

Migratory Bird Treat Act: Past, Present, and Future

Austin Hill, SWCA Environmental
Consultants

Agenda

- History
- Migratory Bird Treaty Act Law
- Case Law
- Future of Act
- Best Management Practices

History

- Market Hunting
- Plume trade of 1800's
- Treaty with Great Britain (on behalf of Canada) in 1916
- Act passed in 1918



History

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MBTA

- “it shall be unlawful at any time, **by any means or in any manner**, to pursue, hunt, **take**, capture, **kill**, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory **bird**, any **part**, **nest**, or **egg** of any such bird, or any product, whether or not manufactured, which consists, or is composed in whole or part, of any such bird or any part, nest, or egg thereof...”

MBTA

- Protected Birds
 - “Migratory Birds”
 - 1027 species
 - Does not protect introduced species or game birds
- Penalties
 - 15,000 or imprisonment up to 6 months or both
 - take
 - 2,000 or imprisonment up to 2 years or both
 - “knowingly” sell or intent to sell

MBTA

- Habitat removal OK so long as no active nesting
- Empty nest destruction OK (2003 USFWS Memorandum)

Case Law

- Seattle Audubon Society vs. Evans 1991
 - MBTA does not apply to habitat modification or destruction
 - MBTA does not apply beyond hunting and poaching

Case Law

- U.S. vs. Moon Lake Electrical Ass'n Inc. 1999
 - No distinction between direct and indirect take

Case Law

- U.S. vs. Chevron USA, Inc. 2009
 - MBTA not meant to be applied to commercial activities

Case Law

- U.S. vs. Apollo Energies, Inc. (2010)
 - Strict liability crime
 - Due process satisfied only if:
 - Proximately caused harm
 - Adequate notice that conduct is in violation of act

Case Law

- U.S. vs. Citgo Petroleum Corporation 2007, 2012, 2015
 - Strictly liable when exposed to waste oil in open air tanks
 - Overturned Sept 2015

Case Law

- U.S. vs. Brigham Oil and Gas, L.P. 2013
 - Reserve pits legal, commercial activity

Case Law Summary

- Mixed signals
- MBTA interpretations vary by district

Future of MBTA

- USFWS notice of intent to prepare PEIS for migratory bird incidental take (May 2015)
 - Evaluate impacts of multiple possible approaches
 - General Conditional Authorization for Incidental Take Associated With Particular Industry Sectors
 - Individual Permits
 - Memoranda of Understanding With Federal Agencies
 - Voluntary Guidance for Industry Sectors

General Conditional Authorization for Incidental Take Associated With Particular Industry Sectors

- provided that those industry sectors adhere to appropriate standards for protection and mitigation of incidental take
- Specific hazards and industry sectors
 - Oil, gas, and wastewater disposal pits
 - Methane or other gas burner pipes

Individual Permits

- For project or activities not covered under General Conditional Authorization
- Complexities and siting considerations that require project specific considerations

MOUs with Federal Agencies

- Expand Existing MOUs and negotiate MOUs with additional federal agencies to authorize incidental take for agency programs and activities.
- MOUs also possibly used for authorizing take for 3rd parties regulated by those agencies.

Voluntary Guidance for Industry Sectors

- Best management practices or technologies to avoid or minimize avian mortality.
- No legal authorization.
- Effort to comply with guidance as factor in potential enforcement action.

Best Management Practices

- Oil, gas, and wastewater pits
 - Birds & Wildlife attracted to pits
 - Closed containment system



MBTA and O&G

- Oil pits – estimates of 500,000 to 1 million deaths
- Gas flares
- Infrastructure construction

Best Management Practices

- Oil, gas, and wastewater pits
 - Birds & Wildlife attracted to pits
 - Netting over pits



Best Management Practices

- Oil and Gas Flares
 - Entrapment in pipes
 - Perching



Best Management practices

- Infrastructure Development
 - Seasonal avoidance
 - Pre-construction nest surveys during breeding season

Questions



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Environmental Due Diligence for Oil and Gas Transactions

Gene Murray, W&M Environmental