Appendix D

Case Study: Migratory Bird Treaty Act Incidental Take Permits

Introduction

The Migratory Bird Treaty Act (MBTA)[1] is one of the nation's oldest wildlife conservation laws, enacted in 1918 to implement a 1916 treaty with Great Britain. Although originally administered by the Department of Agriculture, MBTA authority was transferred in 1939 to the Department of the Interior and has for many years been administered by the U.S. Fish and Wildlife Service (Service). Several additional migratory bird conservation treaties with other nations have been folded into the MBTA program since its enactment.

Notwithstanding its long tenure, the MBTA's brevity, breadth of scope, and lack of details have led to uncertainty regarding its scope and administration. For example, section 703 of the MBTA establishes a sweeping prohibition, violation of which is a strict liability criminal offense:

> [U]nless and except as permitted by regulations made as hereinafter provided, 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, included in the terms of the conventions.[2]

Section 704(a) in turn authorizes the Service "to determine when, to what extent, if at all, and by what means, it is compatible with the terms of the conventions to allow…taking," but requires that such determination be made with "due regard to zones of temperature and to the distribution, abundance, economic value, breeding habits, and times and lines of migratory flight of such birds."[3] More broadly, the Service "is authorized to issue such regulations as may be necessary to implement the provisions of the convention[s]."[4]

That is the extent of the MBTA's prohibition/permitting structure and detail. Unlike its conservation statute cousin, the Endangered Species Act (ESA), which the Service also administers, the MBTA does not define operative terms such as "take" and does not include a provision, beyond what is found in section 3(a), specifying procedures and standards for issuing take authorizations. By contrast, the ESA defines "take" through a long list of terms, including to "harm,"[5] and prescribes the procedures and standards for authorizing "taking…incidental to, and

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[1] 16 U.S.C. §§ 703-711. For a brief history of the MBTA see Andrew Ogden, *Dying for a Solution: Incidental Taking Under the Migratory Bird Treaty Act*, 38 WM. & MARY ENVTL. L. & POL'Y REV. 1, 4-6 (2013).
[2] 16 U.S.C. § 703. Section 707 of the MBTA defines the criminal penalties for violations. *Id*. § 707.
[3] *Id*. § 704
[4] *Id*. § 712(2).
[5] 16 U.S.C. § 1532.

not the purpose of, the carrying out of an otherwise lawful purpose."[6] It is clear under the ESA, therefore, that "incidental take" of a protected species, such as by habitat modification from a housing subdivision that harms a species by impairing breeding success, is prohibited unless authorized by the Service pursuant to the permitting procedures and standards.

It is much less clear how the MBTA treats incidental take and its authorization. Historically, the Service prosecuted MBTA violations primarily related to hunting, poaching, and other actions specifically listed in the statute.[7] Beginning in the 1970s, however, the Service expanded its scope of enforcement to include takes incidental to other activities, such as oil production.[8] This interpretation of the MBTA's taking prohibition has become quite controversial. Although some federal courts have endorsed the Service's approach,[9] others have held that the MBTA applies only to intentional takings and thus does not prohibit incidental takings.[10] The Supreme Court has yet to address this clear split in the circuits. The merits of this issue, however, are outside the scope of this case study; given that the Service's interpretation of incidental take prohibition is enforced in some federal circuits, there is a need to consider how to design MBTA incidental take permitting. This case study uses the criteria developed in our report to evaluate the Service's approach to MBTA incidental take permits, including in particular the agency's recent notice of intent to consider ways of carrying out incidental take permitting.[11]

Legal Background of MBTA Permitting

Notwithstanding the MBTA's broad delegation of permitting authority to the Service, the agency has made sparing use of permits of any kind. The Service has promulgated regulations creating general exemptions for certain federal and state wildlife agency purposes, such as acquisition by public zoos and transport by the Service and state game agencies in the course of their official duties, and also has promulgated permit exemptions involving captive-bred mallard ducks and other waterfowl.[12] Several of these exemptions impose extensive conditions, arguably making them operate more like a general permit than a true regulatory exemption. The Service also has promulgated regulations governing specific permits required for a variety of activities including import and export, banding, scientific collection, taxidermy, waterfowl sales, control of Canada geese, falconry and raptors.[13] There are also regulations setting up specific permit rules and

[6] *Id*. § 1539.
[7] *See* Ogden, *supra* note 1, at 15-16.
[8] *See id*. at 16.
[9] *See* Ogden, *supra* note 1, at 16-28.
[10] *See U.S. v. Brigham Oil and Gas, L.P.*, 840 F. Supp. 2d 1202 (8th Cir. 2012). *City of Sausalito v. O'Neill*, 386 F.3d 1186 (9th Cir. 2004); *Seattle Audubon Society v. Evans*, 952 F.2d. 297 (9th Cir. 1991).
[11] *See* 80 Fed. Reg. 30032 (May 26, 2015). This case study focuses only on incidental take permitting for non-federal activities. The Service also is evaluating how it works with federal agencies to ensure their compliance with the MBTA. *See id*. at 30035. The way in which the Service designs permits for non-federal actors will also affect the federal agencies indirectly, as in many instances a federal agency approving a non-federal actor's action, such as constructing a pipeline, must coordinate with the Service regarding the action's effects under the ESA, MBTA, and similar statutes. The Service's design of MBTA permits thus will have an impact on other federal agencies when they are considering authorization of non-federal actions within their respective scopes of authority.
[12] *See* 50 C.F.R. §§ 21.12-21.14.
[13] *See id*. §§ 21.21-21.26, 21.28-21.30.

exemptions for depredation control of overabundant waterfowl and nuisance birds such as grackles.[14]

With regard to incidental taking, the Service has promulgated a catch-all specific permit rule for other actions, which could include incidental takings. This rule requires the applicant to make a "sufficient showing of benefit to the migratory bird resource, important research reasons, reasons of human concern for specific birds, or other compelling justification,"[15] which would be difficult to satisfy for many actions causing incidental take. Also, pursuant to the 2003 National Defense Authorization Act, the Service promulgated a rule exempting incidental takes resulting from certain military readiness operations.[16] Like some of the other exemptions, this rule operates more like what we describe as a general permit. In any event, it is limited in scope to military readiness.

Overall, therefore, the scope of these various exemptions, general permits, and specific permits is quite narrow and does not cover anything like the many and varied activities the agency purports to have authority to regulate under its interpretation that the MBTA prohibits incidental taking. Instead, rather than use general or specific permits to address incidental takings, the Service historically has used its prosecutorial discretion, in cooperation with the Department of Justice, to encourage voluntary compliance with industry-specific guidelines and other standards the agency has issued as nonlegislative rules.[17] As the Service recently explained:

> We [do] not provide legal authorization for incidental take of migratory birds by companies or individuals that comply with any such guidance, but [do], as a matter of law-enforcement discretion, consider the extent to which a company or individual had complied with that guidance as a substantial factor in assessing any potential enforcement action for violation of the Act.[18]

Likely because it leaves so much to the agency's nonreviewable discretion, this practice has become controversial and has been criticized by a wide variety of interests. Unlike the ESA and other environmental laws, there is no citizen suit provision in the MBTA, meaning that the Service's decision regarding enforcement is the final word on the matter. Objections to the Service's exercise of that discretion include that the agency's approach results in ineffective conservation, leads to uncertainty in the regulated community about what constitutes sufficient compliance, and has been applied inconsistently and arbitrarily across different industries.[19]

Although without specifically addressing those concerns, in May 2015 the Service announced that it is

> considering rulemaking to address various approaches to regulating incidental take of migratory birds, including issuance of general incidental take authorizations for

[14] *See id*. §§ 21.41-47.
[15] *See id*. § 21.27.
[16] *See id*. § 21.15; *see also* 72 Fed. Reg. 8931 (Feb. 28, 2007) (promulgating and explaining the final rule and, in particular, outlining the Service's position on its scope of authority to regulate incidental take).
[17] *See* Ogden, *supra* note 1, at 29-32.
[18] 80 Fed. Reg. at 30035.
[19] *See* Ogden, *supra* note 1, at 32-41

> some types of hazards associated with particular industry sectors; issuance of specific permits authorizing incidental take from particular projects or activities;…and/or development of voluntary guidance for industry sectors regarding operational techniques or technologies that can avoid or minimize incidental take.[20]

Although the Service did not provide much detail regarding what the different models would look like in practice, it is clear that the agency has in mind using what we describe as general and specific permits as alternatives to, or in conjunction with, its current voluntary guidelines practice. The agency also briefly articulated its rationale for considering the general and specific permit approaches in a way consistent with the spectrum of criteria we develop in our report. For example, for the general permit model the agency explained:

> We are considering developing authorizations under this approach for a number of types of hazards to birds that are associated with particular industry sectors, described below. We selected these hazards and sectors because we know that they consistently take birds and we have substantial knowledge about measures these industries can take to prevent or reduce incidental bird deaths. We have a history of working with these industry sectors to address associated hazards to birds by issuing guidance and reviewing projects at the field level or by engaging in collaborative efforts to establish best management practices and standards.[21]

For specific permits the agency explained:

> A second possible approach would be to establish legal authority for issuing individual incidental take permits for projects or activities not covered under the described general, conditional authorization that present complexities or siting considerations that inherently require project-specific considerations, or for which there is limited information regarding adverse effects.[22]

The Service's announcement did not provide sufficient detail to determine how the general permit approach would differ from the voluntary guidelines approach other than by formally codifying the guidelines or something like them as legislative rules and declaring them the conditions for a general permit. For example, in describing the voluntary guidelines approach the agency explained:

> We will also evaluate an approach that builds on our experience working with particular industry sectors to develop voluntary guidance that identifies best management practices or technologies that can be applied to avoid or minimize avian mortality resulting from specific hazards in those sectors. Under this approach, we would continue to work closely with interested industry sectors to assess the extent that their operations and facilities may pose hazards to migratory

[20] 80 Fed. Reg. at 30032-33. This announcement also implicitly confirms the agency's position that it has jurisdiction under the MBTA to regulate incidental takings.
[21] *Id*. at 30035
[22] *Id*. at 30035

> birds and to evaluate operational approaches or technological measures that can avoid or reduce the risk to migratory birds associated with those hazards.[23]

And in describing the general permit approach the agency similarly explained:

> One possible approach would be to establish a general conditional authorization for incidental take by certain hazards to birds associated with particular industry sectors, provided that those industry sectors adhere to appropriate standards for protection and mitigation of incidental take of migratory birds. The standards would include conservation measures or technologies that have been developed to address practices or structures that kill or injure birds.[24]

This description gives the impression that the general permits will transform the voluntary guidelines into mandatory conditions. Some of the industry guidelines, however, are quite elaborate and extensive—for example, the guidelines for land-based wind energy projects[25] are 80-pages long and contain hundreds of technical standards and siting and operation protocols—meaning that the general permit, if it does not significantly condense the conditions, would be unusually long and detailed compared to the typical general permit, though it would still meet the characteristics we define for general permits. Guidelines for other industries might be more manageable in terms of translating them into a general permit format.

The Service solicited input on the various approaches and received just over 140 comments, mostly from environmental and business interest groups, expressing a range of support and objections and offering a wide variety of suggestions to the agency.

Analysis

The Service's announcement that it is considering creating general and specific permitting programs for the MBTA offers an opportunity to compare permitting in general to one of its alternatives—exercise of prosecutorial discretion. We only briefly allude in our report to prosecutorial discretion as an alternative to permitting, yet the MBTA context suggests that the criteria developed in our report for comparing general and individual permitting apply equally to the comparison of permitting and prosecutorial discretion as regulatory tools.

- *Barriers to Entry:* Many of the activities the Service addresses in the proposal, such as oil and gas operations and communications towers, are large in scale and significant capital investments. The uncertainty associated with the voluntary guidelines approach could impose information costs and business risks that act as barriers to entry for such large-scale projects. Providing for general and specific permitting would remove that barrier. This effect may be less pronounced for small-scale actions not involving significant investments; indeed, such actors might find the voluntary guidelines approach less of a barrier than a more formal general or specific permit approach. From there, the barriers to

[23] *Id*. at 30035
[24] *Id*. at 30035
[25] Available at http://www.fws.gov/ecological-services/es-library/pdfs/WEG_final.pdf.

entry criteria outlined in our report for comparing general and specific permits seem fully applicable to the MBTA context.

- *Information:* Although the voluntary guidelines approach has been criticized, the Service's description of the general permits approach it has in mind reveals that the former approach has been an important source of information with which the agency could craft the general permits for different industries. Creating a specific permits program would allow the Service to gain information about industries for which it has not currently developed guidelines, which could lead to more efficient specific permitting for such industries or to the development of guidelines or a general permit. From an information perspective, therefore, it may be that having all three approaches at its disposal provides the agency the most effective information management option. From there, the information management criteria outlined in our report for comparing general and specific permits seem fully applicable to the MBTA context.
- *Tailoring*: The Service's announcement suggests that, given the agency's experience with particular industries, the general permit approach will use conditions (presumably derived from the voluntary guidelines) to tailor general permits to each industry's profile of risks to migratory birds and best practices and technologies to reduce such risks. Where complexities or siting considerations inherently require project-specific considerations, the specific permit approach allows even more finely tailored permitting. From there, the permit tailoring criteria outlined in our report for comparing general and specific permits seem fully applicable to the MBTA context.
- *Politics*: The voluntary guidelines approach has been the subject of political controversy, intense at times, and may in the long run not be politically viable as the Service's principal way of administering the MBTA. Developing general and specific permitting programs, with maximal use of general permits where the agency has sufficient information to design effective conservation conditions, is likely a more viable approach. The criteria the Service has suggested for opting between general and specific permits—the extent to which the agency has information about an industry and the degree to which a proposed action presents site-specific concerns—map well onto permitting programs that employ both models, such as the Corps' Section 404 program, and thus do not seem to present any inherent political concerns. From there, the politics criteria outlined in our report for comparing general and specific permits seem fully applicable to the MBTA context.
- *Enforcement*: The enforcement advantage of both permitting approaches over the voluntary guidelines approach is that the permit becomes the enforcement reference point and can require more of the permittee, such as reporting, than can be accomplished through voluntary guidelines. The disadvantage is that many of the activities that would be regulated, such as wind power and oil and gas development, are vast in geographic scope and scale, making enforcement a daunting task. The Service could continue to exercise prosecutorial discretion with regard to enforcement of permit violations, but this could lead to the same criticisms the voluntary guidelines approach has faced. From there, the

enforcement criteria outlined in our report for comparing general and specific permits seem fully applicable to the MBTA context.

- *Administrative Discretion*: The voluntary guidelines approach clearly provides the Service greater discretion than do the permitting approaches. The Service can more easily and quickly revise guidelines promulgated as nonlegislative rules, and its exercise of prosecutorial discretion is nonreviewable. On the other hand, by limiting itself to the voluntary guidelines approach, the Service lacks the discretion that comes with permitting, such as crafting conditions for specific projects and requiring information and reporting by general permittees. Permitting programs do, however, come with a cost in terms of agency discretion, as issuance of permits is an agency action subject to procedures such as NEPA and subject to judicial review. From there, the administrative discretion criteria outlined in our report for comparing general and specific permits seem fully applicable to the MBTA context.
- *Reducing Regulatory Burdens*: While general permitting can reduce regulatory burdens compared to specific permitting, it is difficult to predict the extent of this effect for the MBTA. Some of the industry guidelines the Service has developed are quite elaborate and burdensome. Were the agency simply to codify the voluntary guidelines for each industry as mandatory conditions, some industries might not perceive that as reducing regulatory burdens. On the other hand, the certainty the general permit provides is valuable. From there, the regulatory burdens criteria outlined in our report for comparing general and specific permits seem fully applicable to the MBTA context.

Without additional details about how the Service would design general and specific permits, it is difficult for us to go further with the analysis to compare general and specific permitting approaches for the MBTA. The context of the MBTA seems sufficiently similar to the Section 404 wetlands program and Endangered Species Act incidental take permitting program, both of which use general permits or hybrids, to warrant the conclusion that both general and specific permits could be effectively employed for the MBTA for some classes of actions and that the criteria we develop in our report would be useful in comparing the two approaches for different settings and purposes.

One aspect of the Service's proposal in particular complicates our analysis. At the broadest level, the risk/variance analysis for the MBTA suggests that general permitting is not a good fit. Many species of migratory birds are injured by many different types of land uses. The agency appears confident, however, that it already knows enough about some major industries to design general permits tailored to those industries. Tailoring industry-specific permits does reduce the potential variance of action, making general permitting more appropriate. Our impression, however, is that because the potential for harm remains high for specific industries, these general permits will for the most part incorporate the existing voluntary guidelines as the permit conditions, and in some cases the guidelines are quite extensive. Although many general permit programs include conditions, we are unaware of any general permit program that attaches conditions as extensive as some of the MBTA voluntary guidelines and thus cannot confidently evaluate the effects of doing

so under our criteria. In short, while such an approach would qualify under our definitions as a general permit, it would not be like any general permit we have seen. Notably, the Service received numerous comments from industry trade groups expressing concern that the general permit approach, given the potential scope and scale of the conditions, could be overly burdensome and inflexible.[26] Overall, therefore, while even an industry general permit with extensive conditions would differ considerably across many of our criteria from relying on specific permits for the industry, we believe more detail about the scope and design possibilities the Service is considering will be necessary before a complete assessment can be made. Where the extent of conditions and protocols for a specific industry can be controlled to avoid producing a "mega" general permit, we believe doing so presents many of the advantages of general permitting outlined in our report.

Conclusion

Because the MBTA does not contain a citizen suit provision, the Service has total control over enforcement decisions, which has allowed it to use exercise of enforcement discretion as a proxy for permitting of incidental takings. Our analysis suggests, however, that there are many good reasons for the Service to consider developing general and specific permitting programs for authorization of incidental take under the MBTA. Indeed, using all three approaches in tandem may provide the greatest flexibility for the agency to address and balance the factors we outline in our report.

Designing industry-specific general permits for major industries could be difficult. Identifying industries for tailored general permits reduces the variance; however, the potential harm could be significant for some industries, thus potentially requiring more extensive and restrictive conditions than is normally the case for general permits. Much will depend, therefore, on how the general permits are designed in terms of scope and scale of conditions, the details of which are insufficient at this time to allow a more complete evaluation.

[26] For an example see the comments from the American Wind Energy Association, available at http://www.regulations.gov/#!documentDetail;D=FWS-HQ-MB-2014-0067-0139.