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Mr. Jerome Ford  
Assistant Director, Migratory Birds  
U.S. Fish and Wildlife Service  
MS: JAO/1N  
5275 Leesburg Pike  
Falls Church, VA 22041-3803

RE: Regulations Governing Take of Migratory Birds, Proposed Rulemaking, 85 *Federal Register* 5915  
(Feb. 3, 2020) - **Docket No. FWS-HQ-MB-2018-0090**

Dear Mr. Ford:

The Associated General Contractors of America (AGC) appreciates this opportunity to provide the U.S. Fish and Wildlife Service (U.S. FWS or the “Service”) with comments on the proposed rule to define the scope of the Migratory Bird Treaty Act (MBTA)<sup>1</sup> as it applies to any actions that result in the injury, death or “take” of a migratory bird, egg, or nest protected by the Act.

AGC represents more than 27,000 construction contractors, suppliers and service providers across the nation, through a nationwide network AGC Chapters. AGC contractors are involved in all aspects of nonresidential construction and are building the nation’s public and private buildings, highways, bridges, water and wastewater facilities, locks, dams, levees, multi-family housing units, and more. The MBTA comes into play on any construction project that may impact a migratory bird, egg, or nest.

AGC supports the proposed changes, which would clarify that unintended or incidental impacts to migratory birds that occur within the scope of lawful—and often necessary business—activities do not carry criminal penalties and expansive liability exposure.<sup>2</sup> There are approximately 1,027 protected species of migratory birds,<sup>3</sup> a small percentage<sup>4</sup> of which are also listed as threatened or endangered species (with additional protections in place). Contractors consistently practice avoidance and mitigation measures to minimize the impact their activities may have on migratory birds—which may contribute to time delays to projects. However, following the law and guidance by the Service does not eliminate the risk of severe penalties or jail time if unintentional harm occurs.

AGC members maintain that the prior, more expansive interpretation of liability is unworkable. AGC strongly agrees with FWS’s observations in the preamble to the proposed rule that “it is literally impossible

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<sup>1</sup> 16 U.S.C. §§ 701-12.

<sup>2</sup> Violations of the MBTA are criminal offenses, and punishable by imprisonment and/or fines of up to \$15,000.

<sup>3</sup> See the [Alphabetical list of MBTA protected birds](#) and the [Migratory Bird Data Center](#).

<sup>4</sup> Approximately eight percent of the species on the MBTA list are also designated as endangered or threatened in all or some portion of their U.S. range under provisions of the Endangered Species Act of 1973 (16 U.S.C. 1531–44; 50 CFR 17.11), but “[n]o legal complications arise from the dual listing as the two lists are developed under separate authorities and for different purposes.” (78 Fed. Reg. at 65,849).

for individuals and companies to know exactly what is required of them under the law when otherwise lawful activities necessarily result in accidental bird deaths. Even if they comply with everything requested of them by the Service, they may still be prosecuted, and still found guilty of criminal conduct.” AGC also agrees with FWS’s statement: “Productive and otherwise lawful economic activity should not be functionally dependent upon the ad hoc exercise of enforcement discretion.”

## I. SUMMARY OF PROPOSED CHANGES

The proposed rule would codify and apply a uniform interpretation of the MBTA that its prohibitions do not apply to incidental take. The proposal would limit the scope of the MBTA to actions that are directed at migratory birds, their nests, or their eggs, and to clarify that injury to or mortality of migratory birds that results from, but is not the purpose of, an action (i.e., incidental taking or killing) is not prohibited by the Act. The construction industry would benefit from regulatory clarity on incidental take. The MBTA does not address incidental take, and a federal circuit court split on the scope of the Act’s take prohibition has created ambiguity and confusion for potential defendants who wish to comply with the MBTA while continuing their otherwise legal activities.

The Feb. 3 proposed rule<sup>5</sup> would continue to prohibit deliberate actions specifically directed at migratory birds, their nests, or their eggs. However, unintentional (or not purposeful) impacts would not violate the MBTA. Specifically, the proposal would change the regulatory text as follows:

Add § 10.14 to subpart B to read as follows:  
Scope of the Migratory Bird Treaty Act.

The prohibitions of the Migratory Bird Treaty Act ([16 U.S.C. 703](#)) that make it unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, or kill migratory birds, or attempt to engage in any of those actions, apply only to actions directed at migratory birds, their nests, or their eggs. Injury to or mortality of migratory birds that results from, but is not the purpose of, an action (i.e., incidental taking or killing) is not prohibited by the Migratory Bird Treaty Act.

The issue of whether the MBTA, which is a strict liability statute, prohibits incidental take of migratory birds has been the subject of multiple lawsuits over the years. Federal Circuit Courts are split on whether unintentional take is, in fact, prohibited. The proposed rule would clarify that a violation of the MBTA “unambiguously require[s] an action that is directed at migratory birds, nests, or eggs.” As proposed, the rule would provide significant certainty to and reduced burden for the regulated community. In the preamble to proposal, FWS explains that “it is in its own interest, as well as that of the public, to have and apply a national standard that sets a clear, articulable rule for when an operator crosses the line into criminality.”

## II. AGC’S RESPONSE TO QUESTIONS POSED BY THE SERVICE

In the proposed rule, the Service requested feedback on several questions such as the types of avoidance, minimization, and mitigation measures currently employed. The Service has also requested information related to the direct and indirect costs of those practices.

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<sup>5</sup> In January 2017, the Obama Administration issued a late-hour opinion to criminalize incidental take, which the Trump Administration reversed within a month---and followed up by issuing their own opinion (M-37050) in December of that year. The Service then released the current proposed rule on Feb. 3, 2020, to codify the Trump Administration’s Solicitor’s Opinion M-37050 that determined incidental take resulting from otherwise lawful action does not violate the MBTA.

### ***A. Mitigation Practices - Current***

Contractors follow avoidance and mitigation measures recommended by the Service and often referenced in their contract documents to minimize the impact their activities may have on migratory birds. The Service has outlined conservation measures to avoid impacts to migratory birds, their eggs, and nests that are to be followed on every construction site. Applicable projects may also follow other agency guidance, such as the Federal Highway Administration's (FHWA) guidance related to nesting swallows.<sup>6</sup> Furthermore, protective measures can also be included in construction specifications, such as for highway or bridge projects. Specific conservation plans for groupings or specific species of birds may also be in place, such as for shorebirds or waterbirds. Typical measures across projects include surveys, management and/or compliance plans, and avoidance/mitigation practices such as scheduling of grading or clearing activities outside of breeding or nesting times and providing natural buffers. This letter summarizes some of the typical measures below.

The U.S. FWS's Nationwide Standard Conservation Measures<sup>7</sup> provide measures in three categories: General, Habitat Protection, and Stressor Management. General measures include such practices as training and covering waste disposal containers. Habitat protection measures include establishing buffers, implementing erosion and sedimentation plans, dust controls, for example. Stressor management is focused on eight types of stressors: vegetation removal, invasive species, artificial lighting, collision, entrapment, noise, chemical contamination, and fire. The Services recommends conservation measures for each stressor. Below is a sampling of those recommendations:

- Conduct surveys
- Time/schedule construction around peak bird breeding season
- Weed abatement
- Location of vehicle wash stations
- Limit construction times
- Limit bright lights
- Restrict access
- Increase visibility
- Avoid planting desirable vegetation in medians or Rights of Way
- Install wildlife "crossings"/culverts
- Cover nesting areas with mesh/nets
- Cap pipes
- Install anti-perching devices
- Monitor nesting areas
- Stop work if a nest becomes active
- Reduce noise

Section 1439 of the FAST Act temporarily authorizes, under MBTA (16 U.S.C. 703 *et seq.*), the temporary take of nesting swallows between April 1 and August 31 for bridge construction projects that are: (1) that are eligible for funding under Title 23, U.S.C., and (2) that have any component condition rated 3 or less as defined by the National Bridge Inventory General Condition Guidance. Contractors must implement measures developed in collaboration with the U.S. FWS to minimize adverse effects on nesting swallows:

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<sup>6</sup> Section 1439 of the Fixing America's Surface Transportation Act (FAST Act) provides a temporary authorization, between April 1 and August 31 of each year, for the take of nesting swallows on certain bridge construction projects. *See* [https://www.environment.fhwa.dot.gov/legislation/authorizations/fastact/guidance\\_elimination-of-barriers\\_1439.aspx](https://www.environment.fhwa.dot.gov/legislation/authorizations/fastact/guidance_elimination-of-barriers_1439.aspx).

<sup>7</sup> *See* <https://www.fws.gov/migratorybirds/pdf/management/nationwidestandardconservationmeasures.pdf>.

- Time bridge construction activities to avoid the nesting season to the extent possible.
- Apply bird exclusion devices to work areas prior to nest initiation in the spring, potentially before April 1. Devices may include plastic sheeting that is thick enough to withstand the elements; or weather-resistant polypropylene netting with 0.25-inch or smaller openings. Netting is an option that is often used, but is not recommended as nets have been known to result in mortalities by trapping adult swallows. Install bird exclusion devices such that bird access to the underside of the bridge, including its exterior girders, is completely blocked. Clean bird waste or other debris from the contact surfaces of the bridge girders before installing the exclusion devices. Monitor the devices daily and maintain and repair them to keep them effective. Remove bird exclusion devices from the job site at the end of each nesting season.
- Swallow nests that are near but not in the immediate work area can be left alone if they do not pose a safety concern.
- Conduct nest removal efforts at the onset of nest-building activity, potentially *before* April 1, in order to encourage use of alternative areas and avoid mortality of eggs, hatchlings, and adults. Take of eggs, juveniles, and adults is authorized only from April 1 to August 31.
- If an established nest must be removed from a work area before young have fledged, then remove the nest as early in the nesting cycle as possible, from April 1 to August 31, to encourage re-nesting elsewhere.
- Construct temporary alternative habitat/nesting substrate(s) in the vicinity of the bridge to attract displaced swallows prior to their return in spring. Alternative habitats should be species-specific and could include temporary structures for swallows and/or traditional purple martin houses.
- Restore, rehabilitate, and/or preserve habitats that will benefit swallows.
- Injured swallows may be taken to an authorized wildlife rehabilitation facility.
- Dead swallows that are retrieved should be disposed of either by burial or in a landfill if allowable.

Specifications for construction work, such as on highway or bridge projects, also will reference compliance with the MBTA (and other environmental regulations) and place conditions on the contractor to develop a plan (such as in accordance with the state department of transportation's (DOT) plan), hire biologists, survey, and implement repellents and nesting prevention measures.<sup>8</sup> In some examples AGC reviewed, the contractor may be able to recuperate the cost of compliance, but remains liable if the plan does not work and a take occurs and may be responsible if nesting occurs and the project is delayed. Construction documents may tabulate direct costs in varying ways, such as by time spent (hourly) by the biologist conducting a survey or by field staff in inactive nest removal or by materials used (square footage).

AGC's review of several migratory bird mitigation plans provided by its members shows the extent to which contractors actively seek to avoid impacts to migratory birds. Depending on the complexity of the project, the plan may be a page in length (e.g., referring to a more comprehensive DOT plan) to a lengthy report prepared by a third-party. The plan outlines the measures the contractor will take to avoid and minimize exposures to migratory birds. It may provide information on surveying protocol, buffers, specific nest monitoring methods, experience of the team, deterrence practices, applicable state and federal regulations, and reporting protocols. Some may even include specifications for products that will be used as deterrents on the project. Contractors will also prepare training aides, such as toolbox talks, to educate field workers on their responsibilities related to managing migratory birds.

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<sup>8</sup> AGC reviewed multiple specifications, not all of which are publicly available online. *See* these available online: [https://www.codot.gov/content/projects/I70DotseroCMGC/18162\\_Dotsero%20Project%20Special%20Provisions.pdf](https://www.codot.gov/content/projects/I70DotseroCMGC/18162_Dotsero%20Project%20Special%20Provisions.pdf); <https://www.iowadot.gov/specifications/pdf/completebook.pdf>; [https://www.odot.org/contracts/a2018/plan\\_rev1809/835\\_1809\\_SSP-263B\(062\)PM\\_2956904/AB01-29569\(04\)-GENERAL%20NOTES%20AND%20SUMMARY%20OF%20PAY%20QUANTITIES%20\(BRIDGE\).pdf](https://www.odot.org/contracts/a2018/plan_rev1809/835_1809_SSP-263B(062)PM_2956904/AB01-29569(04)-GENERAL%20NOTES%20AND%20SUMMARY%20OF%20PAY%20QUANTITIES%20(BRIDGE).pdf); and <https://apps.itd.idaho.gov/Apps/manuals/SpecBook/SpecBook18.pdf>.

### ***B. Mitigation Practices - Future***

In the proposed rule, the Service also requested feedback on the extent which avoidance, minimization, and mitigation measures will continue to be used if this proposed rule is finalized. AGC members anticipate that protective measures would continue under the proposed regulatory regime. Communications from the U.S. FWS and FHWA demonstrate that the agencies are taking a conservative approach following the release of the December 2017 M-Opinion. Importantly, the clarification provided in the Trump Administration’s Solicitor’s Opinion M-37050 that would be codified by this proposed rule would provide a much-needed safeguard should protective measures fail.

A Service memo<sup>9</sup> to regional directors on the subject of the destruction and relocation of migratory bird nests contents (signed June 14, 2018) acknowledges the new incidental take policy in the December 2017 M-Opinion and then clarifies when permits for removing birds or nests or policies for Good Samaritan would apply. The implication is that incidental take is not equivalent to a permit for removal nor Good Samaritan provisions. “...[A]n individual or entity may destroy an active nest while conducting any activity where the intent of the action is not to kill migratory birds or destroy their nests or contents. However, because the MBTA specifically protects migratory bird nests, eggs, chicks, and adults from possession and transport without a permit, individuals and entities cannot, in most cases, take reasonable protective actions (such as removing eggs and chicks prior to nest destruction or relocating nests) without first obtaining authorization to do so.” The Service has permits in place if you knowingly need to remove nests or birds as well as Good Samaritan provisions if you inadvertently harm a bird (or find a harmed bird) and temporarily transport it to a rehabilitation expert.

AGC members have observed that FHWA and other federal actions incorporate measures necessary to mitigate adverse impacts to migratory birds---a practice continuing after issuance of the December 2017 M-Opinion. This is consistent with Executive Order 13186, *Responsibilities of Federal Agencies to Protect Migratory Birds*, that encourage migratory bird conservation and established the Council for the Conservation of Migratory Birds. Furthermore, Federal agencies use best scientific data available to assess migratory birds through the National Environmental Policy Act (NEPA) process. Special consideration is given to priority habitats, such as important nesting areas, migration stopover areas, and wintering habitats. States also may have migratory bird or wildlife requirements that would apply on a project, such as in Texas.<sup>10</sup>

### **III. WHY THIS PROPOSED RULE IS NEEDED**

AGC strongly supports the approach to incidental take outlined in this proposed rule, because the many avoidance and minimization efforts discussed above are imperfect. Managing birds in the field is notoriously difficult, even after careful planning and scheduling around common breeding and nesting times and with the use of deterrents. AGC members observe that birds will nest whenever/wherever they want to. Some mitigation measures or bird deterrents are not 100 percent effective and others---even U.S. FWS-recommended deterrents---can cause unintentional damage to the birds (e.g., entangled in nets) or exasperate other environmental issues, such as erosion and sedimentation from clearing vegetation prior to the nesting season, especially if it coincides with a rainy season.

AGC received feedback from members indicating that contractors try to phase clearing and demolition of structures, such as bridges, outside the nesting season. When that is not feasible, contractors will use nesting deterrents, and the members mention it is expensive to net a bridge. Netting is not always effective and requires continual monitoring throughout the time of its use. Contractors may use gell repellents, but these

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<sup>9</sup> See <https://www.fws.gov/policy/m0407.pdf>.

<sup>10</sup> See <https://ftp.dot.state.tx.us/pub/txdot-info/env/toolkit/350-01-gui.pdf>.

also are not completely effective. A more common deterrent when dealing with bridges is removing the inactive nests to keep them non-viable. Again, the contractor must continually monitor the bridge during the nesting season and undertake nest control almost daily. If one bird builds a nest and lays an egg, then the effort, time and money invested are wasted---the project stops.

Furthermore, some nesting periods can range for wide periods of time, which can complicate construction schedules. A member shared an example from California: The nesting season is typically December 15 to August 15 for raptors and February 15 to September 15 for all other species. The nesting bird management plan must meet the guidelines of the California Department of Fish and Wildlife and the U.S. FWS. This plan and coordination with these agencies may be the only way construction work can advance within the annual nine-month nesting season. On jobs without a plan, the buffer can be up to a mile.

Additional examples of mitigation challenges provided by AGC members include:

- Reflective flash tape: Incredibly prone to weathering and deterioration. Once installed, its life span can be as little as a day, depending on conditions. On some projects, the tape will fall from locations where it has been installed and litter the ground. In those cases, the litter puts some avian species at risk because they could choke on the small pieces. Members also have observed birds using pieces of the tape as nesting material.
- Bird netting: Incredibly prone to weathering and deterioration. Gaps that may have been inadvertently overlooked during installation (they are incredibly easy to miss) and/or the tiniest holes that may have been created from just normal wear and tear can cause animal entrapment (not just of bird species, but all small animals), which could result in a take of migratory birds.

For these reasons, AGC members need the safeguard this proposed rule would provide---without it they could be criminally liable even when following the Service's recommendations and carrying out the best management practices available to the industry.

#### IV. CONCLUSION

The Trump administration approach to the MBTA is a common sense interpretation that refocuses the Act back onto its original intent to prevent over-hunting. AGC appreciates the U.S. FWS's efforts to end the confusion about the applicability of the MBTA provisions to legal, authorized activities. If you have any questions or require additional information, please contact me, Melinda Tomaino, at 703-837-5415 or [melinda.tomaino@agc.org](mailto:melinda.tomaino@agc.org).

Respectfully submitted,



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