

This document has been prepared as part of the implementation project of Legal Pathways to Deep Decarbonization (Michael B. Gerrard and John C. Dernbach, eds. Environmental Law Institute [2019]) (LPDD). For background information on the project, see <https://lpdd.org>

Protected Avian Species Permitting

- **Summary:** Give the U.S. Fish and Wildlife Service (USFWS) explicit authority to grant permits for incidental take caused by renewable power generation facilities and electric transmission and distribution infrastructure under the Migratory Bird Treaty Act of 1918 (MBTA)¹ and the Bald and Golden Eagle Protection Act of 1940 (BGEPA).²
- **Issue to be Addressed:** Electric infrastructure that is critical to achieving a net zero economy may impact federally protected avian species. To encourage construction of this infrastructure, project developers prefer certainty regarding both their potential liability for impacts to protected avian species and the actions that can be taken to avoid that liability. As a result of textual differences among the three key federal avian protection statutes—the Endangered Species Act of 1973 (ESA),³ BGEPA, and MBTA—that certainty does not currently exist. Courts and different administrations at the U.S. Department of the Interior have relied on these textual differences to reach conflicting interpretations of the statutes. Notably, there is disagreement about whether the MBTA prohibits incidental (i.e., unintentional or non-purposeful) “take” that can result from construction and operation of electric infrastructure. In addition, some have questioned the USFWS’s authority under both the MBTA and BGEPA to permit incidental take, including through general permit programs. There is currently an incidental take permit program for BGEPA and the ESA, but not for the MBTA—though the USFWS announced its intention to create one in October 2021. As a result, many project developers lack certainty and must rely on prosecutorial discretion from the U.S. Department of Justice. Since the MBTA and BGEPA, like the ESA, are criminal statutes, this uncertainty may be an intolerable risk for both project developers and financing institutions.
- **Recommendation:** Amend the MBTA and BGEPA to provide clear authority to the USFWS to implement incidental take permit programs that encourage development of electric infrastructure that is protective of federally protected avian species. Two key amendments are proposed.
 - **Authority to Permit Incidental Take:** First, it is recommended that the MBTA and BGEPA be amended to provide the USFWS with express authority to permit incidental take, as already provided in the ESA.⁴ There is not currently an MBTA incidental take permit program, so the language could be inserted into the MBTA

¹ 16 U.S.C. §§ 704 et seq.

² 16 U.S.C. §§ 668-668d.

³ 16 U.S.C. § 1531 et seq.

⁴ See 16 U.S.C. § 1539(a)(1) (“The Secretary may permit, under such terms and conditions as he shall prescribe— . . . (B) any taking otherwise prohibited by section 1538(a)(1)(B) of this title if such taking is *incidental* to, and not the purpose of, the carrying out of an otherwise lawful activity.”) (emphasis added); see also 16 U.S.C. § 1536(b)(4) (providing authority to authorize incidental take after interagency consultation).

without affecting any existing regulatory program. Although there is already a BGEPA incidental take permitting program that relies on existing language in the BGEPA⁵, amending the statutory language would create greater certainty for developers. However, to avoid disrupting this program, edits should be made to expand rather than replace that language.

- **Authority to Issue General Permits:** Second, it is recommended that the MBTA and BGEPA be amended to provide USFWS authority to issue general permits for categories of activities that are otherwise lawful, but result in incidental take of protected avian species. As demonstrated by the BGEPA incidental take permit program, issuing permits on a project-specific basis (*i.e.*, an individual or specific permit) can be difficult to implement as a result of the significant administrative burdens imposed on both the agencies and applicants. A well-designed general permit program, like that used to permit discharges of dredged or fill material into waters of the United States under Section 404 of the Clean Water Act (CWA), can protect sensitive resources while minimizing administrative burdens, reducing legal risks for the USFWS and project developers, and ensuring that critical electric infrastructure (and other projects) can be constructed in a timely manner. The proposed text is a simplified version of the language in Section 404 of the CWA (33 U.S.C. 1344(e)). Notably, the phrase limiting the Secretary’s discretion to issue general permits only when “the Secretary determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment” is not included. As recently acknowledged by the USFWS, this phrase has required the U.S. Army Corps of Engineers to create a “complex and resource-intensive” general permitting program, which should be avoided here.⁶ In addition, the period for re-issuing the permits is extended from five years to ten years to reduce the burdens on the USFWS.

MBTA (16 U.S.C. § 704)⁷

(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, *including taking that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity*, 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

⁵ See Eagle Permits; Take Necessary to Protect Interests in Particular Localities, 74 Fed. Reg. 46,835 (Nov. 10, 2009) (“This rulemaking establishes permit regulations to authorize eagle take ‘for the protection of . . . other interests in any particular locality.’”).

⁶ Eagle Permits; Incidental Take, 86 Fed. Reg. 51,096 (Sept. 14, 2021).

⁷ Amending language in red, italics and underscored.

permitting and governing the same, in accordance with such determinations, which regulations shall become effective when approved by the President.

(b) General Permits.

(1) In carrying out the Secretary of the Interior's functions relating to the conservation of migratory birds under this section, the Secretary of the Interior may, after notice and opportunity for public hearing, issue general permits on a State, regional, or nationwide basis for any category of activities that involves taking that is incidental to, and not the purposes of, the carrying out of an otherwise lawful activity.

(2) No general permit issued under this subsection shall be for a period of more than ten years after the date of its issuance and such general permit may be revoked or modified by the Secretary of the Interior if, after opportunity for public hearing, the Secretary of the Interior determines that the activities authorized by such general permit have an adverse impact on the environment or such activities are more appropriately authorized by individual permits.

(c) It shall be unlawful for any person to— . . .

BGEPA (16 U.S.C. § 668a)

(a) 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, including taking that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity, he may authorize the taking of such eagles pursuant to regulations which he is hereby authorized to prescribe . . .

(b) General Permits.

(1) In carrying out the Secretary of the Interior's functions relating to the preservation of bald eagle or golden eagle under this section, the Secretary of the Interior may, after notice and opportunity for public hearing, issue general permits on a State, regional, or nationwide basis for any category of activities that involves taking that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.

(2) No general permit issued under this subsection shall be for a period of more than ten years after the date of its issuance and such general permit may be revoked or modified by the Secretary of the Interior if, after opportunity for public hearing, the Secretary of the Interior determines that the activities authorized by such general permit have an adverse impact on the environment or such activities are more appropriately authorized by individual permits.