



## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 10

[Docket No. FWS–HQ–MB–2018–0090; FF09M22000–201–FXMB1231090BPP0]

RIN 1018–BD76

#### Regulations Governing Take of Migratory Birds; Delay of Effective Date

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Final rule; delay of effective date and request for public comments.

**SUMMARY:** On January 7, 2021, we, the U.S. Fish and Wildlife Service, published a final rule (“MBTA rule”) defining the scope of the Migratory Bird Treaty Act (MBTA) as it applies to conduct resulting in the injury or death of migratory birds protected by the MBTA. We are delaying the MBTA rule’s effective date until March 8, 2021, in conformity with the Congressional Review Act (CRA). We request public comments to inform our review of this final rule and to determine whether the further extension of the effective date is necessary.

**DATES:** *Effective Date:* As of February 5, 2021, the effective date of the rule that published on January 7, 2021, at 86 FR 1134, is delayed until March 8, 2021.

*Written Comments:* We request public comments on issues of fact, law, and policy raised by the MBTA rule published on January 7, 2021 (86 FR 1134), and on whether that rule should be amended, rescinded, delayed pending further review by the agency, or allowed to go into effect. Public comments must be received or postmarked on or before [INSERT DATE 20 DAYS AFTER DATE OF FEDERAL REGISTER PUBLICATION].

**ADDRESSES:** You may submit comments by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal: <http://www.regulations.gov>. In the Search box, enter FWS–HQ–MB–2018–0090, which is the docket number for the rule. Then,

click on the Search button. You may submit a comment by clicking on “Comment Now!” Please ensure you have located the correct document before submitting your comments.

(2) *By hard copy*: Submit by U.S. mail to: Public Comments Processing, Attn: FWS–HQ–MB–2018–0090, U.S. Fish and Wildlife Service, MS: JAO/3W, 5275 Leesburg Pike, Falls Church, VA 22041–3803.

We request that you send comments only by the methods described above. We will post all comments on <https://www.regulations.gov>. This generally means that we will post any personal information you provide us (see **Public Comments**, below, for more information).

**FOR FURTHER INFORMATION CONTACT:** Jerome Ford, Assistant Director, Migratory Birds, at 202–208–1050.

**SUPPLEMENTARY INFORMATION:** On January 7, 2021, we, the U.S. Fish and Wildlife Service (USFWS), published a final rule defining the scope of the Migratory Bird Treaty Act (MBTA) as it applies to conduct resulting in the injury or death of migratory birds protected by the MBTA. During the course of review, the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget (OMB), based on information provided by the USFWS, determined that the MBTA rule was economically significant under Executive Order 12866, because it was likely to have an annual effect on the economy of \$100 million or more, and that it was therefore a “major rule” under subtitle E of the Small Business Regulatory Enforcement Fairness Act (the “Congressional Review Act” or “CRA”), 5 U.S.C. 804(2). See OIRA Conclusion of EO 12866 Regulatory Review of the MBTA, *available at* <https://www.reginfo.gov/public/do/eoDetails?rrid=131383> (designating the MBTA rule as a major rule under the CRA). The CRA provides that major rules shall not take effect for at least 60 days after publication in the *Federal Register* (5 U.S.C. 801(a)(3)).

Notwithstanding this statutory requirement, the MBTA rule was published in the *Federal Register* without the requisite delay. This final rule corrects the effective date to March 8, 2021, in accordance with the CRA.

The statutory provisions at issue in the MBTA rule have been the subject of repeated litigation. The final rule interpreted the scope of the MBTA to exclude incidental take of migratory birds—codifying Solicitor’s Opinion M-37050 and rejecting several decades of past agency practice concluding that the MBTA prohibits the incidental take of migratory birds. However, in August 2020, a court vacated Solicitor’s Opinion M-37050, as contrary to the MBTA (*Natural Resources Defense Council v. U.S. Department of the Interior*, No. 18-CV-4596 (VEC), 2020 WL 4605235 (S.D.N.Y. Aug. 11, 2020)). In late January 2021, two new lawsuits were filed that challenge the legal basis for the final rule: *Nat’l Audubon Soc’y v. U.S. Fish and Wildlife Serv.*, 1:21-cv-00448 (S.D.N.Y. filed Jan. 19, 2021); *State of New York v. U.S. Dep’t of the Interior*, 1:21-cv-00452 (S.D.N.Y. filed Jan. 19, 2021).

In addition, on January 20, 2021, the White House issued a memorandum (86 FR 7424, January 28, 2021) instructing Federal agencies to consider postponing the effective date of any rules that have published in the *Federal Register* but not yet taken effect, for the purpose of reviewing any questions of fact, law, and policy they may raise. The memorandum directs that, for rules postponed in this manner, where appropriate and consistent with applicable law, agencies consider opening a comment period to allow interested parties to provide comments about issues of fact, law, and policy raised by those rules, and consider any petitions for reconsideration involving such rules.

For the reasons explained above, in accordance with the Congressional Review Act, we are delaying the effective date of the MBTA rule we published on January 7, 2021 (86 FR 1134). The original effective date of the rule was February 8, 2021; with this document, we are changing the effective date of the rule to March 8, 2021, 60 days from its initial publication.

Immediate implementation of the MBTA rule on March 8, 2021, significantly impacts the public interest. Specifically, the public has a strong interest in conserving the migratory bird resource and fulfilling shared objectives and obligations with a treaty partner, Canada. These interests could be harmed by allowing this regulation to take effect on its current effective date.

First, as noted in the environmental impact statement (EIS) developed to analyze the impacts of the MBTA rule (85 FR 76077, November 27, 2020), its implementation may have significant impacts on migratory bird species and other resources. The EIS concluded that implementing the MBTA rule may have significant impacts on migratory birds, vegetation, other wildlife, and associated ecosystem services and other economic activities, but admitted that data are not readily quantifiable and available to determine the magnitude of those impacts. Neither the EIS nor the associated record of decision (“ROD”) set forth a monitoring plan to ascertain the magnitude of those impacts after implementation of the final rule. Thus, there is a high likelihood that the public interest in these resources will be harmed given that the magnitude of the impacts is likely significant but unknown and no monitoring plan is in place to determine that magnitude.

Second, further delay of the effective date may make it possible to avoid costly and unnecessary litigation. As noted above, the District Court for the Southern District of New York, in vacating Solicitor’s Opinion M-37050, has already expressly rejected the legal rationale of the MBTA rule, and two additional suits have been filed challenging the MBTA rule itself.

Third, further consideration of concerns expressed by one of our treaty partners may counsel in favor of further delay of the effective date of the MBTA rule. The MBTA implements four bilateral migratory bird Conventions with Canada, Mexico, Russia, and Japan. *See* 16 U.S.C. 703–705, 712. The Government of Canada communicated its concerns with the MBTA rule both during and after the rulemaking process, including providing comments on the EIS associated with the rule.

After the public notice and comment period had closed, Canada’s Minister of Environment and Climate Change summarized the Government of Canada’s concerns in a public statement issued on December 18, 2020 (<https://www.canada.ca/en/environment-climate-change/news/2020/12/minister-wilkinson-expresses-concern-over-proposed-regulatory-changes-to-the-united-states-migratory-bird-treaty-act.html>). Minister Wilkinson stated the Government

of Canada’s concern regarding “the potential negative impacts to our shared migratory bird species” of allowing the incidental take of migratory birds under the MBTA rule and “the lack of quantitative analysis to inform the decision.” He noted that the “Government of Canada’s interpretation of the proposed changes . . . is that they are not consistent with the objectives of the Convention for the Protection of Migratory Birds in the United States and Canada.”

Additionally, in its public comments on the draft EIS for the MBTA rule, Canada stated that it believes the rule “is inconsistent with previous understandings between Canada and the United States (U.S.), and is inconsistent with the long-standing protections that have been afforded to non-targeted birds under the *Convention for the Protection of Migratory Birds in the United States and Canada* . . . as agreed upon by Canada and the U.S. through Article I. The removal of such protections will result in further unmitigated risks to vulnerable bird populations protected under the *Convention*.”

Therefore, we invite public comments on the MBTA rule to allow interested parties to provide comments about issues of fact, law, and policy raised by that rule, and so that we can consider any petitions for reconsideration involving the rule. We also invite public comments on whether the rule should be amended, rescinded, delayed pending further review by the agency, or allowed to go into effect. In particular, the USFWS would appreciate comments on the scope of the MBTA as it applies to conduct resulting in the injury or death of migratory birds protected by the MBTA, the impact of the MBTA rule on our treaty partners, the impact of the MBTA rule on regulated entities, the effect of the pending litigation on the MBTA rule, and the appropriateness of delaying the effective date of the MBTA rule beyond March 8, 2021. The USFWS will consider these comments in reviewing the MBTA rule. See **DATES** and **ADDRESSES**, above, and **Public Comments**, below, for more information on submitting comments.

### **Public Comments**

You may submit your comments and materials concerning the rule by one of the methods listed in **ADDRESSES**. Comments must be submitted to <http://www.regulations.gov> before

11:59 p.m. (Eastern Time) on the date specified under *Written comments* in **DATES**. We will not consider mailed comments that are not postmarked by the date specified under *Written comments* in **DATES**. Comments previously submitted need not be resubmitted and will be fully considered in our review of the rule.

We will post your entire comment—including your personal identifying information—on <http://www.regulations.gov>. If you provide personal identifying information in your comment, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. Comments and materials we receive will be available for public inspection on <http://www.regulations.gov>.

### **Administrative Procedure Act**

Our implementation of this action delaying the effective date of the MBTA rule from February 8, 2021, to March 8, 2021, without opportunity for public comment, effective immediately upon filing for publication in the *Federal Register*, is based on the good cause exceptions provided in the Administrative Procedure Act. Pursuant to 5 U.S.C. 553(b)(B), we have determined that good cause exists to forgo the requirement to provide prior notice and an opportunity for public comment thereon for this rule as such procedures are unnecessary where the agency lacks discretion to choose an alternative course of action. As discussed above, the change of the effective date to March 8, 2021, is being made to comply with the 60-day effective date delay for major rules provided for in the Congressional Review Act. 5 U.S.C. 801(a)(3). For the same reasons discussed above, USFWS finds that there is good cause to waive the effective date delay under 5 U.S.C. 553(d)(3) and 5 U.S.C. 808(2).

### **Authority**

The authorities for this action are 16 U.S.C. 668a–d, 703–712, 742a–j–l, 1361–1384, 1401–1407, 1531–1543, 3371–3378; 18 U.S.C. 42; and 19 U.S.C. 1202.

---

**Shannon A. Estenoz**  
*Senior Advisor to the Secretary,*

*Exercising the Delegated Authority of the Assistant Secretary for Fish and Wildlife and Parks.*

[FR Doc. 2021-02667 Filed: 2/5/2021 11:15 am; Publication Date: 2/9/2021]