

US Fish and Wildlife Service Considering Permit Program Under the Migratory Bird Treaty Act to Cover Commercial and Industrial Activities

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Monday, June 1, 2015

For the first time, the **US Fish & Wildlife Service** (FWS) is considering a proposed rulemaking to authorize the unintentional injury or killing of migratory birds by certain commercial and industrial activities.

On May 26, FWS issued notice of its intent (NOI) to study the environmental effects of at least four different approaches to regulating the “incidental take” of species protected under the **Migratory Bird Treaty Act (MBTA)**, 16 U.S.C. 703-711 (80 Fed. Reg. 30032 (May 26, 2015).) Although FWS has previously authorized incidental take of migratory birds by the military, and it has regulations that authorize purposeful take of migratory birds through a small number of special use permits for noncommercial activities (primarily scientific in nature), it is now considering establishing more general permitting authority for harm caused by common commercial and industrial activities, such as oil and gas projects, cell phone towers, electric transmission and distribution lines, and renewable energy development and production. Comments on the proposal, including responses to 15 specific issues raised by FWS, are due by July 27.

The MBTA is a criminal statute enacted in 1918. It prohibits the “take” of covered avian species, regardless of whether any harm to birds was intended by the activity.

“Take” includes the killing of covered species, but it can also include lesser disruptions, such as injury. Federal courts have disagreed about whether the MBTA prohibits incidental take (i.e., take associated with an otherwise lawful activity that was not intended to cause the avian harm). Nevertheless, the Department of Justice (DOJ), with support from FWS, has frequently sought to criminally prosecute under the MBTA, arguing that even incidental take gives rise to criminal culpability—a position some courts have accepted. The DOJ’s approach, combined with the broad reach of the MBTA (which protects 1,027 avian species native to the United States, of which only 8% are also protected as either threatened or endangered under the *Endangered Species Act*, 16 U.S.C. 1531) has made the MBTA a statute of great concern to commercial operators in many industries.

Somewhat paradoxically, FWS has cited the overall decline of migratory birds as a primary driver for providing broader incidental take authorization (i.e., as a reason to make it more clearly lawful for some incidental take to occur). In giving its notice, FWS indicates that the conservation benefits and mitigation measures that various incidental take authorizations would likely require could contribute to the protection and recovery of various species. In other words, FWS apparently anticipates that the conditions it will be able to impose as part of providing incidental take protection will more than compensate for the incidental take that will then lawfully occur. FWS also recognized that this effort could bring long sought-after regulatory certainty to commercial and industrial activities that may harm migratory birds, which otherwise must depend largely on FWS’s and DOJ’s discretion not to take enforcement actions against common and otherwise lawful activities.

FWS is actively considering four different regulatory approaches to authorizing incidental take, which it may deploy separately or in combination:

- Implementing general take authorizations for identified types of hazards known to be caused by specific industry activities
- Allowing individual permits for particular projects or activities
- Expanding FWS agreements with other federal agencies (“memoranda of understanding”), and providing take authorization for actions approved by those agencies
- Expanding the voluntary guidance FWS has issued for certain industry sectors, and providing for best management practices that, if followed, lessen the likelihood of enforcement

The May 26 proposal suggests that general incidental take authorization to industry sectors would most likely be limited to well-understood hazards that could be reduced or eliminated through known avoidance and mitigation measures. FWS identified oil, gas, and wastewater disposal pits; methane or other gas burner pipes; communication towers; and electric transmission and distribution lines as examples of activities that could be suitable for this approach. FWS is considering offering general authorization for wind generation incidental take and potentially for other industries as well; it expressly requested public input on the effects, issues, and mitigation that FWS should address if it does so. Notably, despite FWS’s increased

focus on the potential harm to avian species posed by the solar industry, the proposal did not expressly identify solar energy development as potentially eligible for a general authorization.

FWS recognizes that a permitting process for individual projects or activities could be valuable to industry, but it could prove highly burdensome to applicants and agencies alike. FWS is therefore examining whether the analysis required for an MBTA permit could be incorporated into other permitting processes needed to authorize a project. One avenue for doing this could be through expansion of existing memoranda of understanding or entering into new agreements that allow other federal agencies to incorporate incidental take protection into other project authorizations that they may offer.

FWS may continue to rely on its use of voluntary industry standards. It has worked with several industries to adopt best management practices, and it has suggested that, absent unusual circumstances, it will use its enforcement discretion to avoid criminal or civil prosecution of companies that adhere to the standards. The best practices standard adopted by the electric transmission industry has substantially reduced effects on avian species, and it appears to have provided some degree of enforcement protection; however, the wind industry has experienced mixed results. Moreover, even some degree of residual uncertainty can affect such things as the willingness to invest or the ability to secure associated long-term project financing.

The NOI is the initial phase of what is certain to be a long regulatory process. FWS's decision to issue notice of a "programmatic" environmental impact statement (PEIS) under the National Environmental Policy Act suggests that FWS may have an interest in adopting multiple measures to authorize incidental take under the MBTA and to establish standards for compensatory mitigation for authorized take in a variety of circumstances. Presuming that FWS goes forward, the NOI will be followed by a draft PEIS, which will then be followed by a final PEIS and, ultimately, draft and final regulations, if general or individual permitting approaches are adopted. The opportunity to help shape FWS's thinking at the outset by responding to its request for comments could be extremely valuable and could contribute to the design of a workable incidental take authorization program under the MBTA that offers practical benefits. In addition, should new programs or incidental take regulations be finalized, litigation challenges may follow. The ability to successfully defend any regulations favorable to industry or to challenge overly restrictive provisions will depend fundamentally on the record created before FWS as it develops these rules. Thus, it is important to respond effectively from the outset of the FWS rulemaking process rather than wait until rules finally materialize.

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