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US Fish and Wildlife Service Reinstates MBTA Interpretation and Seeks Input on Take Permitting Scheme

The U.S. Fish and Wildlife Service revoked its January 7, 2021, rule defining the scope of the Migratory Bird Treaty Act as it applies to conduct that results in the injury or death of protected migratory birds. Revocation of the January 2021 rule reinstates the Service's long-standing interpretation of the MBTA as prohibiting incidental take and applying discretionary enforcement. The [final rule](#), published on October 4, 2021, takes effect on December 3, 2021.

Concurrently, the Service published an [Advanced Notice of Proposed Rulemaking](#) to develop regulations that permit incidental take under prescribed conditions and codify the interpretation that the MBTA prohibits incidental take of migratory birds. The Service is soliciting input on development of a proposed rule and draft environmental review, with comments due December 3, 2021. Among other topics addressed in the ANPR, the Service notes that renewable energy generation facilities may qualify for project-level general permit authorization and seeks data regarding impacts to migratory birds at project sites and best practices for mitigation measures.

Background

The MBTA prohibits unauthorized take of over 1,000 species of migratory birds, many of which are common and abundant. It is a strict liability criminal law with broad potential 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, which clearly applies to the incidental and unintentional take of listed species, neither the MBTA nor its legislative history address 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 prior attempts by the Service to promulgate regulations have fizzled.

On January 7, 2021, the Trump administration issued a final rule codifying a narrow interpretation that defined "take" or "kill" as only active and affirmative conduct. This interpretation excluded incidental and unintentional take associated with development or project operations from the scope of the MBTA. Under the Biden administration, on May 7, 2021, the Service issued a [proposed rule](#) to revoke the January 7, 2021 final rule. The Service noted that the January 2021 final rule "does not reflect the best reading of the MBTA's text, purpose, and history" and created significant enforcement uncertainty.

Impact of Rule Revocation

The final rule published by the Service on October 4, 2021, adopts the May 2021 proposed rule and revokes the January 2021 final rule, restoring the Service's prior interpretation of the MBTA as applicable to both intentional and incidental take. As of December 3, 2021—the effective revocation date—the incidental take of protected migratory birds is prohibited, and violations are subject to discretionary enforcement by the Service, with the potential for criminal prosecution. The Service considers this revocation a return to prohibiting incidental take "consistent with judicial precedent and longstanding agency practices prior to 2017."

Updated Enforcement Position

With the revival of a prohibition on incidental take, the Service issued a [Director's Order](#) to clarify the agency's current enforcement position and provide guidance on how to implement the final rule. Given limited resources and the wide range of activities that may result in incidental take, the Service will prioritize enforcement of activities that both foreseeably cause incidental take *and* fail to implement known mitigation measures or "beneficial practices." Public or private sector entities that conduct activities in accordance with applicable beneficial practices to avoid and minimize take will not be an enforcement priority.

Proposed Incidental Take Regulation

The ANPR published on October 4, 2021, announces the Service's request for public input on the development of regulatory alternatives to authorize the incidental take of migratory birds. Through the new rulemaking process, the Service seeks to codify the interpretation of the MBTA as prohibiting incidental take, rather than relying on discretionary enforcement, and to develop a "common-sense" regulatory scheme for incidental take. The Service's stated goal is two-fold: to better protect migratory bird populations and to provide certainty to regulated entities. In the ANPR, the Service states that the population of North American birds has declined by 3 billion over the last 50 years due to natural and human-caused actions. Although the Service notes that many projects voluntarily adopt beneficial practices to avoid incidental take, the Service expects that regulations could further protect migratory bird populations.

The Service is soliciting public comment on whether and how the agency could authorize incidental take and under what conditions or circumstances. Specifically, the Service seeks input on three primary mechanisms to authorize incidental take: (1) exceptions to the MBTA's prohibition on incidental take; (2) general permits for certain activity types; and (3) specific or individual permits. Activities that often result in bird mortality, including electric transmission and distribution infrastructure, offshore and onshore wind generation facilities, and solar generation facilities, may qualify for project-level general permit authorization. For these activities, the Service seeks information and data regarding the cause of migratory bird deaths at project sites, activity-specific beneficial practices, and the economic impact of the identified beneficial practices.

Finally, the Service invites public comment on identification of alternatives and significant issues related to the proposed action as part of the National Environmental Policy Act scoping process. Virtual stakeholder meetings will run from late October through mid-November, with the official comment period for both the proposed rulemaking and draft environmental review closing December 3, 2021.

Implications and Next Steps

Codifying the Service's longstanding interpretation of the MBTA as prohibiting incidental take, while also establishing a permitting system for incidental take, could provide significant enforcement clarity and help avoid confusion over MBTA compliance. The permitting framework could be particularly relevant to commercial activities that may result in take of migratory birds, such as electric transmission and distribution infrastructure, offshore and onshore wind generation facilities, and solar generation facilities. Interested parties should consider weighing in on this potential framework, including supplying the Service with current experiences and best practices managing migratory bird interactions at project sites.

It is also important to keep in mind any applicable state laws that protect migratory birds. Even as federal agencies weigh a permitting framework for incidental take, most infrastructure projects must comply with

different, potentially more stringent, migratory bird regulations imposed by states. For instance, California has robust state law protections for migratory birds, which have been interpreted by the state as prohibiting incidental take.

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