

\*\* (10 or fewer claims).

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**Laura Daniel-Davis,**

*Principal Deputy Assistant Secretary, Land and Minerals Management.*

[FR Doc. 2021-21514 Filed 10-1-21; 8:45 am]

BILLING CODE 4310-84-P

**NATIONAL TRANSPORTATION SAFETY BOARD**

**49 CFR Part 801**

[Docket No.: NTSB-2021-0006]

RIN 3147-AA23

**Internal Personnel Rules and Practices of the NTSB**

**AGENCY:** National Transportation Safety Board (NTSB).

**ACTION:** Interim final rule; request for comments.

**SUMMARY:** The National Transportation Safety Board (NTSB) is amending its Internal Personnel Rules and Practices to reflect that the agency is closing its “public reference room” and will now make qualifying records electronically available. Moreover, the agency will remove an outdated paragraph describing a particular category of exempted records under the Freedom of Information Act (FOIA): internal matters of a relatively trivial nature that have no significant public interest, and predominately internal matters that the release would risk circumvention of a statute or agency regulation. The revisions to the NTSB FOIA regulation are being issued as an interim final rule to ensure that an updated regulations is in place as soon as practicable to implement the Supreme Court decision.

**DATES:** This rule is effective on October 4, 2021. The NTSB will accept written comments on this interim final rule on or before December 3, 2021.

**ADDRESSES:** You may send comments, identified by Docket Number (No.) NTSB-2021-0006, by any of the following methods:

- *Federal e-Rulemaking Portal:* <https://www.regulations.gov>.
- *Email:* [rulemaking@ntsb.gov](mailto:rulemaking@ntsb.gov).
- *Fax:* 202-314-6090.
- *Mail/Hand Delivery/Courier:* NTSB, Office of General Counsel, 490 L'Enfant Plaza East SW, Washington, DC 20594.

*Instructions:* All submissions in response to this interim final rule must include Docket No. NTSB-2021-0006. All comments received will be posted without change to [https://](https://www.regulations.gov)

[www.regulations.gov](https://www.regulations.gov), including any personal information provided.

*Docket:* For access to the docket, go to <https://www.regulations.gov> and search Docket No. NTSB-2021-0006.

**FOR FURTHER INFORMATION CONTACT:** Kathleen Silbaugh, General Counsel, (202) 314-6080, [rulemaking@ntsb.gov](mailto:rulemaking@ntsb.gov).

**SUPPLEMENTARY INFORMATION:**

**I. Background**

Previously, the agency offered its physical public reading room to allow for in-person inspection of its **Federal Register** publications; however, with the advent of modern technology, the need for such a room is obsolete as documents are electronically available to the public through [regulations.gov](https://www.regulations.gov) and the agency’s electronic reading room.

Currently, part 801 provides that the NTSB will maintain a “public reference room” in accordance with FOIA and notes the various records that will be made available in that room; however, with fewer visitors and the frequent use of the public reference room as a meeting space, the agency is closing its physical reading room and will make qualifying records available electronically. Consequently, the agency is issuing this interim final rule because technical amendments are necessary to remove all references to the “public reference room.”

Further, the agency will amend 49 CFR 801.52, which exempts internal personnel rules and practices of the NTSB from public disclosure under 5 U.S.C. 552(b)(2), FOIA’s Exemption 2. Consistent with that exemption, § 801.52(b) pertains to records regarding internal matters of a relatively trivial nature that have no significant public interest, and predominately internal matters that the release would risk circumvention of a statute or agency regulation. However, the Supreme Court has since held that the exemption “encompasses only records relating to issues of employee relations and human resources.” *Milner v. Department of the Navy*, 131 S.Ct. 1259 (2011). Accordingly, the NTSB is issuing an interim final rule to remove paragraph (b) from 49 CFR 801.52.

**II. Regulatory Analysis**

Because the NTSB is an independent agency, this interim final rule does not require an assessment of its potential costs and benefits under section 6(a)(3) of Executive Order (E.O.) 12866, Regulatory Planning and Review, 58 FR 51735 (Sept. 30, 1993). In addition, the

NTSB has considered whether this rule would have a significant economic impact on a substantial number of small entities, under the Regulatory Flexibility Act (5 U.S.C. 601-612). The NTSB certifies under 5 U.S.C. 605(b) that this rule would not have a significant economic impact on a substantial number of small entities.

The NTSB does not anticipate this rule will have a substantial, direct effect on state or local governments or will preempt state law; as such, this rule does not have implications for federalism under E.O. 13132, Federalism, 64 FR 43255 (Aug. 4, 1999).

This rule complies with all applicable standards in sections 3(a) and 3(b)(2) of E.O. 12988, Civil Justice Reform, 61 FR 4729 (Feb. 5, 1996), to minimize litigation, eliminate ambiguity, and reduce burden. The NTSB has evaluated this rule under: E.O. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 FR 7629 (Feb. 16, 1994); E.O. 13045, Protection of Children from Environmental Health Risks and Safety Risks, 62 FR 19885 (Apr. 21, 1997); E.O. 13175, Consultation and Coordination with Indian Tribal Governments, 65 FR 67249 (Nov. 6, 2000); E.O. 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use, 66 FR 28355 (May 18, 2001); and the National Environmental Policy Act, 42 U.S.C. 4321-47. Pursuant to the Paperwork Reduction Act, the NTSB has determined that there is no new requirement for information collection associated with this interim final rule. The NTSB has concluded that this interim final rule neither violates nor requires further consideration under those orders, statutes, E.O.s, and acts.

**List of Subjects in 49 CFR Part 801**

Archives and records, Freedom of information.

Accordingly, for the reasons stated in the Preamble, the NTSB amends 49 CFR part 801 as follows:

**PART 801—PUBLIC AVAILABILITY OF INFORMATION**

■ 1. The authority citation for part 801 continues to read as follows:

**Authority:** 49 U.S.C. 1113(f); 5 U.S.C. 552; 18 U.S.C. 641, 2071; 31 U.S.C. 3717, 9701; 44 U.S.C. Chapters 21, 29, 31, and 33.

■ 2. In part 801, revise all references to “public reference room” to read “electronic reading room”.

■ 3. Revise § 801.52 to read as follows:

**§ 801.52 Internal personnel rules and practices of the NTSB.**

Pursuant to 5 U.S.C. 552(b)(2), the following records are exempt from disclosure under FOIA: Records relating solely to internal personnel rules and practices, including memoranda pertaining to personnel matters such as staffing policies, and procedures for the hiring, training, promotion, demotion, or discharge of employees, and management plans, records, or proposals relating to labor-management relations.

Jennifer Homendy,  
Chair.

[FR Doc. 2021–21517 Filed 10–1–21; 8:45 am]

BILLING CODE 7533–01–P

**DEPARTMENT OF THE INTERIOR**

**Fish and Wildlife Service**

**50 CFR Part 10**

[Docket No. FWS–HQ–MB–2018–0090;  
FF09M22000–212–FXMB1231099BPP0]

RIN 1018–BD76

**Regulations Governing Take of Migratory Birds; Revocation of Provisions**

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

**ACTION:** Final rule.

**SUMMARY:** On January 7, 2021, we, the U.S. Fish and Wildlife Service (we, the Service, or USFWS), published a final rule (January 7 rule) defining the scope of the Migratory Bird Treaty Act (MBTA) as it applies to conduct resulting in the injury or death of migratory birds protected by the MBTA. We now revoke that rule for the reasons set forth below. The immediate effect of this final rule is to return to implementing the MBTA as prohibiting incidental take and applying enforcement discretion, consistent with judicial precedent and longstanding agency practice prior to 2017.

**DATES:** This rule is effective December 3, 2021.

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

**SUPPLEMENTARY INFORMATION:** On January 7, 2021, we published a final rule defining the scope of the MBTA (16 U.S.C. 703 *et seq.*) as it applies to conduct resulting in the injury or death of migratory birds protected by the MBTA (86 FR 1134) (hereafter referred

to as the “January 7 rule”). The January 7 rule codified an interpretation of the MBTA set forth in a 2017 legal opinion of the Solicitor of the Department of the Interior, Solicitor’s Opinion M–37050 (also referred to as the Jorjani Opinion), which concluded that the MBTA does not prohibit incidental take.

As initially published, the January 7 rule was to become effective 30 days later, on February 8, 2021. However, on February 4, 2021, USFWS submitted a final rule to the **Federal Register** correcting the January 7 rule’s effective date to March 8, 2021, to conform with its status as a “major rule” under the Congressional Review Act, which requires a minimum effective date period of 60 days, *see* 5 U.S.C. 801(a)(3) and 804(2). The final rule extending the effective date of the January 7 final rule itself became effective when it was made available for public inspection in the reading room of the Office of the Federal Register on February 5, 2021, and was published in the **Federal Register** on February 9, 2021 (86 FR 8715). In that document, we also sought public comment to inform our review of the January 7 rule and to determine whether further extension of the effective date was necessary.

After further review, we decided not to extend the effective date of the January 7 rule beyond March 8. We acknowledged that the January 7 rule would remain in effect for some period of time even if it is ultimately determined, after notice and comment, that it should be revoked. But rather than extending the effective date again, we determined that the most transparent and efficient path forward was instead to immediately propose to revoke the January 7 rule. The proposed rule provided the public with notice of our intent to revoke the January 7 rule, subject to our final decision after consideration of public comments.

We have undertaken further review of the January 7 rule and considered public comments on our proposed revocation rule and determine that the January 7 rule does not reflect the best reading of the MBTA’s text, purpose, and history. It is also inconsistent with the majority of relevant court decisions addressing the issue, including the decision of the District Court for the Southern District of New York on August 11, 2020 that expressly rejected the rationale offered in the rule. The January 7 rule’s reading of the MBTA also raises serious concerns with Canada, a United States’ treaty partner, and for the migratory bird resources protected by the MBTA and underlying treaties. Accordingly, we revoke the January 7 rule and remove the

regulation codifying the interpretation set forth in the January 7 rule at 50 CFR 10.14.

At this time, we have not proposed replacement language for the Code of Federal Regulations. This rulemaking simply removes the current regulatory language. A Director’s Order clarifying our current enforcement position was issued at the time of this final rule’s publication and will come into effect on the effective date of this final rule (see **DATES**). We will introduce new policies in the future, including a proposed regulation codifying an interpretation of the MBTA that prohibits incidental take and potentially a regulatory framework for the issuance of permits to authorize incidental take. Concurrent with this final rule, we have also published an advance notice of proposed rulemaking requesting public input on potential alternatives for authorizing incidental take of migratory birds and a Director’s Order clarifying our current enforcement position. These new policies and regulatory actions will fully implement the new National Environmental Policy Act (NEPA) Record of Decision (ROD) associated with this revocation rule, which is available at <https://www.fws.gov/regulations/mbta/resources>.

The MBTA statutory provisions at issue in the January 7 rule have been the subject of repeated litigation and diametrically opposed opinions of the Solicitors of the Department of the Interior. The longstanding historical agency practice confirmed in the earlier Solicitor M-Opinion, M–37041, and upheld by most reviewing courts, had been that the MBTA prohibits the incidental take of migratory birds (subject to certain legal constraints). The January 7 rule reversed several decades of past agency practice and interpreted the scope of the MBTA to exclude any prohibition on the incidental take of migratory birds. In so doing, the January 7 rule codified Solicitor’s Opinion M–37050, which itself had been vacated by the United States District Court for the Southern District of New York. This interpretation focused on the language of section 2 of the MBTA, which, in relevant part, makes it “unlawful at any time, by any means, or in any manner, to pursue, hunt, take, capture, kill” migratory birds or attempt to do the same. 16 U.S.C. 703(a). Solicitor’s Opinion M–37050 and the January 7 rule argued that the prohibited terms listed in section 2 all refer to conduct directed at migratory birds, and that the broad preceding language, “by any means, or in any manner,” simply covers all potential methods and means of performing actions directed at