

# FEDERAL COURT STRIKES DOWN TRUMP ADMINISTRATION'S NARROW INTERPRETATION OF MIGRATORY BIRD TREATY ACT

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A federal court recently struck down the Trump administration's 2017 memorandum that had narrowly interpreted the Migratory Bird Treaty Act (MBTA or Act) to exclude incidental bird deaths.<sup>1</sup>

The practical implications of the ruling remain uncertain, as the court's ruling did not reinstate the Department of Interior's (Interior) prior, broad interpretation of the Act, nor did it invalidate 2018 U.S. Fish and Wildlife Service (USFWS) guidance applying the 2017 memorandum's interpretation.

## BACKGROUND

The MBTA makes it unlawful “by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill . . . any migratory bird.”<sup>2</sup> The list of birds protected by the Act is extensive and covers many common species.<sup>3</sup> Generally, a violation of the MBTA is a misdemeanor punishable by a fine of up to \$15,000 and imprisonment for up to six months.<sup>4</sup> There is no “knowledge” or “intent” requirement for a misdemeanor violation of the Act, meaning it is a strict liability crime and the government does not need to prove that a person acted intentionally in killing a protected bird.

Without a “knowledge” or “intent” requirement, many businesses and developers are exposed to potential liability under the Act. For instance, a business could be liable for a misdemeanor under the Act if a protected bird dies after striking a wind turbine or if a nest is destroyed when tilling a field. A further complicating factor is that, unlike the Endangered Species Act, there is no permit available under the MBTA to authorize the “incidental take”—i.e., nonpurposeful take—of an MBTA-protected species when conducting an otherwise lawful or approved activity (e.g., operating a wind energy facility).

For several decades, the Interior interpreted the MBTA to prohibit the incidental or accidental takes and kills of protected birds. As recently as January 2017, Interior reaffirmed its “long-standing interpretation that the MBTA prohibits incidental take.”<sup>5</sup> In December 2017, however, following the change in administrations, Interior dramatically changed course when it issued Memorandum M-37050 (the M-Opinion).<sup>6</sup>

In the M-Opinion, Interior concluded that “the MBTA's prohibitions on pursuing, hunting, taking, capturing, killing, or attempting to do the same only criminalize affirmative actions that have as their purpose the taking or killing of migratory birds, their nests, or their eggs.”<sup>7</sup> In other words, according to the M-Opinion, only deliberate acts intended to take a migratory bird are prohibited under the MBTA. Incidental deaths of birds are not prohibited. This interpretation of the Act significantly reduced the activities that would result in liability under the Act and, as a result, reduced the risks businesses and developers face.

In April 2018, USFWS issued guidance to clarify what acts are prohibited under the MBTA in light of the M-Opinion.<sup>8</sup> The guidance included an FAQ in which the USFWS provided examples of situations in which an activity would or would not be prohibited under the M-Opinion. The guidance focused on the subjective purpose of an action in deciding whether it was prohibited.

For instance, the guidance provided that pressure washing nests off a bridge in order to paint the bridge would be a purposeful action resulting in taking or killing birds, but removing a dilapidated barn with known nesting owls would not be a violation because the purpose of removing the barn is not to kill the owls.

In May 2018, environmental interest groups and states challenged the M-Opinion under the Administrative Procedure Act on the basis that, among other things, it was contrary to the plain language of the Act.

## **U.S. DISTRICT COURT STRIKES DOWN M-OPINION**

On August 11, 2020, on cross-motions for summary judgment, Judge Valerie Caproni of the Southern District of New York issued an order granting summary judgment to plaintiffs and striking down the M-Opinion as contrary to the plain language of the MBTA.

For purposes of her decision on the motions for summary judgment, Judge Caproni accepted Interior's view that the M-Opinion only interpreted the actions or behaviors prohibited under the Act and did not interpret the Act to add a mental state requirement, as the plaintiffs had argued.

As Judge Caproni explained, the difference in these interpretations of the M-Opinion was significant because it is undisputed that the Act itself includes no mental state requirement and the Second Circuit (which would govern) has held that the misdemeanor provision of the Act is a strict liability provision.<sup>9</sup> As a result, if plaintiffs' reading of the M-Opinion were correct, Interior's case would be dead in the water. Instead, Judge Caproni held that, for purposes of the motions, she would assume that the M-Opinion "only limits the MBTA to actions 'directed at' birds in the sense that hunting birds, poaching birds, throwing rocks at birds, pressure washing bird nests off a bridge, or setting poison traps for birds are activities 'directed at' birds."<sup>10</sup>

Next, Judge Caproni held that the M-Opinion was not entitled to Skidmore deference because the M-Opinion is "a recent and sudden departure from long-held agency positions backed by over forty years of consistent enforcement practices," and was adopted without notice and comment or "other protective rulemaking procedures."<sup>11</sup> Judge Caproni also rejected Interior's claim of agency expertise, noting that there was no evidence that Interior consulted with the USFWS, which is the agency actually tasked with implementing the Act.

On the merits, Judge Caproni rejected Interior's narrow interpretation of the Act to prohibit only actions "directed at" birds based on the plain language of the Act. Judge Caproni concluded that the M-Opinion was "in direct conflict" with the Act's "clear language making it unlawful at any time, by any means or in any manner, to . . . kill . . . any migratory bird protected" by the Act.<sup>12</sup>

Judge Caproni explained that the Act's use of the phrase "by any means or in any manner" in describing the broad term "kill" means that "any killing is a violation, which plainly includes dumping oil waste, building wind turbines, or pressure washing bridges, irrespective of whether those activities are specifically directed at wildlife."<sup>13</sup> Interior's interpretation in the M-Opinion that only "means" and "manners" directed at birds are prohibited runs counter to that plain language.<sup>14</sup>

Judge Caproni concluded that Interior's opinion violates the letter of the law for the past century and contradicts Interior's long held position that even incidental take or kill of a migratory bird violated the MBTA "irrespective of whether the activities targeted birds or were intended to take or kill birds." Judge Caproni explained that, "There is nothing in the text of the MBTA that suggests that in order to fall within its prohibition, activity must be directed specifically at birds. Nor does the statute prohibit only intentionally killing migratory birds. And it certainly does not say that only 'some' kills are prohibited."<sup>15</sup> She noted that, while Congress could have so limited the Act, it chose not to, and there is no basis to impose such a limitation on the scope of the Act.<sup>16</sup>

## IMPACTS OF THE DECISION

Judge Caproni's order vacated the M-Opinion and remanded to Interior for further proceedings. The order, however, did not express a decision regarding the USFWS 2018 guidance interpreting the M-Opinion. Also, as Judge Caproni noted in a footnote, USFWS is currently in the process of a formal notice-and-comment rulemaking based on the interpretation of the MBTA presented in the M-Opinion.<sup>17</sup> It is possible that the Trump administration's narrow interpretation will gain new life through that rulemaking; however, it will inevitably face similar challenges to validity that served as the basis for invalidating the M-Opinion.

The upshot of the district court's decision for businesses and developers in the United States is that there is increased uncertainty regarding potential liability under the MBTA for actions that incidentally or accidentally kill protected birds. Further rulemaking and court proceedings are likely to provide additional clarity but on an uncertain timeline.

## FOOTNOTES

<sup>1</sup> Nat. Res. Def. Council, Inc. v. U.S. Dep't of Interior, No. 18-CV-04596-VEC, slip op. (S.D.N.Y.) (Aug. 11, 2020) available [here](#).

<sup>2</sup> 16 U.S.C. § 703 (2004).

<sup>3</sup> The current list of protected species is available [here](#).

<sup>4</sup> 16 U.S.C. § 707(a). The Act also provides felony penalties for certain knowing violations of the Act. *Id.* § 707(b).

<sup>5</sup> Incidental Take Prohibited Under the Migratory Bird Treaty Act, Memorandum M-37041 (Jan. 10, 2017).

<sup>6</sup> Memorandum from Daniel H. Jorjani, Principal Deputy Solicitor, Dep't of the Interior, to Secretary et al., Dep't of the Interior, [The Migratory Bird Treaty Act Does Not Prohibit Incidental Take](#), (Dec. 22, 2017).

<sup>7</sup> *Id.*

<sup>8</sup> Memorandum from Principal Deputy Director, Dep't of the Interior, to Service Directorate, Dep't of the Interior, [Guidance on the recent M-Opinion affecting the Migratory Bird Treaty Act](#), (Apr. 11, 2018).

<sup>9</sup> See *United States v. FMC Corp.*, 572 F.2d 902, 908 (2d. Cir. 1978).

<sup>10</sup> Nat. Res. Defense Council, slip op. at 12.

<sup>11</sup> *Id.* at 13.

<sup>12</sup> *Id.* at 17 (internal quotation marks omitted).

<sup>13</sup> *Id.* at 18–20.

<sup>14</sup> *Id.* at 19.

<sup>15</sup> *Id.* at 28.

<sup>16</sup> *Id.* at 29.

<sup>17</sup> *Id.* at 13 n.9; Regulations Governing Take of Migratory Birds, 85 Fed. Reg. 5915 (Feb. 3, 2020).

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