



Environmental Data & Governance Initiative Website Monitoring Report

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Removals of Access to Migratory Bird Treaty Act and Incidental Take Resources on the DOI's U.S. Fish and Wildlife Service Website

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Removals of Access to Migratory Bird Treaty Act and Incidental Take Resources on the DOI's U.S. Fish and Wildlife Service Website

Overview

The U.S. Department of Interior's (DOI) U.S. Fish and Wildlife Service (FWS) has removed links and content related to the Migratory Bird Treaty Act and to "Incidental Take" from three webpages in the FWS domain. The FWS "Incidental Take" page itself has also been removed. Additionally, a "public involvement initiative" website of FWS, birdregs.org, that focused on the incidental take of migratory birds, is no longer accessible. The website changes described in this report occurred between December 28, 2017 and April 6, 2018.

Description of Changes

[The Migratory Bird Treaty Act of 1918](#) (MBTA) implemented the 1916 Convention between the U.S. and Great Britain (for Canada) for the protection of migratory birds. Later amendments implemented treaties between the U.S. and Mexico, the U.S. and Japan, and the U.S. and the Soviet Union (now Russia). The original statute established a Federal prohibition, unless permitted by regulations, to "pursue, hunt, take, capture, kill, attempt to take, capture or kill, possess, offer for sale, sell, offer to purchase, purchase, deliver for shipment, ship, cause to be shipped, deliver for transportation, transport, cause to be transported, carry, or cause to be carried by any means whatever, receive for shipment, transportation or carriage, or export, at any time, or in any manner, any migratory bird, included in the terms of this Convention . . . for the protection of migratory birds . . . or any part, nest, or egg of any such bird." (16 U.S.C. § 703). The MBTA is administered by the Department of Interior, acting through the Fish and Wildlife Service.

Beginning in late December 2017 through early April 2018, webpages in the FWS domain associated with [Energy Development](#), [Habitat Conservation](#) and [Birds](#) were altered to remove links to the Migratory Bird Treaty Act and to resource pages relating to "incidental take."¹ The FWS "Incidental Take" page itself has also been removed. In addition, all content, images and links were removed on the BirdRegs.org website--referenced in the webpage footer as a "public involvement initiative" of FWS and in the header as "An open public conversation about the incidental take of migratory birds"; the birdregs.org website was subsequently removed. While information on the Migratory Bird Treaty Act and Incidental Take still exists on the FWS website, access to them has been reduced.

¹ A FWS online glossary <https://www.fws.gov/midwest/Endangered/glossary/index.html> includes the following definitions of "Take" and "Incidental Take": 'Take - from Section 3(18) of the Federal Endangered Species Act: "The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.'" 'Incidental Take: Take that results from, but is not the purpose of, carrying out an otherwise lawful activity.'

These changes are significant in light of [Memorandum M-37050](#), issued by the DOI Solicitor's office on December 22, 2017 and titled "The Migratory Bird Treaty Act Does Not Prohibit Incidental Take", which concludes that the MBTA's "prohibitions on pursuing, hunting, taking, capturing, killing, or attempting to do the same apply only to affirmative actions that have as their purpose the taking or killing of migratory birds, their nests, or their eggs." Memorandum M-37050 reversed the January 10, 2017 DOI Solicitor opinion, [Memorandum M-37041](#), issued in the final days of the previous administration, which states "In sum, the MBTA's broad prohibition on taking and killing migratory birds by any means and in any manner includes incidental taking and killing."² (See Appendix for additional information and actions related to these opinions.)

The notable changes to the five webpages are summarized here:

- 1. Removed link text and links to Migratory Bird Treaty Act from two FWS Ecological Services website pages**
 - a. Removed link text and link to "Migratory Bird Treaty Act" page from a page listing Energy Development Permits, Policies, and Authorities administered by the FWS (Page 1)
 - b. Removed link text and link to "Migratory Bird Treaty Act" page from a page listing the authorities under which FWS biologists carry out conservation planning work (Page 2)
- 2. Removed menu text, menu links, and webpage related to Incidental Take from FWS Birds website**
 - a. Removed link text and links on the FWS Birds website to its "Incidental Take" page from the Management menu and the Procedures/Policies menu (Page 3)
 - b. Removed "Incidental Take" webpage, subtitled "MIGRATORY BIRD PROGRAM PROVIDES VOLUNTARY GUIDANCE TO HELP PROJECT PROPONENTS REDUCE INCIDENTAL TAKE" (Page 4)
- 3. Removed access to resources on Incidental Take from Birdregs.org website**
 - a. Removed all content, links and images on BirdRegs.org webpage including the header "An open public conversation about the incidental take of migratory birds;" birdregs.org website subsequently was rendered unavailable. (Page 5)

² Memorandum M-37041, along with three other Solicitor opinions, [was suspended and temporarily withdrawn](#) by the Acting Secretary of the Interior on February 6, 2017, pending review by agency officials, until the issuance of M-37050 on December 22, 2017. The DOI "Solicitor's Opinions" webpage <https://www.doi.gov/solicitor/opinions/> now includes only the brief suspension memo under its M-37041 listing, not the M-37041 Opinion itself.

Table of Contents

	Page Title	URL	Status
Page 1	Energy Development Laws and Policies	https://www.fws.gov/ecological-services/energy-development/laws-policies.html	Link Removed
Page 2	Conservation Planning	https://www.fws.gov/ecological-services/habitat-conservation/cp.html	Link Removed
Page 3	Birds	https://www.fws.gov/birds/	Links Removed
Page 4	Incidental Take	https://www.fws.gov/birds/policies-and-regulations/incidental-take.php	Links and Page Removed
Page 5	Birdregs.org	http://birdregs.org/	All Content and Links Removed; Website Removed
Appendix: Summary of Recent Actions Relating to the Migratory Bird Treaty Act			

Detailed Description of Changes

Page 1: Energy Development Laws and Policies

- URL:
<https://www.fws.gov/ecological-services/energy-development/laws-policies.html>
- Side-by-side View: 11/7/18 - 2/27/18
- Change occurred between **February 26, 2018 8:38 PM ET** and **February 27, 2018 8:47 PM ET**

Screenshot 1.1

(1.1a) Removed link text and link URL to “Migratory Bird Treaty Act (MBTA)” page from a list of Energy Development Permits, Policies, and Authorities administered by the FWS. The Migratory Bird Treaty Act page (last updated December 3, 2017) still exists at <https://www.fws.gov/birds/policies-and-regulations/laws-legislations/migratory-bird-treaty-act.php>.

The screenshot shows a side-by-side comparison of the U.S. Fish & Wildlife Service's "Energy Development" page. The left panel shows the page as of November 7, 2017, and the right panel shows it as of February 27, 2018. The page title is "Ecological Services | Energy Development | Permits, Policies, and Authorities". The main heading is "Energy Development". The page content includes an overview, an energy project review, and a list of laws administered by the FWS. In the 2017 version, the list includes the Endangered Species Act (ESA), Bald and Golden Eagle Protection Act (BGEPA), Migratory Bird Treaty Act (MBTA), and Fish and Wildlife Coordination Act (FWCA). In the 2018 version, the MBTA link has been removed from the list. The text below the list states: "A variety of environmental assessments and permits may be considered when the Service reviews energy projects." and "Energy developers can apply for Incidental Take Permits (ITP) if a federally endangered or threatened species, or a bald or golden eagle, is likely to be affected by a".

Internet Archive's Wayback Machine: previous version from [February 27, 2018](#) (UTC) and current version from [February 28, 2018](#) (UTC)

Page 2: Conservation Planning

- URL: <https://www.fws.gov/ecological-services/habitat-conservation/cp.html>
- Side-by-side View: 11/7/2017 - 2/28/2018
- Change occurred between **February 26, 2018 8:38 PM ET** and **February 27, 2018 8:47 PM ET**

Screenshot 2.1

(2.1a) Removed link text and link URL to “Migratory Bird Treaty Act ” page from a list of the authorities under which FWS biologists carry out conservation planning work. The Migratory Bird Treaty Act page (last updated December 3, 2017) still exists at <https://www.fws.gov/birds/policies-and-regulations/laws-legislations/migratory-bird-treaty-act.php>.

Ecological Services | Conservation Planning
<https://www.fws.gov/ecological-services/habitat-conservation/cp.html>

View this diff in Versionista (account: versionista2) Remove formatting

From: November 7, 2017, 4:29:49 AM PST Comparison: Side-by-Side Rendered To: February 28, 2018, 1:02:41 PM PST

U.S. Fish & Wildlife Service
Conservation Planning

ES Home | About Us | Species | **Wildlife and Habitat Conservation** | Development and Energy | FWS Regions | L

ES Home » Conservation Planning

Overview

The U.S. Fish and Wildlife Service (Service) works directly with other federal agencies and programs, as well as the American public, on infrastructure development projects to protect the environment and preserve our nation's biological resources. Field biologists in all 50 states assist project proponents, planners, and agency personnel in developing plans that conserve, restore, or enhance plant and animal species, while accomplishing the objectives of proposed development. Our biologists in the field fulfill numerous duties under multiple authorities, including the [Endangered Species Act](#), [Clean Water Act](#), [Federal Power Act](#), [Fish and Wildlife Coordination Act](#), [National Environmental Policy Act](#), [Migratory Bird Treaty Act](#), and [Bald and Golden Eagle Protection Act](#). Biologists review and provide recommendations on plans and development designs, craft mitigation plans, provide expertise in wildlife and habitat science, and

Internet Archive's Wayback Machine: previous version from [February 27, 2018](#) (UTC) and current version from [February 28, 2018](#) (UTC)

Page 3: Birds

- URL: <https://www.fws.gov/birds/>
- Changes occurred between **December 28, 2017 5:45 PM ET** and **March 28, 2018 7:33 PM ET**

Screenshot 3.1

(3.1a) Removed “Managing Incidental Take” link text and link URL from “Management” dropdown menu. Not pictured: removed “Managing Incidental Take” link text and link URL from the sidebar of the [“Management” page of the FWS Birds website](#). The links had directed to the “Incidental Take” webpage of the FWS Policies & Regulations subdomain of the FWS Birds website (see [Page 4](#) of this report).

The screenshot shows the FWS Birds website interface. At the top, there is a navigation bar with the U.S. Fish & Wildlife Service logo and the text "U.S. Fish & Wildlife Service" and "Migratory Bird Program Conserving America's Birds". Below this is a main navigation menu with links for "BIRD ENTHUSIASTS", "SURVEYS & DATA", "MANAGEMENT", "GRANTS", "EDUCATION", and "GET INVOLVED". Under "MANAGEMENT", a dropdown menu is open, listing the following items: "Managed Species", "Managing Threats to Birds", "Managing Incidental Take", "Project Assessment Tools & Guidance", "Adaptive Harvest Management", "Flyways", "Bird Management Plans", "Bird Conservation Partnerships & Initiatives", and "Training". The background of the page features a large image of a flock of birds flying over a body of water. At the bottom left, there is a breadcrumb trail: "HOME > MANAGEMENT".

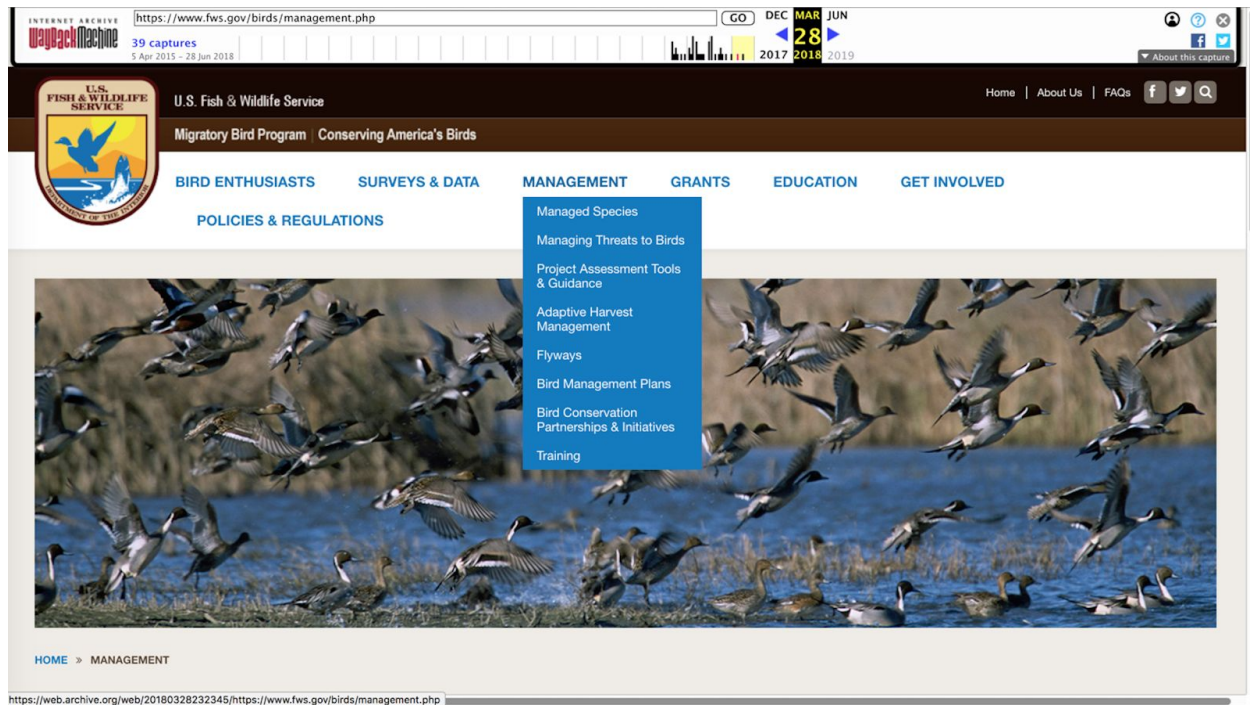
U.S. Fish & Wildlife Service
Migratory Bird Program Conserving America's Birds

BIRD ENTHUSIASTS SURVEYS & DATA MANAGEMENT GRANTS EDUCATION GET INVOLVED

POLICIES & REGULATIONS

Managed Species
Managing Threats to Birds
Managing Incidental Take
Project Assessment Tools & Guidance
Adaptive Harvest Management
Flyways
Bird Management Plans
Bird Conservation Partnerships & Initiatives
Training

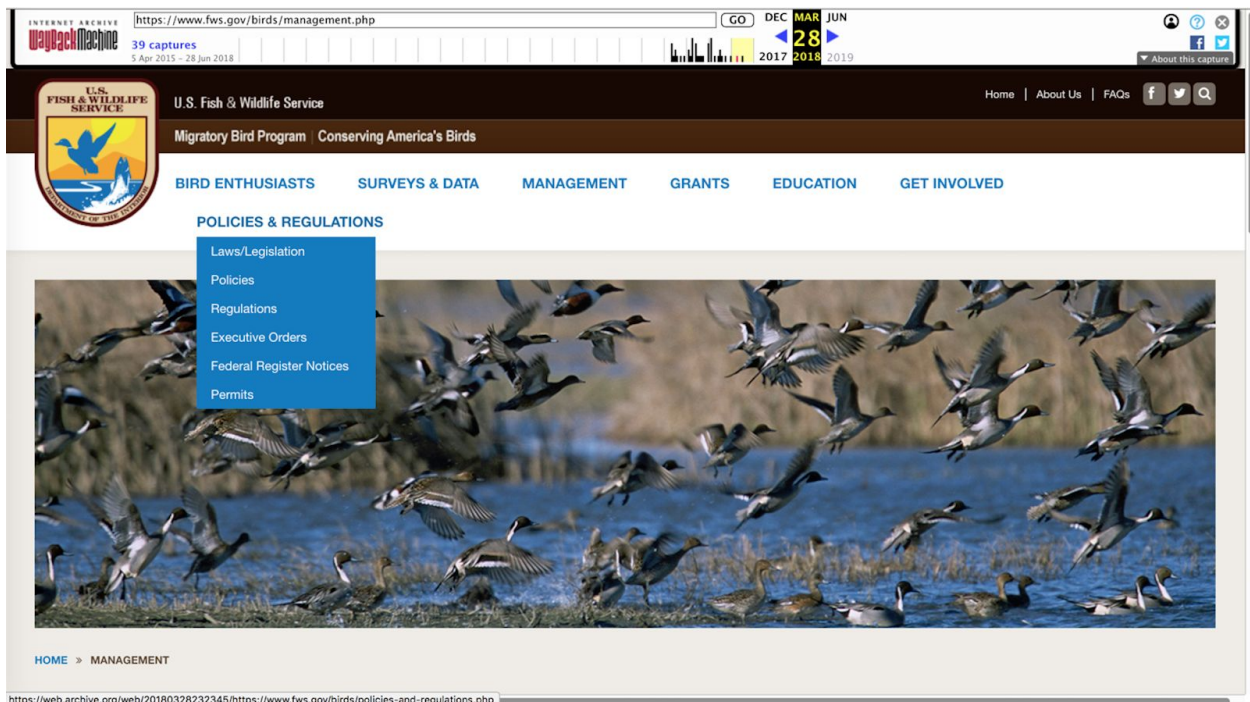
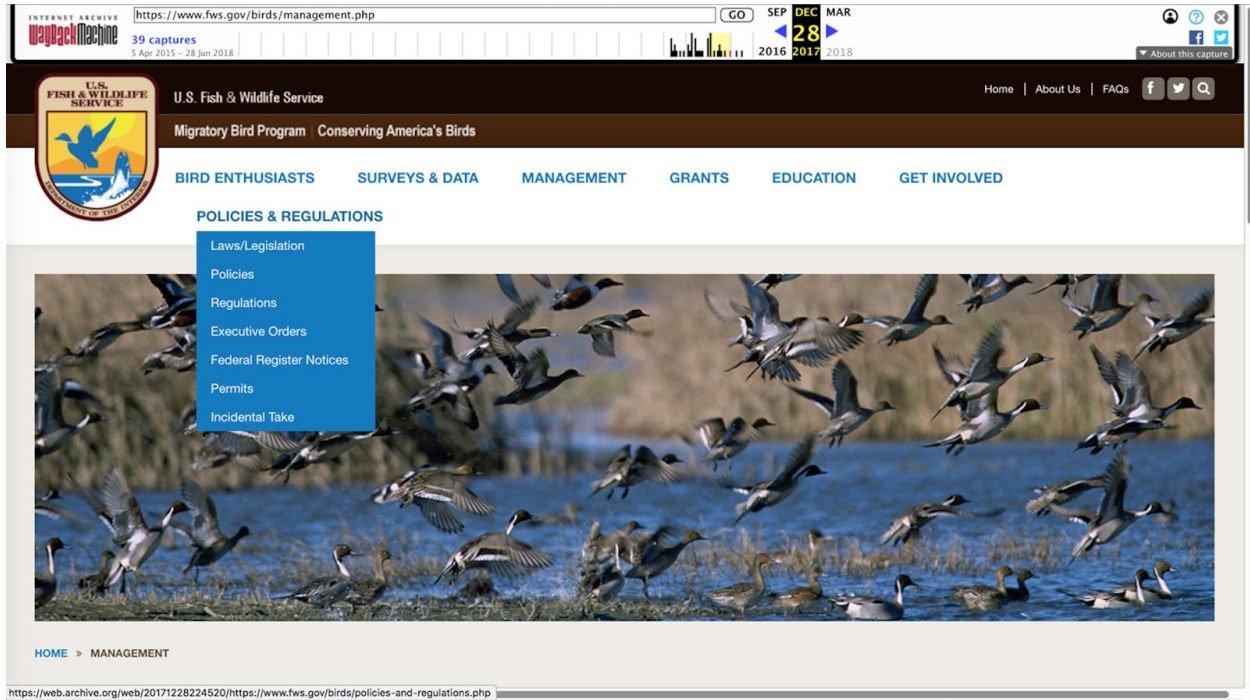
HOME > MANAGEMENT



Internet Archive’s Wayback Machine: previous version from [December 28, 2017](https://web.archive.org/web/20171228000000/https://www.fws.gov/birds/management.php) (UTC) and current version from [March 28, 2018](https://web.archive.org/web/20180328232345/https://www.fws.gov/birds/management.php) (UTC)

Screenshot 3.2

(3.2a) Removed “Incidental Take” link text and link URL from “Policies and Regulations” dropdown menu. Not pictured: removed “Incidental Take” link text and link URL from the sidebar of the [“Policies and Regulations” page of the FWS Birds website](#). The links had directed to the “Incidental Take” webpage of the FWS Policies & Regulations subdomain of the FWS Birds website (see [Page 4](#) of this report).



Internet Archive's Wayback Machine: previous version from [December 28, 2017](https://www.fws.gov/birds/management.php) (UTC) and current version from [March 28, 2018](https://www.fws.gov/birds/management.php) (UTC)

Page 4: Incidental Take

- URL: <https://www.fws.gov/birds/policies-and-regulations/incidental-take.php>
- Change occurred between **December 28, 2017 5:45 PM ET** and **January 29, 2018 9:23 PM ET**

Screenshot 4.1

(4.1a) Removed webpage titled “Incidental Take” and subtitled “MIGRATORY BIRD PROGRAM PROVIDES VOLUNTARY GUIDANCE TO HELP PROJECT PROPONENTS REDUCE INCIDENTAL TAKE”; URL now leads to a page with the notice “[404 Error/Page not found.](#)” Internet Archive Wayback Machine links to last available Incidental Take page on [December 28, 2017](#).


The screenshot shows the Internet Archive Wayback Machine interface for the URL <https://www.fws.gov/birds/policies-and-regulations/incidental-take.php> as of December 28, 2017. The page content includes:

- Navigation:** HOME > POLICIES & REGULATIONS > INCIDENTAL TAKE
- Left Sidebar:** A menu with categories: POLICIES & REGULATIONS (selected), LAWS/LEGISLATION, POLICIES, REGULATIONS, EXECUTIVE ORDERS, FEDERAL REGISTER NOTICES, PERMITS, and INCIDENTAL TAKE.
- Main Content:**
 - Section Header:** Incidental Take
 - Subheader:** MIGRATORY BIRD PROGRAM PROVIDES VOLUNTARY GUIDANCE TO HELP PROJECT PROPONENTS REDUCE INCIDENTAL TAKE
 - Text:** Migratory birds are susceptible to both natural and human-caused sources of injury and mortality. Millions of birds die each year from collisions with human-made structures, electrocutions, chemicals, and other similar causes.
 - Text:** These sources of mortality are becoming more prevalent across the landscape and are contributing to continental-scale population declines for many species. These mortality factors are often made even worse by landscape and habitat alterations resulting from changes in climate.
 - Text:** The Migratory Bird Treaty Act (MBTA) provides the primary legal protection for most birds. The Act currently protects 1,027 bird species, all of which are susceptible to anthropogenic threats.
 - Text:** The Service has developed, and continues to develop, voluntary guidance that helps project proponents reduce their incidental take of these species. For more information on available voluntary guidance please visit our Guidance Documents page.
- Right Column:**
 - Section Header:** WHAT MATTERS MOST?
 - Text:** Migratory bird resources just for you:
 - Form:** I am select one... (dropdown menu)
 - Section Header:** FEATURED NEWS
 - Date:** OCTOBER 25, 2017
 - Text:** View all 13 of the Hautman brothers' Original Winning Duck Stamp Paintings
- Image:** A banner image for the Federal Duck Stamp with the text "Federal Duck Stamp" and "INVEST IN CONSERVATION".

INTERNET ARCHIVE
Wayback Machine
25 captures
4 Mar 2016 - 30 Jan 2018

GO
DEC JAN FEB
30
2017 2018 2019
About this capture

BIRD ENTHUSIASTS SURVEYS & DATA MANAGEMENT GRANTS EDUCATION GET INVOLVED
POLICIES & REGULATIONS



HOME > 404 ERROR

404 Error

PAGE NOT FOUND

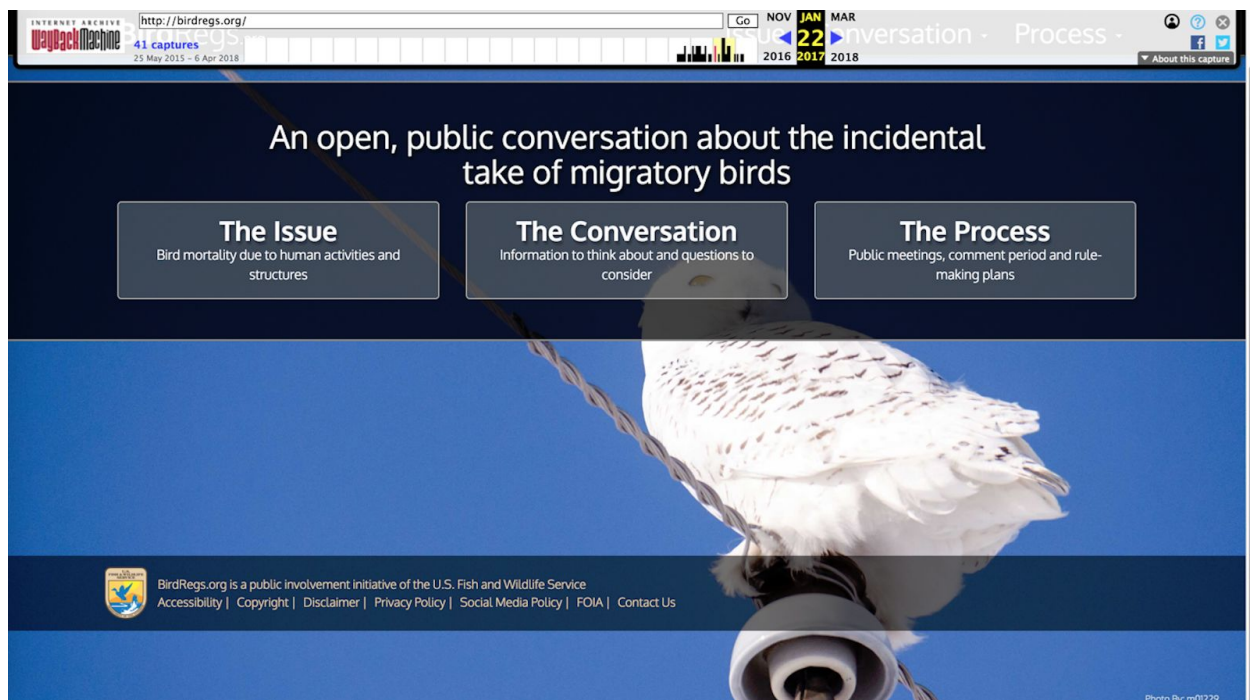
Internet Archive's Wayback Machine: previous version from [December 28, 2017](#) (UTC) and current version from [January 30, 2018](#) (UTC)

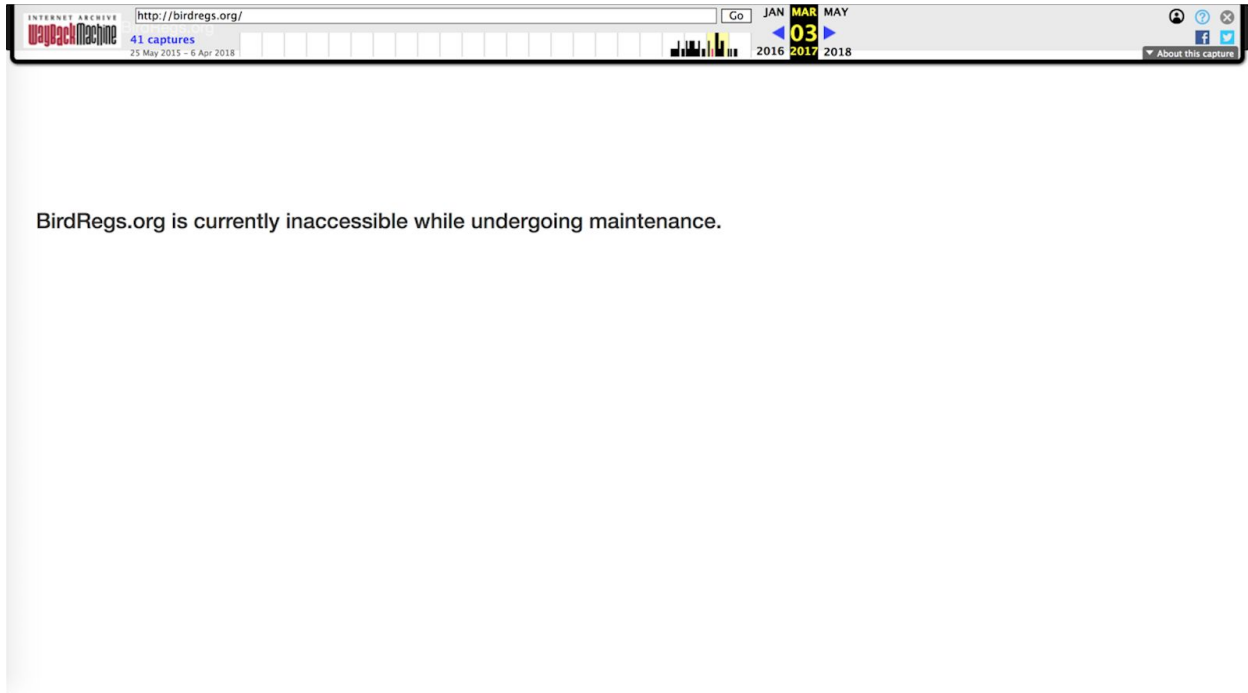
Page 5: Birdregs.org

- URL: <http://birdregs.org/>
- Removal of access to website content occurred between **January 22, 2017 12:39 PM ET** and **March 3, 2017 5:39 AM ET**. Removal of website occurred after **April 6, 2018 12:39 AM ET**.

Screenshot 5.1

(5.1a) Removed all content, links and images on BirdRegs.org webpage including the header “An open public conversation about the incidental take of migratory birds “ along with three boxes with text and links labeled “The Issue,” “The Conversation,” and “The Process” respectively. As of March 3, 2017 through April 6, 2018, URL opens to blank page with the words “BirdRegs.org is currently inaccessible while undergoing maintenance.”

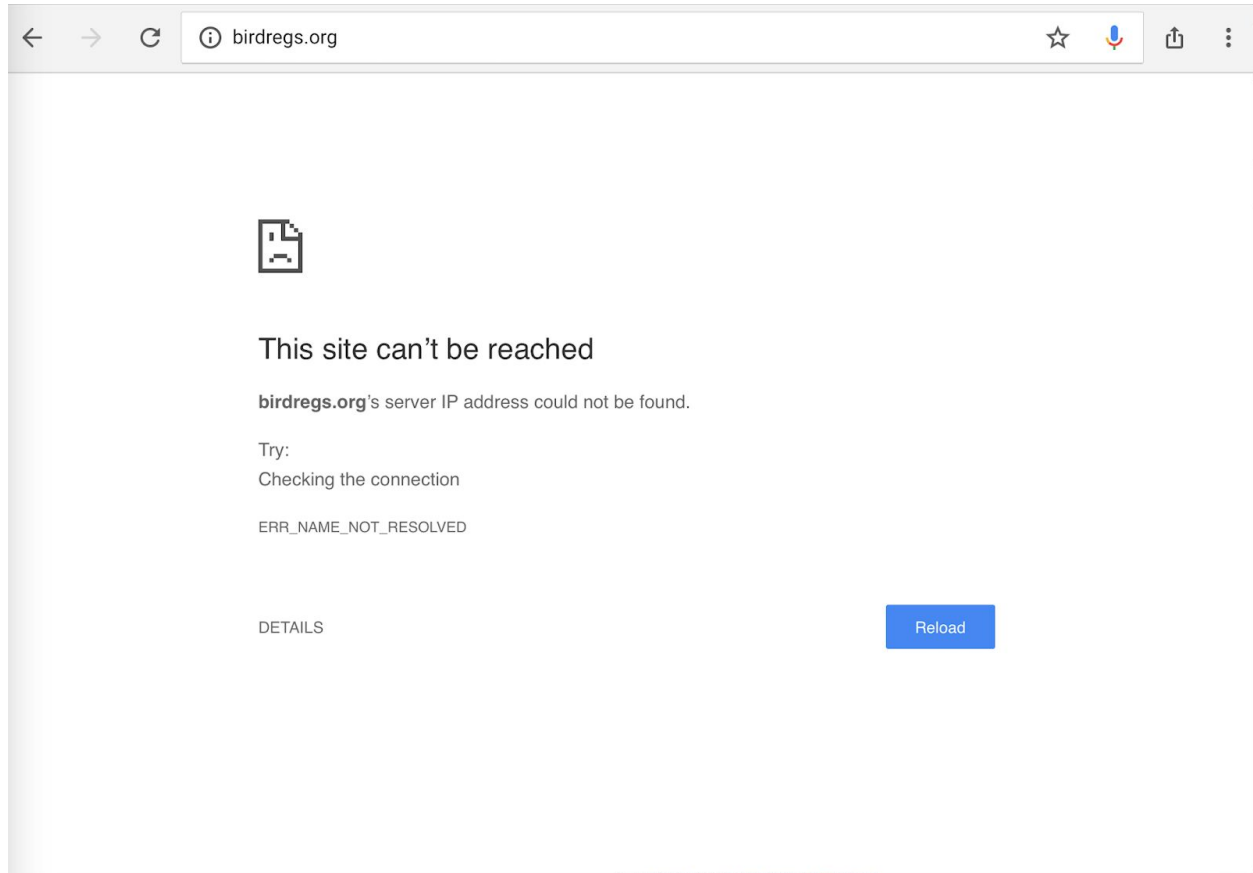




Internet Archive's Wayback Machine: previous version from [January 22, 2017](#) (UTC) and above version from [March 3, 2017](#) (UTC) through [April 6, 2018](#) (UTC).

Screenshot 5.2

(5.2a) Sometime between April 6, 2018 and August 28, 2018, the birdregs.org website itself became unavailable. An August 28, 2018 realtime snapshot returned a message “This site can’t be reached” and “birdregs.org’s server IP address could not be found.”



Internet Archive’s Wayback Machine: previous version from [April 6, 2018](#), no captures since.

Real-time capture: since [August 28, 2018](#) returns “This site can’t be reached” message.

Appendix: Summary of Recent Actions Relating to the Migratory Bird Treaty Act

[The Migratory Bird Treaty Act of 1918](#) (MBTA) implemented the 1916 Convention between the U.S. and Great Britain (for Canada) for the protection of migratory birds. Later amendments implemented treaties between the U.S. and Mexico, Japan and the Soviet Union (now Russia). The original statute established a Federal prohibition, unless permitted by regulations, to "pursue, hunt, take, capture, kill, attempt to take, capture or kill, possess, offer for sale, sell, offer to purchase, purchase, deliver for shipment, ship, cause to be shipped, deliver for transportation, transport, cause to be transported, carry, or cause to be carried by any means whatever, receive for shipment, transportation or carriage, or export, at any time, or in any manner, any migratory bird, included in the terms of this Convention . . . for the protection of migratory birds . . . or any part, nest, or egg of any such bird." (16 U.S.C. § 703)

On January 10, 2017, in the final days of the Obama Administration, the DOI Solicitor released [Memorandum M-37041](#) detailing "... the Department of the Interior's legal analysis supporting FWS's long-standing interpretation that the MBTA prohibits incidental take." Memorandum M-37041, along with three other Solicitor opinions, [was suspended and temporarily withdrawn](#) by the Acting Secretary of the Interior on February 6, 2017, pending review by agency officials. (Of note, the "DOI Solicitor's Opinions" webpage <https://www.doi.gov/solicitor/opinions/> includes only the brief suspension memo under its M-37041 listing, not the M-37041 Opinion itself.) On December 22, 2017, the DOI Solicitor's office released [Memorandum M-37050](#), titled "The Migratory Bird Treaty Act Does Not Prohibit Incidental Take", an opinion reversing the conclusion of the January 2017 memo, stating that the Migratory Bird Treaty Act only prohibits those activities that "have as their purpose the taking or killing of migratory birds, their nests, or their eggs." On April 11, 2018, the FWS issued a follow-up [guidance document](#) consistent with M-37050 with regard to incidental take under the MBTA, while stating that "Migratory bird conservation remains an integral part of our mission," and pointing to provisions of other acts and environmental review processes that separately address impacts on bird populations.

Responses to the issuance of Memorandum M-37050 have included the following:

- ❑ On January 10, 2018, [seventeen former DOI officials sent a letter to Secretary Zinke](#), stating "We are, each and all, very concerned by the Interior Department's December 22, 2017 announcement of a new legal memorandum (M-37050) reinterpreting the Migratory Bird Treaty Act."
- ❑ On February 8, 2018, a [letter from 513 national, regional and state conservation and other groups](#) was presented to Congress urging defense of the MBTA and opposition to "any effort that undermines the ability to address the incidental take of birds under the MBTA."

- ❑ On April 4, 2018, [ten members of the Senate sent a letter urging Secretary Zinke](#) to “reconsider” the December 2017 opinion and to “cease any corresponding efforts to change agency rules or guidance under the MBTA.”
- ❑ On April 19, 2018, sixty-two members of the House of Representatives [sent a letter to Secretary Zinke closely matching that of the senators’](#).
- ❑ On May 24, 2018, [these four conservation organizations](#) as well as the [NRDC and National Wildlife Federation](#) filed challenges to the December 2017 opinion.
- ❑ On September 5, 2018, [eight state Attorneys General filed suit against the DOI](#) seeking to vacate the December 2017 opinion, which “harms the States by depriving them of the MBTA’s protections of migratory birds that engage in breeding, feeding, and sheltering activities as those birds migrate within and through their territories.”