

FWS Revokes Trump Administration's Migratory Bird Treaty Act Rule

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On October 4, 2021, the US Fish and Wildlife Service (FWS or the Service) published a [final rule](#) revoking its January 7, 2021, Migratory Bird Treaty Act (MBTA or Act) rule. 86 Fed. Reg. 54,642 (Oct. 4, 2021) (Rule or Revocation Rule). The January 7 rule was issued at the end of the Trump administration and established that the MBTA does not prohibit incidental (unintentional) take of migratory birds. 86 Fed. Reg. 1134 (Jan. 7, 2021). In the preamble to the Rule, which lists an effective date of December 3, 2021, the Service explained that “[t]he immediate effect of this final rule is to return to implementing the MBTA as prohibiting incidental take and applying enforcement discretion, consistent with judicial precedent and longstanding agency practice prior to 2017.” 86 Fed. Reg. at 54,642. On the same day it published the Revocation Rule, FWS also published an [Advanced Notice of Proposed Rulemaking](#) (ANPR), requesting public input that will be used to develop proposed regulations to authorize the incidental take of migratory birds under prescribed conditions, 86 Fed. Reg. 54,667 (Oct. 4, 2021), and issued a [Director's Order](#) clarifying the Service's current enforcement position.

These are the latest developments in a series of efforts under the last three presidential administrations to implement competing interpretations of the MBTA, as we have reported in previous articles, and the story may not end here.

Background

The MBTA, one of the oldest wildlife protection laws in the US, makes it a crime for any person to “take” a migratory bird. “Take” is defined broadly to include “pursue, hunt, shoot, wound, kill, trap, capture, or collect” migratory birds, or attempt such activities. 50 C.F.R. § 10.12. Migratory birds protected by the Act include approximately 90 percent of all birds occurring in North America.

Uncertainty has prevailed for years regarding the scope of the MBTA's take prohibition. While the original purpose of the MBTA was to regulate over-hunting of migratory birds, primarily by commercial enterprises, in the 1970s the Service, which has primary responsibility for MBTA

enforcement, broadened its interpretation and began prosecuting *incidental* take of protected birds (i.e., take that results from but is not the purpose of an otherwise lawful activity). Since that time, persons engaging in an activity likely to result in a take, however unintentional and otherwise lawful, have faced the risk of prosecution.

The Federal Courts of Appeal have split on the scope of the MBTA's take prohibition. The Fifth and Eighth Circuits have held that the MBTA does not prohibit incidental take, while the Second and Tenth Circuits have held that it does. As a result, the geographic location in which an action occurs that could result in take of migratory birds may determine the risk of enforcement under the Act.

In January 2017, at the close of the Obama administration, the Solicitor's Office of the US Department of Interior (DOI) – of which FWS is a part – issued a legal opinion affirming the Service's then-prevailing position that the MBTA prohibits both intentional and incidental take of migratory birds.

Later that year, the Trump administration reversed course, issuing a superseding Solicitor's opinion on December 22, 2017 (and ultimately the January 7, 2021 rule) that sided with the Fifth and Eighth Circuits and concluded that the take prohibition under the MBTA applies “only to actions directed at migratory birds, their nests, or their eggs,” 86 Fed. Reg. at 1134, and does not prohibit incidental take. With the October 4 regulatory actions, FWS has formally reversed course again, reverting to its prior position that the MBTA prohibits incidental take.

The Service's Three October 4, 2021 Actions

1. *Final Rule Revoking 2021 MBTA Rule*

With this action, the Service revokes the Trump Administration's January 7 rule and returns to an interpretation of the MBTA that prohibits incidental take, subject to the Service's exercise of enforcement discretion. The Revocation Rule removes the text added to the US Code of Federal Regulations by the January 7 rule and clarifies FWS's view that incidental take of migratory birds is a potential violation of the MBTA.

According to the Service, the January 7 rule had several “legal infirmities.” For example, the Service found the rule was inconsistent with the court's decision in *Natural Res. Def. Council v. US Dep't of the Interior*, 478 F. Supp. 3d 469 (S.D.N.Y. 2020), in which the court vacated the December 2017 Solicitor's opinion, reasoning that the language of the MBTA's prohibition on killing protected migratory bird species “at any time, by any means, and in any manner” shows that the MBTA prohibits incidental killing. FWS also notes that issues raised by the Government of Canada in response to the January 7 rule raised concerns regarding whether that rule is consistent with US treaty obligations and other migratory bird conventions.

With publication of the Revocation Rule, the regulated community will once again face uncertainty regarding its exposure to enforcement for unintentional take of birds protected under the MBTA. Notably, this could include the operation of wind turbines, an activity that the current administration otherwise has taken steps to encourage as part of its effort to expand the use of renewable energy to address climate change.

There is a good possibility that the Rule will be challenged in federal court, possibly in the Fifth Circuit, which held in 2015 (in a decision discussed in the Revocation Rule) that the MBTA does not

prohibit incidental take.

2. ANPR

The Service's October 4 ANPR announces its plan to issue a proposed regulation codifying an interpretation of the MBTA that prohibits incidental take and propose a system of regulations to authorize the incidental take of migratory birds under certain conditions. The ANPR indicates that FWS is considering a "three-tiered approach," under which it would authorize incidental take using three primary mechanisms. 86 Fed. Reg. at 54,669. This is a reboot of a similar effort to develop an incidental take permitting program under the MBTA initiated by the Service in 2015, 80 Fed. Reg. 30032 (May 26, 2015) but abandoned in 2018 in the wake of the December 2017 Solicitor's opinion concluding that the MBTA did not prohibit, and thus no permitting program was needed for, incidental take. 83 Fed. Reg. 24080 (May 24, 2018).

First, FWS suggests the contemplated permitting program would provide an exception to the MBTA's prohibition on incidental take for non-commercial activities, such as individual homeowner activities that take birds. Second, FWS is considering establishing a general permit system whereby an entity would register, pay a fee, and agree to comply with general permit conditions tailored to specific industries. FWS is considering developing general permits for activities that have been identified as common sources of bird mortality, such as onshore and offshore wind power generation, solar power generation, electric transmission and distribution infrastructure, and transportation infrastructure. The general permit conditions may include reporting requirements for dead birds found during routine maintenance and operation activities. Finally, for projects that do not meet the criteria for eligibility for a general permit, FWS is considering a program for issuing individual permits to authorize incidental take of migratory birds for specific activities or projects.

The Service will accept comments on the ANPR during a 60-day public comment period that ends on December 3, 2021. Specifically, FWS seeks data and information on ten topics, including what best management practices may be appropriate to require for different industries and tiers of authorization and the costs of such practices.

3. Director's Order

Concurrently with the Final Rule revoking the 2021 MBTA Rule and the ANPR, the Service also issued a Director's Order clarifying the agency's enforcement position. Specifically, the Order acknowledges that a wide range of activities may result in incidental take of migratory birds and that it would not be an effective use of agency resources to pursue enforcement in each case. Thus, the Order indicates that FWS will focus its enforcement efforts on activities that "both foreseeably cause incidental take and where the proponent fails to implement known beneficial practices to avoid or minimize incidental take." (emphasis in original). The Order defines "beneficial practice" broadly to include any action implemented in an effort to avoid and minimize the incidental take of migratory birds, including best management practices and conservation measures. For additional information on "known" beneficial practices for particular activities, the FWS maintains a [website](#) providing project assessment tools and guidance, including applicable best practices and conservation measures. An example of these best practices is the Service's [Land-Based Wind Energy Guidelines](#), which are designed to mitigate impacts to wildlife from land-based wind energy facilities and to help wind project developers reduce their exposure to the risk of MBTA enforcement. Notably, although adherence to guidelines issued by the Service may reduce the risk of MBTA enforcement, it does not

provide a safe harbor. For many engaged in commercial activities with collateral impacts to birds, the publication of the Revocation Rule represents a return to uncertainty. However, if the Service succeeds in establishing a workable permitting process under the MBTA, this could eliminate some enforcement risk and provide a way for many businesses to more effectively plan for compliance with the MBTA under the Service's current interpretation of the take prohibition.

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