

Myth vs Facts: Migratory Bird Treaty Act

In 2018, we are celebrating the 100th anniversary of the Migratory Bird Treaty Act. Over the decades, the MBTA has saved millions, if not billions of birds, and countless species from extinction. Without this bird protection law, species like the Sandhill Crane, Wood Duck, and Snowy Egret may have gone the way of the Passenger Pigeon, which disappeared just four years before the MBTA passed. For decades, the law has helped address modern-day industrial hazards like oil waste pits, electrocutions on power lines, and toxic chemicals, but this vital tool for saving birds is under threat by the administration and Congress. Many of the arguments in favor of gutting the MBTA rely on myths, particularly the idea that the law was never meant to address current threats that birds face.

Myth: *The Migratory Bird Treaty Act only prohibits the killing and taking of birds from intentional activities such as hunting and poaching.*

Fact: The history, language of the law, and Congressional, agency, and judicial actions over decades demonstrate that the MBTA prohibits not only illegal hunting and poaching, but also the incidental take of birds, including from industrial activity. First, while overhunted birds such as egrets and waterfowl were protected by the law, the MBTA also protected non-game species that were not threatened by hunting and poaching, including hummingbirds, woodpeckers, meadowlarks, and more, in part because of their value to agriculture. In upholding the MBTA in 1920, Justice Holmes called these insect-eating and pollinator species the “protectors of our forests and our crops”. Second, the language of the law makes it clear that bird deaths do not need to be intentional to be a violation, as the law makes it illegal to kill birds “by any means or in any manner”. Third, Congress has implicitly recognized numerous times that incidental take is illegal under the MBTA, including by the exemption of incidental deaths caused by the military, which it would not have needed to do without recognizing that these actions could be liable. Fourth, incidental take has been enforced by agencies at least since the early 1970s, under both Republican and Democratic administrations. Finally, numerous district and appeals courts over decades have upheld the interpretation that the law was meant to cover incidental take and not just cover hunting and poaching.



Myth: *The MBTA is hindering energy development and other industrial activity*

Fact: There is no evidence that energy projects are being stifled by the MBTA, or that any projects have not been permitted because of the law. The Fish and Wildlife Service has used significant discretion when enforcing the law, after working directly with industries to share best management practices that can effectively and feasibly reduce bird deaths. Egregious and preventable cases have led to enforcement under the MBTA, including from oil pits, toxic waste, and major oil spills such as Deepwater Horizon, which killed one million birds.

Myth: *If the law isn't changed, anyone that accidentally kills a bird is at risk from prosecution, from home owners, to car drivers, or even cat owners.*

Fact: In 100 years, there has never been a prosecution for those activities, and there is no expectation that there ever will be. Only industrial actors that caused bird deaths from their activities and failed to take reasonable action to prevent them have been seen enforcement.

Myth: *The administration's legal opinion only reverses a last-minute Obama-era rule*

Fact: For more than 40 years, Republican and Democratic

administrations have enforced incidental take violations in egregious cases. In January, 17 former officials from administrations under both parties, including Deputy and Assistant Secretaries, FWS Directors, and Migratory Bird Chiefs under Presidents Reagan, George H.W. Bush, Bill Clinton, George W. Bush, Barack Obama, and more, wrote to Secretary Zinke opposing the administration's legal opinion and supporting incidental take authority.

Myth: *Exempting incidental take is the only path forward to provide more regulatory certainty under MBTA*

Fact: The Fish and Wildlife Service proposed an incidental take permit process in 2015, which could have provided regulatory certainty while ensuring the conservation of birds. Under the right conditions, this could be an effective path forward for industry and birds, but the Trump administration has withdrawn the rulemaking and issued a legal opinion that incidental take is not covered under the law.

Myth: *The MBTA is no longer necessary and has been superseded by other environmental laws*

Fact: Ending the prohibition of incidental take would

cause more 1,000 species of birds to lose protections from industrial impacts. Without these protections that help ensure common-sense practices are taken that save birds' lives, it could make Endangered Species Act listings more likely if populations begin to fall. It could also mean the loss of proactive, collaborative work between NGOs, industries, and agencies. This work has led to critical best management practices and expanded research, such as the Avian Power Line Interaction Committee, voluntary wind energy guidelines, and the Avian Solar Working Group, which are in place because of the MBTA.

Myth: *Language in H.R. 4293 doesn't change the law but only clarifies Congressional intent*

Fact: This bill would gut the MBTA, and would be a major change to decades of interpretation and conservation actions by agencies, representing the most significant roll-back of the law in its century of existence. It would have a far-reaching impact to our nation's birds, at a time when one-third of bird species are of high conservation concern and at risk of extinction without urgent action, according to the 2016 State of the Birds report.

