

## AN UPDATE ON TRUMP'S "TAKE" ON THE MIGRATORY BIRD ACT – CROSS MOTIONS FOR SJ FILED

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The U.S. Department of Interior recently argued that, prior to the Trump Administration, the Migratory Bird Treaty Act ("MBTA"), 16 U.S.C. § 703(a), had been improperly enforced. According to the Department of Interior, the Act's original intent was to criminalize the intentional killing of protected birds.- Opponents to the Department of Interior's interpretation have argued that the Act applies strict liability, such that accidental killing or injuring migratory birds resulting from incidental actions are also prohibited activities under the Act.

### Takes On The Migratory Bird Act

The MBTA protects more than 1,000 native U.S. species of birds, including the bald eagle, that were near extinction before it was enacted in 1918. Section 2 of the MBTA makes it unlawful for persons "at any time, by any means or in any manner to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, [or] possess" specific migratory birds.

The language of Section 2 of the MBTA states:

Unless and except as permitted by regulations made as hereinafter provided in this subchapter, it shall be unlawful at any time, by 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 egg 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.

16 U.S.C. § 703(a); see *also* 50 C.F.R. § 10.13 (list of applicable migratory birds).

The MBTA is a criminal statute—in general, violations of the MBTA are misdemeanor offenses punishable by imprisonment of no more than six months, a fine of no more than \$15,000, or both. 16 U.S.C. § 707(a). Courts have held that misdemeanor violations of the MBTA are strict liability offenses—if an action falls within the scope of activity prohibited by the misdemeanor provisions of the statute, it is a criminal violation regardless of whether the violator acted with intent. See, e.g., *United States v. CITGO Petroleum Corp.*, 801 F.3d 477, 488 (5th Cir. 2015); (AR 12-13 & n.76). In 1960, the MBTA was amended to make it a felony to take any migratory bird with the intent to sell or barter such bird, or to sell or barter any migratory bird. (AR 10); Pub. L. No. 86-732, 74 Stat. 866. After the United States Court of Appeals for the Sixth Circuit found this to be an unconstitutional violation of a defendant's due process rights, see *United States v. Wulff*,

758 F.2d 1121, 1125 (6th Cir. 1985), Congress amended the felony provision of the MBTA to limit it only to “knowing” violations. See 16 U.S.C. § 707(b) (felony liability for “[w]hoever, in violation of this Act, shall knowingly (1) take by any manner whatsoever any migratory bird with intent to sell, offer to sell, barter or offer to barter such bird, or (2) sell, offer for sale, barter or offer to barter, any migratory bird”). It is also a felony to take a bird with the aid of bait if the person knows or reasonably should know that the area is baited. See 16 U.S.C. § 707(c).

In the past, federal prosecutors have filed criminal charges under the MBTA against oil and gas, timber, mining, chemical, and electricity companies whose activities “incidentally” caused the deaths of migratory birds. The Second Circuit Court of Appeals in 1978, ruled that “incidental take” is a crime under the MBTA when it found a corporation guilty after birds came into contact with water pollution and died. *United States v. FMC Corporation*, 572 F.2d 902, 908 (2d Cir. 1978).- And, the Tenth Circuit found that incidental take is prohibited by the MBTA when a defendant has or should have knowledge that its conduct may kill or injure migratory birds, and it does so.- *United States v. Apollo Energies, Inc.*, 611 F.3d 679, 690 (10th Cir. 2010) (quoting *United States v. Moon Lake Elec. Ass’n, Inc.*, 45 F. Supp. 2d 1070, 1085 (D. Colo. 1999)). Not all of the appellate courts agree, however.- The Fifth Circuit Court of Appeals in 2015 concluded that the statute does not prohibit an “incidental take.” *CITGO*, 801 F.3d 477.-

Because of these contradictory precedents, the Solicitor General in the Trump Administration issued Opinion M-37050 on December 22, 2017, entitled “The Migratory Bird Treaty Act Does Not Prohibit Incidental Take,” stating that enforcement would only be sought for actions that are directed at migratory birds, their nests, or their eggs, and not incidental, accidental, or inadvertent actions. -The memorandum explains that the text, history, and purpose of the MBTA demonstrate that the Act’s prohibition on pursuing, hunting, taking, capturing, killing, or attempting to do the same applies only to actions that are directed at migratory birds, their nests, or their eggs, and not to injuries to or deaths of migratory birds that result from an action but are not the purpose of that action. The memorandum also asserts that “[n]either the plain language of the statute nor its legislative history support the notion that Congress intended to criminalize, with fines and potential jail time, otherwise lawful conduct that might incidentally result in the taking of one or more birds.” M-37050, page 2, note 4.

Subsequently, the FWS issued a memorandum on April 11, 2018 to “provide[] guidance to clarify what constitutes prohibited take, what actions must be taken when conducting lawful intentional take (e.g., obtain a permit via 50 C.F.R. Part 21), and what changes to prior practice should be made in light of the M-Opinion.” And, on February 3, 2020, the FWS published in the Federal Register a proposed rule entitled “Regulations Governing Take of Migratory Birds.” 85 Fed. Reg. 5915 (Feb. 3, 2020) (the “Proposed Rule”) to define the scope of the MBTA as it applies to conduct resulting in the injury or death of migratory birds protected by the Act. The Proposed Rule is consistent with Opinion M-37050.

The Natural Resources Defense Council (“NRDC”), the National Audubon Society, the American Bird Conservancy, the Center for Biological Diversity, and Defenders of Wildlife challenged the issuance of Opinion M-37050 and an April 2018 guidance memorandum by the Fish and Wildlife Service, pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*, 701 *et seq.* (“APA”), and the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* (“NEPA”).

Last week, the Department of Interior and the FWS submitted their cross-motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and in opposition to the motions for summary judgment filed by plaintiffs. From a procedural standpoint, the Department of Interior argued that Opinion M-37050 was an interpretation of an existing rule and not a “final action” subject to NEPA review. The Department of Interior asserted that the appropriate time for plaintiffs to bring a NEPA challenge is after rulemaking. In January 2020, the Trump administration moved to codify its decision to eliminate criminal penalties for incidental migratory bird deaths, which will go through the NEPA process, including the preparation of an environmental impact statement. After that time, according to the Department of Interior, and not before then, the matter would be ripe for a challenge.

The plaintiffs, including attorneys general from California, New York, Illinois, Maryland, Massachusetts, New Jersey, New Mexico and Oregon, previously argued that Opinion M-37050 was a major federal action triggering NEPA, because it fundamentally changed the interpretation of the MBTA.

The California Environmental Lawyers at Bick Law LLP are closely following this important case for implications to clients, as well as potential impacts to endangered species and birds. Kim Bick, partner at Bick Law LLP is privileged to serve on the Board of the Newport Bay Conservancy, an organization that educates, researches, and restores the Newport Bay, which is an important stopping place in the Pacific flyway for migratory birds, as well as a habitat for countless other species.