No. 14-55842 (consolidated with No. 14-55666)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PROTECT OUR COMMUNITIES FOUNDATION,

Plaintiff-Appellant,

v.

SALLY JEWELL, *et al*.,

Defendants-Appellees,

and

TULE WIND, LLC,

Intervenor-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

APPELLANT'S OPENING BRIEF

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Rule 26.1 Jurisdictional Statement

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiff-Appellant Protect Our Communities Foundation states that it has no parent corporations or any publicly held corporations that own 10% or more of its stock.

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STATEMENT OF JURISDICTION

This case challenges a Bureau of Land Management ("BLM") Record of Decision ("ROD") authorizing development of an industrial wind project on federal land. The district court had jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1346. The district court granted summary judgment for Federal Defendants and Defendant-Intervenor Tule Wind LLC ("Tule Wind") on March 25, 2014, and Plaintiff Protect Our Communities Foundation ("POC") filed a notice of appeal on May 23, 2014. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUE

Whether BLM's authorization for construction and operation on federal land of an industrial wind project that will kill migratory birds in violation of the Migratory Bird Treaty Act, 16 U.S.C. §§ 703-712 ("MBTA"), where neither BLM nor Tule Wind has obtained or even requested an MBTA permit authorizing such direct take, constitutes agency action that is "not in accordance with law" within the meaning of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A)?

ADDENDUM

The pertinent statutory and regulatory provisions are set forth in the Addendum.

STATEMENT OF THE CASE

POC's appeal presents a single question: whether, in issuing an ROD authorizing an industrial wind project on federal land that will directly kill birds protected by the MBTA, BLM was required to comply with the MBTA's prohibition on the killing of migratory birds without a permit from the U.S. Fish and Wildlife Service ("FWS"). POC's position, applying the plain terms of the MBTA and the APA, is that BLM's authorization of the project cannot be deemed "in accordance with law," 5 U.S.C. § 706(2)(A), and hence the ROD should be set aside pending compliance with the MBTA.

The district court rejected that position, holding that the MBTA does not "prohibit incidental take of protected birds from otherwise lawful activity," Excerpts of the Record ("ER") at 34, although the federal government has brought criminal prosecutions under the MBTA against "otherwise lawful activit[ies]" for causing the direct and foreseeable, albeit unintentional, killing of birds protected by the MBTA. POC is appealing the district court's ruling that the MBTA has no applicability here.[1]

[1] POC is not appealing any other issue resolved by the district court.

STATEMENT OF FACTS

A. The MBTA

The "International Convention for the Protection of Migratory Birds," 39 Stat. 1702 (1916), between the United States and Great Britain (on behalf of Canada) addressed "a national interest of very nearly the first magnitude." *Missouri v. Holland*, 252 U.S. 416, 435 (1920). The treaty "recited that many species of birds in their annual migrations traversed certain parts of the United States," but "were in danger of extermination through lack of adequate protection." *Id*. at 431.

Additional international conventions for the protection of migratory birds were entered into with Mexico in 1936, Japan in 1972, and the former Soviet Union in 1976. *See* Larry Martin Corcoran & Elinor Colbourn, *Shocked, Crushed, and Poisoned: Criminal Enforcement in Non-hunting Cases Under the Migratory Bird Treaties*, 77 Denv. U. L. Rev. 359, 360-66 (1999) (describing conventions). These "migratory bird conventions impose substantive obligations on the United States for the conservation of migratory birds and their habitats, and through the [MBTA], the United States has implemented these migratory bird conventions with respect to the United States." Exec. Order No. 13186, 66 Fed. Reg. 3853, 3853

(Jan. 10, 2001); 72 Fed. Reg. 8931, 8946 (Feb. 28, 2007) ("The Japan and Russia treaties each call for implementing legislation that broadly prohibits the take of migratory birds.").

In enacting the MBTA, Congress intended to "prohibit[] the killing, capturing or selling any of the migratory birds included in the terms of the treaty except as permitted by regulations" issued and administered by the FWS, an agency within the Department of the Interior ("DOI"). *Missouri*, 252 U.S. at 431. Section 703 of the Act provides that:

> [u]nless and except as permitted by regulations made as hereinafter provided in this subchapter, it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill . . . any migratory bird . . . included in the terms of the conventions . . . .

16 U.S.C. § 703(a). As the D.C. Circuit observed in holding that the MBTA's prohibitions are imposed on federal agencies as well as private parties whose actions "take" migratory birds, "[a]s legislation goes, § 703 contains broad and unqualified language – 'at any time,' 'by any means,' 'in any manner,' 'any migratory bird'"; the "one exception to the prohibition is in the opening clause – '[u]nless and except as permitted by regulations made as hereinafter provided in this subchapter . . . .'" *The Humane Soc'y of the U.S. v. Glickman*, 217 F.3d 882, 885 (D.C. Cir. 2000) (quoting 16 U.S.C. § 703).

Section 704 provides that, "in order to carry out the purposes of the conventions . . . the Secretary of the Interior is authorized and directed, from time to time, to determine when, to what extent, if at all, and by what means, it is compatible with the terms of the conventions to allow . . . killing . . . of any such bird . . . and to adopt suitable regulations permitting and governing the same . . . ." 16 U.S.C. § 704(a). Pursuant to that authority, the FWS has adopted permitting regulations that have been invoked to authorize various forms of "take" of migratory birds, including take associated with activities conducted and/or authorized by federal agencies that, while not *designed* to kill migratory birds, directly and foreseeably do so. For example, one FWS regulation provides that "the Armed Forces may take migratory birds incidental to military readiness activities" provided that the military "cooperate[s] with the Service to develop and implement appropriate conservation measures to minimize or mitigate . . . significant adverse effects." 50 C.F.R. § 21.15(a)(1).

Another FWS implementing regulation authorizes the issuance of permits for "special purpose activities related to migratory birds," including where there is a "compelling justification" for such permitted activities. 50 C.F.R. § 21.27. The FWS has stated that one such justification may exist "whereby take of migratory birds *could result as an unintended consequence*" of an otherwise lawful activity.

72 Fed. Reg. at 8947 (emphasis added). In circumstances analogous to those here, the FWS recently issued such a "special purpose permit" to a federal agency – the National Marine Fisheries Service ("NMFS") – for its *regulatory activities* that result in incidental take of seabirds. 77 Fed. Reg. 50153, 50153 (Aug. 20, 2012).

B. Industrial Wind Projects Foreseeably Kill Migratory Birds.

Large industrial-scale wind projects, such as the one at issue here, foreseeably kill migratory birds protected by the MBTA. In 2009 – when there were far fewer projects than there are today – the FWS "estimated that wind turbines cause[d] as many as 440,000 bird deaths per year." R. Kyle Evans, *Wind Turbines and Migratory Birds: Avoiding a Collision Between the Energy Sector and the Migratory Bird Treaty Act*, 15 N.C.J.L. & Tech. On. 32, 46 & n.86 (2014).

While some project sites pose higher risks than others, modern industrial-scale wind projects are *inherently* hazardous to birds. They involve massive spinning turbines that occupy the same airspace used by migratory birds; the turbines can "attain incredibly high speeds at the blade tips, up to 180 mph, creating added difficulties for migrating birds attempting to navigate through or around" the turbines; and they are "often placed in wind corridors directly in the path of migratory birds." *Id*. at 47. "Raptors are especially susceptible to wind

turbine collisions," since their feeding and flight behaviors place them directly in the path of turbines. *Id*. at 49.

Consequently, at least "some incidental taking of protected birds is inevitable in the operation of wind energy facilities . . . ." Andrew G. Ogden, *Dying for a Solution: Incidental Taking Under the Migratory Bird Treaty Act*, 38 Wm. & Mary Envtl. L. & Policy Rev. 1, 33 (2013); *see also* ER at 150 ("Avian mortality through collision with moving rotor blades is one of the main adverse impacts of wind farms."); ER at 151 (documenting "a total of 125 dead birds from eight raptor species" at a wind project in Spain).

Bird kills from turbine collisions have been especially well-documented at projects in California. The "first large-scale wind energy development took place in California," and studies of the Altamont and Tehachapi facilities have documented hundreds of deaths of various migratory bird species. ER at 153-54. The "wind turbines located at Altamont Pass" alone "are estimated to kill . . . 1,766 birds annually, including between 881 and 1330 raptors." Evans, *supra*, 15 N.C.J.L. & Tech. On. at 48 & n.95. "Avian mortality has also been documented at other California windplants" as well, leading to estimates that "*6,800 birds were killed annually* at the San Gorgonio wind facility based on 38 dead birds found while monitoring nocturnal migrants." ER at 154 (emphasis added).

C. The Tule Wind Project

As described by the district court, this case involves an ROD issued by BLM "authorizing development of the Tule Wind Project, a utility-scale wind energy facility, on public lands in San Diego County." ER at 3. BLM approved a "right-of-way for Tule [Wind], a subsidiary of Iberdrola Renewables, Inc., to construct, operate, and maintain 62 wind turbines on 12,360 acres of federally-managed lands in the McCain Valley." *Id.* The project could not be built on federal land administered by BLM without BLM's express authorization.

Although the project approved by BLM is "scaled-down" somewhat from Tule Wind's initial proposal, *id.*, and Tule Wind worked with BLM and FWS to reduce some of the project's anticipated impacts, two facts are clear from the record: (1) a "utility-scale wind energy" facility consisting of 62 wind turbines on over 12,000 acres of federal land in Southern California will foreseeably kill raptors, songbirds, and other migratory birds protected by the MBTA; and (2) neither BLM nor Tule Wind has ever applied for, let alone received, an MBTA permit from the FWS authorizing such take.[2]

[2] In the course of BLM's consideration of the project, the FWS expressed particular concerns that turbines being considered for certain ridgelines posed an extremely high risk to resident golden eagles in particular. *See* ER 128 (Final EIS at D.2-173) (acknowledging that a nearby eagle pair "and their fledglings are at extremely high risk of collision" with the ridgeline turbines). However, the ridgeline portion

As for the first point, the project location is indisputably occupied by various species of migratory birds. Millions of birds, including raptors and "nocturnal migrating songbirds," pass over Southern California every year. ER at 142 (comments of Defenders of Wildlife, Natural Resources Defense Council, Audubon California, and others). According to data obtained by Tule Wind's own consultant, which conducted surveys criticized by conservation groups as woefully inadequate, *see* ER at 143, "[r]aptor use of the site was considered moderate . . . when compared to other sites with data from similar studies" and "[o]f the raptor species detected in the Tule Wind Project area, red-tailed hawks and turkey vultures had the highest encounter rate" – which is "an estimate of the frequency with which a species is observed at the elevations of the proposed turbine's rotor swept area ('RSA')." ER at 127 (Final EIS at D.2-172) (emphasis added).

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of the project was ultimately approved in a separate ROD issued in 2013 by the Bureau of Indian Affairs. That ROD has recently been challenged by POC in another lawsuit which is pending in the district court. *See Protect Our Communities v. Black*, No. 3:14-cv-2261 (S.D. Cal.). Accordingly, although Plaintiffs in this case raised an APA claim based on the Bald and Golden Eagle Protection Act, 16 U.S.C. §§ 668-668d ("BGEPA"), as well as the MBTA, POC believes that the BGEPA issue is more appropriately addressed in the context of the BIA ROD authorizing turbines that the FWS has found to pose an extraordinarily high risk to eagles.

Further "[o]f the non-raptor species detected in the Tule Wind Project area, white-throated swift [ ], common raven, and Vaux's swift had the highest encounter rates"; "[b]ased solely on encounter rates, these species would have the highest risk of collision." ER at 128 (Final EIS at D.2-173). The "encounter rates were nearly entirely in the fall for Vaux's swift, indicating migratory use of the project area," and the swift – which "is listed as a Species of Concern" in California – "had the highest encounter rates for both RSA elevation ranges of any species observed during both studies." ER at 128-29 (Final EIS at D.2-173-74).

In short, migratory bird species use the project site and many fly at heights that will in fact routinely place them on a collision course with the enormous spinning turbines. *See also* ER at 142 (comments of Defenders of Wildlife, *et al.*) ("Recent published scientific reports indicate that greater than 10% of nocturnal migrating songbirds migrating over ridges fly at elevations putting them within the area of rotating turbines."). Neither the EIS, nor any other document in the record, suggests any biological reason why at least *some* of the raptors and other birds that use the site and will be in harm's way will not inevitably be killed *by the normal, anticipated operation of the turbines*.

To the contrary, while the EIS suggests that there may be "*relatively* low raptor mortality" compared to even higher risk sites (e.g., Altamont), it it is entirely

foreseeable that this federally authorized project slated for construction on federal land will directly kill migratory birds protected by the MBTA and the various treaties the MBTA implements. Indeed, the final EIS admits as much, determining that the "Tule Wind Project would have unavoidable adverse impacts" to "biological resources" from "bird/eagle strikes with turbines." ER at 126 (Final EIS at ES-26); ER at 145-46 (*Project-Specific Avian and Bat Protection Plan for the Tule Wind Project* (Oct. 3, 2011) ("ABPP") (chart reflecting "[e]stimated mean bird fatality/turbine/year" for various wind projects in the U.S.")).

It is equally clear that the FWS has not issued any MBTA permit authorizing such take, although BLM and Tule Wind were certainly on notice of the need for MBTA compliance. For example, the U.S. Environmental Protection Agency ("EPA") advised BLM in comments that "[g]iven the known bird use and identified nesting birds in the vicinity, *several special status bird . . . species have a significant risk of mortality*" and that "EPA is concerned about potential impacts to sensitive wildlife species, since the proposed Project area supports a number of resident and migratory birds"; accordingly, EPA urged BLM to "specify" and "clarify how the Applicant *will comply with the Migratory Bird Treaty Act* . . . ." ER at 130-35 (emphases added).

Similarly, the State of California Department of Parks and Recreation commented that the "project would have adverse impacts to migratory birds protected under the [MBTA]," and that "[w]ind turbines have been well documented to cause mortality to a variety of migratory birds." ER at 139. The California Department of Fish and Game ("CDFG") and national conservation organizations echoed that concern. *See* ER at 137 (CDFG) ("[T]he Department cannot conclude that these [mitigation] measures will prevent 'take' [of certain bird species] during construction and particularly operation of the wind project."); ER at 142 (comments of Defenders of Wildlife, *et al*.) ("Migratory birds are protected by the [MBTA] and the project must address these impacts . . . ."); ER at 143 ("Nesting raptor species on the project site are protected under the federal [MBTA], including those species known to be vulnerable to turbine collision such as the red-tailed hawk.").

However, instead of either BLM or Tule Wind obtaining or even requesting an MBTA permit – which constitutes the "*one exception* to the prohibition" on take in section 703 of the MBTA, *Glickman*, 217 F.3d at 885 (emphasis added) – Tule Wind has adopted a "monitoring" and "adaptive management" plan based on the assumption that bird "mortality" *will* result from the project. *See* ER at 147 (explaining that the "primary objectives of the post-

construction baseline monitoring *are to estimate avian . . . mortality rates at the sites, and to determine whether the estimated mortality is lower, similar, or higher than the average mortality rates at other local, regional, and national projects*") (emphasis added); ER at 148 (describing the "avian adaptive management" that will be based on a "report summarizing the number of species found as fatalities" and "the estimates of total fatalities for the Project").

D. The District Court's Ruling Rejecting POC's MBTA Claim

In the district court, BLM did *not* dispute that when industrial wind turbines foreseeably and directly kill migratory birds, as will occur here, that *is* in fact a violation of the MBTA. To the contrary, the government stated explicitly that the MBTA's prohibitions on take are *not* "limited to conduct of the sort engaged in by hunters and poachers," and that those prohibitions may apply to predictable, albeit "unintentional take." ER at 43 (Fed. Defs.' Reply in Supp. of their Mot. for Summ. J). Rather, the government contended that it is not a violation of the APA for a federal agency to *authorize* a third party to engage in conduct that the agency knows will violate the MBTA.

In its summary judgment ruling, the district court stated that it was "deeply troubled by the Project's potential" impact on birds, and the court seemingly accepted POC's contention that the "Project will inevitably cause bird fatalities."

ER at 34. The court nevertheless rejected Plaintiffs' MBTA-based APA claim. Notwithstanding the government's acknowledgement that foreseeable incidental take associated with wind turbines *is* covered by the MBTA's prohibitions, the district held that the "governing interpretation of the MBTA in the Ninth Circuit is quite narrow and holds that the statute does not even prohibit incidental take of protected birds from otherwise lawful activity." ER at 35. The court cited for that proposition this Court's ruling in *Seattle Audubon Soc'y v. Evans*, 952 F.2d 297, 303 (9th Cir. 1991), which simply held that "*habitat destruction*" that may only "indirectly" harm birds is not covered by the MBTA's prohibition on "take," and expressly contrasted that situation with cases finding that there *is* MBTA liability where there is "direct, *though unintended*" bird killing, *id*. at 303 (emphases added) – i.e., the precise situation here.[3]

The court also expressed agreement with the government's position that in any event an APA claim cannot be based on an MBTA violation when a federal agency is "acting in a regulatory capacity to authorize activity" that will kill migratory birds, ER at 34-35, although the court did not explain whether it would

[3] Although POC's Complaint discussed both indirect effects on birds resulting from habitat modification and direct killing from collisions with wind turbines, this appeal is limited to the kind of "direct, though unintended" bird killing that *Seattle Audubon* suggested is covered by the MBTA.

have reached the same conclusion if the "incidental take" associated with the project *would* in fact constitute a violation of the MBTA. *Id.*

SUMMARY OF ARGUMENT

Large industrial wind projects such as the one at issue here foreseeably and directly kill migratory birds through normal operation of massive turbines, which the plain terms of the MBTA make unlawful in the absence of a permit from the FWS. This does not necessarily mean that such projects should never be built. It *does* mean that when, as here, a federal agency authorizes such a project to be built on federal land, then the federally authorized project is not "in accordance with law" – i.e., the MBTA – within the meaning of the APA unless the federal agency has either received or conditioned project approval on receipt of an FWS permit approving the take. Accordingly, just as this Court would set aside a federal agency's approval of a project that violates other federal environmental laws, BLM's authorization of the Tule Wind project should be vacated and remanded for full compliance with the MBTA.

ARGUMENT

I. STANDARD OF REVIEW

Although the MBTA contains no private right of action, where, as here, a federal action is being challenged, an APA claim may be predicated on an asserted

MBTA violation. *See, e.g.*, *Glickman*, 217 F.3d at 886 & n.5 (explaining that while there is "no provision in the [MBTA] for injunctive relief," the APA "authorizes suits in federal courts naming the United States as a defendant"). The APA "requires a reviewing court to set aside agency action that is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' . . . . [and] [n]o stretching of the statutory language is needed to conclude that a federal agency's decision to take action that would violate the MBTA would be 'otherwise not in accordance with law.'" *Mahler v. U.S. Forest Serv.*, 927 F. Supp. 1559, 1573 (S.D. Ind. 1996) (quoting 5 U.S.C. § 706(2)(A)); *see also* 5 U.S.C. § 706(2)(D) (a reviewing court shall also "hold unlawful and set aside agency action" adopted "without observance of procedure required by law").

II. BLM'S AUTHORIZATION ON FEDERAL LAND OF AN INDUSTRIAL WIND PROJECT THAT WILL DIRECTLY AND FORESEEABLY KILL MIGRATORY BIRDS IN VIOLATION OF THE MBTA IS AGENCY ACTION THAT IS "NOT IN ACCORDANCE WITH LAW."

A. The Foreseeable, Direct Killing Of Migratory Birds Through Operation Of Industrial Wind Turbines Constitutes A "Take" Within The Meaning Of The MBTA.

As the government conceded below, the MBTA's "broad and unqualified" prohibition on the killing of migratory birds without a permit, *Glickman*, 217 F.3d at 885, is not restricted to actions specifically directed *at* migratory birds. *See* 16

U.S.C. § 703(a) ("[I]t shall be unlawful at *any* time, by *any* means or in *any* manner to . . . kill . . . *any* migratory bird.") (emphasis added). Rather, the plain language clearly encompasses take that *directly and foreseeably* causes the killing of migratory birds regardless of whether that is the purpose of the action. *See Matao Yokeno v. Sawako Sekiguchi*, 754 F.3d 649, 653 (9th Cir. 2014) ("Where the statute's language is plain, the sole function of the courts is to enforce it according to its terms, for courts must presume that a legislature says in a statute what it means and means in a statute what it says there.") (internal quotation marks omitted); *see also United States v. Gonzales*, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning."); *Berm-Air Disposal v. Cohen*, 156 F.3d 1002, 1004 (9th Cir. 1998) (holding that a statutory provision authorizing suit by "any person" had "extraordinary breadth" and that "'any means any'") (quoting *Bennett v. Spear*, 520 U.S. 154 (1997)).[4]

That the MBTA in fact applies to "any" action in which the killing of migratory birds is a foreseeable, direct consequence is compelled not only by the

[4] The broad, plain language of the Act is reinforced by its legislative history. *See United States v. Moon Lake Electric Ass'n*, 45 F. Supp. 2d 1070, 1080-81 (D. Colo. 1999) (explaining that the legislative history confirms that "Congress intended the MBTA to regulate more than just hunting and poaching," as also evidenced by the fact that the Act and the various conventions "protect[] many species that are not considered game birds").

plain language of the statute, but also by Congress's direction to the FWS to establish permitting regulations for the incidental take of migratory birds by federal military operations. In response to a district court decision finding that, in carrying out certain training exercises, the Navy was "knowingly engaged in activities that have the direct consequence of killing and harming migratory birds," and hence violated the MBTA although Navy personnel were not "purposefully firing their guns or aiming their bombs directly at the birds," *Ctr. for Biological Diversity v. Pirie*, 191 F. Supp. 2d 161, 174 & n.6 (D.D.C. 2002), *vacated as moot sub nom.*, *Ctr. For Biological Diversity v. England*, No. 02-5163, 2003 WL 179848 (D.C. Cir. Jan. 23, 2003), Congress enacted the National Defense Authorization Act for Fiscal Year 2003. *See* Pub. L. No. 107-314, § 315, 116 Stat. 2458 (2002).

The pertinent provision of that statute – entitled "Incidental Takings of Migratory Birds During Military Readiness Activities" – provides that the "Secretary of the Interior *shall exercise the authority of that Secretary under section 3(a) of the Migratory Bird Treaty Act* (16 U.S.C. 704(a)) to prescribe regulations to exempt the Armed Forces *for the incidental taking of migratory birds* during military readiness activities authorized by the Secretary of Defense or the Secretary of the military department concerned." *Id*. at § 315(d) (emphases added). Plainly, the FWS could not "exercise [its] authority under" the MBTA to

issue regulations prescribing conditions for "incidental take" unless such take was covered by the MBTA in the first instance. *Id*.

That incidental take of the kind at issue here is covered by the Act is further buttressed by the fact that the U.S. Department of Justice has for decades successfully brought *criminal* MBTA actions against private activities that, although not targeting migratory birds, have the direct and foreseeable result of killing them, and hence are indistinguishable *in practical effect* from intentional killings. *See, e.g.*, *United States v. Apollo Energies, Inc.*, 611 F.3d 679, 684-86, 691 (10th Cir. 2010) (sustaining the government's position that there was MBTA liability because it was "reasonably foreseeable" that "unprotected oil field equipment" traps and kills migratory birds); *United States v. FMC Corp.*, 572 F.2d 902 (2d Cir. 1978) (imposing liability for unintentionally poisoning birds through application on crops of a highly toxic pesticide); *United States v. Citgo Petroleum Corp.*, 893 F. Supp. 2d 841, 847 (S.D. Tex. 2012) (sustaining the government's position that the MBTA was violated when migratory birds "were killed as a direct result of being exposed to waste oil in uncovered tanks" where it was "obvious" that the tanks were hazardous to migratory birds); *United States v. Moon Lake Electric Ass'n*, 45 F. Supp. 2d at 1071 (sustaining the government's position that a company's "power poles" that were "preferred locations for perching, roosting,

and hunting by birds of prey" directly and proximately caused the deaths of 38 birds of prey); *United States v. Corbin Farm Service*, 444 F. Supp. 510, 528, 534 (E.D. Ca. 1978), *aff'd on other grounds*, 578 F.2d 259 (9th Cir. 1978) (sustaining the government's position that the application of pesticides to a field known to be used by migratory birds triggered MBTA liability).[5]

Of particular relevance, in November 2013, the government invoked the same principles in pursuing criminal charges against a wind power project in Wyoming for "unlawfully tak[ing] approximately 58 migratory birds . . . without permit or other authorization" from the FWS. ER at 46 (*United States v. Duke Energy Renewables*, No. 2:13-cr-00268-KHR (Information, ECF No. 1) (D. Wyo. Nov. 7, 2013)). A plea agreement explained that "[c]ommercial wind power projects can cause the deaths of federally protected birds" through "collisions with wind turbines" and "at the present time, no post-construction remedies" exist that can prevent operating turbines from killing birds. ER at 64-65.

[5] Although several courts have reached the opposite conclusion in the criminal law context, a "majority of appellate and lower courts have found that incidental taking is subject to misdemeanor liability under Section 703(a), so long as the conduct of such activity is both the actual and proximate cause of the taking." Ogden, *supra*, 38 Wm. & Mary Envtl. L. & Policy Rev. at 27; *id*. ("The current trend of judicial authority is towards the expanded view of the MBTA's prohibitions to include incidental taking with an outer limit of activities that are too attenuated under a probable causation analysis.").

Contrary to the district court's holding, there is nothing in this Court's ruling in *Seattle Audubon* that compels a different conclusion. Rather, on close scrutiny, the Court's reasoning in that case supports POC's position that MBTA liability exists here.

The issue in *Seattle Audubon* was whether certain timber sales approved by the Forest Service in northern spotted owl habitat violated the MBTA as well as the Endangered Species Act, 16 U.S.C. §§ 1531-1544 ("ESA"). In addressing that issue, the Court explained that various "[c]ourts have held that the [MBTA] *reaches as far as direct, though unintended*" killing of migratory birds, such as "bird poisoning from toxic substances." 952 F.2d at 303 (citing, e.g., the Second Circuit's ruling in *FMC Corp.* and the Eastern District of California's ruling in *Corbin Farm Service*).

Crucially, the Court did *not* express disagreement with those rulings, which the Court read as standing for the propositions that MBTA "liability" at least flows from inherently "dangerous conditions or substances" regardless of intent, *id.* (describing *FMC Corp.*), and that liability may attach to "those who did not intend to kill migratory birds" but took actions that would predictably do so. *Id.*; *see also Corbin Farm Service*, 444 F. Supp. 2d at 532 ("The use of the broad language 'by any means or in any manner' belies the contention that Congress intended to limit

the imposition of criminal penalties to those who hunted or captured migratory birds. Moreover, a number of songbirds and other birds not commonly hunted are protected by the conventions and so by the Act.").[6]

Rather, in *Seattle Audubon* the Court held that the "reasoning of those cases [was] inapposite" to a situation involving *only* "*habitat destruction*, leading *indirectly*" to potential impacts on owls. *Id*. at 303 (emphases added). In particular, the Court contrasted the take prohibition in the MBTA to the one in the ESA, and held that "*[h]abitat destruction* causes 'harm' to the owls under the ESA but does not 'take' them within the meaning of the MBTA." *Id*. at 303 (emphasis added); *see also City of Sausalito v. O'Neill*, 386 F.3d 1186, 1225 (9th Cir. 2004) (where the plaintiff "allege[d] only that migratory birds and their nests will be disturbed *through habitat modification*," the Court held that the "Park Service did not need to seek authorization [under the MBTA] from" the FWS) (emphasis added) (citing *Seattle Audubon*).

[6] If, as the cases cited in *Seattle Audubon* have held, a *criminal* action may be brought without evidence of intent to kill migratory birds, then it would make no sense for the Court to hold that a *civil* action that merely seeks to ensure that federal agencies will act in accordance with the law requires evidence of such intent.

In short, as confirmed by the Justice Department's regular prosecution of activities that foreseeably but unintentionally result in the unauthorized taking of migratory birds, and in particular the government's criminal prosecution of another wind power project for killing migratory birds without an MBTA permit, the foreseeable killing of birds through the *normal* operation of industrial wind turbines is the sort of "direct, though unintended" take that *is* squarely covered by the MBTA's broad prohibitions. *Seattle Audubon*, 952 F.2d at 303. Indeed, operating huge spinning turbines in habitat known to be occupied by migratory birds is the paradigmatic example of an inherently "dangerous condition" for birds migrating through the airspace where the turbines will be erected and hence an activity which *Seattle Audubon* suggests *is* appropriately regulated under the Act. *Id.* Accordingly, there is nothing in this Court's precedents that forecloses application of the plain terms of the MBTA here; rather, the Court's reasoning, including the other rulings cited with approval by the Court, supports such application.

B. Federal Agencies May Be Sued Under The APA For Taking Or Authorizing Actions That Violate The MBTA.

As the Supreme Court has explained, the APA "requires federal courts to set aside federal agency action that is 'not in accordance with law,' which means, of course, *any* law, and not merely those laws that the agency itself is charged with

administering." *FCC v. NextWave Personal Communications*, 537 U.S. 293, 300 (2003). Consequently, if BLM's authorization of a project on federal land that will kill migratory birds in violation of the MBTA is "not in accordance with" the MBTA, then the APA is clear: BLM's authorization must be "set aside" pending compliance with the MBTA, i.e., procurement of an MBTA permit by either BLM itself or Tule Wind.

In the district court, the government did not dispute that federal agencies *are* subject to the MBTA's prohibitions, and hence that a federal agency may be sued under the APA for *carrying out an action* that kills birds in violation of the MBTA. Any such argument would contravene the plain terms of the MBTA. *See Glickman*, 217 F.3d at 885 ("There is no exemption in § 703 for . . . federal agencies . . . . 'No valid reason has been or can be suggested why [the statutory prohibitions] should apply to private persons and not to federal or state officers.'") (quoting *United States v. Arizona*, 295 U.S. 174, 184 (1935)). "Indeed, it would be odd if [federal agencies] were exempt" from the Act's prohibitions on killing migratory birds without a permit because, once again, the MBTA implements various treaties, which are "undertakings between nations" and "bind the contracting parties." *Id*. at 887. And it would be especially odd to exempt *BLM* from such compliance, since BLM is an agency within the Department of the

Interior, the component of the Executive Branch *most* responsible for implementing the Act and effectuating the underlying treaties. *Id*. at 883.[7]

Accordingly, it is apparent that if BLM *itself* constructed and operated an industrial-scale wind project on federal land knowing that the project would foreseeably and directly kill migratory birds in violation of the MBTA, then BLM could be successfully sued under the APA on the grounds that the action would be "not in accordance with law." 5 U.S.C. § 706(2)(A). Consequently, Federal Defendants' argument reduces to the proposition, as articulated by the district court, that "Federal agencies are not required to obtain a permit before acting in a *regulatory capacity* to authorize activity" by third parties that will directly and foreseeably kill migratory birds in violation of the MBTA. ER at 34-35 (emphasis added). That argument is untenable for several reasons. First, it overstates Plaintiffs' position, which is simply that BLM must ensure compliance with the MBTA – *either* by obtaining a permit itself *or* by requiring that Tule Wind do so –

[7] In *Glickman*, the D.C. Circuit was "willing to assume," as the government argued, that "the *criminal* enforcement provision [of the MBTA] could not be used against federal agencies," but the court held that that had nothing to do whether a claim for relief could be brought against an agency under the APA. 217 F.3d at 886 (emphasis added). Indeed, the government's position that federal agencies are immune from criminal enforcement renders the availability of APA relief in appropriate circumstances all the more essential because the APA is the *only* legal mechanism by which agencies may be called to account for MBTA violations.

before BLM's authorization for a project on federal land that will foreseeably kill birds protected by the MBTA can be deemed "in accordance with law" and in "observance of procedure required by law." 5 U.S.C. §§ 706(2)(A), (D).

That is hardly a revolutionary proposition. Indeed, this Circuit's precedents establish that it is not "in accordance with law" for a federal agency to authorize another party's actions that require federal approval and will violate a federal environmental statute. *See, e.g.*, *Anderson v. Evans*, 371 F.3d 475, 501 (9th Cir. 2004) (holding that the National Marine Fisheries Service did not act "in accordance with law" when it authorized the hunting of gray whales by a Tribe that did not obtain permission to take whales in the manner required by the Marine Mammal Protection Act); *The Wilderness Soc'y v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1062 (9th Cir. 2003) (holding that the FWS did not act "in accordance with law" when it authorized a third party to engage in a commercial activity in a designated wilderness area in violation of the Wilderness Act); *cf. Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1128 (9th Cir. 2012) (setting aside a BLM authorization for a private party to construct a natural

gas pipeline where the private party was unlawfully relying on voluntary conservation measures to satisfy its ESA obligations).[8]

The validity of POC's position is also confirmed by NMFS's recent experience in requesting and obtaining an MBTA permit in circumstances that are functionally indistinguishable from those here. *See supra* at 5-6. NMFS does not itself engage in the fishing activities in U.S. waters that cause migratory bird take but, rather, authorizes third parties to do so; nonetheless, because those federally authorized activities foreseeably result in the killing of some MBTA-protected species, NMFS sought an MBTA permit to come into compliance with federal law in its regulatory capacity. 77 Fed. Reg. at 50153; *see also* 77 Fed. Reg. 1501, 1502 (Jan. 10. 2012) (explaining that seabirds are killed "when they are unintentionally hooked or entangled in fishing gear" associated with longline fishing).

The FWS did not refuse to process NMFS's permit request but, rather, granted a permit to the agency with enforceable conditions designed to "result in

[8] Indeed, while finding that habitat modification alone was insufficient to trigger the MBTA's prohibitions, this Court's decision in *Seattle Audubon* – which involved federal authorization of timber cutting by third parties – in no way suggests that an APA claim could not be pursued if there *would* have been an impermissible take. *See* 952 F.2d at 302-03; *see also Sausalito*, 386 F.3d at 1225 (holding that "the Park Service does not need to seek authorization from the Secretary" based solely on the finding that the plaintiff "alleges only that migratory birds and their nests will be disturbed through habitat modification").

improved information about sources of take in the fishery and means of reducing take." 77 Fed. Reg. at 50154. Accordingly, the FWS's actions leave little doubt that federal agency activities, including those authorizing third party conduct, resulting in the direct, foreseeable killing of MBTA-protected species are encompassed within the statutory scheme and may be subjected to a permitting process under existing FWS regulations. *See also Turtle Island Restoration Network v. U.S. Dep't of Commerce*, No. 12-00594 SOM-RLP, 2013 WL 4511314, at **10-12 (D. Haw. 2013) (upholding MBTA permit for incidental take resulting from NMFS's authorization of longline fishing).[9]

In sum, this case poses a vitally important issue for MBTA implementation as well as for the federally authorized development of wind energy, i.e., whether this increasingly widespread energy source will develop in full compliance with one of the nation's most crucial wildlife conservation statutes or, rather, whether it will develop outside of the legal framework established in the MBTA for migratory bird conservation. The Court should conclude that the importance of

[9] The ruling below noted that several "[d]istrict courts within the Ninth Circuit," as well as in other jurisdictions, have declined to adopt the "interpretation of the MBTA proposed by Plaintiffs." ER at 35. Those rulings are either factually inapposite because they do not involve direct, foreseeable killings of the kind at issue here, and/or they reflect the same flaws in legal analysis embodied in the ruling below.

developing renewable energy need not – and in any event lawfully cannot – supplant the Congressionally mandated process for ensuring that activities that are inherently hazardous to birds, such as operating industrial wind turbines, are regulated through the permitting process required by the MBTA. *Cf. Animal Welfare Inst. v. Beech Ridge Energy LLC*, 675 F. Supp. 2d 540, 581 (D. Md. 2009) (explaining that the development of renewable energy resources should "proceed in harmony" with, rather than in contravention of, the ESA's specific permitting mechanisms for addressing harm to endangered species).[10]

[10] In the district court, the government and Tule Wind raised the specter that a favorable ruling for Plaintiffs here would open the floodgates to other cases involving incidental take of migratory birds. That argument is misplaced. Not only may APA claims *only* be asserted against federal agencies, but, as a number of courts have pointed out in the criminal context, if incidental take liability is limited to situations involving the direct, foreseeable – i.e., "proximate" – cause of birds killed by an activity that is *inherently* dangerous to birds, then the slippery slope argument has little traction. *See Moon Lake Electric Ass'n*, 45 F. Supp. 2d at 1085 (while the action at issue was inherently dangerous to birds, "[b]ecause the death of a protected bird is *generally not a probable consequence* of driving an automobile, piloting an airplane, maintaining an office building, or living in a residential dwelling with a picture window, such activities would not normally result in liability" under the MBTA); *see also Corbin Farm Service*, 444 F. Supp. 2d at 535 (explaining that a "hypothetical car driver . . does not stand in the same position as the defendants here," who could foresee that the application of pesticides to a field used by migratory birds would kill birds).

CONCLUSION

For the foregoing reasons, the district court's ruling concerning the MBTA should be reversed, and the case should be remanded with instructions that BLM's ROD be vacated and remanded pending compliance with the MBTA. *See* 5 U.S.C. §§ 706(2)(A), (D) ("The reviewing court *shall* hold unlawful and set aside agency action, findings, and conclusions found to be . . . not in accordance with law," or "without observance of procedure required by law") (emphasis added).

ORAL ARGUMENT REQUESTED

Due to the importance of the issue raised in this appeal, and POC's view that the Court's consideration would benefit from oral argument, POC respectfully requests that the Court schedule such an argument.

STATEMENT OF RELATED CASE

This appeal has been consolidated with another appeal taken from the district court's summary judgment disposition. *See Backcountry Against Dumps, et al. v. Jewell, et al.*, No. 14-55666.

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October 1, 2014

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that this opening brief is proportionately spaced, has a typeface of 14 points or more, and contains 6,875 words.

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PROOF OF SERVICE

I hereby certify that on October 1, 2014, I electronically filed the foregoing Opening Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system, which includes the following counsel of record for Federal Defendants and Defendant-Intervenor:

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ADDENDUM

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ADMINISTRATIVE PROCEDURE ACT

5 U.S.C. § 706. Scope of Review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

16 USC 703-712
Migratory Bird Treaty Act

SUBCHAPTER II—MIGRATORY BIRD TREATY

Release date: 2004-04-30

§ 703. Taking, killing, or possessing migratory birds unlawful

(a) In general
Unless and except as permitted by regulations made as hereinafter provided in this subchapter, it shall be 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 eggs 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, included in the terms of the conventions between the United States and Great Britain for the protection of migratory birds concluded August 16, 1916 (39 Stat. 1702), the United States and the United Mexican States for the protection of migratory birds and game mammals concluded February 7, 1936, the United States and the Government of Japan for the protection of migratory birds and birds in danger of extinction, and their environment concluded March 4, 1972 [1] and the convention between the United States and the Union of Soviet Socialist Republics for the conservation of migratory birds and their environments concluded November 19, 1976.

(b) Limitation on application to introduced species

(1) In general
This subchapter applies only to migratory bird species that are native to the United States or its territories.

(2) Native to the United States defined

(A) In general
Subject to subparagraph (B), in this subsection the term “native to the United States or its territories” means occurring in the United States or its territories as the result of natural biological or ecological processes.

(B) Treatment of introduced species
For purposes of paragraph (1), a migratory bird species that occurs in the United States or its territories solely as a result of intentional or unintentional human-assisted introduction shall not be considered native to the United States or its territories unless—

(i) it was native to the United States or its territories and extant in 1918;
(ii) it was extirpated after 1918 throughout its range in the United States and its territories; and
(iii) after such extirpation, it was reintroduced in the United States or its territories as a part of a program carried out by a Federal agency.

§ 704. Determination as to when and how migratory birds may be taken, killed, or possessed

16 USC 703-712
Migratory Bird Treaty Act

(a) Subject to the provisions and in order to carry out the purposes of the conventions, referred to in section 703 of this title, the Secretary of the Interior is authorized and directed, from time to time, having due regard to the zones of temperature and to the distribution, abundance, economic value, breeding habits, and times and lines of migratory flight of such birds, to determine when, to what extent, if at all, and by what means, it is compatible with the terms of the conventions to allow hunting, taking, capture, killing, possession, sale, purchase, shipment, transportation, carriage, or export of any such bird, or any part, nest, or egg thereof, and to adopt suitable regulations permitting and governing the same, in accordance with such determinations, which regulations shall become effective when approved by the President.

(b) It shall be unlawful for any person to—

(1) take any migratory game bird by the aid of baiting, or on or over any baited area, if the person knows or reasonably should know that the area is a baited area; or

(2) place or direct the placement of bait on or adjacent to an area for the purpose of causing, inducing, or allowing any person to take or attempt to take any migratory game bird by the aid of baiting on or over the baited area.

§ 705. Transportation or importation of migratory birds; when unlawful

It shall be unlawful to ship, transport, or carry, by any means whatever, from one State, Territory, or district to or through another State, Territory, or district, or to or through a foreign country, any bird, or any part, nest, or egg thereof, captured, killed, taken, shipped, transported, or carried at any time contrary to the laws of the State, Territory, or district in which it was captured, killed, or taken, or from which it was shipped, transported, or carried. It shall be unlawful to import any bird, or any part, nest, or egg thereof, captured, killed, taken, shipped, transported, or carried contrary to the laws of any Province of the Dominion of Canada in which the same was captured, killed, or taken, or from which it was shipped, transported, or carried.

§ 706. Arrests; search warrants

Any employee of the Department of the Interior authorized by the Secretary of the Interior to enforce the provisions of this subchapter shall have power, without warrant, to arrest any person committing a violation of this subchapter in his presence or view and to take such person immediately for examination or trial before an officer or court of competent jurisdiction; shall have power to execute any warrant or other process issued by an officer or court of competent jurisdiction for the enforcement of the provisions of this subchapter; and shall have authority, with a search warrant, to search any place. The several judges of the courts established under the laws of the United States, and United States magistrate judges may, within their respective jurisdictions, upon proper oath or affirmation showing probable cause, issue warrants in all such cases. All birds, or parts, nests, or eggs thereof, captured, killed, taken, sold or offered for sale, bartered or offered for barter, purchased, shipped, transported, carried, imported, exported, or possessed contrary to the provisions of this subchapter or of any regulation prescribed thereunder shall, when found, be seized and, upon conviction of the offender or upon judgment of a court of the United States that the same were captured, killed, taken, sold or offered for sale, bartered or offered for barter, purchased, shipped, transported, carried, imported, exported, or possessed contrary to the provisions of this subchapter or of any regulation prescribed thereunder, shall be forfeited to the United States and disposed of by the Secretary of the Interior in such manner as he deems appropriate.

§ 707. Violations and penalties; forfeitures

(a) Except as otherwise provided in this section, any person, association, partnership, or corporation who shall violate any provisions of said conventions or of this subchapter, or who shall violate or fail to comply with any regulation made pursuant to this subchapter shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than $15,000 or be imprisoned not more than six months, or both.

(b) Whoever, in violation of this subchapter, shall knowingly—

(1) take by any manner whatsoever any migratory bird with intent to sell, offer to sell, barter or offer to barter such bird, or

(2) sell, offer for sale, barter or offer to barter, any migratory bird shall be guilty of a felony and shall be fined not more than $2,000 or imprisoned not more than two years, or both.

(c) Whoever violates section 704 (b)(2) of this title shall be fined under title 18, imprisoned not more than 1 year, or both.

16 USC 703-712
Migratory Bird Treaty Act

(d) All guns, traps, nets and other equipment, vessels, vehicles, and other means of transportation used by any person when engaged in pursuing, hunting, taking, trapping, ensnaring, capturing, killing, or attempting to take, capture, or kill any migratory bird in violation of this subchapter with the intent to offer for sale, or sell, or offer for barter, or barter such bird in violation of this subchapter shall be forfeited to the United States and may be seized and held pending the prosecution of any person arrested for violating this subchapter and upon conviction for such violation, such forfeiture shall be adjudicated as a penalty in addition to any other provided for violation of this subchapter. Such forfeited property shall be disposed of and accounted for by, and under the authority of, the Secretary of the Interior.

§ 708. State or Territorial laws or regulations

Nothing in this subchapter shall be construed to prevent the several States and Territories from making or enforcing laws or regulations not inconsistent with the provisions of said conventions or of this subchapter, or from making or enforcing laws or regulations which shall give further protection to migratory birds, their nests, and eggs, if such laws or regulations do not extend the open seasons for such birds beyond the dates approved by the President in accordance with section 704 of this title.

§ 709. Omitted

§ 709a. Authorization of appropriations

There is hereby authorized to be appropriated, from time to time, out of any money in the Treasury not otherwise appropriated, such amounts as may be necessary to carry out the provisions and to accomplish the purposes of said conventions and of this subchapter and regulations made pursuant thereto, and the Secretary of the Interior is authorized out of such moneys to employ in the city of Washington and elsewhere such persons and means as he may deem necessary for such purpose and may cooperate with local authorities in the protection of migratory birds and make the necessary investigations connected therewith.

§ 710. Partial invalidity; short title

If any clause, sentence, paragraph, or part of this subchapter, which shall be known by the short title of the "Migratory Bird Treaty Act", shall, for any reason, be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered.

§ 711. Breeding and sale for food supply

Nothing in this subchapter shall be construed to prevent the breeding of migratory game birds on farms and preserves and the sale of birds so bred under proper regulation for the purpose of increasing the food supply.

§ 712. Treaty and convention implementing regulations; seasonal taking of migratory birds for essential needs of indigenous Alaskans to preserve and maintain stocks of the birds; protection and conservation of the birds

(1) In accordance with the various migratory bird treaties and conventions with Canada, Japan, Mexico, and the Union of Soviet Socialist Republics, the Secretary of the Interior is authorized to issue such regulations as may be necessary to assure that the taking of migratory birds and the collection of their eggs, by the indigenous inhabitants of the State of Alaska, shall be permitted for their own nutritional and other essential needs, as determined by the Secretary of the Interior, during seasons established so as to provide for the preservation and maintenance of stocks of migratory birds.

(2) The Secretary of the Interior is authorized to issue such regulations as may be necessary to implement the provisions of the convention

16 USC 703-712
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between the United States and Great Britain for the protection of migratory birds concluded August 16, 1916, the convention between the United States and the United Mexican States for the protection of migratory birds and game mammals concluded February 7, 1936, the convention between the United States and the Government of Japan for the protection of migratory birds in danger of extinction, and their environment concluded March 4, 1972, and the convention between the United States and the Union of Soviet Socialist Republics for the conservation of migratory birds and their environment concluded November 19, 1976.

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2003, P.L. 107-314, 116 Stat. 2458, § 315

SEC. 315. INCIDENTAL TAKING OF MIGRATORY BIRDS DURING MILITARY READINESS ACTIVITIES.

(a) INTERIM AUTHORITY FOR INCIDENTAL TAKINGS.—During the period described in subsection (c), section 2 of the Migratory Bird Treaty Act (16 U.S.C. 703) shall not apply to the incidental taking of a migratory bird by a member of the Armed Forces during a military readiness activity authorized by the Secretary of Defense or the Secretary of the military department concerned.

(b) IDENTIFICATION OF MEASURES TO MINIMIZE IMPACT OF ACTIVITIES.—During the periods described in subsections (c) and (d), the Secretary of Defense shall, in consultation with the Secretary of the Interior, identify measures—

> (1) to minimize and mitigate, to the extent practicable, any adverse impacts of authorized military readiness activities on affected species of migratory birds; and
>
> (2) to monitor the impacts of such military readiness activities on affected species of migratory birds.

(c) PERIOD OF APPLICATION FOR INTERIM AUTHORITY.—The period described in this subsection is the period beginning on the date of the enactment of this Act and ending on the date on which the Secretary of the Interior publishes in the Federal Register a notice that—

> (1) regulations authorizing the incidental taking of migratory birds by members of the Armed Forces have been prescribed in accordance with the requirements of subsection (d);
>
> (2) all legal challenges to the regulations and to the manner of their promulgation (if any) have been exhausted as provided in subsection (e); and
>
> (3) the regulations have taken effect.

(d) INCIDENTAL TAKINGS AFTER INTERIM PERIOD.—

(1) Not later than the expiration of the one-year period beginning on the date of the enactment of this Act, the Secretary of the Interior shall exercise the authority of that Secretary under section 3(a) of the Migratory Bird Treaty Act (16 U.S.C. 704(a)) to prescribe regulations to exempt the Armed Forces for the incidental taking of migratory birds during military readiness activities authorized by the Secretary of Defense or the Secretary of the military department concerned.

(2) The Secretary of the Interior shall exercise authority under paragraph (1) with the concurrence of the Secretary of Defense.

(e) LIMITATION ON JUDICIAL REVIEW.—An action seeking judicial review of regulations prescribed pursuant to this section or of the manner of their promulgation must be filed in the appropriate Federal court by not later than the expiration of the 120–day period beginning on the date on which such regulations are published in the Federal Register. Upon the expiration of such period and the exhaustion of any legal challenges to the regulations pursuant to any action filed in such period, there shall be no further judicial review of such regulations or of the manner of their promulgation.

(f) MILITARY READINESS ACTIVITY.—

(1) In this section the term "military readiness activity" includes—

(A) all training and operations of the Armed Forces that relate to combat; and

(B) the adequate and realistic testing of military equipment, vehicles, weapons, and sensors for proper operation and suitability for combat use.

(2) The term does not include—

(A) the routine operation of installation operating support functions, such as administrative offices, military exchanges, commissaries, water treatment facilities, storage facilities, schools, housing, motor pools, laundries, morale, welfare, and recreation activities, shops, and mess halls;

(B) the operation of industrial activities; or

(C) the construction or demolition of facilities used for a purpose described in subparagraph (A) or (B).

processed immediately prior to cooking, smoking, or canning, the marked foot or wing must remain attached to each carcass: *Provided*, That persons, who operate game farms or shooting preserves under a State license, permit, or authorization for such activities, may remove the marked foot or wing when either the number of his State license, permit, or authorization has first been legibly stamped in ink on the back of each carcass and on the container in which each carcass is maintained, or each carcass is identified by a State band on leg or wing pursuant to requirements of his State license, permit, or authorization. When properly marked, such carcasses may be disposed of to, or acquired from, any person and possessed and transported in any number at any time or place.

[40 FR 28459, July 7, 1975, as amended at 46 FR 42680, Aug. 24, 1981; 54 FR 36798, Sept. 5, 1989]

§ 21.14 Permit exceptions for captive-bred migratory waterfowl other than mallard ducks.

You may acquire captive-bred and properly marked migratory waterfowl of all species other than mallard ducks (*Anas platyrhynchos*), alive or dead, or their eggs, and possess and transport such birds or eggs and any progeny or eggs for your use without a permit, subject to the following conditions and restrictions. Additional restrictions on the acquisition and transfer of muscovy ducks (*Cairina moschata*) are in paragraph (g) of this section.

(a) You may acquire live waterfowl or their eggs only from a holder of a valid waterfowl sale and disposal permit in the United States. You also may lawfully acquire them outside of the United States with appropriate permits (*see* § 21.21 of subpart C of this part).

(b) All progeny of captive-bred birds or eggs from captive-bred birds must be physically marked as set forth in § 21.13(b).

(c) You may not transfer or dispose of captive-bred birds or their eggs, whether alive or dead, to any other person unless you have a waterfowl sale and disposal permit (*see* § 21.25 of subpart C of this part).

(d) Lawfully possessed and properly marked birds may be killed, in any number, at any time or place, by any means except shooting. Such birds may be killed by shooting only in accordance with all applicable hunting regulations governing the taking of like species from the wild (*see* part 20 of this subchapter).

(e) At all times during possession, transportation, and storage until the raw carcasses of such birds are finally processed immediately prior to cooking, smoking, or canning, you must leave the marked foot or wing attached to each carcass, unless the carcass was marked as provided in § 21.25(b)(6) and the foot or wing was removed prior to your acquisition of the carcass.

(f) If you acquire captive-bred waterfowl or their eggs from a waterfowl sale and disposal permittee, you must retain the FWS Form 3–186, Notice of Waterfowl Sale or Transfer, from the permittee for as long as you have the birds, eggs, or progeny of them.

(g) You may not acquire or possess live muscovy ducks, their carcasses or parts, or their eggs, except to raise them to be sold as food, and except that you may possess any live muscovy duck that you lawfully acquired prior to March 31, 2010. If you possess muscovy ducks on that date, you may not propagate them or sell or transfer them to anyone for any purpose, except to be used as food. You may not release them to the wild, sell them to be hunted or released to the wild, or transfer them to anyone to be hunted or released to the wild.

(h) Dealers in meat and game, hotels, restaurants, and boarding houses may serve or sell to their customers the carcass of any bird acquired from a holder of a valid waterfowl sale and disposal permit.

[75 FR 9320, Mar. 1, 2010]

§ 21.15 Authorization of take incidental to military readiness activities.

(a) *Take authorization and monitoring.* (1) Except to the extent authorization is withdrawn or suspended pursuant to paragraph (b) of this section, the Armed Forces may take migratory birds incidental to military readiness activities provided that, for those ongoing or proposed activities that the Armed Forces determine may result in

a significant adverse effect on a population of a migratory bird species, the Armed Forces must confer and cooperate with the Service to develop and implement appropriate conservation measures to minimize or mitigate such significant adverse effects.

(2) When conservation measures implemented under paragraph (a)(1) of this section require monitoring, the Armed Forces must retain records of any monitoring data for five years from the date the Armed Forces commence their action. During Integrated Natural Resource Management Plan reviews, the Armed Forces will also report to the Service migratory bird conservation measures implemented and the effectiveness of the conservation measures in avoiding, minimizing, or mitigating take of migratory birds.

(b) *Suspension or Withdrawal of take authorization.* (1) If the Secretary determines, after seeking the views of the Secretary of Defense and consulting with the Secretary of State, that incidental take of migratory birds during a specific military readiness activity likely would not be compatible with one or more of the migratory bird treaties, the Secretary will suspend authorization of the take associated with that activity.

(2) The Secretary may propose to withdraw, and may withdraw in accordance with the procedures provided in paragraph (b)(4) of this section the authorization for any take incidental to a specific military readiness activity if the Secretary determines that a proposed military readiness activity is likely to result in a significant adverse effect on the population of a migratory bird species and one or more of the following circumstances exists:

(i) The Armed Forces have not implemented conservation measures that:

(A) Are directly related to protecting the migratory bird species affected by the proposed military readiness activity;

(B) Would significantly reduce take of the migratory bird species affected by the military readiness activity;

(C) Are economically feasible; and

(D) Do not limit the effectiveness of the military readiness activity;

(ii) The Armed Forces fail to conduct mutually agreed upon monitoring to determine the effects of a military readiness activity on migratory bird species and/or the efficacy of the conservation measures implemented by the Armed Forces; or

(iii) The Armed Forces have not provided reasonably available information that the Secretary has determined is necessary to evaluate whether withdrawal of take authorization for the specific military readiness activity is appropriate.

(3) When the Secretary proposes to withdraw authorization with respect to a specific military readiness activity, the Secretary will first provide written notice to the Secretary of Defense. Any such notice will include the basis for the Secretary's determination that withdrawal is warranted in accordance with the criteria contained in paragraph (b)(2) of this section, and will identify any conservation measures or other measures that would, if implemented by the Armed Forces, permit the Secretary to cancel the proposed withdrawal of authorization.

(4) Within 15 days of receipt of the notice specified in paragraph (b)(3) of this section, the Secretary of Defense may notify the Secretary in writing of the Armed Forces' objections, if any, to the proposed withdrawal, specifying the reasons therefore. The Secretary will give due consideration to any objections raised by the Armed Forces. If the Secretary continues to believe that withdrawal is appropriate, he or she will provide written notice to the Secretary of Defense of the rationale for withdrawal and response to any objections to the withdrawal. If objections to the withdrawal remain, the withdrawal will not become effective until the Secretary of Defense has had the opportunity to meet with the Secretary within 30 days of the original notice from the Secretary proposing withdrawal. A final determination regarding whether authorization will be withdrawn will occur within 45 days of the original notice.

(5) Any authorized take incidental to a military readiness activity subject to a proposed withdrawal of authorization will continue to be authorized by this regulation until the Secretary makes a final determination on the withdrawal.

(6) The Secretary may, at his or her discretion, cancel a suspension or withdrawal of authorization at any time. A suspension may be cancelled in the event new information is provided that the proposed activity would be compatible with the migratory bird treaties. A proposed withdrawal may be cancelled if the Armed Forces modify the proposed activity to alleviate significant adverse effects on the population of a migratory bird species or the circumstances in paragraphs (b)(2)(i) through (iii) of this section no longer exist. Cancellation of suspension or withdrawal of authorization becomes effective upon delivery of written notice from the Secretary to the Department of Defense.

(7) The responsibilities of the Secretary under paragraph (b) of this section may be fulfilled by his/her delegatee who must be an official nominated by the President and confirmed by the Senate.

[72 FR 8949, Feb. 28, 2007]

Subpart C—Specific Permit Provisions

§ 21.21 Import and export permits.

(a) *Permit requirement.* Except as provided in paragraphs (b), (c), and (d) of this section, you must have a permit to import or export migratory birds, their parts, nests, or eggs. You must meet the applicable permit requirements of the following parts of this subchapter B, even if the activity is exempt from a migratory bird import or export permit:

(1) 13 (General Permit Procedures);

(2) 14 (Importation, Exportation, and Transportation of Wildlife);

(3) 15 (Wild Bird Conservation Act);

(4) 17 (Taking, Possession, Transportation, Sale, Purchase, Barter, Exportation, and Importation of Wildlife and Plants);

(5) 20 (Migratory Bird Hunting);

(6) 21 (Migratory Bird Permits);

(7) 22 (Eagle Permits); and

(8) 23 (Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)).

(b) *Exception to the import permit requirements.* If you comply with the requirements of parts 14, 20, and 23 of this subchapter B, you do not need a migratory bird permit to import or possess migratory birds in the families Anatidae, Columbidae, Gruidae, Rallidae, and Scolopacidae for personal use that were lawfully hunted by you in a foreign country. The birds may be carcasses, skins, or mounts. You must provide evidence that you lawfully took the bird or birds in, and exported them from, the country of origin. This evidence must include a hunting license and any export documentation required by the country of origin. You must keep these documents with the imported bird or birds permanently.

(c) *General exceptions to the export permit requirements.* You do not need a migratory bird export permit to:

(1) Export live, captive-bred migratory game birds (see § 20.11 of this subpart) to Canada or Mexico if they are marked by one of the following methods:

(i) Removal of the hind toe from the right foot;

(ii) Pinioning of a wing by removal of all or some of the metacarpal bones of one wing, which renders the bird permanently incapable of flight;

(iii) Banding of one metatarsus with a seamless metal band; or

(iv) A readily discernible tattoo of numbers and/or letters on the web of one foot.

(2) Export live, lawfully-acquired, captive-bred raptors provided you hold a valid raptor propagation permit issued under § 21.30 and you obtain a CITES permit or certificate issued under part 23 to do so. You must have full documentation of the lawful origin of each raptor, and each must be identifiable with a seamless band issued by the Service, including any raptor with an implanted microchip for identification.

(d) *Falconry birds covered under a CITES ''pet passport.''* You do not need a migratory bird import or export permit to temporarily export and subsequently import a raptor or raptors you lawfully possess for falconry to and from another country for use in falconry when the following conditions are met:

(7) *What are the limitations of the special permit?* The following limitations apply:

(i) Nothing in this section applies to any Federal land within a State's boundaries without written permission of the Federal Agency with jurisdiction.

(ii) States may not undertake any actions under any permit issued under this section if the activities adversely affect other migratory birds or species designated as endangered or threatened under the authority of the Endangered Species Act.

(iii) We will only issue permits to State wildlife agencies in the conterminous United States.

(iv) States may designate agents who must operate under the conditions of the permit.

(v) *How long is the special permit valid?* A special Canada goose permit issued or renewed under this section expires on the date designated on the face of the permit unless it is amended or revoked or such time that we determine that the State's population of resident Canada geese no longer poses a threat to human health or safety, personal property, or injury to other interests. In all cases, the term of the permit may not exceed five (5) years from the date of issuance or renewal.

(vi) *Can we revoke the special permit?* We reserve the right to suspend or revoke any permit, as specified in §§ 13.27 and 13.28 of this subchapter.

(e) *What are the OMB information collection requirements of the permit program?* OMB has approved the information collection requirements of the permit and assigned clearance number 1018–0099. Federal agencies may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. We will use the information collection requirements to administer this program and in the issuance and monitoring of these special permits. We will require the information from State wildlife agencies responsible for migratory bird management in order to obtain a special Canada goose permit, and to determine if the applicant meets all the permit issuance criteria, and to protect migratory birds. We estimate the public reporting burden for this collection of information to average 8 hours per response for 45 respondents (States), including the time for reviewing instructions, gathering and maintaining data needed, and completing and reviewing the collection of information. Thus, we estimate the total annual reporting and record-keeping for this collection to be 360 hours. States may send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Service Information Collection Clearance Officer, Fish and Wildlife Service, ms 224–ARLSQ, 1849 C Street N.W., Washington, DC 20240, or the Office of Management and Budget, Paperwork Reduction Project 1018–0099, Washington, DC 20503.

[64 FR 32774, June 17, 1999]

§ 21.27 Special purpose permits.

Permits may be issued for special purpose activities related to migratory birds, their parts, nests, or eggs, which are otherwise outside the scope of the standard form permits of this part. A special purpose permit for migratory bird related activities not otherwise provided for in this part may be issued to an applicant who submits a written application containing the general information and certification required by part 13 and makes a sufficient showing of benefit to the migratory bird resource, important research reasons, reasons of human concern for individual birds, or other compelling justification.

(a) *Permit requirement.* A special purpose permit is required before any person may lawfully take, salvage, otherwise acquire, transport, or possess migratory birds, their parts, nests, or eggs for any purpose not covered by the standard form permits of this part. In addition, a special purpose permit is required before any person may sell, purchase, or barter captive-bred, migratory game birds, other than waterfowl, that are marked in compliance with § 21.13(b) of this part.

(b) *Application procedures.* Submit application for special purpose permits to the appropriate Regional Director (Attention: Migratory bird permit office). You can find addresses for the Regional

Directors in 50 CFR 2.2. Each application must contain the general information and certification required in §13.12(a) of this subchapter, and the following additional information:

(1) A detailed statement describing the project or activity which requires issuance of a permit, purpose of such project or activity, and a delineation of the area in which it will be conducted. (Copies of supporting documents, research proposals, and any necessary State permits should accompany the application);

(2) Numbers and species of migratory birds involved where same can reasonably be determined in advance; and

(3) Statement of disposition which will be made of migratory birds involved in the permit activity.

(c) *Additional permit conditions.* Inaddition to the general conditions set forth in part 13 of this subchapter B, special purpose permits shall be subject to the following conditions:

(1) Permittees shall maintain adequate records describing the conduct of the permitted activity, the numbers and species of migratory birds acquired and disposed of under the permit, and inventorying and identifying all migratory birds held on December 31 of each calendar year. Records shall be maintained at the address listed on the permit; shall be in, or reproducible in English; and shall be available for inspection by Service personnel during regular business hours. A permittee may be required by the conditions of the permit to file with the issuing office an annual report of operation. Annual reports, if required, shall be filed no later than January 31 of the calendar year following the year for which the report is required. Reports, if required, shall describe permitted activities, numbers and species of migratory birds acquired and disposed of, and shall inventory and describe all migratory birds possessed under the special purpose permit on December 31 of the reporting year.

(2) Permittees shall make such other reports as may be requested by the issuing officer.

(3) All live, captive-bred, migratory game birds possessed under authority of a valid special purpose permit shall be physically marked as defined in §21.13(b) of this part.

(4) No captive-bred migratory game bird may be sold or bartered unless marked in accordance with §21.13(b) of this part.

(5) No permittee may take, purchase, receive or otherwise acquire, sell, barter, transfer, or otherwise dispose of any captive-bred migratory game bird unless such permittee submits a Service form 3–186A (Migratory Bird Acquisition/Disposition Report), completed in accordance with the instructions on the form, to the issuing office within five (5) days of such transaction.

(6) No permittee, who is authorized to sell or barter migratory game birds pursuant to a permit issued under this section, may sell or barter such birds to any person unless that person is authorized to purchase and possess such migratory game birds under a permit issued pursuant to this part and part 13, or as permitted by regulations in this part.

(d) *Term of permit.* A special purpose permit issued or renewed under this part expires on the date designated on the face of the permit unless amended or revoked, but the term of the permit shall not exceed three (3) years from the date of issuance or renewal.

[39 FR 1178, Jan. 4, 1974, as amended at 54 FR 38152, Sept. 14, 1989; 63 FR 52637, Oct. 1, 1998]

§21.28 [Reserved]

§21.29 Falconry standards and falconry permitting.

(a) *Background*—(1) *The legal basis for regulating falconry.* The Migratory Bird Treaty Act prohibits any person from taking, possessing, purchasing, bartering, selling, or offering to purchase, barter, or sell, among other things, raptors (birds of prey) listed in §10.13 of this subchapter unless the activities are allowed by Federal permit issued under this part and part 13 of this chapter, or as permitted by regulations in this part.

(i) This section covers all Falconiformes (vultures, kites, eagles, hawks, caracaras, and falcons) and all Strigiformes (owls) listed in §10.13 of this subchapter (''native'' raptors), and applies to any person who possesses one or more wild-caught, captive-bred,

Federal Register
Vol. 66, No. 11
Wednesday, January 17, 2001

Presidential Documents

Title 3—

The President

Executive Order 13186 of January 10, 2001

Responsibilities of Federal Agencies To Protect Migratory Birds

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in furtherance of the purposes of the migratory bird conventions, the Migratory Bird Treaty Act (16 U.S.C. 703–711), the Bald and Golden Eagle Protection Acts (16 U.S.C. 668–668d), the Fish and Wildlife Coordination Act (16 U.S.C. 661–666c), the Endangered Species Act of 1973 (16 U.S.C. 1531–1544), the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4347), and other pertinent statutes, it is hereby ordered as follows:

Section 1. *Policy.* Migratory birds are of great ecological and economic value to this country and to other countries. They contribute to biological diversity and bring tremendous enjoyment to millions of Americans who study, watch, feed, or hunt these birds throughout the United States and other countries. The United States has recognized the critical importance of this shared resource by ratifying international, bilateral conventions for the conservation of migratory birds. Such conventions include the Convention for the Protection of Migratory Birds with Great Britain on behalf of Canada 1916, the Convention for the Protection of Migratory Birds and Game Mammals-Mexico 1936, the Convention for the Protection of Birds and Their Environment- Japan 1972, and the Convention for the Conservation of Migratory Birds and Their Environment-Union of Soviet Socialist Republics 1978.

These migratory bird conventions impose substantive obligations on the United States for the conservation of migratory birds and their habitats, and through the Migratory Bird Treaty Act (Act), the United States has implemented these migratory bird conventions with respect to the United States. This Executive Order directs executive departments and agencies to take certain actions to further implement the Act.

Sec. 2. *Definitions.* For purposes of this order:

(a) ''Take'' means take as defined in 50 C.F.R. 10.12, and includes both ''intentional'' and ''unintentional'' take.

(b) ''Intentional take'' means take that is the purpose of the activity in question.

(c) ''Unintentional take'' means take that results from, but is not the purpose of, the activity in question.

(d) ''Migratory bird'' means any bird listed in 50 C.F.R. 10.13.

(e) ''Migratory bird resources'' means migratory birds and the habitats upon which they depend.

(f) ''Migratory bird convention'' means, collectively, the bilateral conventions (with Great Britain/Canada, Mexico, Japan, and Russia) for the conservation of migratory bird resources.

(g) ''Federal agency'' means an executive department or agency, but does not include independent establishments as defined by 5 U.S.C. 104.

(h) ''Action'' means a program, activity, project, official policy (such as a rule or regulation), or formal plan directly carried out by a Federal agency. Each Federal agency will further define what the term ''action'' means with respect to its own authorities and what programs should be included

in the agency-specific Memoranda of Understanding required by this order. Actions delegated to or assumed by nonfederal entities, or carried out by nonfederal entities with Federal assistance, are not subject to this order. Such actions, however, continue to be subject to the Migratory Bird Treaty Act.

(i) ''Species of concern'' refers to those species listed in the periodic report ''Migratory Nongame Birds of Management Concern in the United States,'' priority migratory bird species as documented by established plans (such as Bird Conservation Regions in the North American Bird Conservation Initiative or Partners in Flight physiographic areas), and those species listed in 50 C.F.R. 17.11.

Sec. 3. *Federal Agency Responsibilities.* (a) Each Federal agency taking actions that have, or are likely to have, a measurable negative effect on migratory bird populations is directed to develop and implement, within 2 years, a Memorandum of Understanding (MOU) with the Fish and Wildlife Service (Service) that shall promote the conservation of migratory bird populations.

(b) In coordination with affected Federal agencies, the Service shall develop a schedule for completion of the MOUs within 180 days of the date of this order. The schedule shall give priority to completing the MOUs with agencies having the most substantive impacts on migratory birds.

(c) Each MOU shall establish protocols for implementation of the MOU and for reporting accomplishments. These protocols may be incorporated into existing actions; however, the MOU shall recognize that the agency may not be able to implement some elements of the MOU until such time as the agency has successfully included them in each agency's formal planning processes (such as revision of agency land management plans, land use compatibility guidelines, integrated resource management plans, and fishery management plans), including public participation and NEPA analysis, as appropriate. This order and the MOUs to be developed by the agencies are intended to be implemented when new actions or renewal of contracts, permits, delegations, or other third party agreements are initiated as well as during the initiation of new, or revisions to, land management plans.

(d) Each MOU shall include an elevation process to resolve any dispute between the signatory agencies regarding a particular practice or activity.

(e) Pursuant to its MOU, each agency shall, to the extent permitted by law and subject to the availability of appropriations and within Administration budgetary limits, and in harmony with agency missions:

(1) support the conservation intent of the migratory bird conventions by integrating bird conservation principles, measures, and practices into agency activities and by avoiding or minimizing, to the extent practicable, adverse impacts on migratory bird resources when conducting agency actions;

(2) restore and enhance the habitat of migratory birds, as practicable;

(3) prevent or abate the pollution or detrimental alteration of the environment for the benefit of migratory birds, as practicable;

(4) design migratory bird habitat and population conservation principles, measures, and practices, into agency plans and planning processes (natural resource, land management, and environmental quality planning, including, but not limited to, forest and rangeland planning, coastal management planning, watershed planning, etc.) as practicable, and coordinate with other agencies and nonfederal partners in planning efforts;

(5) within established authorities and in conjunction with the adoption, amendment, or revision of agency management plans and guidance, ensure that agency plans and actions promote programs and recommendations of comprehensive migratory bird planning efforts such as Partners-in-Flight, U.S. National Shorebird Plan, North American Waterfowl Management Plan, North American Colonial Waterbird Plan, and other planning efforts, as well as guidance from other sources, including the Food and Agricultural

Organization's International Plan of Action for Reducing Incidental Catch of Seabirds in Longline Fisheries;

(6) ensure that environmental analyses of Federal actions required by the NEPA or other established environmental review processes evaluate the effects of actions and agency plans on migratory birds, with emphasis on species of concern;

(7) provide notice to the Service in advance of conducting an action that is intended to take migratory birds, or annually report to the Service on the number of individuals of each species of migratory birds intentionally taken during the conduct of any agency action, including but not limited to banding or marking, scientific collecting, taxidermy, and depredation control;

(8) minimize the intentional take of species of concern by: (i) delineating standards and procedures for such take; and (ii) developing procedures for the review and evaluation of take actions. With respect to intentional take, the MOU shall be consistent with the appropriate sections of 50 C.F.R. parts 10, 21, and 22;

(9) identify where unintentional take reasonably attributable to agency actions is having, or is likely to have, a measurable negative effect on migratory bird populations, focusing first on species of concern, priority habitats, and key risk factors. With respect to those actions so identified, the agency shall develop and use principles, standards, and practices that will lessen the amount of unintentional take, developing any such conservation efforts in cooperation with the Service. These principles, standards, and practices shall be regularly evaluated and revised to ensure that they are effective in lessening the detrimental effect of agency actions on migratory bird populations. The agency also shall inventory and monitor bird habitat and populations within the agency's capabilities and authorities to the extent feasible to facilitate decisions about the need for, and effectiveness of, conservation efforts;

(10) within the scope of its statutorily-designated authorities, control the import, export, and establishment in the wild of live exotic animals and plants that may be harmful to migratory bird resources;

(11) promote research and information exchange related to the conservation of migratory bird resources, including coordinated inventorying and monitoring and the collection and assessment of information on environmental contaminants and other physical or biological stressors having potential relevance to migratory bird conservation. Where such information is collected in the course of agency actions or supported through Federal financial assistance, reasonable efforts shall be made to share such information with the Service, the Biological Resources Division of the U.S. Geological Survey, and other appropriate repositories of such data (e.g, the Cornell Laboratory of Ornithology);

(12) provide training and information to appropriate employees on methods and means of avoiding or minimizing the take of migratory birds and conserving and restoring migratory bird habitat;

(13) promote migratory bird conservation in international activities and with other countries and international partners, in consultation with the Department of State, as appropriate or relevant to the agency's authorities;

(14) recognize and promote economic and recreational values of birds, as appropriate; and

(15) develop partnerships with non-Federal entities to further bird conservation.

(f) Notwithstanding the requirement to finalize an MOU within 2 years, each agency is encouraged to immediately begin implementing the conservation measures set forth above in subparagraphs (1) through (15) of this section, as appropriate and practicable.

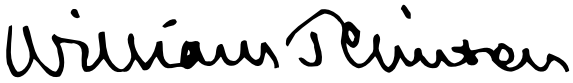
(g) Each agency shall advise the public of the availability of its MOU through a notice published in the **Federal Register**.

Sec. 4. *Council for the Conservation of Migratory Birds.* (a) The Secretary of Interior shall establish an interagency Council for the Conservation of Migratory Birds (Council) to oversee the implementation of this order. The Council's duties shall include the following: (1) sharing the latest resource information to assist in the conservation and management of migratory birds; (2) developing an annual report of accomplishments and recommendations related to this order; (3) fostering partnerships to further the goals of this order; and (4) selecting an annual recipient of a Presidential Migratory Bird Federal Stewardship Award for contributions to the protection of migratory birds.

(b) The Council shall include representation, at the bureau director/administrator level, from the Departments of the Interior, State, Commerce, Agriculture, Transportation, Energy, Defense, and the Environmental Protection Agency and from such other agencies as appropriate.

Sec. 5. *Application and Judicial Review.* (a) This order and the MOU to be developed by the agencies do not require changes to current contracts, permits, or other third party agreements.

(b) This order is intended only to improve the internal management of the executive branch and does not create any right or benefit, substantive or procedural, separately enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.



THE WHITE HOUSE,
January 10, 2001.

[FR Doc. 01–1387
Filed 1–12–01; 8:45 am]
Billing code 3195–01–P

subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, or impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104–4). Nor does it require any special considerations under Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994); or OMB review or any Agency action under Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note). Since tolerances and exemptions that are established on the basis of a petition under section 408(d) of FFDCA, such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply. In addition, the Agency has determined that this action will not have a substantial direct effect on States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, entitled *Federalism*(64 FR 43255, August 10, 1999). Executive Order 13132 requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' This final rule directly regulates growers, food processors, food handlers, and food retailers, not States. This action does not alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of section 408(n)(4) of FFDCA. For these same reasons, the Agency has determined that this rule does not have any ''tribal implications'' as described in Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 6, 2000). Executive Order 13175, requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' ''Policies that have tribal implications'' is defined in the Executive order to include regulations that have ''substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and the Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.'' This rule will not have substantial direct effects on tribal governments, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified in Executive Order 13175. Thus, Executive Order 13175 does not apply to this rule.

VII. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of this final rule in the **Federal Register**. This final rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: February 16, 2007.

James Jones,

Director, Office of Pesticide Programs.

■ Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. Section 180.625 is added to read as follows:

§180.625 Orthosulfamuron; tolerances for residues.

(a) *General.* Tolerances are established for residues of orthosulfamuron 1-(4,6-dimethoxypyrimidin-2-yl)-3-[2-(dimethylcarbamoyl)- phenylsulfamoyl] urea) *per se* in or on the following commodities:

Commodity	Parts per million
Rice, grain	0.05
Rice, straw	0.05

(b) *Section 18 emergency exemptions.* [Reserved]

(c) *Tolerances with regional registrations.* [Reserved]

(d) *Indirect and inadvertant residues.* [Reserved]

[FR Doc. 07–898 Filed 2–23–07; 2:13 pm]

BILLING CODE 6560–50–S

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 21

RIN 1018–AI92

Migratory Bird Permits; Take of Migratory Birds by the Armed Forces

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: The Migratory Bird Treaty Act (MBTA) prohibits the taking, killing, or possessing of migratory birds unless permitted by regulations promulgated by the Secretary of the Interior. While some courts have held that the MBTA does not apply to Federal agencies, in July 2000, the United States Court of Appeals for the District of Columbia Circuit ruled that the prohibitions of the MBTA do apply to Federal agencies, and that a Federal agency's taking and killing of migratory birds without a permit violated the MBTA. On March 13, 2002, the United States District Court for the District of Columbia ruled that military training exercises of the Department of the Navy that incidentally take migratory birds without a permit violate the MBTA.

On December 2, 2002, the President signed the 2003 National Defense Authorization Act (Authorization Act). Section 315 of the Authorization Act provides that, not later than one year after its enactment, the Secretary of the Interior (Secretary) shall exercise his/her authority under Section 704(a) of the MBTA to prescribe regulations to exempt the Armed Forces for the

incidental taking of migratory birds during military readiness activities authorized by the Secretary of Defense or the Secretary of the military department concerned. The Authorization Act further requires the Secretary to promulgate such regulations with the concurrence of the Secretary of Defense. The Secretary has delegated this task to the U.S. Fish and Wildlife Service (Service).

In passing the Authorization Act, Congress itself determined that allowing incidental take of migratory birds as a result of military readiness activities is consistent with the MBTA and the treaties. With this language, Congress clearly expressed its intention that the Armed Forces give appropriate consideration to the protection of migratory birds when planning and executing military readiness activities, but not at the expense of diminishing the effectiveness of such activities. This rule has been developed by the Service in coordination and cooperation with the Department of Defense and the Secretary of Defense concurs with the requirements herein.

Current regulations authorize permits for take of migratory birds for activities such as scientific research, education, and depredation control (50 CFR parts 13, 21 and 22). However, these regulations do not expressly address the issuance of permits for incidental take. As directed by Section 315 of the Authorization Act, this rule authorizes such take, with limitations, that result from military readiness activities of the Armed Forces. If any of the Armed Forces determine that a proposed or an ongoing military readiness activity may result in a significant adverse effect on a population of a migratory bird species, then they must confer and cooperate with the Service to develop appropriate and reasonable conservation measures to minimize or mitigate identified significant adverse effects. The Secretary of the Interior, or his/her designee, will retain the power to withdraw or suspend the authorization for particular activities in appropriate circumstances.

DATES: This rule is effective March 30, 2007.

ADDRESSES: The final rule and other related documents can be downloaded at *http://migratorybirds.fws.gov*. The complete file for this rule is available for inspection, by appointment, during normal business hours at the Division of Migratory Bird Management, U.S. Fish and Wildlife Service, 4401 North Fairfax Drive, Arlington, Virginia 22203, telephone 703–358–1714.

FOR FURTHER INFORMATION CONTACT: Robert Blohm, Chief, Division of Migratory Bird Management, U.S. Fish and Wildlife Service, telephone 703–358–1714.

SUPPLEMENTARY INFORMATION:

Background

Migratory birds are of great ecological and economic value and are an important international resource. They are a key ecological component of the environment, and they also provide immense enjoyment to millions of Americans who study, watch, feed, or hunt them. Recognizing their importance, the United States has been an active participant in the internationally coordinated management and conservation of migratory birds. The Migratory Bird Treaty Act (16 U.S.C. 703–712) (MBTA) is the primary legislation in the United States established to conserve migratory birds. The U.S. Fish and Wildlife Service (Service), is the Federal agency within the United States responsible for administering and enforcing the statute.

The MBTA, originally passed in 1918, implements the United States' commitment to four bilateral treaties, or conventions, for the protection of a shared migratory bird resource. The original treaty upon which the MBTA was based was the Convention for the Protection of Migratory Birds, signed with Great Britain in 1916 on behalf of Canada for the protection ''of the many species of birds that traverse certain parts of the United States and Canada in their annual migration.'' The MBTA was subsequently amended after treaties were signed with Mexico (1936, amended 1972, 1997), Japan (1972), and Russia (1976), and the amendment of the treaty with Canada (1995).

While the terms of the treaties vary in their particulars, each treaty and subsequent amendments impose substantive obligations on the United States for the conservation of migratory birds and their habitats. For example, the Canada treaty, as amended, includes the following conservation principles:

- To manage migratory birds internationally;
- To ensure a variety of sustainable uses;
- To sustain healthy migratory bird populations for harvesting needs;
- To provide for, maintain, and protect habitat necessary for the conservation of migratory birds; and
- To restore depleted populations of migratory birds.

The Canada and Mexico treaties protect selected families of birds, while the Japan and Russia treaties protect selected species of birds. All four treaties provide for closed seasons for hunting game birds. The list of the species protected by the MBTA appears in title 50, section 10.13, of the Code of Federal Regulations (50 CFR 10.13).

Under the MBTA, it is unlawful ''by any means or in any manner, to pursue, hunt, take, capture, [or] kill'' any migratory birds except as permitted by regulation (16 U.S.C. 703). The Secretary is authorized and directed, from time to time, having due regard to the zones of temperature and to the distribution, abundance, economic value, breeding habits, and times and lines of migratory flight of such birds to adopt suitable regulations permitting and governing the take of migratory birds when determined to be compatible with the terms of the treaties (16 U.S.C. 704). Furthermore, the regulations at 50 CFR 21.11 prohibit the take of migratory birds except under a valid permit or as permitted in the implementing regulations. The Service has defined ''take'' in regulation to mean to ''pursue, hunt, shoot, wound, kill, trap, capture, or collect'' or to attempt these activities (50 CFR 10.12).

On July 18, 2000, the United States Court of Appeals for the District of Columbia ruled in *Humane Society* v. *Glickman,* 217 F.3d 882 (D.C. Cir. 2000), that Federal agencies are subject to the take prohibitions of the MBTA. The United States had previously taken the position, and two other courts of appeals held or suggested, that the MBTA does not by its terms apply to Federal agencies. See *Sierra Club* v. *Martin,* 110 F.3d 1551, 1555 (11th Cir. 1997); *Newton County Wildlife Ass'n* v. *U.S. Forest Service,* 113 F.3d 110, 115 (8th Cir. 1997). Subsequently, on December 20, 2000, we issued Director's Order 131 to clarify the Service's position that, pursuant to *Glickman,* Federal agencies are subject to the permit requirements of the Service's existing regulations.

Because the MBTA is a criminal statute and does not provide for citizen-suit enforcement, a private party who violates the MBTA is subject to investigation by the Service and/or prosecution by the Department of Justice. However, the Administrative Procedure Act (5 U.S.C. 551 et seq.) (APA) allows private parties to file suit to prevent a Federal agency from taking ''final agency action'' that is ''arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law'' (5 U.S.C. 706(2)(A)). If the prohibitions of the MBTA apply to Federal agencies, private parties could seek to enjoin Federal actions that take migratory birds, unless such take is authorized pursuant to regulations developed in

accordance with 16 U.S.C. 704, even when such Federal actions are necessary to fulfill Government responsibilities and even when the action poses no threat to the species at issue.

In *Center for Biological Diversity* v. *Pirie,* a private party obtained an injunction prohibiting live-fire military training exercises of the Department of the Navy that had the effect of killing some migratory birds on the island of Farallon de Medinilla (FDM) in the Pacific Ocean. On March 13, 2002, the United States District Court for the District of Columbia ruled that the Navy activities at FDM resulting in a take of migratory birds without a permit from the Service violated the MBTA and the APA (191 F. Supp. 2d. 161 and 201 F. Supp. 2d 113). On May 1, 2002, after hearing argument on the issue of remedy, the Court entered a preliminary injunction ordering the Navy to apply for a permit from the Service to cover the activities, and preliminarily enjoined the training activities for 30 days. The United States Court of Appeals for the District of Columbia Circuit stayed the District Court's preliminary injunction pending appeal. The preliminary injunction, and associated stay, expired on May 31, 2002. A permanent injunction was issued by the District Court on June 3, 2002. The Circuit Court also stayed this injunction pending appeal on June 5, 2002. On December 2, 2002, the President signed the Authorization Act creating an interim period during which the prohibitions on incidental take of migratory birds would not apply to military readiness activities. During the interim period, Congress also directed the Secretary of the Interior to develop regulations that exempt the Armed Forces from incidental take during authorized military readiness activities. The Department of Defense must concur with the regulations before they take effect. The Circuit Court subsequently dismissed the *Pirie* case as moot. In light of the *Glickman* and *Pirie* decisions, the authorization that this rule provides is essential to preserving the Service's role in determining what military readiness activities, if any, create an unacceptable risk to migratory bird resources and therefore must be modified or curtailed.

The Armed Forces are responsible for protecting the United States from external threats. To provide for national security, they engage in military readiness activities. ''Military readiness activity'' is defined in the Authorization Act to include all training and operations of the Armed Forces that relate to combat, and the adequate and realistic testing of military equipment, vehicles, weapons, and sensors for proper operation and suitability for combat use. It includes activities carried out by contractors, when such contractors are performing a military readiness activity in association with the Armed Forces, including training troops on the operation of a new weapons system or testing the interoperability of new equipment with existing weapons systems. Military readiness does not include (a) the routine operation of installation operating support functions, such as: administrative offices; military exchanges; commissaries; water treatment facilities; storage facilities; schools; housing; motor pools; laundries; morale, welfare, and recreation activities; shops; and mess halls, (b) the operation of industrial activities, or (c) the construction or demolition of facilities listed above.

Section 315 of the 2003 National Defense Authorization Act (Pub. L. 107–314, 116 Stat. 2458, Dec. 2, 2002, *reprinted in* 16 U.S.C. 703 note) (hereinafter ''Authorization Act'') requires the Secretary of Defense, in consultation with the Secretary, to identify ways to minimize, mitigate, and monitor take of migratory birds during military readiness activities and requires the Secretary to prescribe, with the concurrence of the Secretary of Defense, a regulation that exempts military readiness activities from the MBTA's prohibitions against take of migratory birds. With the passage of the Authorization Act, Congress determined that such regulations are consistent with the MBTA and the underlying treaties by requiring the Secretary to promulgate such regulations. Furthermore, Congress clearly expressed its intention that the Armed Forces give appropriate consideration to the protection of migratory birds when planning and executing military readiness activities, but not at the expense of diminishing the effectiveness of such activities. Any diminishment in effectiveness could impair the ability of the Armed Forces to fulfill their national security mission. Diminishment could occur when military training or testing is modified in ways that do not allow the full range of training methods to be explored.

This rule authorizes the Armed Forces to take migratory birds incidental to military readiness activities, subject to certain limitations and subject to withdrawal of the authorization to ensure consistency with the provisions of the migratory bird treaties. The authorization provided by this rule is necessary to ensure that the work of the Armed Forces in meeting their statutory responsibilities can go forward. This rule is also appropriate and necessary to ensure compliance with the treaties and to protect a vital resource in accordance with the Secretary's obligations under Section 704 of the MBTA as well as under Section 315 of the Authorization Act. This rule will continue to ensure conservation of migratory birds as the authorization it provides is dependent upon the Armed Forces conferring and cooperating with the Service to develop and implement conservation measures to minimize or mitigate significant adverse effects to migratory birds. This rule has been developed by the Service in coordination and cooperation with the Department of Defense, and the Secretary of Defense concurs with the requirements herein.

Executive Order 13186

Migratory bird conservation relative to activities of the Department of Defense and the Coast Guard other than military readiness activities are addressed separately in Memoranda of Understanding (MOUs) developed in accordance with Executive Order 13186, Responsibilities of Federal Agencies to Protect Migratory Birds, signed January 10, 2001. The MOU with the Department of Defense was published in the **Federal Register** August 30, 2006 (Volume 71, Number 168). Upon completion of the MOUs with additional Federal agencies, and in keeping with the intent of the Executive Order for Federal agencies to promote the conservation of migratory bird populations, the Service may issue incidental take authorization to address specific actions identified in the MOUs.

Responses to Public Comment

On June 2, 2004, we published in the **Federal Register** (69 FR 31074) a proposed rule to authorize the take of migratory birds, with limitations, that result from Department of Defense military readiness activities. We solicited public comment on the proposed rule for 60 days ending on August 2, 2004.

By this date, we received 573 comments in response to the proposed rule; 24 were from identified organizations or agencies. The following text discusses the substantive comments received and provides our response to those comments. Additionally, it provides an explanation of significant changes from the proposed rule. We do not specifically address the comments that simply opposed the rule unless they included recommendations for revisions. Comments are organized by topic.

To more closely track the language in the Authorization Act and to clarify that the rule applies to the incidental taking

of a migratory bird by a member of the Armed Forces during a military readiness activity, we have replaced the ''Department of Defense'' with ''Armed Forces,'' where applicable.

Violation of the Migratory Bird Treaty Act and the Four Migratory Bird Treaties

Comment: The statement that the rule allows take only in ''narrow instances'' of military readiness activities goes against the spirit and letter of the MBTA, which forbids the take of migratory birds and thus abrogates the MBTA.

Service Response: The MBTA regulates, rather than absolutely forbids, take of migratory birds. The Secretary is authorized and directed, from time to time, having due regard to the zones of temperature and to the distribution, abundance, economic value, breeding habits, and times and lines of migratory flight of such birds to adopt suitable regulations permitting and governing the take of migratory birds when determined to be compatible with the terms of the treaties (16 U.S.C. 704). In the Authorization Act, Congress directed the Secretary to utilize his/her authority to permit incidental take for military readiness activities. Furthermore, Congress itself by passing the Authorization Act determined that allowing incidental take of migratory birds as a result of military readiness activities is consistent with the MBTA and the treaties. Thus, this rule does not abrogate the MBTA.

Comment: Citing broad take authorization language in the current text of the treaty with Canada, concern was expressed regarding the analysis in the proposed rule that the treaty with Canada has a narrower focus than the treaties with Japan and Russia.

Service Response: We agree with the commenter that the Canada treaty, as amended by the 1995 Protocol, now includes broad exception language similar to that in the Japan and Russia treaties. We have expanded upon and added additional clarification in the section ''Is the rule consistent with the MBTA?'' discussing compatibility of this rule with the MBTA and the four treaties.

Authorization of Take Under § 21.15(a)

Comment: The Department of Defense should avoid take of migratory birds by avoiding areas inhabited by migratory birds including restricting construction and active use of airfields in the vicinity of wildlife refuges, prohibiting military operations over wildlife refuges or sensitive migratory bird habitat areas, and avoiding areas where migratory birds nest, breed, rest, and feed.

Service Response: Military lands often support a diversity of habitats and their associated species, including migratory birds; thus it would be difficult for the Armed Forces to completely avoid areas inhabited by birds or other wildlife species. When determining the location for a new installation, such as an airfield, the applicable Armed Force must prepare environmental documentation in accordance with the National Environmental Policy Act (42 U.S.C. 4321 et seq.) (NEPA) that gives due consideration to the impacts of the proposal on the environment, including migratory birds. With respect to wildlife refuges, Congress in the 2000 amendments to the National Wildlife Refuge System Administration Act noted specifically that the provisions of the Act relating to determinations of the compatibility of a use would not apply to overflights above a refuge (Pub. L. 106–580; December 29, 2000). Nevertheless, as noted in this rule, the Armed Forces have made significant investments in acquiring data on the distribution of bird populations and identification of migration routes, as well as the use of military lands for breeding, stopover sites, and over-wintering areas, to protect and conserve these areas. The Armed Forces actively utilize radar ornithology to plan new construction and testing and training operations in areas and times of least constraints. The Armed Forces also have a strong interest in avoiding bird/aircraft conflicts and use this type of information to assist range planners in selecting training times when bird activity is low.

In accordance with the Sikes Act (included in Pub. L. 105–85), the Department of Defense must provide for the conservation and rehabilitation of natural resources on military installations. Thus, potential conflicts with natural resources, including migratory birds, should be addressed in Integrated Resource Management Plans (INRMP), where applicable. Although the Sikes Act does not apply to the Coast Guard, they are also starting to encourage applicable bases to develop INRMPs.

Comment: Provision should be included that the Department of Defense cannot ignore scientific evidence and proceed on a course of action where take is inevitable.

Service Response: None of the four treaties strictly prohibit the taking of migratory birds without exception. Furthermore, the Service acknowledges that regardless of the entity implementing an activity, some birds may be killed even if all reasonable conservation measures are implemented. With the passage of the Authorization Act, Congress directed the Secretary to authorize incidental take by the Armed Forces. Thus, they will be allowed to take migratory birds as a result of military readiness activities, consistent with this rule. This rule, however, will continue to ensure conservation of migratory birds as it requires the Armed Forces to confer and cooperate with the Service to develop and implement conservation measures to minimize or mitigate adverse effects to migratory birds when scientific evidence indicates an action may result in a significant adverse effect on a population of a migratory bird species.

As stated in the Principles and Standards section of this rule, the Armed Forces will use the best scientific data available to assess through the NEPA process, or other environmental requirements, the expected impact of proposed or ongoing military readiness activities on migratory bird species likely to occur in the action areas.

Comment: The Department of Defense should not have the sole authority/responsibility to determine whether the survival of the species is threatened, and only then initiate consultation with the Service.

Service Response: We assume that, despite the commenter's use of the term ''consultation'', this is a reference to the requirement under § 21.15(a)(1) to ''confer and cooperate,'' and not to the requirement of ''consultation'' under section 7 of the Endangered Species Act (ESA), 16 U.S.C. 1536. Section 21.15(a)(1) does condition the requirement to ''confer and cooperate'' on a determination by the Armed Forces that a military readiness activity may result in a significant adverse effect on a population of a migratory birds species. However, we expect that the Armed Forces will notify the Service of any activity that even arguably triggers this requirement. In addition, putting aside the requirements of this regulation, the Armed Forces would, as a matter of course share such information in a number of circumstances.

First, NEPA, and its regulations at 40 CFR 1500–1508, require that Federal agencies prepare environmental impact statements for ''major Federal actions significantly affecting the quality of the human environment.'' These statements must include a detailed analysis of the impacts of an agency's proposed action and any reasonable alternatives to that proposal. NEPA also requires the responsible Federal official to ''consult

with and obtain comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved.''

Second, the Sikes Act (16 U.S.C. 670a-670o), as amended in 1997, requires the development of INRMPs by the Department of Defense that reflect the mutual agreement of the Department of Defense, the Service, and the appropriate State wildlife agency. The Sikes Act has provided the Service, as well as the public, with an opportunity to review natural resources management on military lands, including any major conflicts with migratory birds or their habitat. NEPA documentation is also completed on new or revised INRMPs. Department of Defense policy requires installations to review INRMPs annually in cooperation with the Service and State resource agencies. Annual reviews facilitate adaptive management by providing an opportunity for the parties to review the goals and objectives of the plans and to evaluate any new scientific information that indicates the potential for adverse impacts on population of a migratory bird species from ongoing (or new) military readiness activities.

Third, if the military readiness activity may affect a species listed under the ESA, the Armed Forces would communicate with the Service to determine whether formal consultation is necessary under section 7 of the ESA.

If, as a result these formal processes or by any other mechanism the Service obtains information which raise concerns about the impacts of military readiness on migratory bird populations, the Service can request additional information from the Armed Services. Under section 21.15(b)(2)(iii), failure to provide such information can form the basis for withdrawal of the authorization to take migratory birds. In any case, based on this information, the Service can, under appropriate circumstances, suspend or withdraw the authorization even if the Armed Forces do not themselves determine that a military readiness activity may result in a significant adverse effect on a population of a migratory bird species.

Comment: The threshold for requiring the Department of Defense to confer with the Service when a ''significant adverse effect on the sustainability of a population of migratory bird species of concern'' is too high. This could allow significant damage to resources that could be avoided with criteria that are more stringent.

Service Response: We agree. We have modified the threshold to ''significant adverse effect on a population of migratory bird species.'' The definitions of ''population'' and ''significant adverse effect'' have also been modified accordingly in this rule.

Comment: The provision that the rule must be promulgated with the concurrence of the Secretary of Defense requires the regulator to get permission of the regulated agency.

Service Response: The 2003 Defense Authorization Act required that the regulation be developed with the concurrence of the Secretary of Defense. However, as indicated in § 21.15(b), we have the authority to withdraw authorization if it is determined that a proposed military readiness activity may be in violation of any of the migratory bird treaties or otherwise is not being implemented in accordance with this regulation.

Comment: Encourage more emphasis on upfront planning and evaluation of minimum-impact alternatives to foster more opportunities to avoid or mitigate impacts.

Service Response: As stated in this rule, the Department of Defense currently incorporates a variety of conservation measures into their INRMP documents to address migratory bird conservation. Additional measures will be developed in the future with all the Armed Forces in coordination with the Service and implemented where necessary to avoid, minimize, or mitigate significant adverse effects on migratory bird populations. This rule also indicates the Armed Forces shall engage in early planning and scoping and involve agencies with special expertise in the matters related to the potential impacts of a proposed action.

Comment: The proposed rule grants the Department of Defense greater authority to take and kill migratory birds than authorized in the Defense Authorization Act, which is the only statutory authority for the proposed rule and requires that the Department of Defense minimize and mitigate impacts to migratory birds.

Service Response: We do not agree that the rule provides greater authority to take birds than authorized in the Defense Authorization Act. What this rule does is provide clarity regarding the processes the Armed Forces are required to initiate to minimize and mitigate adverse impacts of authorized military readiness activities on migratory birds while ensuring compliance with the migratory bird treaties and meeting the Secretary's obligations under Section 704 of the MBTA.

Comment: The rule should require mitigation options be formally assessed and evaluated prior to undertaking the activity and that mitigation be commensurate with the extent of the impact.

Service Response: We agree that mitigation can be very complex both from the perspective of replicating all the ecosystem components that a species needs to successfully survive and reproduce regardless of whether mitigation is ex-situ or in-situ.

The Service's Mitigation Policy (Fish and Wildlife Service Manual, 501 FW 2) is designed to assist the Service in the development of consistent and effective recommendations to protect and conserve valuable fish and wildlife resources to help ensure that mitigation be commensurate with the extent of the impact.

In addition, as indicated in this rule, the Armed Forces will confer and cooperate with the Service to develop and implement conservation measures when an ongoing or proposed activity may have a significant adverse effect on a population of migratory bird species. The public, and the Service, also have the opportunity to review and comment on proposed military readiness activities in accordance with NEPA.

Comment: Section 21.15(a) of the proposed regulation must be revised to provide a system of oversight by the Service both in determining whether Department of Defense military readiness activities would likely adversely impact a migratory bird population and in setting a timeline for the implementation of conservation measures.

Service Response: As previously indicated, the Service and the public have the opportunity to review and comment on proposed military readiness activities in accordance with NEPA or other environmental review. Thus, we will be provided an opportunity to evaluate whether a proposed activity may have an adverse effect on migratory bird populations.

Comment: Pursuant to authority granted by 10 U.S.C. 101 and 14 U.S.C. 1, the U.S. Coast Guard is a branch of the armed forces of the USA at all times. Under this authority, the Coast Guard engages in military readiness activities. Furthermore, under the definition of ''Secretary of Defense,'' the Department of Homeland Security is included with respect to military readiness activities of the U.S. Coast Guard. The rule should be revised accordingly to reflect this.

Service Response: Section 315 of the Authorization Act provides for the Secretary ''to prescribe regulations to exempt the Armed Forces for the incidental taking of migratory birds during military readiness activities authorized by the Secretary of Defense or the Secretary of the military department concerned.'' We agree that

''Armed Forces'' includes the Coast Guard.

Comment: In order for potential impacts of the implementation of this rule to be effectively analyzed, the rule should not be categorically excluded. A full NEPA analysis should be conducted for the rule.

Service Response: Because of the broad spectrum of activities, activity locations, habitat types, and migratory birds potentially present that may be affected by this rule, it is not foreseeable or reasonable to anticipate all the potential impacts in a meaningful manner of military readiness activities conducted by the Armed Forces on the affected environment; thus it is premature to examine potential impacts of the rule in accordance with NEPA. We have determined that any environmental analysis of the rule would be too broad, speculative, and conjectural.

Part 516 Departmental Manual 2.3 A (National Environmental Policy Act Part 1508.4) allows an agency (Bureau) in the Department of Interior to determine if an action is categorically excluded from NEPA. We have made the determination that the rule is categorically excluded in accordance with 516 Departmental Manual 2, Appendix 1.10. This determination does not diminish the responsibility of the Armed Forces to comply with NEPA. Whenever the Armed Forces propose to undertake new military readiness activities or to adopt a new, or materially revised, INRMP where migratory bird species may be affected, the Armed Forces invite the Service to comment as an agency with ''jurisdiction by law or special expertise'' upon their NEPA analysis. In addition, if the potential for significant effects on migratory birds makes it appropriate, the Armed Forces may invite the Service to participate as a cooperating agency in the preparation of their NEPA analysis. Moreover, authorization under this rule requires that if a proposed military readiness activity may result in a significant adverse impact on a population of migratory bird species, the Armed Forces must confer and cooperate with the Service to develop and implement appropriate measures to minimize or mitigate these effects. The environmental consequences of the proposed military readiness activity, as well as the potential of any such measures to reduce the adverse impacts of the proposed activity, would be covered in NEPA documentation prepared for the proposed action.

Comment: Section 21.15(a) of the proposed regulation is unclear as to who is to determine that ongoing or proposed activities are likely to result in significant adverse effects.

Service Response: We have revised § 21.15(a) to clarify that this responsibility initially lies with the action proponent, i.e., the Armed Forces. Just as the Armed Forces make the initial determination that consultation is required under similar statutes, such as the Endangered Species Act (16 U.S.C. 1531 et seq.) (ESA) or the National Historic Preservation Act (16 U.S.C. 470), the action proponent will consider the likely effects of its proposed action and whether such effects require that it confer with the Service to develop and implement appropriate conservation measures to minimize or mitigate potential significant adverse effects. Where significant adverse impacts are likely, existing requirements under NEPA for federal agencies to prepare environmental documentation will ensure that both the public and the Service have an opportunity to review a proposed action and the Armed Force's determination with respect to migratory birds.

The Service and State wildlife agencies (and the general public if plan revisions are proposed) also have an opportunity to review the Department of Defense's management of installation natural resources, including the impacts of land use on such resources, during the quintennial review of INRMPs for Department of Defense lands. Consultation under the Endangered Species Act offers yet another opportunity for the Service to provide input on the potential effects of a proposed military readiness activity on federally listed migratory birds.

Comment: The document uses both the terms ''may'' affect migratory birds and ''likely'' to affect migratory birds. ''May'' should be used to be consistent with the NEPA threshold for impacts on the environment.

Service Response: The Service has intentionally established different standards for when the Armed Forces are required to confer with the Service and for when we may propose withdrawal of authorization. We have established a broad standard for triggering when the Armed Forces must notify the Service of potential adverse effects on migratory birds. We agree that requiring the Armed Forces to confer with the Service when applicable activities ''may'' result in a significant adverse effect is consistent with the analysis threshold utilized in NEPA. The Secretary determined that the more restrictive threshold of suspending or withdrawing authorization was warranted when a military readiness activity likely would not be compatible with one or more of the treaties or is likely to result in a significant adverse effect on a migratory bird population.

Withdrawal of Take Authorization § 21.15(b)

Comment: The Department of Defense is given too much decision power in the rule. Concern was expressed that the final decision regarding whether a military readiness activity is authorized or not is made by political appointees rather than unbiased career employees.

Service Response: Our political system is based upon a structure whereby policy decisions are made by political appointees rather than career employees. To address what may be perceived as too much power by the Armed Forces, it is the Secretary of the Interior who has, and retains, the final determination regarding whether an activity is authorized under the MBTA, not the Secretary of Defense.

Comment: The rule should require sufficient monitoring to detect significant impacts and provide for diligent oversight by the Department of the Interior to head off problems well before jeopardy is near and withdrawal of authorization is suspended or proposed to be withdrawn.

Service Response: We concur that monitoring can play a key role in providing valuable data needed to evaluate potential impacts of activities, inform conservation decisions, and evaluate effectiveness of conservation measures. For monitoring to be relevant, it should focus on specific objectives, desired outcomes, key hypotheses, and conservation measures. As stated in § 21.15(b)(2)(ii) of the rule, in instances where it is appropriate, the Armed Forces are required to ''conduct mutually agreed upon monitoring to determine the effects of military readiness activity on migratory bird species and/or the efficacy of the conservation measures implemented by the Armed Forces.'' This rule also states that the Armed Forces will consult with the Service to identify techniques and protocols to monitor impacts of military readiness activities. We have also added additional text clarifying the monitoring requirements of the Armed Forces.

Comment: The procedure for withdrawal of the authority is so cumbersome and subject to so many exclusions as to make the withdrawal procedure non-functional.

Service Response: We have clarified the procedures for when the Secretary may propose withdrawing authorization in § 21.15(b)(2), (4) and (5).

Comment: The statutory language of the Defense Authorization Act says

nothing about requiring input from the State Department prior to suspending authorization. Thus, the rule needlessly goes beyond its statutory authority.

Service response: In accordance with the MBTA (16 U.S.C. 704), the Secretary of the Interior has the authority to ''determine when, and to what extent, if at all, and by what means, it is compatible with the terms of the conventions to allow hunting, taking, capture, killing * * * and to adopt suitable regulations permitting and governing the same.'' The Defense Authorization Act does not limit that authority. Requiring the input of the State Department is within the standards of § 704.

Comment: The provision that the Secretary must seek the view of the Department of Defense prior to suspending authorization due to a violation with any of the treaties it affects permits the Department of Defense to itself determine its compliance with the migratory bird treaties. The statutory language of the Defense Authorization Act did not address this in any way.

Service Response: Section 21.15(b)(1) of this regulation provides that the Secretary retains the discretion to make the ultimate determination that incidental take of migratory birds during a specific military readiness activity would be incompatible with the treaties. Although the Defense Authorization Act required the Secretary to promulgate a regulation, it did not mandate the specific text or all of the conditions in this regulation. This regulation is consistent with the Defense Authorization Act as well as with 16 U.S.C. 704. Moreover, seeking the views of the Armed Forces is appropriate given the possible impacts that suspension of the take authorization could have on national security. Similarly, consulting with the State Department on issues of treaty interpretation is appropriate because of the State Department's expertise and authority in this area as well as its responsibility for maintaining the relationship of the United States with its treaty partners.

Comment: The Secretary should not have unilateral power to suspend or withdraw take authorization as the Defense Authorization Act states the Secretary must exercise authority with the concurrence of the Secretary of Defense.

Service Response: In accordance with § 315(d)(1) and (2) of the Authorization Act, the regulation ''to exempt the Armed Forces for the incidental take of migratory birds during military readiness activities'' shall be developed by the Secretary of the Interior with the concurrence of the Secretary of Defense. However, the Defense Authorization Act does not restrict or limit our authority in 16 U.S.C. 704 and 712 relative to administering and enforcing the MBTA and complying with the four migratory bird treaties.

Definitions § 21.3

Comment: Incidental take is not defined in the rule or the Defense Authorization Act. Concern was expressed that the Department of Defense being authorized to take migratory birds incidental to military readiness activities without ''incidental'' being defined will result in the Department of Defense reading this as the ability to actively kill migratory birds and destroy their habitat in anticipation of the potential for such problems.

Service Response: Current regulations authorize permits for take of migratory birds for activities such as scientific research, education, and depredation control (50 CFR parts 13, 21 and 22). However, these regulations do not expressly address the issuance of permits for incidental take. ''Incidental take of migratory birds'' is not defined under the MBTA or in any subsequent regulation, and the Service does not anticipate having a regulatory definition for ''incidental take'' in the short term. Neither the MBTA, the Defense Authorization Act, nor this rule authorize the take of migratory birds simply in anticipation of the potential for future problems, i.e., removing the potential source of problems before any conflicts may arise with military readiness activities.

Comment: Blanket exemption for any and all military readiness activities should not be authorized. In particular, those activities that involve acquisition of new land and construction of facilities in sensitive migratory bird habitat areas should not be authorized. Authorization to take birds should only include those types of activities that are too time or mission-sensitive for thorough evaluation, and where incidental take is unavoidable.

Service Response: As defined in the 2003 Defense Authorization Act, military readiness activities include all training and operations of the Armed Forces that relate to combat, and the adequate and realistic testing of military equipment, vehicles, weapons, and sensors for proper operation and suitability for combat use. Military readiness does not include (a) routine operation of installation operating support functions, such as: administrative offices; military exchanges; commissaries; water treatment facilities; storage facilities; schools; housing; motor pools; laundries; morale, welfare, and recreation activities; shops; and mess halls, (b) operation of industrial activities, or (c) construction or demolition of facilities listed above.

Acquisition of lands by the Armed Forces is not covered by this authorization as the acquisition itself does not take birds even when the land is being acquired for implementing future military readiness activities. In accordance with NEPA, environmental analysis of any major Federal agency action, which may include land acquisition and future proposed activities on these lands, must be addressed prior to the action occurring. Likewise, construction of facilities in sensitive migratory bird habitat would be addressed through NEPA.

Comment: The rule covers all military branches of service and includes contractors and agents. These should be clearly delineated in order to minimize the number of exempt entities.

Service Response: The rule applies to contractors only when such contractors are performing a military readiness activity in association with the Armed Forces—i.e., the contractors are performing a federal function. For example, a contractor training troops on the operation of a new weapons system or testing its interoperability with existing weapons systems would be covered. The regulation does not cover routine contractor testing performed at an industrial activity that is privately owned and operated.

Comment: The Defense Authorization Act does not limit applicability of minimization and mitigation measures to just ''species of concern'' but applies to all ''affected species of migratory birds.'' In addition, concern was expressed that this level of threshold could result in avoidable impacts to species that are not included in the ''species of concern lists'' but are nevertheless valuable public resources.

Service Response: We agree that the Defense Authorization Act is not specifically limited to species of concern, nor did we envision that the rule prevents the Armed Forces from addressing adverse impacts on all affected species of migratory birds through the NEPA process, including those that are locally endemic or otherwise have limited distribution within a State. The rule has been modified by requiring the Armed Forces to confer with the Service when they determine an action may result in a significant adverse effect on the

population of any migratory bird species.

Comment: Use of population status at the Bird Conservation Region (BCR) level as a criterion for action could reduce consideration of locally important bird resources, concentrations of birds and special habitats, and populations that do not coincide closely with BCRs.

Service Response: We have revised the definition of population so that it is not based upon species distribution or occurrence within a Bird Conservation Region and thus eliminates the concerns expressed above. As used in the rule, a population is defined as ''a group of distinct, coexisting (conspecific) individuals of a single species, whose breeding site fidelity, migration routes, and wintering areas are temporally and spatially stable, sufficiently distinct geographically (at some time of the year), and adequately described so that the population can be effectively monitored to discern changes in its status.''

What constitutes a population for the purposes of determining potential effects of military readiness activities will be scientifically based. A population could be defined as one that occurs spatially across a geographically broad area, such as the Western Atlantic red knot population that migrates along the Atlantic seaboard, to a more geographically limited species, such as breeding population of Bicknell's thrush whose breeding range is limited to mountain tops in the northeastern U.S. and southeastern Canada. When requested, the Service will provide technical assistance to the Armed Forces in identifying specific populations of migratory bird species that may be affected by a military readiness activity.

Comment: The definition of conservation measure does not adequately recognize international treaty obligations and the right of the Secretary of the Interior to withdraw take authorization should the treaties be violated. In the definitions, after the words ''while allowing for completion of the action in a timely manner,'' insert ''if such action would be consistent with the international treaties underlying the MBTA.''

Service Response: If conservation measures implemented by the Armed Forces in accordance with the rule are not sufficient to render the action compliant with the treaties, the Secretary will suspend the authorization. Failure to implement conservation measures is not the sole criterion for proposing withdrawal.

Comment: ''Conservation measures'' is defined to include monitoring when it has the potential to produce data relevant to substantiating impacts, validating effectiveness of mitigation, or providing other pertinent information. However, in the absence of a monitoring requirement, this provision is unworkable.

Service Response: Monitoring is required in § 21.15(b)(ii) of the rule. This section indicates that the Department of Defense's failure ''to conduct mutually agreed upon monitoring to determine the effects of military readiness activity on migratory bird species and/or the efficacy of the conservation measures implemented by the Department of Defense'' is potential cause for the Secretary to propose withdrawing authorization. However, as indicated in the response below, reference to monitoring has been removed from the definition of conservation measures.

Comment: Monitoring should not be considered a conservation measure, rather it should be conducted separately and apart from any necessary and reasonable mitigation actions.

Service Response: Although monitoring can play a key role in the continued growth of bird conservation by providing the information needed to inform conservation decisions and evaluate their effectiveness, we have removed it from the definition of conservation measures.

Comment: The threshold of ''significant adverse effect on the sustainability of a population'' is too high.

Service Response: The threshold for when the Armed Forces will be required to confer with the Service and implement appropriate conservation measures has been modified to when a ''significant adverse effect on a population of migratory bird species'' may result from an ongoing or proposed military readiness activity. The definition of significant adverse effect has also been accordingly revised in the rule.

Comment: The rule has a different standard than what was indicated by Congress in the Defense Authorization Act. The Act indicates measures are to be identified that minimize and mitigate ''any adverse impacts'' not just ''significant adverse effects.'' The Service is inserting thresholds of both likelihood and significance that are not any way implied by the statute.

Service Response: As indicated in Section 315(b) of the Authorization Act, the identification of measures to minimize and mitigate *any adverse impacts* of authorized military readiness activities pertains to the period of interim authority. The standard for authorization of take is established by the Secretary's authority under § 704 of the MBTA, whereby in exercising this authority he/she may prescribe regulations that exempt the Armed Forces for the incidental taking of migratory birds during military readiness activities. As indicated in the rule, the Secretary established thresholds for granting authority to incidentally take migratory birds. For those military readiness activities that would not have a significant adverse effect on migratory bird species populations take is authorized without conferring with the Service, subject to the withdrawal provision of § 21.15(b)(1). If a proposed or ongoing activity may result in a significant adverse effect, the Armed Forces must confer and cooperate with the Service. Take authorization would be suspended or withdrawn only when a military readiness activity likely would not be compatible with one or more of the treaties or is likely to result in a significant adverse effect on a migratory bird population.

Comment: Conservation measures that are project designs or mitigation activities should be changed from those that are ''reasonable and feasible'' to ''reasonable and necessary.'' This will result in a conservation measure that is appropriate to its purpose and essential to conservation.

Service Response: This revision has been made to the definition of conservation measures.

Comment: ''Conservation measures'' fails to place any restrictions or requirements on the amount of time that the Department of Defense would be given to apply the mitigation actions. The phrase ''over time'' implicitly grants the Department of Defense the ability to ignore the need for immediate action to counter adverse impacts.

Service Response: ''Over time'' was deleted from the definition.

Supplementary Information Section

Many comments were received on the Supplementary section of the proposed rule which did not pertain to any recommended revisions to § 21.15. These were taken into consideration in the final rule.

Comment: Ambiguous terms such as ''should,'' ''encourage,'' ''anticipates,'' etc., relative to Department of Defense activities contributing towards the conservation of migratory birds should be replaced with stronger terms such as ''require.''

Service Response: The **SUPPLEMENTARY INFORMATION** text has no

regulatory force and thus use of stronger terms has no regulatory weight. However, this comment was given due consideration and several revisions were made to strengthen the measures the Armed Forces are currently undertaking to address migratory bird conservation. These terms are not applicable in the actual rule, and therefore, no revisions were made relative to the authorization in this regard.

Comment: Integrated Natural Resources Management Plans (INRMPs) as informal mechanisms may not provide prompt and diligent efforts to minimize permitted take of birds. State wildlife agencies encourage more rigorous and thorough planning requirements and offer their considerable expertise and assistance.

Service Response: The Sikes Act Improvement Act of 1997 (included in Pub. L. 105–85) requires the development and implementation of INRMPs for relevant Department of Defense installations and mandates that plans be prepared in cooperation with the Service and State fish and wildlife agencies. The purpose of INRMPs is to plan natural resource management activities within the capabilities of the biological setting to support military training requirements. Although the Sikes Act does not apply to the Coast Guard, the Coast Guard is also starting to encourage their bases to address natural resource activities through INRMPs. The Service has been and continues to be committed to expanding partnerships with the Department of Defense. Updated Department of Defense guidance stresses that installations shall work in cooperation with the Service and States while developing or revising INRMPs. Each installation will invite annual feedback from the Service and States concerning how effectively the INRMP is being implemented. Installations have also established and maintain regular communications with the Service and State fish and wildlife agencies to address issues concerning natural resources management including migratory birds.

The Sikes Act also offers opportunities beyond the INRMP process for States and the Service to offer their expertise and assistance on military lands and with respect to migratory birds. For example, under the Sikes Act, the Department of Defense can enter into cooperative agreements with the Service, States, and nonprofit organizations to benefit birds and other species. Programs such as the Chesapeake Bay Program, Coastal America, and Partners In Flight also offer opportunities to partner with States and to share information and advice.

Comment: If the Service must rely on INRMPs for monitoring and mitigation of bird take, we recommend a requirement to complete, revise, and update plans to address bird monitoring and assessment of military readiness impacts and that migratory bird conservation activities receive adequate funding.

Service Response: The Sikes Act and Department of Defense guidance provide mechanisms to address emerging needs related to bird monitoring and assessment of military readiness impacts. The Sikes Act requires INRMPs to be reviewed, and revised as necessary, as to operation and effect by the parties (i.e., the Service and State resource agencies) on a regular basis, but not less often than every 5 years. In October 2004, the Department of Defense issued supplemental guidance for implementation of the Sikes Act relating to INRMP reviews. Department of Defense policy requires installations to review INRMPs annually in cooperation with the Service and State resource agencies. Annual reviews facilitate adaptive management by providing an opportunity for the parties to review the goals and objectives of the plans and to establish a realistic schedule for undertaking proposed actions. During annual reviews of the INRMPs, the Department of Defense will also discuss with the Service conservation measures implemented and the effectiveness of these measures in avoiding, minimizing, or mitigating take of migratory birds.

This rule relies on the Armed Forces utilizing the NEPA process to determine whether any ongoing or proposed military readiness activity is likely to result in a significant adverse effect on a population of a migratory bird species. The rule requires the Armed Forces to develop and implement appropriate conservation measures if a proposed action may have a significant adverse effect on a population of migratory bird species. To ensure that such conservation measures adequately address impacts to migratory birds, the rule also requires the Armed Forces to monitor the effects of such military readiness activities on migratory bird species taken during the military readiness activities at issue, and to retain records of these measures and monitoring data for 5 years from the date the Armed Forces commence their action.

Comment: We do not believe that impacts addressed by this rule can be adequately monitored or remedied without commitment of more resources to gather new bird data, conduct additional efforts to monitor impacts, or spend more money.

Service Response: Although the rule requires the Armed Forces to conduct mutually agreed upon monitoring to determine the effects of a military readiness activity on migratory bird species and the efficacy of the conservation measures implemented by the Armed Forces, we cannot require the Armed Forces to provide additional funding or resources towards monitoring. However, we do agree that monitoring is an important component of activities the Armed Forces undertake to address migratory bird conservation. We have expanded the monitoring discussion under ''Rule Authorization'' below.

Comment: Concern was expressed that the proposed broad exemption will be perceived as precluding the need for full NEPA consideration for covered activities.

Service Response: As stated in this rule, the Armed Forces will continue to be responsible for being in compliance with NEPA, and all other applicable regulations, and ensuring that whenever they propose to undertake new military readiness activities or to adopt a new, or materially revised, INRMP and migratory bird species may be affected, the Armed Forces invite the Service to comment as an agency with ''jurisdiction by law or special expertise'' upon their NEPA analysis. In addition, if the potential for significant effects on migratory birds makes it appropriate, the Armed Forces may invite the Service to participate as a cooperating agency in the preparation of their NEPA analysis. Moreover, authorization under this rule requires that if a proposed military readiness activity may result in a significant adverse impact on a population of migratory bird species, the Armed Forces must confer and cooperate with the Service to develop and implement appropriate measures to minimize or mitigate these effects. The environmental consequences of the proposed military readiness activity, as well as the potential of any such measures to reduce the adverse effects of the proposed activity, would be covered in NEPA documentation prepared for the proposed action.

Comment: The Department of Defense should be required to demonstrate that all ''practicable'' means of avoiding the ''take'' of migratory birds have been considered prior to the implementation of a new readiness program or construction of a new installation.

Service Response: The Armed Forces will be addressing ''take'' in a variety of ways. As stated above, through the NEPA process, the environmental consequences of their proposed military readiness activities will be evaluated, as well as any measures to reduce take of migratory birds. In addition, the INRMPs currently incorporate conservation measures to address migratory bird conservation. The Service will continue to work with the Armed Forces to develop additional measures in the future.

Comment: Nowhere does the rule mention how and when the Department of Defense will assess current, ongoing activities for which NEPA compliance is complete. The rule should be amended to require, within a specified time period of 90–120 days, a report by the Department of Defense to the Secretary on the impacts of their current military readiness activities on migratory birds.

Service Response: As a preliminary matter, it is important to note that where NEPA compliance has been completed, that compliance should have included consideration of the impacts on migratory birds. Since the enactment of NEPA, the Service has been notified of, and provided the opportunity to comment on, proposed military readiness activities that have the potential for significant impacts on the environment, including significant impacts on migratory birds. Nevertheless, it is possible that ongoing military readiness activities might in the future be determined to meet the threshold for the requirement under § 21.15(a)(1) to ''confer and cooperate.'' There are at least three mechanisms in place that require the Armed Forces to address environment impacts of ongoing activities for which NEPA is complete; supplementary statements under NEPA, INRMP reviews, and the monitoring requirements in the rule.

In accordance with NEPA Part 1502.9, an agency shall prepare a supplement to either a draft or a final environmental impact statement whenever: (1) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or (2) the agency learns of significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. This rule relies on the Armed Forces to use the NEPA process to determine whether an ongoing military readiness activity may result in a significant adverse effect on a population of a migratory bird species.

The Sikes Act (16 U.S.C. 670a–670o), enacted in 1960, has required cooperation among the Department of Defense, the Service, and State wildlife agencies. The 1997 amendments to the Sikes Act require the development of INRMPs that reflect the mutual agreement of the Department of Defense, the Service, and the appropriate State wildlife agency. The Sikes Act provides the Service, as well as the public, an opportunity to review natural resources management on military lands, including any potential effects on migratory birds or their habitat. NEPA documentation is prepared to support new or revised INRMPs. Department of Defense policy requires installations to review INRMPs annually in cooperation with the Service and State resource agencies. Annual reviews facilitate adaptive management by providing an opportunity for the parties to review the goals and objectives of the plans and to evaluate any new scientific information that indicates the potential for adverse impacts on migratory birds from new or ongoing military readiness activities. In addition, during annual INRMP reviews, the Department of Defense, the Service and the State resources agency evaluate the conservation measures implemented and the effectiveness of these measures in avoiding, minimizing, or mitigating take of migratory birds.

This rule requires the Armed Forces to develop and implement appropriate conservation measures if a proposed action may have a significant adverse effect on a population of migratory bird species. When conservation measures implemented in accordance with § 21.15(a)(1) require monitoring, the Armed Forces must retain records of these measures and monitoring data for 5 years from the date the Armed Forces commence their action.

Comment: We disagree with the interpretation of the statute that Congress ''signaled that the Department of Defense should give appropriate consideration to the protection of migratory birds when planning and executing military readiness activities, but not at the expense of diminishing the effectiveness of such activities.'' This suggests a diminishment of protection for migratory birds. It was Congress's intent that the Department of Defense should not be forced to halt these activities but rather should modify them to minimize impacts, or, if such activities cannot be practicably altered to minimize impacts, that mitigation measures must be in place to ensure conservation of migratory birds.

Service Response: This rule will not diminish the protection of migratory birds. Rather, by requiring the Armed Forces to confer with the Service to develop and implement conservation measures when a military readiness activity may significantly affect a population of a migratory bird species, a greater benefit to birds will result than the current status operandi. Increased coordination and technical assistance between the Service and the Armed Forces will reduce the number of migratory birds that are incidentally taken as a result of military readiness activities.

Measures Taken by the Armed Forces To Minimize and Mitigate Takes of Migratory Birds

As the basis for this rule, under the authority of the MBTA and in accordance with Section 315 of the Authorization Act, the Armed Forces will consult with the Service to identify measures to minimize and mitigate adverse impacts of authorized military readiness activities on migratory birds and to identify techniques and protocols to monitor impacts of such activities. The inventory, avoidance, habitat enhancement, partnerships, and monitoring efforts described below illustrate the efforts currently undertaken by the Armed Forces to minimize or mitigate adverse impacts to migratory birds from testing and training activities to maintain a ready defense. Additional conservation measures, designed to minimize and mitigate adverse impacts of authorized military readiness activities on affected migratory bird species, with emphasis on species of concern, will be developed in joint coordination with the Service when evaluation of specific military readiness activities indicates the need for additional measures.

We have a long history of working with natural resources managers at Armed Forces installations through our Field Offices to develop and implement these conservation initiatives. Many of the conservation measures detailed below represent state-of-the-art techniques and practices to inventory, protect, and monitor migratory bird populations. In accordance with provisions of the Sikes Act, as amended, these conservation measures are detailed in Department of Defense INRMPs for specific installations and endorsed by the Service and State fish and wildlife agencies. Additional conservation measures may be incorporated into future revisions of the INRMPs if determined necessary during their quintennial review.

Bird Conservation Planning. The Department of Defense prepares INRMPs for most Department of Defense installations. Under the Sikes Act, the Department of Defense must provide for the conservation and rehabilitation of natural resources on military

installations. To facilitate the program, the Secretary of Defense prepares and implements an INRMP for each military installation in the United States on which significant natural resources are found. The resulting plans must reflect the mutual agreement of the military installation, the Service, and the appropriate State fish and wildlife agency on conservation, protection, and management of fish and wildlife resources. The importance of a cooperative relationship among these parties is also stressed in Department of Defense and Service guidances concerning INRMP development and review. In accordance with the Department of Defense guidance, each installation will invite annual feedback from the Service and States concerning how effectively the INRMP is being implemented. Installations also maintain regular communications with the Service and State fish and wildlife agencies to address issues concerning natural resources management including migratory birds. Although the Sikes Act does not apply to the Coast Guard, they are also starting to encourage applicable bases to develop INRMPs.

INRMPs incorporate conservation measures addressed in Regional or State Bird Conservation Plans to ensure that the Department of Defense does its part in landscape-level management efforts. INRMPs are a significant source of baseline conservation information and conservation initiatives used to develop NEPA documents for military readiness activities. This linkage helps to ensure that appropriate conservation measures are incorporated into mitigation actions, where needed, that will protect migratory birds and their habitats.

To-date, over 370 INRMPs have been approved. Through cooperative planning in the development, review and revision of INRMPs, the Department of Defense, the Service and the States can effectively avoid or minimize adverse impacts on migratory bird populations. Through this process, the Service and the Department of Defense will continue to work together to design and develop monitoring surveys that effectively evaluate population trends and cumulative impacts on installations.

The Fish and Wildlife Conservation Act of 1980, as amended in 1988, directs the Secretary of the Interior to ''identify species, subspecies, and populations of all migratory non-game birds that, without additional conservation action, are likely to become candidates for listing under the Endangered Species Act of 1973.'' This list is prepared and updated at 5-year intervals by the Service's Division of Migratory Bird Management. The current list of the ''Birds of Conservation Concern'' is available at *http://migratorybirds.fws.gov/reports/bcc2002.pdf*.

''Birds of Conservation Concern 2002'' includes species that are of concern because of (a) documented or apparent population declines, (b) small or restricted populations, or (c) dependence on restricted or vulnerable habitats. It includes three distinct geographic scales: Bird Conservation Regions, Service Regions, and National. The Service Regions include the seven Service Regions plus the Hawaiian Islands and Puerto Rico/U.S. Virgin Islands.

Bird Conservation Regions (BCRs), adopted by the North American Bird Conservation Initiative (NABCI), are the most basic geographical unit by which migratory birds are designated as birds of conservation concern. The BCR list includes certain species endemic to Hawaii, the Pacific Island territories, and the U.S. Caribbean Islands that are not protected by the MBTA, and thus are not subject to this rule. These species are clearly identified in the list. The complete BCR list contains 276 species. NABCI is a coalition of U.S., Canadian, and Mexican governmental agencies and private organizations working together to establish an inclusive framework to facilitate regionally based, biologically driven, landscape-oriented bird conservation partnerships. A map of the NABCI BCRs can be viewed at *http://www.nabci-us.org*.

The comprehensive bird conservation plans, such as the North American Waterfowl Management Plan, the U.S. Shorebird Conservation Plan, Partners in Flight (PIF) Bird Conservation Plans, and the North American Waterbird Conservation Plan, are the result of coordinated partnership-based national and international initiatives dedicated to migratory bird conservation. Each of these initiatives has produced landscape-oriented conservation plans that lay out population goals and habitat objectives for birds. Additional information on these plans and their respective migratory bird conservation goals can be found at:

North American Waterfowl Management Plan (*http://birdhabitat.fws.gov/NAWMP/nawmphp.htm*).

North American Waterbird Conservation Plan (*http://www.waterbirdconservation.org*).

U.S. Shorebird Conservation Plan (*http://shorebirdplan.fws.gov/*).

Partners in Flight (*http://www.partnersinflight.org*).

Conservation Partnerships. The Department of Defense has entered into a number of conservation partnerships with nonmilitary partners to improve habitats and protect avian species. In 1991, the Department of Defense, through each of the military services, joined the PIF initiative. The Department of Defense developed a PIF Strategic Plan in 1994, and revised it in 2002. The Department of Defense PIF program is recognized as a model conservation partnership program. Through the PIF initiative, the Department of Defense works in partnership with over 300 Federal and State agencies and nongovernmental organizations (NGOs) for the conservation of neotropical migratory and resident birds and enhancement of migratory bird survival. For example, bases have worked with NGOs to develop management plans that address such issues as grazing and the conversion of wastewater treatment ponds to wetlands and suitable habitat. Universities use Department of Defense lands for migratory bird research and, on occasion, re-establish nesting pairs to take advantage of an installation's hospitable habitat. The Department of Defense PIF program tracks this research and provides links between complementary research on different installations and service branches.

The Authorization Act included a provision that allows the Department of Defense to provide property at closed bases to conservation organizations for use as habitat and another provision that, in order to lessen problems of encroachment, allows the Department of Defense to purchase conservation easements on suitable property in partnership with other groups. Where utilized, these provisions will offer further conservation benefits to migratory birds.

Bird Inventories. The most important factor in minimizing and mitigating takes of migratory birds is an understanding of when and where such takes are likely to occur. This means developing knowledge of migratory bird habits and life histories, including their migratory paths and stopovers as well as their feeding, breeding, and nesting habits.

The Department of Defense implements bird inventories and monitoring programs in numerous ways. Some Department of Defense installations have developed partnerships with the Institute for Bird Populations to Establish Monitoring Avian Productivity and Survivorship (MAPS) stations. The major objective of

the MAPS program is to contribute to an integrated avian population monitoring system for North American land birds by providing annual regional indices and estimates for four populations and demographic parameters for select target species in seven different regions of North America. The MAPS methodology provides annual regional indices of adult population size and post-fledgling productivity from data on the numbers and proportions of young and adult birds captured; annual regional estimates of adult population size, adult survivorship, and recruitment into the adult population from capture-recapture data on adult birds; and additional annual estimates of adult population size from point-count data collected in the vicinity of MAPS stations. Without these critical data, it is difficult or impossible to account for observed population changes. The Department of Defense is helping to establish a network of MAPS stations in all seven biogeographical regions and build the program necessary to monitor neotropical migratory bird population changes nationwide. Approximately 20% of the continental MAPS network involves military lands.

Since the early 1940s, radar has been used to monitor bird migration. The newest weather surveillance radar, WSR–88D or NEXRAD (for Next Generation Radar), is ideal for studies of bird movements in the atmosphere. This sophisticated radar system can be used to map geographical areas of high bird activity (e.g., stopover, roosting and feeding, and colonial breeding areas). It also provides information on the quantity, general direction, and altitudinal distribution of birds aloft. Currently, the United States Air Force is using NEXRAD, via the U.S. Avian Hazard Advisory System (AHAS), to provide bird hazard advisories to all pilots, military and civilian, in an attempt to warn air traffic of significant bird activity. The information is publicly available for the contiguous United States on line at *http://www.usahas.com* and will soon be available for the State of Alaska.

NEXRAD information is critically important for the protection of habitats used by migratory birds during stopover periods. This information is vital to Department of Defense land managers who protect stopover areas on military land. The data is also particularly important to land managers of military air stations where bird/aircraft collisions threaten lives and cost millions of dollars in damages every year. The Department of Defense established a partnership with the Department of Biological Sciences at Clemson University to collect, analyze, and use the biological information from the NEXRAD network to identify important stopover habitat in relation to Department of Defense installations. Initial efforts were concentrated in the Southeast to complement existing radar data from the Gulf Coast. This partnership has enabled the collection and transfer of radar data from all NEXRAD sites, via modem, to one remote station at Clemson University, where the data can be archived and analyzed.

The Department of Defense uses bird inventory and survey information in connection with the preparation of INRMPs. The Department of Defense also uses bird inventory and survey information when undertaking environmental analyses required under the NEPA. An environmental assessment or an environmental impact statement is used to determine the potential effects of any new, planned activity on natural resources, including migratory birds.

The Department of Defense PIF program is currently developing a database of migratory bird species of concern that are likely to occur on each installation utilizing the Service's published list of Birds of Conservation Concern (*http://migratorybirds.fws.gov/reports/bcc2002.pdf*); priority migratory bird species documented in the comprehensive bird conservation plans (North American Waterbird Conservation Plan (*http://www.waterbirdconservation.org*), United States Shorebird Conservation Plan (*http://shorebirdplan.fws.gov*), Partners in Flight Bird Conservation Plans (*http://www.partnersinflight.org/*); species or populations of waterfowl identified as high, or moderately high, continental priority in the North American Waterfowl Management Plan; listed threatened and endangered bird species in 50 CFR 17.11; and Migratory Bird Treaty Act-listed game birds below desired population sizes (*http://migratorybirds.fws.gov/reports/reports.html*).

Avoidance. Avoidance is the most effective means of minimizing takes of migratory birds. Where practicable, the Department of Defense avoids potentially harmful use of nesting sites during breeding and nesting seasons and of resting sites on migratory pathways during migration seasons. Avoidance sometimes involves using one area of a range rather than another. On some sites in which bombing, strafing, or other activities involving the use of live military munitions could affect birds in the area, the Department of Defense may conduct an initial, benign sweep of the site to ensure that any migratory birds in the area are dispersed before live ordnance is used. Another tool used by the Department of Defense to deconflict flight training activities is the U.S. Air Force Bird Avoidance Model (BAM). This model places breeding bird and Christmas count data into a Geographic Information Systems model to assist range planners in selecting training times when bird activity is low. The BAM is available online at the *http://www.usahas.com* Web site.

Pesticide Reduction. Reducing or eliminating pesticide use also benefits migratory birds. The Armed Forces maintain an integrated pest management (IPM) program that is designed to reduce the use of pesticides to the minimum necessary. The Department of Defense policy requires all operations, activities, and installations worldwide to establish and maintain safe, effective, and environmentally sound IPM programs. IPM is defined as a planned program, incorporating continuous monitoring, education, record-keeping, and communication to prevent pests and disease vectors from causing unacceptable damage to operations, people, property, material, or the environment. IPM uses targeted, sustainable (i.e., effective, economical, and environmentally sound) methods, including education, habitat modification, biological control, genetic control, cultural control, mechanical control, physical control, regulatory control, and the judicious use of least-hazardous pesticides. Department of Defense policy mandates incorporation of sustainable IPM philosophy, strategies, and techniques in all aspects of Department of Defense pest management planning, training, and operations, including installation pest-management plans and other written guidance to reduce pesticide risk and prevent pollution.

Habitat Conservation and Enhancement. Habitat conservation and enhancement generally involve improvements to existing habitat, the creation of new habitat for migratory birds, and enhancing degraded habitats. Improvements to existing habitat include wetland protection, maintenance and enhancement of forest buffers, elimination of feral animals (in particularly feral cats) that may be a threat to migratory birds, and elimination of invasive species that crowd out other species necessary to migratory bird survival. Examples of the latter include control and elimination of brown tree snake, Japanese honeysuckle, kudzu, and brown-headed cowbirds.

Efforts to eliminate invasive species are being undertaken in association with natural resources management under Sikes Act INRMPs. For example, at one site, grazing was reduced from more than 60,000 to about 23,000 acres, and has become a management tool to enhance the competitive advantage of native plants, especially perennial grasses. Special projects are under way on Department of Defense property to control exotic plants and to remove unused structures that occupy potentially valuable habitat or unnaturally increase predator populations. At some locations, native forest habitat is being reestablished.

The preparation of INRMPs continues to offer opportunities to consider such land management measures as converting to uneven-age and/or other progressive forest management that enhances available habitat values, establishing native warm-season grasslands, maintaining and enhancing bottomland hardwood forests, and promoting positive water-use modifications to improve hydrology and avian habitat in arid areas. Department of Defense installations are active in promoting the use of nest boxes and, where appropriate, the use of communications towers for nesting. In addition, the Department of Defense PIF program has prepared fact sheets addressing such issues as communications towers and power lines, West Nile virus, wind energy development, the Important Bird Areas program, and bird/aircraft strike hazards (BASH).

Other. At a few sites where the potential for migratory bird take is more severe, the Department of Defense has implemented extensive mitigation measures. In such instances, the responsible military service has taken practicable measures to minimize the impacts of its operations on protected migratory birds. Such measures include limiting the type and quantity of ordnance; limiting target areas and activities to places and times that protect key nesting areas for migratory birds; implementing fire-suppression programs or measures where wildfire can potentially damage nesting habitat; conducting environmental monitoring; and implementing mitigation measures, such as predator removal, on the site or nearby.

Monitoring the Impacts of Military Readiness Activities on Migratory Birds

The Authorization Act requires the Armed Forces to identify measures to monitor the impacts of military readiness activities on migratory birds. For military lands where migratory bird data may be lacking, monitoring may include the collection of baseline demographic, population, or habitat-association data. Where feasible, the Armed Forces will conduct agreed-upon monitoring to determine the level of take from military readiness activities.

Monitoring provides important data regarding the impacts of military readiness on migratory birds. It also contributes valuable information where data on species of migratory birds may be limited. In addition, monitoring data assists the Armed Forces in guiding their decisions regarding migratory bird conservation, particularly in developing or amending INRMPs.

The Department of Defense monitors bird populations that may be affected by military readiness activities in numerous ways. In addition to the MAPS program discussed above, Department of Defense facilities participate in the Breeding Biology Research and Monitoring Database (BBIRD) program to study nesting success and habitat requirements for breeding birds. Many installations also engage in Christmas bird counts, migration counts (Point, Circle, Area, or Flyover Counts), standardized and/or customized breeding and wintering point counts, grassland-bird flush counts, NEXRAD (discussed above) and BIRDRAD studies, point count surveys, hawk watches, overflight surveys, and/or rookery surveys. At sites where bird takes are a concern, such as Farallon de Medinilla in the Northern Marianas, the Department of Defense engages in more extensive monitoring, including overflight and rookery surveys several times a year, so that it can monitor trends in bird populations.

The Department of Defense is not alone in monitoring the status of birds on its installations. Much of its monitoring is done through formal partnerships with conservation organizations. In addition, Watchable Wildlife programs provide opportunities for the public to provide feedback on the numbers and types of birds they have observed from viewing sites on Department of Defense installations.

The Armed Forces can use clear evidence of bird takes, such as the sight of numerous dead or injured birds, as a signal that it should modify its activities, as practicable, to reduce the number of takes. With respect to the problem of bird/aircraft collisions, the Department of Defense undertakes intensive, bird-by-bird monitoring. The U.S. Air Force Safety Center's Bird/Wildlife Aircraft Strike Hazard team at Kirtland Air Force Base, NM, and the Navy Safety Center at Norfolk, VA, track aircraft/wildlife (bird and mammal) collisions because of the danger such collisions represent to pilots, crews, and aircraft. By focusing on local, regional, and seasonal populations and movements of birds, pilots and airport personnel have been better able to avoid collisions, in many cases by modifying those conditions at airfields that are attractive to birds.

What Are the Provisions of the Rule?

National Environmental Policy Act (NEPA) Considerations

NEPA, and the Council on Environmental Quality's (CEQ) NEPA implementing regulations at 40 CFR 1500–1508, require that Federal agencies prepare environmental impact statements for ''major Federal actions significantly affecting the quality of the human environment.'' These statements must include a detailed analysis of the impacts of an agency's proposed action and any reasonable alternatives to that proposal. NEPA requires the responsible Federal official to ''consult with and obtain comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved'' (42 U.S.C. 4332(2)(C)). NEPA also provides for public involvement in the decision-making process. The CEQ's regulations implementing NEPA emphasize the integration of the NEPA process with the requirements of other environmental laws. The CEQ regulations at 40 CFR 1500.2 state: ''Federal agencies shall to the fullest extent possible * * * integrate the requirements of NEPA with other planning and environmental review procedures required by law or by agency practice so that all such procedures run concurrently rather than consecutively.'' Regulations at 40 CFR 1502.25 state: ''To the fullest extent possible, agencies shall prepare draft environmental impact statements concurrently with and integrated with environmental impact analyses and related surveys and studies required by * * * other environmental review laws and executive orders.''

In keeping with this emphasis, the rule relies on the Armed Forces utilizing the NEPA process to determine whether any ongoing or proposed military readiness activity is ''likely to result in a significant adverse effect on the population of a migratory bird species.'' More particularly, the Armed Forces prepare NEPA analyses whenever they propose to undertake a new military readiness activity that may significantly affect the quality of the human environment; propose to make a substantial change to an ongoing military readiness activity that is

relevant to environmental concerns; learn of significant new circumstances or information relevant to the environmental concerns bearing on an ongoing military readiness activity; or prepare or revise an INRMP covering an area used for military readiness activities. During the preparation of environmental impact statements analyzing the effects of proposed military readiness activities on migratory bird species, the Armed Forces consult with the Service as an agency with ''jurisdiction by law and special expertise.'' If the Armed Forces identify a significant adverse effect on migratory birds during the preparation of a NEPA analysis, this rule requires the Armed Forces to confer and cooperate with the Service to develop and implement appropriate conservation measures to minimize or mitigate any such significant adverse effects. The Armed Forces will continue to be responsible for ensuring that military readiness activities are implemented in accordance with all applicable statutes including NEPA and ESA.

Endangered Species Act Consideration

Section 7(a)(1) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*) (ESA), provides that, ''[t]he Secretary [of the Interior] shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act.'' Furthermore, section 7(a)(2) requires all Federal agencies to insure that any action authorized, funded, or carried out is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of critical habitat. We completed an Intra-Service Consultation on the proposed rule and we have determined that this rule to authorize take under the MBTA will have no effect on listed species. The rule does not authorize take under the ESA. If a military readiness activity may affect a listed species, the Armed Forces retains responsibility for consulting with the Service under section 7(a)(2) of the ESA. Similarly, if a military readiness activity is likely to jeopardize the continued existence of a species proposed for listing, the Armed Forces retain responsibility for conferring with the Service in accordance with section 7(a)(4) of the ESA.

Rule Authorization

This rule authorizes the Armed Forces to take migratory birds as an incidental result of military readiness activities. The Armed Forces must continue to apply for and receive an MBTA permit for scientific collecting, control of birds causing damage to military property, or any other activity that is addressed by our existing permit regulations (50 CFR part 13, 21, 22). These activities may not be conducted under the authority of this rule. If any activity of the Armed Forces falls within the scope of our existing regulations, we will consider, when processing the application, the specific take requested as well as any other take authorized by this rule that may occur.

Authorization of take under this rule applies to take of migratory birds incidental to military readiness activities, including (a) all training and operations of the Armed Forces that relate to combat, and (b) the adequate and realistic testing of military equipment, vehicles, weapons, and sensors for proper operation and suitability for combat use. Authorization of take does not apply to (a) routine operation of installation operating support functions, such as: administrative offices; military exchanges; commissaries; water treatment facilities; storage facilities; schools; housing; motor pools; laundries; morale, welfare, and recreation activities; shops; and mess halls, (b) operation of industrial activities, or (c) construction or demolition of facilities listed above.

The authorization provided by this rule is subject to the military service conducting an otherwise lawful military readiness activity in compliance with the provisions of the rule. To ensure the Service maintains the ability to manage and conserve the resource, the Secretary retains the authority to withdraw or suspend authorization of take with respect to any specific military readiness activity under certain circumstances.

With respect to a military readiness activity of the Armed Forces likely to take migratory birds, the rule authorizes take provided the Armed Forces are in compliance with the following requirement:

> If the Armed Forces determine that ongoing or proposed activities may result in a significant adverse effect on the population of a migratory bird species, the Armed Forces must confer and cooperate with the Service to develop and implement appropriate conservation measures to minimize or mitigate such significant adverse effects.

The Armed Forces will continue to be responsible for addressing their activities other than military readiness through a MOU developed in accordance with Executive Order 13186, ''Responsibilities of Federal Agencies to Protect Migratory Birds,'' January 10, 2001.

When Is Take Not Authorized?

If a proposed or an ongoing action may have a significant adverse effect on a population of a migratory bird species, as that term is defined in Section 21.3, the Armed Forces must confer with the Service so that we may recommend conservation measures. In certain circumstances, the Secretary must suspend the take authorization with respect to a particular military readiness activity; in other circumstances, the Secretary has the discretion to initiate a process that may result in withdrawal. We will make every effort to work with the Armed Forces in advance of a potential determination to withdraw take authorization in order to resolve migratory bird take concerns and avoid withdrawal. With respect to discretionary withdrawal, the rule provides an elevation process if the Secretary of Defense or other national defense official appointed by the President and confirmed by the Senate determines that protection of national security requires continuation of the activity.

The Secretary will immediately suspend authorization for take if continued authorization likely would not be compatible with any one of the migratory bird treaties. Withdrawal of authorization may be proposed if the Secretary determines that failure to do so is likely to result in a significant adverse effect on a population of a migratory bird species and one or more of the following circumstances apply:

> (A) The Armed Forces have not implemented conservation measures that (i) are directly related to protecting the migratory bird species affected by the proposed military readiness activity; (ii) would significantly reduce take of migratory birds species affected by the military readiness activity, (iii) are economically feasible, and (iv) do not limit the effectiveness of military readiness activities.
>
> (B) The Armed Forces fail to conduct mutually agreed upon monitoring to determine the effects of a military readiness activity on migratory bird species and/or the efficacy of the conservation measures implemented by the Armed Forces.
>
> (C) The Armed Forces have not provided reasonably available information that the Secretary has determined is necessary to evaluate whether withdrawal of take authorization for the specific military readiness activity is appropriate.

The determination as to whether an immediate suspension of authorization is warranted (i.e., whether the action likely would not be compatible with a migratory bird treaty), or withdrawal of an authorization is proposed will be made independent of each other. Regardless of whether the circumstances of paragraphs (A) through (C) above

exist, there will be an immediate suspension if the Secretary determines, after seeking the views of the Secretary of Defense and after consulting with the Secretary of State, that incidental take of migratory birds during a specific military readiness activity likely would not be compatible with one or more of the migratory bird treaties.

Proposed withdrawal of authorization will be provided in writing to the Secretary of Defense including the basis for the determination. The notice will also specify any conservation measures or other measures that would, if the Armed Forces agree to implement them, allow the Secretary to cancel the proposed withdrawal of authorization. Any take incidental to a military readiness activity subject to a proposed withdrawal of authorization will continue to be authorized by this regulation until the Secretary of the Interior, or his/her delegatee, makes a final determination on the withdrawal.

The Secretary may, at his/her discretion, cancel a suspension or withdrawal of authorization at any time. A suspension may be cancelled in the event new information is provided that the proposed activity would be compatible with the migratory bird treaties. A proposed withdrawal may be cancelled if the Armed Forces modify the proposed activity to alleviate significant adverse effects on a population of a migratory bird species or the circumstances in paragraphs (A) through (C) above no longer exist. Cancellation of suspension or withdrawal of authorization becomes effective upon delivery of written notice from the Secretary to the Department of Defense.

Request for Reconsideration

In order to ensure that the action of the Secretary in not authorizing take does not result in significant harm to the Nation, any proposal to withdraw authorization under 50 CFR 21.15(b)(2) will be reconsidered by the Secretary or his/her delegatee who must be an official nominated by the President and confirmed by the Senate, if, within 45 days of the notification with respect to a military readiness activity, the Secretary of Defense, or other national defense official, who also must be an official nominated by the President and confirmed by the Senate, determines that protection of the national security requires continuation of the action.

Scope of Authorization

The take authorization provided by the rule applies to military readiness activities of the Armed Forces, including those implemented through contractors of the Armed Forces and their agents.

Principles and Standards

As discussed above, the only condition applicable to the authorization under this rule is that the Armed Forces confer and cooperate with the Service if the Armed Forces determine that a proposed or an ongoing military readiness activity may result in a significant adverse effect on a population of a migratory bird species. To avoid this threshold from being reached, as well as to provide for migratory bird conservation, it is in the best interest of the Armed Forces to address potential migratory bird impacts from military readiness activities by adopting the following principles and standards.

To proactively address migratory bird conservation, the Armed Forces should engage in early planning and scoping and involve agencies with special expertise in the matters relating to the potential impacts of a proposed action. When a proposed action by the Armed Forces related to military readiness may result in the incidental take of birds, the Armed Forces should contact the Service so we can assist the Armed Forces in addressing potential adverse impacts on birds and mitigating those impacts. As stated in this rule, the Armed Forces must confer with the Service when these actions may have a significant adverse effect on a population of a migratory bird species.

The Armed Forces will, in close coordination with the Service, develop a list of conservation measures designed to minimize and mitigate potential adverse impacts of authorized military readiness activities on affected migratory bird species. A cooperative approach initiated early in the project planning process will have the greatest potential for successfully reducing or eliminating adverse impacts. Our recommendations will emphasize avoidance, minimization, and rectifying adverse impacts. The Armed Forces should consider obvious avoidance measures at the outset of project planning, such as siting projects to avoid important nesting areas or to avoid collisions of birds with structures, or timing projects to avoid peak breeding activity. In addition, models such as the AHAS and BAM should be used to avoid bird activity when planning flight training and range use. The Armed Forces will consider these conservation measures for incorporation in new NEPA analyses, INRMPs, INRMP revisions, and base comprehensive or master plans, whenever adverse impacts to migratory birds may result from proposed military readiness activities.

''Conservation measures'' are project designs or mitigation activities that are technically and economically reasonable, and minimize the take of migratory birds and adverse impacts while allowing for completion of an action in a timely manner. When appropriate, the Armed Forces should adopt existing industry guidelines supported by the Service and developed to avoid or minimize take of migratory birds. We recognize that implementation of conservation measures will be subject to the availability of appropriations.

The Armed Forces should promote the inclusion of comprehensive migratory bird management objectives from bird conservation plans into the planning documents of the Armed Forces. The bird conservation plans, available either from the Service's Regional Offices or via the Internet, include: North American Waterfowl Management Plan, PIF, and the U.S. Shorebird Conservation Plan. The North American Waterbird Conservation Plan, the newest planning effort, addresses conservation of seabirds, wading birds, terns, gulls, and some marsh birds, and their habitats. The Armed Forces should also work collaboratively with partners to identify, protect, restore, and manage Important Bird Areas, Western Hemisphere Shorebird Reserve Network sites, and other significant bird sites that occur on Department of Defense lands. The Department of Defense should continue to work through the PIF program to incorporate bird habitat management efforts into INRMPs.

In accordance with the Authorization Act and the 2002 revised Sikes Act guidelines, the annual review of INRMPs by the Department of Defense, in cooperation with the Service and State fish and wildlife agencies, will include monitoring results of any migratory bird conservation measures.

The Armed Forces will use the best available databases to determine which migratory bird species are likely to occur in the area of proposed military readiness activities. This includes species likely to occur in the project area during all phases of the project.

The Armed Forces will use the best scientific data available to assess, through the NEPA process or other environmental requirements, the expected impact of proposed or ongoing military readiness activities on migratory bird species likely to occur in action areas. Special consideration will be given to priority habitats, such as important nesting areas, migration stop-over areas, and wintering habitats.

The Armed Forces will adopt, to the maximum extent practicable, conservation measures designed to minimize and mitigate any adverse impacts of authorized military readiness activities on affected migratory bird species. The term ''to the maximum extent practicable'' means without limiting the subject readiness activities in ways that compromise the effectiveness of those activities, and to the extent economically feasible.

At the Department of Defense's request, the Service will provide technical assistance in identifying the migratory bird species and determining those likely to be taken as a result of the proposed action, assessing impacts of the action on migratory bird species, and identifying appropriate conservation measures to mitigate adverse impacts.

Is this rule consistent with the MBTA?

Yes. This issue has two components. First is the question of whether the MBTA prohibits promulgation of regulations authorizing incidental take of migratory birds pursuant to military readiness activities. Second is the question of whether the details of this rule, individually and collectively, conflict with the MBTA in some way.

The starting point for answering both questions is the fact that Sections 704 and 712(2) of 16 U.S.C. provide us with broad authority to promulgate regulations allowing for the take of migratory birds when compatible with the terms of the migratory bird treaties. We find the take that is authorized in this rule is compatible with the terms of the treaties and consistent with the purposes of the treaties.

Regarding the first question, whether any such regulations are permissible under the MBTA, Congress itself by passing the Authorization Act determined that such regulations are consistent with the MBTA and the underlying treaties by requiring us to promulgate such regulations. Even in the absence of the Authorization Act, regulations authorizing take incidental to military readiness activities are compatible with the terms of the treaties, and therefore authorized by the MBTA.

The MBTA implements four treaties: a 1916 treaty with Great Britain on behalf of Canada that was substantially amended by a 1995 protocol; a 1936 treaty with Mexico, amended by a 1997 protocol; a 1972 treaty with Japan; and a 1978 treaty with the former Soviet Union. These international agreements recognize that migratory birds are important for a variety of purposes. They provide a food resource, insectivorous birds are useful to agriculture, they provide recreational benefits and are useful for scientific and educational purposes, and they are important for aesthetic, social, and spiritual purposes. Collectively, the treaties require the Unites States to provide mechanisms for protecting the birds and their habitats, and include special emphasis on protecting those birds that are in danger of extinction.

The Japan and Russia treaties each call for implementing legislation that broadly prohibits the take of migratory birds. At the same time, those treaties allow the implementing legislation to include exceptions to the take prohibitions. The treaties recognize a variety of purposes for which take may be authorized, including scientific, educational, and propagative purposes; the protection of persons or property; and hunting during open seasons. The treaties also contemplate authorizing takings ''for specific purposes not inconsistent with the objectives [or principles]'' of the treaties. The Canada treaty, since adoption of the 1995 Protocol, now includes similar language: ''the taking of migratory birds may be allowed * * * for * * * specific purposes consistent with the conservation principles of this Convention.''

In contrast, the take prohibitions required by the 1936 Mexico treaty have a narrower focus than the later treaties. The Mexico treaty is more clearly directed at stopping the indiscriminate killing of migratory birds by hunting and for commercial purposes through the establishment of closed seasons. In addition, even the language of the Mexico treaty that addresses the need for domestic regulation prohibiting certain activities with respect to migratory birds is subject to the objective ''to satisfy the need set forth in * * * Article[I].'' Article I provides: ''In order that the species may not be exterminated, the high contracting parties declare that it is right and proper to protect birds denominated as migratory, whatever may be their origin, which in their movements live temporarily in the United States of America and the United Mexican States, by means of adequate methods which will permit, in so far as the respective high contracting parties may see fit, the utilization of said birds rationally for purposes of sport, food, commerce and industry.'' Therefore, to the extent that the Mexico treaty is interpreted to have application to take beyond hunting and the like, that treaty must also be interpreted to allow the parties to authorize take that is consistent with the needs set forth in Article I.

The broad language of the exceptions in the Japan, Russia, and Canada treaties clearly indicate that the intent of the parties was not to prohibit all take of migratory birds. Just as clearly, the take of large absolute numbers of birds (e.g. millions of birds taken in sport hunting) is allowable under the treaties, so long as that take is ultimately limited in a way that is consistent with the conservation principles and objectives of the treaties. Thus, allowing for take incidental to military readiness activities is, as a general matter, consistent with the conservation principles and objectives of all three of these treaties.

The Mexico treaty does not require the parties to prohibit incidental take, and therefore allowing take incidental to military readiness activities cannot conflict with the terms of that treaty. And even if that treaty was read to apply more broadly, it is clear that the parties intended it only to require the rational regulation of take, not an absolute prohibition. Allowing take incidental to military readiness activities is consistent with the needs set forth in Article I. More broadly, we conclude that any incidental take allowed under the broad exceptions of the other three treaties is consistent with the Mexico treaty.

Turning to the second question, whether this particular rule governing take incidental to military readiness activities is consistent with the treaties (and therefore the MBTA), the take that is authorized here is for a special purpose consistent with the principles and objectives of the treaties. The authorization allows take of birds only in limited instances—take that results from military readiness activities. Furthermore, the rule expressly requires the Armed Forces to develop conservation measures to minimize or mitigate impacts where such impacts may have a significant adverse effect on a population of a migratory bird species. Moreover, the Secretary must suspend the take authorization if he/she concludes that a specific military readiness activity likely would not be compatible with the migratory bird treaties and may withdraw the authorization if he/she is unable to obtain from Armed Forces the information needed to assure compliance. Thus, the authorization in this rule in effect incorporates a safeguard that provides for compliance with the requirements of the treaties.

It is not entirely clear what level of effect on a migratory bird population would be required to constitute a violation of any of the treaties. It is clear, however, that the relatively minor

(at a population level) amount of take caused by military readiness activities is exceedingly unlikely to constitute a possible violation, even in the absence of any safeguards. When combined with the procedural safeguards set forth in this rule, there is no reasonable chance that a violation of the treaties will occur under this rule. In these circumstances, the take that would be authorized by this rule is thus compatible with the terms of the treaties and consistent with the purposes of those treaties.

The rule's process of broad, automatic authorization subject to withdrawal is particularly appropriate to military readiness activities. First, as noted above, we expect that military readiness activities will rarely, if ever, have the broad impact that would lead to a significant adverse effect on a population of migratory bird species, even absent the conservation measures that the Armed Forces undertake voluntarily or pursuant to another statute, such as the ESA. Second, the Armed Forces, like other federal agencies, have a special role in ensuring that the United States complies with its obligations under the four migratory bird treaties, as evidenced by the Migratory Bird Executive Order 13186 (January 10, 2001). Like other Federal agencies, the Armed Forces strive not only to lessen detrimental effects of their actions on migratory birds but to actively promote the conservation of the resource and integrate conservation principles and practices into agency programs. Numerous internal programs and collaborative ventures among Federal agencies and non-Federal partners have contributed significantly to avian conservation. These efforts are grounded in the tenets of stewardship inherent in our treaty obligations. Third, given the importance of military readiness to national security, it is especially important not to create a complex process that, while perhaps useful in other contexts, might impede the timely carrying-out of military readiness activities.

Why does the rule apply only to the Armed Forces?

This rule was developed in accordance with the Authorization Act, which created an interim period, during which the prohibitions on incidental take of migratory birds would not apply to military readiness activities, and required the development of regulations authorizing the incidental take of migratory birds associated with military readiness activities. This rule carries out the mandates of the Authorization Act. This rule authorizes take resulting from otherwise lawful military readiness activities subject to certain limitations and subject to withdrawal of the authorization to ensure consistency with the provisions of the treaties.

Required Determinations

Regulatory Planning and Review (E.O. 12866). In accordance with the criteria in Executive Order 12866, this rule is a significant regulatory action. OMB makes the final determination of significance under Executive Order 12866.

a. Analysis indicates this rule will not have an annual economic effect of $100 million or adversely affect an economic sector, productivity, jobs, the environment, or other units of government. This rule is intended to benefit the Department of Defense, and all of its branches of the Armed Forces, by providing a mechanism to comply with the MBTA and the treaties. A full cost-benefit and economic analysis is not required.

This rule will not affect small businesses or other segments of the private sector. It applies only to the Armed Forces. Thus, any expenditure under this rule will accrue only to the national defense agencies. Our current regulations allow us to permit take of migratory birds only for limited types of activities. This rule authorizes take resulting from the military readiness activities of the Armed Forces, provided the Armed Forces comply with certain requirements to minimize or mitigate significant adverse effects on a population of a migratory bird species.

Analysis of the annual economic effect of this rule indicates that it will have de minimis effects for the following reasons. Without the rule, the Armed Forces could be subject to injunction by third parties via the APA for lack of authorization under the MBTA for incidental takes of migratory birds that might result from military readiness activities. This rule will enable the Armed Forces to alleviate costs associated with responding to litigation as well as costs associated with delays in military training. Furthermore, the rule is structured such that the Armed Forces are not required to apply for individual permits to authorize take for every individual military readiness activity. The take authorization is conveyed by this rule. This avoids potential costs associated with staff necessary to prepare and review applications for individual permits to authorize military readiness activities that may result in incidental take of migratory birds, and the costs that would be attendant to delay.

The principal annual economic cost to the Armed Forces will likely be related to costs associated with developing and implementing conservation measures to minimize or mitigate impacts from military readiness activities that may have a significant adverse effect on a population of a migratory bird species. However, we anticipate that this threshold of potential effects on a population has a low probability of occurring. The Armed Forces are already obligated to comply with a host of other environmental laws, such as NEPA, which requires them to assess impacts of their military readiness activities on migratory birds, endangered and threatened species, and other wildlife. Most of the requirements of this rule will be subsumed by these existing requirements.

With this rule, the Armed Forces will have a regulatory mechanism to enable the Armed Forces to effectively implement otherwise lawful military readiness activities. Without the rule, the Armed Forces might not be able to complete certain military readiness activities that could result in the take of migratory birds pending issuance of an MBTA take permit or resolution of any lawsuits.

b. This rule will not create serious inconsistencies or otherwise interfere with the actions of the Armed Forces, including those other than military readiness. The Armed Forces must already comply with numerous environmental laws intended to minimize impacts to wildlife.

c. This rule will not materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients. This rule does not have anything to do with such programs.

d. This rule raises novel legal or policy issues. This rule raises a novel policy issue in that it implements a new area of our program to carry out the MBTA. Under 50 CFR 21.27, the Service has the authority to issue special purpose permits for take that is otherwise outside the scope of the standard form permits of section 21. Special purpose permits may be issued for actions whereby take of migratory birds could result as an unintended consequence. However, the Service has previously issued such permits only in very limited circumstances.

Regulatory Flexibility Act. For the reasons discussed under Regulatory Planning and Review above, I certify that this rule will not have a significant economic effect on a substantial number of small entities as defined under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.). A final Regulatory Flexibility Analysis is not required. Accordingly, a

Small Entity Compliance Guide is not required.

Small Business Regulatory Enforcement Fairness Act. This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule:

a. Will not have an annual effect on the economy of $100 million or more.

b. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.

c. Will not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

Unfunded Mandates Reform Act. In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501, et seq.):

a. This rule will not ''significantly or uniquely'' affect small governments. A Small Government Agency Plan is not required. We have determined and certified pursuant to the Unfunded Mandates Reform Act, 2 U.S.C. 1502 et seq., that this rulemaking will not impose a cost of $100 million or more in any given year on local or State government or private entities.

b. This rule will not produce a Federal mandate of $100 million or greater in any year, i.e., it is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act.

Takings. In accordance with Executive Order 12630, the rule does not have significant takings implications. A takings implication assessment is not required. The only effect of this rule is to authorize incidental takes of migratory birds by the Armed Forces as a result of military readiness activities. This rule will not result in the physical occupancy of property, the physical invasion of property, or the regulatory taking of any property.

Federalism. In accordance with Executive Order 13132, and based on the discussions in Regulatory Planning and Review above, this rule will not have significant Federalism effects. A Federalism assessment is not required. Due to the migratory nature of certain species of birds, and given the Federal Government's responsibility to implement the migratory bird treaties, Congress assigned the Federal Government responsibility over these species when it enacted the MBTA. This rule will not have a substantial direct effect on fiscal capacity, change the roles or responsibilities of Federal or State governments, or intrude on State policy or administration.

Civil Justice Reform. In accordance with Executive Order 12988, the Office of the Solicitor has determined that this rule will not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order. The intent of the rule is to relieve the Armed Forces and the judicial system from potential litigation resulting from potential take of migratory birds during military readiness activities. The Department of the Interior has certified to the Office of Management and Budget that this rule meets the applicable standards provided in Sections 3(a) and 3(b)(2) of Executive Order 12988.

Paperwork Reduction Act. This rule will not require any new information collections under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.). Under the Paperwork Reduction Act, we do not need to seek Office of Management and Budget (OMB) approval to collect information from current Federal employees, military personnel, military reservists, and members of the National Guard in their professional capacities. Because this rule will newly enable us to collect information only from employees of the Armed Forces in their professional capacity, we do not need to seek OMB approval under the Paperwork Reduction Act. In other cases, Federal agencies may not conduct or sponsor, and members of the public are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act. We have determined that this rule is categorically excluded under the Department of the Interior's NEPA procedures in Part 516 of the Departmental Manual, Chapter 2, Appendix 1, Categorical Exclusion 1.10. Categorical Exclusion 1.10 applies to: ''policies, directives, regulations, and guidelines of an administrative, financial, legal, technical or procedural nature and whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case.''

Military readiness activities of the Armed Forces occur across a broad geographic area covering a wide diversity of habitat types and potentially affecting a high diversity of migratory birds. Potential impacts on migratory birds will also vary spatially and temporally across the landscape. In addition, the specific type of military readiness activity will vary significantly among the Armed Forces, and the biological and geographical spectrum across which these activities may occur is potentially unique. Because of the broad spectrum of activities, their locations, habitat types, and migratory birds potentially present that may be affected by this rule, the potential impacts of military readiness activities conducted by the Armed Forces on the affected environment are too broad, speculative and conjectural to lend themselves to meaningful analysis. Thus, it is premature to examine potential impacts of the rule.

However, this determination does not diminish the responsibility of the Armed Forces to comply with NEPA and individual military readiness activities at issue will be subject to the NEPA process by the Armed Forces to evaluate any environmental impacts. Whenever the Armed Forces propose to undertake new military readiness activities or to adopt a new, or materially revised, Integrated Natural Resources Management Plan, and migratory bird species may be affected, the Armed Forces will consult with and obtain comments from the Service, an agency with ''jurisdiction by law or special expertise,'' upon their NEPA analysis. The NEPA analysis will include cumulative effects where applicable. In addition, if the potential for significant effects on migratory birds makes it appropriate, the Armed Forces may invite the Service to participate as a cooperating agency in the preparation of their NEPA analysis. Moreover, authorization under this rule requires that if a proposed military readiness activity may result in a significant adverse impact on a population of migratory bird species, the Armed Forces must confer and cooperate with the Service to develop and implement appropriate measures to minimize or mitigate these effects. The environmental consequences of the proposed military readiness activity, as well as the potential of any such measures to reduce the adverse effects of the proposed activity, would be covered in NEPA documentation prepared for the proposed action.

We have also determined that this authorization would not result in ''extraordinary circumstances'' whereby actions cannot be categorically excluded pursuant to 516 DM 2.3A(2). This rule only authorizes the incidental take of migratory birds (with limitations) as a result of military readiness activities. We are not authorizing the Armed Forces to implement military readiness activities that may have significant adverse impacts on natural resources, have highly controversial environment effects, or result in significant cumulative impacts. If an individual

military readiness action by the Armed Forces or the cumulative impacts of multiple activities may result in such an impact, then the Armed Forces will be responsible for completing an environmental analysis in accordance with NEPA. We are also not authorizing the take of a federally listed or proposed species. The Armed Forces must still comply with the Endangered Species Act.

Furthermore, we expect that military readiness activities will rarely, if ever, have the broad impact that would lead to a significant adverse effect on a population of a migratory bird species, even absent the conservation measures that the Armed Forces undertakes voluntarily or pursuant to another statute. The Armed Forces also have an important role in ensuring that the United States complies with the four migratory bird treaties, the Endangered Species Act, and other applicable regulations for individual ongoing or proposed military readiness activities.

A copy of the Service's Categorical Exclusion determination is available upon request at the address indicated in the **ADDRESSES** section of this rule.

Government-to-Government Relationship with Tribes. In accordance with the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951), E.O. 13175, and 512 DM 2, we have evaluated possible effects on federally recognized Indian tribes and have determined that there are no effects. This rule applies only to military readiness activities carried out by the Armed Forces that take migratory birds. It will not interfere with the Tribes' ability to manage themselves or their funds.

Energy Effects. On May 18, 2001, the President issued Executive Order 13211 on regulations that significantly affect energy supply, distribution, or use. This Executive Order requires agencies to prepare Statements of Energy Effects when undertaking certain actions. As this rule is not expected to significantly affect energy supply, distribution, or use, this action is not a significant energy action, and no Statement of Energy Effects is required.

List of Subjects in 50 CFR Part 21

Exports, Hunting, Imports, Reporting and recordkeeping requirements, Transportation, Wildlife.

■ For the reasons described in the preamble, we amend title 50, chapter I, subchapter B of the Code of Federal Regulations as follows:

PART 21—[AMENDED]

■ 1. The authority citation continues to read as follows:

Authority: Migratory Bird Treaty Act, 40 Stat. 755 (16 U.S.C. 703); Public Law 95–616, 92 Stat. 3112 (16 U.S.C. 712(2)); Public Law 106–108, 113 Stat. 1491, Note following 16 U.S.C. 703.

■ 2. Amend § 21.3 by adding the following definitions, in alphabetical order:

§ 21.3 Definitions.

* * * * *

Armed Forces means the Army, Navy, Air Force, Marine Corps, Coast Guard, and the National Guard of any State.

* * * * *

Conservation measures, as used in § 21.15, means project design or mitigation activities that are reasonable from a scientific, technological, and economic standpoint, and are necessary to avoid, minimize, or mitigate the take of migratory birds or other adverse impacts. Conservation measures should be implemented in a reasonable period of time.

* * * * *

Military readiness activity, as defined in Pub. L. 107–314, § 315(f), 116 Stat. 2458 (Dec. 2, 2002) [Pub. L. § 319 (c)(1)], includes all training and operations of the Armed Forces that relate to combat, and the adequate and realistic testing of military equipment, vehicles, weapons, and sensors for proper operation and suitability for combat use. It does not include (a) routine operation of installation operating support functions, such as: administrative offices; military exchanges; commissaries; water treatment facilities; storage facilities; schools; housing; motor pools; laundries; morale, welfare, and recreation activities; shops; and mess halls, (b) operation of industrial activities, or (c) construction or demolition of facilities listed above.

Population, as used in § 21.15, means a group of distinct, coexisting, conspecific individuals, whose breeding site fidelity, migration routes, and wintering areas are temporally and spatially stable, sufficiently distinct geographically (at some time of the year), and adequately described so that the population can be effectively monitored to discern changes in its status.

* * * * *

Secretary of Defense means the Secretary of Defense or any other national defense official who has been nominated by the President and confirmed by the Senate.

* * * * *

Significant adverse effect on a population, as used in § 21.15, means an effect that could, within a reasonable period of time, diminish the capacity of a population of migratory bird species to sustain itself at a biologically viable level. A population is ''biologically viable'' when its ability to maintain its genetic diversity, to reproduce, and to function effectively in its native ecosystem is not significantly harmed. This effect may be characterized by increased risk to the population from actions that cause direct mortality or a reduction in fecundity. Assessment of impacts should take into account yearly variations and migratory movements of the impacted species. Due to the significant variability in potential military readiness activities and the species that may be impacted, determinations of significant measurable decline will be made on a case-by-case basis.

■ 3. Amend part 21, subpart B, by adding a new § 21.15 as follows:

§ 21.15 Authorization of take incidental to military readiness activities.

(a) *Take authorization and monitoring.*

(1) Except to the extent authorization is withdrawn or suspended pursuant to paragraph (b) of this section, the Armed Forces may take migratory birds incidental to military readiness activities provided that, for those ongoing or proposed activities that the Armed Forces determine may result in a significant adverse effect on a population of a migratory bird species, the Armed Forces must confer and cooperate with the Service to develop and implement appropriate conservation measures to minimize or mitigate such significant adverse effects.

(2) When conservation measures implemented under paragraph (a)(1) of this section require monitoring, the Armed Forces must retain records of any monitoring data for five years from the date the Armed Forces commence their action. During Integrated Natural Resource Management Plan reviews, the Armed Forces will also report to the Service migratory bird conservation measures implemented and the effectiveness of the conservation measures in avoiding, minimizing, or mitigating take of migratory birds.

(b) *Suspension or Withdrawal of take authorization.*

(1) If the Secretary determines, after seeking the views of the Secretary of Defense and consulting with the Secretary of State, that incidental take of migratory birds during a specific military readiness activity likely would not be compatible with one or more of

the migratory bird treaties, the Secretary will suspend authorization of the take associated with that activity.

(2) The Secretary may propose to withdraw, and may withdraw in accordance with the procedures provided in paragraph (b)(4) of this section the authorization for any take incidental to a specific military readiness activity if the Secretary determines that a proposed military readiness activity is likely to result in a significant adverse effect on the population of a migratory bird species and one or more of the following circumstances exists:

(i) The Armed Forces have not implemented conservation measures that:

(A) Are directly related to protecting the migratory bird species affected by the proposed military readiness activity;

(B) Would significantly reduce take of the migratory bird species affected by the military readiness activity;

(C) Are economically feasible; and

(D) Do not limit the effectiveness of the military readiness activity;

(ii) The Armed Forces fail to conduct mutually agreed upon monitoring to determine the effects of a military readiness activity on migratory bird species and/or the efficacy of the conservation measures implemented by the Armed Forces; or

(iii) The Armed Forces have not provided reasonably available information that the Secretary has determined is necessary to evaluate whether withdrawal of take authorization for the specific military readiness activity is appropriate.

(3) When the Secretary proposes to withdraw authorization with respect to a specific military readiness activity, the Secretary will first provide written notice to the Secretary of Defense. Any such notice will include the basis for the Secretary's determination that withdrawal is warranted in accordance with the criteria contained in paragraph (b)(2) of this section, and will identify any conservation measures or other measures that would, if implemented by the Armed Forces, permit the Secretary to cancel the proposed withdrawal of authorization.

(4) Within 15 days of receipt of the notice specified in paragraph (b)(3) of this section, the Secretary of Defense may notify the Secretary in writing of the Armed Forces' objections, if any, to the proposed withdrawal, specifying the reasons therefore. The Secretary will give due consideration to any objections raised by the Armed Forces. If the Secretary continues to believe that withdrawal is appropriate, he or she will provide written notice to the Secretary of Defense of the rationale for withdrawal and response to any objections to the withdrawal. If objections to the withdrawal remain, the withdrawal will not become effective until the Secretary of Defense has had the opportunity to meet with the Secretary within 30 days of the original notice from the Secretary proposing withdrawal. A final determination regarding whether authorization will be withdrawn will occur within 45 days of the original notice.

(5) Any authorized take incidental to a military readiness activity subject to a proposed withdrawal of authorization will continue to be authorized by this regulation until the Secretary makes a final determination on the withdrawal.

(6) The Secretary may, at his or her discretion, cancel a suspension or withdrawal of authorization at any time. A suspension may be cancelled in the event new information is provided that the proposed activity would be compatible with the migratory bird treaties. A proposed withdrawal may be cancelled if the Armed Forces modify the proposed activity to alleviate significant adverse effects on the population of a migratory bird species or the circumstances in paragraphs (b)(2)(i) through (iii) of this section no longer exist. Cancellation of suspension or withdrawal of authorization becomes effective upon delivery of written notice from the Secretary to the Department of Defense.

(7) The responsibilities of the Secretary under paragraph (b) of this section may be fulfilled by his/her delegatee who must be an official nominated by the President and confirmed by the Senate.

Dated: July 25, 2006.

Matt Hogan,

Acting Assistant Secretary for Fish and Wildlife and Parks.

Dated: April 10, 2006.

Philip W. Grone,

Deputy Under Secretary of Defense (Installations and Environment).

This document was received at the Office of the Federal Register on February 23, 2007.

[FR Doc. E7–3443 Filed 2–27–07; 8:45 am]

BILLING CODE 4310–55–P

the public of our intention to conduct detailed planning on this refuge.

Background

The CCP Process

The National Wildlife Refuge System Administration Act of 1966 (16 U.S.C. 668dd–668ee) (Administration Act), as amended by the National Wildlife Refuge System Improvement Act of 1997, requires us to develop a CCP for each national wildlife refuge. The purpose of developing a CCP is to provide refuge managers with a 15-year plan for achieving refuge purposes and contributing to the mission of the National Wildlife Refuge System (NWRS), consistent with sound principles of fish and wildlife conservation, legal mandates, and our policies. In addition to outlining broad management direction on conserving wildlife and their habitats, CCPs identify wildlife-dependent recreational opportunities available to the public, including opportunities for hunting, fishing, wildlife observation and photography, and environmental education and interpretation. We will review and update the CCP at least every 15 years in accordance with the Administration Act.

Each unit of the NWRS was established for specific purposes. We use these purposes as the foundation for developing and prioritizing the management goals and objectives for each refuge within the NWRS, and to determine how the public can use each refuge. The planning process is a way for us and the public to evaluate management goals and objectives that will ensure the best possible approach to wildlife, plant, and habitat conservation, while providing for wildlife-dependent recreation opportunities that are compatible with each refuge's establishing purposes and the mission of the NWRS.

Our CCP process provides participation opportunities for Federal, Tribal, State, and local governments, agencies, organizations, and the public. Throughout the process, we will have formal comment periods and hold public meetings to gather comments, issues, concerns, ideas, and suggestions for the future management of Plum Tree Island NWR. You may also send comments during the planning process by mail, email, or fax (see **ADDRESSES**).

We will conduct the environmental review of this project and develop an EA in accordance with the requirements of the National Environmental Policy Act of 1969, as amended (NEPA) (42 U.S.C. 4321 *et seq.*); NEPA regulations (40 CFR parts 1500–1508); other appropriate Federal laws and regulations; and our policies and procedures for compliance with those laws and regulations.

Plum Tree Island National Wildlife Refuge

Plum Tree Island NWR is one of four refuges that comprise the Eastern Virginia Rivers NWR Complex. The 3,502-acre refuge is located along the Atlantic Flyway in the city of Poquoson, VA. It was established in 1972 to conserve wetlands and important migratory bird habitat in the lower Chesapeake Bay. The refuge's salt marsh, scrub-shrub, and forest habitats support a variety of native wildlife species, including waterfowl, marshbirds, and shorebirds. The refuge's beaches are also home to the federally threatened northeastern beach tiger beetle (*Cicindela dorsalis dorsalis*).

The U.S. Department of Defense previously administered the refuge lands and used all but the refuge's 200-acre Cow Island Tract as a gunnery and bombing range. Extensive unexploded ordnance remains on the refuge, posing serious safety concerns. Most of the refuge is closed to public access. The only public use offered is an annual, permit-only, waterfowl hunt on the Cow Island Tract.

Scoping: Preliminary Issues, Concerns, and Opportunities

We have identified several preliminary issues, concerns, and opportunities that we intend to address in the CCP. These include the following:

- Unexploded ordnance on the refuge and its implications for refuge management and public access;
- The potential for climate change to impact refuge resources;
- The potential for land acquisition and conservation easements within the existing, approved boundary;
- Opportunities to collaborate with partner organizations for off-refuge interpretation and education programming.

We expect that members of the public, our conservation partners and Federal, State, Tribal, and local governments may identify additional issues during public scoping.

Public Meetings

During the planning process, we will hold public meetings for individuals, organizations, and agencies to provide comments, issues, concerns, and suggestions about refuge management. When we schedule formal comment periods and public meeting(s), we will announce them in the **Federal Register**, local news media, and on our refuge planning Web site at *http://www.fws.gov/northeast/plumtreeisland/refuge_planning.html.*

You can also obtain the schedule from the planning team leader or project leader (see **FOR FURTHER INFORMATION CONTACT**).

Public Availability of Comments

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: December 5, 2011.

Salvatore M. Amato,

Acting Regional Director, Northeast Region, U.S. Fish and Wildlife Service.

[FR Doc. 2012–293 Filed 1–9–12; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R1–MB–2011–N256; FXMB12310100000P2–123–FF01M01000]

Special Purpose Permit Application; Draft Environmental Assessment; Hawaii-Based Shallow-Set Longline Fishery

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability; request for comments.

SUMMARY: We, the Fish and Wildlife Service, have received an application under the Migratory Bird Treaty Act of 1918, as amended (MBTA), from the Pacific Islands Regional Office of the National Marine Fisheries Service (NMFS), Department of Commerce, for a permit for the incidental take of migratory birds in the operation of the Hawaii-based shallow-set longline fishery that targets swordfish (*Xiphias gladius*). If issued, the permit would be the first of its kind under our Special Purpose permitting regulations. We invite public comment on the draft environmental assessment (DEA), which evaluates alternatives associated with this permit application.

DATES: To ensure consideration, please send your written comments by February 9, 2012.

ADDRESSES: You may download a copy of the DEA on the Internet at *http://*

www.fws.gov/pacific/migratorybirds/nepa.html. Alternatively, you may use one of the methods below to request a hard copy or a CD–ROM. Please specify the ''DEA for the NMFS MBTA Permit'' on all correspondence.

Submitting Comments: You may submit comments or requests for copies or more information by one of the following methods.

- *Email: pacific_birds@fws.gov*. Include ''DEA for the NMFS MBTA Permit'' in the subject line of the message.
- *U.S. Mail:* Please address written comments to Michael Green, Acting Chief, Division of Migratory Birds and Habitat Programs, Pacific Region, U.S. Fish and Wildlife Service, 911 NE 11th Ave., Portland, OR 97232.
- *Fax:* Michael Green, Acting Chief, Division of Migratory Birds and Habitat Programs, (503) 231–2019; Attn.: DEA for the NMFS MBTA Permit.

FOR FURTHER INFORMATION CONTACT: Michael Green, Acting Chief, Division of Migratory Birds and Habitat Programs, Pacific Region, U.S. Fish and Wildlife Service, (503) 231–2019 (phone); *pacific_birds@fws.gov* (email, include ''DEA for the NMFS MBTA Permit'' in the subject line of the message). If you use a telecommunications device for the deaf (TDD), please call the Federal Information Relay Service (FIRS) at (800) 877–8339.

SUPPLEMENTARY INFORMATION:

Introduction

The U.S. Fish and Wildlife Service (Service) has received an application from NMFS for a special purpose permit under the Migratory Bird Treaty Act of 1918 (16 U.S.C. 703–711) (MBTA). The permit, if issued, would authorize incidental take of migratory birds, principally two species of albatross, by NMFS in its regulation of the shallow-set longline fishery based in Hawaii. This fishery targets swordfish and operates on the high seas and within the United States Exclusive Economic Zone (EEZ). The migratory birds incidentally taken in the fishery are predominantly Laysan and Black-footed Albatross (*Phoebastria immutabilis* and *P. nigripes*). One individual each of Sooty Shearwater (*Puffinus griseus*) and Northern Fulmar (*Fulmarus glacialis*) have been reported taken in the fishery. The endangered Short-tailed Albatross (*Phoaebastria albatrus*) occurs in the area where the fishery operates and has been observed from Hawaii-based longline fishing vessels, but no take of this species has been reported. Consultation under section 7(a)(2) of the Endangered Species Act is in progress to assess the impacts of this fishery on the Short-tailed Albatross.

The Draft Environmental Assessment (DEA) analyzes the alternatives associated with this permit application in light of our permitting regulations in the Code of Federal Regulations (CFR) in 50 CFR 21.27 under the MBTA. If we issue the permit at issue in this environmental assessment, it will be the first permit under these regulations issued to authorize incidental take of migratory birds by an agency regulating a commercial, non-conservation activity.

Background

Regulations under the MBTA allow the Service to issue permits to take migratory birds for various reasons, such as depredation and scientific collecting. One of those regulations, 50 CFR 21.27, allows the Service to issue special purpose permits in circumstances not addressed by specific permit regulations. An application for a special purpose permit must meet the general permitting conditions set forth in 50 CFR 13 and make a ''sufficient showing'' of:

- Benefit to the migratory bird resources,
- Important research reasons,
- Reasons of human concern for individual birds, or
- Other compelling justification.

We will issue a special purpose permit only if we determine that the take is compatible with the conservation intent of the MBTA. Standard conditions for permit issuance include those described in 50 CFR 13.21(e) and 21.27(c).

The Hawaii-based longline fishery that targets swordfish is a pelagic or open-ocean fishery that began in the late-1980s and has since been managed under the Fishery Management Plan for the Pelagic Fisheries of the Western Pacific Region. Shallow-set longlining consists of deploying a mainline 18 to 60 nautical miles in length with floats at 360-meter (m) intervals. The mainline depth is 25 to 75 m. About four branchlines, 10 to 20 m in length, with baited hooks and artificial light sticks to attract swordfish, are suspended between floats, for a total of approximately 700 to 1,000 hooks per deployment. The line is deployed, or ''set,'' after sunset, left in the water overnight, and retrieved, or ''hauled,'' in the morning. Seabirds, as well as sea turtles and other non-target species, can be killed or injured during either deployment or retrieval of the lines, when they are unintentionally hooked or entangled in fishing gear.

The shallow-set sector of the Hawaii-based longline fishery operates under NMFS regulations requiring the use of measures to avoid and minimize the injury and death of seabirds (67 FR 34408, 69 FR 17329, 70 FR 75075). These regulations were in place when the fishery was reopened in 2004 following a court-ordered closure in 2001 that addressed concerns about endangered sea turtles. Between 2004 and 2010, the fishery has taken (killed or injured) an estimated total of 332 Laysan and 118 Black-footed albatrosses, an annual average of roughly 55 and 20 birds of each species, respectively. These levels of take are expected to continue, and are not thought to pose a risk of population-level impacts or change in conservation status for either species.

The Pacific Islands Regional Office of NMFS manages and regulates this fishery under the Fishery Management Plan, which was developed by the Western Pacific Regional Fishery Management Council and approved by the Secretary of Commerce, in accordance with the Magnuson-Stevens Act (16 U.S.C. 1801 *et seq.*) (MSA). Under the MSA, Fishery Councils are vested with the authority to propose amendments to Fishery Management Plans. NMFS may approve or partially approve proposed amendments; approvals are codified as Federal regulations. In 2010, regulations went into effect to implement an amendment that removed the restriction on fishing effort (annual number of sets) in this fishery that had been in place since 2004. Because fishing effort never reached the limit that has now been removed, and effort is increasing only slowly, NMFS anticipates that total effort in the fishery will not increase substantially between 2011 and 2014, the period that would be covered by a permit under the MBTA.

Applicant's Proposal

NMFS proposes to continue operation of the shallow-set fishery under current regulations that require the use of measures to avoid and minimize take of migratory birds. In addition to continued implementation of these regulations, NMFS proposes to analyze the high proportion of the total observed take in this fishery that occurs as injured birds. Specifically, NMFS would examine the role of untended or ''lazy'' lines, offal discards, and other practices in making hooks and gear available to seabirds and possibly attracting and habituating seabirds to longline vessels, especially during gear retrieval. The results of these assessments would be reported to the Service, and reports

would include any new information that could further reduce the take of seabirds in the fishery or point to research needed to achieve reduction. If new analyses and qualitative assessments lead to identification of means to reduce take of migratory birds, NMFS would develop these remedies so that they could be incorporated into NMFS regulatory processes in a timely fashion. If new information does not lead to modified or new practices that could reduce take of migratory birds in the fishery, NMFS would develop study plans for needed research and/or a proposal or proposals to offset the unavoidable take in the fishery in a manner that would not affect operation of the fishery. These additional activities were described in materials submitted as part of the permit application, and if we issue the permit after completion of the National Environmental Policy Act (NEPA) process, then these commitments would become conditions of the permit.

The Service independently evaluated the estimated total and average number, and the nominal rate, of seabirds taken in the fishery. This evaluation, in relation to the existing avoidance and minimization measures, proposed new activities, and potential offsetting conservation measures, is discussed in the DEA, along with the implications for direct, indirect, and cumulative effects under three alternatives.

Next Steps

The public process for the proposed Federal permit action will be completed after the public-comment period, at which time we will evaluate the permit application and comments submitted on the DEA and determine whether the application meets the permitting requirements under the MBTA and applicable regulations. Upon completion of that evaluation we will select our course of action among the three alternatives identified in the DEA. We then will either issue a final environmental assessment and a Finding of No Significant Impact or initiate the preparation of an Environmental Impact Statement.

Public Comments

We invite public comment on the DEA. You may submit comments by any one of the methods discussed above under **ADDRESSES**.

Public Availability of Comments

Before including your address, phone number, email address, or other personal identifying information in your comments, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority

We provide this notice under section 668a of the Act (16 U.S.C. 668–668c) and NEPA regulations (40 CFR 1506.6).

Dated: December 23, 2011.

Richard Hannan,

Deputy Regional Director, Pacific Region, Portland, Oregon.

[FR Doc. 2012–192 Filed 1–9–12; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R5–R–2011–N221; BAC–4311–K9–S3]

Massasoit National Wildlife Refuge, Plymouth, MA

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of intent to prepare a comprehensive conservation plan and environmental assessment; request for comments.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), intend to prepare a comprehensive conservation plan (CCP) and environmental assessment (EA) for Massasoit National Wildlife Refuge (the refuge, NWR) in Plymouth, Massachusetts. We provide this notice in compliance with our CCP policy to advise other Federal and State agencies, Tribes, and the public of our intention to conduct detailed planning on this refuge.

DATES: We will announce opportunities for public input throughout the CCP process in the **Federal Register,** local news media, and on our refuge planning Web site at *http://www.fws.gov/northeast/planning/Eastern%20Mass%203/ccphome.html.*

ADDRESSES: Send your comments or requests for more information by any of the following methods.

Email: northeastplanning@fws.gov. Include ''Massasoit CCP'' in the subject line of the message.

Fax: Attn: Carl Melberg, (978) 443–2898.

U.S. Mail: Eastern Massachusetts National Wildlife Refuge Complex, U.S. Fish and Wildlife Service, 73 Weir Hill Road, Sudbury, MA 01776.

In-Person Drop-off: You may drop off comments during regular business hours at the address above.

FOR FURTHER INFORMATION CONTACT: Carl Melberg, Planning Team Leader, (978) 443–4661 extension 32 (telephone), or Libby Herland, Project Leader, (978) 443–4661 extension 11 (telephone), or *fw5rw_emnrw@fws.gov* (email).

SUPPLEMENTARY INFORMATION:

Introduction

With this notice, we initiate our process for developing a CCP for Massasoit NWR, in Plymouth, Massachusetts. This notice complies with our CCP policy to advise other Federal and State agencies, Tribes, and the public of our intention to conduct detailed planning on this refuge.

Background

The CCP Process

The National Wildlife Refuge System Administration Act of 1966 (16 U.S.C. 668dd–668ee) (Administration Act), as amended by the National Wildlife Refuge System Improvement Act of 1997, requires us to develop a CCP for each national wildlife refuge. The purpose for developing a CCP is to provide refuge managers with a 15-year plan for achieving refuge purposes and contributing toward the mission of the National Wildlife Refuge System (NWRS), consistent with sound principles of fish and wildlife management and conservation, legal mandates, and our policies. In addition to outlining broad management direction on conserving wildlife and their habitats, CCPs identify wildlife-dependent recreational opportunities available to the public, including opportunities for hunting, fishing, wildlife observation and photography, and environmental education and interpretation. We will review and update the CCP at least every 15 years in accordance with the Administration Act.

Each unit of the NWRS was established for specific purposes. We use these purposes as the foundation for developing and prioritizing the management goals and objectives for each refuge within the NWRS, and to determine how the public can use each refuge. The planning process is a way for us and the public to evaluate management goals and objectives that will ensure the best possible approach to wildlife, plant, and habitat conservation, while providing for wildlife-dependent recreation opportunities that are compatible with each refuge's establishing purposes and the mission of the NWRS.

Our CCP process provides participation opportunities for Tribal, State, and local governments, agencies,

A permit granted by us under section 10(a)(1)(A) of the Act authorizes the permittee to conduct activities (including take or interstate commerce) with respect to U.S. endangered or threatened species for scientific purposes or enhancement of propagation or survival. Our regulations implementing section 10(a)(1)(A) of the Act for these permits are found at 50 CFR 17.22 for endangered wildlife species, 50 CFR 17.32 for threatened wildlife species, 50 CFR 17.62 for endangered plant species, and 50 CFR 17.72 for threatened plant species.

Application Available for Review and Comment

We invite local, State, and Federal agencies, and the public to comment on the following application. Please refer to the appropriate permit number for the application when submitting comments.

Documents and other information submitted with this application are available for review by request from the Endangered Species Program Manager at the address listed in the **ADDRESSES** section of this notice, subject to the requirements of the Privacy Act (5 U.S.C. 552a) and Freedom of Information Act (5 U.S.C. 552).

Permit Number: TE–80538A

Applicant: H. T. Harvey & Associates, Los Gatos, California.

The applicant requests a permit to take (capture, tissue sample, radio-tag, and release) the Hawaiian hoary bat (*Lasiurus cinereus semotus*) in conjunction with monitoring and population studies in Hawaii for the purpose of enhancing the species' survival.

Public Availability of Comments

All comments and materials we receive in response to this request will be available for public inspection, by appointment, during normal business hours at the address listed in the **ADDRESSES** section of this notice.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority

We provide this notice under section 10 of the Act (16 U.S.C. 1531 *et seq.*).

Dated: August 9, 2012.

Richard R. Hannan,

Acting Regional Director, Pacific Region, U.S. Fish and Wildlife Service.

[FR Doc. 2012–20364 Filed 8–17–12; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R1–MB–2012–N167; FXMB12320100000P2–123–FF01M01000]

Special Purpose Permit Application; Hawaii-Based Shallow-Set Longline Fishery; Final Environmental Assessment and Finding of No Significant Impact

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability.

SUMMARY: We, the Fish and Wildlife Service, announce the availability of a final environmental assessment (FEA) and finding of no significant impact (FONSI) in our analysis of permitting actions in response to an application under the Migratory Bird Treaty Act of 1918, as amended, from the Pacific Islands Regional Office of the National Marine Fisheries Service (NMFS), Department of Commerce. NMFS applied for a permit for the incidental take of migratory birds in the operation of the Hawaii-based shallow-set longline fishery, which targets swordfish. After evaluating several alternatives in a draft environmental assessment (DEA), we have determined that issuing a permit will not result in significant impacts to the human environment.

ADDRESSES: You may download a copy of the FEA and FONSI on the Internet at *http://www.fws.gov/pacific/migratorybirds/nepa.html.* Alternatively, you may use one of the methods below to request a hard copy or a CD–ROM. Please specify the ''FEA/FONSI for the NMFS MBTA Permit'' on all correspondence.

- *Email: pacific_birds@fws.gov.* Include ''FEA/FONSI for the NMFS MBTA Permit'' in the subject line of the message.
- *U.S. Mail:* Please address requests for hard copies of the documents to Nanette Seto, Chief, Division of Migratory Birds and Habitat Programs, Pacific Region, U.S. Fish and Wildlife Service, 911 NE. 11th Ave., Portland, OR 97232.
- *Fax:* Nanette Seto, Chief, Division of Migratory Birds and Habitat Programs, 503–231–2019; Attn.: FEA/FONSI for the NMFS MBTA Permit.

FOR FURTHER INFORMATION CONTACT: Nanette Seto, Chief, Division of Migratory Birds and Habitat Programs, Pacific Region, U.S. Fish and Wildlife Service, 503–231–6164 (phone); *pacific_birds@fws.gov* (email; include ''FEA/FONSI for the NMFS MBTA Permit'' in the subject line of the message). If you use a telecommunications device for the deaf (TDD), please call the Federal Information Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Introduction

After receiving the permit application from NMFS, we provided a public notice and summary background information and solicited public comments on the DEA in January 2012 (77 FR 1501). We have now considered comments, finalized our analysis, and selected an alternative that meets the purpose and need of our action (issuance of a permit under the MBTA). We have determined that issuing a permit will not result in significant impacts to the human environment.

We evaluated several alternatives for the proposed issuance of a permit under the Migratory Bird Treaty Act (MBTA) for incidental take of seabirds in the shallow-set longline fishery based in Hawaii. The analysis of alternatives is documented in a final environmental assessment (FEA), which is available to the public on our Web site or by request (see **ADDRESSES**). Our need in conducting this evaluation was to address an application received from NMFS for a permit to authorize take of migratory birds (seabirds) in the shallow-set longline fishery based in Hawaii. The purposes of our permitting action include: (1) Ensuring that any permit issued meets the criteria established in our regulations under MBTA and does not violate our statutory responsibility to conserve migratory birds; (2) ensuring the Service and NMFS meet their responsibilities under Executive Order 13186 to protect migratory birds and avoid and minimize adverse impacts of our actions to these birds; (3) identifying the mechanisms underlying the take of migratory birds in the fishery; developing, in cooperation with the Service, measures for NMFS and the fishery to implement that would reduce that take or otherwise improve conservation benefit for birds; and (4) minimizing unnecessary costs or burdens on the fishery itself, or on NMFS in its role as regulator.

We analyzed three alternatives in the FEA:

1. No action. Under the No Action alternative, we would deny the permit application and not issue a permit to NMFS. We rejected consideration of a separate alternative of literally taking no action, and not even responding to the permit application, because it is our policy to process all applications received as quickly as possible (50 CFR 13.11(c)).

2. Issue permit as requested (*selected alternative*). The permit would reflect the current operation of the fishery, including the seabird-deterrent measures currently required by NMFS regulations and the Service's Biological Opinion for the impacts of this fishery to the endangered Short-tailed Albatross (*Phoebastria albatrus*), with no changes, regulatory or otherwise, to the operation of the fishery during the permit period. No new regulations governing the operation of the fishery would be proposed. The permit would authorize the observed and reported take of specific numbers of each species, and would include conditions requiring NMFS to analyze observer data and fishery practices to elucidate how and when take is occurring now and identify measures that could reduce this take in the future. In addition, NMFS would be required to provide instruction regarding the importance of seabird-data collection to observers and include specific discussion at Protected Species Workshops for fishers of how and when seabird interactions occur during shallow-set fishing. The permit would specify requirements for reporting the progress on data analysis and identification of additional potential measures for reducing take and the extent of training and information-exchange activities. Reporting would also describe research, if any is identified, needed to help identify measures that could reduce this take in the future. Compliance with these requirements would be considered in a future permit renewal.

3. Issue permit with additional conditions to conduct research and to increase conservation benefit to seabirds. Rather than analyze existing and future observer data and elicit additional information from observers and fishers (as in Alternative 2), Alternative 3 would require research and field trials of new deterrent methods and technologies or those already in use in the industry to develop means to reduce take in the fishery during the 3-year term of the permit. Alternative 3 is otherwise the same as Alternative 2.

Internal Scoping and Public Involvement

We solicited comments on an internal draft of the EA from other programs within the Service, and provided responses in a final draft EA (DEA) that was available to the public from January 10 through February 9, 2012 (77 FR 1501). During the public comment period, we received a total of eight comment letters: One from a federal agency, one from a Fishery Management Council, one from a fishery industry organization, two from conservation organizations, and three from private citizens. The final EA incorporates minor changes to address technical comments and provides narrative responses to substantive comments. Some of these comments touch on policy and legal questions that are raised or implied by, but that do not themselves affect, our permitting action. However, none of the commenters provided additional information that (1) changed the outcome of our analysis or (2) required a finding that our action would have a significant impact.

Impact Analysis

The Impacts Analysis in the EA considered direct, indirect, and cumulative effects of the alternatives on seabirds, the fishery and economic environment, and cultural resources. We found that none of the alternatives would have significant impacts to any of these aspects of the human environment. The alternatives would not have significant adverse impacts to seabirds, because the take of seabirds in this fishery is low. Laysan and Black-footed albatrosses comprise roughly 99 percent of all take of migratory birds in the fishery. The projected take of these species in each year of the 3-year term of a permit, and the slightly greater amount of annual take that would be authorized in a permit (a total of no more than 191 Black-footed and 430 Laysan albatrosses over the 3-year permit term), would constitute less than 1 percent of the total estimated breeding population of each species each year. This level of take does not contribute substantially to the cumulative total take of these seabirds estimated to occur each year in all North Pacific longline fisheries. The other three seabird species analyzed in the FEA are the Sooty Shearwater, Northern Fulmar, and the endangered Short-tailed Albatross. The shearwater and fulmar are represented by one individual bird each in the data on observed take in the fishery. We would authorize take of no more than 10 birds annually of each of these two species. Although no Short-tailed Albatrosses have been reported taken in the fishery, impacts of the fishery to this species have been evaluated under the Endangered Species Act, and take at a rate of one bird every 5 years has been authorized in the Service's Biological Opinion.

The beneficial impacts of the action involve only seabirds. These beneficial impacts are minor. Although either Alternative 2 or 3 would result in improved information about sources of take in the fishery and means of reducing take, neither would result in an additional reduction in take in the fishery during the 3-year permit term. However, the long-term goal of this (and any subsequent) permitting action is the eventual further reduction of seabird take in this fishery.

The alternatives do not have a significant impact on the fishery or economic environment. Although the alternatives variously may result in slight changes in costs to NMFS (for example, to analyze data or conduct field trials), none of the alternatives would result in any major change in the operation of the fishery. No cultural resources as defined under the National Historic Preservation Act are significantly affected by the alternatives because the fishery operates in the 200-mile U.S. Exclusive Economic Zone and on the high seas, far from historic sites.

Determination

Alternative 2 will meet fully the purposes and needs of the proposed permitting action described above (and described in more detail in Chapter 1 of the FEA). This alternative also represents initial steps toward the long-term goal of reducing take of seabirds in this fishery. We determine that implementation of Alternative 2 does not constitute a major Federal action significantly affecting the quality of the human environment under the meaning of section 102(2)(c) of the National Environmental Policy Act of 1969 (as amended). As such, an environmental impact statement is not required.

Authority

We provide this notice under section 668a of the Act (16 U.S.C. 668–668c) and NEPA regulations (40 CFR 1506.6).

Dated: July 20, 2012.

Jason Holm,

Acting Regional Director, Pacific Region, Portland, Oregon.

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