

New Migratory Bird Treaty Act Rule – Unlikely to Take Flight?

JANUARY 27, 2021

On January 7, 2021, the U.S. Fish and Wildlife Service published a final rule in the *Federal Register* codifying the Trump Administration's interpretation that the Migratory Bird Treaty Act's (MBTA) prohibition on taking protected species only applies to purposeful take. The Trump Administration initially introduced this interpretation through a December 2017 Department of the Interior (DOI) legal opinion.

On August 11, 2020, the U.S. District Court for the Southern District of New York vacated the DOI's legal opinion, holding that DOI's interpretation that the MBTA is limited to actions directed at migratory birds is contrary to the plain language of the MBTA. Nevertheless, the final rule mirrors the DOI opinion and establishes that the MBTA does not criminalize takings that occur incidental to otherwise lawful activities, such as the operation of power lines or renewable energy facilities.

Future of the Rule

This final rule was promulgated at the tail end of the Trump Administration and will not take effect, if at all, until February 8, 2021. The Biden Administration has indicated that it intends to review the rule under President Biden's sweeping January 20, 2021, Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis. Congress may also choose to rescind the rule of the Congressional Review Act. Further, the Biden Administration is expected to refuse to defend the rule in court against the legal challenges from environmental groups.

With the future of this rule up in the air, watch our blog for further updates.

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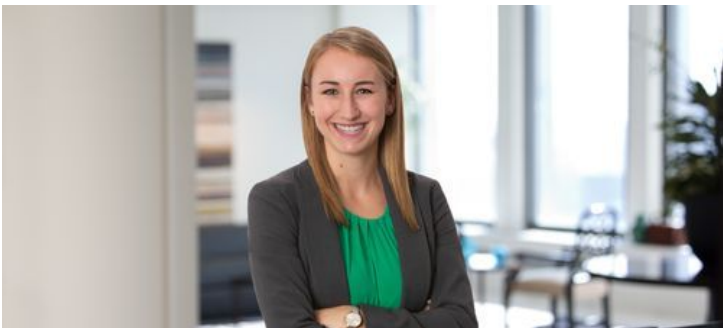
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