Monday, April 16, 2018

On April 13, 2018, the Washington Post published an article entitled “The Trump administration has officially clipped the wings of the Migratory Bird Treaty Act.” The Article correctly notes that the United States Fish and Wildlife Service's “Guidance on the recent M-Opinion affecting the Migratory Bird Treaty Act” (the “Guidance”) limits the ability of federal law enforcement from pursuing or threatening criminal prosecution and associated fines for the incidental take of migratory birds, their nest, or their eggs. But the Article paints an incomplete picture a few important respects, as outlined herein.

First, there may be several legitimate, conservation-based reasons that the Migratory Bird Treaty Act (“MBTA”) should extend to incidental takings. However, contrary to the tone and content of the Article, whether the MBTA extends to incidental takings has long been a complex legal question that has split courts across the country. The MBTA, as it written, is ambiguous as to whether, and what extent, the MBTA allows for criminal prosecution associated with incidental take. The solution has always been and continues to be a legislative fix, and should not rest on political = agendas of a particular administration.

Second, the Article does not address the role that Courts play in interpreting the MBTA. Agency guidance is not entitled to deference by a Court, and in interpreting a statute Courts may reject the same. It is important to recall that there is existing case law which provides that conduct proximately causing the death or injury to migratory birds, their eggs, or their nests, is prohibited by the MBTA if it is reasonably foreseeable that conduct will cause injury or death to a migratory bird, their eggs, or their nests. However, the Article’s point is correct: under the M-Opinion and the Guidance, federal agencies will not pursue criminal prosecutions for incidental take. But neither the M-Opinion nor the Guidance is a change in the law; they are more akin to directives on prosecutorial discretion. Prosecutorial discretion has always played a huge role in the enforcement of the MBTA. This is not to opine that migratory birds don’t deserve protection, but rather to clarify that when the winds of the political climate change, so will the enforcement of the MBTA. In short, the law itself is unchanged, only the prosecutorial discretion as to when a federal agency will pursue criminal enforcement of the MBTA as it relates to incidental take has changed.

Third, the Article does not address the fact that the Clinton-era Executive Order, EO-13186, and the resultant inter-agency MOUs still vest with the federal agencies the ability to condition any federal approval, permit, or right-of-way upon the inclusion of mitigation measures to prevent and mitigate incidental take of migratory birds,
their nests, and their eggs. This is an important part of the conversation, as it reflects that while the Trump Administration may be effectively de-criminalizing incidental take in the short-term, it has not taken any steps to roll back the ability of federal agencies to protect migratory birds for any project which requires a federal approval of any kind. Ultimately, as it stands today, federal agencies still have the ability to condition approval on the protection of migratory birds against incidental take, and to revoke approval is a company fails to abide by the same.

While the Article does frame some of the risks the M-Opinion and the Guidance may pose to the protection of migratory birds against incidental takings, it stops short of clarifying that those risks are ameliorated by: (1) the fact that any project which requires a federal approval will likely still be required to mitigate against incidental take, (2) the fact that the MBTA is unchanged and thus changes in the political climate are likely to lead to a return of prosecutorial discretion whereby incidental takings are deemed violations by the MBTA, and (3) the role of the courts.

Ultimately, the Article fails to truly frame for consideration or even attempt to address the real underlying issue of the MBTA, a century-old law: it is ambiguous as to its scope, and the only real solution is a legislative fix which balances the need to protect migratory birds with meaningful constraints on the federal government’s prosecutorial discretion and the scope of a federal agencies’ ability to require “voluntary” mitigation as condition for receiving federal approval.

**References:**

1 Available online [here](#) (last visited April 16, 2018).

2 M-Opinion 37050 (December 22, 2017) (“[C]ourts have adopted different views on whether Section 2 of the MBTA prohibits incidental take, and, if so, to what extent. Courts of Appeals in the Second and Tenth Circuits, as well as district courts in at least the Ninth and District of Columbia Circuits, have held that the MBTA criminalizes some instances of incidental take, generally with some form of limiting construction. By contrast, Courts of Appeals in the Fifth, Eighth, and Ninth Circuits, as well as district courts in the Third and Seventh Circuits, have indicated that it does not.”) available online [here](#) (last visited April 16, 2018).

3 *S. Forest Watch, Inc. v. Jewell*, 817 F.3d 965, 971 (6th Cir. 2016) ("Statutory interpretations in agency guidance documents are entitled to respect, . . . but only to the extent that those interpretations have the 'power to persuade.'") (internal citations and quotations omitted); *see also Christensen v. Harris County*, 529 U.S. 576, 587, 120 S. Ct. 1655, 146 L. Ed. 2d 621 (2000) (ruling that agency interpretations in opinion letters, policy statements, agency manuals, and enforcement guidelines are not entitled to Chevron deference).

4 *United States v. Apollo Energies, Inc.*, 611 F.3d 679, 691 (10th Cir. 2010) (upholding a conviction under the MBTA for failure to cover heater-treated equipment where company knew that conduct was likely to kill a migratory bird and had received but failed to implement suggestions of the United States Fish and Wildlife Service prior to the killing of a migratory bird).

5 See e.g. M-Opinion 37401 (January 10, 2017) available online [here](#) (last visited April 16, 2017); M-Opinion 37050 (December 22, 2017) available online [here](#) (last visited April 16, 2018);

See e.g. 6 *United States v. FMC Corp.*, 572 F.2d 902, 904-05 (2d Cir. 1978) (situations “such as deaths caused by automobiles, airplanes, plate glass modem office buildings or picture windows in residential dwellings ... properly can be left to the sound discretion of prosecutors and the courts”). (last visited January 29, 2018) (“Executive Order 13186 further defines take to include intentional take, meaning take that is the purpose of the activity in question, and unintentional (or incidental) take, meaning take that results from, but is not the purpose of the activity in question. Both intentional and unintentional take constitute take as defined by the MBTA.”). *Office of Surface Mining, Reclamation and Enforcement and FWS MOU*, (last visited January 29, 2018) (“Executive Order 13186 further defines take to include intentional take, meaning take that is the purpose of the activity in question, and unintentional (or incidental) take, meaning take that results from, but is not the purpose of the activity in question. Both intentional and unintentional take constitute take as defined by the MBTA.”). *National Park Service and FWS MOU*, (last visited January 29, 2018) (“Executive Order 13186 further defines take to include intentional take, meaning take that is the purpose of the activity in question, and unintentional (or incidental) take, meaning take that results from, but is not the purpose
of the activity in question. Both intentional and unintentional take constitute take as defined by the MBTA.""); Bureau of Reclamation and FWS MOU. ("[i]n coordination with the FWS, develop conservation measures and ensure monitoring of the effectiveness of conservation measures to minimize, reduce or avoid unintentional take."); Bureau of Land Management and FWS MOU.

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