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## Biden's Shift On Bird Death Rule Opens Door For Overhaul

By [Michael Phillis](#)

Law360 (March 8, 2021, 9:57 PM EST) -- The Biden administration on Monday said it will undo a rule that would have curtailed the federal government's power to prosecute companies that kill federally protected migratory birds, setting the stage for a potential regulatory overhaul that could reduce bird deaths.

Federal officials announced that they will soon revoke a rule, finalized in the last few weeks of the Trump administration, that [eliminated](#) criminal penalties for incidental migratory bird deaths under the Migratory Bird Treaty Act. The administration also revoked an underlying opinion — already tossed by a federal court — that provided the legal basis for the Trump administration's rule, which the [U.S. Department of the Interior](#) on Monday said "allowed industry to kill birds with impunity."

The Biden administration also said it is open to reevaluating its approach to the [MBTA](#) to "develop common sense standards." Some advocates are hopeful that officials will build on work from the Obama administration to implement an entirely new permit system.

Industrial activity inevitably leads to bird deaths, and companies can be prosecuted for the deaths of nearly 1,100 species protected by the MBTA, a strict liability statute. The U.S. [Fish and Wildlife Service](#) has used selective prosecution of violators to uphold the general protections in the law, at times leaving industry unsure who would end up in the crosshairs, experts say.

Advocates for a shift to a permitting system that would authorize some bird deaths as a byproduct of industrial activity say it could enhance conservation and provide more certainty for industry, which would know the rules and be able to worry less about the mindset of prosecutors.

"I think that there is a great foundation for them to move forward into an incidental take permitting program," said Katie Umekubo, an attorney with the [Natural Resources Defense Council](#). "I think they have a broad record to work with. I do think while it is a large endeavor, it is something that they have a great starting place to kick off from."

The Obama administration had [asked for feedback](#) about how the government should study a

potential permitting scheme, providing a foundation for renewed consideration, Umekubo said. The Trump administration halted the process.

Any attempt to create a new permitting system would have to deal with federal circuit disagreements over whether the Act covers bird deaths that are incidental to a project, rather than intentional. Experts say litigation could follow if officials try to attach a complex new scheme onto a more than century old statute.

The last administration said that, in order to provide certainty for industry, criminal penalties should be reserved only for acts that intentionally harm or kill birds, not incidental deaths. For decades, the DOI held that the Act — which puts into practice treaties reached between the U.S., Canada, Mexico, Japan and Russia to protect migratory birds — prohibits incidental taking or killing that occurs during otherwise permitted activities, such as the operation of electric transmission lines.

According to Eric Glitzenstein, an attorney with the [Center for Biological Diversity](#), industry often takes voluntary measures to reduce bird deaths under the current prosecutorial discretion scheme.

"If you have a permitting system, you give additional regulatory assurances, but at the same time you do something which locks in place better protective measures for birds," Glitzenstein said.

The idea of a permitting program for incidental take has been around for a while. In 2010, Sandra Snodgrass, a partner at [Holland & Hart LLP](#), said in a position paper for natural gas industry group the [INGAA Foundation](#) that a permitting system could provide certainty for industry.

"When incidental take was prohibited and there was no way to get authorization to have take, you are stuck in this position of just, make sure the Fish and Wildlife Service is happy with what we are doing" to avoid being prosecuted, Snodgrass told Law360. "You really don't know what is enough."

To establish a permitting program, however, officials would have to consider how it would apply to multiple industries, which sectors it would cover, how it would adhere to the United States' treaty obligations and ensure it wouldn't stretch the Interior Department's resources too far, among many other concerns, according to experts.

For example, the Fish and Wildlife Service couldn't handle individual permitting for every operator, Snodgrass said. Instead, it could model a permitting system on how the [U.S. Army Corps](#) of Engineers uses general permits to cover dredged or fill material in federally regulated waters under Section 404 of the Clean Water Act, she suggests.


A general permit could allow a large range of activities, impose best management practices and allow for a certain amount of bird deaths. Individual permitting could be used for projects that require more scrutiny, Snodgrass wrote in her proposal.

"They are going to want something as streamlined as possible for sure," she told Law360. "Don't make this like another Endangered Species Act ... permitting process where we are taking forever to get Fish and Wildlife Service's blessing."

The American Bird Conservancy said in comments to the DOI in 2015 that a permitting program "should be applied only to industrial infrastructure that creates a direct but solvable hazard for birds." The group said the amount of harm to species should be tracked to determine thresholds "that would trigger additional environmental review for the permit."

Beyond the particulars of how a permitting system might work, experts disagree over the authority the Act provides. Umekubo of the NRDC said the authority for a permitting system is written into the statute that gives the secretary of the interior the authority to issue regulations governing the take of birds. And there is some precedent: a permitting system was established in 2007 allowing incidental take for military activities.

But the Fifth and Tenth circuits, for example, have disagreed on whether the MBTA allows for enforcement of accidental bird death, known as incidental takes, and there's a contingent of the regulated community that doesn't think the Act prohibits those deaths. A permitting system that includes incidental deaths is near-certain to be challenged.

The Trump administration's position that incidental takes are not covered cited, in part, the 2015 Fifth Circuit decision [USA v. Citgo Petroleum Corp. et al.](#)  The court [held](#) the MBTA's ban on takings only prohibits intentional acts that directly kill migratory birds.

In contrast, last year a New York federal judge [threw out](#) a 2017 [opinion](#) from then-DOI Solicitor Daniel Jorjani that said criminal prosecution is only allowed against individuals or companies that intentionally kill or harm migratory birds. The Tenth Circuit hadn't ruled on the precise legal question at issue, but said the MBTA "applies to activities that incidentally kill birds" if it is reasonably clear they are likely to cause death.

Muddying the question further, the Eighth and Ninth circuits have taken a narrower view of the statute than the Second Circuit. Under the Trump administration, the Interior Department called the circuit divide stark. But the New York district court opinion said the rulings have nuances that make the divergence less distinct.

Snodgrass of Holland & Hart said that the Fish and Wildlife Service will likely address the circuit split in whatever rule they eventually issue, but she doesn't think the circuit split will affect the structure of a potential permitting system. She told Law360 that some regulated actors may not seek coverage under a permit in jurisdictions that haven't broadly interpreted the MBTA, "relying instead on the fact that incidental take is unlikely to be prosecuted in those jurisdictions."

The MBTA dates back more than a century. Peter Whitfield, a partner at [Sidley Austin LLP](#), said a permitting program would likely bring litigation from people who believe the MBTA isn't so expansive as to allow a broad permitting program.

"There's no way that there is an incidental take permitting program that was envisioned when this law was passed," he said of opponents' likely perspective on a permitting program.

Some groups view the law as "a pure criminal liability statute," he said.

Donald Baur, a partner at [Perkins Coie LLP](#), said the issue will likely be litigated if officials develop a new permitting scheme. He said unless Congress acts and provides clarity, companies may argue the Act doesn't prohibit their activity, as it wasn't intended to directly kill birds. If the government moves to prosecute the companies, they may sue.

"Ultimately, the underlying legal question still has to be resolved," Baur said. "There is a circuit spit, you could quite easily see this ending up in the Supreme Court."

--Additional reporting by Juan Carlos Rodriguez and Keith Goldberg. Editing by Nicole Bleier.