

Executive Order for the Conservation of Migratory Birds

Questions and Answers

Why is an Executive Order for Migratory Birds needed?

The Executive Order is a crucial first step in creating a more comprehensive strategy for the conservation of migratory birds by the Federal government, thereby fulfilling the government's duty to lead in the protection of this international resource. The Executive Order will also provide a specific framework for the Federal government's compliance with its treaty obligations to Canada, Mexico, Russia and Japan. An Executive Order will serve to enhance coordination and communication among Federal agencies regarding their responsibilities under the four bilateral treaties on the conservation of migratory birds (Canada - 1916, Mexico - 1936, Japan - 1972, Russia - 1978). The Executive Order provides broad guidelines on conservation responsibilities and requires the development of more detailed guidance in Memoranda of Understanding within two years. It will also build upon the progress that has been made in recent years on conservation of migratory birds. For example, the Executive Order will aid in incorporating national planning for bird conservation into agency programs and provide the formal Presidential guidance necessary for agencies to incorporate migratory bird conservation more fully into their programs.

Does the MBTA apply to Federal agencies, and if so how do those prohibitions relate to this Executive Order?

Federal courts have recently affirmed that Federal agencies are subject to prohibitions in the MBTA, including restrictions on "take" of migratory birds. Nothing in the Executive Order would constitute legal authorization to take migratory birds. In other words, the requirements of the Executive Order are in addition to, not in lieu of, the prohibitions of the MBTA. Federal agencies are required to possess permits before taking migratory birds.

Who will be affected by the Executive Order?

The Executive Order will influence Federal agencies by requiring them to incorporate migratory bird conservation measures into their agency activities. Impacts on the States and private landowners are not expected to be significant.

How much will this cost?

Agencies of the Executive Branch will be directed to implement this order within existing budgets and the overall agency mission will not be changed. The order will require agencies to examine their activities to determine if there are ways to accomplish their mission while increasing efforts in the conservation of migratory birds. The Fish and Wildlife Service may require additional funding to fulfill training and implementation responsibilities.

What part of the government is affected by the Executive Order?

The Executive Order will apply to departments and agencies of the Federal government including the Departments of Interior, Commerce, Agriculture, Transportation, Energy, Defense and the Environmental Protection Agency. Implementation of the Executive Order will be voluntary for independent regulatory agencies.

Who will implement the Executive Order?

All Federal agencies as described in the previous question will be required to implement the Executive Order. The Fish and Wildlife Service will lead coordination and implementation of the order and provide training opportunities to other Executive Branch agencies and departments. An interagency Council for the Conservation of Migratory Birds will monitor and oversee progress in the implementation of the Executive Order.

What will agencies be required to do as a result of the Executive Order?

Each Federal agency will be required to enter into a Memorandum Of Understanding (MOU) with the Service outlining how the agency will promote conservation of migratory birds. These MOUs will be developed through a public process. Other activities called for in the Executive Order include support of various conservation planning efforts already underway, such as the Partners in Flight initiative and North American Waterfowl Management Plan; incorporating bird conservation considerations into agency planning, including National Environmental Policy Act analyses; reporting annually on the level of take of migratory birds; and generally promoting the conservation of migratory birds without compromising the agency mission.

When will the Executive Order be in effect?

Upon signature of the President the order becomes effective. Memoranda of Understanding are scheduled for development within two years, and the development of training programs for other agencies will begin following signature of the order. The order will remain in effect until rescinded by the President.

Why should the public and non-Federal entities care about this Executive Order, if it only affects Federal Agencies?

While this Executive Order does not apply to non-Federal entities, we feel it important to involve the public in the process in order to prevent misunderstandings that might arise from this action. The development of each MOU will provide opportunities for public participation, and also serve as an opportunity to clarify the non-Federal responsibilities and prohibitions that exist under the Migratory Bird Treaty Act. We hope this process will spawn new partnerships in our collective efforts to conserve this valuable resource.

What is a “migratory bird”?

In the biological sense, a migratory bird is a bird that has a seasonal and somewhat predictable pattern of movement. For the sake of the Executive Order and the Migratory Bird Treaty Act, migratory birds are defined as all species covered by the four bilateral treaties. Generally, this includes all native birds in the U.S., except those non-migratory species such as quail and turkey that are managed by states.

What are the prohibitions under the Migratory Bird Treaty Act?

Under the provisions of the Migratory Bird Treaty Act, it is unlawful “by any means or manner to pursue, hunt, take, capture [or] kill” any migratory birds except as permitted by regulations issued by the Service. The term “take” is not defined in the MBTA, but the Service has defined it by regulation to mean to “pursue, hunt, shoot, wound, kill, trap, capture or collect” any migratory bird or any part, nest or egg of any migratory bird covered by the conventions, or to attempt those activities.

Restricted activities are not confined to those that may injure or kill birds. The Service has developed a system of permits for activities that involve the take of migratory birds, including those governing scientific collection and bird banding, and lethal and non-lethal measures taken to prevent depredation of agricultural crops and to protect public health and safety. For more information about those permits, or to clarify whether an activity is allowed, contact the Service.

You’ve stated that Federal agencies must obtain permits from the Service for activities covered by existing MBTA permits. How should Federal agencies proceed when an activity for which there is no existing permit may result in take of migratory birds?

Existing migratory bird permit regulations authorize take for specific types of activities, such as collecting birds for scientific or educational purposes, or lethal control of birds damaging agricultural crops or other personal property. They do not authorize take resulting from activities such as forestry or agricultural operations, construction or operation of powerlines, and other activities where an otherwise legal action might reasonably be expected to take migratory birds, but is not the intended purpose of the action.

Under the provisions of the MBTA, the unauthorized take of migratory birds is a strict liability criminal offense that does not require knowledge or specific intent on the part of the offender. As such, even when engaged in an otherwise legal activity where the intent is not to kill or injure migratory birds, violations can occur if bird death or injury results.

The Service has enforced the MBTA with discretion, focusing on individuals or organizations that take birds with disregard for the law, particularly where no valid conservation measures have been employed. In doing so, the Service has been able to focus its limited resources on working cooperatively with various industries, agencies and individuals to reduce impacts on migratory birds. When necessary, the Service has taken enforcement actions to stop activities that threaten migratory bird populations.

Agency compliance with the Executive Order and the MOUs developed in consultation with the Service, while not eliminating the possibility of violations of the MBTA, should ensure that migratory bird populations are safeguarded. By avoiding or minimizing the impact of activities on migratory bird populations and otherwise implementing the terms of the MOUs, agencies can reduce or eliminate the biological significance of any potential violation, as well as the possibility of enforcement action.