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U.S. Fish and Wildlife Service Proposes to Codify Exemption of Incidental Take Under the Migratory Bird Treaty Act

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On January 30, 2020, the U.S. Fish and Wildlife Service ("FWS") released a Notice of Proposed Rulemaking ("NOPR") that would codify the Department of the Interior's ("DOI") existing interpretation that the prohibitions of the Migratory Bird Treaty Act ("MBTA") only apply to actions "directed at" migratory birds, their nests, or their eggs. The proposed regulations explicitly state that an incidental taking or killing of a migratory bird is not prohibited by the MBTA.

The NOPR will be published in the Federal Register on February 3, and comments are due by March 19, 2020.

The MBTA, enacted in 1918, helps fulfill the United States' obligations under the 1916 "Convention between the United States and Great Britain for the protection of Migratory Birds." In relevant part, the MBTA states that "it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill . . . any migratory bird, [or] any part, nest, or egg of any such bird." 16 U.S.C. § 703(a). Critically, the statute does not define "take," and it does not speak to whether such actions require intent in order for liability to attach. Violations of the MBTA are criminal offenses, and punishable by imprisonment and/or fines of up to $15,000. In interpreting the scope of the MBTA prohibitions, the courts are split on whether the prohibitions apply to incidental (i.e., non-purposeful) take of migratory birds, creating substantial uncertainty and potentially expansive liability exposure.

Over the past decade, the scope of MBTA's prohibitions has been an increasing target of legal opinions and litigation. On January 10, 2017, the DOI Solicitor under the Obama Administration issued a legal opinion, M-37041, "Incidental Take Prohibited Under the Migratory Bird Treaty Act," interpreting the MBTA's prohibitions—and penalties—as applying regardless of a violator's intention or state of mind. Accordingly, under that interpretation, any act that takes or kills a migratory bird is within the scope of the MBTA prohibitions so long as the act resulted in the death of a bird. In enforcing the MBTA, the federal government has typically relied on its prosecutorial discretion, and FWS has issued voluntary guidelines that recommend best practices for certain industries to avoid the incidental take of protected migratory birds.

On February 6, 2017, M-37041 was suspended for further review and then withdrawn and replaced on December 22, 2017, through the issuance of M-37050, "The Migratory Bird Treaty Act Does Not Prohibit Incidental Take." In this succeeding Solicitor's Opinion, the conclusion was reached that an otherwise lawful activity that results in an incidental take of a protected bird does not violate the MBTA. The M-37050 Opinion contained a lengthy review of the text, history, and purpose of the MBTA in determining that the MBTA's prohibitions on pursuing, hunting, taking, capturing, killing, or attempting to do the same only apply to "active" conduct and, therefore, criminalize actions that are specifically directed at migratory birds, their nests, or their eggs.

Building off of the analysis in the M-37050 Opinion, the NOPR would codify the interpretation that the MBTA's prohibitions apply "only to actions that are directed at migratory birds, their nests, or their eggs," and include an explicit exemption for injury or mortality of migratory birds "that results from, but is not the purpose of, an action (i.e., incidental taking or killing)." In the preamble to the NOPR, FWS explains that a driving factor in formalizing the policy within the implementing regulations is that "it is in its own interest, as well as that of the public, to have and apply a national standard that sets a clear, articulable rule for when an operator crosses the line into criminality."

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As part of the NOPR, FWS further criticizes the prior, more expansive interpretation of liability as unworkable. Here, FWS observes that "it is literally impossible for individuals and companies to know exactly what is required of them under the law when otherwise lawful activities necessarily result in accidental bird deaths. Even if they comply with everything requested of them by the Service, they may still be prosecuted, and still found guilty of criminal conduct." Instead, the proposed regulations would assert the position that "[p]roductive and otherwise lawful economic activity should not be functionally dependent upon the ad hoc exercise of enforcement discretion."

In the NOPR, FWS also requests that the public provide information on a number of specific matters:

1. the avoidance, minimization, and mitigation measures entities employed to address incidental take of migratory birds, and the degree to which these measures reduce bird mortality;
2. the extent that avoidance, minimization, and mitigation measures continue to be used, and will continue to be used if this proposed rule is finalized;
3. the direct costs associated with implementing these measures;
4. indirect costs entities have incurred related to the legal risk of prosecution for incidental take of migratory birds (e.g., legal fees, increased interest rates on financing, insurance, opportunity costs);
5. the sources and scale of incidental bird mortality; and
6. any quantitative information regarding ecosystem services provided by migratory birds.

FWS also released a notice of intent to prepare a draft environmental impact statement under the National Environmental Policy Act (NEPA) to assess the impacts of the proposed rule and the effects on migratory bird populations of mortality resulting from incidental take. The public scoping period will continue through March 19, and FWS will hold several scoping webinars in February and March 2020.

It is important to note that the DOI Solicitor's M-37050 Opinion underpinning the NOPR is currently subject to legal challenge by several environmental groups and states (California, Illinois, Maryland, New Jersey, New Mexico, New York, and Oregon) in the U.S. District Court for the Southern District of New York. *Nat. Res. Def. Council, Inc. v. U.S. Dep't of the Interior*, No. 1:18-cv-04596 (S.D.N.Y. filed May 24, 2018). The plaintiffs have raised substantive and procedural challenges alleging that the M-37050 Opinion misconstrues the MBTA and violates NEPA. The case is currently in the midst of summary judgment briefing on the merits.

For More Information

Van Ness Feldman counsels clients on MBTA compliance and, when necessary, defends clients in MBTA enforcement proceedings and litigation. If you would like more information about this proposed rule, please contact Joe Nelson, Matt Love, Tyson Kade, or Melinda Meade Meyers.

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