March 1, 2021

Via http://www.regulations.gov
United States Fish and Wildlife Service
Attn: FWS–HQ–MB–2018–0090
MS: JAO/3W, 5275 Leesburg Pike
Falls Church, VA 22041–3803

Re: Docket No. FWS–HQ–MB–2018–0090; Regulations Governing Take of Migratory Birds; Delay of Effective Date

Dear Sir or Madam:

GPA Midstream Association ("GPA Midstream") appreciates this opportunity to submit comments to the U.S. Fish & Wildlife Service ("FWS") regarding its Direct Final Rule delaying of the effective date of the final rule *Regulations Governing Take of Migratory Birds*, 86 Fed. Reg. 1,134 (Jan. 7, 2021) ("Final Rule").

GPA Midstream has served the U.S. energy industry since 1921 and has nearly 70 corporate members that directly employ more than 75,000 employees that are engaged in a wide variety of services that move vital energy products such as natural gas, natural gas liquids ("NGLs"), refined products and crude oil from production areas to markets across the United States, commonly referred to as "midstream activities." The work of our members indirectly creates or impacts an additional 450,000 jobs across the U.S. economy. GPA Midstream members recover more than 90% of the NGLs such as ethane, propane, butane, and natural gasoline produced in the United States from more than 400 natural gas processing facilities. In the 2017-2019 period, GPA Midstream members spent over $105 billion in capital improvements to serve the country's needs for reliable and affordable energy.

GPA Midstream opposes the Direct Final Rule as it violates the Administrative Procedure Act ("APA") by amending the Final Rule without public notice and comment. Although FWS appeals to the APA's "good cause" exception, none of the reasons provided qualify as "good cause" as interpreted by multiple courts over the last few years. GPA Midstream believes that the Direct Final Rule is invalid and urges FWS to immediately withdraw it.

Additionally, GPA Midstream supports immediate implementation of the Final Rule, as it is entirely consistent with the history and purpose of the Migratory Bird Treaty Act ("MBTA"). A contrary interpretation subjects regulated industry to substantial compliance uncertainty, leaves those entities without a permitting structure to avoid liability for incidental take, and allows for potential abuses through selective prosecution.

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I. FWS Cannot Delay Implementation of the Final Rule through a Direct Final Rule

A. Staying the Effective Date Violates the Administrative Procedure Act

Issuing the Direct Final Rule without public notice and comment violates the APA. Multiple courts have recently vacated delays of final rulemaking effective dates where they did not comply with the APA. *See*, *e.g.*, *Clean Air Council v. Pruitt*, 862 F.3d 1, 6 (D.C. Cir. 2017) (vacating administrative stay of final rulemaking effective date without notice and comment because it is "tantamount to amending or revoking a rule"); *Open Communities Alliance v. Carson*, 286 F. Supp. 3d 148, 162 (D.D.C. 2018) (agency had "no authority" to suspend a final rule's effective date "without notice and comment"); *NRDC v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 113 (2d Cir. 2018) ("NHTSA violated the APA by announcing the Suspension Rule without first having undertaken notice and comment rulemaking"); *Pineros y Campesinos Unidos del Noroeste v. Pruitt*, 293 F. Supp. 3d 1062, 1060 (N.D. Cal. 2018) ("The Court has carefully reviewed the Administrative Record and finds that EPA violated the [APA] by failing to provide notice and opportunity to comment before delaying the Pesticide Rule's effective date.").

The effective date is "an essential part of any rule: without an effective date, the agency statement could have no future effect, and could not serve to implement, interpret, or prescribe law or policy." *NRDC, Inc. v. U.S. EPA*, 683 F.2d 752, 762 (3d Cir. 1982) (internal quotes omitted). Under the APA, an agency's action changing, suspending, or revoking a final rule's effective date requires that agency to "give notice and an opportunity to comment before promulgating any final rule," Pineros, 293 F. Supp. 3d at 1066, unless FWS can legitimately avail itself of an exception provided in the APA. As explained in further detail below, FWS cannot.

B. The Direct Final Rule's Appeal to the Good Cause Exception is Invalid

FWS contends that using a direct final rule to delay of the Final Rule's effective date is appropriate under the good cause exemption of the APA. "The good cause exception, however, is extraordinarily narrow and is reserved for situations where delay would do real harm." *Pineros*, 293 F. Supp. 3d at 1067; *see also Jifry v. FAA*, 370 F.3d 1174, 1179 (D.C. Cir. 2004) ("good cause" exception is "narrowly construed and only reluctantly countenances"); *Buschmann v. Schweiker*, 676 F.2d 352, 357 (9th Cir. 1982) ("good cause exception is essentially an emergency procedure"). The "good cause" exemption only applies where "notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(3)(B). None of the reasons in the Direct Final Rule can meet this "exacting standard." *Pineros*, 293 F. Supp. 3d at 1067.

The Direct Final Rule claims that, (1) based on an OIRA evaluation never made public, the Final Rule used the wrong effective date under the Congressional Review Act, (2) the rule "may have significant impacts on migratory bird species and other resources" despite the admitted lack of quantifiable data, (3) the lack of a monitoring plan to determine the extent of any potential impacts, (4) FWS seeks to avoid litigation, and (5) the Canadian government expressed concerns about the rulemaking. 86 Fed. Reg. at 8,716-17. Each rationale is irrelevant to the "good cause" standard which requires a reason why an agency simply cannot wait for the notice and comment rulemaking. At bottom, FWS has attested only that there may be a public interest in undertaking a new rulemaking but the Direct Final Rule says nothing about why eschewing the legally mandated

public notice and comment procedure in this instance is "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(3)(B).

Courts have already rejected some of the reasons proffered by the Direct Final Rule. FWS asserts that its purported (and unsupported) claim it violated the Congressional Review Act means it "lacks discretion to choose an alternative course of action." 86 Fed. Reg. at 8,717. It further seeks to avoid anticipated lawsuits. *Id.* at 8,716. In *California v. Health & Human Services*, 281 F. Supp. 3d 806, 827 (N.D. Cal. 2017), the court rejected similar claims that the agency could dispense with notice and comment rulemaking to "cure violations" of the Religious Freedom Restoration Act which had already sparked dozens of lawsuits. The court also rejected claims that "good cause" was satisfied by the need to "bring [agency] guidelines into 'accord with the legal realities' of the temporary injunctions issued in various cases." Id. Thus, even where the legal violation was far more serious than a mere technical violation of the Congressional Review Act, and even where lawsuits were not only filed but courts had enjoined the agency action at issue, there was still no "good cause" to forgo notice and comment procedures.[1]

The remaining reasons cannot support a finding of "good cause" either. FWS speculates that the Final Rule "may have significant impacts on migratory bird species and other resources." 86 Fed. Reg. 8,716. Not only does FWS admit that this claim lacks factual support but it relies on the Environmental Impact Statement ("EIS") supporting the Final Rule itself. Any claim that EIS could support a finding of significant impacts to migratory birds was known to FWS at the time it issued the Final Rule. Appealing to the EIS's description of speculative impacts would not even support a reversal of the Final Rule under *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009) as it does not even attempt to marshal new factual findings that contradict those supporting the Final Rule. Instead, it points to the same factual findings and, without explanation, claims they now demonstrate the possibility of significant harms. Even if FWS could explain why it reaches a different conclusion based on the same facts, it still offers no inkling of the purported emergency justifying action without public notice and comment.

The absence of a monitoring plan is even further from "good cause" than FWS's speculation regarding harm to migratory birds. The Direct Final Rule is not actually proposing a monitoring plan, it merely notes its absence. Even if it was proposing a monitoring plan, FWS fails to explain how the receipt of information later justifies "good cause" now. FWS never attempts to make a connection between the two.

Likewise, FWS never explains why concerns expressed by Canada create an emergency worthy of forfeiting notice and public comment. As FWS admits, Canada expressed these concerns during the prior public comment period on both the proposed rulemaking and the draft Environmental Impact Statement. 86 Fed. Reg. at 8,716-17. Taking those concerns into consideration, FWS promulgated the Final Rule. FWS does not now identify any new information or otherwise explain why these concerns trigger the "good cause" exception. The United States has very recently disappointed the Canadian government without sparking an international

[1] Further, there is a significant disconnect between delaying the Final Rule's effective date and the desire "to avoid costly and unnecessary litigation." 86 Fed. Reg. at 8,716. Delaying the effective date by 30 days will not delay any legal challenges as the Final Rule remains a final agency action subject to judicial review. FWS provides no explanation of how the Direct Final Rule will "avoid" challenges to the Final Rule altogether.

emergency. *See*, *e.g.*, Press Release, Prime Minister Justin Trudeau speaks with the President of the United States of America Joe Biden (Jan. 22, 2021) ("The Prime Minister raised Canada's disappointment with the United States' decision on the Keystone XL pipeline."). FWS never explains how or why some disagreements with the Canadian government are so serious as to justify abandoning public notice and comment while other disagreements are not.

C. FWS Cannot Circumvent the APA with a White House Memorandum

FWS also appeals to a January 20, 2021 White House memorandum "instructing Federal agencies to consider postponing the effective date of any rules that have published in the Federal Register but not yet taken effect, for the purpose of reviewing any questions of fact, law, and policy they may raise." 86 Fed. Reg. 8,716 (citing Memorandum for the Heads of Executive Departments and Agencies from Ronald A. Klain, Assistant to the President and Chief of Staff, 86 Fed. Reg. 7,424 (Jan. 28, 2021)). This memorandum cannot, and does not purport to, provide an independent exemption from FWS's obligations under the APA. In fact, the memorandum reminds agencies that the recommended postponement of final regulations already published in the Federal Register may only be done "consistent with applicable law." As explained above, the Direct Final Rule was not issued consistent with applicable law.

II. The Final Rule Is Consistent with the MBTA

A. FWS Correctly Determined the MBTA Prohibits Only Actions Directed Toward Migratory Birds

FWS' determination that the "MBTA's prohibitions on pursuing, hunting, taking, capturing, killing, or attempting to do the same, apply only to actions directed at migratory birds, their nests, or their eggs," 86 Fed. Reg. at 1,134, is entirely consistent with the history and purpose of the Act. A contrary interpretation finding the MBTA to prohibit incidental take is not.

In 1916, the United States and Great Britain (on behalf of Canada) entered into a treaty in order to protect migratory birds "from indiscriminate slaughter." Convention between the United States and Great Britain for the Protection of Migratory Birds, U.S.-Gr. Brit, Aug. 16, 1916, 39 Stat. 1702. This treaty, referred to as the Migratory Bird Treaty, sought to curtail the hunting of and trade in migratory birds, as well as their nests and eggs. *Id*. In order to accomplish this purpose, the Treaty restricted or closed altogether the hunting seasons for listed birds (Articles I-IV); prohibited the shipment, exportation, trafficking, or taking of migratory birds, bird nests or eggs (Articles V-VI); and granted the contracting parties the authority to issue permits to kill protected birds that "may become seriously injurious to the agricultural or other interests in any particular community" (Article VII). *Id*.

This Treaty[2] serves as the foundation for the MBTA, 16 U.S.C. §§ 703-712, which Congress enacted two years later in an effort to codify the provisions of the treaty. Pursuant to the MBTA, "[u]nless and except as permitted by regulations made as hereinafter provided, 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 . . . any migratory bird, any part, nest, or egg of any such bird." 16 U.S.C. § 703(a). The MBTA criminalizes violations of the statute, stating that "any person,

[2] As well as other similar treaties enumerated in the Final Rule. See 86 Fed. Reg. at 1,134.

association, partnership, or corporation who shall violate any provisions of said conventions or of this Act, or who shall violate or fail to comply with any regulation made pursuant to this Act shall be deemed guilty of a misdemeanor." *Id*. § 707(a). Additionally, the statute makes certain violations felonies. *Id*. § 707(a).

The concept of incidental take – take resulting from actions *not* directed towards migratory birds – is nowhere present in the underlying treaty or the MBTA itself. This is for good reason, as the behavior Congress sought to criminalize were those actions pertaining to hunting or trade of migratory bird species. A large majority of courts agree.

In determining whether the MBTA applies to certain actions that result in a take of migratory birds, courts generally focus on whether the action purposefully was directed towards a migratory bird. *See Newton County Wildlife Ass'n v. U.S. Forest Serv.*, 113 F.3d 110, 115 (8th Cir. 1997); *City of Sausalito v. O'Neill*, 386 F.3d 1186 (9th Cir.2004); *Seattle Audubon Soc'y v. Evans*, 952 F.2d 297, 302 (9th Cir. 1991). In *Newton County*, for example, the Eighth Circuit declined to extend the MBTA to cover timber sale operations even though the parties acknowledged that timber harvesting would potentially lead to the death of birds. 113 F. 3d at 115 ("the MBTA's plain language prohibits conduct *directed* at migratory birds." (emphasis added)). The court held that "[s]trict liability may be appropriate when dealing with hunters and poachers. But it would stretch this 1918 statute far beyond the bounds of reason to construe it as an absolute criminal prohibition on conduct, such as timber harvesting, that *indirectly* results in the death of migratory birds." *Id*. (emphasis original). A number of other courts followed this same reasoning. *See Seattle Audubon Soc'y*, 952 F.2d at 302 (holding that the terms "take" and "kill" in 16 U.S.C. § 703 mean "physical conduct of the sort engaged in by hunters and poachers, conduct which was undoubtedly a concern at the time of the statute's enactment in 1918"); *United States v. CITGO Petroleum Corp*., 801 F.3d 477, 488–89 (5th Cir. 2015) ("[W]e agree with the Eighth and Ninth circuits that a "taking" is limited to deliberate acts done directly and intentionally to migratory birds. Our conclusion is based on the statute's text, its common law origin, a comparison with other relevant statutes, and rejection of the argument that strict liability can change the nature of the necessary illegal act."); *Mahler v. U.S. Forest Serv.*, 927 F. Supp. 1559, 1576 (S.D. Ind. 1996) ("The MBTA was designed to forestall hunting of migratory birds and the sale of their parts. The court declines Mahler's invitation to extend the statute well beyond its language and the Congressional purpose behind its enactment."); *Citizens Interested in Bull Run, Inc. v. Edrington*, 781 F. Supp. 1502, 1510 (D. Ore. 1991) (same).

Thus, FWS's Final Rule is entirely consistent with the foundational treaties and a majority of case law, as it limits liability to those actions directed at migratory birds.

B. Interpreting the MBTA To Prohibit Incidental Take Produces Absurd Results

FWS indicates in the Direct Final Rule that it seeks comments on potentially reconsidering the Final Rule as well as on "the scope of the MBTA as it applies to conduct resulting in the injury or death of migratory birds protected by the MBTA." 86 Fed. Reg. at 8,717. No reconsideration is needed, however, as FWS properly limited the scope of MBTA liability. An interpretation of the MBTA that would extend liability to incidental or accidental take leads to absurd results, as everyday activities could be criminalized.

Broad construction of the MBTA in a manner that would prohibit incidental take of migratory birds "would offend reason and common sense." *United States v. FMC Corp.*, 572 F.2d 902, 905 (2d Cir. 1978) ("construction [of the MBTA] that would bring every killing within the statute such as deaths caused by automobiles, airplanes, plate glass modern office buildings or picture windows in residential dwellings into which birds fly, would offend reason and common sense."); *see also Brigham Oil & Gas*, 840 F. Supp. 2d at 1212 ("If the Migratory Bird Treaty Act concepts of 'take' or 'kill' were read to prohibit any conduct that proximately results in the death of a migratory bird, then many everyday activities become unlawful."). As FWS has recognized, such an interpretation would subject many ordinary actions and operations to liability.

The absurdity of such an interpretation is evident from the pure number of migratory birds killed per year from existing infrastructure and everyday activities. According to FWS, bird collisions with building windows account for approximately 97 to 976 million bird deaths each year. *U.S. Fish & Wildlife Service, Migratory Bird Mortality, Many Human–Caused Threats Afflict our Bird Populations* at 2 (Jan. 2002) https://www.fws.gov/mainefieldoffice/PDFs/mortality-fact-sheet%5B1%5D.pdf. And avian collisions with automobiles account for approximately 60 million or more birds per year, which pales in comparison to the hundreds of millions of birds killed by domestic cats each year. *Id*. Consequently, FWS should not broaden its interpretation of the MBTA in its Final Rule to criminalize unavoidable bird mortalities from every day activities.

C. Prohibiting Incidental Take under the MBTA Causes Substantial Uncertainty

FWS also should not broaden its interpretation of the MBTA to prohibit incidental take because it would result in substantial uncertainty for the regulated community. While other wildlife statutes include measures to shield activity that results in the incidental take of protected species from liability, no such structure exists under the MBTA.

As FWS is aware, there is no permitting regime under the MBTA for incidental take. The MBTA does afford permits for activities whose purpose involves intended interaction directed at migratory birds. *See* 50 C.F.R. § 21.11 ("No person may take, possess, import, export, transport, sell, purchase, barter, or offer for sale, purchase, or barter, any migratory bird, or the parts, nests, or eggs of such bird except as may be permitted under the terms of a valid permit."). The agency will also issue permits for "the following types of migratory bird-related activities: import/export, scientific collecting, taxidermy, waterfowl sale and disposal, educational use, game bird propagation, salvage, falconry, raptor propagation, rehabilitation, control of depredating migratory birds, and special purpose activities." *See* Fish and Wildlife Service Manual, 724 FW 2 (available at http://www.fws.gov/policy/724fw2.pdf); *see also* 50 C.F.R. §§ 21.12 – 21.41. But, there is no permitting infrastructure or mechanism in place that allows for the take of migratory birds, when such take is incidental to the operation of a lawful commercial activity. Consequently, interpreting the MBTA to prohibit incidental take would leave regulated industry open to liability without a program in place to take measures to guard against such liability.

D. The MBTA Could Allow for Selective Enforcement and Prosecution

Strict criminal liability has a clear history of abuse through selective enforcement and prosecution. *See*, *e.g.*, Andrew G. Ogden, *Dying for a Solution: Incidental Taking Under the Migratory Bird Treaty Act*, 38 Wm. & Mary Envtl. L. & Pol'y Rev. 1, 37-38 (2013) (discussing

history of prosecutorial discretion "to favor wind energy over other activities such as the oil and gas industry); Scott W. Brunner, *The Prosecutor's Vulture: Inconsistent MBTA Prosecution, its Clash with Wind Farms, And How to Fix It*, Seattle J. of Envt'l L., Vol. 3, Issue 1 (2013) at 11-21 (history of prosecutions). FWS itself estimates that wind turbines kill anywhere from 140,000 to 500,000 migratory birds each year[3] yet, during the 2010s, the Department of Justice chose to pursue criminal cases against oil companies for very small numbers of bird mortalities. In the Apollo Energy prosecution, the company was criminal charged for the deaths of five birds. *United States v. Apollo Energies, Inc.*, 611 F.3d 679, 683 (10th Cir. 2010). In one case involving prosecutions against three oil companies, the Department of Justice sought criminal penalties for a total of seven mortalities. *Brigham Oil & Gas, LP*, 840 F. Supp. 2d at 1203; *see also United States v. CITGO*, 893 F. Supp. 2d 841, 842 (S.D. Tex. 2012) (ten birds).

Where nearly any industry, or person, can be charged with a crime by merely undertaking typical day-to-day activities, consistent and fair prosecutions are virtually impossible. Even if every federal prosecutor was charged with bringing nothing but MBTA criminal cases they could only prosecute a small fraction of bird mortalities. Instead, the past practices of ignoring some industries causing significant mortalities while prosecuting other industries for a handful of deaths "give the appearance that prosecutorial discretion is being applied unevenly and with the possible intention of favoring a specific industry." 38 Wm. & Mary Envtil. L. & Pol'y Rev. at 38. Any return to strict criminal liability must come with some set of objective and enforceable guidelines to prevent selective enforcement and prosecution.

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GPA Midstream appreciates the opportunity to submit these comments on the Direct Final Rule and is standing by to answer any questions that you may have.

Respectfully submitted,

Matt Hite

Vice President of Government Affairs

GPA Midstream Association

[3] FWS, Wind Turbines, *available at*, https://www.fws.gov/birds/bird-enthusiasts/threats-to-birds/collisions/wind-turbines.php.