

USFWS Clarifies Stance on Incidental Takings under the MBTA

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In an April 11, 2018 [guidance memorandum](#), the U.S. Fish and Wildlife Service (USFWS) reiterated the Trump Administration's stance that "the take of birds, eggs or nests occurring as a result of an activity, the purpose of which is not to take birds, eggs or nests, is not prohibited" by the Migratory Bird Treaty Act (MBTA). As discussed in [Trump Administration Reverses Long-Held Department of Interior Stance on Incidental Takings](#), the current stance differs significantly from the Department of Interior's (DOI's) prior position.

The MBTA was first enacted in 1918 and makes the "kill[ing]" or "tak[ing]" of a migratory bird, nest, or egg unlawful. "Take," for the purposes of the Act, is defined as "pursue, hunt, shoot, wound, kill, trap, capture, or collect." For decades, the DOI maintained that the MBTA also prohibits the incidental taking of birds that occurs during otherwise lawful activities (for instance, the construction and operation of wind turbines), although neither the MBTA nor its amendments explicitly refer to "incidental take." As recently as January 10, 2017, the DOI issued a [memorandum](#) concluding that the USFWS "has long recognized that [the prohibition against unauthorized takings] includes incidental takings and killing" and "the MBTA's prohibitions on taking and killing migratory birds apply broadly to any activity, subject to the limits of proximate causation, and are not limited to certain factual contexts ... [T]hose prohibitions can and do apply to direct incidental take." The threat of potential prosecution under the MBTA historically incentivized project developers to collaborate with federal agencies to minimize and mitigate bird deaths.

In a [memorandum](#) dated December 22, 2017, however, DOI Principal Deputy Solicitor Daniel Jorjani established the Trump administration's position that the MBTA does not prohibit incidental takes and kills. Rather, the December 2017 memorandum stated that the MBTA's prohibitions on takings "apply only to affirmative actions that have their purpose for the taking of killing of migratory birds, their nests, or their eggs." The December 2017 memorandum "permanently with[drew] and replace[d]" the January 2017 memorandum.

The April 2018 memorandum includes a set of questions and answers intended "to clarify the effect of the" December 2017 memorandum. Interestingly, however, the questions and answers make clear that, even under the new policy, significant ambiguities can arise. Consider the following example:

A homeowner knows that Chimney Swifts are nesting in their chimney. If the homeowner lights a fire and destroys the nests, is this considered intentional take or incidental take under the [2017 memorandum]?

Answer: Possibly either, but more information is needed to determine whether the homeowner lit the fire to intentionally destroy swift nests or simply lit the fire to heat the house

Apart from the potential problems associated with determining intent, the April 2018 memorandum establishes a number of important points under the new policy, including:

- The legality of an activity does not affect the determination as to whether the activity constitutes a MBTA violation;
- Desire or failure to take possession of a bird does not affect whether the action constitutes a MBTA violation; and
- The USFWS will no longer pursue MBTA charges against projects that cause eagle deaths (although the policy does not affect the Service's ability to bring claims under the Bald and Golden Eagle Protection Act).

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