

Client Alert

Incidental Take Under the Migratory Bird Treaty Act: Biden Administration Revokes Trump-Era Rule and Proposes New Permitting Regime

October 15, 2021

Key Contacts

Matthew H. Ahrens, Partner
+1 212.530.5882
mahrens@milbank.com

Allison Sloto, Associate
+1 212.530.5954
asloto@milbank.com

As expected, on October 4, 2021, the U.S. Fish and Wildlife Service (“FWS”) published a [Final Rule](#) and issued a [Director’s Order](#) formally revoking the Trump-era rule (issued January 7, 2021) that had limited liability for incidental takes of migratory birds under the Migratory Bird Treaty Act of 1918 (“MBTA”) 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](#) (“ANPR”) to consider the creation of a new MBTA incidental take permitting program.

Trump’s Migratory Bird Rule Flies Away

The MBTA makes it unlawful to, “by any means or in any manner,” pursue, hunt, take, capture, or kill any migratory bird, and protects virtually every North American bird species. Pre-Trump administrations had broadly interpreted this provision to include incidental takes, such as an accident that occurs during otherwise lawful activities. As described in our January 19, 2021 [Client Alert](#), in President Trump’s last days in office, the FWS published a rule that had departed from this precedent and took the position that the MBTA’s prohibition on take of migratory birds relates only to intentional, directed takes, such as hunting or poaching. Although this 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

The FWS has indicated that it plans to use discretion in its 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”: (i) incidental take that is the result of an otherwise illegal activity; or (ii) incidental take that (a) results from activities by a public or private sector entity that are otherwise legal, (b) is foreseeable, and (c) occurs where known general or activity-specific beneficial practices were not implemented.

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 presently considering authorizing incidental take by three primary mechanisms: (i) exceptions to the MBTA's prohibition on incidental take; (ii) general permits for certain types of activities; and (iii) specific or individual permits.

The FWS is considering exceptions to the prohibition on incidental take for activities such as: (i) noncommercial activities, including most activities by individuals, e.g., homeowners; and (ii) 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 U.S. Army Corps of Engineers' Nationwide Permit program. 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 prior to being effective. The environmental review would be for the general permit system, rather than a site-specific review for each individual 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 ([50 C.F.R. Part 21\(C\)](#)) for intentional takes. 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 specifically considering developing general permit authorization regulations for certain categories of activities, including both wind and solar renewable energy projects. The FWS may decide to establish a general permit, with certain types of required beneficial practices, for each type of renewable project. The FWS is receiving public comments to guide the drafting of the proposed Rule until December 3, 2021.

Environmental Practice Group Contacts

New York | 55 Hudson Yards, New York, NY 10001-2163

Matthew H. Ahrens	mahrens@milbank.com	+1 212.530.5882
Allison Sloto	asloto@milbank.com	+1 212.530.5954

Environmental Practice Group

Please feel free to discuss any aspects of this Client Alert with your regular Milbank contacts or any member of our Environmental Practice Group.

This Client Alert is a source of general information for clients and friends of Milbank LLP. Its content should not be construed as legal advice, and readers should not act upon the information in this Client Alert without consulting counsel.

© 2021 Milbank LLP All rights reserved. Attorney Advertising.
Prior results do not guarantee a similar outcome.