

## U.S. Fish & Wildlife Service Proposes Migratory Bird Permitting Program

OCTOBER 15, 2021

On October 4, 2021, the U.S. Fish & Wildlife Service (USFWS) issued a final rule revoking the Trump administration's Migratory Bird Treaty Act (MBTA) rule.<sup>1</sup> This revocation will be effective December 3, 2021. By revoking the Trump-era rule, USFWS is returning to the pre-2017 interpretation of the MBTA where incidental take of migratory birds is a crime. Concurrent with the revocation, USFWS issued an advanced notice of proposed rulemaking (ANPR) for an MBTA incidental take permitting program.<sup>2</sup>

As we have covered previously, the Trump-era rule interpreted the MBTA to only prohibit purposeful take that results in the injury or death of a migratory bird. Thus, incidental take of a protected species was not subject to the MBTA criminal liability scheme. The rule issued earlier this month rescinds the Trump-era rule and by default returns to the prior scheme where incidental take of a migratory bird is a federal crime.

USFWS concurrently issued an ANPR requesting public comment on what regulation of incidental take of protected migratory birds will look like moving forward. In the notice, USFWS states that it "is concerned that voluntary implementation of beneficial practices and prioritization of limited enforcement resources may be insufficient to conserve the species the Service is charged with protecting."<sup>3</sup> To address this concern, the USFWS is proposing a permitting program for authorizing certain incidental take of migratory birds. The ANPR contemplates authorizing incidental take using three mechanisms: (1) exceptions to the MBTA's prohibition on incidental take; (2) general permits for certain activities, which would be tailored to enumerated industries, including onshore and offshore wind electric generating facilities; and (3) specific or individual permits for projects that are not eligible for general permits.

USFWS is seeking public comment on the criteria it will use in this three-tiered approach (such as geographic features, beneficial practices, and infrastructure design). USFWS has also requested input on topics including:

- what beneficial practices might be appropriate to require for different authorization types;
- information regarding the causes of migratory bird death and injury at projects;
- activity- and project-specific beneficial practices; and
- the economic costs and benefits of implementing beneficial practices for retrofitting existing infrastructure and in new construction.

In addition to providing public comment, regulated entities can weigh in on the proposed permitting scheme through the six virtual meetings USFWS will host in late October and early November. Three of these scoping webinars will be for federally recognized Native American Tribes, and three will be for the general public.

This proposed permitting scheme is sure to impact many regulated entities, most notably renewable energy project developers. Interested parties are encouraged to participate in the rulemaking process by submitting public comments and/or attending the scoping webinars. The 60-day comment period will close on December 3, 2021.

*Please note that government orders on the federal, state, and local level are changing every day, and the information contained herein is accurate only as of the date above.*

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<https://www.federalregister.gov/documents/2021/10/04/2021-21473/regulations-governing-take-of-migratory-birds-revocation-of-provisions#h-6>

<https://www.govinfo.gov/content/pkg/FR-2021-10-04/pdf/2021-21474.pdf>

*Id.* at 54668.

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## Author

[Madalyn Brown Feiger](#)

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Madalyn Brown Feiger

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