

The Pendulum Swings Back (Again) on Prohibition of Incidental Take under the Migratory Bird Treaty Act

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The scope of the prohibition of “take” under the Migratory Bird Treaty Act (MBTA or the Act) – and specifically whether the prohibition includes the incidental (unintentional) take of migratory birds – is an issue that has been hotly debated for years. As we reported [previously](#), the federal circuit courts do not agree on the issue, and the federal government’s position has changed several times in recent years, depending on the political party in control of the Executive Branch.

The Trump administration amended the government’s position again on April 11, 2025, when the Acting Solicitor for the US Department of the Interior issued a one-page legal [opinion](#) (or “M-Opinion”) repealing opinion M-37065, which was issued during the Biden administration and specified that the MBTA prohibits both intentional and incidental take of migratory birds, and restoring opinion M-37050, which was issued during the first Trump administration and specifies that only intentional take of migratory birds is prohibited. This latest legal opinion cites President Trump’s January 20, 2025 Executive Order on “Unleashing American Energy,” which directed the heads of each federal agency to implement plans “to suspend, revise, or rescind all agency actions identified as unduly burdensome,” and Interior Secretary Doug Burgum’s identification of opinion M-37065 as falling within this directive as reasons for the change of direction.

Enacted over 100 years ago, in 1918, the MBTA is one of the oldest wildlife protection laws in the US. and protects approximately 90 percent of all birds occurring in North America. The Act makes it a crime for any person to “take” a migratory bird. “Take” is defined broadly under the MBTA to include “pursue, hunt, shoot, wound, kill, trap, capture, or collect” migratory birds, or to attempt such activities. 50 C.F.R. § 10.12.

The original purpose of the MBTA was to regulate over-hunting of migratory birds, primarily by commercial enterprises, but the US Fish and Wildlife Service (USFWS or the Service) – the agency with primary responsibility for MBTA enforcement – broadened its interpretation during the 1970s and began prosecuting incidental take of protected birds. Since that time, persons engaging in an activity likely to result in a take of migratory birds, however unintentional and otherwise lawful, have faced the risk of enforcement. Permits for incidental take under the MBTA remain unavailable, as efforts to establish a permitting program under the Biden administration stalled, and the Service withdrew a

rule that it was developing in late 2023. This lack of available permitting adds to the long-term uncertainty created by the federal government's shifting interpretations of the scope of the MBTA take prohibition for those engaged in industries or activities that may result in unintentional and even unavoidable incidental impacts to birds.

Adding to this uncertainty, the federal courts of appeals have split on the scope of the MBTA's take prohibition. The Fifth and Eighth Circuits have held that the MBTA does not prohibit incidental take, while the Second and Tenth Circuits have held that it does. As a result, the geographic location where an action that could result in take of migratory birds occurs may determine the risk of enforcement under the Act.

While the US Supreme Court has not had occasion to consider the question, the US District Court for the Southern District of New York reviewed the first Trump administration's opinion M-37050, found it unlawful, and vacated it in 2020. *See Natural Res. Def. Council v. US Dep't of the Interior*, 478 F.Supp.3d 469 (S.D.N.Y. 2020). For this reason, the April 11 opinion specifies that the newly restored M-Opinion will be "administrative and binding on the Department, except with respect to actions relying on such opinion that are taken within the jurisdiction of the United States District Court for the Southern District of New York." In addition, a similar legal challenge to this new opinion, perhaps in a different jurisdiction, is a distinct possibility. Regardless of the outcome of any such legal challenge, the new M-Opinion signals that the Department of the Interior can be expected to exercise its discretion to forego enforcement action for incidental take of migratory birds while the current administration remains in control.

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