

## Updates

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### Bird Is the Word: US Fish & Wildlife Service Proposes Narrow Interpretation of Migratory Bird Treaty Act

The U.S. Fish and Wildlife Service issued a proposed rule on January 30, 2020, that narrowly interprets the protections afforded by the Migratory Bird Treaty Act. The new rule would provide that the MBTA prohibits only the intentional take of migratory birds, and not incidental and unintentional take associated with land development activities or project operations. The new rule seeks to codify a December 2017 U.S. Department of Interior guidance memorandum (known as [Memorandum M-37050](#)), which reversed the agency's January 2017 guidance issued at the end of the Obama administration.

## **Background**

The MBTA prohibits the unauthorized taking or killing of over one thousand species of migratory birds, many of which are common and abundant. The MBTA is a strict liability criminal law with potentially broad applicability. Specifically, the act makes it illegal to "pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess . . . any migratory bird . . . or any part, nest, or egg of any such bird." 16 U.S.C. §§ 703-712. The MBTA was enacted in 1918 to implement an international treaty to protect migratory birds threatened by the commercial trade of birds and their feathers.

Unlike the federal Endangered Species Act, which clearly applies to the incidental and unintentional take of listed species, neither the MBTA nor its legislative history addresses whether the law was intended to prohibit the incidental and unintentional take of migratory birds, or only hunting and other forms of direct, intentional take. Federal courts have been split on this issue for decades, and attempts by the FWS to promulgate regulations have fizzled.

## **A Tale of Two Solicitors' Opinions**

On January 10, 2017, in the final days of the Obama administration, the Department of Interior Office of the Solicitor issued [Memorandum M-37041](#), which expressed the agency's legal opinion that the MBTA prohibits both intentional and incidental take. The opinion concluded that the MBTA's broad prohibitions on taking and killing migratory birds apply to any activity and are not limited to hunting, poaching, or any other similar factual contexts. Accompanying the opinion was a new section of the FWS Service Manual providing guidance regarding what types of situations would potentially be subject to prosecution—namely, projects in which the proponents either do not cooperate or do not attempt to avoid impacts to migratory birds.

In a 180-degree reversal, on December 22, 2017, the current administration issued Memorandum M-37050, which reaches the opposite conclusion: the definition of take under the MBTA is limited in relevant part to affirmative and purposeful actions, such as hunting and poaching. The December 2017 memorandum discusses at length the relevant statutory text, interpreting it to criminalize only purposeful and affirmative actions intended to reduce migratory birds to human control. It argues that the more ambiguous terms "kill" and "take" should be read together with "pursue," "hunt," and "capture," which suggest affirmative acts. The opinion also looks to common law definitions of "take" for support.

The December 2017 memorandum closes by discussing the legal implications of prosecuting incidental take under the MBTA, arguing that a narrow reading of the take prohibition is necessary to avoid constitutional due-process concerns. The memorandum cites a list of top human-caused threats to birds compiled by the

FWS—including pet cats, collisions with building glass and vehicles, poisons, electrical lines, and so on—to argue that a broad interpretation of "take" would have the "absurd result" of turning the "vast majority of Americans" into potential criminals. The memorandum also points to the rule of lenity, which affirms that the resolution of reasonable doubt under a criminal statute should lean in a defendant's favor. Based on these considerations, the memorandum concludes that the correct interpretation of the MBTA's take prohibition is to limit it to intentional take only.

## **New Proposed Rule Seeks to Codify M-37050**

The new proposal would take the December 2017 Department of Interior memorandum a step further by codifying the narrow interpretation of the statutory protections for migratory birds into the federal regulations that formally implement the MBTA. The proposed rule retains much of the Interior memorandum's discussion of the common understanding of active versus passive terms, specifically "pursue," "hunt," and "capture" compared to "kill" and "take"—the former being active, and the latter being potentially active or passive, depending on the context and circumstances. Utilizing the tools of statutory construction, including caselaw, the proposed rules rest on the determination that when these terms are read together with the other active verbs, the interpretation of "take" and "kill" should be construed to mean only active and affirmative conduct.

According to Rob Wallace, assistant secretary for Fish and Wildlife and Parks, "it is important to bring regulatory certainty to the public by clarifying that the criminal scope of the MBTA only reaches to conduct intentionally injuring birds." In the [news release](#) for the proposed rule, the FWS clarifies that the new regulations would not affect the interpretation of the term "take" under the Endangered Species Act or the Bald and Golden Eagle Protection Act.

As expected, those who favor the proposed rule have emphasized the certainty and reliability from a clear interpretation where previously there was uncertain application of the MBTA with potentially significant consequences. Those who oppose the rule claim that it would remove crucial protections for migratory birds and allow for indiscriminate killing of birds at project sites across the country.

## **Implications of Proposed Rule**

There are two key considerations when looking at the implications of the proposed rule. First, as a practical matter, the lifetimes of energy and infrastructure projects, where ongoing operations have the potential to affect migratory birds, are measured in decades, not years. As demonstrated by the Trump administration's swift withdrawal of the January 2017 guidance memorandum, executive branch opinion can change abruptly with a new administration, suggesting that developers and other entities would be wise to keep a long-term perspective of MBTA-related risk. It therefore would be prudent to maintain a cooperative approach with FWS staff on migratory bird issues. It is also recommended that companies continue to (1) implement best management practices to mitigate impacts on migratory birds and (2) document those efforts, including discussions with FWS.

Second, it is essential to keep in mind the applicable state laws that protect migratory birds. For example, in California, the state has repeatedly emphasized that—regardless of whether the federal protections in the MBTA are interpreted broadly or narrowly—it will vigorously enforce the independent state law requirements in the Fish and Game Code, which prohibits the incidental as well as the intentional take of migratory birds and their nests.

Thus, as with other recent regulatory initiatives, a narrow application of federal law may simply serve to shift the focus to state and local enforcement.

Written comments and information on the proposed rule must be submitted on or before March 19, 2020.

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