

RECORD OF DECISION

Regulations Governing Take of Migratory Birds

Final Environmental Impact Statement
U.S. Fish and Wildlife Service

December 2020

Introduction..... 2

Purpose and Need 2

Key Issues 2

Proposed Action 3

No Action Alternative 4

Action Alternatives 4

Alternative A (preferred alternative) - Promulgate regulations that define the scope of the MBTA to exclude incidental take..... 4

Alternative B (environmentally preferable alternative) - Promulgate regulations that define the scope of the MBTA to include incidental take..... 5

Alternatives Considered but Not Carried Forward for Further Review..... 5

Develop a general-permit framework to regulate incidental take 5

Develop an enforcement system to address gross negligence..... 6

Public Involvement 6

Service Decision..... 8

Introduction

The U.S. Fish and Wildlife Service (Service) developed this Record of Decision (ROD) in compliance with the National Environmental Policy Act (NEPA) of 1969, as amended, and its implementing regulations at 40 CFR parts 1500–1508.¹ This ROD documents the decision of the Service to develop a regulation in 50 CFR part 10 that defines the scope of the Migratory Bird Treaty Act (MBTA) as it relates to incidental take. This regulation would provide legal certainty for the public regarding what actions are prohibited under the MBTA. The Service based its decision on the analysis completed in the June 5, 2020, Draft Environmental Impact Statement (DEIS) and the November 27, 2020, Final Environmental Impact Statement (FEIS), as well as public comments received during the comment period for the DEIS and information received during government-to-government consultation with federally recognized Tribes.

This ROD is designed to a) state the Service's decision and present the rationale for its selection; b) identify the alternatives considered in reaching the decision; and c) state whether all practicable means to avoid or minimize environmental harm from the implementation of the selected alternative have been adopted (40 CFR 1505.2).

Based on the review of the alternatives and their environmental consequences described in the FEIS and after considering the economic factors in the Regulatory Impact Analysis (RIA) for this rulemaking, the Service will implement Alternative A, the Preferred Alternative. The selected action entails promulgating a regulation that defines the scope of the MBTA's prohibitions to include only actions directed at migratory birds, thereby excluding actions that only incidentally take migratory birds.

FOR FURTHER INFORMATION CONTACT: Jerome Ford, U.S. Fish and Wildlife Service, Department of the Interior, (202) 208–1050.

Purpose and Need

The purpose of this action is to provide a regulatory definition of the scope of the statute as it relates to incidental take of migratory birds. The Service needs to conduct this action to improve consistency and efficiency in enforcement of the MBTA's prohibitions across the country and thereby eliminate public uncertainty and inform the public, businesses, government agencies, and other entities what is and is not prohibited under the MBTA.

Key Issues

Through public scoping, input from various Federal and State agencies, and government-to-government consultation with federally recognized Tribes, the Service identified key issues, which it considered and evaluated during the NEPA process. These issues focused on the following subject areas:

- Legal interpretation of the statute and consideration of related Federal laws, regulations, and policies;
- Compliance with bilateral international treaties to protect migratory birds;
- Economic benefits and ecosystem services derived from migratory birds;
- Effects on entities related to the implementation of best practices; and

¹ The Service initiated development of the FEIS prior to CEQ's recent amendments to the NEPA implementing regulations becoming effective on September 14, 2020. The FEIS is, therefore, written to comply with the previous regulations in effect at that time.

- Potential impacts to migratory birds from the change of policy.

Proposed Action

The Service proposed to promulgate a rule that provides legal certainty for the public regarding what actions are prohibited as criminal misdemeanor violations under the MBTA. NEPA requires that a Federal agency consider a reasonable range of alternatives, including a No Action Alternative (40 CFR 1502.14). The action alternatives describe two approaches that the Service could take to provide increased regulatory certainty regarding incidental take of migratory birds. The intent of this analysis is to provide decision-makers with a meaningful range of reasonable alternatives to foster informed decisions and public participation. The Service considered the No Action Alternative and two action alternatives for achieving greater regulatory certainty.

The Service's preferred alternative is to promulgate regulations defining the scope of the MBTA to exclude incidental take. This approach provides regulatory certainty for industries and agencies, is feasible to implement using current Service resources, and is consistent with the purpose and need for the proposed action (provide legal certainty). The No Action Alternative describes how the incidental take of migratory birds would be regulated without the Service taking an action to codify into regulation our interpretation of the MBTA as it applies to incidental take. None of these alternatives directly affect the implementation and enforcement of the Endangered Species Act (16 U.S.C. 1531 et seq.) or the Bald and Golden Eagle Protection Act (16 U.S.C. §§ 668-668d).

For the analysis of each of the alternatives below, the Service reasoned that there are many factors that influence an entity's decision to implement measures that may protect migratory birds from incidental take. In some cases, there are other Federal, State, Tribal, or local laws and regulations that directly or indirectly require actions to benefit or otherwise reduce impacts on migratory birds. Federal statutes such as the Endangered Species Act and the Bald and Golden Eagle Protection Act require entities to take steps to reduce incidental take and protect habitat, which may in turn benefit migratory birds and other wildlife. For example, the Federal Aviation Administration approved new lighting standards that require flashing lighting on most communication towers greater than 350 feet above ground level. Additionally, 13 States have regulations governing netting of oil pits (see p.13, USFWS 2009). These Federal and State regulations and guidelines reduce the risk of incidental take of migratory birds.

Federal agencies are required to evaluate the impacts to the environment of their proposed actions under NEPA. NEPA compliance requires Federal entities to identify impacts to the environment that would result from implementing a proposal, including impacts to migratory birds and socioeconomic impacts if they are likely to occur. NEPA also requires Federal entities to assess potential mitigation of unavoidable adverse environmental impacts, which may include analysis of project design or mitigation measures that reduce potential impacts to migratory birds. Some States have NEPA-equivalent statutes (e.g., California Environmental Quality Act) and a variety of provisions regulating some form of incidental, indirect, or accidental take, or potentially allowing commissions or agencies to make applicable rules. In 2019, in response to M-Opinion 37050, California passed the Migratory Bird Protection Act, which makes it unlawful to take or possess any migratory nongame bird protected under the MBTA. It is expected that some additional States will craft new regulations to clarify that they have jurisdiction to regulate or otherwise oversee incidental take of migratory birds (AFWA 2019).

Additional reasons that may factor into an entity's decision to implement measures that may reduce the risk of incidental take include the following: public perception, size of company, cost of implementation, perceived risk of killing migratory birds, or availability of standard industry practices. Some entities may continue to implement practices that reduce take for any of these reasons or simply to reduce their perceived legal risk due to short- or long-term uncertainty concerning future application of laws and

regulations governing take of migratory birds.

No Action Alternative

Under the No Action Alternative, the Service would continue to implement the MBTA consistent with the direction given in M-Opinion 37050, which defines the scope of the MBTA to exclude incidental take, as a matter of policy. A legal opinion of the Department of the Interior or policy regarding the use of enforcement discretion does not provide the public or other Federal departments and agencies with the long-term certainty of a codified regulation and any legal certainty established by that Opinion is further reduced by its vacatur by the District Court for the Southern District of New York.

Under the No Action Alternative, the Service would still enforce the MBTA for prohibited and unauthorized actions directed at migratory birds and provide technical assistance to industry, the public, and partners seeking to reduce impacts to migratory birds voluntarily or to comply with other Federal, State, local, or Tribal laws and regulations. Technical assistance activities include working with industry sectors and Federal agencies to develop recommendations that identify best practices or technologies that can be applied to avoid or minimize avian mortality.

Action Alternatives

Alternative A (preferred alternative) - Promulgate regulations that define the scope of the MBTA to exclude incidental take

Under Alternative A, the Service would promulgate a regulation that defines the scope of the MBTA's prohibitions to apply only to actions directed at migratory birds. Promulgating a regulation defining the scope of the MBTA to exclude incidental take would potentially increase the level of judicial deference applied to that interpretation by a reviewing Federal court. We do not expect this alternative to change our current implementation or enforcement of the MBTA (in accordance with the M-Opinion 37050 holding that the MBTA excludes incidental take, parties are not currently subject to enforcement for the incidental take of birds).

Promulgating this regulation would be consistent with the M-Opinion's conclusion that the MBTA's prohibitions for misdemeanor violations (as reflected by the Act's language and legislative history) are limited to actions directed at migratory birds, their nests, or their eggs. This is the Service's preferred alternative because it best fulfills the purpose and need for action by significantly improving legal certainty, reducing both the regulatory burden on the public and the enforcement burden on the Service's law enforcement officers, and providing the public with a clear, binding rule on what does and does not constitute an MBTA misdemeanor violation.

Under this alternative, incidental take of migratory birds would not fall under the purview of the MBTA. Therefore, like the No Action Alternative, the Service would continue to enforce the MBTA for actions directed at migratory birds, unless authorized under 50 CFR part 20 or 21. The Service would also continue to provide technical assistance to industry, the public, and partners voluntarily seeking to reduce impacts to migratory birds, or as required to comply with other Federal, State, Tribal, and local laws and regulations.

Technical assistance activities include working with entities and Federal agencies to update current, and develop new, recommendations that identify best practices or technologies that avoid or minimize incidental take of migratory birds.

Alternative B (environmentally preferable alternative) - Promulgate regulations that define the scope of the MBTA to include incidental take

Under this alternative, the Service would interpret the MBTA to apply to incidental take. Because this interpretation would be inconsistent with the Department's current view of the law and current policy approach, adopting this alternative is dependent on that view changing and again investigating actions that incidentally take birds and enforcing the criminal provisions of the MBTA when appropriate. The Service would promulgate a regulation that defines the scope of the MBTA to prohibit incidental take, which would potentially increase the level of judicial deference applied to that interpretation by a reviewing Federal court.

Prior to December 2017, the government viewed as criminal conduct any action that directly and foreseeably resulted in the death of a migratory bird and enforced the statute accordingly, except within the jurisdiction of the U.S. Court of Appeals for the Fifth Circuit. The Service relied on enforcement discretion to determine when to pursue alleged incidental take violations. Several courts adopted constraints on this broad authority, including, for example, requiring evidence that the activity proximately caused the take or requiring evidence that the action directly resulted in take rather than indirectly through habitat destruction.

The Service did not enforce incidental take of migratory birds within the jurisdiction of the Fifth Circuit because that court held the MBTA does not prohibit incidental take. Promulgating a regulation defining the scope of the MBTA to include incidental take would potentially increase the level of judicial deference applied to that interpretation potentially allowing the Service to enforce the MBTA consistently in all jurisdictions.

Under this alternative, the Service's Office of Law Enforcement would investigate incidental take at a particular site or project if it received a complaint or had reason to believe that unlawful take occurred. The Service would consider good faith attempts to meet voluntary standards when making enforcement decisions under the MBTA to provide an incentive for potential violators to implement those voluntary measures.

There would be no regulatory framework to authorize take or official policy on enforcement discretion under this alternative; the Service would simply rely on general law enforcement discretion to determine when to pursue alleged incidental take violations.

In addition to enforcement actions, the Service would work with entities to encourage implementation of best practices with the goal of reducing project-related impacts. Under this approach, an individual or entity could demonstrate they have taken reasonable steps to reduce the take of birds and increase the likelihood that the government would exercise its enforcement discretion and decline to pursue an enforcement action related to any resulting incidental take.

Alternatives Considered but Not Carried Forward for Further Review

We considered two additional alternatives during the scoping process but determined not to carry them forward for further analysis because they do not meet the purpose and need for the proposed action.

Develop a general-permit framework to regulate incidental take

We considered an alternative under which the Service re-establishes the Department's prior interpretation that the MBTA prohibits incidental take and promulgates a regulation defining that position, and subsequently establishes a regulatory general-permit framework. Under this framework, the Service could create general permits that provide legal coverage for a variety of activities that commonly take migratory birds incidentally. This general-permit system could take many forms, but one possibility would be to use a risk management approach that identifies specific hazards associated with particular activities and establishes best practices as permit conditions to reduce or avoid those hazards. A general-permit framework could require a nominal application fee and potentially an in-lieu fee to compensate for any remaining take after implementation of avoidance and minimization measures. Any incidental take occurring under a general permit would be authorized and not subject to enforcement. The Service would continue to use enforcement discretion for activities not covered by a general permit and large-scale, incidental-take incidents, such as oil spills.

The Service eliminated this alternative from further review at this time because developing a general-permit system would be a complex process and better suited to analysis in a separate subsequent proposal if the Service had chosen Alternative B. This alternative goes beyond the current purpose and need of simply providing regulatory certainty regarding the Service's interpretation of the MBTA as it relates to incidental take. For these reasons, it would be premature to discuss this alternative in detail as a part of this proposed action. Thoroughly evaluating this alternative would instead require a separate detailed process to define adequately the parameters of such a permit system.

Developing a general permit system would likely require the following at a minimum: determining reasonable and adequate conservation measures for different industries and activities that effectively reduce the impacts of the actions of private parties and government entities on over 1,000 bird species, whether a separate rulemaking would be required for each individual general permit, and how to authorize actions that do not fit within a general-permit category.

Develop an enforcement system to address gross negligence

We also considered an alternative where the Service promulgates a regulation defining the MBTA to prohibit incidental take of migratory birds and develops an enforcement policy requiring gross negligence to establish a misdemeanor violation of the MBTA for incidental take. Criminal statutes generally require proof that the accused acted with a specific mental state (or *mens rea*). Gross negligence is a specific mental state generally defined as carelessness or reckless disregard of the consequences of an action, especially when a reasonable person should have anticipated and guarded against it. Establishing a gross-negligence requirement for a misdemeanor violation would allow the Service to focus its law enforcement resources on activities known to take birds incidentally that do not implement reasonable best practices known to avoid or minimize that take.

The Service eliminated this alternative from further review because it fails to meet the purpose and need of this proposal. A significant majority of Federal courts have interpreted the MBTA's misdemeanor provision to be a strict-liability offense, meaning that no mental state is required to prove a violation has occurred. This alternative would have established a gross-negligence mental-state requirement before the Service could enforce the statute's misdemeanor provision. Thus, it would be inconsistent with most case law and, therefore, would likely reduce legal certainty for the public.

Public Involvement

On February 3, 2020, the Service published a Notice of Intent (NOI) in the Federal Register to prepare a draft environmental review pursuant to NEPA. The Service used this NOI to notify Federal and State agencies, Tribes, and the public of our intentions to evaluate the potential environmental impacts of the

proposed action. In the NOI, we invited input from other Federal agencies, State agencies, Tribes, nongovernmental organizations, and members of the public on the scope of the proposed environmental review, including any pertinent issues we should address and alternatives to our proposed approach for authorizing incidental take. We also invited input on the concurrently published proposed rule to define the scope of the MBTA. The public comment period on both documents was open until March 19, 2020.

As part of the scoping process, the Service convened five public webinars between March 3 and March 16, 2020. A sixth webinar was conducted strictly for members of Federally recognized Tribes. During these webinars, Service biologists gave presentations that were streamed live and recorded. These presentations described the process for creating the DEIS that included the purpose and need for the action, most of the alternatives being initially considered, and reiterated the need for specific information for analyzing the alternatives. The participants were given opportunities to ask questions and seek clarity on the process.

On June 5, 2020, the Service published the DEIS, opening another 45-day public comment period. In the DEIS, the Service proposed a no action alternative and two action alternatives.

During the public comment period, we received 8,398 distinct comments on the Proposed Rule and the NOI, and an additional 5,818 distinct comments on the DEIS. Many comments included additional attachments (e.g., scanned letters, photographs, and supporting documents). These comments represented the views of multiple State and local government agencies, a U.S. treaty partner, private industries, Tribes, non-governmental organizations, and private citizens. In addition to the individual comments received, multiple organizations submitted attachments representing individuals' comments, form letters, and signatories to petition-like letters representing almost 180,000 signers.

After publication of the FEIS, several additional comments were received. First, the U.S. State Department received additional comment from the Government of Canada expressing concern over the Service's selection of Alternative A. Canada stated that it considers efforts to mitigate incidental take mortality to be at the core of the MBTA Convention signed by both countries; expressed concern that removal of this protection would result in unmitigated risks to vulnerable bird populations in both countries; requested that the Service clearly identify the impacts of the proposed changes on migratory birds and how it will mitigate any expected negative impacts; and proposed a series of bilateral meetings to discuss and further implement shared priorities. Second, the FWS received additional public comment from multiple parties that, for the most part, reiterated issues for which the Service provided responses in the FEIS or the Final Rule. However, three additional peer-reviewed literature citations were provided that the Service did not include in the FEIS. One study estimated that 58,000-440,000 bird deaths occurred on an annual basis at U.S. commercial wind facilities existing in 2008.² A second study estimated that 888,000 bats and 573,000 bird deaths, including 83,000 raptors, occurred annually at U.S. wind turbines.³ A third study estimated that there was a decrease of 6 million birds in the U.S. between 2018 and 2019.⁴

² Manville, A.M. 2009. Towers, turbines, power lines and buildings – steps being taken by the U.S. Fish and Wildlife Service to avoid or minimize take of migratory birds at these structures. Proceedings of the Fourth International Partners in Flight Conference. C.J. Ralph and T.D. Rich, editors.

³ Smallwood, K.S. 2013. Comparing bird and bat fatality-rate estimates among North American wind-energy projects. *Wildlife Society Bulletin* 37:19-33.

⁴ Audubon Society. 2020. 120th Christmas Bird Count Summary. Accessible at: <https://www.audubon.org/news/120th-christmas-bird-count-summary>

Service Decision

The Service will implement the Preferred Alternative, Alternative A, as it is described in the FEIS for the Project. This decision is based on a thorough review of the alternatives and their environmental consequences.

The Service selects the Preferred Alternative because it meets the purpose and need under NEPA, and because it creates more legal certainty by promulgating a regulation that excludes incidental take. Although Alternative A may have more negative environmental consequences than the No Action Alternative or Alternative B, it meets the purpose and need better than those alternatives. These reasons are explained in more detail below.

We select Alternative A because it meets the purpose and need of our proposed action. The purpose of the action is to provide a regulatory definition of the scope of the statute as it relates to incidental take of migratory birds. This action improves consistency in enforcement of the MBTA's prohibitions across the country, thereby eliminating public uncertainty caused by the current patchwork of legal standards across the different Federal courts of appeals, which have reached different conclusions on the central question of whether the MBTA prohibits incidental take.

Alternative A has been selected because it creates legal certainty. This certainty is created by promulgating a regulation that excludes incidental take. This meets the purpose and need better than the No Action Alternative because the No Action Alternative does not result in a regulation that clarifies whether incidental take is applicable under MBTA. This results in greater legal risk for entities that do not implement best practices. Alternative A also better meets the purpose and need than Alternative B. Though Alternative B would also result in a regulation that defines the scope of the MBTA as it relates to incidental take, regulated entities would still be left uncertain whether any conduct potentially causing the incidental take of migratory birds is subject to enforcement and prosecution. Thus, Alternative A also best meets the need for consistency and efficiency in our enforcement of the MBTA.

Alternative A may reduce costs for some regulated entities and may increase costs for some States. The regulation created under Alternative A makes it likely that fewer entities will need to implement best practices intended to reduce incidental take unless required to by other Federal, State, Tribal or local laws and regulations. It is also likely that fewer entities will seek or implement guidance from the Service about ways to avoid or minimize adverse effects on migratory birds. For some entities there would likely be cost savings from not implementing beneficial practices. Some States may need to enact changes to their regulatory processes and staffing to meet State laws that implicate incidental take of migratory birds in the absence of Federal regulation. This would likely increase costs for States as they work to develop and implement regulatory and policy changes to meet their State mandates to protect birds, although any costs required to comply with Federal law prohibiting incidental take under Alternative B would be eliminated. However, the Service believes the benefit to regulated entities will outweigh any extra cost borne by States.

Alternative A may increase negative impacts on migratory birds, vegetation, other wildlife, and associated ecosystem services. This may mean that Alternative A will result in a higher level of bird mortality than the No Action Alternative and especially Alternative B, particularly for those entities previously subject to enforcement actions under the MBTA. Negative impacts on migratory birds, vegetation and other wildlife, as well as associated ecosystem services, may also increase over time as more entities react to the certainty that incidental take is not prohibited under the MBTA and elect to reduce implementation of beneficial practices. Data are not readily quantifiable and available to determine an accurate economic value of these changes in ecosystem services, but the amount may be significant.

In compliance with 40 CFR 1505.2(c), the Service is adopting all practicable means to avoid or minimize environmental harms from Alternative A by continuing to: provide assistance to industries and partners regarding design, implementation and monitoring of management practices intended to reduce bird mortality; restore and conserve bird habitat on National Wildlife Refuges; educate the public about the benefits of birds to the economy and their provision of ecosystem services; provide grants to States to further migratory bird conservation; meet and consult with U.S. Treaty partners; and conserve gamebirds through adaptive harvest management and population monitoring. Specific programs the Service leads or contributes resources to include the Waterfowl Breeding Population and Habitat Survey, American Woodcock Singing Ground Survey, and the Gulf of Mexico Marine Assessment Program for Protected Species, among others. In addition, the Service lends financial support to the Cornell Lab of Ornithology's eBird project. The Service has used data from this project in modeling population estimates for bald and golden eagles and other species and we anticipate this type of partnership continuing to expand with future monitoring efforts. Our current and anticipated future monitoring efforts will continue to monitor anthropogenic effects on migratory bird populations and can be expanded if necessary to track population fluctuations in the aggregate and, in some cases, at the species level. Because mitigation requirements or commitments are not required as part of this rule, a monitoring and enforcement program is not required to be adopted or summarized.

Regarding the comments from the Government of Canada, the Service identified the impacts to migratory birds to the extent it was able in the FEIS, based on the information available.

Alternative B, the environmentally preferable alternative, was not selected because it would require the Service to change its current interpretation of the statute, and it would not improve consistency and efficiency in our enforcement of the MBTA. While Alternative B would provide a greater level of legal certainty than the No Action Alternative by creating a regulatory definition of the scope of the MBTA, uncertainty would remain in the regulated community regarding what is required to achieve compliance with the MBTA when compared to the No Action Alternative and Alternative A. It is also anticipated that Alternative B would result in increased costs to entities for implementing beneficial practices compared to the No Action Alternative and Alternative A. Finally, the Service would incur increased costs to enforce and implement the MBTA under Alternative B as compared with the other alternatives.

The No Action Alternative was not selected because it would retain the uncertainty over the long-term status of our current interpretation and exercise of enforcement discretion regarding incidental take. This means that some entities would likely continue to implement some beneficial practices to reduce take of migratory birds, hedging their legal compliance on the side of caution. However, over time as entities become more confident of the long-term application of our current interpretation of the MBTA, there will likely be a reduction in the number of best practices implemented. This may have a positive economic impact on regulated entities, but a negative impact on migratory birds, vegetation, and other wildlife and ecosystem services. The impacts on government entities are expected to be negative and may be significant in individual cases, though the Service's law enforcement program would continue to realize cost savings from not enforcing incidental take under the MBTA and government entities would not be required to avoid incidental take of migratory birds under Federal law when conducting their own actions.

In summary, the Service selects Alternative A because it best meets the purpose and need for the proposed action by creating regulatory certainty while reducing costs to regulated entities and improving consistency and efficiency in enforcement.

Dated: _____.

Aurelia Skipwith,
Director, U.S. Fish and Wildlife Service