



United States Department of the Interior

FISH AND WILDLIFE SERVICE
Office of Law Enforcement



CD-B53

Date:

CHIEF'S DIRECTIVE

SUBJECT: Enforcement of the Migratory Bird Treaty Act as it Relates to Industry and Agriculture

PURPOSE: This directive provides guidance for special agents of the Office of Law Enforcement (OLE), U.S. Fish and Wildlife Service (Service) investigating possible violation of the Migratory Bird Treaty Act (MBTA) arising from the take of federally protected birds in connection with the actions and facilities of industry and agriculture.

BACKGROUND: The MBTA establishes a misdemeanor penalty for the take of protected avian species "by any means and in any manner." The MBTA covers many hundreds of avian species that are never subject to hunting and includes corporations as possible defendants. The Service is tasked with enforcing the MBTA and has long considered unpermitted takings of protected birds outside the hunting context, including takes associated with industrial facilities and agricultural activity, to be potential violations of the statute. Despite the MBTA's "strict liability" standard, the Service has long employed an unwritten policy of encouraging industry and agriculture to employ "best practices" aimed at minimizing and avoiding the unpermitted take of protected birds. Service agents refer for prosecution those takes that occur after the responsible party becomes aware of the condition or practice causing the take and fails to remediate it. This Directive provides formal guidance regarding this policy.

To promote compliance with the law, thus protecting migratory birds from take and to minimize the need for criminal enforcement actions, OLE will look for opportunities to foster relationships with, and provide guidance to, individuals, companies, and industries during the development and maintenance of their operational plans. OLE will partner with other Service divisions to accomplish this mission.

OLE recognizes that the take of some migratory birds may occur even when individuals and companies consult with the Service and others, comply with best management practices and follow Service recommendations. OLE will focus investigative efforts on bird take that is foreseeable, avoidable and/or proximately caused. Investigations will focus on individuals or companies that fail to utilize conservation measures or otherwise minimize negative impacts on migratory birds.

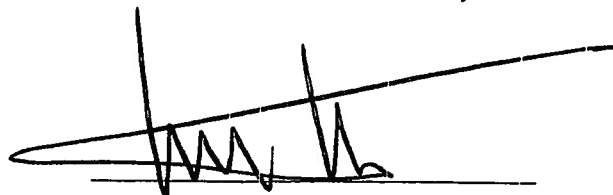
ACTION: OLE agents should review the guidance provided in this document when initiating an investigation involving possible take of migratory birds by industrial activities or agriculture.

GUIDANCE: The Service acknowledges that each investigation presents unique factual and evidentiary factors. Therefore, this guidance constitutes recommendations consistent with the general policy of providing notice, encouraging compliance and an opportunity to correct before charging, rather than a mandatory or complete list of procedures to be followed in each case. The recommendations below should be adjusted as necessary to comply with the overall policy. Situations may arise in which prosecution is justified even if steps other than those recommended here have been employed by the investigator.

When OLE receives information, directly or from other sources, of the possible take of migratory birds in a non-hunting setting (for example, by industry or agriculture) the following steps are recommended.

- Determine the species of bird(s) at issue and whether additional Federal statutes and regulations (Endangered Species Act, Bald and Golden Eagle Protection Act) may apply. Additionally, determine the severity of the take, how often birds are being taken (if possible) and whether the birds are species of conservation concern.
- Determine and document what contacts (whether written, electronic or oral) the individual or company may have had with Federal or other regulatory entities including but not limited to the Service, regarding migratory birds, particularly as to the location or activity at issue. Federal agencies like the Environmental Protection Agency, Army Corps of Engineers and Bureau of Land Management, or state agencies, may have issued relevant permits or guidance.
- Determine and obtain the state and local laws, regulations, permits or other authorizations, and best management practices (and the basis thereof) for the industrial or agricultural activities at issue. Assess whether the company is complying with applicable legal requirements (including permit conditions) and/or adhering to relevant best management practices.
- Coordinate with other Service divisions on present and future correspondence with the company as appropriate.
- Where possible, work with the company or individual and with other Service divisions to facilitate communication of appropriate guidance to help eliminate any future take of migratory birds by placing the company or individual on notice of the issue(s) relating to the take of migratory birds, unless such notice would compromise appropriate investigative techniques. Provide the company or individual the opportunity to take remedial action to halt and/or minimize the take. Document those communications and the relevant actions taken, or not taken, by the company or individual following notice.
- Work closely with the appropriate office of the Department of Justice, U.S. Attorney's Office and consult with, if needed, the Environmental Crimes Section of the Department of Justice.

These recommendations are intentionally general in nature. Development of a complete list of specific investigative steps or techniques is not possible due to the uniqueness of individual investigations and the broad range of industrial and agricultural activities that may be involved in the take of migratory birds.



Chief, Office of Law Enforcement