

Trump officials move to relax rules on killing birds

Overhaul of the 1918 Migratory Bird Treaty Act would not hold firms liable for ‘incidentally’ causing scores of bird deaths

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A rule change easing companies’ liability for killing birds would not cause unacceptable environmental harm, the Trump administration said in an analysis published Friday, clearing the way for it to finalize a major rollback before the president’s term ends on Jan. 20.

The administration, which is racing to lock in a series of regulatory changes before President-elect Joe Biden takes office, can now publish a final rule modifying the U.S. Fish and Wildlife Service’s interpretation of the 1918 Migratory Bird Treaty Act,

The act prohibits unauthorized “take” of protected bird species — regulatory-speak for hunting, killing, capturing, selling or otherwise hurting the animals. For three years, officials at the Interior Department have sought to exclude accidental deaths from the “take” definition, shielding energy companies, construction firms and land developers from prosecution if their operations “incidentally” kill birds.

The new analysis looked at three alternatives for interpreting the act: continuing to tacitly permit incidental take; codifying the interpretation that incidental takes are allowed; or strengthening the law to return to the historical understanding that companies are accountable for accidental killings. It suggested that all three options would “have incremental effects on current environmental conditions” but identified scaling back the rule as its “preferred alternative.”

The rule change is now open for a 30-day review period, which ends Dec. 28. If finalized, it would set in stone the Interior’s Department’s current, narrow view of the law — making the policy easier for companies to understand but also making it more difficult for future administrations to reverse.

In a statement, Fish and Wildlife Service spokesman Brian Hires said the agency’s goal was to “provide legal certainty for the public” about what kinds of hazards to birds are permitted. He added it would make enforcement “across the country” more consistent and effective.

But the administration’s claim that the new rule wouldn’t cause significant environmental harm is contradicted by the rest of the analysis, said Audubon Society policy manager Erik Schneider.

The document suggests that the preferred version of the rule would “likely result in increased bird mortality,” because companies would have less of an incentive to adopt precautions to prevent birds from becoming ensnared or colliding with their operations. It also notes that permitting incidental take could have economic consequences from loss of

beneficial ecosystem services and may hurt species that are important to Native American tribes.

Studies show that human activities are responsible for millions of accidental bird deaths every year. Hawks, owls and songbirds can mistake uncovered oil skim pits for ponds and get stuck when they attempt to scoop prey out of the sticky oil. Birds in flight suffer fatal crashes with communications towers or become tangled in telephone wires and power lines.

In August, a federal judge struck down as illegal the administration's first attempt to weaken the rule, a Dec. 22, 2017, solicitor's opinion. Referring to Harper Lee's famous novel, U.S. District Court Judge Valerie E. Caproni wrote: "It is not only a sin to kill a mockingbird, it is also a crime. ... But if the Department of the Interior has its way, many mockingbirds and other migratory birds that delight people and support ecosystems throughout the country will be killed without legal consequence."

The Interior Department was dismissive of that ruling in the new environmental analysis, writing that it "respectfully disagreed" with the judge's reading of the law, which it said had no bearing on the rule-making process.

Indeed, the department argued that the ruling "effectively underscores the need to codify our official interpretation," instead of leaving the definition of "take" up for further legal debate.

Trump officials argue that the previous legal interpretation of the century-old law — which makes it illegal to "pursue, hunt, take, [or] capture" migratory birds without a permit — was too broad. Under a Jan. 10, 2017, opinion from an Obama-era Interior solicitor, companies could be held liable for birds ensnared by uncovered oil-waste pits or unmarked transmission lines. And for decades, prosecutors have sought fines of up to \$15,000 per bird for accidental deaths.

BP pleaded guilty to one misdemeanor count of violating the act in connection to the 2010 Deepwater Horizon explosion, which killed hundreds of thousands of birds, and as part of the settlement paid \$100 million to fund wetlands restoration in the United States.

Under Interior's proposed rule, companies and individuals would not face prosecution if they "incidentally" killed birds — even scores of them — in the course of their operations.

Since the administration began pursuing its looser interpretation of the law in April 2018, hundreds of birds have perished without penalty, according to documents compiled by conservation groups this year.

If finalized, the rollback will have the greatest benefit for electric utilities and oil and gas companies, which before 2018 were subject to an average of 46 incidental take investigations every year. According to data compiled by the Fish and Wildlife Service, about 32 million birds are killed annually by colliding with power lines, getting electrocuted at power poles and drowning in uncovered oil pits.

These industries have largely supported the rule change. In a statement Friday, American Petroleum Institute senior adviser Amy Emmert wrote that oil and gas companies are committed to protecting wildlife but are not the greatest threat to migrating birds — that distinction goes to cars, cats and glass buildings.

"As proposed, the rule reinforces the original intent of the Migratory Bird Treaty Act," Emmert said.

The new rule could also have a marginal impact on wind turbines — which President Trump has frequently called "monsters" that "kill all birds." In actuality, collisions with wind turbines are blamed for killing about 250,000 birds a

year; far fewer deaths than are associated with building collisions, chemical exposure and entanglement with electric cables. Before the Trump administration stopped prosecuting incidental takes, the Interior Department investigated bird deaths at wind farms about twice per year.

Environmental groups also point out that, by countering the effects of climate change, wind energy delivers a net benefit for birds — whose habitat, migratory patterns and food have been adversely affected by warming.

Conservationists decried the move as legally flawed and argued the rule would undermine industry's incentive to take precautions that could avoid needless bird deaths. Former interior officials from both parties, who have served under the past eight presidents, have urged the administration not to change the law's interpretation.

“This is another step by the U.S. Fish and Wildlife to jam through a rule to cement an interpretation of the Migratory Bird Treaty Act that a federal court has already declared illegal,” said Defenders of Wildlife President and CEO Jamie Rappaport Clark. “At a time when North America has already lost 3 billion birds, the rule will further undercut our nation's ability to conserve birds so many people care about deeply.”

While a legal opinion can be reversed with the stroke of a pen under a new administration, a final rule can take years to undo. But Eric Glitzenstein, litigation director for the advocacy group Center for Biological Diversity, said in an email that he was confident his organization and others could overturn it in court if the agency issues it before Biden takes office.

“The rule will inevitably meet the same fate as the illegal opinion on which it is based,” Glitzenstein said.
