

Responding To Migratory Bird Law Uncertainty Under Biden

By **Matthew Ahrens and Allison Sloto** (October 29, 2021)

As expected, on Oct. 4, the U.S. Fish and Wildlife Service published a final rule and issued a director's order formally revoking the rule then-President Donald Trump issued on Jan. 7 that had limited liability for incidental takes of migratory birds under the Migratory Bird Treaty Act, and affirmatively stating that the MBTA prohibits incidental take.

However, the FWS didn't stop there. On the same date, the FWS published an advance notice of proposed rulemaking, or ANPR, to consider the creation of a new MBTA incidental take permitting program.

Trump's Migratory Bird Rule Flies Away, Restoring Past Uncertainty

The applicability of the MBTA to incidental take remains uncertain given the conflict posed by past judicial and administrative activity.

The MBTA makes it unlawful to pursue, hunt, take, capture or kill any migratory bird, and protects virtually every North American bird species. Federal courts have long disagreed over whether the MBTA criminalizes incidental take of migratory birds.

Currently, there is a split among federal courts of appeal:

- The U.S. Courts of Appeals for the Fifth, Eighth, and Ninth Circuits have more narrowly interpreted the MBTA in a similar manner to the Trump administration, each essentially holding that only intentional killing of birds constitutes a taking and that inadvertent bird deaths, such as from habitat destruction, are not a taking.[1]
- On the other hand, the U.S. Courts of Appeals for the Second and Tenth Circuits have supported a broader view of the criminal enforcement provisions of the MBTA. The U.S. Court of Appeals for the Second Circuit upheld the conviction of a pesticide manufacturer for bird deaths as a take under the MBTA in 1977 in *U.S. v. FMC Corp.*,[2] and the U.S. Court of Appeals for the Tenth Circuit held that all intentional or unintentional bird killings constitute a strict liability misdemeanor crime in 2010 in *U.S. v. Apollo Energies Inc.*[3]

As a result, liability for incidental take under the MBTA may differ depending on the federal circuit in which the violation occurs.

Further, past presidential administrations have differed in interpretation with respect to the applicability of the MBTA to incidental take:



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- During President Barack Obama's tenure, the U.S. Department of the Interior issued legal opinion number M-37041 on Jan. 10, 2017, which interpreted the MBTA to prohibit incidental takes.
- On Dec. 22, 2017, Trump reversed course and withdrew M-37041, and the DOI issued legal opinion number M-37050, which interpreted the MBTA to prohibit only intentional, directed takes.
- M-37050 was struck down by the U.S. District Court for the Southern District of New York in an Aug. 11, 2020, decision. The DOI appealed. After President Joe Biden took office, the DOI filed a stipulation to dismiss the appeal on Feb. 25, and the deputy solicitor permanently withdrew M-37050 on March 8.
- In Trump's last days in office, the FWS published a rule that in effect codified M-37050. Pursuant to the rule, the MBTA's prohibition on take of migratory birds related only to intentional, directed takes, such as hunting or poaching.

Although the Trump-era rule has now been formally revoked, we note that there are no rules currently in effect to codify whether incidental take is prohibited under the MBTA.

Pursuant to the ANPR, the FWS has started the rulemaking process to publish a rule that confirms its position that the MBTA prohibits incidental take.

A New Pecking Order: Priority to Enforcement for Incidental Take

Historically, the FWS has relied on enforcement discretion to apply the MBTA's take provision. Despite uncertainty over whether incidental take is a violation, the threat of enforcement as the result of incidental take remains real, especially given the Biden administration's publicly stated position.

This has prompted many companies, especially in the renewable energy project finance world, to voluntarily implement best management practices to assess, manage and lower the risk of adverse impacts to migratory birds.

The FWS has now confirmed that it plans to continue its use of discretion in the enforcement of incidental takes of migratory birds. Pursuant to the director's rule, the FWS presented guidance that provides some comfort for companies seeking to avoid liability under the MBTA.

The guidance demonstrates the continued value in companies implementing best management practices to assess, manage and lower the risk of adverse impacts to migratory birds, classifying companies that implement beneficial practices for avoiding and minimizing incidental take as not a priority for enforcement.

Instead, the following activities are considered a priority for enforcement:

- Incidental take that is the result of an otherwise illegal activity; or
- Incidental take that:
 - Results from activities by a public or private sector entity that are otherwise legal;
 - Is foreseeable; and
 - Occurs where known general or activity-specific beneficial practices were not implemented.

While this guidance is helpful to all industries, it is not clear whether in practice it will be equally applied.

The Biden administration's push for clean energy could result in leniency in terms of MBTA enforcement toward renewable energy projects — especially those that have taken active steps to avoid, minimize and mitigate risk for incidental take — which would be particularly significant for wind energy projects that could otherwise face substantial risk of enforcement under a broad interpretation of liability for incidental take under the MBTA.

Hatching a New Permitting Scheme

In issuing the ANPR, the FWS has formally begun the process of considering an MBTA permitting scheme. Unlike the Endangered Species Act and the Bald and Golden Eagle Protection Act, permits authorizing the incidental take of protected species cannot currently be issued under the MBTA.

The FWS noted that the impetus for a formal permitting regime stems from concerns about severe population declines of migratory birds from both natural and human-caused sources, and fears that voluntarily implemented beneficial practices intended to avoid and minimize the take of migratory birds are not sufficient.

As a result, the FWS is considering authorizing incidental take by three primary mechanisms: (1) exceptions to the MBTA's prohibition on incidental take; (2) general permits for certain types of activities; and (3) specific or individual permits.

From a high level, it appears that the FWS has taken steps to follow a permitting approach akin to that utilized by the U.S. Army Corps of Engineers for permits that may be required pursuant to Section 404 of the Clean Water Act for the fill of wetlands.

Like the incidental take of migratory birds, the filling of wetlands is commonplace and could thus arguably require permits for each and every fill, which, in turn, would be overly burdensome and time-consuming for individuals, companies and the governmental agency.

As a result, the Corps has split CWA Section 404 permits into two types: general permits for certain categories of activities that have minimal individual or cumulative adverse environmental effects, and individual permits for activities with more material impacts, which are administratively more complex and could require comprehensive environmental reviews prior to issuance. Most projects seek to avoid material impacts and, as a result, can be eligible to not require any permit or use a general nationwide permit.

The FWS is considering exceptions to the prohibition on incidental take for activities such as: (1) noncommercial activities, including most activities by individuals, such as homeowners; and (2) certain activities where activity-specific beneficial practices or technologies sufficiently avoid and minimize incidental take.

A general permit could be authorized through a registration system, where an entity would register, pay a fee, and agree to abide by general permit conditions and reporting requirements — similar to administration of the Corps' nationwide permit program with respect to wetlands. These permit conditions may be activity-specific and require certain beneficial practices.

The general permit would be effective upon submission of the request and would not require FWS review. The environmental review would be for the general permit system itself, rather than a site-specific review for each permit authorization.

For projects that do not meet the eligibility criteria for a general permit, the FWS is considering development of regulations that describe eligibility criteria and procedures for applying for a specific permit to authorize incidental take of migratory birds, similar to current specific permit regulations for intentional takes under the MBTA.

In that scenario, FWS staff would review the application and develop customized permit applications. The FWS recognizes the administrative burden this would place on staff and the potential for project delays, and notes that if such an approach is developed, the agency will seek to minimize as much as possible the need for specific permits.

The FWS is likely trying to avoid similar difficulties to those that have plagued the Bald and Golden Eagle Protection Act permitting program. Despite having been in place since 2009, few incidental take permits have been issued. Because each eagle take permit is issued on an individual basis, the comprehensive review required has placed a significant strain on FWS staff and resulted in permitting delays with applications requiring several years of review.

The FWS is specifically considering developing general permit authorization regulations for certain categories of activities that have been identified as common sources of bird mortality or have well-developed, activity-specific beneficial practices, including:

- Communication towers;

- Electronic transmission and distribution infrastructure;

- Onshore wind power generation facilities;

- Solar power generation facilities;

- Methane and other gas burner pipes;
- Oil, gas and wastewater disposal pits;
- Marine fishery bycatch;
- Transportation infrastructure construction and maintenance; and
- Government agency activities — excluding military-readiness activities already covered under Title 50 of the Code of Federal Regulations, Section 21.15.

For each of these activities, the FWS may decide to establish a general permit, with certain types of required beneficial practices. For activities not contained in the initial list, the FWS is seeking input on how those activities should be treated, and what beneficial practices should be required for those activities.

The FWS is also considering whether to develop and implement a conservation fee structure to fund programs to benefit birds, and whether that structure should take the form of compensatory mitigation, where mitigation is developed and implemented specific to a given project, or general conservation fee structure, where the fee would go to a specific fund.

The FWS is receiving public comments to guide the drafting of the proposed rule until Dec. 3.

Flying Cautiously: How to Respond to the Current Regulatory Environment

We are uncertain once again with respect to incidental take of migratory birds. While the Biden administration has restored the pre-Trump status quo and announced its position that the MBTA prohibits incidental take, no formal rules are currently in effect to codify whether incidental take is prohibited under the MBTA. Furthermore, liability for incidental take arguably again depends on the stance of the federal circuit in which the violation occurs.

Nonetheless, it seems fairly certain that Biden will put new rules in place. Similarly, it is very likely that any new rules will be challenged in court. The director's order provides some reassurance that if prudent companies adopt the approach of implementing best management practices to assess, manage and lower the risk of adverse impacts to migratory birds, they will not be considered a priority for enforcement.

Companies should pay close attention to the ANPR and take the opportunity to provide comments relevant to their respective industries and shape the new regulations. Incidental take permits could afford a level of protection to companies from liability due to incidental

take, so long as measures are also taken to minimize bird injuries or deaths. And the introduction of compensatory mitigation projects or a conservation fee could help companies find the right balance between providing necessary services and infrastructure and complying with the MBTA.

However, if the new regulations are not crafted in a streamlined manner, companies could potentially find themselves worse off than before, expending significant costs and enduring administrative delays for permit approval. Companies, especially those in the renewable energy field, should continue to closely monitor these developments.

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[1] *United States v. Citgo Petroleum Corp.*, 801 F.3d 477, 488-89 (5th Cir. 2015); *Newton Cnty. Wildlife Ass'n v. U.S. Forest Serv.*, 113 F.3d 110, 115 (8th Cir. 1997); *United States v. Brigham Oil & Gas, L.P.*, 840 F. Supp. 2d 1202, 1214 (D.N.D. 2012); *Seattle Audubon Soc'y v. Evans*, 952 F.2d 297, 302 (9th Cir. 1991).

[2] *United States v. FMC Corp.*, 572 F.2d 902 (2d Cir. 1978).

[3] *United States v. Apollo Energies, Inc.*, 611 F.3d 679 (10th Cir. 2010).