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Two northern gannets tangled in a long-line fishing rig. Fishing bycatch is a major source of mortality for seabirds along the coast of the United States and throughout the world. Under the new memo, there will be no liability for killing gannets or many other seabirds with fishing gear.

MIGRATORY BIRD TREATY ACT REVERSING TERMS OF ENFORCEMENT

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On December 22nd as the nation was gearing down for the festive Christmas holiday, the Department of Interior quietly released a memo redefining the terms of how the Migratory Bird Treaty Act (MBTA) will be enforced. This new interpretation will have far-reaching impacts on bird conservation throughout the United States and represents the culmination of a decades-long fight by lobbyists to undermine the Act. The action effectively removes (by interpretation) a key prohibition and constrains the USFWS from pursuing the original intent of the Act.

The MBTA (and its predecessors) has been the legal cornerstone of bird protection in the United States for more than 100 years. The Act represents the legal first-line-of-defense for more than 1,000 species and its mere

existence and long history is a reflection of how our society has valued bird populations. By drawing a line in the sand defining acceptable conduct, the Act has educated generations of conservation-minded citizens and set a standard for corporate behavior. The memo released on 22 December shifts the line and by doing so represents a sea-change in the value that our society places on bird populations.

Wildlife laws are often vague and include terms that are open to interpretation. From a practical standpoint, implementation of these laws requires that regulatory agencies formulate working definitions that may be used to clarify prohibited activities to telegraph intended prosecutorial boundaries. Changing the definitions



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A sample of more than 40 pounds (>1,000) of cedar waxwings killed along less than 100 meters (.06 miles) of Interstate 64 in Virginia. The birds were attracted to their deaths by fruiting shrubs planted in the median. The situation was resolved when the Virginia Department of Transportation agreed under threat of MBTA to remove the shrubs. Under the new interpretation of MBTA, the U.S. Fish and Wildlife Service would be impotent to request such removal.

effectively changes which behaviors will be prosecuted under the law. The MBTA clearly states a prohibition on “killing” protected birds. Over the past several decades, the U.S. Fish and Wildlife Service (USFWS) has recognized killing to include “intended take” (e.g. shooting and capture) and “incidental take” (unintended killing) as prohibited behaviors under the Act.

In practice, the USFWS has long recognized two forms of “incidental take,” including accidental killing where the mortality could not have been reasonably anticipated or avoided, and unintended killings where the mortality could have been reasonably anticipated and prevented.

No one wants to prosecute every homeowner who has had a bird fly into a window or every driver who has hit a bird flying across the road, and no prosecutions of this type have been brought forth. However, situations where a party knowingly places large numbers of birds at risk of being killed should be avoided (see example below following the main story), and it is in the public’s interest to have legal deterrents to these activities.

In the past, the USFWS has used the MBTA to work toward resolving these types of incidental takes to protect bird populations. The 22 December memorandum eliminates the legal avenue to find a reasonable solution.

The MBTA was passed during a time when very large numbers of birds were being taken for commercial enterprises for collections or to prevent perceived impacts

ABOUT THE MIGRATORY BIRD TREATY

The Migratory Bird Treaty Act (MBTA) of 1918, is a United States federal law, first enacted in 1916 to protect migratory birds between the United States and Great Britain.

The U.S. Fish and Wildlife Service has statutory authority and responsibility for enforcing the MBTA. The statute makes it unlawful to pursue, hunt, take, capture, kill, or sell birds listed therein as migratory birds without a waiver. The statute does not discriminate between live or dead birds, and also grants full protection to any bird parts including feathers, eggs, and nests.

Over 800 species are currently on the list. Unlike the Endangered Species Act, the MBTA is relatively unknown to the general public.

ADDITIONAL RESOURCES:

<http://www.audubon.org/news/the-migratory-bird-treaty-act-explained>

<https://www.fws.gov/birds/policies-and-regulations/laws-legislations/migratory-bird-treaty-act.php>

https://en.wikipedia.org/wiki/Migratory_Bird_Treaty_Act_of_1918

to game or farm animals. However, the intent of the MBTA was not merely to restrict recreational collecting and other activities, but instead to preserve bird populations in perpetuity. This new interpretation redefines “killing” as only including acts with the “intent” to kill birds. Birds that are killed during activities where the primary intent is other than to specifically kill birds are no longer subject to the Act. Bird populations belong to the public, and reasoned measures should be taken to protect our shared heritage and not leaving them without a legal advocate.

I have worked in the bird conservation business long enough to have seen many, many examples of how the MBTA has been used reasonably and effectively to avoid unnecessary impacts to bird populations. In the majority of cases, birds could be protected with minimal impacts to business. One example from the past comes to mind.

In June of 1994, while surveying for piping plovers on the north end of Wallops Island in Virginia, I could see an unusually white wrack line in the distance as the tide ebbed out. The mystery was not resolved until I actually reached the line, examined the white objects, and realized that they were the bleached keels of red-throated loons. The line of keels stretched more than a mile to the north and represented 10,000+ loons. Sometime during the winter there had been a significant kill and the keels piled up by the surf were what remained.

Later investigation revealed that the loons were bycatch from the nearshore gill netters, the same group that had been responsible for scores of sea turtles and bottlenose dolphins that had been washing up on the islands for years. The netters were not charged, but with full consideration of the implications of MBTA, they were convinced to move farther off shore beyond the normal foraging area of the loons.

Under this new interpretation the loons killed by gill netters would not be subject to any legal violation as the gill netters were there to catch fish, not birds. Yet since they had to remove the loons from nets, they had to be aware of the hazard they were creating for a federally protected species. But here killing the loons was a mere nuisance.

Removing any legal liability from parties who “incidentally” kill large numbers of protected birds, despite being able to avoid doing so, clearly does not reflect the original intent of this 100-year-old conservation law.

<http://www.ccbirds.org/>

WHAT CAN YOU DO TO HELP?

Send a letter to your representatives in your state government, Congress and the administration urging them to uphold the MBTA and to oppose any legislation that would weaken the MBTA's ability to keep birds safe.

ADDITIONAL RESOURCES:

<https://www.govtrack.us/congress/members>

<https://www.house.gov/representatives/find-your-representative>

<https://www.house.gov/representatives>

https://www.senate.gov/general/contact_information/senators_cfm



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