



Migratory Bird Protections Reinstated

On Tuesday, September 29, 2021, the U.S. Department of Interior (“DOI”) announced the revocation of the Trump Administration’s regulation that had limited the scope of the Migratory Bird Treaty Act (“MBTA”). The revocation rule will go into effect 60 days after publication in the Federal Register on October 4, 2021.

Enforced by the Fish and Wildlife Service (“FWS”), the MBTA was enacted in 1918 to prohibit “incidental” harm to migratory birds. Simultaneously with the rule’s revocation, the agency noted its intention to publish an Advance Notice of Proposed Rulemaking (“ANPR”) on October 4, 2021, seeking public comment on the development of rules that will authorize the incidental taking of migratory birds in certain circumstances.

The DOI’s action revokes the January 7, 2021 rule that protected companies, landowners, and others from the legal consequences of violating the MBTA in the event that their activities were deemed to have unintentionally harmed migratory birds.

The agency emphasized that:

Over the last 50 years, the population of North American birds has declined by an estimated 3 billion birds. Many of the 1,093 species of birds protected under the MBTA are experiencing population decreases due to increased threats across the continent. Just recently, the Service released the [Birds of Conservation Concern 2021 report](#) with 269 bird species considered to be in greatest need of conservation attention.

The [DOI’s press release](#) states:

With this final and formal revocation of the January 7 rule, the [Fish and Wildlife] Service returns to implementing the MBTA as prohibiting incidental take and applying enforcement discretion, consistent with judicial precedent and long-standing agency practice prior to 2017.

Soon-to-be-developed instructions to FWS employees will establish criteria for identifying conduct that will receive enforcement priority related to the incidental take of migratory birds.

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