

TO KILL A MOCKING BIRD - TRUMP ADMINISTRATION FINALIZES RULE NARROWING MIGRATORY BIRD TREATY ACT

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On 7 January 2021, the Trump administration finalized a new rule that limits the scope of the Migratory Bird Treaty Act (MBTA or the Act).¹ Under the new rule (which President Biden has already directed the Department of the Interior (Interior) to review), the Fish and Wildlife Service (the FWS) has declared that the MBTA covers only intentional, and not incidental, take of protected birds, memorializing a memorandum that was rejected by a federal court last August.² The new rule—if it withstands legal challenges and efforts by the Biden administration and Congress to reverse it—significantly reduces the activities that would result in liability under the Act, and as a result, reduces the risks businesses and developers face.

BACKGROUND OF THE MBTA

Under the MBTA, it is unlawful “by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill...any migratory bird.”³ The Act protects over 1,000 birds, including many common species such as the Canada Goose and American Crow.⁴ Generally, a violation of the MBTA is a misdemeanor punishable by a fine of up to \$15,000 or imprisonment for up to six months, or both.⁵ The MBTA is a strict liability crime; there is no “knowledge” or “intent” requirement (i.e., *mens rea*) for a misdemeanor violation of the MBTA. This means the government does not need to prove that a person acted intentionally in killing a protected bird. Furthermore, unlike the Endangered Species Act the MBTA does not have an incidental take permit program.⁶

Because MBTA violations are strict liability crimes and the MBTA lacks an incidental take permit program, many businesses and developers have been exposed to potential liability under the Act even while engaged in lawful activities. For instance, a business could be liable for a misdemeanor under the Act if a protected bird dies after striking a wind turbine or building, or if a nest is destroyed when tilling a field or cutting timber.

After President Trump took office in 2017, Interior reversed its longstanding interpretation that the MBTA prohibits incidental take. Interior issued Memorandum M-37050 (the M-Opinion), which concluded that only deliberate acts intended to take a migratory bird are prohibited under the MBTA.⁷ After environmental groups challenged the legality of the M-Opinion, Judge Valerie Caproni of the Southern District of New York struck down the M-Opinion as contrary to the plain language of the MBTA.⁸ The Department of Justice appealed the court's decision and moved forward with its rulemaking.

THE NEW RULE

The new rule provides that “[i]njury to or mortality of migratory birds that results from, but is not the purpose of, an action (i.e., incidental taking or killing) is not prohibited by the [MBTA].”⁹ This means MBTA liability applies only to

deliberate, voluntary affirmative actions “directed at killing or reducing an animal to human control, such as when a hunter shoots a protected bird causing its death.”¹⁰ Under the new rule, a hunter is strictly liable for the death of the protected bird, regardless of whether he knew he shot a protected bird because he “was engaged in an activity the object of which was to kill or render a bird subject to human control.”¹¹ However, “actions that are not directed toward rendering an animal subject to human control” but could foreseeably result in the deaths of protected birds, such as “driving a car, allowing a pet cat to roam outdoors, or erecting a windowed building[,]” are no longer subject to MBTA liability.¹²

Accordingly, the removal of a barn with known nesting owls inside would no longer violate the MBTA because the purpose of removing the barn is not to kill the owls. A rancher that shoots black vultures on his property without a MBTA depredation permit, however, would violate the Act “because it is an affirmative action that has killings birds as its purpose.”¹³ Limiting MBTA liability to activities “that are directed at migratory birds will focus prosecutions on activities like hunting and trapping and exclude more attenuated conduct, such as lawful commercial activity, that unintentionally and indirectly results in death to migratory birds.”¹⁴ The rule becomes effective 8 February 2021, but the Biden administration has directed federal agencies to consider postponing the effective date of rules that have been published in the *Federal Register*, but have not yet taken effect, for 60 days to review the rule.¹⁵

The rule (and the preceding M-Opinion) is based on the 2015 ruling from the Fifth Circuit Court of Appeals, where the court held that MBTA does not prohibit incidental take.¹⁶ The Fifth Circuit rejected the notion that because the MBTA imposes strict liability, “it must forbid acts that accidentally or indirectly kill birds.”¹⁷ Instead, the Fifth Circuit reasoned that a “take” “even without a *mens rea*, is not something that is done unknowingly or involuntarily. Accordingly, requiring defendants, as an element of an MBTA misdemeanor crime, to take an affirmative action to cause migratory bird deaths is consistent with the imposition of strict liability.”

Federal Courts of Appeals have been split on how to interpret the MBTA, with the Second and Tenth Circuits holding that the MBTA criminalizes incidental take,¹⁸ while, according to the FWS, Courts of Appeals in the Fifth, Eighth, and Ninth Circuits have held that the MBTA does not apply to incidental take.¹⁹ There is, however, some dispute regarding whether the holdings in the Eighth and Ninth Circuits stretch that far.²⁰

FATE OF THE RULE

The fate of the new rule, however, is all but certain. Several states, led by New York, and environmental groups have already filed legal challenges to the rule in the United States District Court for the Southern District for New York, contending that the new rule is in direct conflict with the language and purpose of the MBTA.²¹ On his first day in office, President Biden directed Interior to review the new rule and the M-Opinion, indicating that the Biden administration will likely reverse the rule.²² Lawmakers could also invoke the Congressional Review Act to overturn the rule.²³ Lastly, Congress could pass legislation amending the MBTA to prohibit the incidental take of protected birds, which would reverse the rule, and create an incidental take permit program for protected birds.²⁴

FOOTNOTES

¹ See [Regulations Governing Take of Migratory Birds, 86 Fed. Reg. 1134](#) (Jan. 7, 2021) (to be codified at 50 C.F.R. Part 10).

² See *Nat. Res. Def. Council, Inc. v. U.S. Dep't of Interior*, No. 18-CV-04596-VEC, 2020 WL 4605235, slip op. (S.D.N.Y.) (Aug. 11, 2020) (hereinafter, NRDC) available [here](#). For additional information, see K&L Gates' analysis [here](#).

³ 16 U.S.C. § 703.

⁴ The current list of protected species is available [here](#).

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

⁶ The MBTA does have a depredation permit, which allows short-term relief to protect human health and safety or personal property from damage caused by birds. See, e.g., 50 C.F.R. § 21.41.

⁷ 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).

⁸ See NRDC, No. 18-CV-04596-VEC, 2020 WL 4605235.

⁹ 86 Fed. Reg. 1134 at 1165.

¹⁰ *Id.* at 1136-1137.

¹¹ *Id.* at 1137.

¹² *Id.*

¹³ U.S. Fish & Wildlife Service, ["Frequently asked questions about the MBTA proposed rule and EIS process,"](#) (last visited Jan. 8, 2021).

¹⁴ *Id.*

¹⁵ Exec. Office of the President, [Memorandum For the Heads of Executive Departments and Agencies, Regulatory Freeze Pending Review](#) (Jan. 20, 2021).

¹⁶ See *United States v. CITGO Petroleum Corp.*, 801 F.3d 477, 488-489 (5th Cir. 2015) (hereinafter, CITGO). For more information, see K&L Gates' analysis [here](#).

¹⁷ *Id.* at 491.

¹⁸ See *U.S. v. FMC Corp.*, 572 F.2d 902, 908 (2d Cir. 1978); *U.S. v. Apollo Energies, Inc.*, 611 F.3d 679, 686 (10th Cir. 2010).

¹⁹ 86 Fed. Reg. 1134 at 1142; see *Newton Cty. Wildlife Ass'n v. U.S. Forest Serv.*, 113 F.3d 110, 115 (8th Cir. 1997); *Seattle Audubon Soc'y v. Evans*, 952 F.2d 297, 302 (9th Cir. 1991).

²⁰ See, e.g., NRDC at *7 ("Interior argues that the Eighth and Ninth Circuits reached a different conclusion. But this is not accurate. Those circuits held only that habitat destruction, leading indirectly to bird deaths, does not amount to the taking of migratory birds within the meaning of the MBTA.") (internal quotations omitted).

²¹ See *Nat'l Audubon Soc. et al. v. U.S. Fish & Wildlife Serv. et al.*, S.D.N.Y. Case No. 1:210cv-00448; *New York et al. v. U.S. Dep't of the Interior et al.*, S.D.N.Y. Case No. 1:21-cv-00452.

²² See Biden-Harris Transition, Fact Sheet: List of Agency Actions for Review (Jan. 20, 2021), available [here](#).

²³ See 5 U.S.C. §§ 801-808. The CRA requires agencies issuing a "major rule" to delay the effective date by 60

days and submit the rule for review by Congress. Under the CRA, Congress may pass a joint resolution of disapproval that, if signed by the president, deems the rule to not have had any effect at any time. Because the president retains the right to veto such a resolution, the CRA has rarely been successful for rescinding regulations.

²⁴ See Migratory Bird Protection Act of 2020, H.R. 5552, 116th Cong. (2020), available [here](#).

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