

# Locke Lord QuickStudy: Trump Administration's MBTA M-Opinion Vacated: What You Need to Know

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The Migratory Bird Treaty Act (“MBTA”) was first adopted in 1918, and for most of its existence the Department of the Interior (“DOI”) interpreted it to prohibit any taking or killing of migratory birds, intentional or not. That policy changed in late 2017 when the DOI issued a memorandum opinion designated M-37050 (the “M-Opinion”), which reversed the Department’s interpretation and declared that the MBTA’s prohibitions apply only to affirmative actions that “have as their purpose the taking or killing of migratory birds, their nests, or their eggs.” This reversal was significant, as it removed a threat of enforcement that the U.S. Fish and Wildlife Service (“USFWS”) used to influence companies to minimize risks to migratory birds from facilities such as oil and gas reserve pits, power lines, and wind turbines. On August 11, 2020, in response to a challenge to the M-Opinion brought by several environmental organizations, a federal district court in the Southern District of New York vacated the M-Opinion.<sup>1</sup> The decision is significant, but it is fair to question whether it will have any practical effect. This QuickStudy will provide a brief overview of the MBTA, the M-Opinion and the court’s reasoning for vacating it, before considering the short and longer-term implications of the ruling.

## Background of the MBTA and M-Opinion

Section 2 of 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 . . . .” On January 10, 2017, in the final days of the Obama Administration, the DOI Solicitor issued an M-Opinion, M-37041, reaffirming the Department’s long-standing interpretation that this prohibition includes incidental take. The DOI issued this initial M-Opinion largely in response to recent court decisions that had cast doubt on that principle, most notably the Fifth Circuit’s decision in *United States v. CITGO Petroleum Corp.*,<sup>2</sup> in which the Fifth Circuit held that the MBTA prohibits only intentional acts, not omissions, that kill migratory birds directly, rather than indirectly or accidentally.

Less than one month later on February 6, 2017, just days after the Trump Administration took office, the new Solicitor suspended M-37041 pending review. In December of that same year, in one of the first of the Trump Administration’s now many moves to reduce environmental regulatory burdens, the new Principal Deputy Solicitor, Daniel Jorjani, withdrew M-37041 and issued the new M-Opinion, followed several months later by [new guidance from the USFWS](#) on how it would implement such a significant reversal of long-standing policy. In reversing the interpretation set forth in the previous M-Opinion, Jorjani observed that the threat of strict, criminal liability under the MBTA hung like “the sword of Damocles over a host of otherwise lawful and productive

actions.” In defending the M-Opinion, DOI cited the significant circuit split on the question of the MBTA’s applicability to incidental take and the absurd results that ensue when lawful, everyday actions that incidentally result in the death of migratory birds become a source of misdemeanor criminal liability.

The Jorjani M-Opinion stated that the interpretation it announced, that the MBTA’s prohibitions “apply only to affirmative actions that have as their purpose the taking or killing of migratory birds, their nests, or their eggs” was “consistent with the text, history, and purpose of the MBTA.” The M-Opinion thus limited the application of the MBTA prohibition to “direct and affirmative purposeful actions that reduce migratory birds, their eggs, or their nests, by killing or capturing, to human control.” The subsequent USFWS guidance on the M-Opinion clarified that a person’s knowledge that an activity will result in the killing of migratory birds is not relevant to a take analysis under the statute – the only relevant factor is whether a person undertakes the action for the specific purpose of killing migratory birds.

### **The Court’s Opinion of the M-Opinion**

The court took a very dim view of the reasoning contained in the M-Opinion, and that of the DOI in defending it. It began its analysis by noting that under the Administrative Procedures Act (“APA”), agency decisions may be set aside if they are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” It also noted that because it was not a formal agency action, the M-Opinion was not entitled to full *Chevron* deference, but rather to the lesser standard of *Skidmore* deference, under which the court must defer to the M-Opinion to the extent that it has the “power to persuade,” based on factors including the agency’s expertise, the care it took in reaching its conclusions, the formality with which it promulgated its interpretation, the consistency of its views over time, and the ultimate persuasiveness of its views. Based on those factors, the court determined that the M-Opinion did not warrant any deference, noting that it was an informal pronouncement that appeared to have been made without the benefit of input from the USFWS, represented a complete reversal of long-standing USFWS policy, and was, for a number of reasons, quite unpersuasive to the court. Therefore, the court undertook its own analysis of the MBTA’s prohibition, and in so doing provided one of the most thorough discussions of the MBTA in any court opinion on the subject.

The court first asserted that the DOI had greatly overstated the extent of the split between circuit courts on the issue of the MBTA’s applicability to incidental take. The DOI argued that the Fifth, Eighth and Ninth Circuits have held that the MBTA does not apply to incidental take, but the court disagreed, reading the relevant cases from the Eighth and Ninth Circuits as holding only that destruction of habitat that leads indirectly to migratory bird deaths does not amount to take under the MBTA. Even the Fifth Circuit’s *CITGO* decision, the court noted, interpreted the term “take” in the Act’s prohibition but not the less ambiguous term “kill,” and that following the *CITGO* decision DOI had promptly reaffirmed its long-standing interpretation of the prohibition in the previous M-Opinion.

Analyzing the M-Opinion itself, the court observed that by limiting the MBTA’s prohibition to “direct and affirmative purposeful actions,” the M-Opinion imposes both a mental state requirement in the form of intent and purpose, and a proximate cause requirement in the form of directness, neither of which are actually present in the statutory language. In defending its interpretation, DOI relied upon a canon of statutory interpretation that calls for reading a term in accordance with its surrounding words. Thus, it argued that the term “kill” should be read in the context of the terms “pursue,” “hunt” and “capture,” all of which reference activities directed at birds. Therefore, it’s

reasoning continued, “kill” must also be understood as applying only when the act is similarly intentional.

The court staunchly disagreed with DOI’s application of this interpretive canon, noting that it is a tool to be used only to resolve ambiguity, and the term “kill” is not ambiguous. This is particularly so, the court noted, in light of the preceding language in the statute which says that taking or killing is unlawful “at any time, by any means, or in any manner,” not just by means or in a manner specifically directed at birds. Reading the language in that way would, in the court’s view, actually deprive the term “kill” of any independent meaning.

The court similarly rejected DOI’s use of the “absurd results” canon, noting that “there is nothing absurd about an interpretation of the MBTA that broadly criminalizes killing migratory birds as a misdemeanor.” That had been the law of the land for decades prior to the M-Opinion, and USFWS has long used appropriate discretion to avoid unreasonable results. Thus, the court concluded that the M-Opinion was not a necessary or persuasive interpretation of the MBTA, but rather “a solution in search of a problem.”

Finally, and perhaps most notably, the court addressed DOI’s argument, one that has been voiced frequently over the years, that the MBTA was aimed at curbing hunting and the trade in feathers, the primary threats to bird populations in 1918, and was not intended to cover incidental take. The court opined that the fact a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity, it demonstrates breadth, and we are ultimately governed by “the provisions of our laws rather than the principal concerns of [the] legislators” who adopted them. In this sense, as well the court’s reliance on the “by any means or in any manner” language to reject DOI’s use of various interpretive canons, the court’s opinion reads very much like one that might have been drafted by a conservative textualist rather than a liberal activist. If the expected appeal of the decision were to reach the more conservative Supreme Court, it would be interesting to see how Court’s conservative members would react to a textualist interpretation that resulted in broader applicability of the statute.

After thoroughly rejecting the interpretation and rationale embodied in the M-Opinion, the court determined that vacatur of the opinion was the appropriate remedy and issued its order to that effect.

### **Implications of the Court’s Decision**

As definitive as the court’s opinion is, the practical effect in the short term may be minimal. While the court vacated the M-Opinion and remanded it to DOI, it did not vacate the USFWS guidance that implemented the M-Opinion, nor did it restore the previous M-Opinion that had been issued by the Obama Administration but withdrawn when the Jorjani M-Opinion was released. As a result, the current status is essentially similar to the situation that existed prior to the issuance of the previous M-Opinion. Although the court’s decision provides new guidance on the scope of the MBTA and the applicability of its prohibition to incidental take, that aspect of the opinion (as opposed to the vacatur of the M-Opinion itself) is only binding within the Southern District of New York. Thus, the *CITGO* decision remains intact and controlling within the Fifth Circuit’s jurisdiction, and the same is true of previous decisions in other circuits.

The court’s opinion and the vacatur of the M-Opinion notwithstanding, it remains highly unlikely that the Trump Administration, even if unsuccessful in reversing the decision on appeal, would commence enforcement of incidental take of migratory birds that occurred indirectly or even as a foreseeable result of legitimate business activity. However, it is possible that the USFWS may resume its prior practice of using the threat of enforcement

to cajole project developers into adopting more robust take avoidance and minimization measures. Field office staff may be more likely to do so in the course of project consultations and the provision of technical assistance than DOI political appointees or even USFWS management may prefer. This issue bears watching, as does whether the USFWS will issue any new or updated guidance to staff on this topic.

Regardless of how the USFWS responds to this decision, it does mean that MBTA liability is once again a risk for any project that may unintentionally take or kill migratory birds. If the November elections bring a change in Administrations, a Biden Administration would almost certainly restore the previous M-Opinion and revert to the previous, long-standing policy. While that policy did involve broad enforcement discretion, the risk of enforcement would certainly be greater than what industry has become accustomed to over the past several years. Thus, for projects seeking outside financing, third-party lenders and investors may insist on a higher level of avoidance and minimization to reduce potential exposure under future administrations, whether in 2021 or further down the road.

A question that is foremost in the mind of many is how the court's decision will affect the proposed rule that the USFWS has been developing to codify the interpretation set forth in the M-Opinion. While the court's decision clearly undermines the basis for such a rule, DOI can find sufficient support for its interpretation in *CITGO* and other cases to justify the proposed rule. If anything, DOI may be more likely now to publish the rule and potentially even finalize it before the election to ensure its interpretation becomes law. Although the rule would be immediately challenged, a final rule adopted in accordance with the APA would be entitled to greater deference than the M-Opinion received, and if DOI addresses some of the more glaring deficiencies cited by the court in the final rule, it is certainly conceivable that the rule could survive a legal challenge where the M-Opinion did not.

All things considered, the court's decision was a major victory for environmental advocates, but its practical effect in the short term is likely to be minimal and the question of how broadly the MBTA will be applied remains far from resolved. If the Trump Administration can finalize a rule codifying the interpretation of the M-Opinion prior to the election or a change in administrations, it may have a greater and more lasting effect than the court's decision in this case. But in any event, a Biden Administration would likely make it a priority to restore the previous interpretation even if that meant repealing such a rule. So as with so many other issues in the current regulatory landscape, the impact of this decision won't really be clear until November.

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1. *Nat. Res. Defense Council, et al. v. U.S. Dep't. of the Interior*, 1:18-cv-04596-VEC, 8/11/20
2. 801 F.3d 477 (5th Cir. 2015).?

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