

DEPARTMENT OF THE INTERIOR  
Fish and Wildlife Service

50 CFR Part 21

RIN 1018-AI92

Migratory Bird Permits; Take of Migratory Birds by Department of Defense

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed 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. Section 315 of the Authorization Act provides that, not later than one year after its enactment, the Secretary of the Interior (Secretary) shall exercise 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. This proposed rule has been developed 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. However, these regulations do not expressly address the issuance of permits for incidental take. As directed by Section 315 of the Authorization Act, we are proposing this rule to authorize such take, with limitations, that result from Department of Defense military readiness activities. If the Department of Defense determines that a proposed or an ongoing military readiness activity may result in a significant adverse effect on the sustainability of a population of a migratory bird species of concern, then

they must confer and cooperate with the U.S. Fish and Wildlife Service (Service) to develop appropriate and reasonable-conservation measures to minimize or mitigate identified significant adverse effects. The Secretary of the Interior, or her designee, will retain the power to withdraw or suspend the authorization for particular activities in appropriate circumstances.

We invite your comments on this proposed rule.

DATES: We will accept comments on this proposed rule until August 2, 2004.

ADDRESS: You may mail, fax, or deliver comments to the Division of Migratory Bird Management, U.S. Fish and Wildlife Service, 4401 North Fairfax Drive, Room 4107, Arlington, Virginia 22203-1610, fax 703-358-2217. Comments can also be sent on-line at [DODMBTARULE@fws.gov](mailto:DODMBTARULE@fws.gov). The proposed rule and other related documents can be downloaded at <http://migratorybirds.fws.gov>. The complete file for this proposed 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: Brian Millsap, 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. We, the U.S. Fish and Wildlife Service (Service), are 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, 1995), Japan (1972), and Russia (1976), and the amendment of the treaty

with Canada (1999).

The treaties and subsequent amendments impose substantive obligations on the United States for the conservation of migratory birds and their habitats, including, but not limited to, the following conservation principles:

- 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.

Each of the treaties protects selected species of birds and specifies 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 regulations at 50 CFR 21.11 prohibit the take of migratory birds except under a valid permit or as permitted in the implementing regulations. We define “take” 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 (11<sup>th</sup> Cir. 1997); *Newton County Wildlife Ass’n v U.S. Forest Service*, 113 F.3d 110, 115 (8<sup>th</sup> Cir. 1997). Subsequently on December 20, 2000, we issued a Director’s Order 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 (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, 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. A permanent injunction was issued by the District Court on June 3. 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 would be provided by this rule is essential to preserving the Service's role in determining what military readiness activities, if any, create an unacceptable risk to the migratory bird resources and should be modified or curtailed.

The Department of Defense is responsible for protecting the United States from external threats. To provide for national security, they engage in military readiness activities, which 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) 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.

The 2003 National Defense Authorization Act (Pub. L. 107-314, 116 Stat. 2458, Dec. 2, 2002, 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 such activities from the MBTA's prohibitions against take of migratory birds. With this language, Congress has 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. Any diminishment in effectiveness could impair the Department of Defense's ability to fulfill its 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 proposed rule, if finalized, will authorize the Department of Defense to take migratory birds associated with 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 Department of Defense in meeting its statutory responsibilities can go forward. This rule is also appropriate and necessary to preserve the treaties as workable and sensible protections of a vital resource and to meet the Secretary's obligations under Section 704 of the MBTA as well as under Section 315 of the Authorization Act. This proposed rule has been developed 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 the Department of Defense activities other than military readiness activities will be addressed separately in a Memorandum of Understanding (MOU) developed in accordance with Executive Order 13186, Responsibilities of Federal Agencies to Protect Migratory Birds, signed January 10, 2001. Upon completion of the MOU, and in keeping with the intent of the Executive Order for Federal agencies to promote the conservation of migratory bird populations, the Service proposes issuing a 50 CFR § 21.27 Special Purpose Permit to address specific actions identified in the MOU not covered by this rule.

#### Measures Taken by the Department of Defense to Minimize and Mitigate Takes of Migratory Birds

As the basis for this proposed rule, under the authority of the MBTA and in accordance with Section 315 of the Authorization Act, the Department of Defense 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 Department of Defense to minimize 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 specific military readiness activities suggest the need for additional measures.

We have a long history of working with Department of Defense installation natural resources managers 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 Improvement Act of 1997 (16 U.S.C. 670a *et seq.*), these conservation measures are detailed in Integrated Natural Resources Management Plans (INRMPs) for specific installations and endorsed by the Service and State fish and game agencies.

**Bird Conservation Planning.** The Department of Defense prepares INRMPs for most the 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 department, the Service, and the appropriate State fish and wildlife agency on conservation, protection, and management of fish and wildlife resources. 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 National Environmental Policy Act (NEPA) documents for military readiness activities. This linkage helps to ensure that appropriate conservation measures are incorporated into mitigation actions, where needed, which will protect migratory birds and their habitats.

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 proposed 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 Armed Forces have 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 enhancing 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 the 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 population 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.

The NEXRAD information is critically important for the protection of habitats used by migratory birds during stopover periods. This information is vital to the 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 the 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 bird species listed in the Service's "Birds of Conservation Concern" report that are likely to occur on each of the installations utilizing the Birds of Conservation Concern published by the Service. This database will be valuable in initially evaluating what species may potentially be affected by military readiness activities.

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 the 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 impact 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 on line at the <http://www.usahas.com> website.

Pesticide Reduction. Reducing or eliminating pesticide use also benefits migratory birds. The Department of Defense maintains 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. The Department of Defense policy mandates incorporation of sustainable IPM philosophy, strategies, and techniques in all aspects of the 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 particular, 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 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 the very 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 their 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 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 Fly Over Counts), standardized and/or customized breeding and wintering point counts, grassland bird flush counts, NEXRAD (discussed above) and BIRD RAD 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.

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.

Department of Defense 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.

Department of Defense will continue to develop and implement conservation measures, as described above, to mitigate adverse impacts on species of concern, from military readiness activities. Department of Defense will also continue to consult with the Service to identify measures to minimize and mitigate testing and training impacts and will continue to monitor the impacts of military readiness activities on species of concern.

What Are the Provisions of the Proposed Rule?

NEPA Considerations

The 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 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 Council on Environmental Quality's (CEQ) regulations

implementing NEPA emphasize the integration of the NEPA process with the requirements of other environmental laws. 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 proposed rule anticipates that the Department of Defense will use 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 of concern.” More particularly, the Department of Defense prepares NEPA analyses whenever they propose to undertake a new military readiness activity that may significantly affect the quality of the human environment; 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 on-going military readiness activity; or prepare or revise an INRMP covering an area used for military readiness activities. During the preparation of environmental impacts statements analyzing the military readiness activities’ effects on migratory bird species, DOD consults with the Service as an agency with jurisdiction by law and special expertise. If the Department of Defense identifies any such significant adverse effects on migratory birds during the preparation of its NEPA analysis, this rule would require the Department of Defense to confer and cooperate with the Service to develop appropriate conservation measures to minimize or mitigate any such significant adverse effects. Upon finalization of this rule, the Department of Defense 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 (ESA) of 1973, as amended (16 U.S.C. 1531, et seq.), 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 have determined that this proposed rule to authorize take under the MBTA will have no effect on listed species. The proposed rule does not authorize take under the ESA. In addition, if a military training activity may affect a listed species, the Department of Defense must consult with the Service in accordance with section 7(a)(2) of the ESA.

## Rule Authorization

The proposed rule would authorize the Department of Defense to take migratory birds as an incidental result of military readiness activities. The Department of Defense must continue to apply for and receive an MBTA permit for scientific collecting, control of birds causing damage to Department of Defense property, or any other activity that is addressed by our existing permit regulations. These activities could not be conducted under the authority of this rule. If any Department of Defense activity 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 proposed rule that may occur.

Authorization of takes under this proposed rule would apply 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 would 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 relating to these routine operations.

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 authorization of take with respect to any specific military readiness activity under certain circumstances.

With respect to a Department of Defense military readiness activity likely to take migratory birds, the rule would authorize take provided the Department of Defense is in compliance with the following requirement:

If ongoing or proposed activities are likely to result in a significant adverse effect on the sustainability of the population of a migratory bird species of concern, the Department of Defense must confer and cooperate with the Service to develop appropriate conservation measures to minimize or mitigate such significant adverse effects.

We recognize that data on species of migratory birds may be limited. Furthermore, the migratory nature of most species complicates assessment of the expected effects of a proposed action or the effects of an ongoing action. We encourage the Department of Defense to develop information that will assist in guiding its decisions regarding migratory bird conservation, particularly in developing or amending INRMPs. This proposed rule would not require the Department of Defense to obtain new data to assess impacts of a proposed or an ongoing action on birds in order to comply with the provisions of this rule. Existing demographic, population,

habitat association, species indicator, or ecological indicator data may be used to estimate the level of take and evaluate whether a proposed or an ongoing action is likely to have a significant adverse impact on a population.

The Department of Defense will continue to be responsible for addressing its activities other than military readiness through an MOU developed in accordance with Executive Order 13186.

#### When Would Take Not Be Authorized

If a proposed or an ongoing action may threaten the sustainability of a population of a migratory bird species of concern, the Department of Defense must confer with the Service so 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 Department of Defense 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 his/her delegatee determines that protection of national security requires continuation of the activity.

The Secretary will immediately suspend authorization for take if continued authorization 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 would result in a significant adverse effect on the sustainability of a population of a migratory bird species of concern and one or more of the following circumstances apply:

- (A) The Department of Defense has not implemented conservation measures that (i) are directly related to protecting the migratory bird species of concern affected by the proposed military readiness activity; (ii) would significantly reduce take of migratory birds species of concern affected by the military readiness activity, (iii) are economically feasible, and (iv) do not limit the effectiveness of military readiness activities.
- (B) The Department of Defense fails to conduct mutually agreed upon monitoring to determine the effects of a military readiness activity on the migratory bird species of concern and/or the efficacy of the conservation measures implemented by the Department of Defense.
- (C) The Department of Defense has not provided reasonable, appropriate, and readily available information that the Service has requested and that the Secretary determines is necessary to evaluate whether withdrawal of take authorization for the specific action is required or appropriate.

The determination as to whether an immediate suspension of authorization is warranted (i.e., whether the action would 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 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 Department of Defense agrees 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 would continue to be authorized by this regulation until the Secretary of the Interior, or his or her delegatee, makes a final determination on the withdrawal.

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 Department of Defense modifies the proposed activity to alleviate significant adverse effects on the sustainability of a population of a migratory bird species of concern or the circumstances in paragraphs (A) – (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 paragraph 21.15 (b) (2) of the proposed rule, will be reconsidered by the Secretary of the Interior or his or her delegatee who must be an official nominated by the President and confirmed by the Senate, if, within 30 days of the notification with respect to a military readiness activity, the Secretary of Defense, or his or her delegatee 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 would apply to the Department of Defense military readiness activities, including those implemented through the Department of Defense contractors and their agents.

## Principles and Standards

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

To proactively address migratory bird conservation, the Department of Defense 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 Department of Defense related to military readiness may result in the incidental take of birds, we encourage the Department of Defense to contact the Service so we can assist the Department of Defense in addressing potential adverse impacts on birds and mitigating those impacts, particularly those that may have a significant adverse effect on a population of a migratory bird species of concern.

To identify species of concern, the Department of Defense should consult “Birds of Conservation Concern”; priority migratory bird species documented in the comprehensive bird conservation plans; 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 MBTA-listed game birds below desired population sizes.

The Department of Defense should, 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, with emphasis on species of concern. 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. We encourage the Department of Defense to 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 US AHAS and BAM should be used to avoid bird activity when planning flight training and range use. These conservation measures should be considered 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 design 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 Department of Defense should adopt existing industry guidelines supported by the Service and developed to avoid or minimize take of migratory birds. Monitoring is an important conservation measure or a component of conservation measures when it has the potential to produce data relevant to substantiating impacts, validating effectiveness of mitigation, or providing other pertinent information. We recognize that implementation of conservation measures will be subject to the availability of appropriations.

The Department of Defense should promote the inclusion of comprehensive migratory bird management objectives from bird conservation plans into the Department of Defense planning documents. 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 Department of Defense should continue to work through the PIF program for incorporating bird habitat management efforts into INRMPs. The Department of Defense 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.

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, should include monitoring results of any migratory bird conservation measures.

The Department of Defense should use the best available databases to determine which migratory bird species are likely to occur in the area of proposed military readiness activities. This would include species likely to occur in the project area during all phases of the project. Any species of concern should be specifically noted.

The Department of Defense should 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. The Department of Defense should address impacts on species of concern more thoroughly and specifically, focusing on the effects of the proposed action on the sustainability of these populations. Special consideration should be given to priority habitats, such as important nesting areas, migration stop-over areas, and wintering habitats.

The Department of Defense should 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, with emphasis on species of concern. 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. The Department of Defense should give special emphasis to addressing those activities that may negatively affect the sustainability of a population of a migratory bird species of concern.

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 proposed rule consistent with the MBTA?

Yes, Section 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 would be authorized in this proposed rule is compatible with the terms of the treaties and consistent with the purposes of the treaties.

The MBTA implements four treaties: a 1916 treaty with Great Britain on behalf of Canada that was substantially revised by a 1999 protocol; a 1936 treaty with Mexico; 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 are important for aesthetic, social, and spiritual purposes. Collectively, the treaties provide mechanisms for protecting the birds and their habitat, and include special emphasis on protecting those birds that are in danger of extinction.

The Japanese and Soviet treaties have the more broadly worded prohibitions against take of migratory birds. At the same time, those treaties include broad exceptions to the take prohibition. The exceptions recognize a variety of purposes for which take may be authorized, including scientific, educational, and propagative purposes; for the protection of persons or property; and for hunting during open seasons. These treaties also authorize takings for "specific purposes not inconsistent with the objectives" of the treaties.

The take prohibitions in the 1916 treaty with Canada and the 1936 treaty with Mexico have a narrower focus than the take prohibitions in the Japanese and Soviet treaties. Those treaties are more clearly directed at stopping the indiscriminate killing of migratory birds from hunting through the establishment of closed seasons. Likewise, the prohibitions in the 1999 Canadian protocol retain the structure of the earlier treaty using closed seasons to prohibit hunting.

The take that is authorized by this proposed rule is compatible with the migratory bird treaties. The Japanese and Soviet treaties expressly authorize exceptions from the take prohibition for special purposes not inconsistent with the treaties. The take that would be

authorized here is for a special purpose not inconsistent with the treaties. The authorization allows take of birds only in narrow instances – take that results from military readiness activities. Furthermore, the proposed rule expressly requires the Department of Defense to develop conservation measures to minimize or mitigate impacts where such impacts may have a significant adverse effect on the sustainability of a population of a migratory bird species of concern. Moreover, the Secretary must suspend the take authorization if she concludes that a specific military readiness activity would not be compatible with the migratory bird treaties and may withdraw the authorization if she is unable to obtain from Department of Defense the information needed to assure compliance. In these circumstances, the take that would be authorized by this proposed rule is thus compatible with the terms of the treaties and consistent with the purposes of those treaties.

The proposed rule's process of broad, automatic authorization subject to withdrawal is particularly appropriate to military readiness activities. First, we expect that military readiness activities will rarely, if ever, have the broad impact that would lead to a significant adverse effect on migratory bird species of concern, even absent the conservation measures that the Department of Defense undertakes voluntarily or pursuant to another statute, such as the ESA. Second, The Department of Defense, like other federal agencies, has 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 Department of Defense strives not only to lessen detrimental effects of the Department of Defense 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 Proposed Rule Apply Only to the Department of Defense?

This proposed rule is being 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 requiring the development of regulations authorizing the incidental take of migratory birds associated with military readiness activities. This proposed rule, if finalized, will carry out the mandates of the Authorization Act. This rule would authorize 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.

#### Public Comments Invited

We invite comments on this proposed rule from affected or concerned government

agencies, the public, the scientific community, industry, environmental organizations, and any other interested party. Please reference "RIN 1018-AI92" at the top of your letter. We will consider all comments submitted to us by the deadline indicated above in DATES.

Our practice is to make comments, including names and home addresses of respondents, available for public review during normal business hours. Individual respondents may request that we withhold their home address from the rulemaking record, which we will honor to the extent allowable by law. If you wish for us to withhold your name and/or address, you must state this prominently at the beginning of your comment. However, we will not consider anonymous comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

#### 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. Preliminary 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 proposed rule would not affect small businesses or other segments of the private sector. It would apply only to the Department of Defense. Thus any expenditure under this proposed rule would accrue only to the Department of Defense. Our current regulations allow us to permit take of migratory birds only for limited types of activities. This proposed rule would authorize take resulting from the Department of Defense military readiness activities, provided the Department of Defense complies with certain requirements to minimize or mitigate significant adverse effects on the sustainability of a population of a migratory bird species of concern.

Preliminary analysis of the annual economic effect of this rule indicates that it would have de minimis effects for the following reasons. Without the rule, the Department of Defense 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 would enable the Department of Defense 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 Department of Defense is not required to apply for individual permits to authorize take for every individual military readiness activity. The take authorization is conveyed by the 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 Department of Defense would 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 the sustainability of a population of a migratory bird species of concern. However, we anticipate that this threshold of potential effects on the sustainability of a population has a low probability of occurring. The Department of Defense is 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 the proposed rule will be subsumed by these existing requirements.

With the rule, the Department of Defense would have a regulatory mechanism to enable the Department of Defense to effectively implement otherwise lawful military readiness activities. Without the rule, the Department of Defense 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 proposed rule would not create serious inconsistencies or otherwise interfere with the Department of Defense actions, including those other than military readiness. The Department of Defense must already comply with numerous environmental laws intended to encourage minimizing impacts to wildlife.

c. This proposed rule would 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 proposed rule raises novel legal or policy issues. This proposed 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 proposed 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 proposed rule would 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 proposed rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule:

- a. Would not have an annual effect on the economy of \$100 million or more.
- b. Would not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.
- c. Would 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 proposed rule would 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 would not impose a cost of \$100 million or more in any given year on local or State government or private entities.

b. This rule would 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 would be to authorize incidental takes of migratory birds by the Department of Defense as a result of military readiness activities. This rule would 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 would 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 would 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 proposed rule would 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 Department of Defense 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 would 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 would newly enable us to collect information only from the Department of Defense employees 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 made a determination that this proposed rule is categorically excluded under the Department of the Interior's NEPA procedures in 516 Departmental Manual 2, Appendix 1.10. Appendix 1.10 applies to "policies, directives, regulations, and guidelines of an administrative, financial, legal, and technical, or procedural nature; or the environmental effects of which are too broad, speculative or conjectural to lend themselves to meaningful analysis and will be subject later to the NEPA process, either collectively or case-by-case."

Department of Defense military readiness activities occur across a very broad geographic area covering a wide diversity of habitat types and potentially affecting a high diversity of migratory birds. In addition, the specific type of military readiness activity will vary significantly amongst the Armed Services. Because of the broad scope of activities, their locations, habitat types, and potential migratory birds present that may be affected by this proposed rule, it is not foreseeable or reasonable to anticipate all the possible locations where the Department of Defense may conduct military readiness activities or what the circumstances of the activities and the surrounding environment will be, thus it is premature to examine potential impacts of the proposed rule. Any environmental analysis of the proposed rule is determined to be too broad, speculative, and conjectural. A copy of the Categorical Exclusion is available upon request at the address indicated in the ADDRESSES section of this proposed rule.

In addition, we have made the determination that this proposed rule does not dictate extraordinary circumstances that would warrant preparation of an environment document in accordance with Departmental Manual, Part 516, 2.3. First, this proposed rule would only apply to military readiness activities that are otherwise authorized by the Secretary of Defense or the Secretary of the military department concerned. Second, we expect that military readiness activities will rarely, if ever, have the broad impact that would lead to a significant adverse effect on migratory bird species of concern, even absent the conservation measures that the Department of Defense undertakes voluntarily or pursuant to another statute. The Department of Defense

also has an important role in ensuring that the United States complies with the four migratory bird treaties.

However, upon finalization of this rule, the Department of Defense will continue to be responsible for ensuring military readiness activities are implemented in accordance with all applicable regulations including NEPA and ESA. In addition, authorization under this rule would require that if a proposed military readiness activity may result in a significant adverse impact on the sustainability of a population of a species of concern, the Department of Defense must confer and cooperate with the Service to develop appropriate measures to minimize or mitigate these effects and address them through their NEPA responsibilities.

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 Department of Defense that take migratory birds. It would 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 proposed 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.

Clarity of Regulations. Executive Order 12866 requires each agency to write regulations that are easy to understand. We invite your comments on how to make this rule easier to understand, including answers to questions such as the following: (1) Are the requirements in the rule clearly stated? (2) Does the rule contain technical language or jargon that interferes with its clarity? (3) Does the format of the rule (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce its clarity? (4) Would the rule be easier to understand if it were divided into more (but shorter) sections? (5) Is the description of the rule in the "Supplementary Information" section of the preamble helpful in understanding the proposed rule? What else could we do to make the rule easier to understand?

Send a copy of any comments about how we could make this rule easier to understand to: Office of Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street NW, Washington, DC 20240.



## 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 propose to amend title 50, chapter I, subchapter B of the CFR as follows:

### PART 21 – [AMENDED]

1. Revise the authority citation to read as follows:

Authority: Pub. L. 95-616, 92 Stat. 3112 (16 U.S.C. 704, 712(2)); Pub. L. 107-314, 116 Stat. 2458 (16 U.S.C. 703 note).

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

#### §21.3 Definitions.

\* \* \* \* \*

Conservation measures, as used in § 21.15, means project design or mitigation activities that are reasonable and feasible from a scientific, technological, and economic standpoint, and avoid or minimize the take of migratory birds, rectify, reduce, or eliminate adverse impacts over time, or compensate for such adverse impacts, while allowing for completion of the action in a timely manner. Monitoring is a conservation measure when it has the potential to produce data relevant to substantiating impacts, validating effectiveness of mitigation, or providing other pertinent information.

\* \* \* \* \*

Military readiness activity 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 includes activities carried out by the Department of Defense and their contractors. It does not include: 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; operation of industrial activities; or construction or demolition of facilities relating to these routine operations.

Population, as used in § 21.15, refers to the population of a migratory bird species of concern, and means the number of individuals of a specific species within a particular Bird Conservation Region (BCR).

\* \* \* \* \*

Secretary of Defense means the Secretary of Defense or any other official in the Department of Defense, any of the military departments, or the Department of Homeland Security with respect to military readiness activities of the United States Coast Guard, who has been nominated by the President and confirmed by the Senate.

\* \* \* \* \*

Significant adverse effect on the sustainability of a population, as used in § 21.15, means an effect that could result in a population no longer being maintained at a “biologically viable level for the long term.” A population is “biologically viable for the long term” when its ability to maintain its genetic diversity, to reproduce, and to perform its role or function in its native ecosystem are not irreversibly harmed.

Species of concern refers to those species listed in the periodic report *Birds of Conservation Concern* published by the FWS Division of Migratory Bird Management (<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>).

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

(b) 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 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 30 days thereafter may withdraw, the authorization for any take incidental to a specific military readiness activity if the Secretary

determines that a proposed military readiness activity may result in a significant adverse effect on the sustainability of the population of a migratory bird species of concern and one or more of the following circumstances exists:

(i) The Department of Defense has not implemented conservation measures that:

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

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

(C) Are economically feasible; and

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

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

(iii) The Department of Defense has 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 Department of Defense, permit the Secretary to cancel the proposed withdrawal of authorization.

(4) Within 30 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 Department of Defense's objections, if any, to the proposed withdrawal, specifying the reasons therefore. Before acting to withdraw the take authorization for any specific military readiness activity, the Secretary will consider the objections raised by the Department of Defense. If the Secretary continues to believe that withdrawal is appropriate, he or she will provide written notice to the Secretary of Defense of the withdrawal and the rationale therefore, including a response to the Department of Defense's objections. If the Secretary of Defense continues to object to the withdrawal of authorization, the withdrawal will not become effective until the Secretary of Defense has had the opportunity to meet with the Secretary.

(5) 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 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 Department of Defense modifies the proposed activity to alleviate significant adverse effects on the sustainability of a population of a migratory bird species of concern 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 or her delegatee who must be an official nominated by the President and confirmed by the Senate.

Craig Manson

12-12-03

Assistant Secretary for Fish and Wildlife and Parks

Date

Concurrence of:

Raymond DuBois

1/8/04

Deputy Under Secretary of Defense (Installation  
And Environment)

Date

Billing Code: 4310-55P