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News Alert

NGOs Challenge Department of Interior's New Interpretation of "Incidental Take" Liability Under Migratory Bird Treaty Act

National environmental groups recently filed a pair of new lawsuits in New York federal district court seeking to expand the scope of liability for "incidental take" under the Migratory Bird Treaty Act (MBTA). The litigation seeks to overturn recent legal and policy guidance issued by the United States Department of the Interior (DOI) and Fish and Wildlife Service (FWS) which provided greater regulatory certainty by limiting those agencies' enforcement actions under the MBTA to claims of intentional harm to migratory birds. If the new lawsuits prevail, many industries may once again face potential criminal liability for day-to-day operations posing a risk of unintentional effects on migratory birds. The lawsuits are also a reminder that courts remain split on the scope of MBTA liability, that MBTA enforcement policy may shift between administrations, and that other statutes still make avian protection a key component of environmental planning and compliance at many facilities.

The MBTA is a century-old federal statute that makes it "unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill" a wide variety of migratory birds. Until recently, DOI and FWS had long interpreted the MBTA as applying both to intentional and unintentional acts resulting in harm to birds. Under this prior policy, for example, the operator of a wind farm might have faced enforcement liability under the MBTA for "bird strikes" – that is, accidental collisions between birds and wind turbines. The regulated community could rely only upon the federal government's exercise of prosecutorial discretion to avoid liability for such "incidental take".

On December 22, 2017, DOI formally reversed course in a legal opinion – known as an M-Opinion – issued by the agency's Acting

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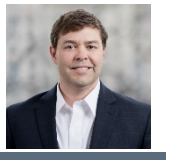

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Solicitor. The M-Opinion concluded that, "consistent with the text, history, and purpose of the MBTA, the statute's prohibitions on pursuing, hunting, taking, capturing, killing, or attempting to do the same apply only to affirmative actions that have as their purpose the taking or killing of migratory birds, their nests, or their eggs." On April 11, 2018, the FWS issued policy guidance consistent with the DOI M-Opinion. The FWS also recently announced it is no longer considering an Obama-era proposal to develop an incidental take permitting program under the MBTA, or preparing a corresponding programmatic Environmental Impact Statement.

The new lawsuits both argue that the M-Opinion is inconsistent with the MBTA and that the government's shift in policy violates the Administrative Procedure Act (APA). One of the suits, led by the National Audubon Society, also argues that the government's new MBTA policy contravenes the National Environmental Policy Act (NEPA). The government has not yet responded to the lawsuits, but likely first steps will include motions to dismiss the suits on jurisdictional grounds, including lack of final agency action, ripeness, and standing.

The lawsuits raise the question of whether the MBTA prohibits the unintentional killing or injury of migratory birds.

Fundamentally, the recent lawsuits raise an important question that has not been answered definitively by the federal courts – namely, whether the MBTA does or does not prohibit the unintentional killing or injury of migratory birds. There is currently a circuit split on this question, with the Second and Tenth Circuits holding that the MBTA prohibits incidental take, and the Fifth, Eighth, and Ninth Circuits holding that the statute only prohibits intentional take. The recent guidance from DOI and FWS represents only one interpretation of the statute, albeit an important one given those agencies' enforcement role. The recent lawsuits are therefore a reminder that the true scope of liability under the MBTA may ultimately need to be decided by the United States Supreme Court. That process could take years to play out, whether or not these lawsuits are an appropriate vehicle for Supreme Court review.

The recent MBTA lawsuits are also notable for raising persistent questions of administrative law surrounding substantive federal guidance that may be relevant to other pending and likely legal challenges to environmental policy shifts. For example, DOI might have the right to change its legal interpretation via the new M-Opinion as a matter of exercising its (generally unreviewable) enforcement discretion. On the other hand, the associated policy guidance issued by FWS after the M-Opinion could potentially be construed as a significant change in agency policy, which may or may not be subject to additional procedural requirements under the APA.

Regardless of the outcome of these cases, it is important to note that they will not affect the ongoing need for effective avian protection efforts by certain industries. For one thing, other federal laws such as the Endangered Species Act and Bald and Golden Eagle Protection Act clearly do impose liability for incidental take of certain birds, whether or not the MBTA does so as well. And many state laws do the same. In addition, while the MBTA does not include a citizen suit provision or other private enforcement mechanism, allegations of MBTA non-compliance could still be used as a basis for APA challenges to federally-permitted projects that involve a risk of unintentional harm to migratory birds. Given the circuit split on MBTA liability and uncertainty on how much deference courts will give to the DOI M-Opinion and FWS guidance, these types of challenges may pose risks to affected industries in certain regions regardless of whether DOI and FWS seek to take independent enforcement action. In the interim, these new lawsuits may be a new wave in the shifting seas of MBTA liability that the recent DOI and FWS guidance sought to calm.

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