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Environmental Practice Group

Client Alert

New Rule on Incidental Take Under the Migratory Bird Treaty Act Likely to be Short-Lived

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On January 7, 2021, the U.S. Fish and Wildlife Service ("FWS") published a final rule limiting liability for incidental takes of migratory birds under the Migratory Bird Treaty Act of 1918 ("MBTA"). The final rule is currently set to become effective on February 8, 2021 but faces several hurdles.

There has long been a debate with respect to the scope of the MBTA's take provision. The Trump administration has taken the position that the MBTA's prohibition on migratory bird takes only relates to intentional, directed takes, such as hunting or poaching, whereas prior administrations have interpreted the provision broadly to include incidental takes, such as accidents that occur in the course of otherwise lawful activities.

The implications of the new rule could be far-reaching given that the MBTA protects nearly every bird species in North America and could be especially significant to renewable energy projects since incidental takes could result from bird collisions with wind turbines and power lines.

The MBTA makes it unlawful to, "by any means or in any manner", pursue, hunt, take, capture or kill any migratory bird. Federal courts have long disagreed over whether the MBTA criminalizes incidental take of migratory birds. Currently, there is a split among federal courts of appeal. As a result, liability for incidental take under the MBTA differs depending on the federal circuit in which the violation occurs.

Historically, the FWS has relied on enforcement discretion to apply the MBTA's take provision. The threat of enforcement action as the result of incidental take has prompted many companies to voluntarily implement best management practices to assess, manage and lower the risk of adverse impacts to migratory birds. An incidental take permitting program is not available under the MBTA, although such a program is available under the Endangered Species Act and the Bald and Golden Eagle Protection Act. Incidental take permits could afford a level of protection to companies from liability due to incidental take so long as measures are also taken to minimize bird injuries or deaths.

The new rule narrowly interprets liability under the MBTA to exclude unintentional, non-directed takings of migratory birds. The new rule codifies the interpretation of the MBTA's take provision set forth in the December 2017 U.S. Department of Interior ("DOI") legal opinion (number M-37050) ("Jorjani M-Opinion"). The Jorjani M-Opinion withdrew and replaced an earlier Obama-era DOI legal opinion (number M-37041) ("Tompkins M-Opinion") interpreting the MBTA to prohibit incidental take. The Jorjani M-Opinion was struck down by Judge Valerie Caproni of the U.S. District Court for the Southern District of New York in an August 11, 2020 decision. The appeal filed by the DOI shortly thereafter remains

pending. The Biden administration could withdraw the appeal and may issue a legal opinion that withdraws and replaces the Jorjani M-Opinion.

With the incoming Biden administration and Democrat-controlled Congress, the new rule faces uncertainty. In its immediate future, the new rule likely faces a regulatory freeze for up to 60 days. As prior administrations have done, the incoming Biden administration will likely implement a regulatory freeze on all pending rules that have not yet become effective, including the new rule limiting liability for incidental take under the MBTA. In addition, the Biden administration may issue a proposed rule to further delay the effective date.

The Democrat-controlled 117th Congress could disapprove the new rule pursuant to the Congressional Review Act ("CRA"). Disapproval under the CRA requires only simple majorities of each house of Congress to pass a joint resolution and the signature of the President. A rule disapproved pursuant to the CRA is not only retroactively nullified, but the issuing agency is also prevented from reissuing a "substantially similar" rule in the future unless Congress authorizes it to do so in a subsequent law. It is safe to assume that the Biden administration will not reissue a "substantially similar" rule.

If the new rule is ultimately undone administratively, judicially or legislatively, it is likely that the FWS under Biden will shift its enforcement policy to be more in line with the Tompkins M-Opinion. However, it is not clear that its enforcement policy will be applied equally across industries. The Biden administration's push for clean energy could result in leniency in terms of MBTA enforcement towards renewable energy projects, which would be particularly significant for wind energy projects that could otherwise face substantial risk of enforcement under a broad interpretation of liability for incidental take under the MBTA.

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Please feel free to discuss any aspects of this Client Alert with your regular Milbank contacts or any member of our Environmental Practice Group.