The Migratory Bird Treaty Act, the Bald and Golden Eagle Protection Act, and the Endangered Species Act: Prohibitions and Remedies

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ABSTRACT

A wide variety of otherwise-lawful activities, including renewable-energy activities such as wind-power generation, can affect wildlife protected under the Migratory Bird Treaty Act (MBTA), the Bald and Golden Eagle Protection Act (Eagle Act), and the Endangered Species Act (ESA). When proposed activities that pose such effects would result in prohibited “takings” of protected wildlife under any or all of these statutes, a complex set of prohibitions, exceptions, and remedies must be considered. This paper describes the complex relationship between the “taking” prohibitions and exceptions of the MBTA, the Eagle Act, and the ESA in the context of the incidental take of protected wildlife. To assist efforts to comply with these statutory prohibitions, existing and potential administrative and regulatory remedies are explored.

Introduction

A number of development activities, whether due to siting, seasonality, or duration or intensity of environmental effects, can pose direct or indirect effects to species protected under the ESA,\(^1\) the Eagle Act,\(^2\) or the MBTA.\(^3\) To determine whether these direct or indirect effects rise to the level of a prohibited “taking,” it is necessary to examine the particular elements and scope of each statute’s “taking” prohibition, exceptions, permitting provisions, and regulatory frameworks.

Analysis and Comparison of Prohibitions

The ESA, the Eagle Act, and the MBTA protect different wildlife species, prescribe remarkably different prohibitions on the “taking” of such wildlife, and offer a higher level of

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\(^2\) Id. §§ 668-668d.
\(^3\) Id. §§ 703-711.
legal complexity when two (or all three) of these statutes apply to a particular development activity. To fully explore these statutory provisions, it is also necessary to examine closely the regulatory interpretations promulgated by the U.S. Fish and Wildlife Service (FWS).

Section 9(a)(1)(B) of the ESA prohibits the taking of any endangered fish or wildlife species within the United States or its territorial sea. A separate prohibition on the taking of endangered fish or wildlife extends to any person subject to the jurisdiction of the United States who takes any endangered fish or wildlife species upon the high seas. For most threatened wildlife species, the FWS has adopted a regulation that extends the taking prohibitions of the ESA to such species. Section 9(a)(1)(G) of the ESA prohibits the violation of any such threatened species regulations.

The ESA defines the term “take” to mean “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” The FWS has defined the term “harass” to mean “an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.” To address the appropriate scope of the term “harm,” the FWS issued a regulation defining it as:

an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

In effect, the broad scope of the ESA definition of “take,” which clearly includes certain sub-lethal effects posed to endangered or threatened wildlife, is tempered by principles of causation-in-fact. Note the specific references to “likelihood of injury” in the definition of “harass” and the requirement to show actual killing or injury in the definition of “harm.” These causation

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4 The List of Endangered and Threatened Wildlife is set out at 50 C.F.R. § 17.11(h).
6 Id. § 1538(a)(1)(C). For purposes of this prohibition, the FWS has interpreted “high seas” to “be all waters seaward of the territorial sea of the United States, except waters officially recognized by the United States as the territorial sea of another country, under international law.” 50 C.F.R. § 17.21(c)(1). In effect, the ESA’s “taking” prohibition extends up to the territorial waters of a foreign country for all U.S. citizens, U.S.-registered vessels, and other persons subject to U.S. jurisdiction. The prohibition does not stop at the boundaries of a foreign country’s exclusive economic zone.
7 50 C.F.R. § 17.31(a). This regulation was promulgated under authority granted in Section 4(d) of the ESA, 16 U.S.C. § 1533(d) (2012). Under Section 4(d), the FWS often promulgates “special rules” that tailor the application of the “taking” prohibition to particular threats posed to certain threatened wildlife species. Such “special rules,” promulgated at 50 C.F.R. §§ 17.40-17.48, set out all of the prohibitions and exceptions for the threatened species covered by those rules. Id. § 17.31(c).
9 Id. § 1532(19).
10 50 C.F.R. § 17.3. Special exceptions are set out for wildlife held in captivity.
11 Id. The FWS definition of “harm” was found to be valid by the Supreme Court. Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687 (1995).
12 It is a violation of Section 9 of the ESA to “cause” an illegal take to be committed, 16 U.S.C. § 1538(g), and this principle of “causation-in-fact” requires proof of “but for” causation and a reasonable likelihood that the activity will cause the take. Speculative facts cannot support a conclusion that Section 9 has or will be violated. See, e.g., National Wildlife Federation v. Burlington N. R.R., Inc., 23 F.3d 1508 (9th Cir. 1994).
principles apply when a particular project proponent is carrying out an otherwise-lawful activity that may “incidentally” take an endangered or threatened wildlife species. Of course, project activities involving the intentional “collection” and relocation of endangered or threatened species for purposes of avoiding incidental take is a direct take that must be preceded by the issuance of a permit to avoid liability under the ESA.

The Eagle Act, first enacted in 1940 to protect bald eagles (and later amended in 1962 to add coverage for golden eagles), prohibits the taking of bald and golden eagles. “Take” is defined by statute to include “pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, or molest or disturb.” Note the absence of the terms “harass” and “harm” in the Eagle Act’s definition of “take.” Instead, the terms “molest” and “disturb” were aimed at addressing certain sub-lethal effects that are subject to the Eagle Act’s taking prohibition. To eliminate ambiguity in the application of the term “disturb,” the FWS promulgated the following regulatory definition:

. . . to agitate or bother a bald or golden eagle to a degree that causes, or is likely to cause, based on the best scientific information available, (1) injury to an eagle, (2) a decrease in its productivity, by substantially interfering with normal breeding, feeding, or sheltering behavior, or (3) nest abandonment, by substantially interfering with normal breeding, feeding, or sheltering behavior.

As with the ESA regulatory definitions of “harass” and “harm,” the Eagle Act regulatory definition of “disturb” incorporates ordinary principles of causation-in-fact. These principles provide a regulatory structure that requires likelihood of take, and not mere hypothetical or speculative assertions, to support a conclusion that an illegal taking of eagles is anticipated.

The MBTA is one of the oldest federal wildlife conservation laws. First enacted in 1918 to implement the Convention between the United States and Great Britain (on behalf of Canada) for the Protection of Migratory Birds, the MBTA (as codified) states:

Unless and except as permitted by regulations made as hereinafter provided in this subchapter, 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 . . . any migratory bird . . . .

Subsequent to enactment, additional treaties were entered with Mexico, Japan, and Russia, each of which added its own list of species of migratory birds that were, through later amendments to the MBTA, incorporated into the regulatory machinery of the statute. The MBTA does not define the concept of “take,” although the inclusion of the term “take” in the prohibitory language of 16 U.S.C. § 703 along with the terms “hunt” and “kill” certainly indicates that the prohibition against “take” means more than just hunting-related activity and more than just lethal take. Nor has the FWS issued, under authority of the MBTA, a regulatory definition of “take.” Instead, FWS has promulgated regulations at 50 C.F.R. Parts 20 and 21 that provide authorization, under carefully-prescribed conditions, for otherwise-unlawful hunting, taking, or killing. The Interior Department and FWS agree with case law that indicates that the MBTA does apply to the

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14 Id. § 668c.
15 50 C.F.R. § 22.3.
incidental take of migratory birds as long as any prosecution for a violation of the taking prohibition requires proof that the defendant “proximately caused” the taking.\textsuperscript{18}

In sum, the “taking” prohibitions under the ESA, the Eagle Act, and the MBTA each require adherence to basic causation principles to support enforcement action. For the ESA and the Eagle Act, “causation-in-fact” must be established to support enforcement action for unlawful incidental take. The MBTA does not prescribe civil remedies, relying instead on a criminal enforcement regime. Under the MBTA, principles of “proximate causation” must be satisfied to support a criminal enforcement action.

\textbf{Review of Remedies and Exceptions}

The ESA, Eagle Act, and the MBTA offer a variety of remedial measures and opportunities that can be used by a project proponent to achieve compliance with these statutory requirements. However, significant differences exist among these three statutes on the procedural and substantive requirements that must be satisfied before achieving compliance.

The ESA has two primary provisions that can be used to authorize incidental take for otherwise-lawful activities. For non-Federally authorized or funded activities, a private applicant can seek a permit under Section 10(a)(1)(B) for the incidental take of an endangered wildlife species within the United States or its territorial sea.\textsuperscript{19} An applicant for an incidental take permit must meet the issuance criteria noted in Section 10(a)(2), including the submission of a habitat conservation plan.\textsuperscript{20} The FWS must publish notice of each application for an endangered species incidental take permit, and it must receive and consider comments and information submitted during the required 30-day public comment period.\textsuperscript{21} However, in contrast to permits issued for scientific purposes or for enhancement of the propagation or survival of endangered species, permits issued for the incidental take of endangered species need not adhere to the permit and exemption policy of Section 10(d).\textsuperscript{22} Therefore, to pass muster under Section 10 an incidental take permit application must submit (with appropriate scientific and funding justification) a habitat conservation plan that minimizes and mitigates, to the maximum extent practicable, the effects of the incidental take posed by the otherwise-lawful activity. Additionally, the issuance of the permit must secure an intra-Service biological opinion, issued under Section 7 of the ESA, that concludes that the permitted activity is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of any designated critical habitat.

For private development activities that involve Federal agency authorization or funding (e.g., federal permits or grants/loans), incidental take authorization may be achieved through the Section 7 consultation procedure. Any proposed federal agency action that “may affect” an endangered or threatened species or any designated critical habitat must undergo formal

\textsuperscript{18} E.g., U.S. v. Apollo Energies, Inc., 611 F.3d 679 (10th Cir. 2010).
\textsuperscript{19} 16 U.S.C. § 1539(a)(1)(B) (2012). Section 10 incidental take permits can only be sought to address the taking prohibition set out in Section 9(a)(1)(B) of the ESA. Such permits are not available to address the taking prohibition that applies on the high seas.
\textsuperscript{20} 16 U.S.C. § 1539(a)(2) (2012). Incidental take permit criteria and procedures for threatened wildlife species are set out at 50 C.F.R. § 17.32(b).
\textsuperscript{21} 16 U.S.C. § 1539(c) (2012).
\textsuperscript{22} Id. § 1539(d). Section 10(a)(1)(B) permits are not mentioned in the list of permits and exemptions that must satisfy the “good faith” and conservation criteria set out in Section 10(d).
consultation under Section 7 of the ESA.\textsuperscript{23} If the conclusion of the biological opinion that results from formal consultation finds that the proposed Federal action (e.g., permit) is not likely to jeopardize the continued existence of such listed species or result in the destruction or adverse modification of critical habitat,\textsuperscript{24} and if incidental take of an endangered or threatened wildlife species is likely to occur from the implementation of the proposed action, then the FWS shall attach an incidental take statement to the biological opinion that specifies the impact of such incidental taking, specifies reasonable and prudent measures that the FWS believes are necessary to minimize the impact of such taking, and sets forth terms and conditions that must be carried out to implement the reasonable and prudent measures. Any incidental taking that complies with the terms and conditions of the Section 7 incidental take statement “shall not be considered to be a prohibited taking of the species concerned.”\textsuperscript{25}

The Eagle Act’s remedial section lacks the elaborate public process and substantive provisions of the ESA. As interpreted by the Interior Department and FWS, no authorization for the taking of bald or golden eagles may be granted unless such action is deemed to be “compatible with the preservation of the bald eagle or the golden eagle.”\textsuperscript{26} FWS regulations were promulgated in 2009 that specify the criteria and issuance standards for Eagle Act incidental take permits.\textsuperscript{27} Permit applications under the Eagle Act do not have to be noticed in the Federal Register, and no public comment periods are required.

The MBTA provides even greater flexibility in prescribing exceptions to its taking prohibition. Under 16 U.S.C. § 704(a) (2012):

Subject to the provisions and in order to carry out the purposes of the conventions [migratory bird treaties], referred to in section 703 of this title, the Secretary of the Interior is authorized and directed, from time to time, having due regard to the zones of temperature and to the distribution, abundance, economic value, breeding habits, and times and lines of migratory flight of such birds, to determine when, to what extent, if at all, and by what means, it is compatible with the terms of the conventions to allow hunting, taking, capture, [or] killing . . . of any such bird . . . and to adopt suitable regulations permitting and governing the same, in accordance with such determinations . . . . (Bracketed text added for clarity.)

The primary purposes of the four migratory bird treaties involve the proper conservation of the avian species identified under each treaty. Those themes are consistent with the above-quoted language from the MBTA, which also focuses on the sustainable take of migratory birds based on sound wildlife-management principles and scientific data. At present, the only explicit regulatory exception provided by the FWS for the incidental take of migratory birds applies to military-

\textsuperscript{24} This requirement is met with a “no jeopardy” biological opinion or the Federal agency’s decision to implement a reasonable and prudent alternative. 50 C.F.R. § 402.14(i)(1).
\textsuperscript{25} 16 U.S.C. § 1536(o)(2) (2012). Interestingly, the incidental take exception provided for federally-authorized and federally-funded actions includes the taking prohibitions covering both U.S. territory and the high seas. See the specific reference to both prohibitions in the opening language of Section 7(o).
\textsuperscript{26} 16 U.S.C. § 668a (2012).
\textsuperscript{27} 50 C.F.R. § 22.26. For greater detail on the “preservation” standard, see the preamble discussion for the final permitting rule. 74 Fed. Reg. 46836 (Sept. 11, 2009); see also USFWS, Final Environmental Assessment—Proposal to Permit Take as Provided Under the Bald and Golden Eagle Protection Act (April 2009).
readiness activities. However, permits have also been issued under the special purpose permitting section, 50 C.F.R. § 21.27, to address incidental take where “a sufficient showing of benefit to the migratory bird resource, important research reasons, reasons of human concern for individual birds, or other compelling justification” has been made. The MBTA does not require any public process for the issuance of permits and, in fact, exceptions to its taking prohibition do not require the establishment of any formal permitting process at all. Exceptions are granted by regulation, and the FWS has ample opportunity to explore the use of this regulatory discretion to examine how to proceed with the authorization of the incidental take of migratory birds.

**Regulatory Flexibility—Present and Future**

At present, project proponents who wish to proceed with projects that pose the risk of taking an endangered or threatened wildlife species or a bald or golden eagle may seek incidental take permits under the ESA and the Eagle Act. In those instances where other federal authorizations or funding is involved, ESA Section 7 consultation may provide the incidental take coverage needed by the project, and such consultation can be coupled with the issuance of an appropriate Eagle Act incidental take permit. FWS has guidance in place to coordinate these processes to minimize overlapping administrative work and decision-making delays.

In contrast, there is no generic permitting or other administrative process currently in place under the MBTA for authorizing the incidental take of migratory birds. As noted above, the incidental take of migratory birds resulting from military-readiness activities has been addressed at 50 C.F.R. § 21.15. And, as appropriate and on a case-by-case basis, incidental take has on occasion been authorized through a special purpose permit issued under 50 C.F.R. § 21.27. For the vast majority of other instances where the FWS has been approached by developers, public utilities, or other economic interests to minimize or mitigate the taking of migratory birds that is incidental to the carrying out of their otherwise-lawful activities, the FWS has provided technical assistance to those parties as they develop a set of best management practices, often documented in Avian Protection Plans, to reduce or eliminate the effects of the taking. When consulting on the development of such Avian Protection Plans, the FWS would, as appropriate, provide a statement on enforcement discretion when it believed that the measures incorporated into a particular plan would reduce or eliminate the effects of take.

The FWS is currently evaluating a number of administrative alternatives that could provide additional opportunities to obtain an authorization under the provisions of the MBTA to engage in activities that incidentally take migratory birds. Such alternatives must pass muster under the statutory criteria set out in 16 U.S.C. § 704 (2012), and they must satisfy the requirements set out in each of the four migratory bird treaties. However, any science-based conservation regime that provides for the minimization and/or mitigation of the effects of incidental take while aiming toward the sustainability of migratory bird species protected under the MBTA should be adequate. Because the MBTA does not require the implementation of a formal permitting regime to address incidental take, the broad rule-making discretion granted by Congress provides ample authority to shape the type of authorization (e.g., general authorizations

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28 50 C.F.R. § 21.15.
29 Id. § 21.27 (opening paragraph).
based on best management practices; traditional permitting approach; use of declaratory orders under 5 U.S.C. § 554(e); targeted exceptions/authorizations) and to set appropriate decision-making thresholds and criteria. Once the FWS identifies a preferred set of procedures and standards to include in a proposed incidental take regulation, the public process will begin.

**Conclusion**

The prohibitory and remedial provisions of the ESA, the Eagle Act, and the MBTA are unique, and their differences in detail and coverage require close attention by practitioners. Existing remedies under the ESA and the Eagle Act provide adequate coverage for those seeking authorization to take endangered wildlife species, threatened wildlife species, or bald or golden eagles incidental to otherwise-lawful activities. But the MBTA, one of our oldest federal wildlife conservation laws, remains on the frontier, and future administrative action will determine what generic measures will be put in place to address the incidental take of migratory birds.