

Armed Forces Authorization under the Migratory Bird Treaty Act Questions and Answers

How does the Migratory Bird Treaty Act protect birds?

Under provisions of the Migratory Bird Treaty Act, no one may take, pursue, hunt, capture, kill, attempt to take, capture, or kill, possess, sell, purchase, barter, or offer for sale, import, export, or transport any migratory bird, or their parts, including feathers, nests, or eggs—except under the terms of a valid permit issued pursuant to Federal regulations. The Act protects all species covered by the four migratory bird treaties the United States signed with Canada (1916), Mexico (1936), Japan (1972) and the Russian Federation (1976). This includes all native birds in the United States, except those non-migratory species such as quail and turkey that are managed as game by the states. By treaty, the Service currently recognizes 832 species of migratory birds, of which 776 are not hunted and are classified as non-game and 55 are classified as game species.

As with many other conservation laws, the Migratory Bird Treaty Act uses Federal permits as a tool to assist in the conservation of migratory birds and to authorize otherwise prohibited activities for scientific, educational, cultural, and other purposes. Pursuant to this provision, the U.S. Fish and Wildlife Service can issue permits to qualified applicants for the following activities involving migratory birds: Import/Export, Scientific Collecting, Taxidermy, Waterfowl Sale and Disposal, Falconry, Raptor Propagation, Depredation, Rehabilitation, and Special Purpose (including salvage and education).

What is incidental take?

To “take” is to pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct (50 CFR § 10.12). Incidental take has not been defined in regulation relative to the Migratory Bird Treaty Act. However, the term is used in reference to take that results by the way of, but is not the purpose of, carrying out an otherwise lawful activity.

How is Armed Forces defined?

Armed Forces means the Army, Navy, Air Force, Marine Corps, Coast Guard, and the National Guard of any State. To more closely track the language of the 2003 Defense 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, the references to “Department of Defense” in the proposed rule have been replaced with “Armed Forces,” where applicable.

Why did Congress give the Armed Forces an authorization for incidental take from the Migratory Bird Treaty Act?

In July 2000, the United States Court of Appeals for the District of Columbia ruled that Federal agencies are subject to the take prohibitions of the Migratory Bird Treaty Act. In May 2002, the Center for Biological Diversity obtained an injunction prohibiting live fire military training exercises by the Department of the Navy that killed migratory birds on the island of Farallon de Medinilla in the Pacific Ocean. In December 2002, following a series of legal determinations on the case from the District Court for the District of Columbia and the Circuit Court, Congress authorized an interim period during which the prohibitions on incidental take of migratory birds would not apply to otherwise authorized military readiness activities.

As described in the 2003 National Defense Authorization Bill, the one-year period for the Secretary of Interior to prescribe regulations authorizing the Armed Forces to incidentally take migratory birds, has passed. Are the Armed Forces currently authorized to incidentally take migratory birds?

The conference report on the 2003 National Defense Authorization Act noted that the interim authority to take migratory birds during military readiness activities would not expire until the regulations took effect.

What will the Armed Forces be required to do as a result of this rule?

The Armed Forces must confer and cooperate with the U.S. Fish and Wildlife Service on the development and implementation of conservation measures to minimize or mitigate adverse effects of a military readiness activity if it determines that such activity may have a significant adverse effect on a population of migratory bird species. This rule also requires that when conservation measures implemented under this authorization require monitoring, the Armed Forces must retain any monitoring data for five years from the date the action is commenced. In addition, it will apply to military readiness training wherever it occurs (land, air and sea). The final rule will not alter the Armed Forces responsibilities to comply with other applicable regulations.

Is the final rule going to result in less protection for migratory birds from military readiness activities than what currently occurs through existing environmental regulations?

No. The Service believes that the regulations announced today will provide more protection and management for migratory birds than the exemption allowed under the 2003 Defense Authorization Act. With the signing of the 2003 Defense Authorization Act, Congress exempted the Armed Forces military readiness activities from the incidental take of migratory birds under the Migratory Bird Treaty Act until the Secretary of Interior developed regulations authorizing such take. Under the final rule, the Armed Forces will still be required under the National Environmental Policy Act to consider the environmental effects of its actions, to assess the effects of military readiness activities on

migratory birds and to develop appropriate conservation measures if a proposed action may have a significant adverse effect on a population of migratory bird species. The Armed Forces must also comply with other existing environmental regulations, such as the Endangered Species Act. When conservation measures implemented to avoid or minimize impacts on populations of migratory bird species require monitoring, the Armed Forces are required to retain any monitoring data for five years from the date the Armed Forces commend their action.

When the Armed Forces determine that a proposed activity may adversely affect a population of a migratory bird species, they must confer with the U.S. Fish and Wildlife Service and cooperatively develop appropriate conservation measures to minimize or mitigate such significant adverse effects. This cooperative relationship will be beneficial for the conservation of migratory birds.

The Department of Defense, as other Federal agencies, has a special role in ensuring the United States complies with its obligations under the four migratory bird treaties, as evidenced by Executive Order 13186, "Responsibilities of Federal Agencies to Protect Migratory Birds," signed January 10, 2001.

Both the Department of the Interior and the Department of Defense recognize that 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 Department of the Interior and Department of Defense also recognize that steps should be taken to minimize or avoid negative impacts to migratory birds when planning and executing military readiness activities, while maintaining the effectiveness of such activities.

Why does the authorization pertain only to military readiness activities?

Congress believed the authorization to be an appropriate balance between the needs of national security and those of bird conservation. The 2003 Defense Authorization Act conference report notes specifically that Congress found the authorization for incidental take to be consistent with the underlying treaty obligations of the United States.

Department of Defense non-military readiness activities are being addressed in a separate Memorandum of Understanding between the Department of Defense and the U.S. Fish and Wildlife Service.

Will the authorization pertain to all migratory birds covered by MBTA?

Yes. However, under the final rule, the Armed Forces are only required to confer and cooperate with the U.S. Fish and Wildlife Service when they determine that a military

readiness activity may have a significant adverse effect on a population of a migratory bird species.

Why is the Secretary of the Interior required to seek the views of the Secretary of Defense and consult with the Secretary of State, prior to suspending an authorization?

The Secretary of the Interior is required by the final rule to suspend an Armed Forces authorization if the Armed Forces activity is not in compliance with one or more of the migratory bird treaties. Because the issue of whether an activity is in compliance with a treaty involves foreign policy considerations and legal interpretations of treaty obligations, a determination as to whether such a violation has occurred requires coordination among the several executive departments with particular expertise in these matters.

How will a determination be made that a proposed military readiness activity may not be in compliance with one or more of the migratory bird treaties?

Collectively, the four migratory bird treaties signed with Canada, Mexico, Japan, and Russia and implemented by the Migratory Bird Treaty Act provide mechanisms for protecting migratory birds and their habitat, and include special emphasis on protecting those birds that are in danger of extinction. The conservation principles of the treaties include the following requirements:

- To conserve and manage migratory birds internationally;
- To sustain healthy migratory bird populations for consumptive and nonconsumptive uses;
- To provide for, maintain, and protect habitat necessary for the conservation of migratory birds; and
- To restore depleted populations of migratory birds.

The treaties include prohibitions against the take of migratory birds, although they were not intended to prohibit all take of birds. The treaties with Canada, Japan and Russia have broadly worded prohibitions against take and recognize a variety of purposes for which take may be authorized including “for specific purposes not inconsistent with the objectives” of the treaties. The treaty with Mexico has a narrower focus on take prohibitions and is more clearly directed at stopping the indiscriminate killing of migratory birds from hunting.

The standard for determining whether a treaty has been violated will be based upon whether the activity is in keeping with the principles and objections of the treaties and is not specifically prohibited under the treaties. Any determination that a proposed military readiness activity would not be compatible with one or more of the treaties will be made only after the Secretary of the Interior carefully considers this country’s obligations under each treaty and after the Secretary seeks the views of the Secretary of Defense and consults with the Secretary of State.

How will a determination be made that a proposed military readiness activity may significantly adversely affect a population of a migratory bird species?

The Armed Forces will consider the environmental impacts of a proposed military readiness activity through the National Environmental Policy Act (NEPA) process using the best scientific data available. The Armed Forces will make this information available for public review in accordance with NEPA. If the Armed Forces determine that a proposed or ongoing activity is likely to result in a significant adverse effect on a population of a migratory bird species, they must confer and cooperate with the Service to develop appropriate conservation measures to minimize or mitigate such significant adverse effects.

An activity will be determined to have a significant adverse effect when it is found within a reasonable period of time to diminish the capacity of a population of a migratory bird species to sustain itself at a level that maintains its genetic diversity, to reproduce and to function effectively in its native ecosystem. In the rule, a population is defined as a group of distinct, coexisting, same 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.

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.

Will Armed Forces facilities need to complete Section 7 consultations with the Service for military readiness activities that may affect species of migratory birds that are listed as threatened or endangered under the ESA?

Yes. The final rule would not alter Armed Forces responsibilities to consult under Section 7 of the Endangered Species Act.

How many comments were received during the public comment period?

On June 2, 2004, the proposed rule was issued in the Federal Register for a 60-day public comment period. A total of 573 public comments were received, 24 from identified organizations or agencies. Responses to the public comments have been incorporated into the Supplementary Information section of the final rule.

What changes were made to the proposed rule as a result of public comments?

The most significant change to the proposed rule was to revise its applicability to the incidental take of all migratory birds not just migratory bird “species of concern”. The criterion for when the Armed Forces must confer with the Service was also amended to apply to incidental take from military readiness activities when the Armed Forces

determines that a proposed military readiness activity may result in a “significant negative effect on the sustainability of a population of a migratory bird species of concern” to a “significant adverse effect on a population of migratory bird species”.

In the event of the Secretary of the Interior proposing to withdraw authorization, the process for resolving any subsequent objections from the Secretary of Defense was also clarified in the final rule.

What are the Department of Defense requirements under the Migratory Bird Treaty Act relative to non-military readiness activities?

Migratory bird conservation relative to Department of Defense non-military readiness activities is being addressed separately in a Memorandum of Understanding developed in accordance with Executive Order 13186, signed January 10, 2001, “Responsibilities of Federal Agencies to Protect Migratory Birds”. The Memorandum of Understanding was signed on July 31, 2006.

In accordance with the Executive Order, responsibilities discussed in the Memorandum of Understanding include, but are not limited to, the Department of Defense:

- (1) Obtaining permits for import and export, banding, scientific collection, taxidermy, special purposes, falconry, raptor propagation, and depredation activities;
- (2) Encouraging incorporation of comprehensive migratory bird management objectives in the planning of Department of Defense planning documents;
- (3) Incorporating conservation measures addressed in Regional or State Bird Conservation Plans in Integrated Natural Resource Management Plans;
- (4) Managing military lands and activities other than military readiness in a manner that supports migratory bird conservation;
- (5) Avoiding or minimizing impacts to migratory birds, including incidental take and the pollution or detrimental alteration of the environments used by migratory birds.
- (6) Developing, striving to implement, and periodically evaluating conservation measures for management actions to avoid or minimize incidental take of migratory birds, and, if necessary, conferring with the Service on revisions to these conservation measures.