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Migratory Bird Treaty Act Uncertainty Continues for Energy and Infrastructure Developers

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Permitting issues—including federal wildlife permits—are common hurdles for the renewable energy sector. The U.S. Fish and Wildlife Service

(FWS) sought to reduce these burdens by issuing new guidance in late 2017 to try to clarify that the Migratory Bird Treaty Act (MBTA) restricts only activities that **intentionally** harm protected species. But attempts at MBTA reform were quickly caught up in litigation between states, environmental groups, and the federal government, creating ongoing uncertainty for renewable energy and other infrastructure projects. And with the record-long government shutdown still in play, it may be even longer than previously expected until this regulatory reform is necessarily addressed.

Reforming the MBTA Could Benefit the Renewable Industry and Other Infrastructure Projects

The Migratory Bird Treaty Act, like its more famous cousin, the Endangered Species Act, prohibits the “taking” of certain species. “Taking” includes capturing, collecting, or killing any of the more than 800 species of birds protected by the law. Under previous administrations, “taking” was interpreted to mean **any** activity that harms migratory birds. That interpretation had serious consequences for developers, owners, and operators of renewable energy facilities. For example, in 2013 and 2014, two wind projects were charged with violating the MBTA, and each was assessed at \$1 million or more in penalties.

As part of the Trump Administration’s ongoing efforts to streamline energy and [infrastructure permitting](#), the FWS issued a [new interpretation](#) of the MBTA on December 22, 2017, and a subsequent guidance memo last April. The new approach targeted only activities that **intentionally** harm protected species and would avoid subjecting a wide range of normal commercial activities to potential strict liability under the Act. For example, under the FWS’ new opinion and guidance, incidental bird collisions with wind turbines or transmission would likely not violate the Act.

States and NGOs Seek to Block Reform Efforts

Consistent with the NGO trend [we have written about extensively](#), less than a year after the FWS issued its new policy, states and NGOs sued to block the new interpretation. The FWS’s new interpretation, the plaintiffs argue, contravenes the statute and reduces companies’ incentives to prevent impacts on protected migratory bird species. The suit is now tied up in briefing the FWS’s motion to dismiss, meaning that uncertainty regarding the

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correct interpretation of the MBTA will continue for the foreseeable future.

This is yet another example of the push-and-pull nature of regulatory progress, as certain states and NGOs seek to block federal reform efforts. Stay tuned for continuing updates on this and other regulatory issues affecting the energy and infrastructure sectors.

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