



Emerging Issues Affecting Conservation of Florida Imperiled Wildlife Species

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PROTECTED SPECIES LAWS

- **The primary laws that regulate our general interactions with protected species in Florida:**
 - Florida Endangered & Threatened Species Act
 - Marine Mammal Protection Act
 - Bald and Golden Eagle Protection Act
 - Migratory Bird Treaty Act (MBTA)
 - Endangered Species Act of 1973 (ESA)



FLORIDA ENDANGERED & THREATENED SPECIES ACT

§§379.2291-379.231, F.S.

■ 68A-27, F.A.C.

- Vast majority of rulemaking authority comes directly from Article IV of the Florida Constitution.
- **Florida has more endangered and threatened species than any other continental state.**
- **Both the statute and rule establish a reward program for the arrest and conviction of person illegally killing or wounding or wrongfully possessing endangered or threatened species.**
- **68A-27.007(2)(d)**
 - 68A-27 sets forth requirements for take permits
 - **Agriculture, conducted in accordance with wildlife BMPs adopted in Rule 5I-8.001, F.A.C., by FDACS, is authorized and does not require a permit authorizing incidental take.**



MARINE MAMMAL PROTECTION ACT (MMPA)

16 U.S.C. CH. 31

■ PROTECTS ALL MARINE MAMMALS

- Prohibits, with certain exceptions, “take” of marine mammals.
- Prohibits importation of marine mammals and marine mammal products into the U.S.
- Jurisdiction shared by FWS and NMFS



MMPA

AUTHORIZED TAKE

- **Take can be authorized for the following activities:**
 - Scientific research
 - Enhancing the survival or recovery of a marine mammal species or stock
 - Commercial and educational photography
 - First-time import for public display
 - **Capture of wild marine mammals for public display**
 - **Incidental take during commercial fishing operations**
 - Incidental take during non-fishery commercial activities



MMPA

INCIDENTAL TAKE AUTHORIZATIONS UNDER MMPA

- **Most incidental take authorizations have been issued for activities that produce underwater sound.**
 - Military **sonar** and training exercises
 - **Oil and gas development**, exploration, production, and abandonment projects
 - **Pile driving** associated with construction projects
 - Explosive structure removal



MMPA

INCIDENTAL TAKE AUTHORIZATIONS UNDER MMPA

- **What determinations must be made for an incidental take authorization to be issued?**
 - The take must be of a **small number**
 - Have no more than a **“negligible impact”** on those marine mammal species or stocks; and
 - **Not have an “unmitigable adverse impact”** on the availability of the species or stock for “subsistence” uses.



BALD AND GOLDEN EAGLE PROTECTION ACT

16 U.S.C. 668



- Protects bald and gold eagles
- Bald eagles delisted from ESA in 2007 but still protected under the BGEPA and MBTA
- Prohibits anyone, without a permit issued by the Secretary of the Interior, from “taking” bald and golden eagles, including their parts, nests, or eggs.
- Take defined as “pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, molest or disturb”

BALD AND GOLDEN EAGLE PROTECTION ACT



■ Disturb means

- To agitate or bother a bald or golden eagle to a degree that causes, or is likely to cause...
 - **injury** to an eagle
 - a **decrease in its productivity**, by substantially interfering with normal breeding, feeding, or sheltering behavior, or
 - **Nest abandonment**, by substantially interfering with normal breeding, feeding, or sheltering behavior

BALD AND GOLDEN EAGLE PROTECTION ACT

“DISTURB”/EAGLE NOT PRESENT

- In addition to immediate impacts, this definition also covers impacts that result from human-induced **alterations initiated around a previously used nest site during a time when eagles are not present**, if, upon the eagle’s return, **such alterations agitate or bother** an eagle to a degree that interferes with or interrupts normal breeding, feeding, or sheltering habits, and **causes injury, death or nest abandonment**.



MIGRATORY BIRD TREAT ACT (MBTA)

16 U.S.C. §§ 703-712

- One of the oldest (implemented in 1918) and most comprehensive pieces of legislation designed to protect birds.
- The MBTA implements Treaties and Conventions between the United States, Canada, Mexico, Japan and Russia.
- FWS has statutory authority and responsibility for enforcing the MBTA.



MBTA

- 1027 species of birds are currently listed under the MBTA.
- Approximately 500 species occur in Florida.
- The protected birds are **many of our most common species**, as well as birds listed as threatened or endangered.
- Many birds protected by the MBTA are not, in fact, migratory.



Black-Necked
Stilt



Northern Crested Caracara



Northern Mockingbird

MBTA



- What species are not protected by the MBTA?

The MBTA does not apply to:

- **Nonnative species** introduced into the U.S. or its territories.
- Species that are **native** *and* belong to families **not covered by any of the conventions** implemented by the MBTA. These species are managed by states.

MBTA

TAKE

- The MBTA provides that it is unlawful to pursue, hunt, **take**, capture, kill, possess, sell, purchase, barter, import, export, or transport any migratory bird, or any part, **nest**, or **egg** of any such bird, unless authorized under a permit issued by the Secretary of the Interior.
- **Take** is defined as: "pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to pursue, hunt, shoot, would, kill, trap, capture, or collect."

MBTA

INCIDENTAL TAKE



- While the ESA provides mechanisms for FWS to regulate, and in some instances authorize take of endangered and threatened species, at present no such comparable mechanism exists under the MBTA.
- FWS has not issued rules expressly providing for a permitting program for incidental take, although, in limited circumstances, it has granted individual permits.

MBTA

INCIDENTAL TAKE

However...

FWS normally will not recommend prosecution unless the actor declined to adopt available measures to reduce the known risk of migratory bird deaths.



MBTA

FWS NOTICE OF INTENT (NOI) TO PREPARE A PROGRAMMATIC EIS RE: MBTA INCIDENTAL TAKE (IT)



- IT in exchange for compensatory mitigation: funding of habitat replacement, restoration, or acquisition.
- The permit program would focus on **industries and activities that involve significant avian mortality** and for which measures to avoid or minimize take exist.
- Four possible approaches.

FWS NOI TO PREPARE A PROGRAMMATIC EIS RE: MBTA IT GENERAL CONDITIONAL AUTHORIZATION

I. General conditional authorization for IT associated with particular industry sectors.

- Provided those sectors adhere to appropriate standards for protection and mitigation of IT.
- Standards would include conservation measures or technologies developed to address practices or structures that kill or injure birds.



MBTA

FWS NOI TO PREPARE A PROGRAMMATIC EIS RE: MBTA IT INDUSTRY SECTORS IDENTIFIED

- Industry sectors already identified: Oil, gas, and wastewater disposal pits (can attract and entrap birds)
- Methane or gas burner pipes
- Communication towers
- Electricity transmission and distribution lines



FWS NOI TO PREPARE A PROGRAMMATIC EIS RE: MBTA IT WIND ENERGY INDUSTRY

- Also considering a general authorization for the wind energy generation industry



MBTA

FWS NOI TO PREPARE A PROGRAMMATIC EIS RE: MBTA IT INDIVIDUAL PERMITS

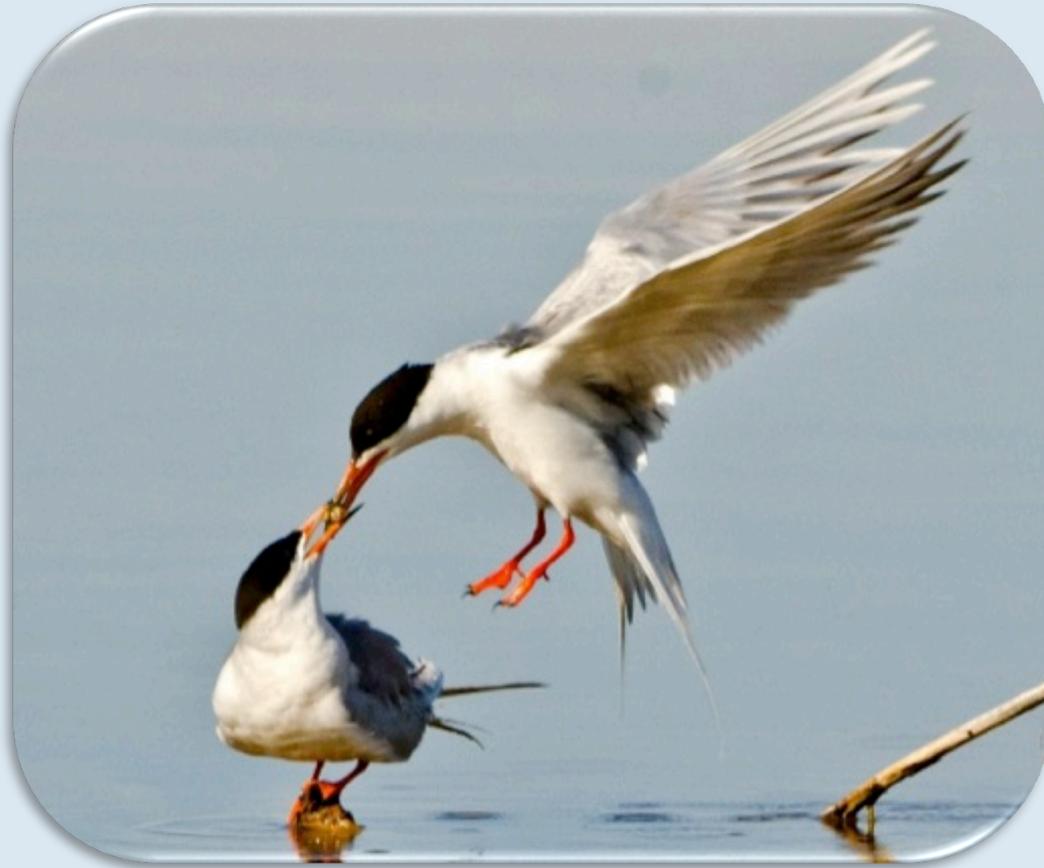
II. Individual IT permits for projects/ activities not covered under general, conditional authorization.

- Projects/activities that present complexities that require project-specific considerations, or for which there is limited information regarding adverse effects.
- SFWMD STAs, FEBs, Reservoirs



MBTA

FWS NOI TO PREPARE A PROGRAMMATIC EIS RE: MBTA IT MEMORANDUM OF UNDERSTANDING (MOU) WITH FEDERAL AGENCIES



- III. Would **authorize IT by federal agencies** that commit in MOU with FWS to consider impacts to migratory birds in their actions and to mitigate for that take.

MBTA

FWS NOI TO PREPARE A PROGRAMMATIC EIS RE: MBTA IT VOLUNTARY GUIDANCE

IV. Development of Voluntary Guidance for Industry Sectors

- Identify BMPs or technologies that would avoid or minimize avian mortality resulting from specific hazards in those sectors.
- **Would not authorize IT**, but would consider the extent of compliance with guidance in assessing any potential law enforcement action for a violation of the MBTA.
- The same as what the FWS currently does with APPs, etc., but on an industry sector scale.

MBTA

FWS NOI TO PREPARE A PROGRAMMATIC EIS RE: MBTA IT CURRENT STATUS

- FWS considering comments received during NOI public comment period.
- Draft rule with programmatic EIS to be published in the Federal Register and out for public comment by the end of calendar year 2016.



ENDANGERED SPECIES ACT

16 U.S.C. §1531 et seq.

- **Section 2:** Findings , Purposes and Policy
- **Section 3:** Definitions
- **Section 4:** Determination of Endangered Species and Threatened Species (Listing, Critical Habitat Designation, Recovery, Monitoring)
- **Section 5:** Land Acquisition
- **Section 6:** Cooperation with States
- **Section 7:** Interagency Cooperation (Consultations)
- **Section 8:** International Cooperation
- **Section 8A:** Convention Implementation
- **Section 9:** Prohibited Acts
- **Section 10:** Exceptions (Permits)
- **Section 11:** Penalties and Enforcement

KEY DEFINITIONS

SECTION 3

■ Endangered

- Any species in **danger of extinction** throughout all or a significant portion of its range.

■ Threatened

- Any species **likely to become endangered** within the foreseeable future throughout all or a significant portion of its range.

■ Take

- To harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.



KEY DEFINITIONS

SECTION 3

■ Critical Habitat

- The specific areas within the geographical area occupied by the species, at the time it is listed ... on which are found those physical or biological features:
 - essential to the conservation of the species and
 - which may require special management considerations or protection; and
- Specific areas outside the geographical area occupied by the species at the time it is listed ... upon a determination by the Secretary that such areas are essential to the conservation of the species.



LISTING

SECTION 4

- **Identifying species for Potential Listing as Endangered or Threatened.**
 - **Petition Process**
 - Citizen may “petition” to list a species
or
 - **Candidate Process**
 - FWS may identify species for listing through internal studies and input from States, academia, and other experts.

LISTING

SECTION 4

- **Factors Considered in Determining Whether a Species is Endangered or Threatened:**
 - Present or threatened **destruction, modification**, or curtailment of the species' range or **habitat**
 - **Overutilization** for commercial, recreational, scientific, or educational purposes
 - **Disease or predation**
 - **Inadequacy of existing regulatory mechanisms**
 - Other natural or man-made factors affecting the existence of the species

CRITICAL HABITAT

SECTION 4

- Specific areas essential to the conservation of a species and which may require special management consideration or protection.
- Areas can be excluded based on economic impacts and other facts (economic analysis required).
- Requires rulemaking process (publish proposed rule, solicit public comment, publish final rule).
- Protected from destruction or adverse modification.



RECOVERY

SECTION 4

■ Recovery Plans

- Develop with stakeholders
- **Identify recovery strategy**
- Identify tasks and partners
- **Establish delisting/
downlisting criteria**
- Provide **timetable** and **cost estimate**
- **May address multiple species**



Bald Eagle delisted in 2007

CONSULTATIONS

SECTION 7

- Requires all **federal agencies** to consult with the National Marine Fisheries Service (NMFS) or the FWS if an action is proposed that **may affect listed species or their designated critical habitat**.
- Section 7 may affect **private individuals** when their action **involves Federal authorization or funding**.
- FWS/NMFS Section 7 **Consultation Handbook** available online.

CONSULTATIONS

SECTION 7

■ Informal Consultations

- **Clarify whether and what** listed, proposed, and candidate **species** or designated or proposed **critical habitats** may be **in the action area**;
- Determine what **effect the action may have** on these species or critical habitats;
- **Explore ways to modify the action** to reduce or remove adverse effects to the species or critical habitats;
- **Determine the need to enter into formal consultation.**

CONSULTATIONS

SECTION 7

■ Formal Consultations

- Required when **Federal action is likely to adversely affect listed species or critical habitat.**
- The Service issues a **biological opinion (BO)** determining **whether the action jeopardizes the continued existence** of a listed species or adversely modifies critical habitat.
 - If FWS finds that the action will not jeopardize the continued existence of the species, then BO will include an **incidental take statement.**
 - Incidental take statement will include the amount or extent of the anticipated take and **reasonable and prudent measures** to minimize take.

PROHIBITED ACTS

SECTION 9

- **Prohibits the take of endangered and threatened species.**
- **Take means**
 - Harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or to attempt to engage in these activities. ***Harm* includes habitat destruction that kills or injures listed species.**
 - The take prohibition for wildlife applies to any person including Federal, state, and local agencies.

PERMITS

SECTION 10

- **FWS issues Section 10(a)(1)(A) permits for scientific purposes or to enhance the propagation or survival of a species. (genetic research, capture and marking)**
- **Section 10(a)(1)(A) permitting authority is used to encourage species conservation on non-Federal lands.**

| Type of Agreement | Landowner agrees to... | Fish and Wildlife Service assures... |
|---|---|---|
| Safe Harbor Agreement | Take actions to benefit listed species on their land | No additional restrictions will be imposed as species populations improve |
| Candidate Conservation Agreements with Assurances | Take actions to benefit candidate or other non-listed species on their land | No additional restrictions will be imposed if species is later listed |

PERMITS

SECTION 10

INCIDENTAL TAKE PERMITS

- **Section 10(a)(1)(B) permits**
 - For **incidental take** by **non-federal** entities (private landowners).
 - Requires a **Habitat Conservation Plan** to avoid, minimize, and mitigate the take to the maximum extent practicable.
 - Planning document that describes the **anticipated effects** of the proposed taking and **how those impacts will be minimized and mitigated.**

PENALTIES AND ENFORCEMENT

SECTION 11

- **Provides for civil and criminal penalties for ESA violations**
 - Civil penalties up to \$25,000 per violation
 - Criminal penalties up to \$50,000 and/or a year in prison per violation
- **Provides for citizen suits**
 - To compel the Secretary of the Interior to enforce the ESA

REGULATED ENTITIES/AGENCIES

