

## Environment Alert

December 28, 2017

### Key Points:

- The Opinion finds that the Migratory Bird Treaty Act (MBTA) prohibits only affirmative and purposeful actions to take migratory birds. Incidental takes that are not the purpose of an action, even if they are direct and foreseeable results, are no longer subject to potential criminal prosecution.
- This Opinion will provide welcome relief to operators of industrial activities that unavoidably kill migratory birds, sometimes even after efforts to mitigate take and to comply with industry best practices or FWS voluntary guidelines, by removing the threat of criminal prosecution. However, this memorandum has no impact on eagle take issues, as the eagle is additionally protected by the Bald and Golden Eagle Protection Act.
- The Opinion reverses a prior Solicitor's Opinion issued on January 10, 2017, titled *Incidental Take Prohibited Under the Migratory Bird Treaty Act* (M-37041), ostensibly formalizing what it characterized as the U.S. Fish and Wildlife Service's (FWS) longstanding interpretation and implementation of the Act spanning back at least four decades.



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## New Department of Interior Solicitor's Opinion Provides Relief on Incidental Take of Migratory Birds

### Overview

On December 22, 2017, the Principal Deputy Solicitor Exercising the Authority of the Solicitor issued a memorandum titled *The Migratory Bird Treaty Act Does Not Prohibit Incidental Take* (M-37050 or Solicitor's Opinion), which concludes that the "MBTA's prohibitions on pursuing, hunting, taking, capturing, killing or attempting to do the same applies only to direct and affirmative purposeful actions that reduce migratory birds, their eggs, or their nests, by killing or capturing, to human control." [Op. at 41] As noted above, this opinion withdraws and replaces a Solicitor's Opinion issued at the tail end of the Obama administration that had reached the opposite conclusion. The debate over whether the MBTA applies to incidental takings is not new, and while until now the Agency's position had held consistent over the years, there had not been a unanimous conclusion among the district or circuit courts across the country. This revised interpretation of the MBTA provides relief to entities engaged in industrial operations that unavoidably kill migratory birds, such as oil and gas production, mining, pesticide applications, wind

turbines operations, and forestry and other land development. tio ex ex eaquatet peruntium laut lita  
aceperovid magnatatiam qui idebitat quo imusam, excea delesectem fugiat.

## **Background**

The MBTA was first enacted in 1918 to implement the Treaty between the United States and Great Britain (on behalf of Canada) for the protection of migratory birds. Subsequently, the United States entered into treaties with Mexico (1936), Japan (1973) and the Union of Soviet Socialist Republics (1976) that additionally spoke to the protection of migratory bird species and their habitats. Several of the treaties have been updated with revised protocols since their original ratification. Collectively, these treaties provide the legal authority for the Act and the list of more than migratory birds that are now protected by it.

Since its enactment, the MBTA has been modified on additional occasions that included adding felony provisions for commercialization of migratory birds, related forfeiture provisions (and later adding a “knowing” mental state requirement) and by requiring proof of negligence for a taking by baiting. In 2002, however, following a judicial order enjoining military training that took migratory birds, Congress temporarily exempted incidental take caused by military readiness activities, directed the Secretary of Defense to minimize incidental take and directed the FWS to write regulations to provide for a permanent exemption related to military readiness.

The current, operative language of Section 2 of the MBTA is broad and provides:

it shall be unlawful, at any time, or any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird, any part, nest, or eggs of any such bird, or any product, whether or not manufactured, which consists, or is composed in whole or part, of any such bird or any part, nest, or egg thereof...

It is a strict liability statute, allowing for criminal prosecution regardless of the intent of the actor. According to the now-replaced Solicitor’s Opinion, the FWS had consistently interpreted the statute to apply to incidental take as bounded by the limits of proximate causation, “which requires the death to be ‘reasonably anticipated or foreseen as a natural consequence’ of the action.” [M-37041 at 21]

Notwithstanding the long-standing practice, the FWS had failed to establish a national permitting program under which good actors could have found a measure of safe harbor. Rather, the FWS relied on voluntary guidelines, or recommended best practices, to guide operators in certain industries. Even these guidelines, however, did not necessarily provide safe harbor for those who attempted to comply with their requirements. Rather, the final defense was the application of either prosecutorial discretion or the application of proximate cause by courts.

## **The Solicitor’s Opinion**

In arriving at the conclusion that the MBTA’s scope is limited to activities that are intended to harm migratory birds, the Solicitor’s Opinion focuses on the historical purpose of the statute as reflected in the

plain language of the statute itself, and concludes that to the extent there is any ambiguity on the scope of the statute, it ought to be resolved in favor of the potential defendant. The Solicitor's Opinion starts its analysis looking at the impetus for the MBTA, which was unequivocally to curtail commercial hunting that had taken its toll on many species of migratory birds, many to the brink of extinction. It finds that migratory game birds as well as non-game birds were hunted and killed for commercialization of their meat and feathers. It then reviews the language of the statute, including the operative verbs—pursue, hunt, take, capture, kill. It finds that “pursue” “hunt” and “capture” all require deliberate action, and recognizes that “kill” and “take” could apply to active or passive conduct, concluding however that those words should be read in context of the other three. The Opinion therefore concludes that collectively they “unambiguously require an affirmative and purposeful action.” [Op. at 19] Furthermore, as the Opinion notes, nowhere in the statute does the term “incidental take” appear. The Opinion finds that “[r]eading the MBTA to apply to incidental takings casts an astoundingly large net that potentially transforms the vast majority of average Americans into criminals,” [Op. at 40] ultimately causing it to resolve any potential ambiguity in favor of potential defendants.

### **Final Words**

While the Opinion provides near-term relief to operators of industrial activities that unavoidably kill migratory birds, there will doubtless be a legal challenge. Operators would be well-advised to continue best efforts to mitigate current take and plan future developments heeding the recommendations in the industry or FWS best practices guidelines. Absent a decision from the Supreme Court on this question, or decisive action by Congress, a subsequent reversal-of-course on this position is definitely not out of the question. And as noted above, eagles are still a cause for concern as they are separately protected by the Bald and Golden Eagle Protection Act.

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