



POLITICS

The Price of Folly

The energy industry has 99 problems with the Migratory Bird Treaty Act—and now accidental kills may no longer be one of them.

BY RAILLAN BROOKS

THE EARLY MORNING HOURS at the Leopold-Pine Island Important Bird Area in Wisconsin are typically the most lethal for roosting Sandhill Cranes. The floodplains are dark and quiet, and they're edged by power lines.

If a coyote were to scare the cranes up, they might crash straight into the wires and be electrocuted. But in this case, local conservation groups worked with the utility company to build towers with lower, specially marked lines that the birds could clear while making their escape. Now tens of thousands of cranes, pelicans, and waterfowl can migrate through the wetlands without facing considerable mortalities. Credit is due in part to the Migratory Bird Treaty Act (MBTA).

For the past four decades, the U.S. Fish and Wildlife Service (USFWS) has interpreted the 100-year-old law, which prohibits the harming of more than 1,000 migratory bird species, in an expansive light, using the MBTA's powers to cover both deliberate and accidental kills—whether by gas flares, power lines, or wind turbines. These “incidental takes” are subject to penalty if companies don't work with the agency to fix hazardous sites and operations.

But now that interpretation, a crucial arrow in conservationists' regulatory quiver, is under assault. On December 22, the Department of the Interior issued a 41-page opinion stating that USFWS should no longer enforce the law against companies that kill birds unintentionally. Even worse, the memo sets up a high-stakes faceoff that could end in the industry's greatest wish: a narrower MBTA definition that's signed, sealed, and delivered by Congress. In the coming months, the U.S. House of Representatives is expected to vote on an amendment to the SECURE American Energy Act that would abolish incidental take. The “clarification,” the brainchild of Rep. Liz Cheney (R-WY), prohibits federal agencies from using the MBTA to punish and prosecute accidental injuries.

Unsurprisingly, the lobby list behind the amendment and other MBTA-related rules includes a dozen or so renewable energy and fossil fuel companies. Some filings, like those of Berkshire Hathaway Energy, which spent nearly half a million dollars on lobbying in the last quarter of 2017 alone, specifically mention incidental-take legislation as an action item.

Add your voice to the opposition at action. audubon.org/MBTA.

AFTERMATH
In 2013, an open flare at a gas terminal in Canada killed more than 7,500 songbirds, resulting in a \$750,000 fine under the country's MBTA counterpart.

In the meantime, the Interior's opinion is exactly that—an opinion. “It could change tomorrow,” says David O'Neill, Audubon's chief conservation officer. But that doesn't mean bird advocates should stand down. “We will fight hard; we will bring our partners to the table,” O'Neill says. Challenging the changes will be much tougher if the department starts drafting rules, however. To warn against that, former Interior and USFWS leaders representing every White House since 1971 appealed to Interior Secretary Ryan Zinke directly. “The Migratory Bird Treaty Act can and has been successfully used to reduce gross negligence by companies that simply do not recognize the value of birds to society or the practical means to minimize harm,” they wrote in a letter of opposition.

The MBTA's weight doesn't just come to bear after companies have killed birds; it also can induce them to do better beforehand. “It was the act that gave us the leverage to work with private as well as public entities,” says John F. Turner, the USFWS director under George H.W. Bush and one of the letter's signatories. During his tenure, he says, businesses were aware of how stringently the MBTA could be applied to incidental take; the 1989 Exxon Valdez oil spill, which killed some 250,000 birds in Alaska, had prompted an eye-popping fine of \$150 million. That, in turn, brought drilling companies to the table, where USFWS negotiated with them to net their waste pits.

In the case of the Sandhill Cranes in Wisconsin, a bird-proof plan was built around guidelines from the Avian Power Line Interaction Committee, which includes 77 member companies and is one of multiple industry- and conservationist-led working groups that shape avian-friendly infrastructure. “We felt like the MBTA applied necessary pressure for the company to take the issue seriously from a legal standpoint,” says Steve Swenson, the Aldo Leopold Foundation's director of conservation. “The real damage would be in conversations no longer being possible between competing interests.” The Leopold Pine-Island cranes are now safe from power lines, but the world beyond may be about to get more dangerous.

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