

CRYING FOWL: THE BIDEN ADMINISTRATION SET TO UNWIND TRUMP MBTA RULE

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On 29 September 2021, the U.S. Department of Interior (Interior) [announced](#) a series of actions to unwind a Trump-era rule in an effort to “to ensure that the Migratory Bird Treaty Act (MBTA) conserves birds today and into the future.” First, on 4 October 2021, the U.S. Fish and Wildlife Service (Service) published a [final rule](#) revoking the Trump-era regulation that limited the scope of the MBTA (final MBTA revocation rule).¹ In addition, on 4 October 2021, the Service published an [Advanced Notice of Proposed Rulemaking \(ANPR\)](#) announcing the intent to solicit public comments and information to help develop proposed regulations that would establish a permitting system to authorize the incidental take of migratory birds in certain circumstances.² Finally, the Service issued a [Director's Order](#) “establishing criteria for the types of conduct that will be a priority for enforcement activities with respect to incidental take of migratory birds.”

THE MBTA AND RULEMAKINGS IN CONTEXT

For several decades, Interior interpreted the MBTA to prohibit the incidental or accidental takes and kills of protected birds.³ As recently as January 2017, Interior reaffirmed its “long-standing interpretation that the MBTA prohibits incidental take.”

Because MBTA violations are strict liability crimes and—unlike the Endangered Species Act and Bald and Golden Eagle Protection Act, also administered by the Service—the MBTA lacks an incidental take permit program, many businesses and developers have been exposed to potential liability under the MBTA even while engaged in lawful activities. For instance, a business could be liable for a misdemeanor under the MBTA if a protected bird dies after striking a wind turbine or building, or if a nest is destroyed when tilling a field or cutting timber.

In December 2017, however, following the change in administrations, Interior dramatically changed course when it issued Memorandum M-37050 (the M-Opinion).⁴ According to the M-Opinion, only deliberate acts intended to take a migratory bird are prohibited under the MBTA. Incidental deaths of birds are not prohibited. This interpretation of the MBTA significantly reduced the activities that would result in liability and, as a result, reduced the risks businesses and developers face.

On 11 August 2020, a federal district court in New York concluded that Interior's M-Opinion violates the letter of the law for the past century and contradicts Interior's long-held position that even incidental take or kill of a migratory bird violated the MBTA “irrespective of whether the activities targeted birds or were intended to take or kill birds.”⁵ The court stated that while Congress could have limited the MBTA, it chose not to, and there is no basis to impose such a limitation on the scope of the MBTA based on the unambiguous language of the statute.⁶

On 7 January 2021, in reaction to the federal district court's ruling, the Trump administration finalized a rule that significantly reduced the activities that would result in liability under the MBTA and, as a result, reduced the risks businesses and developers face.⁷ Under the rule, the Service declared that the MBTA covers only intentional, and not incidental, take of protected birds, and thereby codifying the M-Opinion that was rejected by a federal court.⁸ Under the Trump-era rule, MBTA liability applied only to deliberate, voluntary affirmative actions “directed at killing or reducing an animal to human control, such as when a hunter shoots a protected bird causing its death.”⁹ However, “actions that are not directed toward rendering an animal subject to human control” but could foreseeably result in the deaths of protected birds, such as “driving a car, allowing a pet cat to roam outdoors, or erecting a windowed building[.]” were no longer subject to MBTA liability.¹⁰

BIDEN ADMINISTRATION'S MBTA ACTIONS AND KEY TAKEAWAYS

The Service has now formally revoked the Trump-era rule, stating:

The January 7, 2021, final rule limiting the scope of the MBTA raised significant concerns from the public and international treaty partners and created numerous legal challenges. With this final and formal revocation of the January 7 rule, the Service returns to implementing the MBTA as prohibiting incidental take and applying enforcement discretion, consistent with judicial precedent and long-standing agency practice prior to 2017.¹¹

According to the *Federal Register*, the final MBTA revocation rule will go into effect on 3 December 2021. The final MBTA revocation rule “does not also include codification of [the Service's] current interpretation of the MBTA as it applies to incidental take, it simply revokes the prior rule codifying [the Service's] former interpretation and nothing more.”¹²

With the 4 October 2021 ANPR, “the Service initiates the process to codify the interpretation that the MBTA prohibits incidental take and develop an approach to authorizing incidental take of migratory birds.”¹³ Publication of the ANPR commences a 60-day public comment period (which closes on 3 December 2021) on potential regulations to authorize the incidental take of migratory birds. The Service will also hold [general public webinars](#) in November 2021, offering an additional opportunity for public comments.

The Service is considering a three-tiered approach to authorizing incidental take:

1. Explicit exceptions to the MBTA's prohibition on incidental take (e.g., for noncommercial—think homeowner—activities that take birds);
2. A general permit scheme authorizing certain types of activities (e.g., potentially similar to the U.S. Army Corps of Engineers' nationwide permitting scheme under the Clean Water Act, with permit conditions for specific activity or tailored to specific industries and with permits effective upon submission of the request for coverage); and
3. An individual permit scheme (e.g., similar to the Service's existing migratory bird permitting scheme at 50 C.F.R. Subpart C for discrete activities like import and export permits).¹⁴

The Service is soliciting comment on the appropriate “criteria for when a given project qualifies as excepted from a permit, meets general permit requirements, or should apply for a specific permit.”¹⁵ The Service also noted that it is considering individual and general permit authorizations for specific activities, including onshore and offshore wind power generation; solar power generation; electric transmission and distribution infrastructure;

communication towers; methane and other gas burner pipes; oil, gas, and wastewater disposal pits; transportation infrastructure construction and maintenance; and marine fishery bycatch.¹⁶

Finally, the Director's Order "confirms that the Service has reestablished its longstanding policy and practice of enforcing the MBTA pursuant to its interpretation of the Act as prohibiting the incidental take of birds federally protected on the List of Migratory Birds."¹⁷ The Order explains that the Service will focus enforcement efforts on specific activities (1) that foreseeably cause incidental take *and* (2) where the project proponent fails to implement known beneficial practices to avoid or minimize incidental take.

For now, the upshot of for businesses and developers in the United States is that there is increased uncertainty regarding potential liability—or, more importantly, how and when the Service will use its enforcement discretion—under the MBTA for actions that incidentally or accidentally kill protected birds. At minimum, for projects that may foreseeably cause incidental take, project proponent should conduct activities following applicable [best practices for avoiding and minimizing incidental take](#).

Adding to the uncertainty, there remains a split between U.S. circuit courts over how MBTA liability applies. The Fifth, Eighth, and Ninth Circuits have held that MBTA liability applies only to the intentional take of migratory birds.¹⁸ Meanwhile, the Second and Tenth Circuits have reached the opposite conclusion, holding that criminal liability under the MBTA extends to unintentional take of migratory birds. This circuit split is likely to feature prominently in any litigation challenging the MBTA revocation rule or the Service's other forthcoming rules on the scope MBTA liability.

The cloud of regulatory uncertainty is likely to hang around unless and until the Service can finalize a durable rule establishing an incidental take authorization program under the MBTA.

FOOTNOTES

¹ Regulations Governing Take of Migratory Birds; Revocation of Provisions, 86 Fed. Reg. 54,642 (Oct. 4, 2021).

² Migratory Bird Permits; Authorizing the Incidental Take of Migratory Birds, 86 Fed. Reg. 54,667 (Oct. 4, 2021).

³ Incidental Take Prohibited Under the Migratory Bird Treaty Act, Memorandum M-37041 (Jan. 10, 2017).

⁴ Memorandum from Daniel H. Jorjani, Principal Deputy Solicitor, Dep't of the Interior, to Secretary et al., Dep't of the Interior, The Migratory Bird Treaty Act Does Not Prohibit Incidental Take, (Dec. 22, 2017).

⁵ Nat. Res. Def. Council, Inc. v. U.S. Dep't of Interior, No. 18-CV-04596-VEC, 2020 WL 4605235, slip op. (S.D.N.Y.) (Aug. 11, 2020).

⁶ *Id.*

⁷ See Regulations Governing Take of Migratory Birds, 86 Fed. Reg. 1134 (Jan. 7, 2021) (to be codified at 50 C.F.R. Part 10).

⁸ See *Nat. Res. Def. Council, Inc.*, 2020 WL 4605235, slip op.

⁹ Regulations Governing Take of Migratory Birds, 86 Fed. Reg. at 1136–37.

¹⁰ *Id.*

¹¹ Press Release, U.S. Dep't of the Interior, Interior Department Ensures Migratory Bird Treaty Act Works for Birds and People (Sept. 29, 2021), <https://www.doi.gov/pressreleases/interior-department-ensures-migratory-bird-treaty-act-works-birds-and-people>.

¹² Migratory Bird Permits; Authorizing the Incidental Take of Migratory Birds, 86 Fed. Reg. at 54,658.

¹³ *Id.*

¹⁴ *Id.* at 54,669.

¹⁵ *Id.*

¹⁶ *Id.* at 54,669–70.

¹⁷ Director's Order No. 255, U.S. Dept. of Interior, Incidental Take of Migratory Birds (Oct. 4, 2021), https://www.fws.gov/regulations/mbta/sites/default/files/2021-09/Final_MBTA_Directors_Order.pdf.

¹⁸ See *United States v. CITGO Petroleum Corp.*, 801 F.3d 477 (5th Cir. 2015); *Newton Cnty. Wildlife Ass'n v. U.S. Forest Serv.*, 113 F.3d 110 (8th Cir. 1997), *Seattle Audubon Soc'y v. Evans*, 952 F.2d 297 (9th Cir. 1991).

¹⁹ See *United States v. FMC Corp.*, 572 F.2d 902 (2d Cir. 1978); *United States v. Apollo Energies, Inc.*, 611 F.3d 679 (10th Cir. 2010).

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