

subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, or impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104–4). Nor does it require any special considerations under Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994); or OMB review or any Agency action under Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note). Since tolerances and exemptions that are established on the basis of a petition under section 408(d) of FFDCA, such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply. In addition, the Agency has determined that this action will not have a substantial direct effect on States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999). Executive Order 13132 requires EPA to develop an accountable process to ensure “meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.” “Policies that have federalism implications” is defined in the Executive order to include regulations that have “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.” This final rule directly regulates growers, food processors, food handlers, and food retailers, not States. This action does not alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of section 408(n)(4) of FFDCA. For these same reasons, the Agency has determined that this rule does not have any “tribal implications”

as described in Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 6, 2000). Executive Order 13175, requires EPA to develop an accountable process to ensure “meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.” “Policies that have tribal implications” is defined in the Executive order to include regulations that have “substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and the Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.” This rule will not have substantial direct effects on tribal governments, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified in Executive Order 13175. Thus, Executive Order 13175 does not apply to this rule.

#### VII. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of this final rule in the **Federal Register**. This final rule is not a “major rule” as defined by 5 U.S.C. 804(2).

#### List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: February 16, 2007.

**James Jones,**  
Director, Office of Pesticide Programs.

■ Therefore, 40 CFR chapter I is amended as follows:

#### PART 180—[AMENDED]

■ 1. The authority citation for part 180 continues to read as follows:

**Authority:** 21 U.S.C. 321(q), 346a and 371.

■ 2. Section 180.625 is added to read as follows:

#### §180.625 Orthosulfamuron; tolerances for residues.

(a) *General.* Tolerances are established for residues of orthosulfamuron 1-(4,6-dimethoxypyrimidin-2-yl)-3-[2-(dimethylcarbamoyl)-phenylsulfamoyl] urea *per se* in or on the following commodities:

Commodity	Parts per million
Rice, grain .....	0.05
Rice, straw .....	0.05

(b) *Section 18 emergency exemptions.* [Reserved]

(c) *Tolerances with regional registrations.* [Reserved]

(d) *Indirect and inadvertent residues.* [Reserved]

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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 21

RIN 1018–AI92

#### Migratory Bird Permits; Take of Migratory Birds by the Armed Forces

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

**ACTION:** Final 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 (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 his/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. The Secretary has delegated this task to the U.S. Fish and Wildlife Service (Service).

In passing the Authorization Act, Congress itself determined that allowing incidental take of migratory birds as a result of military readiness activities is consistent with the MBTA and the treaties. With this language, Congress clearly expressed its intention that the Armed Forces 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. This rule has been developed by the Service 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 (50 CFR parts 13, 21 and 22). However, these regulations do not expressly address the issuance of permits for incidental take. As directed by Section 315 of the Authorization Act, this rule authorizes such take, with limitations, that result from military readiness activities of the Armed Forces. If any of the Armed Forces determine that a proposed or an ongoing military readiness activity may result in a significant adverse effect on a population of a migratory bird species, then they must confer and cooperate with the Service to develop appropriate and reasonable conservation measures to minimize or mitigate identified significant adverse effects. The Secretary of the Interior, or his/her designee, will retain the power to withdraw or suspend the authorization for particular activities in appropriate circumstances.

**DATES:** This rule is effective March 30, 2007.

**ADDRESSES:** The final rule and other related documents can be downloaded at <http://migratorybirds.fws.gov>. The complete file for this 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:** Robert Blohm, 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. The U.S. Fish and Wildlife Service (Service), is 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, 1997), Japan (1972), and Russia (1976), and the amendment of the treaty with Canada (1995).

While the terms of the treaties vary in their particulars, each treaty and subsequent amendments impose substantive obligations on the United States for the conservation of migratory birds and their habitats. For example, the Canada treaty, as amended, includes the following conservation principles:

- To manage migratory birds internationally;
- To ensure a variety of sustainable uses;
- To sustain healthy migratory bird populations for harvesting needs;
- To provide for, maintain, and protect habitat necessary for the conservation of migratory birds; and
- To restore depleted populations of migratory birds.

The Canada and Mexico treaties protect selected families of birds, while the Japan and Russia treaties protect selected species of birds. All four

treaties provide for 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 Secretary is authorized and directed, from time to time, having due regard to the zones of temperature and to the distribution, abundance, economic value, breeding habits, and times and lines of migratory flight of such birds to adopt suitable regulations permitting and governing the take of migratory birds when determined to be compatible with the terms of the treaties (16 U.S.C. 704). Furthermore, 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. The Service has defined "take" in regulation 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 (11th Cir. 1997); *Newton County Wildlife Ass'n v. U.S. Forest Service*, 113 F.3d 110, 115 (8th Cir. 1997). Subsequently, on December 20, 2000, we issued Director's Order 131 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 (5 U.S.C. 551 et seq.) (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, 2002, 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, 2002. A permanent injunction was issued by the District Court on June 3, 2002. 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 this rule provides is essential to preserving the Service's role in determining what military readiness activities, if any, create an unacceptable risk to migratory bird resources and therefore must be modified or curtailed.

The Armed Forces are responsible for protecting the United States from external threats. To provide for national security, they engage in military readiness activities. "Military readiness activity" is defined in the Authorization Act to 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. It includes activities carried out by contractors, when such contractors are performing a military readiness activity in association with the Armed Forces, including training troops on the operation of a new weapons system or testing the interoperability of new equipment with existing weapons systems. 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.

Section 315 of the 2003 National Defense Authorization Act (Pub. L. 107-314, 116 Stat. 2458, Dec. 2, 2002, *reprinted in* 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 military readiness activities from the MBTA's prohibitions against take of migratory birds. With the passage of the Authorization Act, Congress determined that such regulations are consistent with the MBTA and the underlying treaties by requiring the Secretary to promulgate such regulations. Furthermore, Congress clearly expressed its intention that the Armed Forces 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 ability of the Armed Forces to fulfill their 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 rule authorizes the Armed Forces to take migratory birds incidental to 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 Armed Forces in meeting their statutory responsibilities can go forward. This rule is also appropriate and necessary to

ensure compliance with the treaties and to protect a vital resource in accordance with the Secretary's obligations under Section 704 of the MBTA as well as under Section 315 of the Authorization Act. This rule will continue to ensure conservation of migratory birds as the authorization it provides is dependent upon the Armed Forces conferring and cooperating with the Service to develop and implement conservation measures to minimize or mitigate significant adverse effects to migratory birds. This rule has been developed by the Service 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 activities of the Department of Defense and the Coast Guard other than military readiness activities are addressed separately in Memoranda of Understanding (MOUs) developed in accordance with Executive Order 13186, Responsibilities of Federal Agencies to Protect Migratory Birds, signed January 10, 2001. The MOU with the Department of Defense was published in the **Federal Register** August 30, 2006 (Volume 71, Number 168). Upon completion of the MOUs with additional Federal agencies, and in keeping with the intent of the Executive Order for Federal agencies to promote the conservation of migratory bird populations, the Service may issue incidental take authorization to address specific actions identified in the MOUs.

#### Responses to Public Comment

On June 2, 2004, we published in the **Federal Register** (69 FR 31074) a proposed rule to authorize the take of migratory birds, with limitations, that result from Department of Defense military readiness activities. We solicited public comment on the proposed rule for 60 days ending on August 2, 2004.

By this date, we received 573 comments in response to the proposed rule; 24 were from identified organizations or agencies. The following text discusses the substantive comments received and provides our response to those comments. Additionally, it provides an explanation of significant changes from the proposed rule. We do not specifically address the comments that simply opposed the rule unless they included recommendations for revisions. Comments are organized by topic.

To more closely track the language in the Authorization Act and to clarify that the rule applies to the incidental taking

of a migratory bird by a member of the Armed Forces during a military readiness activity, we have replaced the "Department of Defense" with "Armed Forces," where applicable.

*Violation of the Migratory Bird Treaty Act and the Four Migratory Bird Treaties*

*Comment:* The statement that the rule allows take only in "narrow instances" of military readiness activities goes against the spirit and letter of the MBTA, which forbids the take of migratory birds and thus abrogates the MBTA.

*Service Response:* The MBTA regulates, rather than absolutely forbids, take of migratory birds. The Secretary is authorized and directed, from time to time, having due regard to the zones of temperature and to the distribution, abundance, economic value, breeding habits, and times and lines of migratory flight of such birds to adopt suitable regulations permitting and governing the take of migratory birds when determined to be compatible with the terms of the treaties (16 U.S.C. 704). In the Authorization Act, Congress directed the Secretary to utilize his/her authority to permit incidental take for military readiness activities. Furthermore, Congress itself by passing the Authorization Act determined that allowing incidental take of migratory birds as a result of military readiness activities is consistent with the MBTA and the treaties. Thus, this rule does not abrogate the MBTA.

*Comment:* Citing broad take authorization language in the current text of the treaty with Canada, concern was expressed regarding the analysis in the proposed rule that the treaty with Canada has a narrower focus than the treaties with Japan and Russia.

*Service Response:* We agree with the commenter that the Canada treaty, as amended by the 1995 Protocol, now includes broad exception language similar to that in the Japan and Russia treaties. We have expanded upon and added additional clarification in the section "Is the rule consistent with the MBTA?" discussing compatibility of this rule with the MBTA and the four treaties.

*Authorization of Take Under § 21.15(a)*

*Comment:* The Department of Defense should avoid take of migratory birds by avoiding areas inhabited by migratory birds including restricting construction and active use of airfields in the vicinity of wildlife refuges, prohibiting military operations over wildlife refuges or sensitive migratory bird habitat areas,

and avoiding areas where migratory birds nest, breed, rest, and feed.

*Service Response:* Military lands often support a diversity of habitats and their associated species, including migratory birds; thus it would be difficult for the Armed Forces to completely avoid areas inhabited by birds or other wildlife species. When determining the location for a new installation, such as an airfield, the applicable Armed Force must prepare environmental documentation in accordance with the National Environmental Policy Act (42 U.S.C. 4321 et seq.) (NEPA) that gives due consideration to the impacts of the proposal on the environment, including migratory birds. With respect to wildlife refuges, Congress in the 2000 amendments to the National Wildlife Refuge System Administration Act noted specifically that the provisions of the Act relating to determinations of the compatibility of a use would not apply to overflights above a refuge (Pub. L. 106-580; December 29, 2000). Nevertheless, as noted in this rule, the Armed Forces have made significant investments in acquiring data on the distribution of bird populations and identification of migration routes, as well as the use of military lands for breeding, stopover sites, and overwintering areas, to protect and conserve these areas. The Armed Forces actively utilize radar ornithology to plan new construction and testing and training operations in areas and times of least constraints. The Armed Forces also have a strong interest in avoiding bird/aircraft conflicts and use this type of information to assist range planners in selecting training times when bird activity is low.

In accordance with the Sikes Act (included in Pub. L. 105-85), the Department of Defense must provide for the conservation and rehabilitation of natural resources on military installations. Thus, potential conflicts with natural resources, including migratory birds, should be addressed in Integrated Resource Management Plans (INRMP), where applicable. Although the Sikes Act does not apply to the Coast Guard, they are also starting to encourage applicable bases to develop INRMPS.

*Comment:* Provision should be included that the Department of Defense cannot ignore scientific evidence and proceed on a course of action where take is inevitable.

*Service Response:* None of the four treaties strictly prohibit the taking of migratory birds without exception. Furthermore, the Service acknowledges that regardless of the entity implementing an activity, some birds

may be killed even if all reasonable conservation measures are implemented. With the passage of the Authorization Act, Congress directed the Secretary to authorize incidental take by the Armed Forces. Thus, they will be allowed to take migratory birds as a result of military readiness activities, consistent with this rule. This rule, however, will continue to ensure conservation of migratory birds as it requires the Armed Forces to confer and cooperate with the Service to develop and implement conservation measures to minimize or mitigate adverse effects to migratory birds when scientific evidence indicates an action may result in a significant adverse effect on a population of a migratory bird species.

As stated in the Principles and Standards section of this rule, the Armed Forces will 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 the action areas.

*Comment:* The Department of Defense should not have the sole authority/responsibility to determine whether the survival of the species is threatened, and only then initiate consultation with the Service.

*Service Response:* We assume that, despite the commenter's use of the term "consultation", this is a reference to the requirement under § 21.15(a)(1) to "confer and cooperate," and not to the requirement of "consultation" under section 7 of the Endangered Species Act (ESA), 16 U.S.C. 1536. Section 21.15(a)(1) does condition the requirement to "confer and cooperate" on a determination by the Armed Forces that a military readiness activity may result in a significant adverse effect on a population of a migratory birds species. However, we expect that the Armed Forces will notify the Service of any activity that even arguably triggers this requirement. In addition, putting aside the requirements of this regulation, the Armed Forces would, as a matter of course share such information in a number of circumstances.

First, 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 also 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.”

Second, the Sikes Act (16 U.S.C. 670a-670o), as amended in 1997, requires the development of INRMPs by the Department of Defense that reflect the mutual agreement of the Department of Defense, the Service, and the appropriate State wildlife agency. The Sikes Act has provided the Service, as well as the public, with an opportunity to review natural resources management on military lands, including any major conflicts with migratory birds or their habitat. NEPA documentation is also completed on new or revised INRMPs. Department of Defense policy requires installations to review INRMPs annually in cooperation with the Service and State resource agencies. Annual reviews facilitate adaptive management by providing an opportunity for the parties to review the goals and objectives of the plans and to evaluate any new scientific information that indicates the potential for adverse impacts on population of a migratory bird species from ongoing (or new) military readiness activities.

Third, if the military readiness activity may affect a species listed under the ESA, the Armed Forces would communicate with the Service to determine whether formal consultation is necessary under section 7 of the ESA.

If, as a result these formal processes or by any other mechanism the Service obtains information which raise concerns about the impacts of military readiness on migratory bird populations, the Service can request additional information from the Armed Services. Under section 21.15(b)(2)(iii), failure to provide such information can form the basis for withdrawal of the authorization to take migratory birds. In any case, based on this information, the Service can, under appropriate circumstances, suspend or withdraw the authorization even if the Armed Forces do not themselves determine that a military readiness activity may result in a significant adverse effect on a population of a migratory bird species.

*Comment:* The threshold for requiring the Department of Defense to confer with the Service when a “significant adverse effect on the sustainability of a population of migratory bird species of concern” is too high. This could allow significant damage to resources that could be avoided with criteria that are more stringent.

*Service Response:* We agree. We have modified the threshold to “significant adverse effect on a population of migratory bird species.” The definitions of “population” and “significant

adverse effect” have also been modified accordingly in this rule.

*Comment:* The provision that the rule must be promulgated with the concurrence of the Secretary of Defense requires the regulator to get permission of the regulated agency.

*Service Response:* The 2003 Defense Authorization Act required that the regulation be developed with the concurrence of the Secretary of Defense. However, as indicated in § 21.15(b), we have the authority to withdraw authorization if it is determined that a proposed military readiness activity may be in violation of any of the migratory bird treaties or otherwise is not being implemented in accordance with this regulation.

*Comment:* Encourage more emphasis on upfront planning and evaluation of minimum-impact alternatives to foster more opportunities to avoid or mitigate impacts.

*Service Response:* As stated in this rule, the Department of Defense currently incorporates a variety of conservation measures into their INRMP documents to address migratory bird conservation. Additional measures will be developed in the future with all the Armed Forces in coordination with the Service and implemented where necessary to avoid, minimize, or mitigate significant adverse effects on migratory bird populations. This rule also indicates the Armed Forces shall engage in early planning and scoping and involve agencies with special expertise in the matters related to the potential impacts of a proposed action.

*Comment:* The proposed rule grants the Department of Defense greater authority to take and kill migratory birds than authorized in the Defense Authorization Act, which is the only statutory authority for the proposed rule and requires that the Department of Defense minimize and mitigate impacts to migratory birds.

*Service Response:* We do not agree that the rule provides greater authority to take birds than authorized in the Defense Authorization Act. What this rule does is provide clarity regarding the processes the Armed Forces are required to initiate to minimize and mitigate adverse impacts of authorized military readiness activities on migratory birds while ensuring compliance with the migratory bird treaties and meeting the Secretary’s obligations under Section 704 of the MBTA.

*Comment:* The rule should require mitigation options be formally assessed and evaluated prior to undertaking the activity and that mitigation be commensurate with the extent of the impact.

*Service Response:* We agree that mitigation can be very complex both from the perspective of replicating all the ecosystem components that a species needs to successfully survive and reproduce regardless of whether mitigation is ex-situ or in-situ.

The Service’s Mitigation Policy (Fish and Wildlife Service Manual, 501 FW 2) is designed to assist the Service in the development of consistent and effective recommendations to protect and conserve valuable fish and wildlife resources to help ensure that mitigation be commensurate with the extent of the impact.

In addition, as indicated in this rule, the Armed Forces will confer and cooperate with the Service to develop and implement conservation measures when an ongoing or proposed activity may have a significant adverse effect on a population of migratory bird species. The public, and the Service, also have the opportunity to review and comment on proposed military readiness activities in accordance with NEPA.

*Comment:* Section 21.15(a) of the proposed regulation must be revised to provide a system of oversight by the Service both in determining whether Department of Defense military readiness activities would likely adversely impact a migratory bird population and in setting a timeline for the implementation of conservation measures.

*Service Response:* As previously indicated, the Service and the public have the opportunity to review and comment on proposed military readiness activities in accordance with NEPA or other environmental review. Thus, we will be provided an opportunity to evaluate whether a proposed activity may have an adverse effect on migratory bird populations.

*Comment:* Pursuant to authority granted by 10 U.S.C. 101 and 14 U.S.C. 1, the U.S. Coast Guard is a branch of the armed forces of the USA at all times. Under this authority, the Coast Guard engages in military readiness activities. Furthermore, under the definition of “Secretary of Defense,” the Department of Homeland Security is included with respect to military readiness activities of the U.S. Coast Guard. The rule should be revised accordingly to reflect this.

*Service Response:* Section 315 of the Authorization Act provides for the Secretary “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.” We agree that

“Armed Forces” includes the Coast Guard.

*Comment:* In order for potential impacts of the implementation of this rule to be effectively analyzed, the rule should not be categorically excluded. A full NEPA analysis should be conducted for the rule.

*Service Response:* Because of the broad spectrum of activities, activity locations, habitat types, and migratory birds potentially present that may be affected by this rule, it is not foreseeable or reasonable to anticipate all the potential impacts in a meaningful manner of military readiness activities conducted by the Armed Forces on the affected environment; thus it is premature to examine potential impacts of the rule in accordance with NEPA. We have determined that any environmental analysis of the rule would be too broad, speculative, and conjectural.

Part 516 Departmental Manual 2.3 A (National Environmental Policy Act Part 1508.4) allows an agency (Bureau) in the Department of Interior to determine if an action is categorically excluded from NEPA. We have made the determination that the rule is categorically excluded in accordance with 516 Departmental Manual 2, Appendix 1.10. This determination does not diminish the responsibility of the Armed Forces to comply with NEPA. Whenever the Armed Forces propose to undertake new military readiness activities or to adopt a new, or materially revised, INRMP where migratory bird species may be affected, the Armed Forces invite the Service to comment as an agency with “jurisdiction by law or special expertise” upon their NEPA analysis. In addition, if the potential for significant effects on migratory birds makes it appropriate, the Armed Forces may invite the Service to participate as a cooperating agency in the preparation of their NEPA analysis. Moreover, authorization under this rule requires that if a proposed military readiness activity may result in a significant adverse impact on a population of migratory bird species, the Armed Forces must confer and cooperate with the Service to develop and implement appropriate measures to minimize or mitigate these effects. The environmental consequences of the proposed military readiness activity, as well as the potential of any such measures to reduce the adverse impacts of the proposed activity, would be covered in NEPA documentation prepared for the proposed action.

*Comment:* Section 21.15(a) of the proposed regulation is unclear as to who is to determine that ongoing or proposed

activities are likely to result in significant adverse effects.

*Service Response:* We have revised § 21.15(a) to clarify that this responsibility initially lies with the action proponent, i.e., the Armed Forces. Just as the Armed Forces make the initial determination that consultation is required under similar statutes, such as the Endangered Species Act (16 U.S.C. 1531 et seq.) (ESA) or the National Historic Preservation Act (16 U.S.C. 470), the action proponent will consider the likely effects of its proposed action and whether such effects require that it confer with the Service to develop and implement appropriate conservation measures to minimize or mitigate potential significant adverse effects. Where significant adverse impacts are likely, existing requirements under NEPA for federal agencies to prepare environmental documentation will ensure that both the public and the Service have an opportunity to review a proposed action and the Armed Force’s determination with respect to migratory birds.

The Service and State wildlife agencies (and the general public if plan revisions are proposed) also have an opportunity to review the Department of Defense’s management of installation natural resources, including the impacts of land use on such resources, during the quintennial review of INRMPs for Department of Defense lands. Consultation under the Endangered Species Act offers yet another opportunity for the Service to provide input on the potential effects of a proposed military readiness activity on federally listed migratory birds.

*Comment:* The document uses both the terms “may” affect migratory birds and “likely” to affect migratory birds. “May” should be used to be consistent with the NEPA threshold for impacts on the environment.

*Service Response:* The Service has intentionally established different standards for when the Armed Forces are required to confer with the Service and for when we may propose withdrawal of authorization. We have established a broad standard for triggering when the Armed Forces must notify the Service of potential adverse effects on migratory birds. We agree that requiring the Armed Forces to confer with the Service when applicable activities “may” result in a significant adverse effect is consistent with the analysis threshold utilized in NEPA. The Secretary determined that the more restrictive threshold of suspending or withdrawing authorization was warranted when a military readiness

activity likely would not be compatible with one or more of the treaties or is likely to result in a significant adverse effect on a migratory bird population.

#### *Withdrawal of Take Authorization § 21.15(b)*

*Comment:* The Department of Defense is given too much decision power in the rule. Concern was expressed that the final decision regarding whether a military readiness activity is authorized or not is made by political appointees rather than unbiased career employees.

*Service Response:* Our political system is based upon a structure whereby policy decisions are made by political appointees rather than career employees. To address what may be perceived as too much power by the Armed Forces, it is the Secretary of the Interior who has, and retains, the final determination regarding whether an activity is authorized under the MBTA, not the Secretary of Defense.

*Comment:* The rule should require sufficient monitoring to detect significant impacts and provide for diligent oversight by the Department of the Interior to head off problems well before jeopardy is near and withdrawal of authorization is suspended or proposed to be withdrawn.

*Service Response:* We concur that monitoring can play a key role in providing valuable data needed to evaluate potential impacts of activities, inform conservation decisions, and evaluate effectiveness of conservation measures. For monitoring to be relevant, it should focus on specific objectives, desired outcomes, key hypotheses, and conservation measures. As stated in § 21.15(b)(2)(ii) of the rule, in instances where it is appropriate, the Armed Forces are required to “conduct mutually agreed upon monitoring to determine the effects of military readiness activity on migratory bird species and/or the efficacy of the conservation measures implemented by the Armed Forces.” This rule also states that the Armed Forces will consult with the Service to identify techniques and protocols to monitor impacts of military readiness activities. We have also added additional text clarifying the monitoring requirements of the Armed Forces.

*Comment:* The procedure for withdrawal of the authority is so cumbersome and subject to so many exclusions as to make the withdrawal procedure non-functional.

*Service Response:* We have clarified the procedures for when the Secretary may propose withdrawing authorization in § 21.15(b)(2), (4) and (5).

*Comment:* The statutory language of the Defense Authorization Act says

nothing about requiring input from the State Department prior to suspending authorization. Thus, the rule needlessly goes beyond its statutory authority.

*Service response:* In accordance with the MBTA (16 U.S.C. 704), the Secretary of the Interior has the authority to “determine when, and to what extent, if at all, and by what means, it is compatible with the terms of the conventions to allow hunting, taking, capture, killing \* \* \* and to adopt suitable regulations permitting and governing the same.” The Defense Authorization Act does not limit that authority. Requiring the input of the State Department is within the standards of § 704.

*Comment:* The provision that the Secretary must seek the view of the Department of Defense prior to suspending authorization due to a violation with any of the treaties it affects permits the Department of Defense to itself determine its compliance with the migratory bird treaties. The statutory language of the Defense Authorization Act did not address this in any way.

*Service Response:* Section 21.15(b)(1) of this regulation provides that the Secretary retains the discretion to make the ultimate determination that incidental take of migratory birds during a specific military readiness activity would be incompatible with the treaties. Although the Defense Authorization Act required the Secretary to promulgate a regulation, it did not mandate the specific text or all of the conditions in this regulation. This regulation is consistent with the Defense Authorization Act as well as with 16 U.S.C. 704. Moreover, seeking the views of the Armed Forces is appropriate given the possible impacts that suspension of the take authorization could have on national security. Similarly, consulting with the State Department on issues of treaty interpretation is appropriate because of the State Department’s expertise and authority in this area as well as its responsibility for maintaining the relationship of the United States with its treaty partners.

*Comment:* The Secretary should not have unilateral power to suspend or withdraw take authorization as the Defense Authorization Act states the Secretary must exercise authority with the concurrence of the Secretary of Defense.

*Service Response:* In accordance with § 315(d)(1) and (2) of the Authorization Act, the regulation “to exempt the Armed Forces for the incidental take of migratory birds during military readiness activities” shall be developed

by the Secretary of the Interior with the concurrence of the Secretary of Defense. However, the Defense Authorization Act does not restrict or limit our authority in 16 U.S.C. 704 and 712 relative to administering and enforcing the MBTA and complying with the four migratory bird treaties.

#### *Definitions § 21.3*

*Comment:* Incidental take is not defined in the rule or the Defense Authorization Act. Concern was expressed that the Department of Defense being authorized to take migratory birds incidental to military readiness activities without “incidental” being defined will result in the Department of Defense reading this as the ability to actively kill migratory birds and destroy their habitat in anticipation of the potential for such problems.

*Service Response:* Current regulations authorize permits for take of migratory birds for activities such as scientific research, education, and depredation control (50 CFR parts 13, 21 and 22). However, these regulations do not expressly address the issuance of permits for incidental take. “Incidental take of migratory birds” is not defined under the MBTA or in any subsequent regulation, and the Service does not anticipate having a regulatory definition for “incidental take” in the short term. Neither the MBTA, the Defense Authorization Act, nor this rule authorize the take of migratory birds simply in anticipation of the potential for future problems, i.e., removing the potential source of problems before any conflicts may arise with military readiness activities.

*Comment:* Blanket exemption for any and all military readiness activities should not be authorized. In particular, those activities that involve acquisition of new land and construction of facilities in sensitive migratory bird habitat areas should not be authorized. Authorization to take birds should only include those types of activities that are too time or mission-sensitive for thorough evaluation, and where incidental take is unavoidable.

*Service Response:* As defined in the 2003 Defense Authorization Act, military readiness activities 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) 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 listed above.

Acquisition of lands by the Armed Forces is not covered by this authorization as the acquisition itself does not take birds even when the land is being acquired for implementing future military readiness activities. In accordance with NEPA, environmental analysis of any major Federal agency action, which may include land acquisition and future proposed activities on these lands, must be addressed prior to the action occurring. Likewise, construction of facilities in sensitive migratory bird habitat would be addressed through NEPA.

*Comment:* The rule covers all military branches of service and includes contractors and agents. These should be clearly delineated in order to minimize the number of exempt entities.

*Service Response:* The rule applies to contractors only when such contractors are performing a military readiness activity in association with the Armed Forces—i.e., the contractors are performing a federal function. For example, a contractor training troops on the operation of a new weapons system or testing its interoperability with existing weapons systems would be covered. The regulation does not cover routine contractor testing performed at an industrial activity that is privately owned and operated.

*Comment:* The Defense Authorization Act does not limit applicability of minimization and mitigation measures to just “species of concern” but applies to all “affected species of migratory birds.” In addition, concern was expressed that this level of threshold could result in avoidable impacts to species that are not included in the “species of concern lists” but are nevertheless valuable public resources.

*Service Response:* We agree that the Defense Authorization Act is not specifically limited to species of concern, nor did we envision that the rule prevents the Armed Forces from addressing adverse impacts on all affected species of migratory birds through the NEPA process, including those that are locally endemic or otherwise have limited distribution within a State. The rule has been modified by requiring the Armed Forces to confer with the Service when they determine an action may result in a significant adverse effect on the



population of any migratory bird species.

*Comment:* Use of population status at the Bird Conservation Region (BCR) level as a criterion for action could reduce consideration of locally important bird resources, concentrations of birds and special habitats, and populations that do not coincide closely with BCRs.

*Service Response:* We have revised the definition of population so that it is not based upon species distribution or occurrence within a Bird Conservation Region and thus eliminates the concerns expressed above. As used in the rule, a population is defined as “a group of distinct, coexisting (conspecific) individuals of a single species, whose breeding site fidelity, migration routes, and wintering areas are temporally and spatially stable, sufficiently distinct geographically (at some time of the year), and adequately described so that the population can be effectively monitored to discern changes in its status.”

What constitutes a population for the purposes of determining potential effects of military readiness activities will be scientifically based. A population could be defined as one that occurs spatially across a geographically broad area, such as the Western Atlantic red knot population that migrates along the Atlantic seaboard, to a more geographically limited species, such as breeding population of Bicknell's thrush whose breeding range is limited to mountain tops in the northeastern U.S. and southeastern Canada. When requested, the Service will provide technical assistance to the Armed Forces in identifying specific populations of migratory bird species that may be affected by a military readiness activity.

*Comment:* The definition of conservation measure does not adequately recognize international treaty obligations and the right of the Secretary of the Interior to withdraw take authorization should the treaties be violated. In the definitions, after the words “while allowing for completion of the action in a timely manner,” insert “if such action would be consistent with the international treaties underlying the MBTA.”

*Service Response:* If conservation measures implemented by the Armed Forces in accordance with the rule are not sufficient to render the action compliant with the treaties, the Secretary will suspend the authorization. Failure to implement conservation measures is not the sole criterion for proposing withdrawal.

*Comment:* “Conservation measures” is defined to include monitoring when it has the potential to produce data relevant to substantiating impacts, validating effectiveness of mitigation, or providing other pertinent information. However, in the absence of a monitoring requirement, this provision is unworkable.

*Service Response:* Monitoring is required in § 21.15(b)(ii) of the rule. This section indicates that the Department of Defense's failure “to conduct mutually agreed upon monitoring to determine the effects of military readiness activity on migratory bird species and/or the efficacy of the conservation measures implemented by the Department of Defense” is potential cause for the Secretary to propose withdrawing authorization. However, as indicated in the response below, reference to monitoring has been removed from the definition of conservation measures.

*Comment:* Monitoring should not be considered a conservation measure, rather it should be conducted separately and apart from any necessary and reasonable mitigation actions.

*Service Response:* Although monitoring can play a key role in the continued growth of bird conservation by providing the information needed to inform conservation decisions and evaluate their effectiveness, we have removed it from the definition of conservation measures.

*Comment:* The threshold of “significant adverse effect on the sustainability of a population” is too high.

*Service Response:* The threshold for when the Armed Forces will be required to confer with the Service and implement appropriate conservation measures has been modified to when a “significant adverse effect on a population of migratory bird species” may result from an ongoing or proposed military readiness activity. The definition of significant adverse effect has also been accordingly revised in the rule.

*Comment:* The rule has a different standard than what was indicated by Congress in the Defense Authorization Act. The Act indicates measures are to be identified that minimize and mitigate “any adverse impacts” not just “significant adverse effects.” The Service is inserting thresholds of both likelihood and significance that are not any way implied by the statute.

*Service Response:* As indicated in Section 315(b) of the Authorization Act, the identification of measures to minimize and mitigate any adverse impacts of authorized military readiness

activities pertains to the period of interim authority. The standard for authorization of take is established by the Secretary's authority under § 704 of the MBTA, whereby in exercising this authority he/she may prescribe regulations that exempt the Armed Forces for the incidental taking of migratory birds during military readiness activities. As indicated in the rule, the Secretary established thresholds for granting authority to incidentally take migratory birds. For those military readiness activities that would not have a significant adverse effect on migratory bird species populations take is authorized without conferring with the Service, subject to the withdrawal provision of § 21.15(b)(1). If a proposed or ongoing activity may result in a significant adverse effect, the Armed Forces must confer and cooperate with the Service. Take authorization would be suspended or withdrawn only when a military readiness activity likely would not be compatible with one or more of the treaties or is likely to result in a significant adverse effect on a migratory bird population.

*Comment:* Conservation measures that are project designs or mitigation activities should be changed from those that are “reasonable and feasible” to “reasonable and necessary.” This will result in a conservation measure that is appropriate to its purpose and essential to conservation.

*Service Response:* This revision has been made to the definition of conservation measures.

*Comment:* “Conservation measures” fails to place any restrictions or requirements on the amount of time that the Department of Defense would be given to apply the mitigation actions. The phrase “over time” implicitly grants the Department of Defense the ability to ignore the need for immediate action to counter adverse impacts.

*Service Response:* “Over time” was deleted from the definition.

#### Supplementary Information Section

Many comments were received on the Supplementary section of the proposed rule which did not pertain to any recommended revisions to § 21.15. These were taken into consideration in the final rule.

*Comment:* Ambiguous terms such as “should,” “encourage,” “anticipates,” etc., relative to Department of Defense activities contributing towards the conservation of migratory birds should be replaced with stronger terms such as “require.”

*Service Response:* The SUPPLEMENTARY INFORMATION text has no



regulatory force and thus use of stronger terms has no regulatory weight. However, this comment was given due consideration and several revisions were made to strengthen the measures the Armed Forces are currently undertaking to address migratory bird conservation. These terms are not applicable in the actual rule, and therefore, no revisions were made relative to the authorization in this regard.

*Comment:* Integrated Natural Resources Management Plans (INRMPs) as informal mechanisms may not provide prompt and diligent efforts to minimize permitted take of birds. State wildlife agencies encourage more rigorous and thorough planning requirements and offer their considerable expertise and assistance.

*Service Response:* The Sikes Act Improvement Act of 1997 (included in Pub. L. 105-85) requires the development and implementation of INRMPs for relevant Department of Defense installations and mandates that plans be prepared in cooperation with the Service and State fish and wildlife agencies. The purpose of INRMPs is to plan natural resource management activities within the capabilities of the biological setting to support military training requirements. Although the Sikes Act does not apply to the Coast Guard, the Coast Guard is also starting to encourage their bases to address natural resource activities through INRMPs. The Service has been and continues to be committed to expanding partnerships with the Department of Defense. Updated Department of Defense guidance stresses that installations shall work in cooperation with the Service and States while developing or revising INRMPs. Each installation will invite annual feedback from the Service and States concerning how effectively the INRMP is being implemented. Installations have also established and maintain regular communications with the Service and State fish and wildlife agencies to address issues concerning natural resources management including migratory birds.

The Sikes Act also offers opportunities beyond the INRMP process for States and the Service to offer their expertise and assistance on military lands and with respect to migratory birds. For example, under the Sikes Act, the Department of Defense can enter into cooperative agreements with the Service, States, and nonprofit organizations to benefit birds and other species. Programs such as the Chesapeake Bay Program, Coastal America, and Partners In Flight also

offer opportunities to partner with States and to share information and advice.

*Comment:* If the Service must rely on INRMPs for monitoring and mitigation of bird take, we recommend a requirement to complete, revise, and update plans to address bird monitoring and assessment of military readiness impacts and that migratory bird conservation activities receive adequate funding.

*Service Response:* The Sikes Act and Department of Defense guidance provide mechanisms to address emerging needs related to bird monitoring and assessment of military readiness impacts. The Sikes Act requires INRMPs to be reviewed, and revised as necessary, as to operation and effect by the parties (i.e., the Service and State resource agencies) on a regular basis, but not less often than every 5 years. In October 2004, the Department of Defense issued supplemental guidance for implementation of the Sikes Act relating to INRMP reviews. Department of Defense policy requires installations to review INRMPs annually in cooperation with the Service and State resource agencies. Annual reviews facilitate adaptive management by providing an opportunity for the parties to review the goals and objectives of the plans and to establish a realistic schedule for undertaking proposed actions. During annual reviews of the INRMPs, the Department of Defense will also discuss with the Service conservation measures implemented and the effectiveness of these measures in avoiding, minimizing, or mitigating take of migratory birds.

This rule relies on the Armed Forces utilizing the NEPA process to determine whether any ongoing or proposed military readiness activity is likely to result in a significant adverse effect on a population of a migratory bird species. The rule requires the Armed Forces to develop and implement appropriate conservation measures if a proposed action may have a significant adverse effect on a population of migratory bird species. To ensure that such conservation measures adequately address impacts to migratory birds, the rule also requires the Armed Forces to monitor the effects of such military readiness activities on migratory bird species taken during the military readiness activities at issue, and to retain records of these measures and monitoring data for 5 years from the date the Armed Forces commence their action.

*Comment:* We do not believe that impacts addressed by this rule can be adequately monitored or remedied

without commitment of more resources to gather new bird data, conduct additional efforts to monitor impacts, or spend more money.

*Service Response:* Although the rule requires the Armed Forces to conduct mutually agreed upon monitoring to determine the effects of a military readiness activity on migratory bird species and the efficacy of the conservation measures implemented by the Armed Forces, we cannot require the Armed Forces to provide additional funding or resources towards monitoring. However, we do agree that monitoring is an important component of activities the Armed Forces undertake to address migratory bird conservation. We have expanded the monitoring discussion under "Rule Authorization" below.

*Comment:* Concern was expressed that the proposed broad exemption will be perceived as precluding the need for full NEPA consideration for covered activities.

*Service Response:* As stated in this rule, the Armed Forces will continue to be responsible for being in compliance with NEPA, and all other applicable regulations, and ensuring that whenever they propose to undertake new military readiness activities or to adopt a new, or materially revised, INRMP and migratory bird species may be affected, the Armed Forces invite the Service to comment as an agency with "jurisdiction by law or special expertise" upon their NEPA analysis. In addition, if the potential for significant effects on migratory birds makes it appropriate, the Armed Forces may invite the Service to participate as a cooperating agency in the preparation of their NEPA analysis. Moreover, authorization under this rule requires that if a proposed military readiness activity may result in a significant adverse impact on a population of migratory bird species, the Armed Forces must confer and cooperate with the Service to develop and implement appropriate measures to minimize or mitigate these effects. The environmental consequences of the proposed military readiness activity, as well as the potential of any such measures to reduce the adverse effects of the proposed activity, would be covered in NEPA documentation prepared for the proposed action.

*Comment:* The Department of Defense should be required to demonstrate that all "practicable" means of avoiding the "take" of migratory birds have been considered prior to the implementation of a new readiness program or construction of a new installation.

*Service Response:* The Armed Forces will be addressing “take” in a variety of ways. As stated above, through the NEPA process, the environmental consequences of their proposed military readiness activities will be evaluated, as well as any measures to reduce take of migratory birds. In addition, the INRMPs currently incorporate conservation measures to address migratory bird conservation. The Service will continue to work with the Armed Forces to develop additional measures in the future.

*Comment:* Nowhere does the rule mention how and when the Department of Defense will assess current, ongoing activities for which NEPA compliance is complete. The rule should be amended to require, within a specified time period of 90–120 days, a report by the Department of Defense to the Secretary on the impacts of their current military readiness activities on migratory birds.

*Service Response:* As a preliminary matter, it is important to note that where NEPA compliance has been completed, that compliance should have included consideration of the impacts on migratory birds. Since the enactment of NEPA, the Service has been notified of, and provided the opportunity to comment on, proposed military readiness activities that have the potential for significant impacts on the environment, including significant impacts on migratory birds. Nevertheless, it is possible that ongoing military readiness activities might in the future be determined to meet the threshold for the requirement under § 21.15(a)(1) to “confer and cooperate.” There are at least three mechanisms in place that require the Armed Forces to address environment impacts of ongoing activities for which NEPA is complete; supplementary statements under NEPA, INRMP reviews, and the monitoring requirements in the rule.

In accordance with NEPA Part 1502.9, an agency shall prepare a supplement to either a draft or a final environmental impact statement whenever: (1) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or (2) the agency learns of significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. This rule relies on the Armed Forces to use the NEPA process to determine whether an ongoing military readiness activity may result in a significant adverse effect on a population of a migratory bird species.

The Sikes Act (16 U.S.C. 670a–670o), enacted in 1960, has required cooperation among the Department of

Defense, the Service, and State wildlife agencies. The 1997 amendments to the Sikes Act require the development of INRMPs that reflect the mutual agreement of the Department of Defense, the Service, and the appropriate State wildlife agency. The Sikes Act provides the Service, as well as the public, an opportunity to review natural resources management on military lands, including any potential effects on migratory birds or their habitat. NEPA documentation is prepared to support new or revised INRMPs. Department of Defense policy requires installations to review INRMPs annually in cooperation with the Service and State resource agencies. Annual reviews facilitate adaptive management by providing an opportunity for the parties to review the goals and objectives of the plans and to evaluate any new scientific information that indicates the potential for adverse impacts on migratory birds from new or ongoing military readiness activities. In addition, during annual INRMP reviews, the Department of Defense, the Service and the State resources agency evaluate the conservation measures implemented and the effectiveness of these measures in avoiding, minimizing, or mitigating take of migratory birds.

This rule requires the Armed Forces to develop and implement appropriate conservation measures if a proposed action may have a significant adverse effect on a population of migratory bird species. When conservation measures implemented in accordance with § 21.15(a)(1) require monitoring, the Armed Forces must retain records of these measures and monitoring data for 5 years from the date the Armed Forces commence their action.

*Comment:* We disagree with the interpretation of the statute that Congress “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.” This suggests a diminishment of protection for migratory birds. It was Congress’s intent that the Department of Defense should not be forced to halt these activities but rather should modify them to minimize impacts, or, if such activities cannot be practicably altered to minimize impacts, that mitigation measures must be in place to ensure conservation of migratory birds.

*Service Response:* This rule will not diminish the protection of migratory birds. Rather, by requiring the Armed Forces to confer with the Service to develop and implement conservation measures when a military readiness

activity may significantly affect a population of a migratory bird species, a greater benefit to birds will result than the current status operandi. Increased coordination and technical assistance between the Service and the Armed Forces will reduce the number of migratory birds that are incidentally taken as a result of military readiness activities.

#### **Measures Taken by the Armed Forces To Minimize and Mitigate Takes of Migratory Birds**

As the basis for this rule, under the authority of the MBTA and in accordance with Section 315 of the Authorization Act, the Armed Forces 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 Armed Forces to minimize or mitigate 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 evaluation of specific military readiness activities indicates the need for additional measures.

We have a long history of working with natural resources managers at Armed Forces installations 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, as amended, these conservation measures are detailed in Department of Defense INRMPs for specific installations and endorsed by the Service and State fish and wildlife agencies. Additional conservation measures may be incorporated into future revisions of the INRMPs if determined necessary during their quintennial review.

*Bird Conservation Planning.* The Department of Defense prepares INRMPs for most 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 installation, the Service, and the appropriate State fish and wildlife agency on conservation, protection, and management of fish and wildlife resources. The importance of a cooperative relationship among these parties is also stressed in Department of Defense and Service guidances concerning INRMP development and review. In accordance with the Department of Defense guidance, each installation will invite annual feedback from the Service and States concerning how effectively the INRMP is being implemented. Installations also maintain regular communications with the Service and State fish and wildlife agencies to address issues concerning natural resources management including migratory birds. Although the Sikes Act does not apply to the Coast Guard, they are also starting to encourage applicable bases to develop INRMPs.

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 NEPA documents for military readiness activities. This linkage helps to ensure that appropriate conservation measures are incorporated into mitigation actions, where needed, that will protect migratory birds and their habitats.

To-date, over 370 INRMPs have been approved. Through cooperative planning in the development, review and revision of INRMPs, the Department of Defense, the Service and the States can effectively avoid or minimize adverse impacts on migratory bird populations. Through this process, the Service and the Department of Defense will continue to work together to design and develop monitoring surveys that effectively evaluate population trends and cumulative impacts on installations.

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 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 Department of Defense has 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 enhancement of 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 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 populations 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.

NEXRAD information is critically important for the protection of habitats used by migratory birds during stopover periods. This information is vital to 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 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 migratory bird species of concern that are likely to occur on each installation utilizing the Service's published list of Birds of Conservation Concern (<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>).

**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 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 affect 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 online at the <http://www.usahas.com> Web site.

**Pesticide Reduction.** Reducing or eliminating pesticide use also benefits migratory birds. The Armed Forces maintain 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. Department of Defense policy mandates incorporation of sustainable IPM philosophy, strategies, and techniques in all aspects of 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 particularly 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 Department of Defense 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 a 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 its 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 Authorization Act requires the Armed Forces to identify measures to monitor the impacts of military readiness activities on migratory birds. For military lands where migratory bird

data may be lacking, monitoring may include the collection of baseline demographic, population, or habitat-association data. Where feasible, the Armed Forces will conduct agreed-upon monitoring to determine the level of take from military readiness activities.

Monitoring provides important data regarding the impacts of military readiness on migratory birds. It also contributes valuable information where data on species of migratory birds may be limited. In addition, monitoring data assists the Armed Forces in guiding their decisions regarding migratory bird conservation, particularly in developing or amending INRMPs.

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 Flyover 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.

The 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.

The Armed Forces 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.

#### **What Are the Provisions of the Rule?**

##### *National Environmental Policy Act (NEPA) Considerations*

NEPA, and the Council on Environmental Quality's (CEQ) NEPA implementing 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 CEQ's regulations implementing NEPA emphasize the integration of the NEPA process with the requirements of other environmental laws. The 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 rule relies on the Armed Forces utilizing 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.” More particularly, the Armed Forces prepare NEPA analyses whenever they propose to undertake a new military readiness activity that may significantly affect the quality of the human environment; propose to 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 ongoing military readiness activity; or prepare or revise an INRMP covering an area used for military readiness activities. During the preparation of environmental impact statements analyzing the effects of proposed military readiness activities on migratory bird species, the Armed Forces consult with the Service as an agency with "jurisdiction by law and special expertise." If the Armed Forces identify a significant adverse effect on migratory birds during the preparation of a NEPA analysis, this rule requires the Armed Forces to confer and cooperate with the Service to develop and implement appropriate conservation measures to minimize or mitigate any such significant adverse effects. The Armed Forces 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 of 1973, as amended (16 U.S.C. 1531 *et seq.*) (ESA), 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 completed an Intra-Service Consultation on the proposed rule and we have determined that this rule to authorize take under the MBTA will have no effect on listed species. The rule does not authorize take under the ESA. If a military readiness activity may affect a listed species, the Armed Forces retains responsibility for consulting with the Service under section 7(a)(2) of the ESA. Similarly, if a military readiness activity is likely to jeopardize the continued existence of a species proposed for listing, the Armed Forces retain responsibility for conferring with the Service in accordance with section 7(a)(4) of the ESA.

#### *Rule Authorization*

This rule authorizes the Armed Forces to take migratory birds as an incidental result of military readiness activities. The Armed Forces must continue to

apply for and receive an MBTA permit for scientific collecting, control of birds causing damage to military property, or any other activity that is addressed by our existing permit regulations (50 CFR part 13, 21, 22). These activities may not be conducted under the authority of this rule. If any activity of the Armed Forces 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 rule that may occur.

Authorization of take under this rule applies 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 does 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 listed above.

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

With respect to a military readiness activity of the Armed Forces likely to take migratory birds, the rule authorizes take provided the Armed Forces are in compliance with the following requirement:

If the Armed Forces determine that ongoing or proposed activities may result in a significant adverse effect on the population of a migratory bird species, the Armed Forces must confer and cooperate with the Service to develop and implement appropriate conservation measures to minimize or mitigate such significant adverse effects.

The Armed Forces will continue to be responsible for addressing their activities other than military readiness through a MOU developed in accordance with Executive Order 13186, "Responsibilities of Federal Agencies to Protect Migratory Birds," January 10, 2001.

#### **When Is Take Not Authorized?**

If a proposed or an ongoing action may have a significant adverse effect on a population of a migratory bird species, as that term is defined in Section 21.3, the Armed Forces must confer with the Service so that 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 Armed Forces 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 other national defense official appointed by the President and confirmed by the Senate determines that protection of national security requires continuation of the activity.

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

(A) The Armed Forces have not implemented conservation measures that (i) are directly related to protecting the migratory bird species affected by the proposed military readiness activity; (ii) would significantly reduce take of migratory birds species affected by the military readiness activity, (iii) are economically feasible, and (iv) do not limit the effectiveness of military readiness activities.

(B) The Armed Forces fail to conduct mutually agreed upon monitoring to determine the effects of a military readiness activity on migratory bird species and/or the efficacy of the conservation measures implemented by the Armed Forces.

(C) The Armed Forces have 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.

The determination as to whether an immediate suspension of authorization is warranted (i.e., whether the action likely would not 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 likely 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 Armed Forces agree 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 will continue to be authorized by this regulation until the Secretary of the Interior, or his/her delegatee, makes a final determination on the withdrawal.

The Secretary may, at his/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 Armed Forces modify the proposed activity to alleviate significant adverse effects on a population of a migratory bird species or the circumstances in paragraphs (A) through (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 50 CFR 21.15(b)(2) will be reconsidered by the Secretary or his/her delegatee who must be an official nominated by the President and confirmed by the Senate, if, within 45 days of the notification with respect to a military readiness activity, the Secretary of Defense, or other national defense official, 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 applies to military readiness activities of the Armed Forces, including those implemented through

contractors of the Armed Forces and their agents.

#### **Principles and Standards**

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

To proactively address migratory bird conservation, the Armed Forces 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 Armed Forces related to military readiness may result in the incidental take of birds, the Armed Forces should contact the Service so we can assist the Armed Forces in addressing potential adverse impacts on birds and mitigating those impacts. As stated in this rule, the Armed Forces must confer with the Service when these actions may have a significant adverse effect on a population of a migratory bird species.

The Armed Forces will, 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. 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. The Armed Forces should 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 AHAS and BAM should be used to avoid bird activity when planning flight training and range use. The Armed Forces will consider these conservation measures 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 designs 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 Armed Forces should adopt existing industry guidelines supported by the Service and developed to avoid or minimize take of migratory birds. We recognize that implementation of conservation measures will be subject to the availability of appropriations.

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

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

The Armed Forces will use the best available databases to determine which migratory bird species are likely to occur in the area of proposed military readiness activities. This includes species likely to occur in the project area during all phases of the project.

The Armed Forces will 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. Special consideration will be given to priority habitats, such as important nesting areas, migration stop-over areas, and wintering habitats.



The Armed Forces will 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. 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.

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 rule consistent with the MBTA?**

Yes. This issue has two components. First is the question of whether the MBTA prohibits promulgation of regulations authorizing incidental take of migratory birds pursuant to military readiness activities. Second is the question of whether the details of this rule, individually and collectively, conflict with the MBTA in some way.

The starting point for answering both questions is the fact that Sections 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 is authorized in this rule is compatible with the terms of the treaties and consistent with the purposes of the treaties.

Regarding the first question, whether any such regulations are permissible under the MBTA, Congress itself by passing the Authorization Act determined that such regulations are consistent with the MBTA and the underlying treaties by requiring us to promulgate such regulations. Even in the absence of the Authorization Act, regulations authorizing take incidental to military readiness activities are compatible with the terms of the treaties, and therefore authorized by the MBTA.

The MBTA implements four treaties: a 1916 treaty with Great Britain on behalf of Canada that was substantially amended by a 1995 protocol; a 1936 treaty with Mexico, amended by a 1997 protocol; 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 they are important for aesthetic, social, and spiritual purposes. Collectively, the treaties require the United States to provide mechanisms for protecting the birds and their habitats, and include special emphasis on protecting those birds that are in danger of extinction.

The Japan and Russia treaties each call for implementing legislation that broadly prohibits the take of migratory birds. At the same time, those treaties allow the implementing legislation to include exceptions to the take prohibitions. The treaties recognize a variety of purposes for which take may be authorized, including scientific, educational, and propagative purposes; the protection of persons or property; and hunting during open seasons. The treaties also contemplate authorizing takings "for specific purposes not inconsistent with the objectives [or principles]" of the treaties. The Canada treaty, since adoption of the 1995 Protocol, now includes similar language: "the taking of migratory birds may be allowed \* \* \* for \* \* \* specific purposes consistent with the conservation principles of this Convention."

In contrast, the take prohibitions required by the 1936 Mexico treaty have a narrower focus than the later treaties. The Mexico treaty is more clearly directed at stopping the indiscriminate killing of migratory birds by hunting and for commercial purposes through the establishment of closed seasons. In addition, even the language of the Mexico treaty that addresses the need for domestic regulation prohibiting certain activities with respect to migratory birds is subject to the objective "to satisfy the need set forth in \* \* \* Article [I]." Article I provides: "In order that the species may not be exterminated, the high contracting parties declare that it is right and proper to protect birds denominated as migratory, whatever may be their origin, which in their movements live temporarily in the United States of America and the United Mexican States, by means of adequate methods which will permit, in so far as the respective high contracting parties may see fit, the utilization of said birds rationally for purposes of sport, food, commerce and industry." Therefore, to the extent that the Mexico treaty is interpreted to have application to take beyond hunting and the like, that treaty must also be interpreted to allow the parties to authorize take that is consistent with the needs set forth in Article I.

The broad language of the exceptions in the Japan, Russia, and Canada treaties clearly indicate that the intent of the parties was not to prohibit all take of migratory birds. Just as clearly, the take of large absolute numbers of birds (e.g. millions of birds taken in sport hunting) is allowable under the treaties, so long as that take is ultimately limited in a way that is consistent with the conservation principles and objectives of the treaties. Thus, allowing for take incidental to military readiness activities is, as a general matter, consistent with the conservation principles and objectives of all three of these treaties.

The Mexico treaty does not require the parties to prohibit incidental take, and therefore allowing take incidental to military readiness activities cannot conflict with the terms of that treaty. And even if that treaty was read to apply more broadly, it is clear that the parties intended it only to require the rational regulation of take, not an absolute prohibition. Allowing take incidental to military readiness activities is consistent with the needs set forth in Article I. More broadly, we conclude that any incidental take allowed under the broad exceptions of the other three treaties is consistent with the Mexico treaty.

Turning to the second question, whether this particular rule governing take incidental to military readiness activities is consistent with the treaties (and therefore the MBTA), the take that is authorized here is for a special purpose consistent with the principles and objectives of the treaties. The authorization allows take of birds only in limited instances—take that results from military readiness activities. Furthermore, the rule expressly requires the Armed Forces to develop conservation measures to minimize or mitigate impacts where such impacts may have a significant adverse effect on a population of a migratory bird species. Moreover, the Secretary must suspend the take authorization if he/she concludes that a specific military readiness activity likely would not be compatible with the migratory bird treaties and may withdraw the authorization if he/she is unable to obtain from Armed Forces the information needed to assure compliance. Thus, the authorization in this rule in effect incorporates a safeguard that provides for compliance with the requirements of the treaties.

It is not entirely clear what level of effect on a migratory bird population would be required to constitute a violation of any of the treaties. It is clear, however, that the relatively minor

(at a population level) amount of take caused by military readiness activities is exceedingly unlikely to constitute a possible violation, even in the absence of any safeguards. When combined with the procedural safeguards set forth in this rule, there is no reasonable chance that a violation of the treaties will occur under this rule. In these circumstances, the take that would be authorized by this rule is thus compatible with the terms of the treaties and consistent with the purposes of those treaties.

The rule's process of broad, automatic authorization subject to withdrawal is particularly appropriate to military readiness activities. First, as noted above, we expect that military readiness activities will rarely, if ever, have the broad impact that would lead to a significant adverse effect on a population of migratory bird species, even absent the conservation measures that the Armed Forces undertake voluntarily or pursuant to another statute, such as the ESA. Second, the Armed Forces, like other federal agencies, have 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 Armed Forces strive not only to lessen detrimental effects of their 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 rule apply only to the Armed Forces?**

This rule was 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 required the development of regulations authorizing the incidental take of migratory birds associated with military readiness activities. This rule carries out the mandates of the Authorization Act. This rule authorizes 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.

#### **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. 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 rule will not affect small businesses or other segments of the private sector. It applies only to the Armed Forces. Thus, any expenditure under this rule will accrue only to the national defense agencies. Our current regulations allow us to permit take of migratory birds only for limited types of activities. This rule authorizes take resulting from the military readiness activities of the Armed Forces, provided the Armed Forces comply with certain requirements to minimize or mitigate significant adverse effects on a population of a migratory bird species.

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

With this rule, the Armed Forces will have a regulatory mechanism to enable the Armed Forces to effectively implement otherwise lawful military readiness activities. Without the rule, the Armed Forces 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 rule will not create serious inconsistencies or otherwise interfere with the actions of the Armed Forces, including those other than military readiness. The Armed Forces must already comply with numerous environmental laws intended to minimize impacts to wildlife.

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

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

b. This rule will 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 is to authorize incidental takes of migratory birds by the Armed Forces as a result of military readiness activities. This rule will 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 will 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 will 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 rule will 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 Armed Forces 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 will 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 will newly enable us to collect information only from employees of the Armed Forces 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 determined that this rule is categorically excluded under the Department of the Interior’s NEPA procedures in Part 516 of the Departmental Manual, Chapter 2, Appendix 1, Categorical Exclusion 1.10. Categorical Exclusion 1.10 applies to: “policies, directives, regulations, and guidelines of an administrative, financial, legal, technical or procedural nature and whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case.”

Military readiness activities of the Armed Forces occur across a broad geographic area covering a wide diversity of habitat types and potentially affecting a high diversity of migratory birds. Potential impacts on migratory birds will also vary spatially and temporally across the landscape. In addition, the specific type of military readiness activity will vary significantly among the Armed Forces, and the biological and geographical spectrum

across which these activities may occur is potentially unique. Because of the broad spectrum of activities, their locations, habitat types, and migratory birds potentially present that may be affected by this rule, the potential impacts of military readiness activities conducted by the Armed Forces on the affected environment are too broad, speculative and conjectural to lend themselves to meaningful analysis. Thus, it is premature to examine potential impacts of the rule.

However, this determination does not diminish the responsibility of the Armed Forces to comply with NEPA and individual military readiness activities at issue will be subject to the NEPA process by the Armed Forces to evaluate any environmental impacts. Whenever the Armed Forces propose to undertake new military readiness activities or to adopt a new, or materially revised, Integrated Natural Resources Management Plan, and migratory bird species may be affected, the Armed Forces will consult with and obtain comments from the Service, an agency with “jurisdiction by law or special expertise,” upon their NEPA analysis. The NEPA analysis will include cumulative effects where applicable. In addition, if the potential for significant effects on migratory birds makes it appropriate, the Armed Forces may invite the Service to participate as a cooperating agency in the preparation of their NEPA analysis. Moreover, authorization under this rule requires that if a proposed military readiness activity may result in a significant adverse impact on a population of migratory bird species, the Armed Forces must confer and cooperate with the Service to develop and implement appropriate measures to minimize or mitigate these effects. The environmental consequences of the proposed military readiness activity, as well as the potential of any such measures to reduce the adverse effects of the proposed activity, would be covered in NEPA documentation prepared for the proposed action.

We have also determined that this authorization would not result in “extraordinary circumstances” whereby actions cannot be categorically excluded pursuant to 516 DM 2.3A(2). This rule only authorizes the incidental take of migratory birds (with limitations) as a result of military readiness activities. We are not authorizing the Armed Forces to implement military readiness activities that may have significant adverse impacts on natural resources, have highly controversial environment effects, or result in significant cumulative impacts. If an individual

military readiness action by the Armed Forces or the cumulative impacts of multiple activities may result in such an impact, then the Armed Forces will be responsible for completing an environmental analysis in accordance with NEPA. We are also not authorizing the take of a federally listed or proposed species. The Armed Forces must still comply with the Endangered Species Act.

Furthermore, we expect that military readiness activities will rarely, if ever, have the broad impact that would lead to a significant adverse effect on a population of a migratory bird species, even absent the conservation measures that the Armed Forces undertakes voluntarily or pursuant to another statute. The Armed Forces also have an important role in ensuring that the United States complies with the four migratory bird treaties, the Endangered Species Act, and other applicable regulations for individual ongoing or proposed military readiness activities.

A copy of the Service's Categorical Exclusion determination is available upon request at the address indicated in the ADDRESSES section of this rule.

*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 Armed Forces that take migratory birds. It will 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 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.

#### 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 amend title 50, chapter I, subchapter B of the Code of Federal Regulations as follows:

#### PART 21—[AMENDED]

■ 1. The authority citation continues to read as follows:

**Authority:** Migratory Bird Treaty Act, 40 Stat. 755 (16 U.S.C. 703); Public Law 95-616, 92 Stat. 3112 (16 U.S.C. 712(2)); Public Law 106-108, 113 Stat. 1491, Note following 16 U.S.C. 703.

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

##### § 21.3 Definitions.

\* \* \* \* \*

*Armed Forces* means the Army, Navy, Air Force, Marine Corps, Coast Guard, and the National Guard of any State.

\* \* \* \* \*

*Conservation measures*, as used in § 21.15, means project design or mitigation activities that are reasonable from a scientific, technological, and economic standpoint, and are necessary to avoid, minimize, or mitigate the take of migratory birds or other adverse impacts. Conservation measures should be implemented in a reasonable period of time.

\* \* \* \* \*

*Military readiness activity*, as defined in Pub. L. 107-314, § 315(f), 116 Stat. 2458 (Dec. 2, 2002) [Pub. L. § 319 (c)(1)], 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 does not include (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 listed above.

*Population*, as used in § 21.15, means a group of distinct, coexisting, conspecific individuals, whose breeding site fidelity, migration routes, and wintering areas are temporally and spatially stable, sufficiently distinct geographically (at some time of the year), and adequately described so that the population can be effectively monitored to discern changes in its status.

\* \* \* \* \*

*Secretary of Defense* means the Secretary of Defense or any other national defense official who has been nominated by the President and confirmed by the Senate.

\* \* \* \* \*

*Significant adverse effect on a population*, as used in § 21.15, means an effect that could, within a reasonable period of time, diminish the capacity of a population of migratory bird species to sustain itself at a biologically viable level. A population is "biologically viable" when its ability to maintain its genetic diversity, to reproduce, and to function effectively in its native ecosystem is not significantly harmed. This effect may be characterized by increased risk to the population from actions that cause direct mortality or a reduction in fecundity. Assessment of impacts should take into account yearly variations and migratory movements of the impacted species. Due to the significant variability in potential military readiness activities and the species that may be impacted, determinations of significant measurable decline will be made on a case-by-case basis.

■ 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) *Take authorization and monitoring.*

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

(2) When conservation measures implemented under paragraph (a)(1) of this section require monitoring, the Armed Forces must retain records of any monitoring data for five years from the date the Armed Forces commence their action. During Integrated Natural Resource Management Plan reviews, the Armed Forces will also report to the Service migratory bird conservation measures implemented and the effectiveness of the conservation measures in avoiding, minimizing, or mitigating take of migratory birds.

(b) *Suspension or 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 likely 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 may withdraw in accordance with the procedures provided in paragraph (b)(4) of this section the authorization for any take incidental to a specific military readiness activity if the Secretary determines that a proposed military readiness activity is likely to result in a significant adverse effect on the population of a migratory bird species and one or more of the following circumstances exists:

(i) The Armed Forces have not implemented conservation measures that:

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

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

(C) Are economically feasible; and

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

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

(iii) The Armed Forces have 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 Armed Forces, permit the Secretary to cancel the proposed withdrawal of authorization.

(4) Within 15 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 Armed Forces' objections, if any, to the proposed withdrawal, specifying the reasons therefore. The Secretary will give due consideration to any objections raised by the Armed Forces. If the Secretary continues to believe that withdrawal is appropriate, he or she will provide written notice to the Secretary of Defense of the rationale for withdrawal and response to any objections to the withdrawal. If objections to the withdrawal remain, the withdrawal will not become effective until the Secretary of Defense has had the opportunity to meet with the Secretary within 30 days of the original notice from the Secretary proposing withdrawal. A final determination regarding whether authorization will be withdrawn will occur within 45 days of the original notice.

(5) Any authorized 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 Armed Forces modify the proposed activity to alleviate significant adverse effects on the population of a migratory bird species 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/her delegatee who must be an official nominated by the President and confirmed by the Senate.

Dated: July 25, 2006.

**Matt Hogan,**

*Acting Assistant Secretary for Fish and Wildlife and Parks.*

Dated: April 10, 2006.

**Philip W. Grone,**

*Deputy Under Secretary of Defense (Installations and Environment).*

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