



March 19, 2020

Public Comments Processing
ATTN: FWS-HQ-MB-2018-0090
U.S. Fish and Wildlife Service
MS: JAO/1N
5275 Leesburg Pike
Falls Church, VA 22041-3802

Re: Docket No. FWS-HQ-MB-2018-0090, Regulations Governing Take of Migratory Birds

On behalf of more than 8,000 members at the American Road & Transportation Builders Association (ARTBA), I respectfully offer comments on the rule proposed by the U.S. Fish and Wildlife Service (FWS) concerning regulations governing the take of migratory birds.

ARTBA is comprised of private and public sector members that plan, design, build and maintain the nation's roadways, bridges, waterways, ports, airports, rail and transit systems. Our industry generates more than \$500 billion annually in U.S. economic activity and sustains more than 4 million American jobs.

ARTBA members seek to deliver transportation improvements as safely, efficiently and cost-effectively as possible. At the same time, these activities are subject to the environmental review and approval process. To ensure an appropriate balance between these two complementary activities, it is important that relevant federal agencies periodically assess regulatory requirements. Through the proposal described in these comments, the FWS is taking exactly that approach.

The FWS is seeking to clarify that the Migratory Bird Treaty Act (MBTA) does not prohibit the "incidental taking" of migratory birds. Its proposal would codify a previous legal opinion from the Department of the Interior. An "incidental take" is the killing of a migratory bird resulting from an accident or other scenario where there is no specific intent to harm them. Specifically, the FWS states the Act only applies to "actions directed at migratory birds, their nests, or their eggs." **ARTBA supports the FWS proposal clarifying the scope of the MBTA.**

Despite the Act's specific prohibitions on activities which "pursue," "hunt" or "capture" migratory birds, both federal courts and regulatory agencies have broadened interpretation of the statute and applied penalties when where there was no proven intent to take a migratory bird. Exceeding the Act's scope in this way has resulted in a regulatory environment that is inconsistent at best and overreaching at worst.

ARTBA members are engaged on this issue because transportation construction job sites can include migratory bird habitats. Affected species can appear virtually overnight as birds build new nests, making conditions on the job site that much more unpredictable. A broad interpretation of the MBTA requires industry professionals to utilize potentially extraordinary, costly and time-consuming measures to avoid accidental harm to or takings of any such birds. Moreover, if unintended incidents occur despite preventative steps, the firm is subject to an economic penalty, thus further increasing project costs.

In one example on an Interstate bridge replacement project, a contractor completed work on a Friday and returned Monday to undertake a beam replacement, a critical point in the project. However, it discovered nests built over the weekend. All bridge replacement activities were stopped, and the work crew had to build temporary protections for the nests with plywood.

Project delays, for whatever reason, deny the benefit of transportation improvements to the travelling public and increase costs. According to a 2016 report by the Texas A&M Transportation Institute, project delays were estimated to cost \$87,000 per month for a small project (e.g., reconstruction of a rural road), \$420,000 per month for a medium-sized project (e.g., widening of a semi-rural highway) and \$1.3 million per month for a large project (e.g. reconstruction of a highway in a large metro area)¹.

The transportation construction industry is not asking for impunity to harm or take migratory birds and is committed to minimizing its impact on wildlife and other natural resources. However, the enforcement and interpretation of the MBTA should balance 1.) the risk of incidental and unpreventable contact with the animals on transportation construction job sites against 2.) the project costs and delays required to prevent any such contact.

In sum, the FWS proposal would provide needed clarity and reasonableness in enforcement of the MBTA.

ARTBA appreciates the FWS efforts to clarify this important issue and looks forward to continued discussions in the future.

Sincerely,



David Bauer
President & C.E.O

¹ "Assessing the Costs Attributed to Project Delay During Project Pre-Construction Stages," Texas A&M Transportation Institute, March 2016, available at: <https://static.tti.tamu.edu/tti.tamu.edu/documents/0-6806-FY15-WR3.pdf>.