

# Renewable Practitioners Grapple With Federal Species Protections

Interior Secretary Ryan Zinke has announced that offshore wind will play a “big role” in the “America-First Offshore Energy Strategy.” With an estimated over 2,000 gigawatts of wind resource capacity in U.S. waters, offshore wind facilities could be critical in securing energy independence and reducing carbon emissions. As renewable energy practitioners are keenly aware, however, the siting and permitting of wind facilities often must run a gauntlet of environmental reviews and species protections laws. While these laws serve extremely important functions in protecting biodiversity, they need to be reconciled with the new imperative to expand our renewable energy infrastructure.

Central for wind energy facilities is risks to birds and bats. Though these risks are negligible compared to other sources of mortality (such as collisions with buildings), the wind industry has long taken a role in species conservation, collaborating on studies, siting guidelines, and voluntary protocols, and developing innovative technologies. However, some deaths are unavoidable.

The Migratory Bird Treaty Act is celebrating its centennial, yet its meaning remains far from settled. Unless authorized by regulation, the MBTA makes it unlawful to “take” migratory birds. Courts have long disagreed about what take entails. The Fifth, Eighth, and Ninth Circuits have held that the MBTA prohibits only intentional take such as hunting. But the Second and Tenth Circuits, and importantly the Fish and Wildlife Service, have previously determined that the MBTA also prohibits incidental take such as typically occurs with a wind facility.

Then the Justice Department brought a high-profile criminal enforcement action under the MBTA

against a wind energy facility in 2013. The FWS began regulations to authorize incidental take two years later. And the Interior Department solicitor concluded that the MBTA prohibits direct incidental take three days before the Obama administration ended.

The legal pendulum soon swung the other way. The Trump administration’s DOI solicitor concluded that the MBTA does *not* prohibit incidental take. The FWS further cemented this position in guidance issued in April. The story is far from over, however, as six environmental groups filed suit challenging the solicitor’s opinion in the Second Circuit, which has long held that MBTA prohibits incidental take.

The MBTA is not the only law impacting wind developers. The FWS has interpreted the Bald and Golden Eagle Act to prohibit incidental (or non-purposeful) take, and issued revised regulations authorizing incidental take in 2016. Moreover, where federal agency action is re-

quired for a wind facility, practitioners must grapple with a host of measures. Executive Order 13186 directs federal agencies to avoid and minimize impacts to migratory birds, including those resulting in “unintentional take.” The National Environmental Policy Act has its well-known restrictions on federal actions, including permitting. And the Endangered Species Act prohibits federal agencies from jeopardizing the continued existence of threatened and endangered species or adversely modifying critical habitat. Even where federal agency action is not required, wind developers may need to obtain permits for incidental take of threatened and endangered species under the ESA’s Section 10.

Navigating these requirements can extend development timelines, but

## Wind energy facilities have had to meet a swirl of species restrictions



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FWS has already begun experimenting to find efficiencies in the ESA and NEPA processes. For example, FWS recently issued a notice of intent to prepare a programmatic environmental impact statement related to permits authorizing incidental take of two endangered migratory birds and an endangered bat from four wind energy projects in Hawaii. This approach to expediting review could ultimately be replicated for both land-based and offshore wind facilities.

Practitioners must be attuned to developments at the state and local as well. As Mike Speerschneider, senior director of the American Wind Energy Association, acknowledges, “There is a lot of growth going on right now in the midwestern states, and the state resource agencies are taking notice.” This is particularly true with respect to impacts to non-federally listed but state-protected bat species. In some cases, state regulators are considering operational protocols like curtailment and increasing cut-in speeds that create additional challenges for wind facilities, with uncertain benefits.

According to Speerschneider, the wind industry “wants to work with the administration and agencies to develop reasonable permitting programs that involve avoidance, minimization, and mitigation measures that are commensurate with the level of impacts that result from wind farms.”

*The author thanks summer associate Emily Orler for her contributions to this column.*