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USFWS Proposes to Reverse Course (Again) Regarding Incidental Take Under the Migratory Bird Treaty Act

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On May 7, the US Fish and Wildlife Service (USFWS or Service) under the new Biden administration published a proposed rule to revoke a final rule issued during the final weeks of the Trump administration, 86 Fed. Reg. 1134 (Jan. 7, 2021) (January 7 rule), which excluded incidental take from the prohibition against take under the Migratory Bird Treaty Act (MBTA or Act). 86 Fed. Reg. 24,573 (May 7, 2021) (Proposed Rule). This proposal is the latest development in a series of efforts by recent presidential administrations to implement competing interpretations of the MBTA, as we have reported in previous articles. If USFWS revokes the January 7 rule as proposed, the regulated community will once again face uncertainty regarding its exposure to criminal enforcement under the MBTA for unintentional take of protected birds associated with a wide range of productive activities. Notably this could include the operation of wind turbines, an activity that the current administration otherwise presumably wants to encourage as part of its effort to expand the use of renewable energy to address climate change.

The swinging pendulum over the meaning of "take" under the MBTA

The MBTA, a criminal statute enacted in 1918, is one of the oldest wildlife protection laws in the United States. The Act protects more than 1,000 bird species, including approximately 90 percent of all birds occurring in North America, many of which are common and abundant species. The MBTA makes it a crime for any person to "pursue, hunt, take, capture, kill, attempt to take, capture or kill, possess, offer for sale, sell, offer to purchase, purchase, . . . ship, . . . transport, . . . carry, . . . receive . . . at any time, or in any manner, any migratory bird, . . . or any part, nest, or egg of any such bird." 16 U.S.C. § 703. Responsibility for enforcing the MBTA falls to USFWS, an agency within the US Department of Interior (DOI).

Uncertainty has prevailed for years regarding the scope of the take prohibition under the MBTA. While the original purpose of the MBTA was to regulate the extreme over-hunting of migratory birds, primarily by commercial enterprises, the Service broadened its interpretation of the MBTA in the 1970s and began prosecuting incidental takings of protected birds. (*See* Preamble to the January 7

final rule, 86 Fed. Reg. at 1137, 1139). Since that time, persons engaging in an activity likely to result in a take, however unintentional and otherwise lawful, have faced the risk of criminal prosecution, subject to the exercise of enforcement discretion by the Service. At the same time, evaluating enforcement risk under the MBTA has also depended on the state where an activity which results in a take occurs, because Federal Courts of Appeal have split on the scope of the MBTA's take prohibition. The Fifth and Eighth Circuits have held that the MBTA does not prohibit incidental take, while the Second and Tenth Circuits have held that it does. In January 2017, at the tail end of the Obama administration, the Solicitor's Office of DOI issued a legal opinion known as M-37041, affirming the then-prevailing position of the USFWS that the MBTA was intended to prohibit both intentional and incidental take of migratory birds.

During the first year of the Trump administration, the Solicitor's Office of DOI replaced M-37041 with another legal opinion issued on December 22, 2017, known as M-37050, which sided with the Fifth and Eighth Circuits and concluded that the MBTA's take prohibition applied only to "direct and affirmative purposeful actions" that resulted in the killing or capturing of migratory birds, their eggs, or their nests, and did not apply to take that is incidental to an otherwise lawful action that results—even directly and foreseeably—in the death of a protected bird. In April 2018, the Service modified its enforcement policy to conform with the January 2017 legal opinion and issued a guidance memorandum clarifying that "the MBTA's prohibitions on take apply when the purpose of an action is to take migratory birds, their eggs, or their nests," and that "[c]onversely, the take of birds, eggs or nests occurring as a result of an activity, the purpose of which is not to take birds, eggs or nests, is not prohibited under the MBTA." Finally, USFWS published the January 7 rule, which codified M-37050 and provided that the scope of the prohibition of take under the MBTA applies "only to actions directed at migratory birds, their nests, or their eggs," and does not prohibit incidental take.

Overlapping legal challenges and agency actions under the Trump and Biden administrations

Multiple lawsuits, legal decisions and agency actions have followed in the wake of the December 2017 Solicitor's opinion seeking to define "take" according to competing interpretations of the statute. As we previously reported here and here, in 2018 environmental groups and eight states filed lawsuits in federal district court in New York challenging M-37050. While the case was pending, USFWS proposed a rule in February 2020 codifying M-37050. Several months later, the district court issued a decision vacating the 2017 DOI opinion as contrary to the plain meaning of the MBTA. *See Nat. Resources Def. Council v. Dep't of Interior*, No. 18-cv-4596 (S.D.N.Y. Aug. 11, 2020) (NRDC decision). In October 2020, USFWS filed an appeal of that decision in the US Court of Appeals for the Second Circuit, and on January 7, 2021, published a final rule codifying the interpretation set forth in M-37050. One month later, USFWS—now under the Biden administration—issued a notice delaying the effective date of the January 7 rule until March 8, 2021. 86 Fed. Reg. 8715 (Feb. 9, 2021). Shortly thereafter, on February 25, the Service filed a stipulation to dismiss its appeal of the NRDC decision, and on March 8, 2021—the same day the January final rule became effective—the Deputy Solicitor of DOI permanently withdrew M-37050.

Implications of the May 7 proposal

The Service's rationale supporting its May 7 proposal rests largely on the statutory interpretation employed by the district court in its August 2020 decision to vacate M-37050, holding that interpreting the MBTA to exclude incidental take was contrary to the plain meaning of the statute. The proposal also emphasizes concerns articulated by the Canadian government both during and after the

rulemaking process that a rule excluding incidental take was inconsistent with the objectives of the convention between the United States and Canada on the protection of migratory birds, and that such a rule may have negative impacts on shared migratory species. Because the January 7 rule relied on the Fifth Circuit decision holding that the MBTA does not prohibit incidental take (*United States v. CITGO Petroleum Corp*., 801 F.3d 477 (5th Cir. 2015)), the Service also devotes a considerable amount of discussion in the preamble to the Proposed Rule rejecting the statutory construction applied by the Fifth Circuit in that decision. At the same time, however, the Service gives short shrift to one of the most important rationales underlying the *CITGO* decision: that a statute imposing strict liability for criminal penalties should not be interpreted in a way that makes it impossible for regulated entities to comply without risk of liability, short of abandoning their otherwise lawful and socially useful activities, leaving them at the mercy of enforcement discretion. The Service dismisses this rationale as a mere "policy justification." 86 Fed. Reg. at 24,576-77 ("We note as well that the primary policy justifications for the January 7 rule were resolving uncertainty and increasing transparency through rulemaking. These concerns, however, do not outweigh the legal infirmities of the January 7 rule or the [Service's] conservation objectives.").

As USFWS states, "[t]he effect of [revoking the January 7 rule] would be to return to implementing the MBTA as prohibiting incidental take and applying enforcement discretion, consistent with judicial precedent." 86 Fed. Reg. at 24,573. In other words, the proposal simply takes us back to the place we were before the 2017 Solicitor's Opinion and January 7 rule, where regulated entities had to rely on the Service's enforcement discretion or the split in authority regarding the scope of take prohibited under the MBTA to avoid criminal prosecution for unintended and unavoidable take of protected birds. The proposal implies that regulated entities can avoid liability under the MBTA simply by implementing best management practices (BMPs) to reduce the risk of incidental take. In evaluating the costs of the proposed rule to businesses subject to the MBTA, USFWS states: "Only those businesses that reduced best management practices that avoid or minimize incidental take of migratory birds as a result of the issuance of M-37050 . . . and the January 7, 2021, rule would incur costs," reasoning that "[i]f we promulgate this proposed rule, those businesses would presumably reinstate those best management practices." 86 Fed. Reg. at 24,578. However, under the interpretation advanced by USFWS in the Proposed Rule, the take of a single protected bird would be a violation of the MBTA regardless of the efforts made to reduce the risk of such take. As we explained in our most recent post on this topic, implementation by wind energy developers of certain BMPs specified by USFWS in the *Land-Based Wind Energy Guidelines* may increase the likelihood of favorable enforcement discretion, but it does not provide a legally binding safe harbor from prosecution. The Service has taken enforcement action against the operators of wind energy facilities under the MBTA even when those facilities took steps to follow the guidelines. Moreover, there are no comparable guidelines offering the potential for favorable enforcement discretion applicable to other industries whose operations may result in incidental take of protected birds—including solar power generation and oil and gas production. The Service's cost analysis also ignores the potential risk and cost of enforcement under the MBTA following revocation of the January 7 rule, which are likely much greater than the cost of implementing BMPs.

Although the 2017 Solicitor's Opinion has been withdrawn and no longer is in effect, the January 7 rule remains in effect unless and until the current administration issues a final rule to revoke it. Judging from the actions taken to date by the Biden administration, it appears likely that the January 7 rule will be short-lived.

Comments on the proposal are due June 7, 2021.

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