



June 7, 2021

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;
Proposed Rule**

Today ARTBA respectfully offers comments **opposing** the May 7 announcement by the U.S. Fish and Wildlife Service (FWS) that it plans to revoke a final rule clarifying Migratory Bird Treaty Act (MBTA) regulations governing the take of migratory birds.

Relevance to Transportation Construction

ARTBA members seek to build and maintain transportation improvement projects in as safe, timely and cost-effective a manner as possible. Migratory bird habitats can appear on these project sites, so the issue is quite relevant to the industry we represent. 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. These are all potential causes of delays and increased costs for the project, at a time when transportation investment must yield maximum economic benefits.

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 stopped, with the work crew building temporary protections for the nests with plywood. Ultimately, taxpayers and motorists pay the price for project delays like this, especially those so unexpected.

The Revised Rule Improved the MBTA Regulatory Process

In the revised rule, the FWS clarified the MBTA does not prohibit the “incidental taking” of migratory birds. 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. Therefore, under the new

interpretation, the MBTA only applies to “actions directed at migratory birds, their nests, or their eggs,” codifying a previous legal opinion from the Department of the Interior.

As ARTBA described in our comments submitted on March 19, 2020 (incorporated by reference), the revised rule addressed a clear need for this regulatory improvement. Despite the MBTA’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 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.

Revoking the Rule Will Lead Back to Confusion and Project Delays

The revised rule was published on Jan. 7 and has been in effect for exactly five months as of today. This is not adequate time to justify withdrawing the revisions. At a minimum, FWS should allow the MBTA clarifications to remain in effect long enough to evaluate whether targeted modifications or total revocation is preferable. ARTBA members could provide feedback for this purpose, but only after at least one complete construction season.

Additionally, should FWS proceed to withdraw the rule, there will once again be confusion over the distinction between incidental and intentional harm to bird species. The transportation construction industry is not asking for impunity to harm or take migratory birds. It remains committed to minimizing impact on wildlife and other natural resources. In this regard, the recent clarifications to the MBTA represented a significant improvement, balancing 1.) the risk of incidental and unpreventable contact with these birds on transportation construction job sites against 2.) the excessive project costs and delays required to prevent any such contact.

For the reasons described in these comments and those from last year, ARTBA urges FWS not to revoke this much-needed regulatory improvement. However, regardless of the agency’s decision, FWS should work with the regulated community to better understand – and effectively address – the underlying uncertainties and risks we have outlined.

Thank you for considering the views of the transportation construction industry on this important policy matter.

Sincerely,



David Bauer
President & CEO