

Laws for the Birds (and Bats and...): Impacts of Wildlife Protection Laws on Energy Project Development

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Dorsey & Whitney
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Overview

- Introduction/scope
- Federal Wildlife Laws Relevant to Energy Development
 - Endangered Species Act
 - Migratory Bird Treaty Act
 - Bald and Golden Eagle Protection Act
 - Related federal and state laws
- Application to Renewable Projects: Wind Power
- Application to Conventional Projects: CCNG
- Transmission/Pipelines – Special Considerations
- Conclusions/Recommendations

Endangered Species Act

- Species listed as endangered or threatened (ESA §4)
 - Protections to species and critical habitat, protective regulations (4(d)) and prohibition of “take”
- “Take” prohibition (ESA §9)
 - No person can “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempt to engage in such conduct.”
 - “Harm” broadly interpreted to include significant habitat modification/degradation where it actually kills or injures wildlife*
 - Applied to threatened species through “4(d) Rule,” which may allow for some take
- Allowance for “take incidental to otherwise lawful activity”
 - Section 7 consultations
 - Section 10 incidental take permit

Endangered Species Act

- Federal Agency Consultations with FWS (ESA §7)
 - Triggered by federal nexus, e.g. CWA section 404 permit, FERC license or activity on federal land, e.g. BLM lease
 - Action and consulting agencies
 - Permit applicant involved in process, including providing data
 - “Jeopardy” standard – no action that would “likely jeopardize the continued existence” of a listed species or “adversely modify” its critical habitat
 - Initial Consultation
 - Biological assessment by action agency or applicant
 - Federal action: “No Effect” (end) or “May Effect”) (next step) →
 - Not likely to adversely affect,” informal consultation sufficient; request concurrence; process ends
 - If determine “likely to adversely affect,” request formal consultation

Endangered Species Act

- Federal Agency §7 Consultations cont.
 - Informal consultation results
 - No biological opinion or incidental take authorization
 - But creates record of FWS involvement, characterization of action
 - Formal consultation results
 - Biological Opinion – baseline, cumulative impacts, jeopardy/adverse modification determination
 - Reasonable & Prudent Measures (RPMs)
 - Terms & Conditions implement RPMs
 - **Statement authorizing incidental take**
 - If jeopardy, agency cannot move forward without Reasonable and Prudent Alternative
 - NEPA not independently required (but may be for permit)
 - Agency can re-initiate (e.g. take exceeded)
 - Basis for citizen suits, especially to challenge underlying action

Endangered Species Act

- Incidental Take Permit (ESA §10)
 - Where no federal nexus but potential harm to species
 - Exception to take prohibition, issued by FWS
 - Preparation of a Habitat Conservation Plan (HCP)
 - Minimization/mitigation measures, to maximum extent practicable
 - Taking will not appreciably reduce the likelihood of the survival and recovery of species in the wild
 - Funding, alternatives considered; no surprises assurances
 - Adaptive management for changed circumstances
 - Significant delay
 - Likely subject to NEPA, depending on impact
 - Public comment
 - Lack of agency resources
 - But regional multi-species HCPs in the works (Midwest, Great Plains)
 - Take restricted to permitted amount and subject to conditions for minimization and mitigation
- Third route: avoid and minimize without permit but residual risk

Endangered Species Act

- Enforcement (ESA §11)
 - Civil penalties for knowing take (\$49,467/violation) or \$1,000 for other violations
 - Criminal penalties for knowing take (\$100,000; \$200,000 for corporations and/or 1 year in prison)
 - Forfeiture of equipment
 - Injunctive relief
 - Reasonably likely threat of imminent harm
 - Citizen suit for injunctive relief, fees and costs

Endangered Species Act

- Specific Species of Concern In Recent Land-based Energy Projects include:
 - Whooping crane
 - Piping plover
 - Indiana bat
 - Northern long-eared bat
 - Sage Grouse
 - Desert Tortoise
 - But don't forget insects, plants, fish, crustaceans!
 - FWS listing plans through 2023

Migratory Bird Treaty Act

- Illegal to “take” or kill by any means over 1,000 species of birds (MBTA § 703)
- History
- Scope
- Prohibited Activities

Migratory Bird Treaty Act

- Enforcement (MBTA § 707)
 - Criminal Penalties and Imprisonment
 - Strict Liability Misdemeanor for Incidental Takes
 - Felony Provisions for Knowing Takes
 - Equipment Forfeiture

Migratory Bird Treaty Act

- 2012 Land-Based Wind Energy Guidelines
 - Apply to MBTA, ESA and Bald and Golden Eagle Protection Act (BGEPA)
 - Voluntary
 - Structured Set of Best Management Practices
 - Do Not Prevent Enforcement Actions

Bald and Golden Eagle Protection Act

- Prohibits a “take” of bald and golden eagles without a permit
- Scope
- Prohibited Activities
- Non-Purposeful Take and Programmatic Take Permits

Bald and Golden Eagle Protection Act

- Enforcement (BGEPA 16 USC § 668)
 - Criminal Penalties and Imprisonment
 - Scierter standard is knowing/wanton disregard
 - First offense—misdemeanor—up to \$100,000 fine (\$200,000 for corporations) and one year in prison
 - Second offense—felony—up to \$250,000 fine (\$500,000 for corporations) and two years in prison
 - Equipment Forfeiture
 - Civil Penalties

Bald and Golden Eagle Protection Act

- 2012 Land-Based Wind Energy Guidelines
 - Applies to MBTA, ESA and BGEPA
- 2013 Eagle Conservation Plan Guidance
 - Applies to BGEPA
- Voluntary and Do Not Prevent Enforcement Actions

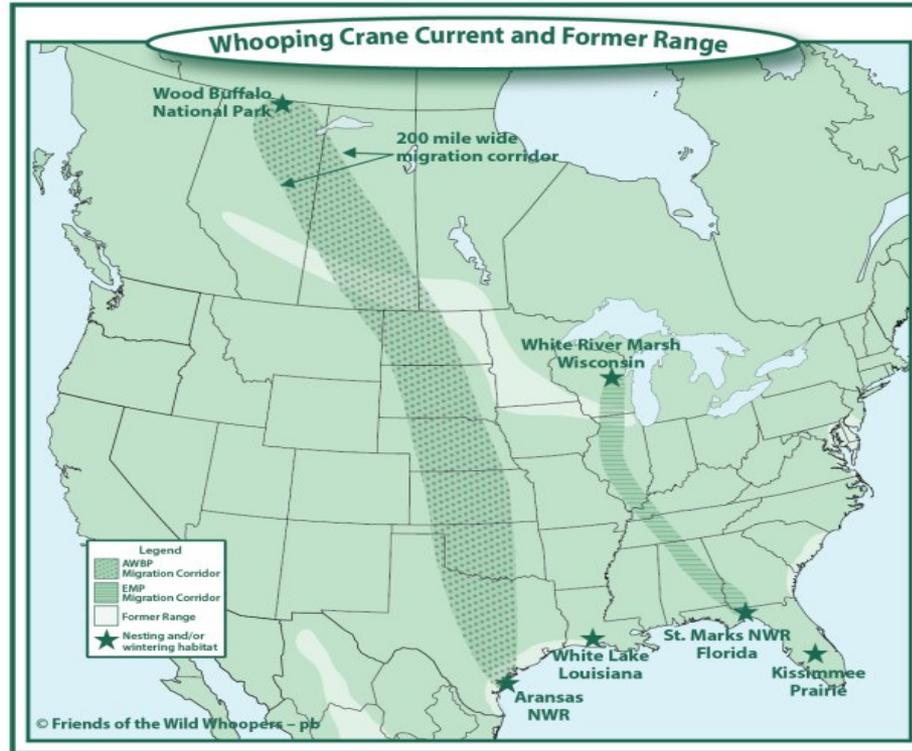
Other Relevant Laws

- Marine Mammal Protection Act (“MMPA”)
- National Environmental Policy Act (“NEPA”)
- State law analogues (mini-NEPA, wetlands, ESA)
- State siting/permitting authority which incorporate federal protections (e.g. PSC Certificates)

Hypothetical 1: New Wind Farm

- Issues:
 - Federal permits implicate ESA § 7 consultation
 - Special issues to consider, even without federal permits:
 - “Takes” Under the ESA (§ 10), MBTA, BGEPA
 - 2012 Land-Based Wind Energy Guidelines
 - 2013 Eagle Conservation Plan Guidance
 - Take Permits If Necessary
 - State Siting Guidelines

Hypothetical 1: New Wind Farm



Hypothetical 2: New CCNG

- Issues:
 - Siting: greenfield vs. brownfield
 - Federal permits implicate ESA § 7
 - CAA PSD, CWA § 404
 - NPDES/ § 316b review by USFWS
 - Special issues to consider:
 - Impact on habitat/land clearing
 - Appurtenant Features, Infrastructure
 - Transmission lines
 - Pipelines
 - Source of cooling water intake, e.g. ponds, wells
 - Thermal discharge
 - Storage of natural gas
 - Other?

Transmission/Pipeline Special Considerations

- Habitat fragmentation
 - MOUs with agencies under MBTA (including FERC)
 - May require plans, measures to minimize, mitigate or compensate; terms & conditions in certificates
 - USFWS, states identify birds of conservation, fragmentation concern
- Avian Protection Plan Guidelines
 - Include construction design standards, reporting, risk assessment methodology, tied to specific utility programs
 - Reduce impacts and potential liability
- FWS Proposed Policy on Compensatory Mitigation
 - For ESA §§ 7 and 9

Conclusions/Recommendations

- Clearly identify project scope and potential impacts
 - Use of experts
 - Develop strategy, including avoidance and minimization
- Early and continued communications with USFWS/state wildlife agencies and others
 - Scope out issues which often arise late in development
- Stay actively involved in scoping, data gathering and assessment
 - Biological assessments, HCPs
- Monitor FWS activities, e.g. listings, regional HCPs

Conclusions/Recommendations

- To permit or not – addressing and reducing risk
 - If federal tie, may not have choice unless you can show no effects to species or habitat
 - Seek to avoid or minimize impacts through project design, FWS-approved guidelines
 - Permits can be expensive and lead to delay but do minimize risk
 - If you forego permit process, what (if any) agency assurances can you get?
- Importance of implementing protective measures and regular monitoring of operations, effectiveness of strategies

Thank you for joining us today. If you have questions, please feel free to contact us.



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