enforcement mechanisms for renewable energy credits, as defined. The bill would specify that facilities located out of state shall not be eligible for supplemental energy payments unless certain requirements are met, and would limit awards to those facilities to 10% of funds available. The bill would require that deliveries of electricity from an eligible renewable energy resource under any electricity purchase agreement with a retail seller executed before January 1, 2002, be tracked and included in the baseline quantity of eligible renewable energy resources of the purchasing retail seller. The bill would require that electricity generated pursuant to a prescribed federal act and pursuant to a purchase contract executed on or after January 1, 2002, count towards the renewables portfolio standard requirements of the retail seller. The bill would provide for the tracking of deliveries under these purchase contracts through a prescribed accounting system. The bill would make other technical and conforming changes.

Existing law provides that if supplemental energy payments from the Energy Commission, in combination with the market prices approved by the CPUC, are insufficient to cover any above-market costs of eligible renewable energy resources, the CPUC is required to allow a retail seller to limit its annual procurement obligation to the quantity of eligible renewable energy resources that can be procured with available supplemental energy payments.

This bill would require the CPUC to adopt flexible rules allowing a retail seller to limit its annual procurement obligation to the quantity of eligible renewable energy resources that can be delivered by existing transmission if the CPUC finds that the retail seller has undertaken all reasonable efforts to utilize flexible delivery points, ensure the availability of any needed transmission capacity, and, if an electric corporation, to construct needed transmission facilities.

(4) The Public Utilities Act permits the Energy Commission to consider an electric generating facility that is located outside the state to be an eligible renewable energy resource if it meets specific criteria.

This bill would delete that provision within the act and would amend the definition of an "in-state renewable electricity generation facility" within related provisions prescribing duties of the Energy Commission to encompass certain facilities located outside the state.

(5) Under existing law, the governing board of a local publicly owned electric utility is responsible for implementing and enforcing a renewables portfolio standard that recognizes the intent of the Legislature to encourage renewable energy resources, while taking into consideration the effect of the standard on rates, reliability, and financial resources and the goal of environmental improvement. Existing law requires the governing board of a local publicly owned electric utility to annually report certain information relative to renewable energy resources to its customers.

This bill would additionally require that the governing board of a local publicly owned electric utility annually report the utility's status in implementing a renewables portfolio standard and progress toward attaining the standard to its customers and to report to the Energy Commission the information that the governing board is required to annually report to their customers. These additional reporting requirements would thereby impose a state-mandated local program.

(6) Under the Public Utilities Act, the CPUC requires electrical corporations to identify a separate rate component to fund programs that enhance system reliability and provide in-state benefits. This rate component is a nonbypassable element of local distribution and collected on the basis of usage. The funds are collected to support cost-effective energy efficiency and conservation activities, public interest research and development not adequately provided by competitive and regulated markets, and renewable energy resources (renewable energy public goods charge). Existing law requires the Energy Commission to transfer funds collected from the renewable energy public goods charge into the Renewable Resource Trust Fund and establishes certain accounts in the fund to carry out certain renewable energy purposes.

This bill would require the Energy Commission, in carrying out the renewable energy resources program, to optimize public investment and ensure that the most cost-effective and efficient investments in renewable energy resources are vigorously pursued with a long-term goal of achieving a fully competitive and self-sustaining supply of electricity generated from renewable sources. The bill would state that a near term objective of the program is to increase the quantity of electricity generated by in-state renewable electricity generation facilities, while protecting system reliability, fostering resource diversity, and obtaining the greatest environmental benefits for California residents with an additional

objective to identify and support emerging renewable energy technologies that have the greatest near-term commercial promise and that merit targeted assistance. The bill would make legislative recommendations for allocations among specified renewable energy resources.

(7) Under existing law, 51.5% of the money collected as part of the renewable energy public goods charge is required to be used for programs designed to foster the development of new in-state renewable electricity generation facilities, and to secure for the state the environmental, economic, and reliability benefits that operation of those facilities will provide. Existing law also provides that any of those funds used for new in-state renewable electricity generation facilities are required to be expended in accordance with a specified report of the Energy Commission to the Legislature, subject to certain requirements, including the awarding of supplemental energy payments.

This bill would require that these funds be awarded only to a project that is selected by an electrical corporation pursuant to a competitive solicitation procedure found by the CPUC to comply with the California Renewables Portfolio Standard Program and that the project participant has entered into an electricity purchase agreement resulting from that solicitation that is approved by the CPUC. The bill would authorize certain projects supplying electricity to retail sellers, as defined, to the extent the retail seller is servicing load that is within the distribution area of an electrical corporation and subject to the renewable energy public goods charge, to receive supplemental energy payments under certain circumstances. The bill would prohibit the Energy Commission from awarding supplemental energy payments for the sale or purchase of renewable energy credits or to service load that is not subject to the renewable energy public goods charge. The bill would incorporate the modified definition of an "in-state renewable electricity generation facility."

(8) Existing law requires that 20% of the funds collected as part of the renewable energy public goods charge be used for a program designed to improve the competitiveness of existing in-state renewable electricity generation facilities and to secure for the state specified benefits.

This bill would reduce that amount to 10% of the funds collected and specify conditions under which certain facilities would be eligible for funding.

(9) Existing law requires that 171/2% of the funds collected as part of the renewable energy public goods charge be deposited into the Emerging Renewables Resources Account, and be used for a multiyear, consumer-based program to foster the development of emerging renewable technologies in distributed generation applications.

Existing law requires the Energy Commission, by January 1, 2008, and in consultation with the CPUC, local publicly owned electric utilities, and interested members of the public, to establish and thereafter revise eligibility criteria for solar

energy systems, as defined, and to establish conditions for ratepayer funded incentives that are applicable to the California Solar Initiative, as defined.

This bill would require that the Energy Commission, in allocating and using moneys in the Emerging Renewables Resources Account and the Renewable Resource Trust Fund to fund photovoltaic and solar thermal electric technologies, to utilize the eligibility criteria and conditions for solar energy systems that are applicable to the California Solar Initiative.

(10) Existing law establishes the Customer-Credit Renewable Resource Purchases Account in the Renewable Resource Trust Fund, requires that 10% of the money collected under the renewable energy public goods charge be deposited into the account and be used for credits to customers that entered into a direct transaction on or before September 20, 2001, for purchases of electricity produced by registered in-state renewable electricity generating facilities.

This bill would delete these provisions.

(11) Existing law requires the use of standard terms and conditions by all electrical corporations in contracting for eligible renewable energy resources.

This bill would require that those terms and conditions include the requirement that, no later than 6 months after the CPUC's approval of an electricity purchase agreement, the following information about the agreement be disclosed by the CPUC: party names, resource type, project location, and project capacity.

(12) This bill would require an electrical corporation or local publicly owned electric utility to adopt certain strategies in a long-term plan or a procurement plan, as applicable, to achieve efficiency in the use of fossil fuels and to address carbon emissions, as specified.

(13) This bill would delete certain obsolete and duplicative provisions and make technical and conforming changes.

(14) This bill would require the CPUC, in consultation with the Energy Commission, to review the impact of allowing supplemental energy payments to be applied toward contracts for the procurement of eligible renewable energy resources that are of a duration of less than 10 years, and, by June 30, 2007, to report to the Legislature with the results of the review, including certain matters. The bill would require the PUC to report to the Legislature, on or before January 1, 2008, on the feasibility, desirability, and design of performance-based incentives for solar energy systems of less than 30 kilowatts.

(15) Existing law establishes the Public Interest Research, Development, and Demonstration Fund in the State Treasury, and provides that the money collected by the public goods charge to support public interest research and development not adequately provided by competitive and regulated markets, be deposited in the fund for use by the Energy Commission to develop, implement, and administer the

Public Interest Research, Development, and Demonstration Program to develop technologies which will improve environmental quality, enhance electrical system reliability, increase efficiency of energy-using technologies, lower electrical system costs, or provide other tangible benefits. The Energy Commission is required to adopt a portfolio approach for the program that accomplishes specified objectives.

This bill would state that the general goal of the program is to develop, and help bring to market, energy technologies that provide increased environmental benefits, greater system reliability, and lower system costs, and that provide tangible benefits to electrical utility customers through specified investments. The bill would require that the portfolio approach used by the Energy Commission additionally ensure an open project selection process, encourage the awarding of research funding for a diverse type of research as well as a diverse award recipient base, equally considers research proposals from the public and private sectors, and be coordinated with other related research programs.

(16) Existing law makes a violation of the Public Utilities Act or a violation of an order of the CPUC a crime.

Certain of the provisions of this bill are a part of the act and an order of the CPUC would be required to implement these provisions. Because a violation of the provisions of the bill that are part of the act or of any CPUC order implementing these provisions would be a crime, this bill would impose a state-mandated local program by creating new crimes.

(17) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that with regard to certain mandates no reimbursement is required by this act for a specified reason.

With regard to any other mandates, this bill would provide that, if the Commission on State Mandates determines that the bill contains costs so mandated by the state, reimbursement for those costs shall be made pursuant to the statutory provisions noted above.

Digest Key

Vote: MAJORITY Appropriation: NO Fiscal Committee: YES Local Program: YES

Bill Text

The people of the State of California do enact as follows:

SECTION 1.

Section 25620.1 of the Public Resources Code is amended to read:

25620.1.

(a) The commission shall develop, implement, and administer the Public Interest Research, Development, and Demonstration Program that is hereby created. The program shall include a full range of research, development, and demonstration activities that, as determined by the commission, are not adequately provided for by competitive and regulated markets. The commission shall administer the program consistent with the policies of this chapter.

(b) The general goal of the program is to develop, and help bring to market, energy technologies that provide increased environmental benefits, greater system reliability, and lower system costs, and that provide tangible benefits to electrical utility customers through investments in the following:

(1) Advanced electricity and natural gas transportation technologies that reduce air pollution and emissions of greenhouse gases beyond applicable standards, and that benefit electricity and natural gas ratepayers.

(2) Increased energy efficiency in buildings, appliances, lighting, and other applications beyond applicable standards, and that benefit electrical utility customers.

(3) Advanced electricity generation technologies that exceed applicable standards to increase reductions in emissions of greenhouse gases from electricity generation, and that benefit electric utility customers.

(4) Advanced electricity technologies that reduce or eliminate consumption of water or other finite resources, increase use of renewable energy resources, or improve transmission or distribution of electricity generated from renewable energy resources.

(c) To achieve the goals established in subdivision (b), the commission shall adopt a portfolio approach for the program that does all of the following:

(1) Effectively balances the risks, benefits, and time horizons for various activities and investments that will provide tangible energy or environmental benefits for California electricity customers.

(2) Emphasizes innovative energy supply and end-use technologies, focusing on their reliability, affordability, and environmental attributes.

(3) Includes projects that have the potential to enhance transmission and distribution capabilities.

(4) Includes projects that have the potential to enhance the reliability, peaking power, and storage capabilities of renewable energy.

(5) Demonstrates a balance of benefits to all sectors that contribute to the funding under Section 399.8 of the Public Utilities Code.

(6) Addresses key technical and scientific barriers.

(7) Demonstrates a balance between short-term, mid-term, and long-term potential.

(8) Ensures that prior, current, and future research not be unnecessarily duplicated.

(9) Provides for the future market utilization of projects funded through the program.

(10) Ensures an open project selection process and encourages the awarding of research funding for a diverse type of research as well as a diverse award recipient base and equally considers research proposals from the public and private sectors.

(11) Coordinates with other related research programs.

(d) The term “award,” as used in this chapter, may include, but is not limited to, contracts, grants, interagency agreements, loans, and other financial agreements designed to fund public interest research, demonstration, and development projects or programs.

SEC. 2.

Section 25740 of the Public Resources Code is amended to read:

25740.

It is the intent of the Legislature in establishing this program, to increase the amount of electricity generated from eligible renewable energy resources per year, so that it equals at least 20 percent of total retail sales of electricity in California per year by December 31, 2010.

SEC. 3.

Section 25741 of the Public Resources Code is amended to read:

25741.

As used in this chapter, the following terms have the following meaning:

(a) "Delivered" and "delivery" mean the electricity output of an in-state renewable electricity generation facility that is used to serve end-use retail customers located within the state. Subject to verification by the accounting system established by the commission pursuant to subdivision (b) of Section 399.13 of the Public Utilities Code, electricity shall be deemed delivered if it is either generated at a location within the state, or is scheduled for consumption by California end-use retail customers. Subject to criteria adopted by the commission, electricity generated by an eligible renewable energy resource may be considered "delivered" regardless of whether the electricity is generated at a different time from consumption by a California end-use customer.

(b) "In-state renewable electricity generation facility" means a facility that meets all of the following criteria:

(1) The facility uses biomass, solar thermal, photovoltaic, wind, geothermal, fuel cells using renewable fuels, small hydroelectric generation of 30 megawatts or less, digester gas, municipal solid waste conversion, landfill gas, ocean wave, ocean thermal, or tidal current, and any additions or enhancements to the facility using that technology.

(2) The facility satisfies one of the following requirements:

(A) The facility is located in the state or near the border of the state with the first point of connection to the transmission network within this state and electricity produced by the facility is delivered to an in-state location.

(B) The facility has its first point of interconnection to the transmission network outside the state and satisfies all of the following requirements:

(i) It is connected to the transmission network within the Western Electricity Coordinating Council (WECC) service territory.

(ii) It commences initial commercial operation after January 1, 2005.

(iii) Electricity produced by the facility is delivered to an in-state location.

(iv) It will not cause or contribute to any violation of a California environmental quality standard or requirement.

(v) If the facility is outside of the United States, it is developed and operated in a manner that is as protective of the environment as a similar facility located in the state.

(vi) It participates in the accounting system to verify compliance with the renewables portfolio standard by retail sellers, once established by the Energy Commission pursuant to subdivision (b) of Section 399.13 of the Public Utilities Code.

(C) The facility meets the requirements of clauses (i), (iii), (iv), (v), and (vi) in subparagraph (B), but does not meet the requirements of clause (ii) because it commences initial operation prior to January 1, 2005, if the facility satisfies either of the following requirements:

(i) The electricity is from incremental generation resulting from expansion or repowering of the facility.

(ii) The facility has been part of the existing baseline of eligible renewable energy resources of a retail seller established pursuant to paragraph (2) of subdivision (b) of Section 399.15 of the Public Utilities Code.

(3) For the purposes of this subdivision, "solid waste conversion" means a technology that uses a noncombustion thermal process to convert solid waste to a clean-burning fuel for the purpose of generating electricity, and that meets all of the following criteria:

(A) The technology does not use air or oxygen in the conversion process, except ambient air to maintain temperature control.

(B) The technology produces no discharges of air contaminants or emissions, including greenhouse gases as defined in Section 42801.1 of the Health and Safety Code.

(C) The technology produces no discharges to surface or groundwaters of the state.

(D) The technology produces no hazardous wastes.

(E) To the maximum extent feasible, the technology removes all recyclable materials and marketable green waste compostable materials from the solid waste stream prior to the conversion process and the owner or operator of the facility certifies that those materials will be recycled or composted.

(F) The facility at which the technology is used is in compliance with all applicable laws, regulations, and ordinances.

(G) The technology meets any other conditions established by the commission.

(H) The facility certifies that any local agency sending solid waste to the facility diverted at least 30 percent of all solid waste it collects through solid waste reduction, recycling, and composting. For purposes of this paragraph, "local agency" means any city, county, or special district, or subdivision thereof, which is authorized to provide solid waste handling services.

(c) "Procurement entity" means any person or corporation that enters into an agreement with a retail seller to procure eligible renewable energy resources pursuant to subdivision (f) of Section 399.14 of the Public Utilities Code.

(d) "Renewable energy public goods charge" means that portion of the nonbypassable system benefits charge authorized to be collected and to be

transferred to the Renewable Resource Trust Fund pursuant to the Reliable Electric Service Investments Act (Article 15 (commencing with Section 399) of Chapter 2.3 of Part 1 of Division 1 of the Public Utilities Code).

(e) "Report" means the report entitled "Investing in Renewable Electricity Generation in California" (June 2001, Publication Number P500-00-022) submitted to the Governor and the Legislature by the commission.

(f) "Retail seller" means a "retail seller" as defined in Section 399.12 of the Public Utilities Code.

SEC. 4.

Section 25740.5 is added to the Public Resources Code, to read:

25740.5.

(a) The commission shall optimize public investment and ensure that the most cost-effective and efficient investments in renewable energy resources are vigorously pursued.

(b) The commission's long-term goal shall be a fully competitive and self-sustaining supply of electricity generated from renewable sources.

(c) The program objective shall be to increase, in the near term, the quantity of California's electricity generated by in-state renewable electricity generation facilities, while protecting system reliability, fostering resource diversity, and obtaining the greatest environmental benefits for California residents.

(d) An additional objective of the program shall be to identify and support emerging renewable technologies in distributed generation applications that have the greatest near-term commercial promise and that merit targeted assistance.

(e) The Legislature recommends allocations among all of the following:

(1) (A) Except as provided in subparagraph (B), production incentives for new in-state renewable electricity generation facilities, including repowered or refurbished facilities.

(B) Allocations shall not be made for electricity that is generated by an in-state renewable electricity generation facility that remains under an electricity purchase contract with an electrical corporation originally entered into prior to September 24, 1996, whether amended or restated thereafter.

(C) Notwithstanding subparagraph (B), production incentives may be allowed in any month for incremental new electricity generated by an in-state renewable

electricity generation facility that is repowered or refurbished, where the electricity is delivered under an electricity purchase contract with an electrical corporation originally entered into prior to September 24, 1996, whether amended or restated thereafter, if all of the following occur:

(i) The facility's electricity purchase contract provides that all electricity delivered and sold under the contract is paid at a price that does not exceed the Public Utilities Commission approved short-run avoided cost of energy.

(ii) Either of the following is true:

(I) The electricity purchase contract is amended to provide that the kilowatthours used to determine the capacity payment in any time-of-delivery period in any month under the contract shall be equal to the actual kilowatthour production, but no greater than the five-year average of the kilowatthours delivered for the corresponding time-of-delivery period and month, in the years 1994 to 1998, inclusive.

(II) The facility's installed capacity as of December 31, 1998, is less than 75 percent of the nameplate capacity as stated in the electricity purchase contract, the electricity purchase contract is amended to provide that the kilowatthours used to determine the capacity payment in any time-of-delivery period in any month under the contract shall be equal to the actual kilowatthour production, but no greater than the product of the five-year average of the kilowatthours delivered for the corresponding time-of-delivery period and month, in the years 1994 to 1998, inclusive, and the ratio of installed capacity as of December 31 of the previous year, but not to exceed contract nameplate capacity, to the installed capacity as of December 31, 1998.

(iii) The production incentive is payable only with respect to the kilowatthours delivered in a particular month that exceeds the corresponding five-year average calculated pursuant to clause (ii).

(2) Rebates, buydowns, or equivalent incentives for emerging renewable technologies.

(3) Customer education.

(4) Incentives for reducing fuel costs, that are confirmed to the satisfaction of the commission, at solid fuel biomass energy facilities in order to provide demonstrable environmental and public benefits, including improved air quality.

(5) Solar thermal generating resources that enhance the environmental value or reliability of the electrical system and that require financial assistance to remain economically viable, as determined by the commission. The commission may require financial disclosure from applicants for purposes of this paragraph.

(6) Specified fuel cell technologies, if the commission makes all of the following findings:

(A) The specified technologies have similar or better air pollutant characteristics than renewable technologies in the report made pursuant to Section 25748.

(B) The specified technologies require financial assistance to become commercially viable by reference to wholesale generation prices.

(C) The specified technologies could contribute significantly to the infrastructure development or other innovation required to meet the long-term objective of a self-sustaining, competitive supply of electricity generated from renewable sources.

(7) Existing wind-generating resources, if the commission finds that the existing wind-generating resources are a cost-effective source of reliable energy and environmental benefits compared with other in-state renewable electricity generation facilities, and that the existing wind-generating resources require financial assistance to remain economically viable. The commission may require financial disclosure from applicants for the purposes of this paragraph.

(f) Notwithstanding any other provision of law, moneys collected for renewable energy pursuant to Article 15 (commencing with Section 399) of Chapter 2.3 of Part 1 of Division 1 of the Public Utilities Code shall be transferred to the Renewable Resource Trust Fund. Moneys collected between January 1, 2007, and January 1, 2012, shall be used for the purposes specified in this chapter.

SEC. 5.

Section 25742 of the Public Resources Code is amended to read:

25742.

(a) Ten percent of the funds collected pursuant to the renewable energy public goods charge shall be used for programs that are designed to achieve fully competitive and self-sustaining existing in-state renewable electricity generation facilities, and to secure for the state the environmental, economic, and reliability benefits that continued operation of those facilities will provide during the 2007–2011 investment cycle. Eligibility for incentives under this section shall be limited to those technologies found eligible for funds by the commission pursuant to paragraphs (4), (5), and (7) of subdivision (e) of Section 25740.5.

(b) Any funds used to support in-state renewable electricity generation facilities pursuant to this section shall be expended in accordance with the provisions of this chapter, including the following conditions:

(1) The commission shall establish a production incentive, which shall not exceed payment caps established by the commission, representing the difference between target prices and the price paid for electricity, if sufficient funds are available. If there are insufficient funds in any payment period to pay either the difference between the target and price paid for electricity or the payment caps, production incentives shall be based on the amount determined by dividing available funds by eligible generation.

(2) The commission may establish a time-differentiated incentive structure that encourages plants to run the maximum feasible amount of time and that provides a higher incentive when the plants are receiving the lowest price.

(3) The commission may consider inflation and production costs.

(c) Facilities that are eligible to receive funding pursuant to this section shall be registered in accordance with criteria developed by the commission and those facilities shall not receive payments for any electricity produced that is used on site.

(d) (1) The commission shall award funding to eligible facilities based on a facility's individual need. In assessing a facility's individual need, the commission shall, to the extent feasible, consider all of the following:

(A) The amount of the funds being considered for an award to the facility.

(B) The cumulative amount of funds the facility has received previously from the commission and other state sources.

(C) The value of any current federal or state tax credits.

(D) The facility's contract price for energy and capacity.

(E) The likelihood that the award will make the facility competitive and self-sustaining within the 2007–2011 investment cycle.

(F) Any other criteria as determined by the commission.

(2) The assessment shall also consider the public benefits provided by the operation of the facility.

(3) The commission shall use its assessment of the facility's individual need to determine the value of an award to the public relative to other renewable energy investment alternatives.

(4) The commission shall compile its findings and report them to the Legislature in the reports prepared pursuant to Section 25748.

SEC. 6.

Section 25743 of the Public Resources Code is amended to read:

25743.

(a) Fifty-one and one-half percent of the money collected pursuant to the renewable energy public goods charge shall be used for programs designed to foster the development of new in-state renewable electricity generation facilities, and to secure for the state the environmental, economic, and reliability benefits that operation of those facilities will provide.

(b) Any funds used for new in-state renewable electricity generation facilities pursuant to this section shall be expended in accordance with the report, subject to all of the following requirements:

(1) In order to cover the above market costs of eligible renewable energy resources as approved by the Public Utilities Commission and selected by retail sellers to fulfill their obligations under Article 16 (commencing with Section 399.11) of Chapter 2.3 of Part 1 of Division 1 of the Public Utilities Code, the commission shall award funds in the form of supplemental energy payments, subject to the following criteria:

(A) The commission may establish caps on supplemental energy payments. The caps shall be designed to provide for a viable energy market capable of achieving the goals of Article 16 (commencing with Section 399.11) of Chapter 2.3 of Part 1 of Division 1 of the Public Utilities Code. The commission may waive application of the caps to accommodate a facility if it is demonstrated to the satisfaction of the commission that operation of the facility would provide substantial economic and environmental benefits to end-use customers subject to the renewable energy public goods charge.

(B) Supplemental energy payments shall be awarded only to facilities that are eligible for funding under this section.

(C) Supplemental energy payments awarded to facilities selected by a retail seller or procurement entity pursuant to Article 16 (commencing with Section 399.11) of Chapter 2.3 of Part 1 of Division 1 of the Public Utilities Code shall be paid for no longer than 10 years, but shall, subject to the payment caps in subparagraph (A), be equal to the cumulative above-market costs relative to the applicable market price referent at the time of initial contracting, over the duration of the contract with the retail seller or procurement entity.

(D) The commission shall reduce or terminate supplemental energy payments for projects that fail either to commence and maintain operations consistent with the contractual obligations to an electrical corporation, or that fail to meet eligibility requirements.

(E) Funds shall be managed in an equitable manner in order for retail sellers to meet their obligation under Article 16 (commencing with Section 399.11) of Chapter 2.3 of Part 1 of Division 1 of the Public Utilities Code.

(F) A project selected by an electrical corporation may receive supplemental energy payments only if it results from a competitive solicitation that is found by the Public Utilities Commission to comply with the California Renewables Portfolio Standard Program under Article 16 (commencing with Section 399.11) of Chapter 2.3 of Part 1 of Division 1 of the Public Utilities Code, and the project has entered into an electricity purchase agreement resulting from that solicitation, that is approved by the Public Utilities Commission. A project selected for an electricity purchase agreement by another retail seller or procurement entity may receive supplemental energy payments only if the Public Utilities Commission determines that the selection of the project is consistent with the results of a least-cost and best-fit process, and the supplemental energy payments are reasonable in comparison to those paid under similar contracts with other retail sellers. The commission may not award supplemental energy payments to service load that is not subject to the renewable energy public goods charge.

(G) (i) Supplemental energy payments shall not be awarded for any purchases of renewable energy credits.

(ii) Supplemental energy payments shall not be awarded for electricity purchase agreements that have a duration of less than 10 years. The ineligibility of agreements of less than 10 years duration for supplemental energy payments does not constitute an insufficiency in supplemental energy payments pursuant to paragraph (4) or (5) of subdivision (b) of Section 399.15.

(2) (A) A facility that is located outside of California shall not be eligible for funding under this section unless it satisfies the requirements of this subdivision and the criteria of subparagraph (B) of paragraph (2) of subdivision (b) of Section 25741.

(B) No more than 10 percent of the funds available under this section shall be awarded to facilities located outside of California.

(3) Facilities that are eligible to receive funding pursuant to this section shall be registered in accordance with criteria developed by the commission and those facilities may not receive payments for any electricity produced that has any of the following characteristics:

(A) Is sold under an existing long-term contract with an existing in-state electrical corporation if the contract includes fixed energy or capacity payments, except for that electricity that satisfies subparagraph (C) of paragraph (1) of subdivision (c) of Section 399.6 of the Public Utilities Code.

(B) Is used onsite or is sold to customers in a manner that excludes competition transition charge payments, or is otherwise excluded from competition transition charge payments.

(C) Is a hydroelectric generation project that will require a new or increased appropriation of water under Part 2 (commencing with Section 1200) of Division 2 of the Water Code, or any other provision authorizing an appropriation of water.

(D) Is a solid waste conversion facility, unless the facility meets the criteria established in paragraph (3) of subdivision (b) of Section 25741 and the facility certifies that any local agency sending solid waste to the facility is in compliance with Division 30 (commencing with Section 40000), has reduced, recycled, or composted solid waste to the maximum extent feasible, and shall have been found by the California Integrated Waste Management Board to have diverted at least 30 percent of all solid waste through source reduction, recycling, and composting.

(4) Eligibility to compete for funds or to receive funds shall be contingent upon having to sell the electricity generated by the renewable electricity generation facility to customers subject to the renewable energy public goods charge.

(5) The commission may require applicants competing for funding to post a forfeitable bid bond or other financial guaranty as an assurance of the applicant's intent to move forward expeditiously with the project proposed. The amount of any bid bond or financial guaranty may not exceed 10 percent of the total amount of the funding requested by the applicant.

(6) In awarding funding, the commission may provide preference to projects that provide tangible demonstrable benefits to communities with a plurality of minority or low-income populations.

(c) Repowered existing facilities shall be eligible for funding under this subdivision if the capital investment to repower the existing facility equals at least 80 percent of the value of the repowered facility.

(d) Facilities engaging in the direct combustion of municipal solid waste or tires are not eligible for funding under this subdivision.

(e) Production incentives awarded under this subdivision prior to January 1, 2002, shall commence on the date that a project begins electricity production, provided that the project was operational prior to January 1, 2002, unless the commission finds that the project will not be operational prior to January 1, 2002, due to circumstances beyond the control of the developer. Upon making a finding that the project will not be operational due to circumstances beyond the control of the developer, the commission shall pay production incentives over a five-year period, commencing on the date of operation, provided that the date that a project begins electricity production may not extend beyond January 1, 2007.

(f) Facilities generating electricity from biomass energy shall be considered an in-state renewable electricity generation facility to the extent that they report to the commission the types and quantities of biomass fuels used and certify to the satisfaction of the commission that fuel utilization is limited to the following:

(1) Agricultural crops and agricultural wastes and residues.

(2) Solid waste materials such as waste pallets, crates, dunnage, manufacturing, and construction wood wastes, landscape or right-of-way tree trimmings, mill residues that are directly the result of the milling of lumber, and rangeland maintenance residues.

(3) Wood and wood wastes that meet all of the following requirements:

(A) Have been harvested pursuant to an approved timber harvest plan prepared in accordance with the Z'berg-Nejedly Forest Practice Act of 1973 (Chapter 8 (commencing with Section 4511) of Part 2 of Division 4).

(B) Have been harvested for the purpose of forest fire fuel reduction or forest stand improvement.

(C) Do not transport or cause the transportation of species known to harbor insect or disease nests outside zones of infestation or current quarantine zones, as identified by the Department of Food and Agriculture or the Department of Forestry and Fire Protection, unless approved by the Department of Food and Agriculture and the Department of Forestry and Fire Protection.

SEC. 7.

Section 25744.5 is added to the Public Resources Code, to read:

25744.5.

The commission shall allocate and use funding available for emerging renewable technologies pursuant to Section 25744 and Section 25751 to fund photovoltaic and solar thermal electric technologies in accordance with eligibility criteria and conditions established pursuant to Chapter 8.8 (commencing with Section 25780).

SEC. 8.

Section 25745 of the Public Resources Code is repealed.

SEC. 9.

Section 25746 of the Public Resources Code is amended to read:

25746.

(a) One percent of the money collected pursuant to the renewable energy public goods charge shall be used in accordance with this chapter to promote renewable energy and disseminate information on renewable energy technologies, including emerging renewable technologies, and to help develop a consumer market for renewable energy and for small-scale emerging renewable energy technologies.

(b) If the commission provides funding for a regional accounting system to verify compliance with the renewable portfolio standard by retail sellers, pursuant to subdivision (b) of Section 399.13 of the Public Utilities Code, the commission shall recover all costs from user fees.

SEC. 10.

Section 25749 of the Public Resources Code is repealed.

SEC. 11.

Section 25751 of the Public Resources Code is amended to read:

25751.

(a) The Renewable Resource Trust Fund is hereby created in the State Treasury.

(b) The following accounts are hereby established within the Renewable Resource Trust Fund:

(1) The Existing Renewable Resources Account.

(2) New Renewable Resources Account.

(3) Emerging Renewable Resources Account.

(4) Renewable Resources Consumer Education Account.

(c) The money in the fund may be expended, only upon appropriation by the Legislature in the annual Budget Act, for the following purposes:

(1) The administration of this article by the state.

(2) The state's expenditures associated with the accounting system established by the commission pursuant to subdivision (b) of Section 399.13 of the Public Utilities Code.

(d) That portion of revenues collected by electrical corporations for the benefit of in-state operation and development of existing and new and emerging renewable

resource technologies, pursuant to Section 25740.5, shall be transmitted to the commission at least quarterly for deposit in the Renewable Resource Trust Fund pursuant to Section 399.6 of the Public Utilities Code. After setting aside in the fund money that may be needed for expenditures authorized by the annual Budget Act in accordance with subdivision (c), the Treasurer shall immediately deposit money received pursuant to this section into the accounts created pursuant to subdivision (b) in proportions designated by the commission for the current calendar year. Notwithstanding Section 13340 of the Government Code, the money in the fund and the accounts within the fund are hereby continuously appropriated to the commission without regard to fiscal year for the purposes enumerated in this chapter.

(e) Upon notification by the commission, the Controller shall pay all awards of the money in the accounts created pursuant to subdivision (b) for purposes enumerated in this chapter. The eligibility of each award shall be determined solely by the commission based on the procedures it adopts under this chapter. Based on the eligibility of each award, the commission shall also establish the need for a multiyear commitment to any particular award and so advise the Department of Finance. Eligible awards submitted by the commission to the Controller shall be accompanied by information specifying the account from which payment should be made and the amount of each payment; a summary description of how payment of the award furthers the purposes enumerated in this chapter; and an accounting of future costs associated with any award or group of awards known to the commission to represent a portion of a multiyear funding commitment.

(f) The commission may transfer funds between accounts for cashflow purposes, provided that the balance due each account is restored and the transfer does not adversely affect any of the accounts.

(g) The Department of Finance shall conduct an independent audit of the Renewable Resource Trust Fund and its related accounts annually, and provide an audit report to the Legislature not later than March 1 of each year for which this article is operative. The Department of Finance’s report shall include information regarding revenues, payment of awards, reserves held for future commitments, unencumbered cash balances, and other matters that the Director of Finance determines may be of importance to the Legislature.

SEC. 12.

Section 387 of the Public Utilities Code is amended to read:

387.

(a) Each governing body of a local publicly owned electric utility, as defined in Section 9604, shall be responsible for implementing and enforcing a renewables portfolio standard that recognizes the intent of the Legislature to encourage renewable resources, while taking into consideration the effect of the standard on rates, reliability, and financial resources and the goal of environmental improvement.

(b) Each local publicly owned electric utility shall report, on an annual basis, to its customers and to the State Energy Resources Conservation and Development Commission, the following:

(1) Expenditures of public goods funds collected pursuant to Section 385 for eligible renewable energy resource development. Reports shall contain a description of programs, expenditures, and expected or actual results.

(2) The resource mix used to serve its customers by fuel type. Reports shall contain the contribution of each type of renewable energy resource with separate categories for those fuels that are eligible renewable energy resources as defined in Section 399.12, except that the electricity is delivered to the local publicly owned electric utility and not a retail seller. Electricity shall be reported as having been delivered to the local publicly owned electric utility from an eligible renewable energy resource when the electricity would qualify for compliance with the renewables portfolio standard if it were delivered to a retail seller.

(3) The utility's status in implementing a renewables portfolio standard pursuant to subdivision (a) and the utility's progress toward attaining the standard following implementation.

SEC. 13.

Section 399.11 of the Public Utilities Code is amended to read:

399.11.

The Legislature finds and declares all of the following:

(a) In order to attain a target of generating 20 percent of total retail sales of electricity in California from eligible renewable energy resources by December 31, 2010, and for the purposes of increasing the diversity, reliability, public health and environmental benefits of the energy mix, it is the intent of the Legislature that the commission and the State Energy Resources Conservation and Development Commission implement the California Renewables Portfolio Standard Program described in this article.

(b) Increasing California's reliance on eligible renewable energy resources may promote stable electricity prices, protect public health, improve environmental quality, stimulate sustainable economic development, create new employment opportunities, and reduce reliance on imported fuels.

(c) The development of eligible renewable energy resources and the delivery of the electricity generated by those resources to customers in California may ameliorate air quality problems throughout the state and improve public health by reducing the burning of fossil fuels and the associated environmental impacts and by reducing in-state fossil fuel consumption.

(d) The California Renewables Portfolio Standard Program is intended to complement the Renewable Energy Resources Program administered by the State Energy Resources Conservation and Development Commission and established pursuant to Chapter 8.6 (commencing with Section 25740) of Division 15 of the Public Resources Code.

(e) New and modified electric transmission facilities may be necessary to facilitate the state achieving its renewables portfolio standard targets.

SEC. 14.

Section 399.12 of the Public Utilities Code is amended to read:

399.12.

For purposes of this article, the following terms have the following meanings:

(a) "Delivered" and "delivery" have the same meaning as provided in subdivision (a) of Section 25741 of the Public Resources Code.

(b) "Eligible renewable energy resource" means an electric generating facility that meets the definition of "in-state renewable electricity generation facility" in Section 25741 of the Public Resources Code, subject to the following limitations:

(1) (A) An existing small hydroelectric generation facility of 30 megawatts or less shall be eligible only if a retail seller owned or procured the electricity from the facility as of December 31, 2005. A new hydroelectric facility is not an eligible renewable energy resource if it will require a new or increased appropriation or diversion of water from a watercourse.

(B) Notwithstanding subparagraph (A), an existing conduit hydroelectric facility, as defined by Section 823a of Title 16 of the United States Code, of 30 megawatts or less, shall be an eligible renewable energy resource. A new conduit hydroelectric facility, as defined by Section 823a of Title 16 of the United States Code, of 30 megawatts or less, shall be an eligible renewable energy resource so

long as it does not require a new or increased appropriation or diversion of water from a watercourse.

(3) A facility engaged in the combustion of municipal solid waste shall not be considered an eligible renewable resource unless it is located in Stanislaus County and was operational prior to September 26, 1996.

(c) "Energy Commission" means the State Energy Resources Conservation and Development Commission.

(d) "Local publicly owned electric utility" has the same meaning as provided in subdivision (d) of Section 9604.

(e) "Procure" means that a retail seller receives delivered electricity generated by an eligible renewable energy resource that it owns or for which it has entered into an electricity purchase agreement. Nothing in this article is intended to imply that the purchase of electricity from third parties in a wholesale transaction is the preferred method of fulfilling a retail seller's obligation to comply with this article.

(f) "Renewables portfolio standard" means the specified percentage of electricity generated by eligible renewable energy resources that a retail seller is required to procure pursuant to this article.

(g) (1) "Renewable energy credit" means a certificate of proof, issued through the accounting system established by the Energy Commission pursuant to Section 399.13, that one unit of electricity was generated and delivered by an eligible renewable energy resource.

(2) "Renewable energy credit" includes all renewable and environmental attributes associated with the production of electricity from the eligible renewable energy resource, except for an emissions reduction credit issued pursuant to Section 40709 of the Health and Safety Code and any credits or payments associated with the reduction of solid waste and treatment benefits created by the utilization of biomass or biogas fuels.

(3) No electricity generated by an eligible renewable energy resource attributable to the use of nonrenewable fuels, beyond a de minimus quantity, as determined by the Energy Commission, shall result in the creation of a renewable energy credit.

(h) "Retail seller" means an entity engaged in the retail sale of electricity to end-use customers located within the state, including any of the following:

(1) An electrical corporation, as defined in Section 218.

(2) A community choice aggregator. The commission shall institute a rulemaking to determine the manner in which a community choice aggregator will participate in the renewables portfolio standard program subject to the same terms and conditions applicable to an electrical corporation.

(3) An electric service provider, as defined in Section 218.3, for all sales of electricity to customers beginning January 1, 2006. The commission shall institute a rulemaking to determine the manner in which electric service providers will participate in the renewables portfolio standard program. The electric service provider shall be subject to the same terms and conditions applicable to an electrical corporation pursuant to this article. Nothing in this paragraph shall impair a contract entered into between an electric service provider and a retail customer prior to the suspension of direct access by the commission pursuant to Section 80110 of the Water Code.

(4) "Retail seller" does not include any of the following:

(A) A corporation or person employing cogeneration technology or producing electricity consistent with subdivision (b) of Section 218.

(B) The Department of Water Resources acting in its capacity pursuant to Division 27 (commencing with Section 80000) of the Water Code.

(C) A local publicly owned electric utility.

SEC. 15.

Section 399.13 of the Public Utilities Code is amended to read:

399.13.

The Energy Commission shall do all of the following:

(a) Certify eligible renewable energy resources that it determines meet the criteria described in subdivision (b) of Section 399.12.

(b) Design and implement an accounting system to verify compliance with the renewables portfolio standard by retail sellers, to ensure that electricity generated by an eligible renewable energy resource is counted only once for the purpose of meeting the renewables portfolio standard of this state or any other state, to certify renewable energy credits produced by eligible renewable energy resources, and to verify retail product claims in this state or any other state. In establishing the guidelines governing this accounting system, the Energy Commission shall collect data from electricity market participants that it deems necessary to verify compliance of retail sellers, in accordance with the requirements of this article and the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code). In seeking data from electrical corporations, the Energy Commission shall request data from the commission. The commission shall collect data from electrical corporations and remit the data to the Energy Commission within 90 days of the request.

(c) Establish a system for tracking and verifying renewable energy credits that, through the use of independently audited data, verifies the generation and delivery of electricity associated with each renewable energy credit and protects against multiple counting of the same renewable energy credit. The Energy Commission shall consult with other western states and with the Western Electricity Coordinating Council in the development of this system.

(d) Certify, for purposes of compliance with the renewable portfolio standard requirements by a retail seller, the eligibility of renewable energy credits associated with deliveries of electricity by an eligible renewable energy resource to a local publicly owned electric utility, if the Energy Commission determines that the following conditions have been satisfied:

(1) The local publicly owned electric utility that is procuring the electricity is in compliance with the requirements of Section 387.

(2) The local publicly owned electric utility has established an annual renewables portfolio standard target comparable to those applicable to an electrical corporation, is procuring sufficient eligible renewable energy resources to satisfy the targets, and will not fail to satisfy the targets in the event that the renewable energy credit is sold to another retail seller.

(e) Allocate and award supplemental energy payments pursuant to Chapter 8.6 (commencing with Section 25740) of Division 15 of the Public Resources Code, to eligible renewable energy resources to cover above-market costs of renewable energy. A project selected by an electrical corporation may receive supplemental energy payments only if it results from a competitive solicitation that is found by the commission to comply with the California Renewables Portfolio Standard Program under this article and the project has entered into an electricity purchase agreement resulting from that solicitation that is approved by the commission. A project selected for an electricity purchase agreement by another retail seller may receive supplemental energy payments only if the retail seller demonstrates to the commission that the selection of the project is consistent with the results of a least-cost and best-fit process, and that the supplemental energy payments are reasonable in comparison to those paid under similar contracts with other retail sellers.

SEC. 16.

Section 399.14 of the Public Utilities Code is amended to read:

399.14.

(a) (1) The commission shall direct each electrical corporation to prepare a renewable energy procurement plan that includes the matter in paragraph (3), to satisfy its obligations under the renewables portfolio standard. To the extent feasible, this procurement plan shall be proposed, reviewed, and adopted by the commission as part of, and pursuant to, a general procurement plan process. The commission shall require each electrical corporation to review and update its renewable energy procurement plan as it determines to be necessary.

(2) The commission shall adopt, by rulemaking, all of the following:

(A) A process for determining market prices pursuant to subdivision (c) of Section 399.15. The commission shall make specific determinations of market prices after the closing date of a competitive solicitation conducted by an electrical corporation for eligible renewable energy resources.

(B) A process that provides criteria for the rank ordering and selection of least-cost and best-fit eligible renewable energy resources to comply with the annual California Renewables Portfolio Standard Program obligations on a total cost basis. This process shall consider estimates of indirect costs associated with needed transmission investments and ongoing utility expenses resulting from integrating and operating eligible renewable energy resources.

(C) (i) Flexible rules for compliance, including rules permitting retail sellers to apply excess procurement in one year to subsequent years or inadequate procurement in one year to no more than the following three years. The flexible rules for compliance shall apply to all years, including years before and after a retail seller procures at least 20 percent of total retail sales of electricity from eligible renewable energy resources.

(ii) The flexible rules for compliance shall address situations where, as a result of insufficient transmission, a retail seller is unable to procure eligible renewable energy resources sufficient to satisfy the requirements of this article. Any rules addressing insufficient transmission shall require a finding by the commission that the retail seller has undertaken all reasonable efforts to do all of the following:

(I) Utilize flexible delivery points.

(II) Ensure the availability of any needed transmission capacity.

(III) If the retail seller is an electric corporation, to construct needed transmission facilities.

(IV) Nothing in this subparagraph shall be construed to revise any portion of Section 454.5.

(D) Standard terms and conditions to be used by all electrical corporations in contracting for eligible renewable energy resources, including performance requirements for renewable generators. A contract for the purchase of electricity

generated by an eligible renewable energy resource shall, at a minimum, include the renewable energy credits associated with all electricity generation specified under the contract. The standard terms and conditions shall include the requirement that, no later than six months after the commission's approval of an electricity purchase agreement entered into pursuant to this article, the following information about the agreement shall be disclosed by the commission: party names, resource type, project location, and project capacity.

(3) Consistent with the goal of procuring the least-cost and best-fit eligible renewable energy resources, the renewable energy procurement plan submitted by an electrical corporation shall include all of the following:

(A) An assessment of annual or multiyear portfolio supplies and demand to determine the optimal mix of eligible renewable energy resources with deliverability characteristics that may include peaking, dispatchable, baseload, firm, and as-available capacity.

(B) Provisions for employing available compliance flexibility mechanisms established by the commission.

(C) A bid solicitation setting forth the need for eligible renewable energy resources of each deliverability characteristic, required online dates, and locational preferences, if any.

(4) In soliciting and procuring eligible renewable energy resources, each electrical corporation shall offer contracts of no less than 10 years in duration, unless the commission approves of a contract of shorter duration.

(5) In soliciting and procuring eligible renewable energy resources, each electrical corporation may give preference to projects that provide tangible demonstrable benefits to communities with a plurality of minority or low-income populations.

(b) The commission may authorize a retail seller to enter into a contract of less than 10 years' duration with an eligible renewable energy resource, subject to the following conditions:

(1) No supplemental energy payments shall be awarded for a contract of less than 10 years' duration. The ineligibility of contracts of less than 10 years' duration for supplemental energy payments pursuant to this paragraph does not constitute an insufficiency in supplemental energy payments pursuant to paragraph (4) or (5) of subdivision (b) of Section 399.15.

(2) The commission has established, for each retail seller, minimum quantities of eligible renewable energy resources to be procured either through contracts of at least 10 years' duration or from new facilities commencing commercial operations on or after January 1, 2005.

(c) The commission shall review and accept, modify, or reject each electrical corporation's renewable energy procurement plan prior to the commencement of renewable procurement pursuant to this article by an electrical corporation.

(d) The commission shall review the results of an eligible renewable energy resources solicitation submitted for approval by an electrical corporation and accept or reject proposed contracts with eligible renewable energy resources based on consistency with the approved renewable energy procurement plan. If the commission determines that the bid prices are elevated due to a lack of effective competition amongst the bidders, the commission shall direct the electrical corporation to renegotiate the contracts or conduct a new solicitation.

(e) If an electrical corporation fails to comply with a commission order adopting a renewable energy procurement plan, the commission shall exercise its authority pursuant to Section 2113 to require compliance. The commission shall enforce comparable penalties on any other retail seller that fails to meet annual procurement targets established pursuant to Section 399.15.

(f) (1) The commission may authorize a procurement entity to enter into contracts on behalf of customers of a retail seller for deliveries of eligible renewable energy resources to satisfy annual renewables portfolio standard obligations. The commission may not require any person or corporation to act as a procurement entity or require any party to purchase eligible renewable energy resources from a procurement entity.

(2) Subject to review and approval by the commission, the procurement entity shall be permitted to recover reasonable administrative and procurement costs through the retail rates of end-use customers that are served by the procurement entity and are directly benefiting from the procurement of eligible renewable energy resources.

(3) A project selected for a long-term electricity purchase contract of more than 10 years' duration by a procurement entity through a competitive solicitation, and approved by the commission, may receive supplemental energy payments from the Energy Commission if the transaction satisfies the requirements of subdivision (b) of Section 25743 of the Public Resources Code.

(g) Procurement and administrative costs associated with long-term contracts entered into by an electrical corporation for eligible renewable energy resources pursuant to this article, at or below the market price determined by the commission pursuant to subdivision (c) of Section 399.15, shall be deemed reasonable per se, and shall be recoverable in rates.

(h) Construction, alteration, demolition, installation, and repair work on an eligible renewable energy resource that receives production incentives or supplemental energy payments pursuant to Sections 25742 and 25743 of the Public Resources Code, including work performed to qualify, receive, or maintain production

incentives or supplemental energy payments is “public works” for the purposes of Chapter 1 (commencing with Section 1720) of Part 7 of Division 2 of the Labor Code.

SEC. 17.

Section 399.15 of the Public Utilities Code is amended to read:

399.15.

(a) In order to fulfill unmet long-term resource needs, the commission shall establish a renewables portfolio standard requiring all electrical corporations to procure a minimum quantity of electricity generated by eligible renewable energy resources as a specified percentage of total kilowatthours sold to their retail end-use customers each calendar year, if sufficient funds are made available pursuant to Section 399.6 and Chapter 8.6 (commencing with Section 25740) of Division 15 of the Public Resources Code, to cover the above-market costs of eligible renewable energy resources.

(b) The commission shall implement annual procurement targets for each retail seller as follows:

(1) Each retail seller shall, pursuant to subdivision (a), increase its total procurement of eligible renewable energy resources by at least an additional 1 percent of retail sales per year so that 20 percent of its retail sales are procured from eligible renewable energy resources no later than December 31, 2010. A retail seller with 20 percent of retail sales procured from eligible renewable energy resources in any year shall not be required to increase its procurement of renewable energy resources in the following year.

(2) For purposes of setting annual procurement targets, the commission shall establish an initial baseline for each retail seller based on the actual percentage of retail sales procured from eligible renewable energy resources in 2001, and to the extent applicable, adjusted going forward pursuant to Section 399.12.

(3) Only for purposes of establishing these targets, the commission shall include all electricity sold to retail customers by the Department of Water Resources pursuant to Section 80100 of the Water Code in the calculation of retail sales by an electrical corporation.

(4) In the event that a retail seller fails to procure sufficient eligible renewable energy resources in a given year to meet any annual target established pursuant to this subdivision, the retail seller shall procure additional eligible renewable energy resources in subsequent years to compensate for the shortfall if sufficient funds are made available pursuant to Section 399.6 and Chapter 8.6 (commencing with

Section 25740) of Division 15 of the Public Resources Code, to cover any above-market costs of eligible renewable energy resources.

(5) If supplemental energy payments from the Energy Commission, in combination with the market prices approved by the commission, are insufficient to cover any above-market costs of electricity procured from eligible renewable energy resources through an electricity purchase agreement of at least 10 years' duration, the commission shall allow a retail seller to limit its annual procurement obligation to the quantity of eligible renewable energy resources that can be procured with available supplemental energy payments. A retail seller shall not be required to enter into long-term contracts with operators of eligible renewable energy resources that exceed the market prices established pursuant to subdivision (c).

(c) The commission shall establish a methodology to determine the market price of electricity for terms corresponding to the length of contracts with eligible renewable energy resources, in consideration of the following:

(1) The long-term market price of electricity for fixed price contracts, determined pursuant to an electrical corporation's general procurement activities as authorized by the commission.

(2) The long-term ownership, operating, and fixed-price fuel costs associated with fixed-price electricity from new generating facilities.

(3) The value of different products including baseload, peaking, and as-available electricity.

(d) The Energy Commission shall provide supplemental energy payments from funds in the New Renewable Resources Account of the Renewable Resource Trust Fund to eligible renewable energy resources pursuant to Chapter 8.6 (commencing with Section 25740) of Division 15 of the Public Resources Code, consistent with this article, for any above-market costs. Indirect costs associated with the purchase of eligible renewable energy resources by an electrical corporation, including imbalance energy charges, sale of excess energy, decreased generation from existing resources, or transmission upgrades, shall not be eligible for supplemental energy payments, but are recoverable in rates, as authorized by the commission. The Energy Commission shall not award supplemental energy payments to service load that is not subject to the renewable energy public goods charge.

(e) The establishment of a renewables portfolio standard shall not constitute implementation by the commission of the federal Public Utility Regulatory Policies Act of 1978 (Public Law 95-617).

(f) The commission shall consult with the Energy Commission in calculating market prices under subdivision (c) and establishing other renewables portfolio standard policies.

SEC. 18.

Section 399.16 of the Public Utilities Code is repealed.

SEC. 19.

Section 399.16 is added to the Public Utilities Code, to read:

399.16.

(a) The commission, by rule, may authorize the use of renewable energy credits to satisfy the requirements of the renewables portfolio standard established pursuant to this article, subject to the following conditions:

(1) Prior to authorizing any renewable energy credit to be used toward satisfying annual procurement targets, the commission and the Energy Commission shall conclude that the tracking system established pursuant to subdivision (c) of Section 399.13, is operational, is capable of independently verifying the electricity generated by an eligible renewable energy resource and delivered to the retail seller, and can ensure that renewable energy credits shall not be double counted by any seller of electricity within the service territory of the Western Electricity Coordinating Council (WECC).

(2) A renewable energy credit shall be counted only once for compliance with the renewables portfolio standard of this state or any other state, or for verifying retail product claims in this state or any other state.

(3) The electricity is delivered to a retail seller, the Independent System Operator, or a local publicly owned electric utility.

(4) All revenues received by an electrical corporation for the sale of a renewable energy credit shall be credited to the benefit of ratepayers.

(5) No renewable energy credits shall be created for electricity generated pursuant to any electricity purchase contract with a retail seller or a local publicly owned electric utility executed before January 1, 2005, unless the contract contains explicit terms and conditions specifying the ownership or disposition of those credits. Deliveries under those contracts shall be tracked through the accounting system described in subdivision (b) of Section 399.13 and included in the baseline quantity of eligible renewable energy resources of the purchasing retail seller pursuant to Section 399.15.

(6) No renewable energy credits shall be created for electricity generated under any electricity purchase contract executed after January 1, 2005, pursuant to the federal Public Utility Regulatory Policies Act of 1978 (16 U.S.C. Sec. 2601 et seq.). Deliveries under the electricity purchase contracts shall be tracked through the accounting system described in subdivision (b) of Section 399.12 and count

towards the renewables portfolio standard obligations of the purchasing retail seller.

(7) The commission may limit the quantity of renewable energy credits that may be procured unbundled from electricity generation by any retail seller, to meet the requirements of this article.

(8) No retail seller shall be obligated to procure renewable energy credits to satisfy the requirements of this article in the event that supplemental energy payments, in combination with the market prices approved by the commission, are insufficient to cover the above-market costs of long-term contracts, of more than 10 years' duration, with eligible renewable energy resources.

(9) Any additional condition that the commission determines is reasonable.

(b) The commission shall allow an electrical corporation to recover the reasonable costs of purchasing renewable energy credits in rates.

SEC. 20.

Article 9 (commencing with Section 635) is added to Chapter 3 of Part 1 of Division 1 of the Public Utilities Code, to read:

Article 9. Long-Term Plans and Procurement Plans

635.

In a long-term plan adopted by an electrical corporation or in a procurement plan implemented by a local publicly owned electric utility, the electrical corporation or local publicly owned electric utility shall adopt a strategy applicable both to newly constructed or repowered generation owned and procured by the electrical corporation or local publicly owned electric utility to achieve efficiency in the use of fossil fuels and to address carbon emissions.

SEC. 21.

Section 2854 is added to Chapter 9 of Part 2 of Division 1 of the Public Utilities Code, to read:

2854.

(a) Notwithstanding Section 7550.5 of the Government Code, on or before January 1, 2008, the commission shall report to the Legislature on the feasibility,

desirability, and design of performance-based incentives for solar energy systems of less than 30 kilowatt.

(b) This section shall remain in effect only until January 1, 2009, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2009, deletes or extends that date.

SEC. 22.

By June 30, 2007, the Public Utilities Commission, in consultation with the State Energy Resources Conservation and Development Commission, shall review the impact of allowing supplemental energy payments to be applied toward contracts for the procurement of eligible renewable energy resources that are of a duration of less than 10 years, and to report to the Legislature with the results of the review, including both of the following:

(a) The impact that higher priced short-term contracts may have on the allocation of supplemental energy payments.

(b) Recommended methods to fairly allocate supplemental energy payments for the above-market costs of short-term contracts that ensure that no more supplemental energy payments are paid for those contracts than would have been allocated for an equivalent long-term contract.

SEC. 23.

No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution for certain costs that may be incurred by a local agency or school district because, in that regard, this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

However, if the Commission on State Mandates determines that this act contains other costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code.

CERTIFICATE OF SERVICE

I hereby certify that on October 1, 2014, I electronically filed the foregoing **APPELLANTS' OPENING BRIEF** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: October 1, 2014

/s/ *Stephan C. Volker*
STEPHAN C. VOLKER