

Eye Toward the Sky: New Legal Protections for Migratory Birds Could Impact Your Business

On October 4, 2021, the U.S. Fish and Wildlife Service (Service) published three significant regulatory notices in the Federal Register related to migratory birds. First, the Service published its final rule revoking a Trump-era rule that limited the scope of the Migratory Bird Treaty Act (MBTA) to intentional acts that kill, harass, or harm migratory birds. ([Docket FWS-HQ-MB-2018-0090](#)). Second, the Service published notice of its Director's Order, reflecting the Service's non-rule interpretation that the MBTA does in fact criminalize incidental take of migratory birds and that it will exercise prosecutorial discretion to enforce the statute accordingly ([Docket FWS-HQ-MB-2018-0090](#)). Finally, the Service published an Advanced Notice of Proposed Rulemaking (ANPR) announcing its intention to develop incidental take permitting rules for migratory birds, a rulemaking that had been suspended during the Trump Administration ([Docket FWS-HQ-MB-2021-0105](#)).

The revocation rule and Director's Order take effect December 3. The ANPR likewise provides for a comment period to guide rule development until December 3. Additionally, the Service announced it will hold six scoping meetings on rule development in webinar format, three for federally recognized Native American Tribes and three for the general public. The [webinars](#) for the general public are scheduled to be held on November 4, November 8, and November 10.

For several decades, the Service interpreted the MBTA to prohibit the incidental or accidental killing of protected migratory birds. The Trump administration reversed this interpretation and declared the MBTA criminalized only acts intentionally directed at migratory birds or their nests or eggs, such as hunting, and did not prohibit incidental or accidental death or harm, even when active migratory bird nests and/or eggs are known to be present. This rule eliminated the federal government's ability to prosecute companies that incidentally killed migratory birds in the course of their operations. The Service's regulatory actions on October 4 would again interpret the MBTA as criminalizing harm or death of a migratory bird or its eggs even if accidentally caused, such as by clearing trees in preparation for development.

The Service's Director's Order establishes criteria for the types of conduct that will be a priority for the Department to enforce with respect to incidental take of migratory birds. The Director's Order states that the Service will prioritize the following categories of incidental take: (1) take resulting from an otherwise illegal activity; (2) take resulting from activities by a public or private-sector entity that are otherwise legal; (3) foreseeable take; and (4) take occurring where known general or activity-specific beneficial practices were not implemented.

It should be noted that the federal appellate courts have split on whether the MBTA prohibits incidental take. In appellate jurisdictions where the courts have ruled that the MBTA prohibits only intentional takes (U.S. Court of Appeals for the Fifth, Eighth, and Ninth Circuit) the Service cannot enforce the Director's Order as to incidental takes. The Eleventh Circuit Court of Appeals has not ruled on the issue, so the Service can implement the Director's Order in Florida and can be expected to do so.

Our Land Development, Zoning & Environmental practice has extensive experience advising clients on all matters related to protected species including migratory birds. [Recent additions](#) to the Stearns Weaver Miller team have been heavily involved in this issue and can help clients navigate issues related to protected MBTA species. For more information, please [contact us](#).