



Migratory Bird Treaty Act Solicitor's Opinion Ignores Federal Court Decisions in Order to Support Broad Enforcement for Incidental Take

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A last-minute Obama Administration Solicitor's Opinion significantly expands the U.S. Fish and Wildlife Service's ("FWS") interpretation of FWS's authority to enforce incidental take of any migratory bird that occurs as a result of oil and gas operations. Under the Solicitor's Opinion released ON January 10, 2017, FWS can enforce the indirect death of any bird under the umbrella of the Migratory Bird Treaty Act ("MBTA"). This new guidance is in direct contradiction with statute and federal case law.

Historically, until the Obama Administration, FWS had not attempted to prosecute an oil and gas company for migratory bird deaths unless an operator knowingly declined to adopt recommended measures to reduce a known risk that directly results in bird deaths. Where FWS has attempted to prosecute oil and gas or other industries for bird deaths, the agency's efforts have, for the most part, been halted by federal courts. Most recently, the Fifth Circuit Court of Appeals ruled that a person had to "take an affirmative action to cause migratory bird deaths[.]" *United States v. Citgo Petroleum Corp.*, 801 F.3d 477, 492 (5th Cir. 2015). There, the court specifically stated that FWS would not be successful in prosecuting migratory bird deaths for indirect or negligent harm.

Disregarding the recent Fifth Circuit case, similar federal decisions, and the MBTA itself, the Solicitor's Opinion concludes that the FWS's interpretation that "taking and killing migratory birds by any means and in any matter includes incidental taking and killing." Solicitor's Opinion, *Incidental Take Prohibited Under the MBTA*, M-37041 at 2 (Jan. 10, 2017), available [here](#).

Under the MBTA, FWS can impose both civil and criminal penalties for the take, killing, or possession of any migratory bird or any part, nest, or eggs of a migratory bird. 16 U.S.C. § 703. "Take" is defined as "to pursue, hunt, shoot, wound, kill, trap, capture or collect" or attempt to do so. 50 C.F.R. § 10.12. Unlike the Endangered Species Act (ESA), the MBTA does not regulate indirect impacts such as "harm" or "harassment" of migratory birds or their habitat. Incidental take, which is defined under the ESA, is not a defined term within the MBTA or its implementing regulations. Thus, the Solicitor's Opinion supporting enforcement of incidental take is beyond any authority provided by the MBTA.

This Solicitor's Opinion is one of many last-minute Obama Administration Solicitor's Opinions issued to try to extend anti-oil and gas policy beyond the former President's term. It is binding on

“all Departmental offices and officials,” 209 DM 3, and can only be rescinded by the Solicitor, a Deputy Secretary within the Department of the Interior, or the Secretary of the Department of the Interior. 209 DM 3.2(A)(11).

For more information on the Solicitor’s MBTA Opinion and its potential far-reaching impacts, please contact [Theresa Sauer](#) or [Bret Sumner](#).

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