

Locke Lord QuickStudy: Fish and Wildlife Service Proposes to Restore Incidental Take Prohibition Under Migratory Bird Treaty Act – What You Need to Know

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On May 7, 2021, the U.S. Fish and Wildlife Service (“USFWS” or “Service”) published a proposed rule that would restore the traditional interpretation of the Migratory Bird Treaty Act (“MBTA”) as prohibiting incidental take and not just purposeful killing of migratory birds. This was a predictable step by the Biden Administration, but the proposed rule contains some revealing commentary that may signal how the USFWS will implement and enforce the MBTA after the rule is finalized.

I. Political Ping-Pong

For over fifty years it was widely accepted that the prohibition in the MBTA against killing migratory birds “at any time, by any means, and in any manner” applied to incidental killing, or “take” of migratory birds as well as intentional killing. Courts that had interpreted the statute generally confirmed that interpretation with a few exceptions, most notably the Fifth Circuit Court of Appeals. In the waning days of the Obama Administration, The Department of Interior’s (“DOI”) Solicitor General issued a memorandum opinion, M-37041, explicitly confirming the DOI’s long-standing interpretation that the MBTA prohibited incidental take and providing the legal basis for that interpretation. Shortly after the Trump Administration took office, the new DOI Solicitor, Daniel Jorjani, suspended M-37041, and less than a year later issued a new opinion, M-37050, reversing the DOI’s long-standing interpretation based on a completely contrary legal analysis.

The Jorjani M-Opinion was challenged in court and ultimately vacated by the Southern District of New York. Nonetheless, on January 7, 2021, in the waning days of the Trump Administration, the DOI published a final rule (the “Trump MBTA Rule”) codifying the interpretation that the MBTA applies only to intentional acts directed at migratory birds and not to incidental take. However, as we noted in [our QuickStudy on that final rule](#), it was destined to be short-lived. Predictably, on February 4, the USFWS delayed the effective date of the rule from February 8 to March 8, 2021, and requested public comment as to whether a further extension of the effective date was appropriate.

In the proposed rule published on May 7, the USFWS asserted that the Trump MBTA Rule “does not reflect the best reading of the MBTA’s text, purpose and history” and proposed to revoke it, returning to its previous interpretation that the MBTA prohibits incidental take and applying discretion in its enforcement activities.

Somewhat surprisingly, however, the USFWS announced that it would allow the Trump MBTA Rule to remain in effect pending the new rule becoming final, believing that approach represents “the most transparent and efficient path forward.”

The proposed rule contains a detailed historical and legal analysis in support of the USFWS’ once and future interpretation of the MBTA and alleging numerous flaws in the reasoning behind the Jorjani opinion and the Trump MBTA Rule. The dueling legal analyses are emblematic of the deep ideological divide between the different political factions and won’t be evaluated here. What is more interesting is what the current proposed rule indicates about how the USFWS will implement the MBTA going forward.

II. Implications for Enforcement and Potential Permit Program

USFWS’ description of the proposed rule is fairly brief – it would simply revoke the Trump MBTA Rule – but no specific language is proposed to affirmatively state that the statute does apply to incidental take. However, the Service’s regulatory impact analysis included with the proposed rule contains some revealing information about how the Service views the impact of the MBTA on certain industries and what is necessary for companies in those industries to warrant the enforcement discretion on which the Service’s implementation of the statute is based.

- *Affected Industries and Costs of Compliance*

The regulatory impact analysis included with the proposed rule states that the USFWS is unable to quantify the benefits of the proposed rule in terms of ecosystem services, businesses that rely on those services, and increased bird watching opportunities. It further states that the primary cost of the rule, the increased compliance cost incurred by industry, also is not quantifiable. But it does provide an estimate of the potential fines that would be assessed under the rule – just over \$15 million per year. The Service doesn’t provide any insight into how it arrived at this number, but it suggests an active if not aggressive enforcement program. That would certainly be in line with the Biden Administration’s increased emphasis on environmental compliance.

The regulatory impact analysis also evaluates the effect of the rule on small businesses, and in so doing identifies the specific industry sectors that most typically, in the Service’s view, incidentally take substantial numbers of migratory birds. The industries listed are:

- Finfish fishing
- Crude petroleum and natural gas extraction
- Drilling oil and gas wells
- Solar electric power generation
- Wind electric power generation
- Electric bulk power transmission
- Electric power distribution
- Wireless telecommunications carriers (except satellite)

The absence of commercial building owners and managers is an interesting exclusion, as the [USFWS’ own](#)

statistics indicate that collision with building glass is the single largest source of human-caused migratory bird mortality, and is second only to cats among all sources. Meanwhile, finfish fishing, which is included, is not among the top twelve sources of mortality listed by the USFWS.

In considering the costs to these industries of compliance with the proposed rule, the USFWS identifies example best management practices (“BMPs”) for each of the listed industries as well as the estimated cost of those measures. For example, for wind energy the BMPs include pre-construction turbine siting adjustments, pre- and post-construction bird surveys, and retrofitting of power poles to minimize eagle mortality. The estimated costs for these activities include the direct costs as well as the nationwide labor and non-labor costs for implementing the USFWS Land-Based Wind Energy Guidelines, estimated at \$54.5 million annually nationwide. For crude petroleum and natural gas extraction and oil and gas well drilling, the costs include netting of ponds for \$130-\$174,000 per acre, plus closed loop wastewater and drilling fluid systems, the cost of which was not available to the Service.

- *Public Comment Sought by June 7*

While it provided estimates of the cost of many of these migratory bird BMPs, the Service ultimately stated it lacked sufficient information to estimate the financial impact of the proposed rule on small businesses within these industries, and requested comment on that topic so it can extrapolate the data to each industry sector and any affected small businesses. The Service did express its belief that the cost of actions that businesses typically implement to reduce effects on birds are small compared with the economic output of these sectors, and requested public comment on that point as well. It also requested comment on the solar power electric generation and finfish fishing industries specifically, to determine the significance of costs on those industries. Finally, the USFWS requested comment generally on whether it should revoke the Trump MBTA Rule as proposed, the costs and benefits of doing so or not doing so, and any reliance interests that might be affected by revocation.

In its regulatory impact analysis, the USFWS suggests that the only business that would incur costs if the Trump MBTA Rule is revoked are those that reduced the use of BMPs to minimize incidental take in response to the issuance of that rule or the Jorjani opinion. Since the number of business that rolled back their avoidance and minimization efforts is not known, USFWS requested public comment on the number of business that have done so. This is a rather dubious request, as it would seem to place a target on the backs of those companies that may object to the potential costs of compliance with the MBTA under the proposed rule.

- *Potential Permit Program?*

Notably, the proposed rule makes no mention of the possibility of USFWS creating a permit program to authorize incidental take under the MBTA. In recent years there have been both legislative and regulatory efforts to do so, or at least explore what such a program might look like and how it could be implemented. By its silence on the topic, the proposed rule seems to suggest that a proposal to create a permit program through regulation is not imminent. However, if such a program is eventually proposed, the list of industries and BMPs in the proposed rule provides a good indication of what industries might be subject to such a permit program, and what may be required of companies in those industries to be eligible.

It behooves companies within the affected industries to review the proposed rule carefully and provide comments on this topic as well as the topics on which the Service has specifically requested comment. In the meantime, it is safe to assume that the USFWS will issue a final rule later this year revoking the Trump MBTA Rule and restoring the historical application of the MBTA to incidental as well as purposeful take. Companies in affected industries would be wise to prepare for that day, as the proposed rule also suggests that more regular enforcement against companies that fail to implement appropriate avoidance or minimizations measures may be in the offing.

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