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MJB&A Permitting and Infrastructure Coalition Position Paper ■ June 8, 2017

Considerations for a Revised Opinion on the Migratory Bird Treaty Act

The Migratory Bird Treaty Act (MBTA) was enacted in 1918 to implement the United States' obligations under international treaties and conventions devised to protect against the "indiscriminate slaughter" of, and trafficking in, migratory birds. The statute makes it unlawful to "pursue, hunt, take, capture, kill…[or transport] any migratory bird, any part, nest, or egg of such bird."

On January 10, 2017, the Solicitor of the Department of the Interior under the Obama Administration released an opinion related to incidental take under MBTA. Subsequently, on February 6, 2017, the Acting Secretary of the Interior under the Trump Administration issued a memorandum suspending and temporarily withdrawing the opinion until the new Administration's Secretary, Deputy Secretary, or Solicitor has completed a review and determined whether the opinion should be reinstated, modified, or revoked.[1]

The MJB&A Permitting and Infrastructure Coalition strongly disagrees with the January opinion.[2] The Trump Administration should issue a modified opinion explaining the legal limits of the Act to ensure business and legal certainty for energy infrastructure investments. A modified opinion should make clear that FWS will not require any permit that covers accidental injury to birds for construction and operation of lawfully permitted structures and operational activities, including vegetative management, arising from normal operations.

The MJB&A Permitting and Infrastructure Coalition believes strongly that a "take" is the result of a deliberate act directed at a bird. Therefore, the U.S. Fish and Wildlife Service (FWS) has no authority to impose any liability arising from the accidental collision of a migratory bird with wind turbines or other infrastructure equipment. Further, the energy industry already takes a range of voluntary and effective measures to protect avian species. Additional permitting requirements will exacerbate regulatory delays and costs.

The U.S. Fish and Wildlife Service Lacks Authority to Regulate Accidental Collisions under the Migratory Bird Treaty Act

The January opinion erroneously concludes that "courts have generally agreed with the FWS interpretation of MBTA as prohibiting incidental take" and that "the MBTA's prohibitions on taking and killing migratory birds apply broadly to any activity, subject to the limits of proximate causation and are not limited to certain factual contexts."

[1] Letter from Acting Secretary K. Jack Haugrud to Acting Solicitor of the Department of the Interior, February 6, 2017. Available at: https://www.doi.gov/sites/doi.gov/files/uploads/temp_suspension_20170206.pdf

[2] MJB&A Permitting and Infrastructure Coalition member companies collectively engage the Administration and Agencies on potential permitting modernization as well as regulatory and legislative opportunities to ensure projects can proceed in a timely and cost-effective manner. The member companies sponsoring this position paper include: Dominion Energy, Entergy Corporation, NextEra Energy, and PG&E Corporation.

The term "take", as defined by MBTA, does not include accidental collisions with or impacts from electric generating, transmission, and distribution activities. Accidental migratory bird deaths or injuries that occur in the course of lawful land-use activities do not constitute violations of the MBTA and, therefore, should not require a permit to avoid criminal liability. The 1918 MBTA was passed to address hunting, poaching, and trafficking of birds; accidents are clearly beyond the scope of the MBTA's criminal penalties.

FWS has no record of enforcement of "incidental take" (i.e., enforcement against those without an unmistakable intent to harm birds) until the 1970s, fully 50 years after the enactment of the MBTA. Congress had the opportunity to include incidental takes in 1974 when other MBTA amendments were made, but it chose not to do so. At that time (after the Endangered Species Act (ESA), with its treatment of incidental take, was enacted in 1973), Congress elected not to add to MBTA the incidental take provisions or the broader "harm" or "harass" concepts from ESA.

The term "take" does not include injuries or mortalities caused by accidental collisions with electric power system equipment including power lines and wind turbines, since such a statutory construction "would offend reason and common sense". In *U.S. v. FMC Corp*, 572 F.2d 902 (2d Cir. 1978), the Court found that an interpretation that brings every killing within the statute ("such as deaths caused by automobiles, airplanes, plate glass modern office buildings or picture windows in residential dwellings into which birds fly") "would offend reason and common sense". Under *FMC*, the Second Circuit Court of Appeals extended MBTA liability to incidental take where a company was aware of "extrahazardous" chemical pesticides manufactured on its property and the disposal of those chemicals led to migratory bird deaths. Such circumstances are not consistent with those that exist at most industrial facilities, and certainly are not consistent with circumstances at facilities that meet existing, voluntary FWS guidance.

In a separate case in the Eighth Circuit Court of Appeals (*Newton County Wildlife Ass'n v. U.S. Department of Agriculture*, 113 F.3d 110, 115 (8th Cir. 1997)), the Court agreed with the holding in *FMC* finding that "[s]trict liability may be appropriate when dealing with hunters and poachers. But it would stretch this 1918 statute far beyond the bounds of reason to construe it as an absolute criminal prohibition on conduct, such as timber harvesting, that *indirectly* results in the death of migratory birds."

Similarly, in *U.S. v. Brigham Oil & Gas*, 840 F.Supp. 2d 1202 (DND 2012), the District Court of North Dakota held that "the use of reserve pits in commercial oil development is [a] legal, commercially-useful activity that stands outside the reach of the federal Migratory Bird Treaty Act. Like timber harvesting, oil development and production activities are not the sort of physical conduct engaged in by hunters and poachers, and such activities do not fall under the prohibitions of the Migratory Bird Treaty Act." The Court recognized that "to extend the Migratory Bird Treaty Act to reach other activities that indirectly result in the deaths of covered birds would yield absurd results." Extending criminal liability to commercial activity would "criminalize driving, construction, airplane flights, farming, electricity and wind turbines, which cause bird deaths, and many other everyday lawful activities." Further, the Court noted, quoting a commentator, that "'[e]xtending the MBTA's reach beyond activity directed at wildlife would hamper normal land use activities that often result in bird deaths—such as farming, timber harvesting, and brush clearing...When the MBTA is construed sensibly, as a whole and in light of legislative history, it can be read only to criminalize activity directed against migratory birds.'" The Court concluded that "[j]ust as in the case of driving, flying, or farming, the Migratory Bird Treaty Act cannot reasonably be read to criminalize the legal operation of a reserve pit at an oil exploration site."

In *U.S. v. CITGO Petroleum Corp*., 801 F.3d 477, (5th Cir. 2015), the Court reversed a criminal conviction for migratory bird deaths when birds flew into oil production-related tanks. The Court said, "we agree with the

Eighth and Ninth circuits that a 'taking' is limited to deliberative acts done directly and intentionally to migratory birds. Our conclusion is based on the statue's text, its common law origin, a comparison with other relevant statutes, and rejection of the argument that strict liability can change the nature of the necessary illegal act." The Court noted that other Circuit Courts took a broad reading of the MBTA and "[t]hese and like decisions confuse the *mens rea* and the *actus reus* requirements. Strict liability crimes dispense with the first requirement; the government need not prove the defendant had any criminal intent. But a defendant must still commit the act to be liable." The Court also explained:

> There is no doubt that a hunter who shoots a migratory bird without a permit in the mistaken belief that it is not a migratory bird may be strictly liable for a 'taking' under the MBTA because he engaged in an intentional and deliberate act toward the bird…[but] [a] person whose car accidentally collided with the bird…has committed no act 'taking' the bird for which he could be held strictly liable. Nor do the owners of electrical lines 'take' migratory birds who run into them. These distinctions are inherent in the nature of the word 'taking' and reveal the strict liability argument as a non-sequitur.

In *Seattle Audubon Society v. Evans*, 952 F.2d 297 (9th Cir. 1991), the Ninth Circuit Court of Appeals found additional limits to the statute when it held that logging timber from lands that might provide habitat for northern spotted owls do not result in a taking under the MBTA. The Court explained that "[t]he differences in the proscribed conduct under the ESA and the MBTA are 'distinct and purposeful'." The Court noted that Congress amended the MBTA the year after enactment of the ESA, "but did not modify its prohibitions to include 'harm'." The case concluded its discussion of the point by stating that "[h]abitat destruction causes 'harm' to the owls under the ESA, but does not 'take' them within the meaning of the MBTA."

A Requirement to Obtain Incidental Take Permits under MBTA would Impose Significant Costs with Limited Benefit to Migratory Birds

The energy industry already takes a range of voluntary and effective measures to protect avian species. FWS has successfully worked with industry to develop voluntary, industry-specific best management practices to conserve migratory birds. The Service should continue to follow this successful path of cooperation instead of moving forward with a permitting program. For example, the Land-Based Wind Energy Guidelines (WEGs) establish a tiered approach to wind development that evaluates and minimizes potential risks to avian (and other wildlife) species and their habitats. In the final WEGs, the Service stated "When used in concert with appropriate regulatory tools, the Guidelines form the best practical approach for conserving species of concern."

Additionally, FWS, through its participation in the Avian Power Line Interaction Committee (APLIC), has contributed to the development of Avian Protection Plan guidelines and has developed guidance documents identifying causes and minimization methods for avian electrocutions and collisions. APLIC was formed in 1989 to address whooping crane collisions with power lines. APLIC has since expanded its role to address a variety of avian/power line interactions including electrocutions, collisions, and nests. APLIC membership includes over 70 utilities, Edison Electric Institute, U.S. Fish and Wildlife Service, Bureau of Land Management, Electric Power Research Institute, National Rural Electrical Cooperative Association, and Rural Utilities Service.

Pursuant to the ESA, projects that may affect federally-designated threatened and endangered species known to occur in the vicinity of a proposed project may obtain an incidental take permit under the ESA thus may be required to mitigate or otherwise compensate for any foreseeable impacts.

Requiring an incidental take permit under MBTA will further exacerbate regulatory delays and costs. In addition to the delays and costs inherent in the process to obtain an incidental take permit, the permitting process itself could trigger NEPA reviews, which could delay project development by an average of six to 24 months.

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