U.S. Fish & Wildlife Service to Consider Expanding Incidental Take Authorization under Migratory Bird Treaty Act

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This week, the U.S. Fish and Wildlife Service (Service) published a notice in the Federal Register identifying its intent to prepare an environmental impact statement analyzing various approaches for regulating incidental take of the 1,027 bird species in the United States currently protected by the Migratory Bird Treaty Act (MBTA). The approaches that the Service will consider include (i) general incidental take authorization for specific types of activities; (ii) individual incidental take permits for specific projects or activities; and (iii) the development of interagency memorandums of understanding authorizing incidental take. The Service will also consider not issuing incidental take authorization, and instead simply developing voluntary guidance intended to avoid or minimize incidental take. Depending upon the outcome of this review, the Service could significantly expand the types of activities that could qualify for incidental take coverage.

While the Service has in the past issued incidental take permits under the MBTA, these permits have generally been limited to activities related to scientific research, raptor propagation, falconry, and military-readiness. Thus, large sectors of the economy have been left open to the threat of enforcement actions and criminal penalties for "taking" a MBTA protected bird species, without any real ability to insulate from this risk. The Service has acknowledged this risk as one of the motivating factors for possibly expanding the scope of its incidental take authorization.

It should be noted that while the Service interprets the "take" prohibition in the MBTA broadly, the courts are split on the issue. Both the Eighth and Ninth Circuits have taken a narrow view of the MBTA's take prohibition, holding that the term "take" in the MBTA does not cover indirect actions that result in the take of migratory birds (e.g. incidental take). *Seattle Audubon Soc'y v. Evans*, 952 F.2d 297 (9th Cir. 1991); *Newton County Wildlife Ass'n v. U.S. Forest Service*, 113 F.3d 110 (8th Cir. 1997). The Second Circuit, however, has

interpreted "take" to include instances in which a defendant has engaged in "extrahazardous" activities, regardless of intention. *United States v. FMC Corp.,* 572 F.2d 902 (2d Cir. 1978). And the Tenth Circuit has taken it a step further, holding that the MBTA prohibits all "take" of migratory birds regardless of the activity. *United States v. Apollo Energies*, 611 F.3d 679 (10th Cir. 2010).

The notice states that if a permit program is implemented, it will focus on a limited number of specific industries and activities, and the program will likely include mitigation requirements for bird mortality that cannot be avoided through the incorporation of technology or best practices. The industries specifically identified in the notice include the oil and gas industry, the electrical industry, and the communications industry. The Service has stated that it will also consider whether to expand the industry group to wind energy generation.

With respect to the alternatives that will be considered, the notice describes the general incidental take authorization as a potential mechanism for permitting specific types of hazards in specific industries, providing the following examples: (i) oil, gas, and wastewater disposal pits; (ii) methane or other gas burner pipes; (iii) communications towers; and (iv) electric transmission and distribution lines. As for the individual permit alternative, the notice contemplates that this option would work in tandem with the general incidental take authorization, potentially providing coverage for projects or activities that would not be covered by a general incidental take authorization and require project-specific considerations. Whereas the two alternatives above clearly contemplate extending take authorization to a non-Federal agency, the notice implies that the memorandum of understanding alternative may not be so expansive.

There is a 60-day comment period running from the date of publication, during which any interested entity, agency, or individual can submit comments. In addition to reviewing submitted comments, the Service has scheduled a number of "Scoping Open Houses" to discuss the issues, including one in Sacramento, California and one in Denver, Colorado.