

# Bye-Bye Birdy?

## How the Migratory Bird Treaty Act Works

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**The mockingbird that wakes you up every morning.** The Canada geese that poop all over. The swallows that build a nest on your porch. These birds are all protected under the Migratory Bird Treaty Act (MBTA).<sup>1</sup> The MBTA prohibits killing migratory birds, taking their nests, or selling their eggs or feathers. According to the U.S. Fish and Wildlife Service (FWS), there are 1,093 migratory birds in the United States.<sup>2</sup> Likely, the bird you hear singing or the one stealing fish from your pond is protected under this act.

### Background of MBTA

The MBTA took effect in 1918 following a treaty between the United States and Great Britain (on behalf of Canada). Treaties were also entered with Mexico, Japan, and Russia (under the Soviet Union at the time). The goal of these treaties, and the MBTA, is to restrict the killing of migratory birds whose habitats extend beyond the borders of one country.

It did not take long for a state to challenge the MBTA. In 1920 the U.S. Supreme Court rejected the State of Missouri's argument that the law impermissibly restricted states' right to set rules for hunting.<sup>3</sup> The Supreme Court held that states are bound by the law because the MBTA is based on a treaty, and the U.S. Constitution describes treaties (together with the Constitution and laws of the United States) as "the supreme law of the land."<sup>6</sup>

While the Supreme Court made it clear that states had to follow the MBTA, it is still not clear just how restrictive the law is. Its plain language makes illegal all types of harmful behavior:

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, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport . . . any migratory bird, any part, nest, or egg [or product]<sup>5</sup> (emphasis supplied).

The issue that divides courts is whether unintentionally killing a bird during otherwise lawful behavior violates the act.

### The Debate Over Strict Liability

Like all laws, not everyone who breaks the MBTA is charged with violating it. The key step between actions that the MBTA describes as illegal and behavior that actually brings you in front of a judge is enforcement: what violations are charged. Enforcement is conducted by FWS. Some dispute whether MBTA violations can be charged against people who did not intend to kill birds, i.e. whether the act holds people strictly liable or whether there must be intent. FWS maintains that it only enforces where a party was informed of the behavior that would lead to a bird's death and did not take reasonable steps to prevent it.<sup>6</sup>

In 2015 the Fifth Circuit Court of Appeals, which reviews federal cases from Mississippi, Louisiana, and Texas, broke with most precedent which held that a person or a company engaged in hazardous activities leading to bird deaths is strictly liable.<sup>7</sup> In its decision, the Fifth Circuit instead found that taking or killing under the act was a violation only where there was human control of the take such as via hunting or trapping.<sup>8</sup> Thus, the court found that an oil company's failure to cover its wastewater tanks as required by federal and state regulations, which led to the deaths of birds, was not an intentional act that was subject to liability under the MBTA.

Prior to that ruling, and not discussed in the court's decision, FWS assessed a \$100 million fine against BP for the 2010 Gulf Oil Spill which killed over a million birds. In 2013, BP admitted guilt for one violation of the MBTA and paid the fine.<sup>9</sup>

### FWS Interpretations of Strict Liability

The Fifth Circuit opinion did not end the dispute. Whether the law imposes strict liability has ping-ponged during the

last three presidential administrations. FWS has changed its mind on the issue. Late in President Obama's term the top attorney for FWS, its Solicitor, issued an opinion on January 10, 2017, that said unintentional killing is a violation of the act if the take is direct, but not if it was caused indirectly through, for example, an action that reduced habitat.<sup>10</sup> One of the facts that the Solicitor's Opinion relied on was that the underlying treaties protected more than game birds, therefore hunting was not the only regulated behavior.

On December 22, 2017, the Trump Administration withdrew that Solicitor's Opinion and replaced it with one that found that the law applied only to intentional direct acts such as hunting and trapping.<sup>11</sup> According to the new Opinion, so-called incidental takes, where a bird was killed as an unintentional result of an otherwise lawful activity, were not within the scope of the MBTA. The Opinion states that the statute's prohibitions "apply only to affirmative actions that have as their purpose the taking or killing of migratory birds, their nests, or their eggs." In order to violate the statute, the Opinion says the action would have to be "directed at" killing a bird. An FAQ document issued by FWS at the time gave the example of cleaning a bridge on which swallows were nesting in order to repaint it. If removing swallows nests was a first step before painting the bridge, that was a violation. However, if the bridge was pressure-washed, and swallows nests were removed as a result, that was not a violation because the nests would be "accidentally destroyed incidental to that [cleaning] process."<sup>12</sup> The December 2017 Opinion was withdrawn by the Biden Administration in March 2021, nullifying the accompanying memorandum and FAQs.

The ping-pong match had a second venue in the courts. Environmental plaintiffs and eight states sued claiming the Solicitor's Opinion issued by the Trump Administration and the subsequent memorandum applying that document to agency practice were contrary to law. The court agreed, describing the Opinion as "a recent and sudden departure from long-held agency positions backed by over forty years of consistent enforcement practices. The Opinion is also an informal pronouncement lacking notice-and-comment or other protective rulemaking procedures."<sup>13</sup> The court found the statute's text was "unambiguous" in requiring strict liability for actions that kill birds "by any means or in any manner" (quoting from the MBTA). The Trump Administration appealed the decision, but the Biden Administration withdrew the appeal before it was reviewed by a court.

### Certain Takes Are Allowed

The MBTA regulations authorize some intentional take of birds without liability.<sup>14</sup> Certain military readiness activities and subsistence harvests by indigenous people are excused. Additionally, the regulations allow taking birds in specific circumstances when a permit is issued in advance. The permits are based on species in some cases, such as Canada geese, or for categories of activities, such as for raising and selling waterfowl. The fees vary. Some of the permits are issued without cost, such as to states wishing to control Canada geese, but permits to kill eagles require a \$36,000 fee.<sup>15</sup>

Permits to take depredating birds are also available. The term depredating is not defined in the regulations but is based on the common definition of causing plunder. Depredating birds harm things, such as personal property, natural resources, or agriculture, usually when in flocks. In some cases, FWS has issued a Depredation Order, which allows certain people to kill the birds after registering with FWS but without needing a permit. Species for which Depredation Orders are issued include blackbirds, cowbirds, grackles, crows, and Canada geese.

Permits authorize people to take birds causing an injury to crops "or other interests." Four things must be demonstrated to get the permit pursuant to 50 C.F.R. § 21.41(b):

- Where depredations are occurring;
- What crops or other interests are being injured;
- The extent of the injury; and
- The species of migratory bird(s) committing the injury.

### Taking Birds Interfering with Aquaculture

When it comes to aquaculture, migratory birds can be a big problem. Birds such as herons and cormorants are known to congregate at aquaculture ponds and live off the immovable feast. In oyster mariculture, such as along the coasts of Alabama and Mississippi, the problem is different. The birds don't eat the oysters, but they rest on the cages and structures of the oyster farms. The bird congregation leads to fouled water due to increased excrement. The bird poop can cause fecal coliform contamination which renders the oysters unsalable until the water quality improves. Killing the birds is against the law. However, FWS could issue MBTA permits to allow the take of fouling waterfowl.

However, it is not clear whether a permitted take of seabirds would offer relief for oyster farmers. It is not an

environment that is easily controlled. More birds would flock in to take the place of the removed ones. Instead, oyster farmers are turning to devices to scare away the birds, from simple zip ties that interfere with bird's ability to land on the cages, to drones and cannons. However, loud displays to chase away birds might lead to oyster farming becoming unpopular along shores. Foreseeably, fewer coastal landowners would want to lease to farms buzzing with drones and bursting with cannon fire. Additionally, many of the fixes require constant human attention, making them financially prohibitive. Others, such as shiny pinwheels or streamers, work only until birds get used to them, and they risk adding plastic pollution to the Gulf.

### State Restrictions

People wishing to take birds also must comply with state law. In Alabama, it is prohibited to take anything other than game birds, crows, pigeons, and non-native species without a permit from the Department of Conservation and Natural Resources.<sup>16</sup> Similarly, Mississippi allows killing of certain birds without a permit where they are harming ornamental trees or agriculture.<sup>17</sup> Those birds are: blackbirds, cowbirds, starlings, crows, grackles, and English sparrows. Birds in these two states' rules – cowbirds, crows, pigeons, and grackles – are identified as migratory birds under 50 C.F.R. § 10.13. However, most of those birds are covered under a Section 21.43 Depredation Order that allows killing without a permit when the birds are causing serious injury to agriculture or pose a health hazard. Notably, there is no depredation order for pigeons. It is not clear how Alabama allows taking pigeons consistent with the MBTA without a permit.

### Conclusion

For almost all of the 100-year history of the MBTA and for almost all of the enforcement by FWS, killing a migratory bird, even if accidental, may be considered a violation of the act. FWS has discretion in enforcing its violations and chooses to prosecute after providing notice and education of the behavior that is harming birds. At present, while a permit may be available to oyster farmers to target depredating birds that contaminate the water, it appears that oyster farmers are limited in how they control the birds, partly due to the MBTA restrictions but also due to the fact that easy solutions are not available in natural environments. 🐦

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### Endnotes

- 16 U.S.C. §§ 703-712.
2. FWS, *Migratory Bird Treaty Act Protected Species* (10.13 List) (as of March 2020). It is known as the 10.13 list as it appears at 50 C.F.R. § 10.13.
3. *Missouri v. Holland*, 252 U.S. 416 (1920).
4. *U.S. Constitution, Art. VI, cl. 2*. This provision is known as the Supremacy Clause.
5. 16 U.S.C. § 703(a). The maximum punishment for a violation is \$15,000 and six months in jail. 16 U.S.C. § 707(a).
6. *See* NRDC v. U.S. Department of the Interior, 478 F. Supp. 3d 469, 473-74 (S.D.N.Y. 2020).
7. *See* United States v. Apollo Energies, Inc., 611 F.3d 679 (10th Cir. 2010) (following a wide campaign notifying oil companies of the harm to birds from ventilation pipes, the court held liable the oil company that received notice of the harm as it could have prevented migratory bird deaths by capping the exhaust stacks); *Seattle Audubon Society v. Evans*, 952 F.2d 297 (9th Cir. 1991) (holding that Forest Service did not violate MBTA, as the act did not apply to harming birds' habitat by cutting down trees); *United States v. FMC Corp.*, 572 F.2d 902, 908 (2d Cir.1978) (finding that dumping highly toxic waste water into an outdoor pond which killed birds violated the MBTA but that such finding "does not dictate that every death of a bird will result in imposing strict criminal liability on some party"). The Eleventh Circuit, which reviews cases from Alabama, Georgia, and Florida has not ruled on the issue.
8. *United States v. CITGO Petroleum Corp.*, 801 F.3d 477 (5th Cir. 2015).
9. FWS Press Release, *BP Deepwater Horizon Oil Spill Settlement Funds Migrate North* (April 27, 2015).
10. Department of the Interior, *Incidental Take Prohibited Under the Migratory Bird Treaty Act*, Solicitor's Opinion M-37041 (Jan. 10, 2017).
11. Department of the Interior, *The Migratory Bird Treaty Act Does Not Prohibit Incidental Take*, Solicitor's Opinion M-37050 (Dec. 22, 2017).
12. FWS, Memorandum from the Principal Deputy Director, *Guidance on the Recent M-Opinion affecting the Migratory Bird Treaty Act* (April 11, 2018).
13. *NRDC v. U.S. Department of the Interior*, 478 F. Supp. 3d 469 (S.D.N.Y. 2020).
14. On May 7, 2021, FWS announced it would revoke the previous administration's regulations that said incidental takes did not violate the MBTA. 86 Fed. Reg. 24573.
15. FWS, *Migratory Bird Permitting Process Fees*.
16. Ala. Admin. Code r. 220-2-.92(1)(d).
17. Miss. Code Ann. § 49-1-39.