FWS Guidance On Incidental Bird Killings May Be Short-Lived

By **Peter Whitfield and Aaron Flyer** (December 18, 2020)

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On Nov. 27, the U.S. Fish and Wildlife Service took a major step toward cementing its position that the Migratory Bird Treaty Act, or MBTA, does not regulate incidental takings and killings of migratory birds with issuance of a final environmental impact statement, or FEIS, analyzing its interpretation that the MBTA's "take" prohibition is limited to purposeful takings directed at migratory birds only.

With the FEIS in hand, the FWS will move to codify its position into regulation quickly before the forthcoming change in administration. While the Biden administration will likely seek to reverse course, finalizing a rule now will make a future change in policy difficult to accomplish, at least in the administration's first 100 days.

According to the FWS, its proposal does not alter the current implementation or enforcement of the MBTA, where individuals are not subject to enforcement actions for incidental takes. However, today's lack of enforcement is a product of FWS discretion — not regulatory certainty.

In December 2017, the then-principal deputy solicitor of the U.S. Department of the Interior, Daniel Jorjani, issued memorandum M-37050, which reversed a prior DOI interpretation that the MBTA does in fact prohibit incidental takes.

Even though the FWS proposed codifying the Jorjani opinion into regulation in February of this year, the U.S. District Court for the Southern District of New York vacated the Jorjani opinion on Aug. 11, finding that M-37050 impermissibly limited the MBTA to prohibiting only hunting and trapping activities, which ignores the broad language used in Section 2(a) and "substantially removes prior incentives for commercial actors to take precautions to avoid threats to migrating birds."[1]

The DOI filled a notice of appeal to the U.S. Court of Appeals for the Second Circuit on Oct. 9. But without the certainty of the Jorjani opinion, those engaged in industrial activities whose normal business operations may result in the inadvertent killing of migratory birds have been left to parse the case law in their applicable circuit to understand their potential liability, which varies dramatically across the country.

Completion of the FEIS

The FEIS, first published in draft form on June 5, is now available for public review for 30 days, after which the FWS will issue a record of decision, and then finalize its February proposed regulation. According to the FWS, solidifying its interpretation that the MBTA does not prohibit incidental takes into regulation provides clarity and regulatory certainty to the public, and simplifies the obligations of law enforcement, allowing it to view the MBTA's misdemeanor provision as a strict liability crime for any action directed at migratory birds.

While the FWS' conclusions are not changing, the FEIS documents the associated environmental impacts of its interpretation. The service recognized that the implementation of best practices and industry standards to limit the incidental takes of migratory birds will

likely decrease, as entities now have certainty that they will not be liable here.

The FEIS would therefore lead to negative impacts on migratory birds and other associated biological and cultural resources. However, the certainty afforded to regulated entities will reduce the legal and financial costs of compliance, and the FWS still predicts that negative impacts to migratory birds can be mitigated through outreach efforts encouraging voluntary adoption of best practices.

Consistent with its obligation to evaluate all regulatory options under the National Environmental Policy Act, the FWS considered and rejected the no-action alternative, as well as other options to promulgate regulations to define the scope of the MBTA to prohibit incidental takes, develop a general-permit framework to regulate incidental takes and develop an enforcement system focusing on gross negligence that leads to incidental takes.

What's Next?

While the FWS has not announced a timeline for issuing a final regulation — the service is only advertising the record of decision, followed by a final rule to come sometime this winter — we may see something as soon as the end of December, following the FEIS 30-day review period. However, with the Jan. 20 inauguration of President-elect Joe Biden quickly approaching, the FWS will need to fast-track issuance of the final rule to complete its three-year effort to solidify its position on incidental takes.

Regardless of how the FWS' appeal to the Second Circuit plays out, a final rule will correct one of the key deficiencies with the Jorjani opinion identified by the Southern District of New York — that it was not subject to notice and comment, and did not adequately explain the service's reversal from the position of the prior administration. With this purported deficiency, the Southern District of New York refused to afford the FWS' interpretation any legal deference. But now that the interpretation is supported by an FEIS and public comment process, another court passing review will likely afford it deference.

But even if the interpretation is solidified through a final rule, the question remains whether the incoming Biden administration will be able to reverse course — and if so, how quickly that may occur. As a first step, environmental groups may seek a preliminary injunction against any final rule, and the Biden administration will likely cease the ongoing appeal effort at the Second Circuit.

Even though the FWS' FEIS claims that the Southern District of New York's opinion "does not directly affect our rulemaking process and effectively underscores the need to codify our official interpretation of the MBTA's application to incidental take," judicial review of a forthcoming final review will not ignore the pending litigation over the Jorjani opinion.

The Biden administration will also not be able to immediately rescind the final rule. Unlike an agency-promulgated interpretive document, which has no binding legal effect, a new administration cannot reverse a final regulation with the stroke of a pen. It must provide a reasoned basis for doing so, and could require a similar NEPA process to unwind, which could take at least six months.

The new administration may seek to go further than simply rescinding the FWS' current interpretation, by imposing affirmative regulations on incidental takes, an effort that could lengthen the process. And while Congress could pass a resolution rescinding the regulation within 60 days under the Congressional Review Act, that result is unlikely absent a Democratic majority in both chambers.

Ultimately, a forthcoming FWS regulation solidifying an interpretation on incidental takes will provide companies with a greater degree of regulatory certainty in the near term, but this certainty could be short-lived. In the long term, the Biden administration will likely seek to reverse course.

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[1] See Natural Resources Defense Council v. U.S. Dep't of the Interior , No. 18-cv-4956, 2020 WL 4605235 (S.D.N.Y. Aug. 11, 2020).