

# Memorandum

January 30, 2018



## Department of Interior Solicitor's M-Opinion (M-37050) Finds the Migratory Bird Treaty Act Does Not Prohibit Incidental Take

### Executive Summary

There has been a longstanding discrepancy of what constitutes take under the Migratory Bird Treaty Act (MBTA)<sup>1</sup>, including whether it prohibits the accidental or incidental take of migratory birds by non-purposeful activities. On December 22, 2017, the Department of the Interior (Interior) Solicitor's Office took an important and helpful step towards clarifying MBTA interpretation by releasing a 41-page legal analysis or Solicitor's Opinion ([M-37050](#) or [M-Opinion](#)). The [M-Opinion](#) finds that the MBTA does *not* prohibit take that is incidental to otherwise lawful activities. It concludes instead that MBTA take prohibitions are *only* applicable to (unpermitted) affirmative and purposeful actions (*e.g.*, hunting and poaching). Therefore, during the current Administration, criminal enforcement actions for incidental take are considered highly unlikely. The [M-Opinion](#) also permanently withdraws and replaces the Opinion (M-37041) issued at the end of the last Administration by Solicitor Hilary Tompkins (January 10, 2017), which had a reverse and broader interpretation.<sup>2</sup> While the [M-Opinion](#) is considered a positive action by the current Administration, its interpretation is still highly contested and a number of uncertainties remain. NRECA continues to recommend that members develop, implement, and maintain avian protection programs (*e.g.*, [Avian Protection Plans](#)), including compliance with any associated permits (*e.g.*, [SPUT permits](#)).

### M-Opinion Analysis

- ◆ Permanently withdraws and replaces previous Solicitor's Opinion M-37041;
- ◆ Reverses the Interior's long-standing position on incidental take;
- ◆ Concludes the MBTA does *not* prohibit the incidental take of migratory birds or their parts;
- ◆ Finds MBTA take prohibitions *only* applies to (unpermitted) affirmative and purposeful actions;
- ◆ Does not change the statute or federal case law; and
- ◆ Considered well-written opinion that analyzes, in detail, the MBTA's legislative history, international bird treaties, social concerns, and key legal principles.

### Implications

- ◆ Unlikely that current Administration will pursue enforcement actions for incidental take;
- ◆ Uncertainties regarding future enforcement of legacy take (*i.e.*, MBTA statute of limitations is 5 years);
- ◆ Existing federal case law holds and circuit court split remains;<sup>3</sup>
- ◆ Courts likely to give low deference to M-Opinion;

---

<sup>1</sup> The MBTA makes it "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)

<sup>2</sup> M-37041 concluded that "the MBTA's broad prohibition on taking and killing migratory birds by any means and in any manner, includes incidental taking and killing."

<sup>3</sup> Second and Tenth have held that the MBTA imposes strict criminal liability on industrial activities that unintentionally kill migratory birds, while the Ninth, Eighth, and Fifth Circuits have concluded that take is limited to deliberate acts done directly and intentionally to migratory birds.

- Given reverse interpretations within a year of each other
- *Skidmore* deference possible, but more likely to evaluate circuit court split
- ◆ M-Opinion has low durability (*i.e.*, a future Administration could withdraw, replace, or amend);
- ◆ Future litigation likely (not to M-Opinion directly, but citizen suits against federal agencies);
  - *e.g.*, claiming that an agency's action will cause unauthorized take of migratory birds
- ◆ USFWS MOUs with other federal agencies continue to exist under Clinton [Executive Order 13186](#); <sup>4</sup>
- ◆ USFWS “voluntary” guidance to various industries remain in effect (*e.g.*, wind and solar guidance);
- ◆ USFWS [memo](#) (MBPM-2 dated April 15, 2003) regarding nest destruction remains in effect; and
- ◆ M-Opinion implementation guidance expected sometime in 2018 to help clarify uncertainties.

## Opposition

- ◆ MBTA interpretation of incidental take continues to be a controversial issue:
  - Bipartisan [letter](#) from former Interior leadership;
  - Former Solicitor Hilary Tompkins [op-ed article](#);
  - eNGO press releases and articles; and
    - *e.g.*, [Audubon](#), [Defenders of Wildlife](#), [Center for Conservation Biology](#)
  - Many career staff are opposed to shift in view.

## Potential Next Steps

- ◆ Each of these options has various pros and cons, degrees of likely success, and timelines to complete: <sup>5</sup>
  - Legislative action to clarify intent of the MBTA;
  - Rulemaking to codify M-Opinion;
  - M-Opinion implementation guidance;
  - No additional action during the current Administration; and
  - Development of an incidental take permitting program.

## Key Take-Aways for Co-ops

- ◆ Enforcement for incidental take under the MBTA considered unlikely during the current Administration;
- ◆ Recommend co-ops continue development and implementation of avian protection programs to address avian and other wildlife related reliability concerns;
- ◆ Recommend co-ops continue best management practices to demonstrate proactive compliance footing to reduce potential future enforcement;
- ◆ Recommend co-ops continue compliance with any related migratory bird permits;
  - *e.g.*, SPUT permits for handling dead birds on utility ROWs as MBTA still prohibits unauthorized handling and transport of migratory birds or their parts.
  - *e.g.*, nest destruction permits as MBTA still prohibits the unauthorized collection of migratory birds or their parts.
- ◆ Bald and Golden Eagle Protection Act (BGEPA) prohibits incidental take; and
- ◆ States may have wildlife take or incidental take laws that co-op may still be subject to.

## NRECA Contacts

- ◆ Janelle Lemen, Regulatory Director, Environmental Policy, [Janelle.Lemen@nreca.coop](mailto:Janelle.Lemen@nreca.coop)
- ◆ Rae Cronmiller, Senior Environmental Issues Director & Counsel, [Rae.Cronmiller@nreca.coop](mailto:Rae.Cronmiller@nreca.coop)

<sup>4</sup> Directs federal agencies that take actions that either directly or indirectly effect migratory birds to develop a Memorandum of Understanding (MOU), and to work with the U.S. Fish & Wildlife Service (USFWS), and other federal agencies to promote the conservation of migratory bird populations. To date, nine agencies have executed MOUs with the USFWS.

<sup>5</sup> This is not an exhaustive list and future analyses / potential advocacy strategies will be discussed in separate forum than this memo.