



## Proposed MBTA Rule Seeks to Provide Regulatory Certainty for Industry

On February 3, 2020, the U.S. Fish and Wildlife Service (FWS) released a [Proposed Rule](#) (PR) clarifying that the criminal scope of the Migratory Bird Treaty Act (MTBA) only extends to conduct intentionally injuring or killing migratory birds. This rulemaking responds, in part, to prior prosecution efforts against oil and gas companies related to the inadvertent or incidental killing of migratory birds during the course of lawful operations. The proposed rulemaking focuses on the original intent of the statute issued in 1918 and would significantly narrow the scope of interpretation to prevent future prosecution for incidental harm or death to birds stemming from lawful operations. The FWS will accept public comment on the PR through March 19, 2020.

The FWS's PR seeks to provide regulatory and business certainty by providing a clear, articulable rule for when conduct crosses the line into criminality. The FWS clarifies in the PR that the criminal scope of the MBTA only extends to conduct intentionally injuring or killing migratory birds. Conduct that results in the unintentional (incidental) injury or death of migratory birds is not prohibited under the MBTA. The FWS's PR is consistent with and proposes to codify [Solicitor's Opinion, M-37050](#), in which the Department of the Interior Solicitor's Office concluded the MBTA's prohibitions on pursuing, hunting, taking, capturing, killing, or attempting to do the same, apply only to actions directed at migratory birds, their nests, or their eggs.

The MBTA provides, "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, [or] any part, nest, or egg of any such bird." 16 U.S.C. § 703(a).

- FWS applies established rules of statutory construction, case law, and contemporary dictionary definitions to clarify that "pursue, hunt, take, capture, kill" are all verbs that require a deliberate action "directed immediately and intentionally against a particular animal" (i.e., the MBTA's prohibition does not extend to indirect and accidental acts).
- FWS further proposes that the MBTA's prohibition on killing be limited to deliberate acts that result in bird deaths.
- The PR determines MBTA prohibited acts are those that are directed at migratory birds (like hunting and trapping) and excludes more attenuated conduct (such as lawful commercial activity) that "unintentionally and indirectly results in the death of migratory birds."
- FWS does not provide additional guidance on the definition of "active nest." Thus, the PR does not alter or codify the [FWS's June 14, 2018 memorandum](#) clarifying the application of the MTBA to the destruction and relocation of migratory bird nests.

The FWS analyzed the congressional intent of the MBTA, enacted in 1918, and concluded the legislative purpose is to combat extreme over-hunting and poaching of migratory birds for commercial purposes (i.e., direct and intentional killing). The FWS notes that the federal regulation of hunting was legally tenuous and controversial in 1918 and therefore, 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. Accordingly, the FWS clarifies that Congress's intent did not include "protect[ing] migratory bird habitats from incidental destruction" or prohibiting "incidental take" of migratory birds (i.e., the MBTA does not criminalize all actions that may affect migratory birds).

In summary, the PR seeks to provide a uniform MBTA interpretation that can be applied as a national standard to provide regulatory and business certainty and eliminate both agency and the judicial system's inconsistent interpretation of the MBTA through "incidental take" enforcement actions.

For more information regarding the Proposed Rule, please contact [Bret Sumner](#), [Nicole Blevins](#), or [Jennifer Collins](#).