

Migratory Bird Treaty Act: U.S. Fish and Wildlife Service Finalizes Rule Defining the Scope of the Act



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The United States Fish and Wildlife Service (“USFWS” or “the Service”) recently announced the final rule defining “the scope of the Migratory Bird Treaty Act (“MBTA” or “Act”) as it applies to conduct resulting in the injury or death of migratory birds protected by the Act.” 86 Fed. Reg. 1134 (Jan. 7, 2021).

The Service determined “that the MBTA’s prohibitions on pursuing, hunting, taking, capturing, killing, or attempting to do the same, apply only to actions *directed at* migratory birds, their nests, or their eggs.” *Id.* (emphasis added).

The final rule becomes effective on February 8, 2021.

We previously reported on the Service’s proposal to study the environmental impacts of a change in rule to limit the MBTA to intentional acts. A link to the February 2020 post can be accessed [HERE](#).

Background

The MBTA, 16 U.S.C. 703 et seq., was enacted in 1918 to fulfill the United States’ obligations under the 1916 “Convention between the United States and Great Britain for the protection of Migratory Birds.” 39 Stat. 1702 (Aug. 16, 1916)(ratified Dec. 7, 1916). The list of protected migratory bird species is found in the Code of Federal Regulations at 50 CFR 10.13.

The MBTA makes it unlawful:

at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird, any part, nest, or egg of any such bird, or any product, whether or not manufactured, which consists, or is composed in whole or part, of any such bird or any part, nest, or egg thereof

16 U.S.C. 703(a). The MBTA is a statute of strict liability that carries criminal penalties for any act, outlined above, unless the act is permitted by regulation. The statutory authority and responsibility for enforcement of MBTA provisions is placed on the Service.

Recent Actions

On December 22, 2017, the Department of the Interior Solicitor’s Office issued a legal opinion, M-3750, which reversed prior Service interpretations and determined that the MBTA only applies to the

intentional take of migratory birds and, therefore, the take of migratory birds incidental to lawful activities is not prohibited.

On August 11, 2020, the U.S. District Court for the Southern District of New York vacated M-37050, “holding that the language of the MBTA plainly prohibits incidental take.” 86 Fed. Reg. at 1134 (citing *Natural Res. Defense Council v. U.S. Dep’t of the Interior*, 2020 WL 4605235 (S.D.N.Y.)). The Service disagreed. The Interior Department promptly filed a notice of appeal.

Final Rule

In its final rule, the Service states that “[a]s a matter of both law and policy the Service hereby adopts the conclusion of M-37050 in a regulation defining the scope of the MBTA.” The Service’s preamble includes a lengthy review of: the history of the MBTA, the Constitutional issues, a policy analysis of incidental take under the MBTA, and a review and response to public comments. The Service received 8,398 comments over a 45-day public comment period.

The change put in place by the final rule is simple, adding only a new section 10.14 to 50 CFR Part 10, Subpart B, which reads as follows:

The prohibitions of the Migratory Bird Treaty Act (16 U.S.C. 703) that make it unlawful at any time, by any means or in any manner to pursue, hunt, take, capture, or kill migratory birds, or attempt to engage in any of those actions, apply only to actions directed at migratory birds, their nests, or their eggs. Injury to or mortality of migratory birds that results from, but is not the purpose of, an action (i.e. incidental taking or killing) is not prohibited by the Migratory Bird Treaty Act.

Implementation of the final rule remains in doubt because of certain legal challenge and scrutiny of the final rule, and because the rule does not take effect until well after the change in Presidential administrations.

A copy of the Service’s Final Rule can be accessed [HERE](#).