

**Migratory Bird Treaty Act – Incidental Take Provision
Info for May DAS meeting**

CLEARED

For Open Publication

Aug 09, 2018

Department of Defense
OFFICE OF PREPUBLICATION AND SECURITY REVIEW

BACKGROUND:

DOI Solicitor's Opinion M-37050: [The Migratory Bird Treaty Act Does Not Prohibit Incidental Take](#)

DOI issued Solicitor's Opinion M-37050 on December 22, 2017, which contradicts the January 10, 2017 Solicitor's Opinion M-37041, and states the MBTA applies only to deliberate acts intended to take birds and does not include incidental take even when the take is easily foreseeable (e.g., take during live fire training).

- Solicitor's Opinion M-37050 has raised questions about potential implications for the Military Services related to [Executive Order \(EO\) 13186, Responsibilities of Federal Agencies to Protect Migratory Birds](#), the Migratory Bird Readiness Rule, and the DoD-USFWS MOU.
- The MBTA does not explicitly address incidental take from otherwise lawful activities.
- The courts are divided in their decisions on whether the MBTA also should include incidental take of migratory birds.
- OSD Counsel Recommendation: DoD installation personnel should continue to minimize the take of migratory birds. Position basis:
 - Solicitor's Opinion M-37050 does not resolve the split in the courts' interpretation of whether the MBTA includes incidental take.
 - The [Migratory Bird Readiness Rule](#) is predicated on Section 315 of the 2003 NDAA, which remains in effect.
 - EO 13186 [Responsibilities of Federal Agencies to Protect Migratory Birds](#), remains in effect.
 - EO 13186 led to the DoD-USFWS [MOU to Promote the Conservation of Migratory Birds](#), so it is not impacted by the Opinion.
 - The [Addressing Migratory Bird Management in Integrated Natural Resources Management Plans Guidance](#) is also still in effect.
- Maureen Sullivan, DASD(ESOH), issued a memo to the DASs on February 6, 2018, advising that until OSD provides further clarification, the Military Departments should continue following existing DoD guidance designed to minimize – to the extent practicable and without diminishing the effectiveness of military readiness activities – the incidental take of migratory birds.

DISCUSSION:

USFWS Guidance on the recent M-Opinion affecting the Migratory Bird Treaty Act

On April 11, 2018, USFWS issued guidance on the recent M-Opinion affecting the MBTA. USFWS interprets the M-Opinion to mean that the MBTA's prohibitions on take apply only when the *purpose* of an action is to take migratory birds, their eggs, or their nests. USFWS affirmed that the new Opinion does not affect the ESA or BGEPA. They also affirmed that DoD should continue to follow the requirements of the Migratory Bird Readiness Rule by taking reasonable and prudent measures to minimize and avoid incidental take for mission essential activities as well as for non-military readiness activities. They also stated that incidental take by DoD (for readiness or non-readiness activities) does not violate the MBTA regardless of whether DoD is complying with the Migratory Bird Readiness Rule.

The Military Services requested that the DoD NR Program coordinate with OSD Counsel to further clarify DoD's MBTA guidance based on the new USFWS guidance. The Military Services also requested examples (e.g., when demolishing a barn, can activity take place if there are owls with a nest and eggs inside; when building, is it advantageous to avoid activity during the nesting season) of when it is acceptable to move forward with an activity that may involve incidental take.

After coordinating with OSD Counsel, the DoD NR Program confirmed that the M-Opinion is not litigable and that the USFWS Guidance has no legal weight. Therefore, the February 2018 memo and the August 2017 Guidance remain in effect. This means that, "to the extent practicable and without diminishing the effectiveness of military readiness activities," installations should minimize the incidental take of migratory birds. This does not mean that no incidental take can occur.