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Locke Lord QuickStudy: The Regulatory Resurrection of M-37050:? Interior Rule Limits the MBTA Again, But Likely Not for Long

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On January 7, the Department of the Interior ("DOI") published a final rule codifying its previously announced interpretation that the Migratory Bird Treaty Act ("MBTA") applies only to intentional acts directed at migratory birds, their nests, or their eggs, and not to incidental take. This regulatory action is the latest effort by the Trump Administration to limit the scope of the MBTA, which for decades has presented a threat of strict, criminal liability for energy companies and development projects of all types that inevitably result in the death of migratory birds. The rule is intended to provide permanent clarity on the issue, but ironically, it will likely be one of the shortest-lived attempts yet to do so.

Birds Not of a Feather

The MBTA was enacted in 1918 to protect migratory bird populations from over-hunting, due largely to the demand for ornamental feathers. Section 2 of the MBTA made it "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 . . ." Until recently, DOI and many courts had long interpreted this prohibition to include the incidental, or unintentional, taking of migratory birds, although some courts including the Fifth Circuit had recently held otherwise.

Just before President Trump's inauguration in January 2017, the DOI Solicitor under President Obama issued a memorandum opinion ("M-Opinion"), designated M-37041, explicitly articulating the long-standing DOI policy that the MBTA prohibits incidental taking of migratory birds. The Trump Administration suspended M-37041 just days after President Trump's inauguration. Subsequently, in December 2017 the new DOI Solicitor, Daniel Jorjani, issued a new M-Opinion, M-37050, which announced the opposite interpretation, reversing years of prior DOI policy. In April 2018, DOI issued a guidance memorandum detailing how the new policy should be implemented.

Eight states and several environmental groups challenged the interpretation presented in M-37050, alleging that the M-Opinion was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" in violation of § 706(2)(A) of the Administrative Procedures Act. The challenge was successful, and in *Natural Resources Defense Council, et al v. U.S. Department of the Interior*, 1:18-CV-04596-VEC (S.D.N.Y. Aug. 11, 2020) the Southern District of New York vacated M-37050 and the subsequent guidance. As discussed in our previous QuickStudy on the topic, the District Court determined that M-37050 was not entitled to deference

because it was issued without a notice-and-comment rulemaking and represented a significant departure from long-established policy. Thus, the court undertook a substantive evaluation of the reasoning in the M-Opinion, which it found unpersuasive. While the court's remedy of vacatur may have formally erased the M-Opinion itself and the associated guidance, it had little immediate, practical impact because DOI continued to adhere in practice to the interpretation it had announced.

A Final Rule, But Not the Final Word

The final rule published yesterday in the Federal Register formally codifies, at 50 C.F.R. § 10.14, the interpretation first set forth in the vacated M-Opinion. The rule states simply: "The prohibitions of [Section 2 of the MBTA] . . . apply only to actions directed at migratory birds, their nests, or their eggs. Injury to or mortality of migratory birds that results from, but is not the purpose of, an action (*i.e.*, incidental taking or killing) is not prohibited by the [MBTA]." 86 Fed. Reg. 1134, 1165.

This action is intended to solidify the Trump Administration's interpretation of the MBTA and eliminate the prospect of misdemeanor criminal liability for companies that erect structures such as wind turbines or office buildings, or maintain potential hazards such as reserve pits or open-top tanks, that unintentionally result in the death of migratory birds. DOI has carefully curated its rulemaking to bolster the administrative record for the inevitable legal challenge. The Federal Register notice dedicates nearly nine pages to restating the rationale contained in M-37050, citing support for its position dating back to an 1896 Supreme Court case, *Geer v. Connecticut*, 161 U.S. 519 (1896). The DOI also spends a full 16 pages carefully rebutting public comments filed in opposition to the original rule proposal. By publishing a final rule, the DOI hopes to minimize a court's ability to overturn its interpretation a second time by qualifying it for *Chevron* deference, although many conservative courts including the Supreme Court seem to be losing their appetite for agency deference in recent years. By providing ample material in the administrative record, the DOI has attempted to increase the likelihood that the rule will withstand a court's scrutiny even if deference is not granted.

For all of DOI's efforts to establish an enduring new interpretation of the MBTA, there is little likelihood that the rule will ever take effect. DOI did not seek to waive the normal 30-day waiting period from publication, so the rule is not scheduled to take effect until February 8. President-Elect Biden's transition team announced on January 4 that President Biden intends to issue an Executive Order on January 20, his first day in office, suspending any regulations and guidance documents promulgated by the Trump Administration but not yet in effect. Thus, this rule would be subject to the regulatory freeze, and given the reversal of long-standing policy it would represent and the intense opposition it has engendered from many of the most influential environmental advocacy groups, it is likely that the Biden Administration will ultimately withdraw the rule. Eventually, the Biden Administration is likely to seek to swing the pendulum back again by restoring the Obama Administration's original M-Opinion, or perhaps by undertaking its own rulemaking. A new rulemaking would almost certainly confirm the MBTA's application to incidental take, but could also establish a new general permitting regime to provide relief from strict liability in certain, limited circumstances where incidental takings can be minimized but not avoided.

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