Trump Rollbacks Hit a New Snag: Incidental Take of Migratory Birds

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"It is not only a sin to kill a mockingbird, it is also a crime," proclaimed U.S. District Court Judge Valerie Caproni, channeling Harper Lee. On August 11, Caproni vacated the "M-Opinion" authored by Interior Solicitor Daniel Jorjani. The opinion embodies the administration's attempt to reverse the Department of the Interior's interpretation of the Migratory Bird Treaty Act as prohibiting incidental, or non-purposeful, "take" of migratory birds. The administration is also expected to release a final rule codifying this policy this fall. As with so many other regulatory rollbacks, the fate of these efforts will likely depend on the outcome of the election.

Depending on the outcome of the election is the fate of bird species

Under the MBTA, "it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess . . . any migratory bird." Interior previously interpreted this language to prohibit not only intentional take (e.g., hunting and poaching), but also take that is incidental to otherwise legal activities (e.g., operation of oil pits, transmission lines, or wind turbines).

As detailed in an earlier column, the courts of appeal have been all over the map in interpreting this provision, some endorsing and others rejecting the government's positions, in a variety of factual contexts. Meanwhile, the Fish and Wildlife Service has never established a permitting program for incidental take, leaving industry to rely on best practices, guidance, and the exercise of enforcement discretion. While there is no citizen suit provision in the MBTA, the lack of regulatory certainty has nonetheless been the subject of intense criticism by project proponents.

The Obama administration was unable to finalize a permitting program for incidental take, due in part to controversy among stakeholders, and within the government, about the appropriate form of such a program. Some commenters wanted to mirror the individual permit programs under the Endangered Species Act and Bald and Golden Eagle Protection Act; others advocated for a general permit program like the Clean Water Act Section 404 Nationwide Permit Program. Meanwhile, the Obama administration's interior solicitor issued a formal legal opinion in late January 2017, just days before Trump's inauguration, formally pronouncing that the MBTA prohibits incidental taking and killing of migratory birds.

Rather than pursue a permitting program, the new administration moved quickly to withdraw the Obama solicitor's opinion, replacing it with the Jorjani opinion, which adopted a polar opposite interpretation. Jorjani determined that incidental take is not prohibited by the MBTA. He interpreted the MBTA's five verbs — "pursue, hunt, take, capture, kill" — to require deliberate, affirmative action specifically directed at achieving a goal, and therefore did not include non-purposeful take. He contended that his interpretation was faithful to the MBTA's original intent to regulate hunting and poaching.

The Jorjani opinion was challenged by a coalition of states and public interest groups. Brushing aside defenses based on lack of standing, finality, and ripeness, Judge Caproni struck at the heart of the opinion, finding that it is "contrary to the plain meaning of the MBTA" and "runs counter to the purpose of the MBTA to protect migratory bird populations." Caproni noted that "Congress could have, but chose not to, limit the MBTA to activities like hunting that are directed at birds, but there is no basis to insert that extratextual limitation."

As the Trump administration's first term winds down, project proponents are largely where they were at end of the Obama administration — uncertain about the path ahead. If President Trump is reelected, litigation will likely continue through appeal of Caproni's ruling, a challenge to the forthcoming FWS regulation, or both.

Ultimately, there could be a shot at a Supreme Court opinion, one among many environmental issues that could be affected by a potential shift in the balance of the Court. On the other hand, if Vice President Biden is elected, his administration is likely to take action, potentially swiftly, to roll back the rollbacks. A new administration may then be forced to confront the difficult task of developing a permitting program, or some other solution, that protects species while meeting the administration's ambitious goals to address climate change — goals that can only be achieved through massive expansion and buildout of renewable energy infrastructure.

To be sure, controversy over environmental review and permitting issues will continue to be high on any administration's agenda.

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