

Defining the Scope of the Migratory Bird Treaty Act

Public Scoping Webinar



U.S. Fish and Wildlife Service
Migratory Bird Program
Conserving America's Birds

Webinar Communication Process

- Comments and questions can be submitted using the Chat window at the bottom of the Zoom screen.
- We will do our best to respond to questions verbally.
- Any comments or questions provided today will not be considered NEPA public scoping comments.
- Official NEPA public scoping comments must be submitted in writing or through [regulations.gov](https://www.regulations.gov).
- This webinar will be recorded and posted to the FWS project website.

Overview of this Presentation

- ✓ USFWS responsibilities under the Administrative Procedure Act (APA) and the National Environmental Policy Act (NEPA)
- ✓ Brief overview of the MBTA
- ✓ Purpose and need for this MBTA rulemaking
- ✓ Proposed framework for incidental take authorization
- ✓ Your opportunity to participate



© E. Kershner

Migratory Bird Program - Conserving America's Birds

Administrative Procedure Act (APA)

The APA governs how Federal Agencies conduct rulemaking – agencies are required to:

- ✓ Publish notices and rules
- ✓ Seek input from the public



© E. Kershner

Migratory Bird Program - Conserving America's Birds

National Environmental Policy Act (NEPA)

NEPA requires Federal agencies to:

- ✓ Analyze the impacts of federal actions
- ✓ Engage the public in the decision making process
- ✓ Prepare an environmental impact statement (EIS) for actions that could significantly affect the quality of the human environment



Migratory Bird Program - Conserving America's Birds

Opportunities for Input

- We're currently in the beginning stages of the Rulemaking and NEPA process
- Opportunity for early input regarding:
 - ✓ the purpose and need for the action
 - ✓ issues and impact topics that should be addressed
 - ✓ alternatives that should be evaluated
 - ✓ sources of information that should be considered

This initial scoping period runs through **December 3, 2021**

You can provide comments at any time during this period

Overview of the Migratory Bird Treaty Act

Historical Context

- 1800 & 1900s – widespread overhunting of migratory birds for commercial use (food and millinery trade)
- Many notable extinctions at this time – Passenger Pigeon
- 1916 – Treaty with Great Britain (for Canada) signed to protect shared resources



Migratory Bird Treaty Act of 1918

PROHIBITS the pursuit, hunting, taking, capturing, or killing of migratory birds, as well as possession and activities related to commercial use.

PROHIBITS the actions listed above “*at any time, by any means or in any manner...any migratory bird, [or] any part, nest, or egg of any such bird*” unless authorized by the Secretary of the Interior

ALLOWS permits for the taking of migratory birds that is “*compatible with the terms*” and to “*carry out the purposes*” of the migratory bird conventions



Current Status of MBTA

JANUARY 7, 2021 – A final rule that characterized MBTA as only prohibiting actions directed at migratory birds

OCTOBER 4, 2021 – A final rule that revokes the January 7 rule based on a review and a determination that the January 7 rule is not the best reading of MBTA statute

DECEMBER 3, 2021 – Revocation rule is effective. Returns to long-standing MBTA implementation/enforcement approach of voluntary best practices to avoid or minimize incidental take and the use of enforcement discretion



Moving Forward

DIRECTOR'S ORDER 225

- Provides instruction to Service employees, including expectations for conducting Service activities and prioritizing our law enforcement activities
- This Director's Order goes into effect on December 3, 2021.

OCTOBER 4, 2021 – ADVANCE NOTICE OF PROPOSED RULEMAKING

- Advises tribes, states, and the public that the U.S. Fish and Wildlife Service intends to gather information necessary to develop a proposed rule to authorize the incidental taking or killing of migratory birds



© E. Kershner

Purpose and Need for this Action

Why is action being taken at this time?



The purpose of this action is to **provide both meaningful bird conservation and regulatory clarity** of the scope of the statute as it relates to incidental take.

- Ensure actions to conserve birds are implemented
- Improve consistency in enforcement of the MBTA's prohibitions across the country
- Eliminate public uncertainty caused by the current patchwork of legal standards across the different Circuit Courts of Appeal

Purpose of the ANPR

Seek comments regarding whether and how the agency could authorize incidental take

Any Approach must be

- ✓ Economically feasible
- ✓ Technically feasible
- ✓ Display common sense
- ✓ Address the purpose and need for taking action, and
- ✓ May not necessarily be the cheapest or easiest solution



Approaches for Consideration

Status Quo Approach



© E. Kershner

© E. Kershner

- Without additional rulemaking the Service would define the scope of the MBTA to prohibit incidental take.
- Enforcement of the MBTA would focus on actions that take migratory birds without consideration of measures to avoid or minimize take.

Framework for Consideration

Multi-Authorization Approach

The Service is considering authorizing incidental take using three primary mechanisms:

1. Exceptions to permits;
2. General permits for certain activity types; and
3. Specific permits under limited circumstances.

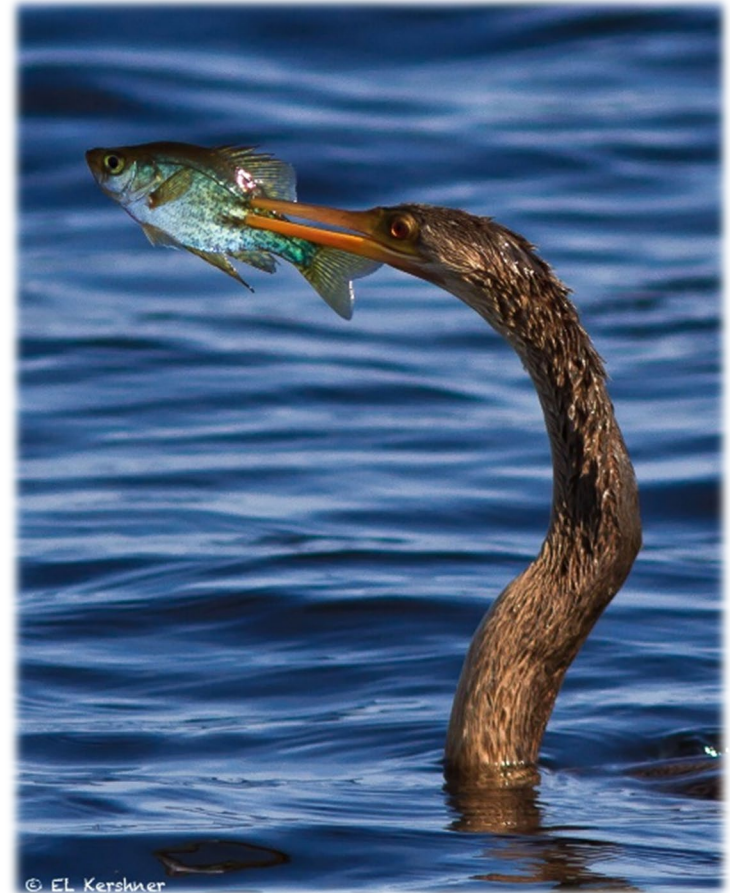
To apply this approach, the Service must identify criteria for when a given project qualifies for an exception to a permit, meets general permit requirements, or should apply for a specific permit.

Permit Exceptions

Authorized - No Permit Required

Authorizing by exception for:

- Individual activities
 - homeowners, driving vehicles
- Activities where beneficial practices or technologies sufficiently avoid and minimize incidental take.



General Permits

Implementing Beneficial Practices as Permit Conditions

Use a registration system – applicants submit contact information, pay any associated application fee, and agree to abide by standard beneficial practices for that activity.

General permits are generated without staff review

Permit conditions would require compliance with specified beneficial practices

Specific Permits

When General Permits Do Not Apply

Specific permits are intended for unique and emerging situations that go beyond the scope of General Permits

It is the Service's intention that the majority of incidental take be authorized under permit exceptions and general permits

Specific permit regulations are needed to authorize unforeseen circumstances that fall outside other regulations

Conservation Fee

Funds for Bird Conservation

The Service is considering a Conservation Fee approach

This would function akin to a flat fee required as part of the general permit application

These funds could be used both to monitor the incidental take of migratory birds and the effectiveness beneficial practices

Funds may also be used for on-the-ground conservation of birds, such as funding actions to support species with declining populations

MBTA Rulemaking Next Steps

- Comment on Advance Notice of Proposed Rulemaking (ANPR) Closes – December 3, 2021
- All comments will be reviewed and addressed as appropriate
- A Proposed Rule will be drafted Summer 2022 and made available for additional input
- Additional engagement activities planned
- A Final Rule is planned for Summer 2023



Migratory Bird Program - Conserving America's Birds

© E. Kershner

NEPA Process and Next Steps

- Scoping Comment Period Closes – December 3, 2021
- A Draft EIS is planned for Summer 2022 and made available for additional input
- A Final EIS and Record of Decision is planned for Summer 2023



© E. Kershner

Migratory Bird Program - Conserving America's Birds

How Can You be Involved?

- Follow the project online at:
<https://www.fws.gov/regulations/mbta/>
- Send Comments by **December 3, 2021**
 - Electronically: Go to the Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments to Docket No. FWS-HQ-MB-2021-0105.
 - By hard copy: Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS-HQ-MB-2021-0105; U.S. Fish and Wildlife Service Headquarters, MS: JAO/1N, 5275 Leesburg Pike, Falls Church, VA 22041-3803.
- We do not accept email or faxes. We will post all comments on <http://www.regulations.gov>, including any personal information you provide.

We are Seeking Specific Information

- (1) The avoidance, minimization, and mitigation measures entities employed to address incidental take of migratory birds;
- (2) The direct costs associated with implementing these measures;
- (3) Indirect costs that entities have incurred related to the legal risk of prosecution for incidental take of migratory birds (e.g., legal fees, increased interest rates on financing, insurance, opportunity costs);
- (4) Triggers for certain activities to qualify for a permit exception, general permit, or a specific permit;
- (5) Any quantitative information regarding the economic benefits and/or ecosystem services (e.g., pollination, pest control, etc.) provided by migratory birds;

Seeking Specific Information (cont.)

- (6) Information regarding resources that may be impacted by the proposal;
- (7) Species having religious or cultural significance for tribes, and species having cultural significance for the general public and impacts to cultural values from the actions being considered;
- (8) Whether the Service should consider compensatory mitigation or a general conservation fee;
- (9) How a conservation fee could be used to improve bird conservation; and
- (10) How the Service should consider authorizing government entities.

Thank You

- We will now open the question/comment period
- Comments and questions can be submitted using the Chat window at the bottom of the Zoom screen.
- We will do our best to respond to questions verbally.
- Official NEPA public scoping comments must be submitted in writing or through [regulations.gov](https://www.regulations.gov).



How Can You be Involved?

- Follow the project online at:
<https://www.fws.gov/regulations/mbta/>
- Send Comments by **December 3, 2021**
 - Electronically: Go to the Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments to Docket No. FWS-HQ-MB-2021-0105.
 - By hard copy: Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS-HQ-MB-2021-0105; U.S. Fish and Wildlife Service Headquarters, MS: JAO/1N, 5275 Leesburg Pike, Falls Church, VA 22041-3803.
- We do not accept email or faxes. We will post all comments on <http://www.regulations.gov>, including any personal information you provide.