Updates
January 02, 2018
Department of Interior Reverses MBTA’s Take Definition in a New Solicitor’s Opinion

The U.S. Department of the Interior's Office of the Solicitor issued Memorandum M-37050, on December 22, 2017, which adopts the position that the Migratory Bird Treaty Act (MBTA) prohibition on the "taking" or "killing" of migratory birds applies only to deliberate acts intended to take a migratory bird. The legal opinion reverses the prior administration's position that the MBTA prohibits not only the intentional take of migratory birds but also the take of migratory birds that is incidental to otherwise lawful activity (i.e., unintentional).

The new opinion expresses the Trump administration's view of the take prohibition in the MBTA, signaling that the Trump administration will not seek criminal penalties against companies and individuals who incidentally take migratory birds through, among other things, fossil fuel production and renewable energy generation. As Interior's quick shift in position demonstrates, however, the issuance of M-37050 does not resolve the ongoing regulatory uncertainty as to the scope of the MBTA's take prohibition.

Background on the Scope of MBTA's Take Prohibition

The MBTA prohibits the unauthorized taking or killing of over 1,000 species of migratory birds. However, neither the statute nor its legislative history directly addresses whether the MBTA was intended to prohibit incidental take of migratory birds in addition to intentional take of those birds (e.g., hunting). Federal courts have been split on the issue for decades, and attempts by the U.S. Fish and Wildlife Service (FWS) to promulgate regulations authorizing incidental take in certain circumstances have fizzled.

In the final days of the prior administration, the Office of the Solicitor issued Memorandum M-37041, which expressed the legal opinion that the MBTA prohibits both intentional and incidental take. The opinion concluded that the MBTA's broad prohibitions on taking and killing migratory birds apply to any activity and are not limited to hunting, poaching or any factual contexts. Accompanying the opinion was a new section of the FWS Service Manual providing guidance regarding what types of situations would potentially be subject to prosecution—namely, projects in which the proponents either do not cooperate or do not attempt to avoid impacts to migratory birds.

Solicitor's Opinion M-37050

At the outset of the Trump administration, the prior opinion (M-37041) was suspended pending review. The new opinion (M-37050) is the culmination of this review and reaches the opposite conclusion: the definition of take under the MBTA is limited in relevant part to affirmative and purposeful actions, such as hunting and poaching.

M-37050 discusses at length the relevant statutory text, interpreting it to criminalize only purposeful and affirmative actions intended to reduce migratory birds to human control. It argues that the more ambiguous terms "kill" and "take" should be read together with "pursue," "hunt" and "capture," which suggest affirmative acts. The opinion also looks to common law definitions of "take" for support.

M-37050 also states that the original purpose of the MBTA was to regulate overhunting, in part because it implemented the Migratory Bird Treaty, which focused on hunting and the shipment of birds from one country to another. The opinion notes that Congress addressed an additional concern with respect to migratory birds—habitat destruction—through the separate Migratory Bird Conservation Act, and argues that a broad reading of the MBTA would render the Conservation Act superfluous. The opinion adds that given the legal uncertainty and political controversy surrounding federal regulation of intentional hunting, it is unlikely that Congress intended to confer broad authority on the executive branch to regulate all manner of economic activity

with an incidental impact on migratory birds.

M-37050 closes by discussing the legal implications of prosecuting incidental take under the MBTA, arguing that a narrow reading of the take prohibition is necessary to avoid constitutional due-process concerns. It cites an FWS list of top human-caused threats to birds—including cats, collisions with building glass and vehicles, poisons, electrical lines and others—to argue that a broad interpretation of "take" would have the "absurd result" of turning the "vast majority of Americans" into potential criminals. The opinion also points to the rule of lenity, namely, that resolution of reasonable doubt in a criminal statute should lean in a defendant's favor. Based on these various considerations, the opinion concludes that the right interpretation of the MBTA's take prohibition is to limit it to intentional take only.

Implications of M-37050

M-37050 is an expression of the Trump administration's support of a narrow reading of the MBTA's take prohibition.

It indicates that the Trump administration will provide short-term relief from the specter of a potential prosecution for incidental take of migratory birds. It could also indicate that the Department of the Interior agencies, such as FWS, the Bureau of Land Management and the Bureau of Ocean Energy Management, will not require the same level of analysis and mitigation to reduce a project's impact on migratory birds as prior administrations.

However, a few words of caution to keep in mind. M-37050 does not provide long-term clarity on the continued uncertainty over the MBTA's take prohibition, which derives principally from a split in court decisions interpreting the law. A Department of the Interior Solicitor's opinion sets legal precedent for the Department, but has no bearing on federal caselaw to the contrary. Indeed, as with the prior administration's M-37041, the new opinion is not a final agency action, and would not likely receive *Chevron* deference. At most, it could be entitled to *Skidmore* deference, under which agency interpretations are judged for their persuasiveness, compared to *Chevron's* more deferential reasonableness standard.

With five federal circuit courts split on the nature of the MBTA's take prohibition, this remains a live issue and can be resolved only by U.S. Supreme Court review or congressional action. Congress has taken some initial steps toward clarifying the legal uncertainty. The U.S. House Committee on Natural Resources recently approved an amendment to the SECURE Act submitted by Congresswoman Liz Cheney (R-WY) which provides that the MBTA take prohibition should not be construed to prohibit activity that is "accidental or incidental to the presence or operation of an otherwise lawful activity."

As a practical matter, energy and infrastructure project lifetimes are measured in decades, not years. As demonstrated by the Trump administration's swift withdrawal of M-37041, executive branch opinion can change abruptly with a new administration, suggesting that developers and other entities would be wise to keep a long-term perspective of MBTA-related risk. As such, it would be wise to maintain a cooperative approach with FWS staff on migratory bird issues. It is also recommended that companies continue to (1) implement best management practices to mitigate impacts on migratory birds; and (2) document those efforts, including discussions with FWS. Indeed, the issuance of M-37050 likely will prompt additional challenges by NGOs to approvals of energy and infrastructure projects that can result in the incidental take of migratory birds.

It is also important to keep in mind any applicable state laws that protect migratory birds. Most infrastructure projects must comply with any different, potentially more stringent, migratory bird regulations imposed by states. For instance, California has robust state law protections for migratory birds, which have been interpreted by the state as prohibiting incidental take. The Trump administration's position may ultimately serve to shift the focus from federal to state regulation of migratory birds and the enforcement for incidental take of migratory

birds in those states with strong migratory bird protections.

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