

Biden Administration Proposes to Revoke Trump Era Rule Limiting Incidental Take Prohibition Under The MBTA

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(By [Ben Clapp](#))

Developers of renewables projects are once again facing regulatory uncertainty regarding the scope of the Migratory Bird Treaty Act (“MBTA”) as a result of a proposed rule issued on May 7 by the U.S. Fish and Wildlife Service (“USFWS”). The proposed [rule](#), if finalized as issued, would revoke a rule issued in the last days of the Trump administration stipulating that deaths of migratory birds occurring incidental to lawful activities (i.e., incidental take) are not prohibited under the MBTA.

The proposed rule represents the latest development in a long-running debate. At issue is whether the MBTA, a law passed in 1918 that was originally intended to prevent the extinction of migratory bird species due to commercial trade and hunting practices, prohibits the incidental taking of protected birds as a result of activities that are otherwise lawful, such as the operation of wind turbines or the clearing of land for a solar project, or whether the law prohibits only the intentional take (i.e., purposeful killing) of protected species. The issue has resulted in a split among U.S. Circuit Courts of Appeals, as well as completely opposite legal interpretations issued by two Solicitors of the Department of Interior within the span of one year in 2017.

By revoking the prior rule, the USFWS would revert to interpreting the MBTA to prohibit incidental take of birds protected under the act, and to employing agency discretion in determining whether an incidental take of such birds warrants an enforcement action. The proposed rule highlights the need for renewable project developers to implement best practices for avoiding the unintended take of protected migratory birds as a means of qualifying for agency enforcement discretion and thus avoiding fines for noncompliance. For wind energy projects, this can largely be accomplished through complying with the USFWS’s [Land-Based Wind Energy Guidelines](#), although there is no guarantee that such compliance will preclude an enforcement action. There are no solar-specific guidelines currently in place. While the risk posed to migratory birds from solar projects is less than that for wind projects, solar developers should nonetheless implement best practices for reducing impacts to birds, including the general [Nationwide Standard Conservation Measures](#) for project development.

Tags: [Migratory Bird Treaty Act](#), [migratory birds](#), [renewable energy projects](#), [solar](#), [wind](#)

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