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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 10

[Docket No. FWS-HQ-MB-2018-0090; FF09M29000-201-FXMB12320900000]

RIN 1018-BD76

**Migratory Bird Permits; Regulations Governing Take of Migratory Birds;
Environmental Impact Statement**

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Supplementary proposed rule; intent to prepare an environmental impact statement.

SUMMARY: This document advises that we, the U.S. Fish and Wildlife Service (Service), intend to prepare a draft environmental impact statement pursuant to the National Environmental Policy Act of 1969 (NEPA). The Service hereby notifies

Federal, State, and local agencies, tribes, and the public of our intentions to evaluate the potential environmental impacts of a proposal to adopt a regulation that clarifies that the Migratory Bird Treaty Act's prohibitions on pursuing, hunting, taking, capturing, killing, or attempting to do the same, apply only to actions directed at migratory birds, their nests, or their eggs, and, therefore, do not extend to incidental take, which occurs when injury or mortality to migratory birds results from, but is not the purpose of, an activity. The review will analyze the environmental effects of the proposed approach and will provide detailed analysis of the environmental effects of the proposed rule. We invite input from other Federal and State agencies, tribes, nongovernmental organizations, and members of the public on the scope of the proposed NEPA analysis, the pertinent issues we should address, and alternatives to our proposed approach for implementing the MBTA. We will hold multiple public scoping webinars to inform the public about the proposal.

DATES: *Comment submission:* Public scoping will begin with the publication of this document in the *Federal Register* and will continue through [INSERT DATE 45 DAYS AFTER DATE OF PUBLICATION IN FEDERAL REGISTER]. We will consider all comments on the scope of the draft environmental review that are received or postmarked by that date. Comments received or postmarked after that date will be considered to the extent practicable.

Public scoping meetings: We will hold public scoping meetings in the form of multiple webinars in February/March 2020. We will announce exact webinar dates, times, and registration details on the internet at <https://fws.gov/migratorybirds/2020Regulation.php>.

ADDRESSES: *Comment submission:* You may submit written comments by one of the following methods. Please do not submit comments by both.

(1) *Electronically:* Go to the Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments to Docket No. FWS–HQ–MB–2018–0090.

(2) *By hard copy:* Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–HQ–MB–2018–0090; U.S. Fish and Wildlife Service; MS: JAO/1N; 5275 Leesburg Pike; Falls Church, VA 22041–3803.

We do not accept email or faxes. We will post all comments on <http://www.regulations.gov>, including any personal information you provide.

Document availability: The proposed rule and supplementary materials will be available at the Federal eRulemaking Portal: <http://www.regulations.gov> in Docket No. FWS–HQ–MB–2018–0090.

FOR FURTHER INFORMATION CONTACT: Jerome Ford, Assistant Director, Migratory Birds, U.S. Fish and Wildlife Service at 202–208–1050.

SUPPLEMENTARY INFORMATION:

Background

The Migratory Bird Treaty Act (MBTA; 16 U.S.C. 703–12) was enacted in 1918 to help fulfill the United States’ obligations under the 1916 “Convention between the United States and Great Britain for the protection of Migratory Birds,” 39 Stat. 1702

(Aug. 16, 1916) (ratified Dec. 7, 1916) (Migratory Bird Treaty). The list of migratory birds protected by the MBTA is currently codified in title 50 of the Code of Federal Regulations at 50 CFR 10.13.

In its current form, section 2(a) of the MBTA (16 U.S.C. 703(a)) provides that, unless permitted by regulations, it is unlawful:

at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird, any part, nest, or egg of any such bird, or any product, whether or not manufactured, which consists, or is composed in whole or part, of any such bird or any part, nest, or egg thereof.

Section 3(a) of the MBTA (16 U.S.C. 704(a)) authorizes and directs the Secretary of the Interior to “adopt suitable regulations” allowing “hunting, taking, capture, killing, possession, sale, purchase, shipment, transportation, carriage, or export of any such bird, or any part, nest, or egg thereof” while considering (“having due regard to”) temperature zones and “distribution, abundance, economic value, breeding habits, and times and lines of migratory flight of such birds.” Section 3(a) also requires the Secretary to “determine when, to what extent, if at all, and by what means, it is compatible with the terms of the conventions” to adopt such regulations allowing these otherwise-prohibited activities.

On December 22, 2017, the Principal Deputy Solicitor of the Department of the Interior, exercising the authority of the Solicitor pursuant to Secretary's Order 3345, issued a legal opinion, M-37050, "The Migratory Bird Treaty Act Does Not Prohibit Incidental Take" (M-37050 or M-Opinion). This opinion thoroughly examined the text, history, and purpose of the MBTA and concluded that the MBTA's prohibitions on pursuing, hunting, taking, capturing, killing, or attempting to do the same apply only to actions directed at migratory birds, their nests, or their eggs. This opinion is consistent with the Fifth Circuit's decision in *United States v. CITGO Petroleum Corp.*, 801 F.3d 477 (5th Cir. 2015), which examined whether the MBTA prohibits incidental take. It also marked a change from prior U.S. Fish and Wildlife Service interpretations and an earlier Solicitor's Opinion, M-37041, "Incidental Take Prohibited Under the Migratory Bird Treaty Act." The Office of the Solicitor performs the legal work for the Department of the Interior, including the U.S. Fish and Wildlife Service. The Service is the Federal agency delegated the primary responsibility for managing migratory birds.

Need for Proposed Agency Action

The Service proposes to interpret the MBTA to prohibit only actions directed at migratory birds, their nests, or their eggs, and to clarify that incidental take is not prohibited. The purpose of this action is to provide an official regulatory definition of the scope of the statute as it relates to incidental take. The Service needs to conduct this action to improve consistency in enforcement of the MBTA's prohibitions across the country and thereby eliminate public uncertainty caused by the current patchwork of legal standards across the different Circuit Courts of Appeal, which have reached different conclusions on the central question of whether the MBTA prohibits incidental take. This

approach also aligns with and implements the Department's interpretation of the MBTA in M-37050.

NEPA Analysis of Potential Codification of the Solicitor's Opinion Options

The National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321–4347) requires Federal agencies to undertake an assessment of the environmental effects of any proposed action prior to making a final decision and implementing it. NEPA requirements apply to any Federal project, decision, or action that may have a significant impact on the quality of the human environment. NEPA also established the Council on Environmental Quality, which issued regulations implementing the procedural provisions of NEPA (40 CFR 1500–1508).

We intend to complete an environmental impact statement to assess the impacts of codifying the Solicitor's Opinion, M-37050 and the effects on migratory bird populations of mortality resulting from incidental take. We will address our compliance with other applicable authorities in our proposed environmental review.

Tribal Trust Responsibilities

The Service has overarching Tribal Trust Doctrine responsibilities to tribes under the Bald and Golden Eagle Protection Act (16 U.S.C. 668–668d); the National Historic Preservation Act (16 U.S.C. 470 *et seq.*); the American Indian Religious Freedom Act (42 U.S.C. 1996); the Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb *et seq.*); Secretarial Order 3206, American Indian Tribal Rights, Federal–Tribal Trust Responsibilities, and the Endangered Species Act (June 5, 1997); Executive Order 13007, Indian Sacred Sites (61 FR 26771, May 29, 1996); and the Service's Native American

Policy. We apply the terms “tribal” or “tribe(s)” generally to federally recognized tribes and Alaska Native tribal entities. We will refer to Native Hawaiian Organizations separately when we intend to include those entities. The Service will separately consult with tribes and with Native Hawaiians on the proposals set forth in the proposed rule. We will also ensure that those tribes and Native Hawaiians wishing to engage directly in the NEPA process will have the opportunity to do so. As part of this process, we will protect the confidential nature of any consultations and other communications we have with tribes and Native Hawaiians to the extent authorized by law.

Public Scoping and Comments

See **DATES** for information about upcoming scoping webinars. Please note that the Service will ensure that the public scoping webinars will be accessible to members of the public with disabilities. A primary purpose of the scoping process is to receive suggestions and information on the scope of issues and alternatives to consider when drafting the environmental documents and to identify significant issues and reasonable alternatives related to the Service’s proposed action. To ensure that we identify a range of issues and alternatives related to the proposed action, we invite comments and suggestions from all interested parties. We will conduct a review of this proposed action according to the requirements of NEPA and its regulations, other relevant Federal laws, regulations, policies, and guidance, and our procedures for compliance with applicable regulations.

We request information from interested government agencies, Native American tribes, Native Hawaiian Organizations, the scientific community, industry,

nongovernmental organizations, and other interested parties. We solicit input on the following:

- (1) The avoidance, minimization, and mitigation measures entities employed to address incidental take of migratory birds (prior to M-Opinion 37050);
- (2) The direct costs associated with implementing these measures;
- (3) The indirect costs that entities have incurred related to the legal risk of prosecution for incidental take of migratory birds (e.g., legal fees, increased interest rates on financing, insurance, opportunity costs);
- (4) The extent that avoidance, minimization, and mitigation measures continue to be used (after issuance of M-Opinion 37050);
- (5) Any quantitative information regarding the economic benefits and/or ecosystem services (e.g., pollination, pest control, etc.) provided by migratory birds;
- (6) Information regarding resources that may be affected by the proposal; and
- (7) Species having religious or cultural significance for tribes and Native Hawaiian Organizations, and species having cultural significance for the general public and impacts to cultural values from the actions being considered.

You may submit your comments and materials by one of the methods described above under **ADDRESSES**. Once the draft environmental documents are completed, we will offer further opportunities for public comment.

Public Availability of Comments

Written comments we receive become part of the public record associated with this action. Your address, phone number, email address, or other personal identifying

information that you include in your comment may become publicly available. You may ask us to withhold your personal identifying information from public review, but we cannot guarantee that we will be able to do so. All submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be made available for public disclosure in their entirety.

Authority

The authorities for this action are the Migratory Bird Treaty Act (16 U.S.C. 703–712) and the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*).

Dated: January 6, 2020

Rob Wallace

Rob Wallace

Assistant Secretary for Fish and Wildlife and Parks.