

APPENDIX 5:

FWS Guidance on Addressing Migratory Birds and Eagles (FWS Only)



United States Department of the Interior

FISH AND WILDLIFE SERVICE

Washington, D.C. 20240

In Reply Refer To:
FWS/TE

FEB - 9 1996

Memorandum

To: Regional Directors, Regions 1, 2, 3, 4, 5, 6, and 7

From: Director

Subject: Incidental Take of Migratory Birds and Bald Eagles

Under the Endangered Species Act, the Fish and Wildlife Service may grant a permit (section 10) or issue a statement (section 7) that allows the incidental take of endangered species. Some migratory birds, including the bald eagle, are ESA-listed species. The Migratory Bird Treaty Act prohibits the take of migratory birds, including any species also listed under the ESA. None of the regulations promulgated under the MBTA expressly provide for permits for incidental take.

Likewise, the Bald and Golden Eagle Protection Act prohibits the taking of bald eagles. The regulations promulgated under the BGEPA do not allow for permits to be issued for incidental take of eagles.

In many instances, Service biologists have concluded that incidental take of certain ESA-listed migratory birds (including bald eagles) could be allowed without harm to the species and their inclusion in a particular ESA section 7 statement or section 10 permit would be appropriate. However, the apparent inability to grant incidental take under the MBTA or BGEPA has caused confusion both within the Service and among permit applicants.

A means to allow incidental take of ESA-listed migratory birds, including the bald eagle, when such incidental take has been judged permissible under the ESA, and to remove the threat of prosecution under the MBTA and BGEPA (when warranted), has been needed. The Solicitor's Office has provided the attached opinion on this issue. We have determined to adopt the approach suggested by the Solicitor's Office as a matter of policy in the following manner:

1. In the ESA section 7 context, the following language should be included when appropriate in any incidental take statement concluding that take of ESA-listed migratory birds (including bald eagles) will result from the actions under consultation:

To the extent that this statement concludes that take of any threatened or endangered species of migratory bird will result from the agency action for which consultation is being made, the Service will not refer the incidental take of any such migratory bird for prosecution under the MBTA of 1918, as amended (16 U.S.C. §§ 703-712), or the Bald Eagle Protection Act of 1940, as amended (16 U.S.C. §§ 668-668d), if such take is in compliance with the terms and conditions (including amount and/or number) specified herein.

2. In the ESA section 10 context, the Service will insert, when appropriate, the following language into any permit concerning the incidental take of ESA-listed migratory birds (including the bald eagle):

[For species other than the bald eagle] This permit also constitutes a Special Purpose Permit under 50 C.F.R. § 21.27 for the take of *[provide species' common and scientific names; species must be ESA-listed, and may not include the bald eagle]* in the amount and/or number and subject to the terms and conditions specified herein. Any such take will not be in violation of Migratory Bird Treaty Act of 1918, as amended (16 U.S.C. §§ 703-12).

[For the bald eagle] The Service will not refer the incidental take of any bald eagle, *Haliaeetus leucocephalus*, for prosecution under the Migratory Bird Treaty Act of 1918, as amended (16 U.S.C. §§ 703-712), or the Bald Eagle Protection Act of 1940, as amended (16 U.S.C. §§ 68-668d), if such take is in compliance with the terms and conditions (including amount and/or number) specified herein.

This memorandum will serve to transmit these recommendations to the Regions as working interim guidance, and when appropriate, section 7(a)(2) incidental take statements and section 10(a)(1)(B) permits should incorporate this language regarding the incidental take of ESA-listed migratory birds. The Service will incorporate final guidance in the final versions of the section 7 and the Habitat Conservation Planning [section 10(a)(1)(B)] handbooks. However, until the section 7 and section 10(a)(1)(B) handbooks have been modified to ensure that their procedures guarantee consistency with the standards of the MBTA and BGEPA, and the procedural requirements of 50 C.F.R. § 21.27, if applicable, any section 7 statement or section 10 permit including the above language should be reviewed by the regional Migratory Bird Coordinator.

Comments on this interim guidance are welcomed and to the extent possible, will be used in the final guidance. Comments should be sent to the Chief, Division of Endangered Species, within 30 days of receiving this memorandum.

Attachment

United States Department of the Interior

OFFICE OF THE SOLICITOR

Washington, D.C. 20240

FEB - 5 1996

Memorandum

To: John Rogers, Deputy Director, U.S. Fish and Wildlife Service

From: Pete Raynor, Assistant Solicitor, Fish and Wildlife Branch

Subject: Permitted Incidental Take of Migratory Birds Listed Under the Endangered Species Act

You have asked whether an incidental take statement, under § 7 of the Endangered Species Act (ESA), 16 U.S.C. § 1536, or an incidental take permit, under § 10 of the ESA, 16 U.S.C. § 1539, (collectively, incidental take documents) can be used to provide an applicant or permittee with some assurance that the applicant or permittee will not be prosecuted under either the Migratory Bird Treaty Act (MBTA) or the Bald and Golden Eagle Protection Act (BGEPA) for that take expressly allowed under the ESA document. We conclude that the Service currently has the authority to do so, using a combination of permitting provisions under the Service's discretion in the enforcement of these statutes.

I. BACKGROUND

Under the ESA, the Service may grant a permit allowing the take of an endangered species incidental to an otherwise lawful activity. Section 10(a)(1). Similarly, pursuant to a consultation under § 7, the Service may issue a statement that incidental take resulting from a federal action will not jeopardize the continued existence of a listed species. Section 7(b)(4). Take of a listed species consistent with an incidental take statement, by the acting agency or an applicant before that agency, does not constitute a violation of the ESA. Section 7(o)(2).

The MBTA prohibits the take of migratory birds, 16 U.S.C. § 703, including migratory birds listed under the ESA. The MBTA authorizes the Secretary of the Interior to permit take consistent with the underlying treaties pursuant to regulation. None of the regulations promulgated under the MBTA expressly allows a permit to be issued for incidental take. See generally 50 C.F.R. part 21. However, 50 C.F.R. § 21.27 provides for the availability of "special purpose permits" for activities outside the scope of the standard permits. The general MBTA permits are not available for eagles; permits for eagles are controlled by the BGEPA regulations, found in 50 C.F.R. part 22. 50 C.F.R. § 21.4(b).

Like the MBTA, the BGEPA prohibits the taking of bald eagles and golden eagles, 16 U.S.C. § 668, except as otherwise permitted pursuant to regulation, id. § 668a. The regulations under the BGEPA allow for the issuance of permits for scientific or exhibition purposes, 50 C.F.R. § 22.21, for Indian religious purposes, id. § 22.22, to take depredating eagles, id. § 22.23, for falconry purposes, id. § 22.24, and to take golden eagle nests, id. § 22.25. The BGEPA regulations do not contain a provision equivalent to the special purpose permit under § 21.27.

Currently, ESA incidental take documents do not provide any relief from the prohibitions of the MBTA and BGEPA; indeed, some of those documents specifically state that they do not provide any such relief. Therefore, an applicant that wants complete protection from prosecution for the take of an ESA-listed migratory bird pursuant to an ESA incidental take document must also seek a permit under the MBTA, or if that bird is a bald eagle, the BGEPA. However, no such permit is currently available under the BGEPA, and § 21.27 under the MBTA has not traditionally been used to provide permits for unintentional take. Thus, applicants in the past have not been provided with assurance that they would not be prosecuted under the MBTA or BGEPA.

II. ALTERNATIVES

There are a number of theories on which ESA incidental take documents could be used to provide relief from liability under the MBTA and BGEPA. The first alternative is that the ESA documents could be expanded to act as permits under the other acts and their existing regulations as well. However, care would have to be taken to ensure that the ESA permit process was consistent with the legal requirements of the other applicable acts and their regulations. Some of the significant legal hurdles are:

- ESA § 7 incidental take statements are not considered to be permits. The process in which these statements are generated is one of scientific analysis. Adapting this process to conform to the procedural requirements of a permit-granting process would be difficult. Among other things, a permitting process may require NEPA analysis, currently not part of the § 7 process.
- An ESA permit could apply to the BGEPA only to the extent which the activity to be permitted falls within the existing permit structure of the BGEPA regulations. This will rarely, if ever, be the case.
- The application of § 21.27 of the MBTA is limited to the "activities related to migratory birds." However, we can argue that activity otherwise unrelated to birds can be considered an "activity related to migratory birds" by virtue of the fact that the activity causes bird mortality.
- An applicant for a permit under § 21.27 must demonstrate "a sufficient showing of benefit to the migratory bird resource, important research reasons, reasons of human concern for individual birds, or other compelling justifications." Thus, most applications for a permit for

take under the MBTA to be used in conjunction with an ESA incidental take document would require either a compelling justification or perhaps sufficient mitigation to show a positive benefit to the migratory bird resource.

We note that although § 21.27 appears to be broad enough to encompass the permitting of unintentional take for the purposes of the MBTA, that section is not narrowly focused on incidental take. A regulatory permitting program specifically geared to the problems of incidental take may be advisable. Indeed, such a program would be necessary in order to issue permits for incidental take with respect to the BGEPA, under which regulatory permitting authority for incidental take is essentially lacking. In the meantime, the use of § 21.27 to permit take in conjunction with an ESA § 10 permit is an acceptable approach.

A second alternative, in situations where 50 C.F. R. § 21.27 is not available, would be to include in ESA incidental take documents a statement of enforcement policy to the effect that the Service would not refer the beneficiary of the document for prosecution under the MBTA or BGEPA for the take of the ESA-listed migratory birds covered by the document, provided that such take was consistent with the terms and conditions of the document. The main advantage of this solution is its simplicity; the complications inherent in the permit alternative, discussed above, are avoided. In addition, there is authority to support the argument that such an announcement of enforcement policy under the MBTA is not subject to judicial review. See Alaska Fish & Wildlife Fed'n & Outdoor Council, Inc. v. Dunkle, 829 F.2d 933, 938 (9th Cir. 1987) ("The discretion granted to the Fish and Wildlife Service precludes our review of the Service's failure to enforce the MBTA"), cert. denied, 485 U.S. 988 (1988), on remand, No. J84-013CIVIL, slip op. at 15-16 (June 29, 1988) (distinguishing between reviewable agreement not to enforce and non-reviewable statement of enforcement priorities); see also 53 Fed. Reg. 16877 (May 12, 1988) (statement referred to by district court on remand). An announcement of enforcement policy may not be as satisfactory as an applicable permit to those seeking a safe haven from prosecution under the MBTA and BGEPA, but it will certainly provide a short-term solution pending development of a regulatory approach.

A third alternative would be to argue that the ESA, a comprehensive and more recent statute; trumps those areas in which it overlaps with the MBTA and the BGEPA. Under this theory, there would be no violation of the other statutes for ESA-listed birds if the ESA was complied with. There is no direct support for such a position; indeed it would be contrary, at a minimum, to a Memorandum from the Assistant Solicitor, Fish and Wildlife, dated Aug. 27, 1980, which stated that the BGEPA, as the more specific statute, governed any situation in which it and the ESA conflict. Arguing, that the ESA trumps the other statutes could have significant, unforeseen consequences, and thus seems an unwise course to pursue, particularly given the other options available.

III. RECOMMENDATION

In order for the Service to give, consistent with the current regulatory authority, the maximum assurance of freedom from prosecution under the MBTA and BGEPA for the take of ESA-listed species consistent with ESA incidental take documents, we recommend the following.

1. In the ESA § 10 context, the § 10 handbook should be revised to require that the standards and procedures of 50 C.F.R. § 21.27 be included in the § 10 process if the permit will cover any non-eagle migratory bird. In addition, the Service should insert the following language into any permit allowing the incidental take of migratory birds:

[For species other than the bald eagle] This permit also constitutes a Special Purpose Permit under 50 C.F.R. § 21.27 for the take of *[provide species' common and scientific names; species must be ESA-listed, and may not include the bald eagle]* in the amount and/or number and subject to the terms and conditions specified herein. Any such take will not be in violation of Migratory Bird Treaty Act of 1918, as amended (16 U.S.C. §§ 703-12).

[For the bald eagle] The Service will not refer the incidental take of any bald eagle, *Haliaeetus leucocephalus*, for prosecution under the Migratory Bird Treaty Act of 1918, as amended (16 U.S.C. §§ 703-712), or the Bald Eagle Protection Act of 1940, as amended (16 U.S.C. §§ 68-668d), if such take is in compliance with the terms and conditions (including amount and/or number) specified herein.

2. In the ESA § 7 context, the Service should include the following language in any incidental take statement concluding that take of ESA-listed migratory birds will result from the subject of the consultation:

To the extent that this statement concludes that take of any threatened or endangered species of migratory bird will result from the agency action for which consultation is being made, the Service will not refer the incidental take of any such migratory bird for prosecution under the MBTA of 1918, as amended (16 U.S.C. §§ 703-712), or the Bald Eagle Protection Act of 1940, as amended (16 U.S.C. §§ 668-668d), if such take is in compliance with the terms and conditions (including amount and/or number) specified herein.

3. The Division of Endangered Species and the Office of Migratory Bird Management should meet to discuss whether any additions to the ESA § 7 and § 10 processes are necessary in order to reflect the goals of the MBTA and BGEPA.

4. Consistent with the standard in Dunkle, under no circumstances should the Service bargain or extract concessions in return for the inclusion in an ESA incidental take document of the above language stating that the Service will not refer take for prosecution.

Should the Service decide to use ESA incidental take documents to provide assurances with regard to the MBTA and BGEPA, we would appreciate an opportunity to review the vehicle by which the Service implements any policy change. Please note that the above analysis and recommendations apply only to migratory birds that are also listed as threatened or endangered under the ESA. The Service should take steps to address the question of how to handle the incidental take of non-ESA-listed migratory birds. If you have any questions concerning the above, please contact me or Ben Jesup at (202) 208-6172.

cc: Jamie Clark
John Doggett
Paul Schmidt