

## Updates

May 10, 2021

### US Fish and Wildlife Service Proposes to Revoke Recent MBTA Final Rule

The U.S. Fish and Wildlife Service (Service) issued a [proposed rule](#) to revoke the Service's January 7, 2021, final rule defining the scope of the Migratory Bird Treaty Act (MBTA) as it applies to conduct resulting in the injury or death of migratory birds protected by the MBTA. The January 7, 2021, rule narrowly interprets the protections afforded by the MBTA. It determines that the MBTA prohibits only the intentional take of migratory birds, and not incidental and unintentional take associated with development activities or project operations.

By revoking the rule, the effect of the new rule, proposed May 7, 2021, would be to return to implementing the MBTA as prohibiting incidental take and applying enforcement discretion. Comments on the proposed rule are due by June 7, 2021.

## **Background**

The MBTA prohibits the unauthorized taking or killing of over one thousand species of migratory birds, many of which are common and abundant. The MBTA is a strict liability criminal law with potentially broad applicability. Specifically, the act makes it illegal to "pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess . . . any migratory bird . . . or any part, nest, or egg of any such bird." 16 U.S.C. §§ 703-712. The MBTA was enacted in 1918 to implement an international treaty to protect migratory birds threatened by the commercial trade of birds and their feathers.

Unlike the federal Endangered Species Act (ESA), which clearly applies to the incidental and unintentional take of listed species, neither the MBTA nor its legislative history addresses whether the law was intended to prohibit the incidental and unintentional take of migratory birds, or only hunting and other forms of direct, intentional take. Federal courts have been split on this issue for decades, and attempts by the Service to promulgate regulations have fizzled.

## **Two Solicitor's Opinions**

On January 10, 2017, in the final days of the Obama administration, the U.S. Department of the Interior Office of the Solicitor issued Memorandum M-37041, which expressed the agency's legal opinion that the MBTA prohibits both intentional and incidental take. The opinion concluded that the MBTA's broad prohibitions on taking and killing migratory birds apply to any activity and are not limited to hunting, poaching, or any other similar factual contexts. Accompanying the opinion was a new section of the FWS Service Manual providing guidance regarding what types of situations would potentially be subject to prosecution—namely, projects in which the proponents either do not cooperate or do not attempt to avoid impacts to migratory birds. The Obama administration had planned to issue regulations to implement an incidental take prohibition under the MBTA, but no proposed rule was ever issued.

On December 22, 2017, in a 180-degree reversal, the Trump administration issued Solicitor's Opinion M-37050, which reached the opposite conclusion: the definition of take under the MBTA is limited in relevant part to affirmative and purposeful actions, such as hunting and poaching. The December 2017 memorandum discussed at length the relevant statutory text, interpreting it to criminalize only purposeful and affirmative actions intended to reduce migratory birds to human control. It argued that the more ambiguous terms "kill" and "take" should be read together with "pursue," "hunt," and "capture," which suggest affirmative acts. The opinion also

looked to common law definitions of "take" for support.

### **January 7, 2021, Rule Codifying M-37050**

On January 7, 2021, the Service published a final rule defining the scope of the MBTA as it applies to conduct resulting in the injury or death of migratory birds protected by it. The January 7 rule codified the interpretation set forth in Solicitor's Opinion M-37050, which concluded that the MBTA does not prohibit incidental take. Utilizing the tools of statutory construction, including case law, the January 7, 2021, rule rests on the determination that when read together with other terms, the interpretation of "take" and "kill" should be construed to mean only active and affirmative conduct.

### **New Proposed Rule Seeks to Revoke January 7, 2021, Rule**

The proposed rule provides the public with notice of the Service's intent to revoke the January 7 rule's interpretation that the MBTA does not prohibit incidental take, subject to the Service's final decision after consideration of public comments.

The proposed rule explains that after undertaking further review of the January 7 rule, the Service has determined that the rule "does not reflect the best reading of the MBTA's text, purpose, and history." The Service notes that the provisions at issue in the January 7 rule have been the subject of "repeated litigation and diametrically opposed" Solicitor's Opinions, but that the "longstanding historical agency practice confirmed in [Solicitor's Opinion M-37041], and upheld by most reviewing courts, had been that the MBTA prohibits the incidental take of migratory birds (subject to certain legal constraints)." According to the Service, the January 7 rule "reversed these several decades of past agency practice" by interpreting the MBTA's scope to exclude incidental take of migratory birds.

In the proposed rule, the Service further asserts that the January 7 rule is inconsistent with the majority of relevant court decisions that have addressed the issue, including in particular a recent decision from the U.S. District Court for the Southern District of New York that vacated Solicitor's Opinion M-37050 and thus expressly rejected the rationale relied upon in the January 7 rule. See *Natural Res. Def. Council v. U.S. Dep't of the Interior*, 478 F. Supp. 3d 469 (S.D.N.Y. 2020) (holding that the MBTA's plain language encompasses the incidental killing of migratory birds). The Service notes that additional lawsuits have since been filed challenging the January 7 rule, as well as that the deputy solicitor permanently withdrew M-37050 on March 8, 2021.

Finally, the proposed rule cautions that the January 7 rule's interpretation of the MBTA raises "serious concerns" with a U.S. treaty partner, as well as for resources protected by other underlying treaties. Specifically, the government of Canada communicated its concerns with the January 7 rule both during and after the rulemaking process. In addition, the proposed rule states that the January 7 rule may also be inconsistent with the migratory bird conventions with Mexico, Japan, and Russia. Taken together with the Service's other arguments regarding the MBTA's text, history, and case law, the proposed rule explains that these international concerns counsel in favor of revoking the January 7 rule.

The Service is soliciting public comments on four topics: (1) Whether it should revoke the January 7 rule, and why or why not; (2) the costs or benefits of revoking the rule; (3) the costs or benefits of leaving the rule in place; and (4) any reliance interests that might be affected by revoking the rule, or not revoking the rule. As noted above, comments are due on June 7, 2021.

## Authors

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