



March 19, 2020

Public Comments Submitted to the U.S. Fish and Wildlife Service on the Proposed Rulemaking to Codify the Exemption of Incidental Take under the Migratory Bird Treaty Act (MBTA)  
Docket No. FWS-HQ-MB-2018-0090

By proposing to codify the Fish and Wild Service's (Service) existing interpretation that the prohibitions of the 1918 Migratory Bird Treaty Act (MBTA) only apply to actions "directed at" migratory birds, their nests, or their eggs, the Service is taking a significant step toward clarifying confusion that has resulted from no fewer than five recent circuit court of appeals decisions on the scope of the MBTA, as well as conflicting interpretations by the Obama administration and the Trump administration.

That confusion has opened the door to more litigation as the public has struggled to understand which actions constitute a "take" of a protected species. The proposed codification differentiates between wanton acts of destruction and criminal negligence, on the one hand, and the accidental or incidental take of a protected bird, however regrettable, on the other. U.S. law has long differentiated between harm caused by intent and harm caused by accident. The proposed rulemaking extends that practice to the MBTA.

The rulemaking would also change how the Service administers the MBTA by determining that an Environmental Impact Statement (EIS) under the National Environmental Policy Act (NEPA) is the most efficient and comprehensive approach for considering the potential impacts of this action on the environment. Until recently, such a proposal would have been a fool's errand because of the extraordinary delays long associated with the NEPA process. However, with the White House Council on Environmental Quality (CEQ) having recently proposed a long-overdue streamlining of the NEPA process, CEQ's rulemaking – assuming it survives legal challenges – compliments what the Service is proposing to do with regard to the MBTA.

Thank you very much for the opportunity to submit comments on this important issue.

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