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# Final Migratory Bird Treaty Act Ruling Faces Substantial Hurdles

FEBRUARY 2, 2021

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On January 7, 2021, the U.S. Fish and Wildlife Service ("FWS") issued a final rule codifying the Trump Administration's interpretation that the prohibitions of the Migratory Bird Treaty Act ("MBTA") only apply to actions "directed at" migratory birds, their nests, or their eggs ("Final Rule"). Consistent with the proposed rule (see VNF's previous alert), FWS adopted the interpretation "that the scope of the MBTA does not include incidental take." The Final Rule is currently scheduled to become effective on February 8, 2021. However, implementation of this Final Rule faces significant hurdles—it may be struck down in federal court, disapproved pursuant to the Congressional Review Act ("CRA"), or withdrawn by the Biden Administration.

## Background and Overview

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." It 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). Violations of the MBTA are criminal offenses punishable by imprisonment and/or fines of up to $15,000. Critically, because the statute does not define "take" and does not speak to whether such actions require intent in order for liability to attach, the courts are split on whether the scope of the MBTA prohibitions apply to incidental (i.e., non-purposeful) take of migratory birds. 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. This combination of judicial disagreement and uneven use of prosecutorial discretion has created substantial uncertainty and potentially expansive liability exposure.

In January 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. Under such an 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. On February 6, 2017, the Trump Administration suspended M-37041 for further review, later withdrawing and replacing it on December 22, 2017, through the issuance of M-37050, "The Migratory Bird Treaty Act Does Not Prohibit Incidental Take." This succeeding Solicitor's Opinion reaches the contrary conclusion 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. As discussed below, on August 11, 2020, the U.S. District Court for the Southern District of New York vacated the M-37050 Opinion.

On January 30, 2020, FWS released a Notice of Proposed Rulemaking to codify the interpretation set forth in M-37050 that the MBTA's prohibitions only apply to actions "directed at" migratory birds, their nests, or their eggs, and providing that an incidental taking or killing of a migratory bird is not prohibited by the MBTA. FWS then released a draft environmental impact statement ("EIS") 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 following the proposed rule.

## Potential Challenges to Implementation of the Final Rule

Given the change in administration and the pending legal challenges to the Final Rule, there appear to be numerous obstacles regarding the implementation and future viability of the Final Rule.

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First, President Biden has effectively frozen the implementation of Trump-era regulations pending review by the new administration. On his first day in office, President Biden issued an Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, which directs the heads of all federal agencies to "immediately review all existing regulations, orders, guidance documents, policies, and any other similar agency actions . . . promulgated, issued, or adopted between January 20, 2017, and January 20, 2021, that are or may be inconsistent with, or present obstacles to, the [Biden Administration's environmental and climate policy],"and "as appropriate and consistent with applicable law, consider suspending, revising, or rescinding the agency actions." The Final Rule is specifically included on the non-exclusive list of agency actions to be reviewed under the Executive Order.

Next, DOI Solicitor's M-37050 Opinion, which provides much of the legal basis for the Final Rule, was recently vacated by the U.S. District Court for the Southern District of New York. Following a legal challenge brought by several environmental groups and states (California, Illinois, Maryland, New Jersey, New Mexico, New York, and Oregon), the judge held that the language of the MBTA clearly prohibits incidental take. *Natural Res. Defense Council v. U.S. Dep't of the Interior*, 2020 WL 4605235 (S.D.N.Y. Aug. 11, 2020). FWS acknowledges this judicial opinion in the Final Rule but dismisses calls to delay implementation of the rulemaking until courts determine the legality of the M-Opinion on appeal, stating "[w]e respectfully disagree with the district court's decision and have addressed the court's findings where appropriate in the discussion [of the Final Rule]." Because the Final Rule is inextricably linked to the analysis in the M-37050 Opinion, the legal justification supporting the Final Rule would be significantly undermined should the Second Circuit uphold the vacatur on appeal. And, new lawsuits have already been filed challenging the Final Rule. *Nat'l Audubon Soc'y, et. al. v. U.S. Fish and Wildlife Serv., et. al.*, 1:21-cv-00448 (S.D.N.Y. filed Jan. 19, 2021); *State of New York et al. v. U.S. Department of the Interior et al.*, 1:21-cv-00452 (S.D.N.Y. filed Jan. 19, 2021). Furthermore, although the U.S. Department of Justice ("DOJ") filed a notice of appeal of the August 2020 decision on the M-37050 Opinion, on January 27, 2021, DOJ filed a motion seeking an abeyance of the appeal for an additional 30 days "to allow new agency officials to review the underlying policy which is the subject of this appeal."

Finally, the timing of the Final Rule's release brings it within the ambit of the CRA. Given that Democrats now control both the House and the Senate, Congress could pass a joint resolution of disapproval under the CRA, which, if signed by the President, would negate the Final Rule. Disapproval under the CRA would bar reissuance of the Final Rule "in substantially the same form" or issuance of a new rule that is "substantially the same" as the Final Rule, unless specifically authorized by subsequent act of Congress. There are important considerations that will be taken in account by Congress and the new administration in determining which, if any, recent rules to address under the CRA, including pending litigation challenging these rules. For the most part, the CRA has been used sparingly since its enactment in 1996.

The fate of the Final Rule has significant implications for the regulated community. If the Final Rule is rescinded, vacated, or disapproved, MBTA compliance would likely be enforced through guidance documents and best management practices, with the regulated community acting in reliance on FWS exercising its enforcement discretion. To address this uncertainty, the Biden Administration may seek to develop a regulatory permitting program to authorize certain incidental takes of migratory birds.

## 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 the Final Rule or the MBTA, please contact Joe Nelson, Tyson Kade, or Melinda Meade Meyers.

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