

Endangered and Protected Species

The Migratory Bird Treaty Act (MBTA)*

Issue Summary

The Migratory Bird Treaty Act of 1918 (MBTA) implements four treaties that provide for international protection of migratory birds. MBTA makes it illegal for anyone to take,¹ possess, import, export, transport, sell, purchase, barter, or offer for sale, purchase, or barter, any migratory bird, or the parts, nests, or eggs of such a bird except under the terms of a valid permit issued pursuant to Federal regulations. There are only a few birds in the US not covered by the statute.²

The MBTA, implemented by the US Fish and Wildlife Service (FWS), is a *strict liability* statute, meaning that proof of intent, knowledge, or negligence is not an element of an MBTA violation. The statute's language is clear that most actions resulting in a "taking" or possession (permanent or temporary) of a protected species, in the absence of regulatory authorization, are a violation of the MBTA.

Impact on Co-ops

An energy company can be held strictly liable for a misdemeanor under the MBTA, if a migratory bird is killed by its facilities.

In *United States v. Moon Lake Electric Assn Inc.* (1999), the court found Moon Lake Electric Association guilty of violating the MBTA and the Bald and Golden Eagle Protection Act because it had "failed to install inexpensive equipment" on power poles "causing the death or injury of 38 birds of prey." The Moon Lake case represented the first time an electric power company had been prosecuted criminally for electrocuting protected birds. More recently, Duke Energy (November 2013) and PacifiCorp (December 2014) entered plea agreements for violations of the MBTA due to deaths of protected birds at wind facilities. Both prosecutions of wind energy corporations occurred in Wyoming and carry with them significant monetary penalties and planning requirements. PacifiCorp agreed to pay \$2.5 million, and Duke Energy \$1 million.

* For more information, please contact [John Novak](#).

¹ The word "take" is defined by regulation as "to pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to pursue, hunt, shoot, wound, kill, trap, capture, or collect." 50 C.F.R. 10.12.

² Avian species are also under the protection of the Endangered Species Act and the Bald and Golden Eagle Protection Act.

In implementing the statute, the FWS has stated that it will focus its enforcement efforts on companies that have acted “with disregard for their actions and the law, especially when conservation measures have been developed but are not properly implemented.”

Best available practices, including design and technology for avian protection, are readily available. In addition, co-ops that receive loans or grants from federal agencies (e.g. RUS, DOE, FEMA, etc.) or require permits to cross federal lands (USFS, BLM, etc.) are subject to environmental review under the National Environmental Protection Act (NEPA), where MBTA compliance can be a factor.

NRECA Position

NRECA works with the FWS, the Avian Power Line Interaction Committee (APLIC), and the Energy and Wildlife Interaction Coalition (EWAC) to develop policies that conserve avian resources while enhancing affordable and reliable energy delivery. NRECA staff are looking for ways to be more proactive with the FWS and improve the workings of MBTA for electric cooperatives, including training.

Status

On May 26, 2015, the FWS published a notice of intent to prepare a programmatic environmental impact statement to evaluate the potential environmental impacts of a proposal to authorize incidental take of migratory birds under the MBTA. There is currently no mechanism for industry sectors to obtain the right to unintentionally kill migratory birds, which happens frequently when birds collide with or are electrocuted by power lines, among other things. The FWS wants to provide greater certainty for companies that have taken efforts to reduce incidental take and benefit bird conservation by promoting best practices, risk management, or technologies that avoid or reduce avian mortality. The FWS would also create a means for bird mortality to be mitigated.

Contact for Questions

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