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Bye, Bye Birdie: Summary and Analysis of the Trump Administration's Recent Policy Change of the Migratory Bird Treaty Act

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I. Background

Just over a month ago, on December 22, 2017, the United States Solicitor's office issued a Memorandum Opinion (referred to herein as the "M-Opinion") reversing the Obama-era policy of interpreting the Migratory Bird Treaty Act ("MBTA") to include "unintentional" or "incidental" takings of migratory birds. Under the new interpretation, the federal agencies under the Department of the Interior (the "Department") will no longer be able to threaten or impose criminal liability with

respect to the MBTA for any activity which unintentionally or incidentally impacts migratory birds.

Since the 1970s, federal agencies[1] have used the threat of criminal prosecution under the MBTA as leverage to impose costly mitigation on any activities that require NEPA compliance or some sort of permit from a federal agency. As a practical matter, these mitigation requirements have increased the costs of infrastructure development, renewable energy development, and mining projects that traverse federal lands or have enough of a federal nexus such that some agency approval is required.

With this policy change, the Trump Administration has removed the threat of federal prosecution. But this M-Opinion stops short of alleviating the costly mitigation obligations. Those obligations remain because of (in part) the outstanding requirements of a 2001 Executive Order and the protections required with respect to companion federal statutes, such as the Endangered Species Act and the Bald and Golden Eagle Protection Act. As outlined herein, the M-Opinion relieves some pressure but leaves federal agencies with plenty of tools to continue to impose costly mitigation requirements aimed at preventing the “incidental” or “unintentional” take of migratory birds. In other words, unless the 2001 Executive Order is revoked, the M-Opinion is merely lip service with respect to reducing cost impediments to infrastructure development, renewable energy development, and mining projects that traverse federal lands or have a federal nexus such that agency approval of some sort is required.

II. What is an “M-Opinion” and What Does the December 22, 2017, M-Opinion Actually Accomplish?

Many environmental organizations have expressed dismay at the December 22, 2017, M-Opinion, claiming that it will lead to a “parade of horribles” with respect to migratory birds.[2]

Perhaps some of that is hyperbole aimed at drumming up "rage donations,"[3] but the remainder seems to come from an overestimation of the realistic scope of the M-Opinion. To understand the M-Opinion's impact, one must recognize exactly what an M-Opinion can and does do as well as what it cannot and does not accomplish. Notably, this M-Opinion did not and cannot repeal or replace the 2001 Executive Order that directs agencies to impose mitigation on impacts associated with intentional and unintentional takings of migratory birds.

The Department of the Interior can communicate using many different methods, each of which requires different formalities before issuance and results in a different amount of influence and authority (*e.g.,* regulations, policies, guidance, memoranda, directives, and opinions). Some agency publications are advisory, some are specifically tailored to a particular case, and others are intended to reach everyone affected by a federal statute overseen by the Department or the agencies thereunder. The “M-Opinion” is one of the latter.

A Memorandum Opinion is a written opinion issued by the Solicitor for the Department of the Interior on a particular topic that constitutes the Department’s

official legal interpretation on a matter within its jurisdiction. M-Opinions are binding on all other offices and divisions within the Department of the Interior. Once issued, an M-Opinion can only be withdrawn, overruled, or modified by the Solicitor, the Secretary of the Interior, or the Deputy Secretary.

A. How Does the MBTA Work?

The MBTA was enacted in 1916 to respond to the overwhelming amounts of hunting that were devastating migratory bird populations. It is codified at 16 U.S.C. § 703. Section (a) of the MBTA makes it a crime to, "at any time, by any means or in any manner, to pursue, hunt, take, capture, kill," or attempt to do so to "any migratory bird, any part, nest, or egg of any such bird...." The U.S. Fish and Wildlife Service has defined "take" to mean "to pursue, hunt, shoot, wound, kill, trap, capture, or collect" or attempt to do so.

Violations of the MBTA are criminal offenses: some misdemeanors, some felonies. Misdemeanor violations of the MBTA are "strict liability" offenses, which means that it does not matter whether the offender intended to violate the statute. So, if a hunter shoots a bird believing it to be non-migratory, but it turns out to actually be migratory, his intent or belief is irrelevant. By taking a migratory bird, he committed a federal crime.

On its face, the MBTA might seem easy enough to follow: don't hunt or kill migratory birds out of season. But look at the language again—the MBTA forbids killing a migratory bird "by any means or in any manner." Does that language extend to migratory birds that die after landing in retention ponds meant to contain toxic waste? Or to the birds that run into windmills (killing approx. 174,000 birds/year) or buildings (303.5 million)? What if you hit a bird with your car (causing an estimated 200 million bird deaths/year)? If your cat kills a migratory bird, have you committed a federal crime? (Cats kill an estimated 2.4 **billion** birds/year). These sorts of activities which aren't meant to kill birds, but do anyway, are referred to commonly as "incidental take" or "unintentional take."

Prosecutors began filing criminal charges under the MBTA based on incidental take more than 40 years ago. The MBTA has been amended a few times since then, but incidental take was not directly addressed by the statute.[4] Interpretations differ. On the one hand, it seems extreme to impose criminal charges against the owner of an energy project, but on the other, the MBTA seems written to protect migratory birds and power lines kill an estimated 30 million birds each year. The text of the statute seems like it is aimed at hunting and poaching, but it also expands the scope to killing birds "by any means." Courts across the country have split as to whether incidental take can trigger strict liability.

B. What Does This M-Opinion Actually Say?

In an effort to resolve the discrepancy, the Solicitor issued M-Opinion 37041 in January 2017, which affirmed that incidental take <u>was</u>prohibited under the MBTA. That M-Opinion was suspended by the new Acting Secretary of the Interior in February 2017. Then on December 22, 2017, the Deputy Solicitor issued a new M-Opinion, M-37050, which withdraws and replaces the old opinion and decrees that

the MBTA does not extend to incidental take.

When boiled down, the analysis in the new M-Opinion interprets the statute differently in four significant ways:

- First, the M-Opinion affirms that a violative action must have some intent behind it to take or kill a bird, *i.e.* "purposeful and voluntary affirmative acts directed at reducing an animal to human control." [p. 22]. Driving a car, erecting a windmill, or owning a cat are not actions designed to kill birds, even if it is likely or foreseeable that some birds will die. But shooting a gun, setting a trap, knocking down a nest, those are all acts with some intent behind them to kill or capture. The latter actions will have strict liability applied against them, but the former actions will not. The old opinion applied strict liability to all actions.
- Second, the M-Opinion gives a different interpretation of the statutory language.[5] The old opinion interpreted the relevant language to prohibit any activity that kills a bird "by any means, in any manner." But the new M-Opinion declares that such a broad reading cannot have been what Congress intended. Instead, the "any means, any manner" language should be more narrowly applied only to intentional acts aimed at the bird. In other words, any means or manner of an intentional act aimed at a bird (e.g. guns, bows, air rifles, nets, lasers, or any other creative ways to take the bird) will violate the statute.
- Third, the M-Opinion looked at the legislative history of the MBTA and concluded that the MBTA was only ever intended to regulate overhunting, not to protect bird habitats or control any action that might have an incidental impact on migratory birds.
- Finally, the M-Opinion disagreed as to the effect of subsequent legislation on the MBTA. For example, the old opinion relied on the 2003 legislation that authorized any incidental take by the military. Why, it reasoned, would that manner of incidental take need an explicit authorization unless every other form of incidental take was not authorized under the MBTA? But the new M-Opinion says that the 2003 legislation was at best a precautionary measure that did not change the scope or language of the MBTA itself. The M-Opinion reasons that if Congress wanted to incorporate incidental take into the MBTA, it would do so directly and not by such a vague reverse inference.
    - Similarly, the M-Opinion explains that a 2001 Executive Order from President Clinton, which expanded the definition of "take" to include incidental take, was only part of a direction as to how agencies should focus their energies, not an attempt to expand the scope of the MBTA itself (nor could an executive order change the text of a Congressional law). [p. 32]

Ultimately, the M-Opinion comes back to the Constitution and a common sense rationale. Due process under the Constitution requires that we be able to reasonably understand whether an action we take would constitute a crime. But the Opinion reasons that if incidental take constituted a criminal act, no one could know whether or not they would commit a crime from day to day. The scope of liability "is virtually unlimited." [p. 33]. Even if they drove a car while obeying all traffic laws or built a building or power line in compliance with all of the relevant regulations, if doing so killed a bird they would have committed a crime punishable by imprisonment. Only

the prosecutor's discretion would keep that person from jail. The M-Opinion warns that such a broad interpretation of the MBTA would not be constitutional.

The M-Opinion concludes that including incidental take within the scope of the MBTA makes the statute vague to the point of absurdity. It points out that even if a developer completely complies with the Fish and Wildlife Service's MBTA Guidelines, compliance with those guidelines does "not provide enforceable legal protections" based on that compliance and the developer may still be prosecuted should bird death occur. [p. 38-39]. It "is literally impossible" to know what is required under the law if the MBTA includes incidental take, and that does not comply with the Constitution's guarantee of due process. *Id*.

III. "Bird is [still] the Word" —the M-Opinion Falls Short of Relieving Developers from the Obligation to Mitigate "Unintentional" or "Incidental" Impacts to Migratory Birds.

Just because incidental take is not a criminal violation of the MBTA doesn't mean that federal agencies will suddenly allow an incidental "open season" to occur. Those agencies will still work to minimize unintentional impacts to migratory birds. And those agencies will also still be required to analyze and approve the environmental impact of projects before they can be approved. Put simply, if the agency doesn't believe that enough is being done to prevent incidental take, it can and will require the developer to employ mitigation measures even without the threat of criminal prosecution. If developers don't comply, the agencies won't issue the relevant permits or decisions needed for a particular project to proceed.

A. The 2001 Executive Order is Not Affected by the M-Opinion.

This reality is somewhat acknowledged by the M-Opinion's discussion of the 2001 Executive Order. The M-Opinion distinguishes the 2001 Clinton Executive Order ("EO-13186")[6] as only providing internal guidance to federal agencies, not interpreting the MBTA. But because that Executive Order remains in effect, it reduces the overall efficacy of the M-Opinion.

Executive Order 13186 is titled "Responsibilities of Federal Agencies to Protect Migratory Birds." It includes "unintentional take" (defined as "take that results from, but is not the purpose of, the activity in question") as part of the agency's mitigation responsibilities. 2001 Executive Order at Section 2(c). The Order requires each federal agency to enter into a Memorandum of Understanding (an "MOU") with U.S. Fish and Wildlife that would identify which of the agency's actions fall under the Executive Order and set forth how those actions "shall promote the conservation of migratory bird populations." *Id.* at Section 3.

Under this Executive Order, the Bureau of Land Management entered into an MOU with the U.S. Fish and Wildlife Service in April 2010 (the "BLM-FWS MOU"). The BLM-FWS MOU provides that BLM will, "[i]n coordination with the FWS, develop conservation measures and ensure monitoring of the effectiveness of conservation measures to minimize, reduce or avoid unintentional take." Paragraph G. Paragraph I provides that the BLM will "[i]ntegrate migratory bird conservation measures, as

applicable, into . . . renewable (wind, solar, and geothermal) energy development NEPA mitigation. This will address habitat loss and minimize negative impacts." Additionally, the BLM-FWS MOU defines "Action" as "any action, permit, authorization, collaborative effort, program, activity, project, official policy, rule, regulation or formal plan directly carried out by the agency." Paragraph IX. Finally, the BLM-FWS MOU defines "take" as "to pursue, hunt, shoot, wound, kill, trap, capture or collect or attempt to pursue, hunt, wound, kill, trap, capture or collect (50 CFR Section 10.12)." Paragraph IX. It goes on to note that the "Executive Order further defines take to include intentional take, meaning take that is the purpose of the activity in question, and unintentional take, meaning take that results from, but is not the purpose of, the activity in question." *Id*. Finally, it states that "[b]oth intentional and unintentional take constitute take as defined by the regulation." *Id*.

All told, the BLM-FWS MOU makes clear that anybody seeking a federal permit or right-of-way from the BLM will be required to continue to integrate mitigation measures to address impacts to migratory birds, both intentional and unintentional/incidental impacts.[7]

B. "Put on a Happy Face"—the M-Opinion Doesn't Change Much.

The M-Opinion clarifies that criminal liability for "taking" a migratory bird under the MBTA will not extend to the unintentional or incidental impacts to migratory birds. But the M-Opinion fails to address the seemingly inconsistent definitions of "take" contained in the agency MOUs with Fish and Wildlife under the 2001 Executive Order. Ultimately, because of the 2001 Executive Order and the MOUs executed as a result of that Order, all the M-Opinion does is remove the threat of criminal prosecution under the MBTA from an agency's quiver. To be sure, the removal of that threat may allow project proponents to have more candid discussions regarding mitigation without the fear of federal criminal prosecution. But federal agencies can (and likely will) still condition their approvals and permits on the inclusion of the same panoply of mitigation requirements they always have—and at the same cost.

The M-Opinion should be further amended to reconcile the inconsistency between its interpretation of the MBTA and the definition of "take" under the MBTA contained in the 2001 Executive Order and the agency MOUs executed under that Order. Without such a clarification, there will continue to be confusion as to the scope of the MBTA with respect to whether a federal agency can require costly mitigation of incidental or unintentional impacts associated with infrastructure development, renewable energy development, and mining projects that traverse federal lands or have a federal nexus such that agency approval of some sort is required.

References:

1 As used herein, "federal agency" or "federal agencies" shall only include those federal agencies under the Department of the Interior.

2 See e.g. here (last visited January 26, 2018).

3 Here (last visited January 26, 2018); here (last visited January 26, 2018)

4 Congress did, however, adopt a regulation in 2003 that authorizes the incidental take of migratory birds

during military training exercises. 50 C.F.R. § 21.15.

5 Bear in mind that section (a) of the statute is a single sentence containing 230 words. The question of whether and how a single clause should apply to another clause within that sentence can make a significant difference in statutory interpretation.

6 Executive Order 13186 is available online here (last visited January 29, 2018)

7 The M-Opinion applies to all agencies under the Department of the Interior, which can be found online here(last visited January 29, 2018). The other agencies have MOUs that likewise define "take" under the MBTA to include incidental or unintentional impacts to migratory birds. See e.g. Bureau of Reclamation and FWS MOU here (last visited January 29, 2018) ("Executive Order 13186 further defines take to include intentional take, meaning take that is the purpose of the activity in question, and unintentional (or incidental) take, meaning take that results from, but is not the purpose of the activity in question. Both intentional and unintentional take constitute take as defined by the MBTA."); National Park Service and FWS MOU, here (last visited January 29, 2018) ("Executive Order 13186 further defines take to include intentional take, meaning take that is the purpose of the activity in question, and unintentional (or incidental) take, meaning take that results from, but is not the purpose of the activity in question. Both intentional and unintentional take constitute take as defined by the MBTA."); Office of Surface Mining, Reclamation and Enforcement and FWS MOU here (last visited January 29, 2018) ("Executive Order 13186 further defines take to include intentional take, meaning take that is the purpose of the activity in question, and unintentional (or incidental) take, meaning take that results from, but is not the purpose of the activity in question. Both intentional and unintentional take constitute take as defined by the MBTA.").