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Wildlife Roundup

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The regulation of protected wildlife is likely to undergo a seismic shift as a result of the change in administrations. Whereas the Trump Administration took several actions to narrow the reach of wildlife protection statutes, the Biden Administration is likely to undo or revise many of those actions and seek ways to expand protection for sensitive species. In fact, it has already taken steps to do so. This increased focus on species conservation will likely result in additional wildlife avoidance, minimization, and mitigation obligations for project proponents. This article summarizes some of the recent changes in law, policy, and listing status relevant to protected wildlife under the Migratory Bird Treaty Act (MBTA), Endangered Species Act (ESA), and Bald and Golden Eagle Protection Act (BGEPA).

Migratory Bird Treaty Act Prohibitions

Over the last few decades, a circuit split has developed regarding the issue of whether incidental take—i.e., take that results from but is not the purpose of an activity—falls within the scope of the MBTA.¹ At the end of the Obama Administration, the Solicitor of the Interior issued an opinion concluding that incidental take is indeed covered by the Act's prohibitions.² Less than a year later, the Acting Solicitor of the Interior in the Trump Administration (Trump Solicitor) withdrew that opinion and issued a new one, which reached the opposite conclusion.³ Despite the fact that a court found the Trump Solicitor's Opinion to be unlawful under the MBTA,⁴ the U.S. Fish and Wildlife Service (USFWS) issued a regulation at the end of the Trump Administration that expressly states that incidental take is not prohibited by the MBTA.⁵

The Biden Administration's reaction to this issue has been swift. On February 25, 2021, it withdrew the government's appeal to the Second Circuit Court of Appeals that sought to uphold the Trump Solicitor's Opinion. And it delayed the effective date of the new regulation from February 8, 2021, to March 8, 2021.⁶ Although that date has passed, and the regulation is currently effective, the Biden Administration has permanently withdrawn the Trump Solicitor's Opinion, noting that the district court's decision is consistent with the Department of the Interior's (DOI) long-standing interpretation of the MBTA.⁷

This suggests that USFWS will take further action to revoke or revise the regulation in the near term, returning to the status quo ante during the Obama Administration when the DOI viewed incidental take as falling within the scope of the MBTA's prohibition. However, the MBTA currently lacks an incidental take permitting program, which creates considerable uncertainty and creates risk management issues for companies considering project development. While the Biden Administration may pursue an MBTA incidental take permit program, it would likely require significant time to establish and may be subject to challenge in light of the

circuit split. Thus, in the interim, project proponents should establish a good working relationship with USFWS and take reasonable steps to minimize the likelihood of incidental take of MBTA-protected species, which should increase the likelihood of garnering prosecutorial discretion if such take occurs.

Endangered Species Act Critical Habitat Regulatory Revisions

The Trump Administration issued two rules regarding the designation of critical habitat under the ESA that became effective in January 2021. The first was in response to the U.S. Supreme Court's holding in the *Weyerhaeuser* decision that any area designated as critical habitat must first qualify as "habitat," which was not defined under the ESA at that time.⁸ USFWS then issued a rule defining "habitat," for purposes of critical habitat designation only, as "the abiotic and biotic setting that currently or periodically contains the resources and conditions necessary to support one or more life processes of a species."⁹ This rule became effective on January 15.

Just days later, USFWS issued a rule amending the regulations regarding the process for excluding areas from critical habitat.¹⁰ This rule was in response to the portion of the *Weyerhaeuser* decision where the Court recognized that the agency's decision not to exclude an area from a critical habitat designation is reviewable for abuse of discretion.¹¹ Thus, as USFWS explained, "[t]he intended effect of this rule is to provide greater transparency and certainty for the public and stakeholders."¹² This rule became effective on January 19.

A coalition of 18 states and the City of New York filed suit in federal district court challenging both of these rules.¹³ On February 16, 2021, the court granted a joint stipulation to stay the proceedings for 60 days. While these rules are currently in effect, they are both on the list of actions for DOI review pursuant to President Biden's Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis.¹⁴ It is likely that USFWS will propose additional action regarding one or both of these regulations in the near future. While the specifics of such additional action cannot be predicted at this time, it is expected that any changes would be intended to increase USFWS's ability to designate critical habitat.

Endangered Species Act Listing and Critical Habitat Actions

In the past six months, numerous species have been the subject of listing or critical habitat actions under the ESA. Several of the Trump Administration actions taken towards the end of its term focused on delisting or downlisting species and shrinking critical habitat, some of which are currently the subject of litigation. While the Biden Administration has also delisted one species and proposed to downlist another, it is likely that the trend will swing towards additional proposed listings and more expansive critical habitat designations. The following table summarizes recent actions to list, downlist, uplist, and delist threatened and endangered species and to propose or designate critical habitat.

| Species | Action | States Affected |
|---|--|--|
| Yellow lance | Final critical habitat designation | Maryland, North Carolina, Virginia |
| Candy darter | Final critical habitat designation | Virginia, West Virginia |
| Suwannee alligator snapping turtle | Proposed threatened listing with a 4(d) rule | Florida, Georgia |
| Hawaiian stilt | Proposed downlisting to threatened with a 4(d) rule | Hawaii |
| Eastern hellbender - Missouri distinct population segment | Final endangered listing | Missouri |
| Bradshaw's lomatium | Final delisting | Oregon, Washington |
| Arizona eryngo | Proposed endangered listing and critical habitat designation | Arizona, New Mexico |
| Northern spotted owl | Final revised critical habitat designation | California, Oregon, Washington |
| Interior least tern | Final delisting | Arkansas, Colorado, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Mexico, North Dakota, Oklahoma, South Dakota, Tennessee, Texas |
| Bearded seal - Beringia distinct population segment | Proposed critical habitat designation | Alaska |

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|-------------------------------|---|--|
| Ringed seal Arctic subspecies | Proposed critical habitat designation | Alaska |
| June sucker | Final downlisting to threatened with a 4(d) rule | Utah |
| Monarch butterfly | 12-month finding of "warranted but precluded" (candidate status) | All states except Alaska |
| Northern spotted owl | 12-month finding on petition to uplist to endangered of "warranted but precluded" | California, Oregon, Washington |
| Whitebark pine | Proposed threatened listing with 4(d) rule | California, Idaho, Montana, Nevada, Oregon, Washington, Wyoming |
| Peppered chub | Proposed endangered listing and critical habitat designation | Colorado, Kansas, Mexico, Oklahoma, Utah |
| Sickle darter | Proposed threatened listing with 4(d) rule | North Carolina, Tennessee, Virginia |
| Gray wolf | Final delisting | Lower 48 states |
| American burying beetle | Final downlisting to threatened with 4(d) rule | Arkansas, Kansas, Massachusetts, Michigan, Nebraska, Ohio, Oklahoma, Rhode Island, South Dakota, Texas |

*Environmental organizations filed a lawsuit challenging the reduction in critical habitat on March 23, 2021. See Complaint for Declaratory and Injunctive Relief, *Audubon Soc'y of Portland v. U.S. Fish & Wildlife Serv.*, No. 3:21-cv-00443 (D. Or. March 23, 2021).

** Environmental organizations filed a lawsuit challenging the delisting decision on January 14, 2021. See Complaint for Declaratory and Injunctive Relief, *Defenders of Wildlife v. U.S. Fish & Wildlife Serv.*, No. 3:21-cv-00344 (N.D. Cal. Jan. 14, 2021).

Bald and Golden Eagle Protection Act Guidance

The policy swings between administrations has not been as pronounced under BGEPA as it has been under the ESA and MBTA. This may be a reflection of the fact that most of USFWS's guidance for BGEPA compliance has been focused on the wind industry. Unlike other deregulation initiatives aimed at creating an easier path for industry, minimizing the regulatory burden on the renewable energy industry was not a high priority for the Trump Administration. The Biden Administration will likely try to balance eagle-conservation objectives with its emphasis on increasing renewable energy development. Thus, the two fairly recent developments in nest buffer guidance summarized below will likely remain in effect during the Biden Administration.

Region 6 Wind Turbine Guidance. One of the strategies for minimizing impacts to bald and golden eagles under BGEPA is the use of spatial buffers around nests. In 2013, USFWS Region 6 issued guidance regarding these nest buffers for wind energy facilities, which recommended a buffer around occupied nests equal to the $\frac{1}{2}$ -mean inter-nest distance ($\frac{1}{2}$ -MIND) for the project area and a 0.5-mile buffer around unoccupied nests, with the potential need for curtailment for turbines located between 0.5 and 1.0 mile from a nest.¹⁵ The size of the $\frac{1}{2}$ -MIND buffer would be based on an average distance among all occupied nests within a given year and approximated the average territory size. On May 21, 2020, USFWS Region 6 issued updated guidance, which replaced the $\frac{1}{2}$ -MIND buffer recommendation for occupied nests with a fixed two-mile buffer; the buffer for unoccupied nests remains the same.¹⁶

Region 8 Golden Eagle Nest Buffer Guidance. In October 2020, USFWS Region 8 (California and Nevada) updated its guidance for "Recommended Buffer Zones for Ground-based Human Activities around Nesting Sites of Golden Eagles in California and Nevada."¹⁷ This guidance recommends a one-mile buffer around golden eagle nests for use of motorized vehicles off-road and on water; pedestrian and non-motorized activities; developed sites; and industrial, municipal, and construction activities. It recommends a two-mile buffer for blasting and other loud non-regular activities. The guidance recognizes that the buffers may be reduced in consultation with USFWS when the nest is not in use or activities are not in line-of-sight of the nest. The changes from the December 2017 version of this guidance are not material, but USFWS recently appears to be taking a more aggressive position that companies conducting activities that are not consistent with these buffer distances are expected to apply for an incidental take permit for disturbance take of nesting golden eagles.

¹*Compare United States v. Apollo Energies, Inc.*, 611 F.3d 679, 684-85 (10th Cir. 2010) and *United States v. FMC Corp.*, 572 F.2d 902, 906-07 (2d Cir. 1978) with *United States v. Citgo Petroleum Corp.*, 801 F.3d 477, 488-89 (5th Cir. 2015).

²Solicitor's Opinion M-37041—Incidental Take Prohibited Under the Migratory Bird Treaty Act (Jan. 12, 2017), available at https://www.eenews.net/assets/2017/02/21/document_ew_01.pdf.

³Solicitor's Opinion M-37050—The Migratory Bird Treaty Act Does Not

Prohibit Incidental Take (Dec. 22, 2017), available at <https://www.doi.gov/solicitor/opinions/>.

⁴ *Nat. Res. Defense Council v. U.S. Dep't of Interior*, 478 F. Supp. 3d 469, 487-88 (S.D.N.Y. 2020).

⁵50 C.F.R. § 10.14. Not surprisingly, this regulation was almost immediately challenged in federal court. See Complaint for Declaratory and Injunctive Relief, *Nat'l Audubon Soc'y v. U.S. Fish & Wildlife Serv.*, No. 1:21-cv-00448 (S.D.N.Y. Jan. 19, 2021).

⁶Regulations Governing Take of Migratory Birds; Delay of Effective Date, 86 Fed. Reg. 8715 (Feb. 9, 2021).

⁷Solicitor's Opinion M-37065—Permanent Withdrawal of Solicitor Opinion M-37050 “The Migratory Bird Treaty Act Does Not Prohibit Incidental Take” (March 8, 2021), available at <https://www.doi.gov/solicitor/opinions/>.

⁸*Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 368-69 (2018).

⁹Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat, 85 Fed. Reg. 81411 (Dec. 16, 2020). The definition is codified at 50 C.F.R. § 424.02.

¹⁰Regulations for Designating Critical Habitat, 85 Fed. Reg. 82376 (Dec. 18, 2020). This regulation is codified at 50 C.F.R. § 17.90 and replaces 50 C.F.R. § 424.19 for USFWS. The National Marine Fisheries Service (NMFS) did not join USFWS's rule, so it will continue to rely on 50 C.F.R. § 424.19.

¹¹*Weyerhaeuser*, 139 S. Ct. at 371-72.

¹²85 Fed. Reg. at 82376.

¹³See Complaint for Declaratory and Injunctive Relief, *California v. Bernhardt*, No. 4:21-cv-00440 (N.D. Cal. Jan. 19, 2021).

¹⁴See Fact Sheet: List of Agency Actions for Review, <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/>.

¹⁵See Region 6 Recommendations for Avoidance and Minimization of Impacts to Golden Eagles at Wind Energy Facilities (April 11, 2013), *available at*

https://www.fws.gov/coloradoes/documents/Final_GOEA_Buffer_Recommendations_AvoidanceMinimization_WindFacilities_April_10_2013.pdf.

Region 6 encompasses Colorado, Kansas, Montana, Nebraska, New Mexico, North Dakota, South Dakota, and Wyoming.

¹⁶See U.S. Fish & Wildlife, Region 6, Recommendations for Avoidance and Minimization of Impacts to Golden Eagles at Wind Energy Facilities (May 21, 2020), *available at* https://www.fws.gov/mountain-prairie/migbirds/library/Revised%20GOEA_Buffer%20Recommendations%20for%20Wind%20Facilities_ver2.pdf.

¹⁷*Available at*

<https://www.fws.gov/cno/conservation/MigratoryBirds/EaglePermits.html>.

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