



DEPARTMENT OF THE ARMY
ASSISTANT CHIEF OF STAFF FOR INSTALLATION MANAGEMENT
600 ARMY PENTAGON
WASHINGTON DC 20310-0600

11 OCT 2002

DAIM-ED-N (200-3)

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Supplemental Army Policy Guidance on Migratory Bird Treaty Act

1. References:

a. Memorandum, DAIM-ED-N, 17 Aug 01, subject: Army Policy Guidance on Migratory Bird Treaty Act.

b. Center for Biological Diversity v. Pirie, 201 F. Supp. 2d 113 (D.D.C. 2002), *rev'd, in part, Center for Biological Diversity v. England*, 2002 U.S. App. LEXIS 11493 (DC Cir. June 5, 2002) (granting Navy's motion for emergency stay of injunction pending appeal).

2. Army Regions, Army National Guard, and Army Reserve Command must ensure that installations comply with the requirements of the Migratory Bird Treaty Act (MBTA) by following the procedures in reference 1a, as supplemented by the guidance in this memorandum.

3. Recent court rulings have created heightened concerns for the Army's need to comply with the MBTA and its permitting requirements prior to engaging in activities that result in the take of migratory birds.

a. The Court of Appeals for the District of Columbia found that MBTA prohibition of unpermitted take of migratory birds applied to activities of federal agencies, and that citizens could enforce that prohibition through citizen lawsuits under the Administrative Procedures Act in Humane Society v. Glickman, 217 F.3d 882 (DC Cir., 2000). The Glickman court did not distinguish between "intentional" take and "unintentional" take. In response, ACSIM ODEP prepared and distributed reference 1a directing Army activities: (1) to apply for MBTA permits before intentionally taking any migratory birds; and (2) to consider and minimize impacts through the National Environmental Policy Act and Integrated Natural Resource Management Plan processes prior to conducting otherwise lawful activities with potential to unintentionally take migratory birds.

b. The Federal District Court for the District of Columbia found that MBTA prohibition of unpermitted take applies to both "intentional" and "unintentional" take in a more recent ruling (reference 1b). The court decided that Navy had violated the MBTA by failing to obtain an MBTA permit to authorize the killing of birds that occurred when

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Navy conducted bombing operations at Farallon de Medinilla in the Pacific Ocean. The district court ordered Navy to refrain from further training activities on the island until it obtained a proper permit. On appeal, the Circuit Court of Appeals for the District of Columbia, reversed the district court decision to issue a preliminary and permanent injunction. This decision allowed the Navy to proceed with training activities with the potential to take migratory birds while the fundamental legal issue regarding the MBTA applicability to “unintentional take” was briefed and argued before the court. The Circuit Court of Appeals for the District of Columbia will likely decide this within the upcoming year. If the Court of Appeals upholds the District Court’s ruling that prohibits intentional or unintentional take pursuant to the MBTA, this may have Army-wide application, as the federal courts in the District of Columbia have jurisdiction over all federal agencies. The unintentional take of migratory birds as a result of mission-related activities could therefore provide a basis for future legal action against the Army.

4. Installations must continue to comply with reference 1a with respect to both intentional and unintentional take. In addition, installation natural resource staff, in coordination with installation Offices of the Staff Judge Advocate, should consider whether there exists an appreciable risk of litigation that could adversely impact mission-related activities, should the installation conduct activities with the potential to unintentionally take migratory birds without a permit. Where the installation concludes that such risk exists, the installation, through its command chain shall notify this office to determine whether additional action is appropriate. In no case will an installation apply for a special purpose permit for unintentional take without advance coordination and concurrence of this office. Installations that have already submitted applications for special purpose permits shall coordinate with this office immediately to determine whether the permit application should be withdrawn.

FOR THE ASSISTANT CHIEF OF STAFF FOR INSTALLATION MANAGEMENT:

/s/

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