

INSIGHTS

A permit system may finally arrive for the Migratory Bird Treaty Act - New Opportunities and Responsibilities

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For years, Federal Courts have held that individuals can be held criminally liable under the Migratory Bird Treaty Act (MBTA) for the death of birds regardless of whether they intended to harm them. While several courts have recently called into question this precedent, yesterday, the Fish and Wildlife Service (FWS) started a process that could help clarify liability under the Act. However, with this clarity will come additional regulatory obligations and the creation of a bright line between compliance and noncompliance. Like the Endangered Species Act (ESA), the MBTA imposes criminal liability for harming specifically-identified birds. Unlike the ESA, however, the MBTA does not currently have an extensive permitting system. As a result, most companies are unable to proactively ensure compliance with the MBTA unless they can avoid harming any migratory birds during their operations - and complete avoidance is extremely difficult when engaging in many industrial activities of any scale. Thus, entities operating wind energy, communication towers, oil and gas production, and electrical transmission facilities, for example, have generally adopted best management practices and hoped that their proactive efforts would result in lenient treatment by FWS if and when their operations accidentally harm migratory birds. Yesterday, FWS began a process which could change this and result in the establishment of an MBTA permit system. FWS is exploring a number of options, including:

- issuance of general incidental take authorizations for some types of hazards to birds associated with particular industry sectors;
- issuance of individual permits authorizing incidental take from particular projects or activities;
- development of memoranda of understanding with Federal agencies authorizing incidental take from those agencies' operations and activities;
- development of voluntary guidance for industry sectors regarding operational techniques or technologies that can avoid or minimize incidental take; and/or
- issuing individual incidental take permits for projects or activities not covered under general permits.

General permits could be issued for oil, gas, and wastewater disposal pits; methane or other gas burner pipes at oil production sites and other locations; communication towers; and electric

transmission and distribution lines, among others. The advantages of such a permitting system would also create some burdens for these industries to watch: The permitting system would almost certainly come with requirements for the implementation of measures to avoid or minimize harm to birds and establishment of required compensation for such harm. In addition, with the availability of a permitting system, companies would likely not be able to simply rely on the implementation of voluntary measures to secure lenience from FWS in case of harm to birds; instead, compliance with the adopted permitting system would likely be required, just as it is under the ESA. Finally, during the development of the permitting system, industry may be asked to provide information about current and past harm to birds, which would obviously involve the identification of potential noncompliances with the MBTA. Thus, interested parties, particularly those in the industries specifically mentioned by FWS, should actively participate in the FWS process, to help create a robust, but workable, permitting system.