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DEPARTMENT OF THE INTERIOR'S NEW MIGRATORY BIRD TREATY ACT INTERPRETIVE RULE IN THE CROSSHAIRS

To Our Clients and Friends:

The Trump administration recently finalized a rule that clarifies that the incidental killing of migratory birds is not punishable under the Migratory Bird Treaty Act (the “MBTA”).

Part of a multinational effort to protect migratory birds, the MBTA was enacted in 1918 as a response to concern over poaching and over-hunting.

The Act criminalizes the hunting, taking, capturing or killing of birds – “by any means or in any manner” – and does not expressly exempt activities whose underlying purpose is one other than inflicting such harm. The possibility of MBTA liability has therefore long lurked in the shadows of petroleum refineries, wind projects, electric transmission lines, and other energy and infrastructure projects whose normal business operations may result in inadvertent impacts to birds. Indeed, the federal government has, albeit infrequently, wielded the MBTA to hold parties accountable for accidental bird kills in the past, including several prosecutions of oil and gas industry actors during the Obama Administration. More often, regulators use the threat of MBTA liability to encourage energy projects and other operators to voluntarily adopt bird impact mitigation best practices.

The U.S. Department of the Interior (“DOI”) claims that its new regulation reaffirms the original meaning and intent of the MBTA and that it is consistent with the interpretation of “several” federal courts (more on that in a moment).[1] While the rule intends to provide legal certainty to landowners and business interests, it is likely to meet immediate resistance on multiple fronts.

Environmentalists and their political allies have been quick to voice their opposition to a regulatory move that DOI has conceded will likely result “in increased bird mortality.”[2] A senior official in the Biden transition team has already indicated that the new administration will work to roll back the regulation,[3] with reversal options including new rulemaking(s) or Congress’s use of the Congressional Review Act (the “CRA”) to rescind the rule. The CRA allows Congress, with Presidential approval, to rescind a rulemaking by simple majority within 60 legislative days of the rule’s finalization. Democrats’ recent clinching of Senate control increases the odds that the CRA option will be exercised.

In the meantime, environmentalists are likely to take their case to court, undeterred by the likely obstacle of agency deference, which would preserve DOI’s interpretation of the MBTA so long as a court deems the interpretation reasonable. Such deference was not on the table when a federal judge recently rejected an earlier DOI legal opinion from December 2017 that informally adopted the MBTA interpretation now codified via formal rulemaking. The U.S. District Court for the Southern District of New York concluded that the MBTA is broad enough to criminalize incidental bird impacts, and rejected the December 2017

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legal opinion under the Administrative Procedure Act as contrary to law. The court recognized that the Court of Appeals for the Fifth Circuit had previously limited the MBTA's prohibition to deliberate acts done directly and intentionally to migratory birds, but sided with prior opinions from the Second and Tenth Circuits that held that incidental impacts are also criminal.^[4]

A circuit split will once again be the *status quo* if DOI's rule is administratively, legislatively, or judicially undone, unless and until the Biden Administration goes a step further and promulgates a formal rule interpreting the MBTA as prohibiting the incidental take of migratory birds.

Assuming the new DOI rule is ultimately overturned, exactly how the Biden Administration will approach MBTA enforcement is uncertain. Environmentalists will bring pressure to take an aggressive approach to wildlife protection, but it is reasonable to expect that the President-elect's friendly outlook toward the renewable energy sector, which potentially faces the most significant impact from a stringent application of the law, will result in continued leniency for wind energy operators and supporting facilities that implement bird protection best practices. Whether the Biden Administration would be inclined to extend such goodwill more broadly is less clear.

[1] U.S. Fish and Wildlife Service Finalizes Regulation Clarifying the Migratory Bird Treaty Act Implementation, U.S. Fish & Wildlife Service (January 5, 2021), https://www.fws.gov/news/ShowNews.cfm?ref=us-fish-and-wildlife-service-finalizes-regulation--clarifying-the-&_ID=36829.

[2] Page 8 of Final Environmental Impact Statement, Regulations Governing Take of Migratory Birds, prepared by Fish & Wildlife Service, U.S. Department of Interior (November 2020).

[3] Lisa Friedman, *Trump Administration, in Parting Gift to Industry, Reverse Bird Protections*, New York Times (January 5, 2021), <https://www.nytimes.com/2021/01/05/climate/trump-migratory-bird-protections.html>.

[4] *Nat. Res. Def. Council, Inc. v. U.S. Dep't of the Interior*, No. 18-CV-4596 (VEC), 2020 WL 4605235, at 7 (S.D.N.Y. Aug. 11, 2020). The Court also posited that the Eighth and Ninth Circuits, in separate decisions regarding MBTA liability, have both left the door open to finding that the MTBA creates criminal liability for incidental bird kills.



Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these developments. Please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's Environmental Litigation and Mass Tort practice group, or the authors:

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