MBTA enforcement targets
Oil and gas exploration and production
Refining
Electricity transmission and distribution
Wind energy
The language of the MBTA
§ 703. Taking, killing, or possessing migratory birds unlawful

(a) In general

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, or kill, posses, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, 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 between the United States and Great Britain for the protection of migratory birds (concluded August 16, 1916, 39 Stat. 1702), the

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SUBCHAPTER II—MIGRATORY BIRD TREATY

§703. Taking, killing, or possessing migratory birds unlawful

(a) In general

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, 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 between the United States and Great Britain for the protection of migratory birds concluded August 16, 1916 (39 Stat. 1702), the
MBTA—Violation of take prohibition

- Class B misdemeanor
- $15,000 per count
- 6 months imprisonment
MBTA—*Knowing* violation of take prohibition

- Class E felony
- $2,000 per count
- 2 years imprisonment
MBTA—Violation of baiting prohibition

- Misdemeanor
- $100,000 per count (for individuals)
- $200,000 per count (for organizations)
- 1 year imprisonment
Title 18 penalties

- The amount specified by statute
- Felonies: $250,000 for individuals and $500,000 for organizations
- Misdemeanors: $100,000 for individuals and $200,000 for organizations
- Twice the gain/loss from the violation
Passive “take”
Actions against federal agencies
“The definition describes physical conduct of the sort engaged in by hunters and poachers. * * * We are not free to give words a different meaning than that which Congress and the Agencies charged with implementing congressional directives have historically given them . . . .”
“Initially, we note that MBTA’s plain language prohibits conduct directed at migratory birds—”pursue, hunt, take, capture, kill, possess,” and so forth. . . . It would stretch this 1918 statute far beyond the bounds of reason to construe it as an absolute criminal prohibition on conduct, such as timber harvesting, that *indirectly* results in the death of migratory birds.”
“on its face, the [MBTA] does not appear to extend to agency action that only potentially and indirectly could result in the taking of migratory birds.”
Criminal enforcement against companies
"[T]he MBTA’s ban on ‘takings’ only prohibits intentional acts (not omissions) that directly (not indirectly or accidentally) kill migratory birds."
“[T]he MBTA requires a defendant to proximately cause the statute’s violation for the statute to pass constitutional muster.”
How does industry mitigate enforcement risk?
Mitigation options

- APLIC
- O&G BMPs/APPs
- Wind energy guidelines
- USFWS OLE MBTA guidance
What some courts think about enforcement discretion . . . .

“The government’s response that prosecutorial discretion is sufficient to protect the innocent in these [MBTA] situations is scant comfort.”

“[P]roper construction of a criminal statute cannot depend upon the good will of those who must enforce it.”

“[D]anger in putting faith in government representations of prosecutorial restraint”
MBTA incidental take permit proposal
Elements of proposal

• Targets industrial operations with available mitigation techniques
  – O&G exploration and production
    • Wastewater disposal pits
    • Oil pits
    • Heater treaters
    • Gas burner pipes
  – Landfill gas burners
  – Electric transmission and distribution
  – Communications towers
  – Wind energy
Different approaches

- No action alternative—keep voluntary programs
- Memoranda of understanding with federal agencies
- Individual permits for complex projects
- General authorizations
IPAA/API comment

• Endorsed the no action alternative because of circuit split on “passive take” issue
• Legislative intent was to prohibit hunting of birds for their feathers
• A passive take theory would criminalize everyday activities
  – 599 million building window strikes
  – 200 million car strikes
  – 2.4 billion domestic feral cats
IPAA/API comment

• Endorsed the voluntary avian protection plan approach
• Suggested that a general authorization would be suitable for the oil and gas industry
  – Authorize all oil and gas operations, or
  – Identify *de minimis* takes
• Must conduct a regulatory impact assessment/cost-benefit analysis
IPAA/API comment

• Take estimates are extraordinarily difficult
• The statute does not authorize compensatory mitigation
• Identifying reasonable compensatory mitigation is extraordinarily difficult
• Cross-cutting statutes: NEPA, ESA, and NHPA
• The Service lacks the experience and resources to implement an ITP program
IPAA/API comment

- Proposed rule and environmental impact statement expected in 2016
- Final rule and record of decision expected in 2017
Discussion
Patrick D. Traylor
202.669.3896

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