Liability For Incidental Migratory Bird Killings Still In Flux

By **Peter Whitfield and Aaron Flyer** (September 11, 2020, 5:23 PM EDT)

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Does the Migratory Bird Treaty Act prohibit incidental takings and killings of migratory birds? Following the U.S. Department of the Interior's issuance of contradictory legal opinions under the Obama and Trump administrations in 2017, and an Aug. 11 decision in Natural Resources Defense Council v. Department of the Interior issued by U.S. District Judge Valerie Caproni of the U.S. District Court for the Southern District of New York, the answer is even more uncertain.

While the DOI is poised to issue a final rule clearing up this uncertainty and solidifying its position that the Migratory Bird Treaty Act does not prohibit incidental takings, current interpretations of the act vary from circuit to circuit.

Whether the act imposes liability for incidental takings is an important question for those engaged in a broad range of industrial activities — such as petroleum refineries, airports and wind power generators — whose normal business operations may result in the inadvertent killing of migratory birds.

Background

Under Section 2(a) of the Migratory Bird Treaty Act, as amended, it is "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."

While written in broad terms, the act does not expressly state that it prohibits incidental — that is, accidental — takes, the way the Endangered Species Act and its implementing regulations do. But in January 2017, Hilary Tompkins, then the solicitor of the DOI, issued memorandum M-37041 — hereafter referred to as the Tompkins opinion — finding that the act prohibits incidental takes.

In December 2017, following the change in administration, DOI principal deputy solicitor Daniel Jorjani issued memorandum M-37050 — hereafter, the Jorjani opinion — which permanently withdrew the Tompkins opinion, and then, in April 2018, issued supplemental guidance making clear that the DOI does not have authority to regulate the incidental taking of migratory birds under the act.

New York Federal Court Opinion

Shortly after the DOI issued the Jorjani opinion, environmental groups and eight states filed lawsuits in the Southern District of New York, seeking to vacate the opinion under the Administrative Procedure Act.

Under the Jorjani opinion's interpretation, the Migratory Bird Treaty Act prohibits takings or killings only as a result of actions "directed at" birds, which the plaintiffs argued unlawfully inserts a mens rea, or mental culpability, into the act's strict liability standard for penalties. The DOI disagreed, arguing that its interpretation only defines the actions or behaviors that the act prohibits.

While the court found the Jorjani opinion to be less than clear in whether it had applied an impermissible mens rea to the act, the court ultimately accepted the DOI's argument that the opinion did not impose a mens rea.

The court explained how the Jorjani opinion interpreted the act without applying a mens rea with a hypothetical: If a child throws a rock at birds in a pond to see them fly and one of those rocks strikes and kills a bird, the child has taken an action directed at a bird without having an intent to kill the bird. However, the court found that the DOI's limitation on the scope of liability under the act was contrary to the plain language of the statute.

First, the court declined to afford the Jorjani opinion any legal deference, stating that the opinion took a sudden departure from the DOI's long-held position that the act prohibited incidental takes without soliciting public comment or engaging the agency actually tasked with implementing the act, the U.S. Fish and Wildlife Service. According to the court, the Jorjani opinion "substantially removes prior incentives for commercial actors to take precautions to avoid threats to migrating birds."

Second, without affording any deference to the DOI's interpretation, the court found that the Jorjani opinion impermissibly limited the act to prohibiting only hunting and trapping activities and ignored the broad language used in Section 2(a). Drawing parallels with the Endangered Species Act, which prohibits incidental takes, the court pointed to both the meaning of "kill" and the act's modification of kill through the phrase "by any means or in any manner" to find that the act prohibits the killing of a migratory bird no matter how and no matter whether it was intentional.

According to the court, killing includes activities such as "dumping oil waste, building wind turbines, or pressure washing bridges irrespective of whether those activities are specifically directed at wildlife."

Liability for Incidental Takes Remains in Flux

But by vacating the Jorjani opinion, the court leaves more questions than answers. Presumably, vacatur of the Jorjani opinion does not otherwise resurrect the Tompkins opinion, and those undertaking the types of commercial activities that may result in accidental bird kills must carefully parse the case law in their applicable circuit, which varies dramatically across the country. For example, a facility located in Colorado may be subject to liability if a migratory bird dies after landing in an uncovered wastewater tank, whereas a facility located in Texas may not.

Further complicating the issue, the Fish and Wildlife Service issued a proposed rule on Feb. 3 that would codify the Jorjani opinion into regulation and firmly establish the service's position that the Migratory Bird Treaty Act's prohibition on "pursuing, hunting, taking, capturing, killing or attempting to do the same" apply only to actions directed at migratory birds.

The service maintains that this position is consistent with rulings by the U.S. Court of Appeals for the Fifth Circuit, the U.S. Court of Appeals for the Eighth Circuit and the U.S. Court of Appeals for the Ninth Circuit — and that it corrects the existing "convoluted patchwork of legal standards" created from contrary opinions out of the U.S. Court of Appeals for the Second Circuit and the U.S. Court of Appeals for the Tenth Circuit.[1]

While Judge Caproni found that the DOI's concern about significant circuit splits was overblown, her opinion made only passing reference to the existence of the proposed rule in a footnote, without explaining how it may affect the opinion. While the proposed rule and Judge Caproni's opinion differ in how they interpret the scope of the law's protections for migratory birds, the Fish and Wildlife Service's reliance on a regulation, rather than an interpretive opinion, now blunts two of Judge Caproni's concerns with the Jorjani opinion — that it was not subject to notice and comment, and it did not adequately explain the service's reversal from its prior position set forth in the Tompkins opinion.

In the proposed rule, the service goes to great lengths the point out what it sees as constitutional due process problems with its prior broad interpretation of the act to prohibit incidental take, arguing that such an approach would "turn the majority of Americans into potential criminals" only left to rely on prosecutorial discretion to avoid the otherwise "absurd results" of widespread criminal exposure.

Furthermore, the service recognizes that because there are no regulations in place creating a permitting scheme for incidental takes, potential violators have no formal mechanism to ensure that their actions comply with the law, and can only point to unenforceable agency guidance for an enforcement standard. With formal rulemaking in progress, the service can stand behind the public notice and comment process to shift the scope of judicial review, in the likely event that the final rule is challenged.

Instead of a de novo review of the meaning of the Migratory Bird Treaty Act — as done by Judge Caproni — the service will likely be afforded Chevron deference, meaning that its interpretation will be upheld, as long as its interpretation is reasonable. When viewed through the lens of Chevron, the service will be on much firmer ground to defend their position that the act is limited to prohibiting actions directed at migratory birds. But until this final rule is issued, industry players must be mindful of potential liability for incidental takes.

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[1] See U.S. v. CITGO Petroleum Corp., 801 F.3d 477 (5th Cir. 2015); Newton County Wildlife Ass'n v. U.S. Forest Serv., 113 F.3d 110 (8th Cir. 1997); Seattle Audubon Soc'y v. Evans, 952 F.2d 297 (9th Cir. 1991). In contrast, the Second and Tenth Circuits have criminalized some instances of incidental take. See U.S. v. FMC Corp., 572 F.2d 902 (2d Cir. 1978); U.S. v. Apollo Energies Inc., 611 F.3d 679 (10th Cir. 2010).
