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## *Clipping the Wings of the MBTA? Newly Embraced Definition of Take Impacts more than Criminal Liability*

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### **New Guidance from the U.S. Fish and Wildlife Service Confirms the Agency will not Use Authority under the MBTA to Regulate Incidental Take of Migratory Birds**

The Migratory Bird Treaty Act of 1918, as amended (16 U.S.C. § 703; “MBTA” or the “Act”) implements the United States’ obligations under four international avian protection conventions by making it “unlawful at any time, by any means or in any manner” to take or attempt to take any migratory bird, or any part, nest, or egg of any such bird, covered by the aforementioned treaties, except as permitted by regulation.<sup>1</sup> “Any migratory bird” means any of the over 1,000 migratory bird species covered by the Act and, in contrast to the Endangered Species Act, species are listed under the MBTA regardless of whether they are endangered and in need of statutory protection.<sup>2</sup> Violations of the MBTA’s prohibition on taking (wounding or killing) migratory birds can result in significant per violation (i.e., per bird) criminal fines, imprisonment, or both.<sup>3</sup>

In light of the criminal liability associated with take,<sup>4</sup> a growing majority of federal circuit courts have concluded that “take” does not include unintentional harm to migratory birds that occurs in the course of otherwise lawful commercial activities. For example, in *Newton County Wildlife Association v. United States Forest Service*, the Eighth Circuit Court of Appeal held that the MBTA “take” prohibition is limited to deliberate actions against migratory birds.<sup>5</sup> Similarly, in *Seattle Audubon Society v. Evans*, the Ninth Circuit Court of Appeal held that “habitat destruction, leading indirectly to bird deaths,” is not a “take” under the MBTA.<sup>6</sup> Most recently, the Fifth Circuit Court of Appeal overturned a district court conviction in *United States v. Citgo Petroleum Corporation*, finding that the scope of “take” under the MBTA only prohibits deliberate acts done intentionally and directly to migratory birds.<sup>7</sup>

Notwithstanding this trend, agencies charged, directly and indirectly, with enforcement duties under the MBTA have continued to interpret the Act to prohibit “incidental take” and have used the threat of prosecution to extract monitoring and experimental adaptive mitigation measures from developers. Accommodating this interpretation of agency authority has added significant cost and delay to development of critical energy infrastructure projects and other developments.

Recent developments coming out of the Department of the Interior (“DOI”), however, have been designed to significantly disrupt the status quo. A December 22, 2017 Memorandum Opinion issued by



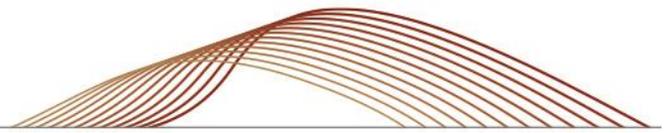
the Solicitor of the Department of Interior (Opinion M-37050<sup>8</sup>) concluded that the MBTA in fact does *not* cover “take that results from an activity, but is not the purpose of that activity” (i.e., “incidental” take). This decision outright reversed a prior opinion by the Solicitor issued during the Obama Administration (Opinion M-37041<sup>9</sup>), which concluded that incidental take is a covered activity. It also spawned new guidance from the United States Fish & Wildlife Service (“USFWS” or the “Service”), issued on April 11, 2018 (the “USFWS Guidance” or “Guidance”). The Guidance, like Opinion M-37050, largely focuses on when USFWS will pursue criminal enforcement actions under the MBTA. But because, as noted above, compliance with the MBTA has been a driving force behind project mitigation requirements, the Guidance and Opinion M-37050, should fundamentally change how the environmental effects of federal actions are evaluated.

## Legal Background

As noted above, the MBTA makes it illegal to “take” any species of migratory bird.<sup>10</sup> From the 1910s through the early-1970s, federal prosecutors interpreted the Act’s take prohibition as a straightforward ban on hunting and poaching migratory birds.<sup>11</sup> However, enactment of the Endangered Species Act (“ESA”) ushered in a broader reading of the MBTA as prosecutors grafted on to the MBTA the ESA’s more comprehensive prohibitions regarding activities that “harm” or “harass” threatened or endangered species, including indirect harm caused by habitat modification, and take that is “incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.”<sup>12</sup> The MBTA does not similarly include “incidental take” or indirect harm in its definition of prohibited activities, but this did not deter prosecutors from charging not only hunters for MBTA violations, but also companies whose operations unintentionally killed or harmed migratory birds.

Subsequently, a debate emerged regarding the intent required to take a migratory bird in violation of the Act, with the Second Circuit taking the first step towards a reading that encompasses incidental take. In *United States v. FMC Corporation*, the court analogized the MBTA’s take provision to strict liability under civil tort law and concluded that the Act prohibits the incidental take of migratory birds that is the foreseeable result of an ultra-hazardous activity, such as pesticide manufacturing.<sup>13</sup> Other courts later expanded MBTA liability to incidental take generally, reasoning that because the MBTA imposes strict liability, it must be expansively interpreted to prohibit all acts that foreseeably and directly cause migratory bird deaths “by any means or in any manner.”<sup>14</sup> Pursuant to this approach, companies have been found liable for unintentional migratory bird deaths caused by a wide range of activities, such as military training exercises,<sup>15</sup> oil drilling,<sup>16</sup> power lines,<sup>17</sup> and fertilizer application.<sup>18</sup>

But the majority of Courts of Appeal have recognized that prosecuting incidental take of ubiquitous migratory birds could lead to criminal liability for mundane daily activities—for simply owning “big windows, . . . cars, cats, and even church steeples”—and have rejected an interpretation that would outlaw incidental take in all its forms.<sup>19</sup> Specifically, these courts have analyzed the particular acts proscribed in the statute, and recognized that the MBTA’s prohibited activities—pursue, hunt, *take*, capture, or kill—are all purposeful, affirmative acts that are necessarily directed towards a particular bird. Citing legislative history, the common law’s definition of “take” (“to reduce those animals, by killing or capturing, to human control”), and the term’s comparatively narrow definition in the MBTA versus the ESA, these courts have concluded that taking a migratory bird requires “physical conduct of the sort engaged in by hunters and poachers.”<sup>20</sup> Pursuant to this reading, an MBTA violation requires a deliberate act directed at killing, capturing, wounding, or otherwise reducing a particular bird to human control.<sup>21</sup> The Act’s strict liability element merely means that engaging in such conduct violates the MBTA, even if the defendant did not know the bird taken was a protected species.<sup>22</sup>



Building upon cases with a more narrow view of the MBTA, and further considering the text, history, and purpose of the Act, Opinion M-37050 delivers a voluminous, detailed defense of the position that the MBTA does not criminalize incidental take with particular focus on the legislative history and due process concerns associated with interpreting criminal provisions to vaguely cover any number of everyday activities. Unlike some courts, the Solicitor was not satisfied that reasonable prosecutorial discretion could be relied on to reign in the unlimited scope of an MBTA that prohibits incidental take. Indeed, the Solicitor expressed particular concern that such an interpretation, and the threat of prosecution that accompanies it, could be arbitrarily abused to regulate or exact concessions from disfavored industries or persons.<sup>23</sup>

## **Prior Enforcement Practices Under the MBTA**

As a practical matter, except in the most extreme cases, USFWS's approach to enforcement, as opposed to its use of the threat of enforcement, has not been heavy-handed.

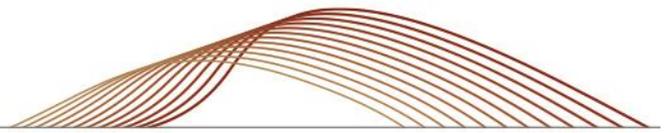
In the nearly 100-year history of the [MBTA], FWS has never adopted a regulatory system that requires MBTA permits for all activities that could potentially result in the incidental, unintentional taking of migratory birds . . . . Rather, FWS has taken a multi-faceted enforcement approach for the MBTA that uses a combination of tools, including education, permits for certain activities, and appropriate criminal enforcement that takes into account voluntary implementation of plans to minimize harm to migratory birds.<sup>24</sup> . . . [T]he federal government typically prioritizes prosecutions of entities that (i) disregard the MBTA, or (ii) fail to implement clear conservation measures that were available.<sup>25</sup>

Thus, in instances where an applicant has worked with FWS to: (i) "establish a programmatic approach to conserve migratory birds"; (ii) "establish monitoring and mitigation requirements"; and (iii) "employ an adaptive management process to address impacts to migratory birds," USFWS has generally not taken enforcement action.<sup>26</sup> This approach has further been consistent with USFWS's Office of Law Enforcement's ("OLE's") industry enforcement guidance, in which OLE has committed (in a non-binding fashion) to not prosecute companies that consult with the FWS in good faith and implement best practices to avoid avian mortalities.<sup>27</sup>

Given this long-standing practice of liberally exercising prosecutorial restraint, one might question whether the trajectory of case law, Opinion M-37050, and USFWS's Guidance will significantly change the role of the MBTA. In terms of actual prosecutions, the impact might be small. But as suggested above, the threat of prosecution has been the cornerstone for claims that project proponents must develop costly monitoring and mitigation requirements. Opinion M-37050 was specifically adopted not just to clarify the scope of criminal liability under the MBTA, but also to diffuse the threat of prosecution that "inhibits otherwise lawful conduct."<sup>28</sup> Its impact should accordingly be felt well beyond the context of criminal prosecutions and, as explained in more detail below, the Guidance indicates that it will be.

## **Impact of Opinion M-37050 on Future Mitigation Demands**

Solicitor's M-Opinions, although not binding on the judicial branch, nevertheless constitute "final legal interpretations . . . on all matters within the jurisdiction of the Department, . . . [are] binding, when signed, on all other Departmental offices and officials and . . . may be overruled or modified only by the Solicitor, the Deputy Secretary, or the Secretary."<sup>29</sup> In addition, Solicitor's opinions are binding on the Office of Hearings and Appeals ("OHA"), including on the Interior Board of Land Appeals ("IBLA").<sup>30</sup> Consequently, the determination in Opinion M-37050 that "the past expansive assertion of



federal authority under the MBTA rested upon a slim foundation—one that ultimately cannot carry its weight” has real significance for how agencies within DOI, especially the USFWS, will enforce and administer the Act.

Contrary suggestions have been made based on the continued existence of Executive Order (“EO”) 13186, a vestige of a time when the definition of “take” under the MBTA was less certain. The Clinton-era EO, which survived the Trump Administration’s significant purge of the Obama Administration’s energy and climate-related presidential actions, directs federal agencies to enter into Memoranda of Understanding (“MOU”) with the USFWS to take certain actions “to further implement the [MBTA].” More precisely, it requires that agencies subject to the order, “to the extent permitted by law[,] . . . identify where unintentional take reasonably attributable to agency actions is having, or is likely to have, a measurable negative effect on migratory bird populations . . . [and] [w]ith respect to those actions so identified, . . . develop and use principles, standards, and practices that will lessen the amount of unintentional take . . . [and] the detrimental effect of agency actions on migratory bird populations.”<sup>31</sup>

Opinion M-37050 undercuts any force and effect the EO previously had. The Opinion is *binding* on the various agencies within the DOI and communicates the current administration’s view of the role of the MBTA. To the extent that the directives in the EO conflict with Opinion M-37050, those directives were made pursuant to “the extent permitted by law” and Opinion M-37050 concludes that the MBTA did not “confer authority upon the executive branch to regulate all manner of economic activity that had an accidental or intended impact on migratory birds.”<sup>32</sup> Furthermore, as a practical matter, the current administration will follow Opinion M-37050 and, short of an act of Congress, there is nothing anyone can do to force agencies to give the EO preference over Opinion M-37050. Both the EO and the MOU implementing the EO clearly state that each was “intended only to improve the internal management of the executive branch and does not create any right or benefit, substantive or procedural, separately enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.”<sup>33</sup> Opinion M-37050 states that EO 13186 is irrelevant guidance<sup>34</sup> and, to the extent that DOI’s agencies take this stance, there is no basis for third parties to force them to implement whatever governing principles might have survived changes in how the MBTA is interpreted.

The continuing validity of the EO on its own is also highly doubtful because its instructions are premised on the flawed conclusion that “take” under the MBTA includes incidental take. Presidential authority to issue an executive order, “if any, must stem either from an act of Congress or from the Constitution itself.”<sup>35</sup> Although “congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility,”<sup>36</sup> this is not a case where the lines of authority are unclear. Because the need to further the purposes of the MBTA provides the primary authority for the requirements of the EO, the significance of mounting legal interpretations of the MBTA demonstrating that it was not designed to reach unintentional take cannot be overstated. As observed in the EO, where Congress has intended to authorize executive action to minimize or mitigate incidental harm, it has done so.<sup>37</sup> The MBTA does not provide this authority, as, under the prevailing interpretations, it does not address incidental take in the first instance. In the spirit of fostering conservation consistent with the treaties on which the MBTA is based, Congress might have imposed more stringent limitations on take—but the prevailing opinion is that they did not go so far.

Even if the EO and the subsequent MOUs entered into by USFWS had some remaining relevance on matters of incidental take, they would not, standing alone, provide authority for indiscriminate



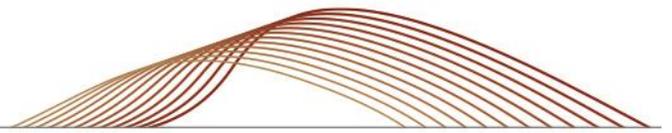
mitigation obligations. In the MOU with the Bureau of Land Management (“USFWS-BLM MOU”), for example, mitigation measures need only be implemented where incidental take has, or is likely to have, “a measurable negative effect on migratory bird *populations*.” This sets a high bar, as “population” is defined to mean “a group of distinct, coexisting, conspecific individuals, whose breeding site fidelity, migration routes, and wintering areas are temporally and spatially stable, sufficiently distinct geographically (at some time of the year), and adequately described so that the population can be effectively monitored to discern changes in its status.”<sup>38</sup> The USFWS-BLM MOU does not impose generic mitigation obligations related to migratory birds in general. Similarly, although the USFWS-BLM MOU commits BLM to “[i]ntegrate migratory bird conservation measures, as applicable, into . . . renewable (wind, solar, and geothermal) energy development NEPA mitigation,” as explained above, there is no legal basis for applying migratory bird conservation measures to renewable energy projects in light of the prevailing interpretation of the MBTA.<sup>39</sup>

## What Protections Remain

As recognized in the USFWS Guidance, executive authority to require monitoring and mitigation for impacts to migratory birds arises from environmental review statutes, like the National Environmental Policy Act, 42 U.S.C. §§ 4321 – 4247 (“NEPA”). “Birds are part of the human environment, and should be included in relevant environmental review processes as directed by NEPA.”<sup>40</sup> The Service has thus committed to continue to provide recommendations on “best management practices to protect migratory birds and their habitats . . . through [its] advisory role under other authorities, including NEPA . . . .”<sup>41</sup>

But even though NEPA remains unchanged, its implementation will be different in a world where the MBTA does not prohibit incidental take. NEPA requires that federal agencies analyze the potentially significant environmental impacts of their actions and consider mitigation measures as appropriate. Whether impacts are significant depends on their context and intensity. “Context” considers the setting of the proposed action, including the affected region, interests, and locality, while “intensity” refers to: the severity of impact, including both beneficial and adverse impacts; unique natural characteristics of the geographic area; the degree to which the effects of the action are likely to be highly controversial, uncertain, or pose unique or unknown risks; the degree to which the action may establish a precedent for future actions; the degree to which the action may adversely affect an endangered or threatened species or protected critical habitat; and whether the action threatens a violation of federal law imposed for the protection of the environment.<sup>42</sup> This last factor in particular has been a driving force behind the imposition of mitigation for migratory bird impacts and it no longer applies.

Especially when combined with other factors, the evolution in understanding the role of the MBTA should have a profound impact on project mitigation. For example, although there once was a time when utility-scale solar projects, theoretically, posed unknown risks to birds and their impacts arguably threatened to violate federal law prohibiting take (i.e., the MBTA), these circumstances no longer hold. The data has not proven this hypothesis. On top of this, an important pillar in the analysis—the presumption that the MBTA prohibits incidental take—has fallen away. The Solicitor’s interpretation undermines the rationale that supported prior conclusions that solar facilities might have a significant impact on the environment. There might be extreme instances where the NEPA intensity factors discussed above could justify a different site-specific conclusion, but in general, the impact of most projects on migratory birds should warrant, at most, a brief discussion of impacts and proportional mitigation.<sup>43</sup> The practice of imposing costly monitoring as a matter of course at all solar projects is simply not justified under NEPA without the MBTA hook.



The discussion of migratory bird impacts going forward should be significantly curtailed because NEPA requires that “[i]mpacts . . . be discussed in proportion to their significance”, that “[t]here shall be only brief discussion of other than significant issues”, and that an environmental impact statement should provide a “full and fair discussion of significant environmental impacts” that “focus[es] on significant environmental issues and . . . [avoids] the accumulation of extraneous background data . . . .”<sup>44</sup> The scope of mitigation that an agency can impose should similarly be limited by the well-established principle that mitigation must be proportional to the impacts of the project.<sup>45</sup>

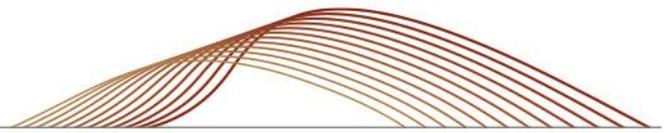
The recently-issued USFWS Guidance indicates that the Service agrees with these conclusions. Specifically, the Service has already committed to ensure that its comments, recommendations, and requirements on projects and other agency actions are not based on its authority under the MBTA to regulate incidental take. The Service, furthermore, “will not . . . request[] or require mitigation based upon incidental take concerns under the MBTA.”<sup>46</sup> Because the MBTA has been the primary source of authority for such comments and demands in the past (in cases where specially protected species are not involved), the Service cannot credibly continue to make the same recommendations in the future.

As has been the case in several other contexts, however, states—especially California—have initiated efforts to fill the void created by the revolutionary interpretations of federal environmental laws ushered in by the Trump administration. Notwithstanding the fact that Opinion M-37050’s rationale predated the administration and had its genesis in numerous decisions from the Courts of Appeal, California has moved quickly to consider a bill that aims to prohibit the incidental take or possession of any migratory non-game bird, except where the person or entity has committed to implement agency-approved best management practices for avoiding, minimizing, and mitigating take of such birds.<sup>47</sup> The bill does not address the practical problems of making every day lawful activities unlawful or how permitting might work where there are no known best management practices for migratory bird impacts, if any.

## Conclusion

After years of struggling with whether there can be any practical limits on liability if the MBTA is understood to encompass incidental take, several courts and the DOI have concluded that the MBTA “applies only to direct and affirmative purposeful actions that reduce migratory birds, their eggs, or their nests, by killing or capturing, to human control.”<sup>48</sup> For activities where population-level impacts have not been demonstrated, as is the case with utility-scale solar energy projects, among others, USFWS’s Guidance implementing these decisions, and other legal authorities, strongly suggest that costly mitigation requirements for impacts to common migratory birds will be significantly curtailed in the future as a result. State efforts to compensate for relaxed federal practices or a future swing back to interpreting the MBTA to provide regulatory authority could effectively resurrect a legal basis for imposing mitigation. But for the time being, relevant authorities require that USFWS modify its practices and best management practices, conservation measures and mitigation will largely be implemented only on a truly voluntary basis.





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<sup>1</sup> 16 U.S.C. § 703(a).

<sup>2</sup> 50 C.F.R. § 10.12 & 10.13 (listing all covered birds).

<sup>3</sup> *Id.* § 707(a), (b); 18 U.S.C. §§ 3571(d), 3561(c)(2), 3571(c)(3); 50 C.F.R. § 10.12.

<sup>4</sup> See *Andrus v. Allard*, 444 U.S. 51, 56, 57, 59 – 60 (1979) (describing the statutory prohibitions of the MBTA as “comprehensive,” “exhaustive,” “carefully enumerated,” “expansive,” and “sweepingly framed”).

<sup>5</sup> 113 F.3d 110 (8th Cir. 1997).

<sup>6</sup> 952 F.2d 297 (9th Cir. 1991).

<sup>7</sup> 801 F.3d 477 (5th Cir. 2015).

<sup>8</sup> M-37050, *The Migratory Bird Treaty Act Does Not Prohibit Incidental Take* (Dec. 22, 2017), at <https://www.doi.gov/sites/doi.gov/files/uploads/m-37050.pdf>.

<sup>9</sup> M-37041, *Incidental Take Prohibited Under the Migratory Bird Treaty Act* (Jan. 10, 2017) (suspended and temporarily withdrawn on February 6, 2017, [https://www.doi.gov/sites/doi.gov/files/uploads/temp\\_suspension\\_20170206.pdf](https://www.doi.gov/sites/doi.gov/files/uploads/temp_suspension_20170206.pdf)).

<sup>10</sup> 16 U.S.C. § 703(a).

<sup>11</sup> See *United States v. Moon Lake Electric Ass’n, Inc.*, 45 F. Supp. 2d 1070, 1082 – 83 (D. Colo. 1999) (discussing prosecutions for non-hunting violations that began in the 1970s); *United States v. FMC Corp.*, 572 F.2d 902, 905 (2nd Cir. 1978) (noting lack of decisional authority on scope of MBTA beyond hunting cases).

<sup>12</sup> 16 U.S.C §§ 1532(19), 1539(a); 50 C.F.R. § 17.3.

<sup>13</sup> *FMC Corp.*, 572 F.2d at 907 – 08.

<sup>14</sup> *Moon Lake Elec. Ass’n*, 45 F. Supp. 2d at 1074 – 75; *United States v. Apollo Energies, Inc.*, 611 F.3d 679, 684 (10th Cir. 2010).

<sup>15</sup> *Ctr. for Biological Diversity v. Pirie*, 191 F. Supp. 2d 161 (D.D.C. 2002).

<sup>16</sup> *Apollo Energies, Inc.*, 611 F.3d 679.

<sup>17</sup> *Moon Lake Elec. Ass’n*, 45 F. Supp. 2d 1070.

<sup>18</sup> *United States v. Corbin Farm Serv.*, 444 F. Supp. 510 (E.D. Cal. 1978).

<sup>19</sup> *CITGO Petroleum Corp.*, 801 F.3d at 493 – 94; see also *FMC Corp.*, 572 F.2d at 907 – 08 (cautioning against an overly-broad interpretation of the Act, emphasizing that the MBTA does not criminalize incidental take “without limitation” and urging prosecutors and courts to interpret the Act in a manner that does not “offend reason and common sense”).

<sup>20</sup> *Seattle Audubon Soc’y*, 952 F.2d at 302 – 03; *CITGO Petroleum Corp.*, 801 F.3d at 489 – 90; but see *Seattle Audubon Soc’y*, 952 F.2d at 303 (indicating that “take” may include ultra-hazardous activities that foreseeably harm migratory birds).

<sup>21</sup> *CITGO Petroleum Corp.*, 801 F.3d at 488 – 89.

<sup>22</sup> *Id.* at 492.

<sup>23</sup> See Opinion M-37050 at pp. 1 – 2, 39 – 41.

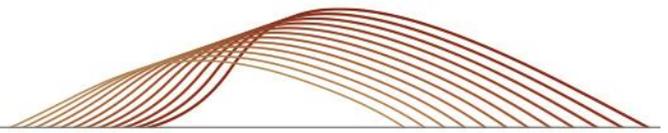
<sup>24</sup> Br. of Defendant at 31, *Pub. Employees for Env’tl. Responsibility v. Beaudreu*, No. 10-1067 (D.D.C. Dec. 7, 2012).

<sup>25</sup> *Id.* at 38.

<sup>26</sup> *Id.*

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- <sup>27</sup> OLE, *Enforcement of the [MBTA] as it Relates to Industry and Agriculture* (OLE Directive B53) (available at <http://katubim.s3.amazonaws.com/OLE%20Memo%20Re%20MBTA%20Enf%20Discretion%2010-2012.pdf>); see also FWS, *Land-Based Wind Energy Guidelines* (Mar. 23, 2012).
- <sup>28</sup> Opinion M-37050 at p. 2.
- <sup>29</sup> 209 DM 3.2(A)(11).
- <sup>30</sup> Solicitor's Opinion M-37008, *Binding Nature of Solicitor's Opinions on the Office of Hearings and Appeals* (2001); 212 DM 13.8(C).
- <sup>31</sup> EO 13186, 66 Fed. Reg. 3853, 3855 (Jan. 17, 2001).
- <sup>32</sup> Opinion M-37050 at p. 29.
- <sup>33</sup> 66 Fed. Reg. at 3856.
- <sup>34</sup> Opinion M-37050 at p. 32 n.172.
- <sup>35</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952).
- <sup>36</sup> *Youngstown*, 343 U.S. at 637 (Jackson, J. concurring).
- <sup>37</sup> M-Opinion at p. 38 ("[I]t is not clear that there is any authority to require minimizing or mitigating actions that balance the environmental harm from the taking of migratory birds with the other societal goals, such as the production of wind or solar energy.").
- <sup>38</sup> MOU between the U.S. Department of the Interior Bureau of Land Management and the U. S. Fish and Wildlife Service To Promote the Conservation of Migratory Birds (Apr. 12, 2010), <https://www.fws.gov/migratorybirds/pdf/management/moublm.pdf> (sec. IX, definitions).
- <sup>39</sup> *Id.* at para. VII.I.
- <sup>40</sup> Guidance at p. 1.
- <sup>41</sup> Guidance at p. 2.
- <sup>42</sup> 40 C.F.R. § 1508.27(b)(1) – (10).
- <sup>43</sup> 40 C.F.R. § 1502.2.
- <sup>44</sup> 40 C.F.R. §§ 1502.1, 1502.2.
- <sup>45</sup> See generally *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (establishing that mitigation demands must be roughly proportional to the impact of the development).
- <sup>46</sup> Guidance at p. 2.
- <sup>47</sup> Assem. Bill 2627, 2017 – 2018 Reg. Sess. (Apr. 17, 2018) (Kalra).
- <sup>48</sup> Opinion M-37050 at p. 41.