LITIGATION, POLITICAL RISKS COMPLICATE ADMINISTRATION'S EFFORT TO PROVIDE REGULATORY CERTAINTY ON MIGRATORY BIRD TREATY ACT LIABILITY

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I. Introduction

For decades, competing court rulings and lack of robust guidance from regulators left the regulated community in a state of uncertainty surrounding the reach of the Migratory Bird Treaty Act (MBTA). The Trump Administration recently proposed a rule intended to more clearly delineate what conduct is permissible under the Act, and what conduct will expose entities and individuals to criminal penalties.[1] The rule, which builds on a December 2017 legal opinion from the Department of the Interior, would limit the MBTA's criminal penalties only to conduct that *intentionally* kills or harms migratory birds. Unintentional or "incidental" harm to birds from otherwise lawful activities would no longer give rise to MBTA liability.

Both the narrowing of criminal liability and the increase in regulatory clarity will be welcome relief for those in the oil and gas, wind, solar, and utility industries (among others) whose operations can unintentionally harm migratory birds. However, absolute certainty could continue to prove elusive due to a number of factors: the continuing circuit court split on the issue of incidental take under the MBTA; the ongoing legal challenges to the 2017 Interior legal opinion; expected additional litigation once the proposed rule is finalized; and the potential that a future administration could abandon the rule and the underlying legal interpretation. And no matter the fate of the proposed rule, affected industries should remain abreast of their compliance obligations under the patchwork of state and other federal laws applicable to conduct that harms birds.

II. Application of the MBTA to Incidental Take

The MBTA was enacted in 1918 to protect declining bird populations and to enable the United States to honor its commitments in international avian-protection treaties.[2] The MBTA makes it illegal "by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill" over 1,000 different species of birds.[3] MBTA violations are misdemeanors, subject to fines up to $15,000 per take and up to 6 months of imprisonment.[4] For decades, interested parties, as well as the courts, have debated whether the MBTA applies to incidental take.

[1] 85 Fed. Reg. 5,915 (Feb. 3, 2020).

[2] 16 U.S.C. § 703 et seq.

[3] 16 U.S.C. § 703.

[4] 16 U.S.C. § 707(a). The MBTA also provides for harsher penalties for felony violations, which apply to one who takes migratory birds with the intent to sell the birds. 16 U.S.C. § 707(b).

a. An Uneven History or Prosecution

The U.S. Department of Justice ("DOJ") has prosecuted oil companies, pesticide manufacturers, electricity providers, and wind-energy producers for incidental bird deaths—although not frequently or consistently. According to one analysis, DOJ has prosecuted only 14 incidental- take cases under the MBTA in the last 20 years.[5] However, some of those prosecutions—most of which targeted the energy industry—have been notable. In the largest MBTA prosecution, DOJ secured a fine from BP of $100 million for the approximately 1 million birds killed by the 2010 Deepwater Horizon oil spill.[6] In 2013, DOJ levied a $1 million fine against Duke Energy in its first-ever MBTA prosecution against the wind-energy sector.[7] And even though these prosecutions have been rare, their unpredictability has created significant uncertainty within affected industries regarding the utility of implementing mitigation measures to avoid unintentionally harming migratory birds—including whether and to what extent such proactive measures will be taken into account by DOJ in exercising its prosecutorial discretion.

b. The Proposed Rule Decriminalizes Incidental Take

In the waning days of the Obama Administration, Interior issued a formal legal opinion stating that the MBTA *does* apply to incidental take.[8] Then, in December 2017, President Trump's Interior Department reversed this interpretation and issued its own legal opinion that concludes that the MBTA *does not* apply to incidental take.[9] Relying on the new Interior legal opinion, the proposed rule provides that the MBTA's prohibitions "apply only to actions directed at migratory birds, their nests, or their eggs. Injury to or mortality of migratory birds that results

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[5] Jessica Scott & Andrea Folds, *From Friend to Foe: The Complex and Evolving Relationship of the Federal Government and the Migratory Birds it is Bound to Protect*, Environmental Law 49:187-227 (2019).

[6] *See* Consent Decree Among Defendant BP Exploration & Production Inc., the United States of America, and the States of Alabama, Florida, Louisiana, and Texas, Case No. 2:10-md-02179 (Oct. 5, 2015). As is the case with all fines collected under the MBTA, the $100 million paid by BP was deposited into the federally administered North American Wetlands Conservation Fund. *See* North American Wetlands Conservation Act of 1989,16 U.S.C. § 4401. Section 4406 of the Act authorizes fines, penalties, and forfeitures from violations of the MBTA to be made available for wetlands conservation projects.

[7] U.S. Dept. of Justice, *Utility Company Sentenced in Wyoming for Killing Protected Birds at Wind Projects* (Nov. 22, 2013), justice.gov/opa/pr/utility-company-sentenced-wyoming-killing-protected-birds-wind-projects.

[8] *See* U.S. Dept. of Interior, Office of the Solicitor, M-37041, *Incidental Take Prohibited Under the MBTA* (Jan. 10, 2017).

[9] *See* U.S. Dept. of Interior, Office of the Solicitor, M-37050, *The MBTA does not Prohibit Incidental Take* (Dec. 22, 2017). In reaching this conclusion, the opinion criticized the "virtually unlimited" scope of liability inherent in criminalizing incidental take under the MBTA. The opinion listed the top killers of migratory birds in the United States—cats (which kill an estimated 2.4 billion birds per year), collisions with windows (303.5 million birds per year), and collisions with vehicles (200 million birds per year)—and concluded that criminalizing incidental take would "turn every American who owns a cat, drives a car, or owns a home—that is to say, the vast majority of Americans—into a potential criminal." *Id.* at 34-35.

from, but is not the purpose of, an action (i.e. incidental taking or killing) is not prohibited by the Migratory Bird Treaty Act."[10]

The U.S. Fish and Wildlife Service (FWS)—the bureau within Interior responsible for MBTA enforcement—accepted comments on the proposed rule until March 19 and aims to publish the final rule during the fall of 2020.

III. Continued Regulatory Uncertainty

As noted above, increased regulatory certainty in this area would be of significant value to the broad spectrum of industries subject to the MBTA. While the proposed rule aims to provide that certainty, several factors must be considered in the near term, including the circuit split over whether the MBTA criminalizes incidental take, ongoing and potential litigation, and the risk that a future administration could attempt to reinstitute criminal liability for incidental takes.

a. Circuit Split

The federal courts of appeals have split on the issue of whether the MBTA applies to incidental take. The unsettled state of the law has created uncertainty and confusion for entities subject to the MBTA, particularly companies with national footprints that are effectively subject to different standards in different jurisdictions. And because these courts were interpreting the requirements of the MBTA statute itself, the regulations may not necessarily resolve the circuit split, and this uncertainty remains.

In an opinion heavily cited in the proposed rule, the Fifth Circuit held that take under the MBTA "is limited to deliberate acts done directly and intentionally to migratory birds," and does not include incidental take.[11] The Fifth Circuit based its holding in part on concerns about the broad scope of liability created by applying the MBTA to incidental take. The Eighth and Ninth Circuits have likewise held that the MBTA does not apply to incidental take.[12]

In contrast, the Second and Tenth Circuits have imposed MBTA liability upon defendants who inadvertently took birds in the course of otherwise lawful activities. MBTA liability has been construed most broadly in the Tenth Circuit, where the court upheld criminal penalties against an oil company for birds killed in oil field equipment.[13] The court held that the MBTA applies to otherwise lawful conduct that proximately causes the death of a protected bird.[14] The Second Circuit similarly held that a pesticide manufacturer could be held liable for incidental take.[15]

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[10] 85 Fed. Reg. 5,915, 5,926 (Feb. 3, 2020).

[11] *United States v. CITGO Petroleum Corp.*, 801 F.3d 477, 488–89 (5th Cir. 2015).

[12] *Newton Cty. Wildlife Ass'n v. U.S. Forest Serv.*, 113 F.3d 110, 115 (8th Cir. 1997); *Seattle Audubon Soc'y v. Evans*, 952 F.2d 297, 302 (9th Cir. 1991); *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1225 (9th Cir. 2004).

[13] *United States v. Apollo Energies*, 611 F.3d 679, 686 (10th Cir. 2010).

[14] *Id.* at 690.

[15] *See United States v. FMC Corp.*, 572 F.2d 902, 907 (2d Cir. 1978).

Those who aim to challenge the rule will likely seek to take advantage of the precedent in the Second and Tenth Circuits interpreting the MBTA to apply to incidental take. Indeed, it would not be surprising to see some "forum shopping" by opponents of the proposed rule to ensure that their challenges are heard in those jurisdictions.

b. Ongoing and Anticipated Litigation

The Interior legal opinion that FWS proposes to codify is already subject to legal challenges. In three now-consolidated lawsuits filed in 2018, eight state Attorneys General and multiple environmental organizations sued Interior. These suits claim that Interior's interpretation of the MBTA is contrary to the text and purposes of the statute, and that Interior violated the procedural requirements of the Administrative Procedure Act and NEPA in adopting and implementing the opinion.[16] The challenges survived the government's motion to dismiss, and the parties are currently briefing cross-motions for summary judgment.

A similar coalition of states and environmental groups can be expected to sue Interior once the rule is finalized. A judicial finding in the current litigation that Interior's interpretation of the MBTA is unlawful would put the proposed rule —which expressly relies upon the rationale in that opinion—in jeopardy. And of course, a ruling upholding Interior's opinion would strengthen the government's position in subsequent litigation challenging the rule.

c. Future Risk

The staying power of the proposed rule depends, to a significant extent, on whether Interior can finalize the rule before the end of this Administration.[17] Interior plans to promulgate the final rule by fall 2020. But that timeline could prove unrealistic in light of the timeframe for a required Environmental Impact Statement (EIS) to accompany the rule—a detailed analysis under NEPA that typically takes significantly longer than a year to complete.[18]

It is also possible that a new administration would withdraw the Trump-era legal opinion, reinstate the Obama-era opinion, and either suspend the rulemaking process (if the rule is not yet final) or rescind and replace the regulation (if it has been finalized). There is also a possibility that the rule could be nullified by invoking the Congressional Review Act to bar its implementation.[19] Finally, there is a remote possibility that Congress enacts legislation that

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[16] *Natural Resources Defense Council, Inc. et al. v. U.S. Department of the Interior et al.*, Case No. 1:18-cv-04596 (S.D.N.Y. May 24, 2018).

[17] For example, the Obama Administration issued a Notice of Intent for a rulemaking to create a regulatory permitting program for incidental takes under the MBTA (analogous to the one that exists under the Endangered Species Act), but the effort was not completed before the end of the Obama Administration and never went into effect.

[18] 85 Fed. Reg. 5,913 (Feb. 3, 2020). The Trump Administration has also proposed new regulations concerning NEPA, including changes intended to shorten the timeframe for an EIS. *See* WilmerHale Client Alert, *Trump's Proposed NEPA Regulations Likely to Face Legal Challenge* (Feb. 18, 2020), https://www.wilmerhale.com/en/insights/client-alerts/20200218-trumps-proposed-nepa-regulations-likely-to-face-legal-challenge. But those changes are not yet in effect and would not apply to the contemplated MBTA EIS.

[19] Under the Congressional Review Act, Congress may disapprove of a regulation within 60 days of its passage by a majority vote of both chambers. If Congress enacts a resolution disapproving a rule, the rule will not take effect, and the agency may not issue a substantially similar rule without authorization from Congress. *See* 5 U.S.C. § 801.

explicitly criminalizes incidental take under the MBTA. The House Natural Resources Committee recently approved legislation to that effect, though the bill currently holds little promise of passage in the Republican-controlled Senate.[20]

IV. Continued Application of Other Avain-Protections Laws

Even if the proposed rule goes into effect and is ultimately upheld, entities should remain vigilant in complying with any other applicable federal or state laws to avoid the risk of liability for incidental take of migratory birds.

The Endangered Species Act, for example, imposes criminal penalties for incidental take of threatened or endangered birds. The Bald and Golden Eagle Protection Act provides stiff penalties for intentional bald or golden eagle take, though there is debate about whether it applies to incidental take.[21] The proposed rule does not affect those laws or their implementing regulations.

Similarly, unaffected are state laws, including state endangered-species-protection statutes, which may also apply to incidental take of migratory birds. And as the federal government loosens protections for migratory birds, states may strengthen their avian-protection laws to fill the perceived regulatory void. For example, California recently amended its version of the MBTA to explicitly criminalize incidental take of migratory birds, notwithstanding any changes to federal law,[22] and the Vermont legislature is considering a similar measure.[23]

As a result, it would be prudent for the regulated community—particularly entities with operations in California—to continue to implement reasonable and feasible mitigation measures to minimize the risk of liability (whether through regulatory penalties or litigation) arising from unintentional harm to birds.

V. Conclusion

The proposed rule aims to remove the looming threat of criminal liability that currently hangs over wind and solar energy producers, oil and gas companies, utilities, and others whose operations may incidentally take migratory birds. While the certainty intended by this proposed rule is a worthy goal, in the near term a state of uncertainty is likely to continue, due to the ongoing circuit split, pending and anticipated litigation, and the potential for a change in administration. Impacted industries should continue to employ best practices to avoid harming migratory birds in order to minimize their litigation risk and protect their ongoing operations from prosecution.

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[20] H.R. 5552, Migratory Bird Protection Act (2020).

[21] The Bald and Golden Eagle Protection Act prohibits eagle takes that are carried out "knowingly, or with wanton disregard for the consequences of [one's] act." 16 U.S.C. § 668.

[22] A.B.-454, "California Migratory Bird Protection Act."

[23] *See* H.683 "An Act Relating to Prohibiting Incidental Take of Migratory Birds."