



March 1, 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;
Delay of Effective Date**

Today I respectfully offer comments on the Feb. 9 announcement by the U.S. Fish and Wildlife Service's (FWS) that it plans to delay implementation of revised regulations relating to the Migratory Bird Treaty Act (MBTA), governing the take of migratory birds. **ARTBA opposes delaying the effective date of the FWS rule.**

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. The issue of migratory birds relates to the transportation construction industry because project sites sometimes include their 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. These are all potential causes of delays and increased costs for the project, at a time when public dollars are constrained and should be used judiciously.

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.

The transportation construction industry is not asking for impunity to harm or take migratory Birds. The industry remains committed to minimizing its impact on wildlife and other natural resources. In this regard, the enforcement and interpretation of the MBTA should balance 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.

Improvements Under the Revised Rule

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 will only apply to “actions directed at migratory birds, their nests, or their eggs.” The revised rule codifies a previous legal opinion from the Department of the Interior.

As ARTBA described in our comments submitted on March 19, 2020, there is 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.

The new rule has already undergone the necessary notice and comment process, as well as National Environmental Policy Act (NEPA) review. In formulating the new rule, FWS reviewed and considered more than 56,000 public comments. With President Biden prioritizing transportation infrastructure as a catalyst for economic recovery, this is the time to provide regulatory clarity and lessen the possibility of project cost increases and delays.

In sum, ARTBA urges FWS to implement these improvements to the MBTA as soon as possible.

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

Sincerely,

A handwritten signature in black ink, appearing to read "David Bauer", written in a cursive style.

David Bauer
President & CEO