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Locke Lord QuickStudy: For the Birds?: USFWS Withdraws Trump ?Rule Limiting MBTA, ?Issues Notice of Plans to Regulate ?Incidental Take

Locke Lord LLP

WRITTEN BY

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On September 29, the U.S. Fish and Wildlife Service (USFWS or Service) announced a final rule and an Advanced Notice of Proposed Rulemaking (ANPR) regarding the Migratory Bird Treaty Act (MBTA). The final rule withdraws the rule the USFWS had published on January 7, 2021 in the waning days of the Trump Administration limiting applicability of the MBTA to intentional actions directed at birds and their nests, and not incidental take. The new final rule (Final Withdrawal Rule), published in the Federal Register on October 4, will restore the previous, long-standing interpretation that the MBTA does apply to incidental take. In addition, in a move intended to prevent future swings of the regulatory pendulum, the ANPR announces the Service's intention to adopt a new rule codifying that interpretation for the first time, and seeking comments on potential regulatory approaches by which the USFWS could authorize incidental take under certain conditions or circumstances.

Final Withdrawal Rule and Director's Order

The Final Withdrawal Rule will take effect 60 days from the date of its publication, or November 3, 2021. That will conclude a process begun on May 7, 2021, when the USFWS issued a proposed rule to withdraw the Trump Administration's January 7 rule. We discussed the proposed rule and the dueling M-Opinions that preceded it in a previous QuickStudy. The Final Withdrawal Rule simply repeals the regulatory language added by the January 7 rule but does not replace it with any new language. However, concurrent with the rule's publication the USFWS is also issuing a Director's Order clarifying its interpretation and enforcement policy. That policy, which will take effect on November 3 and remain in effect until another rule is finalized, will restore the Service's longstanding policy of exercising enforcement discretion in most cases, and reserving enforcement action only for the most significant or egregious violations, or where violators have failed to implement best management practices. Thus, as of November 3, the MBTA will return to the status quo that prevailed prior to the Jorjani M-Opinion in early 2016. Incidental take will again be prohibited except within those federal circuits (the Fifth, Eighth and Ninth) that have held otherwise. However, developers, owners and operators of industrial and commercial projects and infrastructure can generally be assured that implementation of best management practices to avoid and minimize impacts to migratory birds will effectively insulate them from the prospect of enforcement for the violations that will inevitably occur.

The Proposed Rulemaking

While the Final Withdrawal Rule simply restores a previous status quo, the ANPR portends a new era for the MBTA. The USFWS makes clear in the ANPR that the next proposed rule will codify its interpretation of the MBTA as prohibiting incidental take. That will mark the first time that interpretation has been codified, with the goal of entitling the interpretation to judicial deference and ensuring its lasting, nationwide effect. Perhaps more significant from a regulatory perspective, however, is the Service's announced intention to actually authorize incidental take for the very first time instead of relying on enforcement discretion. While much of the regulated community, and their lenders and investors, has gotten comfortable with the enforcement discretion approach, it is an inherently uncertain and unreliable regulatory strategy, and one that is fraught with due process and other concerns. The USFWS hopes to eliminate those uncertainties and concerns with a "common-sense approach for regulating incidental take to better protect migratory bird populations."

Regulatory Approaches Under Consideration

The ANPR provides some specifics about the approaches to regulation and authorization that the USFWS is considering. It states that the Service is considering three primary mechanisms for authorizing incidental take: (1) exceptions to the MBTA's prohibition; (2) general permits for specific types of activities, and (3) specific or individual permits. Although the Service is seeking comments on other potential alternatives, it seems likely that it will ultimately adopt one or more of these approaches.

Exceptions to the take prohibition would likely be very limited. The ANPR suggests that exceptions could apply to noncommercial activities, including most incidental take resulting from actions of individuals (e.g., construction of a home that results in bird collisions), or to activities that utilize highly effective and beneficial technologies that sufficiently avoid and minimize take.

The ANPR devotes more discussion to the concept of a general permit and how that might work. As described, a general permit program could look similar to EPA's program for permitting discharges of storm water from construction activities: submit a notice or registration to USFWS to claim coverage, pay a fee, and implement a plan to abide by the general permit conditions. Distinct general permits would likely be issued for different industries that tailor the requirements to the nature of those industries and their impacts. Notably, the Service suggests in the ANPR that a general permit would likely include reporting requirements, but would not necessarily establish numeric limits on the amount of incidental take permitted or of what species, or require extensive monitoring requirements. Specifically, it indicates that monitoring could be limited to reporting of incidental finds by operations personnel as opposed to active, systematic monitoring.

Finally, the ANPR indicates that an individual or project-specific permit program would likely be limited to activities or facilities that could not meet the eligibility criteria for a general permit, whether due to geographic location, intensity of impact, or other factors. Thus, the Service appears to be leaning towards a general permit approach, either alone or in combination with individual permits. Individual permits would be specifically tailored to the impacts and needs of the applicant. The key question, of course, would be where the Service sets the threshold for eligibility for a general permit, and how little impact is enough to exceed that threshold.

The ANPR also indicates that the Service is considering implementing a conservation fee in conjunction with any of these approaches to permitting. It seeks comment on whether that fee should be in the form of compensatory mitigation or a general conservation fee payment, which the Service would administer and could apply either

towards further research and monitoring of migratory bird populations or to actual conservation activities. No indication is provided on the magnitude of the fees that the Service is considering, and that topic is definitely ripe for comment.

What Could Possibly Go Wrong?

Although the potential approaches to permitting laid out by the Service make a good deal of sense, it is fair – even wise – to be concerned about the Service’s ability to develop a “common sense regulatory approach” and then to implement it in a way that also makes sense. While the Service has some positive history in that regard – most notably its hunting limits and conservation fee program for waterfowl – it has been less effective in designing permitting programs applicable to industry. The Service’s incidental take permitting program under Section 10 of the Endangered Species Act (ESA) is notoriously cumbersome, and in situations involving authorization of direct mortality of listed species rather than impacts to habitat, still requires the development of habitat conservation plans that often direct more money to be spent on monitoring than actual conservation, while imposing sometimes arbitrary limitations on implementation of mitigation and monitoring requirements. The Service’s incidental eagle take permitting program under the Bald and Golden Eagle Protection Act (BGEPA) is even more problematic, imposing a preservation standard that is stricter than the ESA’s practicability standard for a species (bald eagle) with populations that are rapidly expanding throughout much of the country. Despite the health of bald eagle populations, obtaining a permit is such a lengthy and difficult process to navigate that only a handful of permits have been issued in the 12 years since the program was first adopted, even after substantial revisions to the eagle permit rule in 2016 that were intended to reduce some of the barriers to permitting.

With industry’s experience with ESA and BGEPA permitting as a guide, there is understandable trepidation about each of the approaches identified in the ANPR. A general permit approach would seem to make the most sense from both a regulatory perspective (in terms of resources required to administer) and industry perspective (self-certifying and self-implementing, thereby avoiding lengthy and costly reviews), while potentially providing significant conservation benefit in terms of minimizing incidental take and generating funds for conservation activities. But for it to work, the general permits must not be so restrictive or onerous that they become an obstacle, and the fees involved must be reasonable in the context of the projects or activities being permitted and put to good use by the Service.

Finally, if the Service is to begin requiring permits for incidental take, it must apply the standard fairly across all industries. The ANPR identifies several industries that the Service would target for regulation, including oil, gas and wastewater disposal pits, methane and other gas burner pipes, onshore and offshore wind energy, solar generating facilities, communication towers, electric transmission and distribution infrastructure, and more. Notably absent from the list are commercial buildings, which the Service itself ranks as far and away the largest source of migratory bird mortality. It is concerning that the Service shows no indication that it will impose even basic best management practices on commercial buildings, such as requiring bird-safe glass on buildings above a certain height or in certain areas, automated switches to turn lights off at night in unoccupied spaces, and other reasonably available measures to reduce bird collisions that could help reduce the most significant source of migratory bird mortality. Meanwhile, the Service targets for regulation industries that contribute far less to that problem.

Based on the ANPR it seems almost inevitable that USFWS will eventually promulgate some form of MBTA

permitting program for incidental take. Companies that maybe affected by such a program should therefore focus on seeking to ensure that the program USFWS comes up with is not burdensome from either an economic or a procedural perspective. Comments in response to the ANPR are due on November 3, sixty (60) days from its publication. Trade associations from most of the affected industries are already working on comments, but additional comments from individual companies supporting their trade associations' comments or providing additional information or recommendations can help bring greater attention and focus to those concerns.

For further information regarding the Final Withdrawal Rule, the ANPR, or MBTA issues generally, please contact the author.

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