



January 4, 2017

Ms. Lori H. Nordstrom
Assistant Regional Director
Ecological Services Midwest Region
U.S. Fish and Wildlife Service
5600 American Blvd. West, Suite 990
Bloomington, MN 55437-1458

Subject: Response to December 23, 2016 USFWS Letter to FERC Commenting on the Migratory Bird Conservation Plan for the Rover Pipeline Project (FERC No. CP15-93-000)

Dear Ms. Nordstrom:

On December 23, 2016, the U.S. Fish and Wildlife Service (USFWS) submitted a letter to the Federal Energy Regulatory Commission (FERC) commenting on the Rover Pipeline LLC (Rover) Migratory Bird Conservation Plan (MBCP), in which the USFWS ultimately “recommend[ed] that the FERC not consider the MBCP for the Rover Project to be final unless it includes full mitigation for the Project’s impacts to migratory bird habitat.” In that letter, the USFWS expressed its interpretation that, in order to “fully mitigate” the Rover Project, Rover must provide a USFWS-estimated \$16,293,680 in compensatory mitigation (in addition to avoidance and minimization measures). Rover is not limiting the mitigation to \$5 million as these statements indicate, Rover is willing to provide \$5 million in addition to the extensive avoidance, minimization, and mitigation efforts (which are the basis of the Memorandum of Understanding [MOU] with FERC) that have already been employed for the Project. These measures are not discountable for the Project and are direct and intentional avoidance, minimization and mitigation measures and, by the virtue of the MOU with FERC, are legitimate means to offset impacts to migratory birds. In this case, the combined direct mitigation of compensatory donation of \$5 million coupled with the \$16 million estimate to clear trees prior to the onset of full construction to minimize the direct take of migratory birds, totals \$21 million. Further, the USFWS asserts that the final Environmental Impact Statement (FEIS) for the Rover Project “repeatedly notes that Rover would provide mitigation for impacts to forested migratory bird habitat,” and thus, “[i]f the FERC accepts Rover’s mitigation plan, we recommend that the FERC reconsider its conclusion in the FEIS as to the adverse effect of the Project on Wildlife.”

As an initial matter, neither the MBCP nor the FEIS states that Rover will provide compensatory mitigation, and thus no reconsideration of those documents is merited by Rover’s final, voluntary

offer of \$5 million to offset impacts to migratory birds. The representation made in the USFWS' December 23 letter is misleading—all subsections cited (FEIS ES-5, Sections 4.5.3, 4.6.1.5, 4.13.6.3, and 5.1) refer to mitigation as a suite of “avoidance, minimization, and mitigation” measures that, together, provide mitigation for impacts to migratory birds and their habitats. Nowhere did Rover commit in advance to provide whatever amount of compensatory mitigation the USFWS ultimately estimates would be necessary to, in its determination, “fully mitigate” unavoidable impacts to migratory bird habitat. FERC simply stated, in the Conclusions and Recommendations section of the FEIS, “We are recommending that Rover submit a Migratory Bird Conservation Plan, developed in consultation with the FWS, prior to construction.” (FEIS at 5-6). Notably, FERC has never required that the MBCP be approved by the USFWS or fully concurred in by the USFWS in order to be complete.

The USFWS' attempt to make its advisory role in the FERC approval process of Rover into a functionally binding and coercive means of requiring substantial compensatory mitigation is inappropriate and unsupported by law. In its December 23 letter, the USFWS flatly recommends that FERC “not consider the MBCP for the Rover Project to be final” unless it includes Rover's commitment to the entire dollar amount of compensatory mitigation sought by the USFWS. Such a recommendation seeks to instill the USFWS' opinion with a final, determinative, coercive effect in the FERC permitting process. As the Supreme Court has recognized, although the consultative role played by the USFWS in other agencies' permitting decisions affecting federally-protected wildlife or their habitats may “theoretically serve[] an ‘advisory function,’ in reality it has a powerful coercive effect on the action agency.” See *Bennett v. Spear*, 520 U.S. 154, 169 (1997).

Such a coercive effect has enabled regulated parties to challenge a USFWS Biological Opinion as a final USFWS action in the context of interagency consultation occurring under Endangered Species Act (ESA) section 7. *Id.* at 170–71, 177–78. In *Bennett v. Spear*, the Court identified “two conditions that must be satisfied for agency action to be ‘final’: First, the action must mark the ‘consummation’ of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which ‘rights or obligations have been determined,’ or from which ‘legal consequences will flow.’” *Id.* at 177–78. The first requirement is met here, as evinced by the USFWS' December 23 letter, which: (1) responded to Rover's November 30, 2016 letter reflecting the conclusion of consultation; (2) acknowledged the impasse in consultation; (3) made the USFWS' final recommendation to FERC; and (4) stated that the USFWS will now await FERC's decision on the certificate for the Rover Project. With regard to the second requirement, direct and appreciable legal consequences flow from the USFWS recommendation to FERC. Because the USFWS does not consider impacts to migratory birds and their forested habitat fully mitigated by Rover, Rover is exposed when it could otherwise be sheltered from MBTA enforcement risk—if the MBCP were concurred in by the USFWS—and there exists no permitting mechanism by which take of migratory birds can be permitted. Thus, Rover is faced with enforcement exposure for take of migratory birds because Rover

has not complied with the compensatory mitigation conditions prescribed by the USFWS, and the USFWS December 23 letter constitutes a final agency action challengeable under the Administrative Procedure Act. *See id.* at 178–79.

Furthermore, as recently as this month, the USFWS recognized that it is inappropriate for the USFWS to use mitigation recommendations in a coercive fashion. *See* Endangered Species Act Compensatory Mitigation Policy, 81 Fed. Reg. 95315, 95331 (Dec. 27, 2016). In response to a comment that the new ESA Compensatory Mitigation Policy would increase opportunities for the USFWS to force concessions from other Federal agencies and permittees, the USFWS responded that the policy “does not limit the existing discretion of an action agency, or hold the action agency or applicant responsible for mitigation beyond an action agency’s own authority.” Importantly—as previously outlined in the white paper that accompanied Rover’s October 21, 2016 letter to the USFWS—FERC does not possess the authority to require compensatory mitigation for impacts to migratory birds or their habitats, and therefore the USFWS is recommending that FERC refuse to take an action for which it has no legal authority to refuse. Recommending rejection of Rover’s MBCP as incomplete is clearly intended to harm the Project in a way that neither the USFWS nor FERC possesses the legal right to execute.

By issuing a final recommendation that FERC deem the MBCP incomplete unless it includes the \$16,293,680 in compensatory mitigation, the USFWS has taken its final agency action in the migratory bird coordination between agencies and recommends delay of the FERC approval for Rover to begin construction. Although the USFWS acknowledges that it “does not have authority to require mitigation for loss of migratory bird habitat,” it seeks to inappropriately exert coercive pressure on both FERC and Rover to require and to provide, respectively, compensatory mitigation in the amount of \$16,293,680 for impacts to migratory bird habitat. This USFWS action is undertaken in spite of the fact that impacts to migratory bird habitat are not a violation of the plain language of the MBTA and that the underlying migratory bird treaties, as later revised, only contemplate “cooperative arrangements” to conserve habitat and focus on preventing habitat damage from pollution, as opposed to disturbance. *See* Russia Convention, Proclamation & Art. IV (Convention Concerning the Conservation of Migratory Birds and Their Environments, T.I.A.S. No. 9073); Canada Convention, Art. IV (Convention between United States and Great Britain for the Protection of Migratory Birds, 39 Stat. 1702, as amended by the Protocol Between the Government of the United States and the Government of Canada Amending the 1916 Convention Between the United Kingdom and the United States of America for the Protection of Migratory Birds, Sen. Treaty Doc. 104–28).

The USFWS recommendation that FERC not consider the MBCP for the Rover Project to be final until and unless it includes full (in USFWS’ legally unsupportable view) mitigation for the Project’s impacts to migratory bird habitat is inappropriately coercive in relation to both FERC and Rover, recommends that FERC take an action unsupported by legal authority, and seeks to compel compensatory mitigation payment for a habitat resource that is unprotected by the MBTA and only vaguely

addressed by international treaty. Further—as thoroughly addressed in the white paper provided to the USFWS on November 30, 2016—Executive Order 13186 and the related Memorandum of Understanding between FERC and the USFWS are insufficient legal bases for FERC to require compensatory mitigation for impacts to migratory birds or habitat as a condition of a FERC approval. The USFWS letter to FERC dated December 23, 2016 fails to establish any regulatory authority by which an agency may seek compensatory mitigation for impacts to migratory bird habitat. Further, this recommendation directly contradicts guidance from the USFWS Director’s Order addressing Executive Order 13186. The Director’s Order guidance contains the following section:

Why should the public and non-federal entities care about this Executive Order, if it only affects Federal Agencies?

While this Executive Order does not apply to non-federal entities, we feel it important to involve the public in the process in order to prevent misunderstandings that might arise from this action. The development of each MOU will provide opportunities for public participation, and also serve as an opportunity to clarify the non-federal responsibilities and prohibitions that exist under the Migratory Bird Treaty Act.

Rover understands its responsibilities under the MBTA and implementing regulations and with Rover’s commitment to conducting tree clearing outside of the migratory bird breeding season it will abate any chance or direct take of protected species. With the avoidance measures Rover proposes in the MBCP all legal requirements related to migratory birds will be met. As such, the USFWS’ recommendation is inappropriate, unsupported, unable to be lawfully acted upon by the action agency, and challengeable under the Administrative Procedure Act as a final agency action. Additionally, the 5th, 8th and 9th Federal Judicial Circuits have ruled the MBTA does not apply to industrial take of migratory birds at all; in essences, the MBTA is a “hunting” statute only. It is thereby coercion and extortion to forcibly require compensatory mitigation for a FERC-jurisdictional project by exploiting the Federal nexus to inappropriately apply the MOU. If the MBTA required compensatory mitigation, it would be required for other activities that would remove migratory bird habitat, such as highways, residential and commercial construction, etc., and would not be solely applicable to FERC-jurisdictional projects whereby the USFWS believes it can assert leverage.

Rover remains committed to its voluntary allocation of \$5 million to offset impacts to migratory birds (if the USFWS accepts the MBCP and wishes to receive the payment) and to adherence to the entirety of the MBCP developed collaboratively with the USFWS over the past eight months.

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Sincerely,

A handwritten signature in blue ink, appearing to read 'Joey Mahmoud', with a horizontal line underneath it.

Joey Mahmoud
Executive Vice President - Engineering
Rover Pipeline LLC

cc: Mr. Kevin Bowman, Office of Energy Projects