

Trump Administration Reverses Long-Held Department of Interior Stance on Incidental Takings

FEBRUARY 1, 2018

In a memorandum dated December 22, 2017, U.S. Department of the Interior (DOI) Principal Deputy Solicitor Daniel Jorjani set forth the Trump administration's position that the Migratory Bird Treaty Act (MBTA) does not prohibit so-called "incidental" takes and kills, a significant departure from the Department's previous position.

The MBTA was first enacted in 1918 and makes the "kill[ing]" or "tak[ing]" of a migratory bird, nest, or egg unlawful. "Take," for the purposes of the Act, means to "pursue, hunt, shoot, wound, kill, trap, capture, or collect." For decades, the DOI maintained that the MBTA also prohibits the incidental taking or killing of birds that occurs during otherwise lawful activities (for instance, the construction and operation of wind turbines), although neither the MBTA nor its amendments explicitly refer to incidental take. As recently as January 10, 2017, the DOI issued a [memorandum](#) concluding that "the MBTA's prohibitions on taking and killing migratory birds apply broadly to any activity, subject to the limits of proximate causation, and are not limited to certain factual contexts ... [T]hose prohibitions can and do apply to direct incidental take." The threat of potential prosecution under the MBTA historically incentivized project developers to collaborate with federal agencies to minimize and mitigate bird deaths.

The Trump administration has taken the opposite stance, and the recent memorandum states:

[W]e conclude that the MBTA's prohibition on pursuing, hunting, taking, capturing, killing, or attempting to do the same applies only to direct and affirmative purposeful actions that reduce migratory birds, their eggs, or their nests, by killing or capturing, to human control.

Commentators expect environmentalists to challenge the recent memorandum in court.

1 Min Read

Related Locations

Chicago

Washington, DC

Related Topics

Species

Enforcement

Related Capabilities

Environmental

Related Regions

North America

This entry has been created for information and planning purposes. It is not intended to be, nor should it be substituted for, legal advice, which turns on specific facts.