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# Fish and Wildlife Service Issues Guidance Limiting Agency Authority Under Endangered Species and Migratory Bird Acts

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The U.S. Fish and Wildlife Service (“FWS”) recently released two guidance documents that have the potential to streamline project development requirements related to endangered species and migratory birds:

- First, FWS clarified that an incidental take permit under the Endangered Species Act (“ESA”) is needed only when a project is likely to result in injury or death of a listed species.<sup>1</sup> This also applies to alleged harm to species due to habitat modification.
- Second, following an opinion from the Office of the Solicitor, FWS clarified what constitutes prohibited take under the Migratory Bird Treaty Act (“MBTA”), explaining that the MBTA prohibits only affirmative actions where the purpose is to take or kill a migratory bird.<sup>2</sup> Incidental take is not prohibited by the MBTA.

These guidance documents are likely to streamline development across a broad range of energy, infrastructure, and development projects. Any major project may include some level of modification of a listed species’ habitat or incidental harm to migratory birds. Both the ESA and the MBTA have been employed in the past by the FWS and project opponents to require incidental take permits where such impacts are present. Under the new guidance, however, a proposed project may proceed without an incidental take permit under either the ESA or MBTA where a listed species is not likely to be injured and the project is not intended to harm migratory birds.

### HABITAT MODIFICATION DOES NOT CONSTITUTE “HARM” UNLESS IT WILL LIKELY RESULT IN INJURY OR DEATH

The question whether the modification of listed species’ habitat constitutes “harm” under the ESA has been a point of confusion and frustration for many project proponents. Although it has not always been consistent, FWS personnel have sometimes taken the position that almost any modification of a protected species’ habitat is “harm” requiring an incidental take permit. The new guidance rejects this view and clarifies that “habitat modification, in and of itself, does not necessarily constitute take.” Rather, the guidance explains that three factors must be met in order for habitat modification to constitute “harm” under the ESA:



1. The habitat modification must be *significant*;
2. The modification must *impair an essential behavior* (such as feeding, breeding, or sheltering); and
3. The behavior impairment must result in the likelihood of an *actual injury or death*.

No incidental take permit is required under the ESA unless all three of these conditions are satisfied.

### “HARASSMENT” PROHIBITED BY THE ESA REQUIRES ACTUAL INJURY FROM AN INTENTIONAL OR NEGLIGENT ACT.

The guidance also reiterates what constitutes “harassment” of a listed species prohibited under the ESA. The guidance stresses that only “intentional or negligent” acts can constitute harassment. Moreover, “harassment” occurs only if a project disturbs the listed species to the point where it is likely to cause an injury to the species by significantly disrupting normal behavior patterns (e.g., breeding, feeding or sheltering, etc.).

### THE MBTA PROHIBITS ONLY THE INTENTIONAL TAKING OR KILLING OF MIGRATORY BIRDS.

Separately, FWS’s guidance clarifies that the MBTA prohibits only the purposeful taking or killing of migratory birds. This guidance, which implements an interpretation of the MBTA from the Office of the Solicitor,<sup>3</sup> represents a major change in the application of the MBTA, which had formerly been interpreted as prohibiting any take—including incidental take—of migratory birds. This had been a significant issue in the permitting of wind farms and other energy projects.

### NEW GUIDANCE MAY STREAMLINE PROJECT APPROVALS.

Collectively, these guidance documents are likely to streamline project approvals by no longer requiring incidental take permits where there is not likely to be an actual injury to a listed species nor any intentional harm to migratory birds. However, any project proponent must still assess the anticipated impacts of the proposed project on endangered species and weigh the risks of proceeding without an incidental take permit.

King & Spalding has significant experience in endangered species and migratory bird matters, including risk assessments related to protected species liability. If you have questions about how the ESA or the MBTA may impact your business or project, or need assistance in assessing the risk of proceeding without an incidental take permit, please contact any of our lawyers noted in the contact section on the first page.

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<sup>1</sup> U.S. Fish and Wildlife Service, Guidance on Trigger for an Incidental Take Permit Under Section 10(a)(1)(B) of the Endangered Species Act (Apr. 26, 2018), available at <https://www.fws.gov/endangered/esa-library/pdf/Guidance-on-When-to-Seek-an-Incidental-Take-Permit.pdf>.

<sup>2</sup> U.S. Fish and Wildlife Service, Guidance on the Recent M-Opinion Affecting the Migratory Bird Treaty Act (Apr. 11, 2018), available at <http://src.bna.com/ynP>.

<sup>3</sup> U.S. Department of the Interior, Office of the Solicitor, The Migratory Bird Treaty Act Does Not Prohibit Incidental Take (Dec. 22, 2017), available at <https://www.doi.gov/sites/doi.gov/files/uploads/m-37050.pdf>.

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