



Memorandum

Office of Chief Counsel

Subject: Application of the Migratory Bird Treaty Act to Highway Projects

Date: 14 June 2006

From: Senior Agency Counsel
San Francisco, CA

In Reply Refer To:
HCC-WE

To: Mary Gray (HPT-WA)
FHWA Environment Coordinator
Olympia, Washington

You have requested a legal opinion regarding the application and scope of the Migratory Bird Treaty Act (hereinafter MBTA) 16 U.S.C. § 701 et seq., to FHWA projects. Implicit in this request is a consideration of how the MBTA interacts with other environmental laws and is incorporated into FHWA's National Environmental Policy Act (NEPA) documents.

BACKGROUND

The most relevant section of the MBTA to our projects is Section 703 of the MBTA that states:

"... [I]t 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..."

Furthermore, the regulations that implement the MBTA, define the term *take* as "to pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to pursue, hunt, shoot, wound, kill, trap, capture, or collect." 50 CFR § 10.12.

The MBTA was enacted in 1918 and covers four migratory bird treaties. The MBTA prohibits the taking of certain listed birds without a permit. The types of migratory birds that are covered are found in 50 CFR § 10.13 and the Secretary of Interior, in accordance with the MBTA, implements these treaties and permits.

The *take* prohibitions of the MBTA apply to both intentional and unintentional acts. In other words, the MBTA is a strict liability crime – all that is required is that you knowingly did

that act that caused the harm, not that you intended the harm. For example, in United States v. FMC Corp., 572 F.2d 902 (2nd Cir. 1978), the Court held that the Migratory Bird Treaty Act applied to direct, though unintended, bird poisoning by toxic substances from dumping waste water. Also, United States v. Corbin Farm Service, 444 F.Supp 510 (E.D. Cal.) (*affirmed on other grounds*, 578 F.2d 259 (9th Cir. 1978)), involved the deaths of birds resulting from the accidental misapplication of pesticides.

In FMC Corp., the Second Circuit Court of Appeals imposed strict criminal liability for poisoning birds by analogizing it to the principles of strict liability in tort when one uses dangerous conditions or substances. *Id.* at 906-908. Furthermore, in Corbin Farm Service, the United States District Court simply held that the MBTA can “constitutionally be applied to impose criminal penalties on those who did not intend to kill migratory birds.” *Id.* at 536.

While the MBTA is a criminal statute, most Federal Circuits have allowed plaintiffs to file lawsuits against the Federal Government for violations of the MBTA through the Administrative Procedure Act. Seattle Audubon Soc'y v. Evans, 952 F.2d 297, 302 (9th Cir. 1991); Newton County Wildlife Ass'n v. U.S. Forest Service, 113 F.3d 110 (8th Cir. 1997); Hill v. Norton, 275 F.3d 98 (D.C. Cir. 2001). The Act even applies to Federal Government actions that are direct, yet unintentional, for example the killing of migratory birds during a weapons firing exercise. Center for Biological Diversity v. Pirie, 191 F.Supp 2d 161 (D.D.C. 2002)¹. *See also* Humane Society v. Glickman, 217 F.3d 882 (D.C. Cir. 2000).

MBTA DOES NOT APPLY TO HABITAT

The prohibitions under the MBTA are narrower than the prohibitions of the Endangered Species Act (ESA). The ESA not only prohibits the *taking* of a protected animal or plant, but also prohibits an “act [that] 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.” *See* the ESA definition of “harm” at 50 CFR § 17.3 and Babbitt v. Sweet Home Chap. of Communities for a Great Oregon, 515 U.S. 687 (1995). Also, under the ESA, critical habitat can be designated that will afford certain protections. However, the MBTA only prohibits the actual *taking* or killing of the protected bird and not the bird's habitat.

The distinction between these statutes and the fact that only the ESA addressed the issue of habitat was explicitly stated in the case of Seattle Audubon Society v. Evans, 952 F.2d 297 (9th Cir. 1991). In that case, the issue of whether logging would violate the MBTA was addressed. The Court said:

[T]he SAS and PAS contend that timber sales which destroy owl habitat are tantamount to a proscribed “taking” under the [MBTA] Act. Under the regulations promulgated pursuant to the MBTA, “take” is defined as to “pursue, hunt, shoot, wound, kill, trap, capture, or collect,” or to attempt any such act. *Id.* at § 10.12. The definition describes physical conduct of the sort engaged in by hunters and poachers conduct, which was undoubtedly a concern at the time of

¹ MBTA was subsequently amended to allow certain incidental takings of migratory birds during military exercises.

the statute's enactment in 1918. The statute and regulations promulgated under it make no mention of habitat modification or destruction ... We agree with the Seattle district court that the differences in the proscribed conduct under ESA and the MBTA are “distinct and purposeful.” The ESA was enacted in 1973. Congress amended the Migratory Bird Treaty Act the following year, but did not modify its prohibitions to include “harm.” Habitat destruction causes “harm” to the owls under the ESA but does not “take” them within the meaning of the MBTA.

Seattle Audubon Society v. Evans, 952 F.2d at 303.

This same conclusion was also reached in a more recent case. In City of Sausalito v. O'Neill, 386 F.3d 1186 (9th Cir. 2004), the United States Park Service was undertaking a major renovation of the Army's historic Fort Baker site that included certain changes that cut mature trees on the grounds. The plaintiffs asserted that implementation of the Fort Baker Plan would violate the MBTA because migratory birds' nesting trees would be cut down, thereby disturbing both birds and their nests. However, the Court held that “[b]ecause Sausalito alleges only that migratory birds and their nests will be disturbed through habitat modification,” there was no violation of the MBTA and no requirement to get a permit from the Secretary. Id. at 1225. Other United States District Courts and Federal Circuits have also followed this analysis that habitat modification that adversely impacts covered birds later in time is not covered. Newton County Wildlife Ass'n v. U.S. Forest Service, 113 F.3d 110 (8th Cir. 1997); Curry v. U.S. Forest Service, 988 F.Supp 541 (W.D. Pa. 1997); Mahler v. U.S. Forest Service, 927 F.Supp 1559 (S.D. Ind. 1996); Citizens Interested in Bull Run, Inc. v. Edrington, 781 F.Supp 1502 (D. Or. 1991).

APPLYING THE MBTA TO OUR PROJECTS

While it is true that the MBTA does not protect habitat like the ESA does, it is important to remember that caselaw has found that the MBTA is a strict liability crime that applies to both direct and indirect actions that harm the protected birds. Accordingly, it has been held that if you cut down a tree that had a nest with eggs in it one could be held civilly and/or criminally liable. Sierra Club v. Martin, 933 F.Supp 1559 (N.D. Ga. 1996) (*reversed on other grounds* Sierra Club v. Martin, 110 F.3d 1551 (11th Cir. 1997)). In short, impacting habitat that MBTA birds may use is not enough to violate the MBTA, but impacting habitat that indirectly, but proximately leads to the taking of covered birds, nests or eggs is arguably covered.

Irrespective of the subtleties of what is a take under the MBTA, it is important to be aware that birds covered under the MBTA are also important resources under a more general environmental resource sense. Therefore, if these MBTA birds are negatively impacted by our project, this information must be disclosed in any National Environmental Policy Act (NEPA) document and appropriate mitigation considered.

CONCLUSION

In short, the purpose of the MBTA is to protect listed birds, eggs and nests. Generally it does not apply to the habitat that might be used by the listed birds. However, to the extent that there are birds, nests and eggs in our project area that might be harmed and, given that the MBTA has both criminal and civil aspects to it, FHWA needs to be careful in its actions and environmental analysis.

Signature on file
Lawrence (Lance) P. Hanf