



## **New Regulations Clarify that the MBTA Applies to Intentional Acts Only**

By: [Nicole Blevins](#)

The U.S. Fish and Wildlife Service (FWS) issued new [regulations](#) that exclude incidental takings from the Migratory Bird Treaty Act (MBTA), effective February 8, 2021. Thus, bird death that occurs incidentally from lawful operations (*i.e.*, in an oil and gas pit or tank) is not a violation of the MBTA.

For many years, the MBTA has been interpreted to include intentional and incidental takings of migratory birds in conduct that could be penalized under the act. The final rule adopts the conclusion of Memorandum Opinion M-37050 (M-Opinion), defining the scope of the MBTA to apply to intentional takings of migratory birds only, *i.e.*, voluntary actions directed at killing or reducing an animal to human control. The new regulations address a federal circuit court split and will provide regulatory certainty by providing a clear, articulable rule for when an operator crosses the line into criminal activity.

### Background

Section 2 of the MBTA (16 U.S.C. § 703(a)) provides:

[u]nless and except as permitted by regulations . . . 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 . . . any migratory bird, any part, nest, or egg of any such bird . . . included in the terms of the conventions . . . .

The Department of the Interior (DOI) conventionally interpreted Section 2 as broadly prohibiting any taking or killing of migratory birds. This interpretation changed on December 22, 2017, when the DOI issued Memorandum Opinion M-37050 (the M-Opinion). The M-Opinion narrowed the scope of the MBTA's prohibitions to only apply to "affirmative actions that have as their purpose the taking or killing of migratory birds, their nests, or their eggs."

Before the new regulations were finalized, the District Court for the Southern District of New York determined that the M-Opinion was not a valid exercise of agency authority under the APA. The Court concluded that the MBTA text is unambiguous and should be interpreted according to its ordinary meaning at the time Congress enacted the statute, and DOI improperly imposed mental state and proximate cause requirements not supported by the MBTA text.

## FWS Analysis

The FWS explains that the terms “kill” and “take” are ambiguous in that they could refer to active or passive conduct. To interpret the meaning of MBTA’s prohibition, the FWS applied the statutory canon of construction of *noscitur a sociis*, meaning “it is known by its associates.” This canon requires that terms that are listed together are all assigned a similar meaning. The DOI determined “that the operative terms “kill” and “take” need to be read within the context of the other verbs written in the statute. “Kill” and “take,” when read together with the other active verbs in the statute (“pursue,” “hunt” and “capture”), must also be read actively.

In addition, the FWS provided several examples of various court opinions regarding the controversy of hunting of migratory birds and determine that it is “highly unlikely that Congress intended to confer authority upon the executive branch to prohibit all manner of activity that had an incidental impact on migratory birds.”

The FWS explained that the application of a strict liability standard does not answer the separate question of what acts are criminalized under the MBTA. Rather, the key point of analysis is whether the actor was engaged in activity the object of which was to kill or render a bird subject to human control. The new regulations limit the range of actions prohibited which in turn, 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 migratory bird death.

The new regulations are likely candidates for legal challenges and disapproval pursuant to the Congressional Review Act. We will provide an update on key developments.

Please contact [Nicole Blevins](#), [Theresa Sauer](#), or [Bret Sumner](#) for more information.