

Date of Hearing: March 25, 2025

ASSEMBLY COMMITTEE ON WATER, PARKS, AND WILDLIFE

Diane Papan, Chair

AB 454 (Kalra) – As Introduced February 6, 2025

SUBJECT: Migratory birds: California Migratory Bird Protection Act

SUMMARY: Reinstates the prohibition of take or possession of any migratory nongame bird, or any part of any migratory nongame bird, as designated in January 1, 2017 in the federal Migratory Bird Treaty Act (MBTA). Specifically, **this bill:**

- 1) Makes it unlawful to take or possess:
 - a) Any migratory nongame bird, or any part of a migratory nongame bird, as designated before January 1, 2017 in the federal MBTA; or
 - b) Any additional migratory nongame bird, or any part of a migratory nongame bird, which may be designated after January 1, 2017 in the federal MBTA.
- 2) Allows take or possession as provided by the rules and regulations adopted by the U.S. Secretary of the Interior before January 1, 2017 under the MBTA or subsequent rules and regulations, unless those subsequent rules and regulations are inconsistent with the Fish and Game Code (FGC).
- 3) States that no reimbursement is required under this law.

EXISTING LAW:

- 1) Provides for protection of migratory birds, under the federal MBTA, as specified. The MBTA authorizes states and territories of the United States to make and enforce laws or regulations that give further protection to migratory birds, their nests, and eggs [United States Code (U.S.C.) Title 16 § 703–712].
- 2) Prohibits the taking or possession of any migratory nongame bird, or part of any migratory nongame bird, as designated in the MBTA, except as provided by rules and regulations adopted by the United States Secretary of the Interior under provisions of the act (FGC § 3513).
- 3) Allows the Fish and Game Commission (the Commission) to annually adopt regulations pertaining to migratory birds to conform with or to further restrict the rules and regulations prescribed pursuant to the MBTA (FGC § 355).
- 4) Defines nongame birds as all birds occurring naturally in California that are not resident game birds, migratory game birds, or fully protected birds (FGC § 3800).
- 5) States that it is unlawful to take any nongame bird except as provided in the FGC or in accordance with regulations of the Commission or, when relating to mining operations, a mitigation plan approved by the Department of Fish and Wildlife (DFW) (FGC § 3800).

- 6) Makes it unlawful to take a bird, mammal, fish, reptile, or amphibian, except as provided in the FGC and its regulation (FGC § 2000).
- 7) Defines “take” as hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture, or kill (FGC § 86).

FISCAL EFFECT: Unknown. This bill is keyed fiscal.

COMMENTS:

- 1) **Purpose of this bill.** This bill makes permanent the California Migratory Bird Protection Act. According to the author, “California is home to a rich and critical diversity of migratory birds, many of which fulfill important ecological, cultural, and economic functions. In 2019, the California Migratory Bird Protection Act was enacted to continue enforcing effective migratory bird protections in the face of potential federal rollbacks. Unfortunately, the bill has since been sunset. Without it, the people of California could lose access to the hundreds of species of migratory birds that bring biodiversity to residential areas and urban centers and generate millions of dollars for the bird-watching industry. [This bill] will make the California Migratory Bird Protection Act permanent, ensuring that California will continue to preserve important migratory bird populations for generations to come.”
- 2) **Background.** Birds are considered great indicators of environmental health and ecosystem integrity. In North America, research indicates a 29% net loss of birds compared to their 1970 abundance.¹ There is an estimated net loss of 2.5 billion individuals among the 419 native migratory species analyzed. Habitat loss, climate change, unregulated harvest, and other forms of human-caused mortality contribute to these losses.

According to 2017 U.S. Fish and Wildlife Service (USFWS) data, the top human-related threats to birds in the United States are (an estimate of birds per year):

- Cats: 2.4 billion;
- Collisions with building glass: 599 million birds;
- Collisions with vehicles: 214.5 million birds;
- Poisons: 72 million birds;
- Collisions with electrical lines: 25.5 million birds;
- Collisions with communications towers: 6.6 million birds;
- Electrocutions: 5.6 million birds;
- Oil pits: 750,000 birds; and
- Collisions with land-based wind turbines: 234,000 birds.

Other forms of alternative energy, such as solar farms and offshore wind, also kill migratory birds, but reliable numbers are not available.

Examples of best practices currently used by industry to prevent the take of migratory nongame birds include considerations for site location, construction outside of known

¹ Kenneth V. Rosenberg *et al.*, Decline of the North American avifauna. *Science* **366**, 120–124 (2019). DOI:[10.1126/science.aaw1313](https://doi.org/10.1126/science.aaw1313)

breeding seasons, burial of power lines, use of high visibility marking devices, and minimizing the amount of lighting at the site.

Migratory Bird Treaty Act. The MBTA is a United States federal law, first enacted in 1916 to implement the convention for the protection of migratory birds between the United States and Great Britain (acting on behalf of Canada). The statute makes it illegal for anyone to take, possess, import, export, transport, sell, purchase, barter, or offer for sale, purchase, or barter, any migratory bird, or the parts, nests, or eggs of such a bird except under the terms of a valid permit issued pursuant to federal regulations. As of the most recent update of the list on July 31, 2023, the MBTA includes 1,106 species of birds. According to the National Audubon Society, the MBTA is credited with preventing the extinction of the Snowy Egret, Wood Duck, and Sandhill Crane.

Some exceptions to the act, including the eagle feather law, are enacted in federal regulations. USFWS issues permits for activities otherwise prohibited under the act, including permits for taxidermy, falconry, propagation, scientific and educational use, and depredation (e.g., the killing of geese near an airport when they pose a danger to aircraft).

FGC § 3513 codifies the MBTA in state law. This section of code currently states: *It is unlawful to take or possess any migratory nongame bird as designated in the federal Migratory Bird Treaty Act (16 U.S.C. Sec. 703 et seq.), or any part of a migratory nongame bird described in this section, except as provided by rules and regulations adopted by the United States Secretary of the Interior under that federal act.* This section became operative on January 20, 2025. This bill proposes to restore this section of the FGC to the language that became inoperative on January 20, 2025.

This bill allows the take or possession of migratory birds in accordance with the MBTA as implemented before January 1, 2017, or after that date as long as those rules and regulations are in accordance with the FGC. Current law (FGC § 355) allows the Commission to annually adopt regulations pertaining to migratory birds to conform with or to further restrict the rules and regulations prescribed pursuant to the MBTA.

What is “Take”? Take is defined in the FGC as hunting, pursuing, catching, capturing, or killing, or attempting to hunt, pursue, catch, capture, or kill. This is different than the definition under the federal Endangered Species Act, where take is defined as harassing, harming, pursuing, hunting, shooting, wounding, killing, trapping, capturing, or collecting, or attempting to engage in any such conduct. California does not have a state equivalent for harassing or harming. Incidental take describes the take of an animal that results from, but is not the purpose of, an activity.

Why January 1, 2017? The U.S. Department of the Interior (DOI) Office of the Solicitor has issued two legal opinions involving the interpretation of the MBTA. On January 10, 2017, opinion M-37041 stated that the prohibition on taking and killing migratory birds under the MBTA applies broadly to any activity, by any means, and in any manner. Therefore, those prohibitions can and do apply to direct incidental take. This opinion was suspended and withdrawn on February 6, 2017.

On December 22, 2017, opinion M-37050 concluded that based on the text, history, and purpose of the MBTA, the prohibition on take under the MBTA applies “only to direct and affirmative purposeful actions that reduce migratory birds, their eggs, or their nests, by

killing or capturing.” According to the opinion, while the MBTA does contemplate the issuance of permits authorizing the taking of wildlife, it requires such permits to be issued by regulation. No permit scheme is generally available to permit incidental take, so most potential violators have no mechanism to ensure that their actions comply with the law. Because of opinion M-37050, incidental take was no longer prohibited under the MBTA.

Because of this opinion, the USFWS told industry and conservation groups that they were no longer able to enforce on incidences of incidental take. Specifically, this meant that DOI would be unable to pursue penalties for harm caused by oil spills or activities that caused accidental harm under the MBTA (note: some federal agencies collaborate through the Natural Resource Damage Assessment to hold entities accountable for environmental harms; however, this program is not specific to birds). Incidental take has rarely been prosecuted under the MBTA, but notable exceptions include charges against three oil companies with the taking of migratory birds that were found in and around their oil reserve pits [*United States v Brigham Oil & Gas L.P.* U.S. District Court of North Dakota, Case 4:11-po-00005-DLH (2012)]. The 2010 Deepwater Horizon oil spill resulted in BP being fined \$100 million under the MBTA for the deaths of an estimated one million birds.

In May 2018, several conservation groups filed a lawsuit against DOI to challenge the Trump Administration’s interpretation of the MBTA [*National Audubon Society, et al. vs. U.S. Dept. of the Interior, et al.*, U.S. Dist. Court (SDNY), Case No. 1:18-cv-04601]. In September 2018, the state of California joined seven other states in filing a separate lawsuit in the Southern District of New York to challenge the Trump Administration’s MBTA interpretation and actions. The suit asserts that the Administration’s revised opinion and planned pullback of the MBTA is “arbitrary, capricious, an abuse of discretion and in violation of the law” [see *State of New York, et al. vs. U.S. Dept. of the Interior, et al.*, U.S. Dist. Court (SDNY), Case No. 1:18-cv-08084].

These lawsuits were joined and on August 2020 the U.S. District Judge Valerie Caproni found in favor of the plaintiffs, thus restoring the interpretation that the MBTA includes incidental take [*Natural Resources Defense Council v. U.S. Dep’t of the Interior*, 478 F. Supp. 3d 469 (2020)]. In the opening line of the ruling, Judge Caproni referenced Harper Lee’s “To Kill a Mockingbird” stating, “It is not only a sin to kill a mocking bird, it is also a crime.” Judge Caproni granted a motion to vacate DOI’s Solicitor Opinion M-37050, which was permanently withdrawn on March 8, 2021 (opinion M-37065).

The first 100 days. The first 100 days of this federal administration have included numerous efforts to undo actions of the previous administration. This includes a memorandum on February 28, 2025 requiring all M-opinions (opinions M-37065 through M-37084) from the previous administration to be placed under a “Suspension Review.”² This includes the opinion that addresses incidental take in the MBTA, as noted above. While these M-opinions are reviewed, units of the DOI are instructed to not rely on those opinions “as authoritative and binding without first consulting with the Office of the Solicitor for guidance.”

CDFW enforcement. Although CDFW does not cite under the federal MBTA, they do cite under regulation or from FGC § 2000 and § 3513. CDFW reports that the vast majority of

² Solicitor’s Opinions. <https://www.doi.gov/solicitor/opinions>

these are for illegal take of waterfowl that may result in an estimate of \$100–\$1,000 per violation, depending on the case and court. Since 2021, the Law Enforcement Division of CDFW’s Office of Spill Prevention and Response has filed four cases related to oil spills under FGC § 2000 and § 3513.

- 3) **Proposed committee amendments.** The federal list of birds protected under the federal MBTA can be found under the Code of Federal Regulations Title 50 Part 10.13. This list was updated in 2023 to both add and remove species and the change names to conform to accepted use by the scientific community. To reflect this revision, the Committee may wish the author to accept the following amendment:

Amendment 1– Amend FGC § 3513:

It is unlawful to take or possess any migratory nongame bird as designated in the federal Migratory Bird Treaty Act (16 U.S.C. Sec. 703 et seq.) before January 1, ~~2017~~, 2025, any additional migratory nongame bird that may be designated in that federal act after that date, or any part of a migratory nongame bird described in this section, except as provided by rules and regulations adopted by the United States Secretary of the Interior under that federal act before January 1, ~~2017~~, 2025, or subsequent rules or regulations adopted pursuant to that federal act, unless those rules or regulations are inconsistent with this code.

- 4) **Arguments in support.** A coalition of environmental organizations write in support of this bill, which they claim is important due to the decline of avian populations and rollbacks of protections at the federal level. “[This bill] would ensure that existing California law will continue to protect native and migratory birds regardless of actions taken by the federal government to weaken oversight and protection for birds. Additionally, this bill would allow California to set a higher bar than protections offered by federal law.”
- 5) **Related legislation.** AB 454 (Kalra), Chapter 349, Statutes 2019, was substantially similar to this bill and makes it unlawful to take or possess any migratory nongame bird as designated in the MBTA before January 1, 2017, any additional migratory nongame bird designated after that date, or any part of those birds; except as provided by rules and regulations adopted by the U.S. Secretary of the Interior under the federal act before January 1, 2017, or subsequent rules or regulations adopted pursuant to the federal act, unless those rules or regulations are inconsistent with the Fish and Game Code.

AB 2627 (Kalra) of 2018 would have permitted an entity to take a migratory nongame bird if the take is incidental to otherwise lawful activity and the entity self-certifies their compliance with best management practices for avoiding, minimizing, and mitigating take of migratory nongame birds. The bill passed this committee 12 ayes to 4 noes, with 1 not voting. AB 2627 was held in Senate Appropriations.

Chapter 1972, Statutes of 1957, codified the MBTA in state law.

REGISTERED SUPPORT / OPPOSITION:

Support

Audubon California (Sponsor)
Alianza Coachella Valley

American River Conservancy
California Institute for Biodiversity
California Native Plant Society, Alta Peak Chapter
Center for Biological Diversity
Defenders of Wildlife
Endangered Habitats League
Environmental Protection Information Center
Friends of The Inyo
Karmic Action Redistribution Management Agency
Natural Resources Defense Council
Planning and Conservation League
Sequoia Riverlands Trust
Sierra Club of California
Sierra State Parks Foundation

Opposition

None on file

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