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Current Issues in Wildlife Law

**University of Houston Law Center
Environmental LLM Program
Environmental Practicum Class**

**M. Benjamin Cowan
Locke Lord LLP
(713) 226-1339
bcowan@lockelord.com**

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Introduction to Wildlife Law

- Siting of energy facilities has historically been a state issue – some states have power siting boards but not TX
- No federal siting authority - federal approval over siting has generally been limited to major emitting facilities or those with a federal nexus subject to NEPA
- Last 5-10 years have seen a major shift – new types of energy development mean new types of impacts
 - Shale plays bringing energy development to areas not previously accustomed to it
 - Wind and solar bringing new types of impacts – habitat and mortality rather than emissions, discharges and disposal

Introduction to Wildlife Law

- In absence of emissions, discharge or disposal, EPA has no jurisdiction
- USFWS is charged with implementing three federal statutes that, while not directed specifically at energy development, give it the ability to influence siting decisions
- All three statutes focus on “take” of protected species

USFWS Statutory Authority

- **Migratory Bird Treaty Act - 16 U.S.C. §§ 703-712**
 - Unlawful to “pursue, hunt, take, capture, kill, attempt to take, capture, or kill . . . any migratory bird [or] any part, nest, or egg of any such bird . . .” listed under the statute, except when specifically authorized by DOI.
- **Bald & Golden Eagle Protection Act - 16 U.S.C. §§ 668-668d**
 - Unlawful to take any bald eagle or golden eagle in any manner, including by killing, wounding, molesting or disturbing to a degree that causes injury, decrease in productivity, or nest abandonment.
- **Endangered Species Act - 16 U.S.C. §§ 1531-1544**
 - Unlawful to take any listed species (“harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct”)

USFWS v. EPA

- EPA is centralized, designed as a regulatory agency
- USFWS is decentralized, poorly suited to regulate
 - No delegation to states
 - Field offices and regions dominate
 - Biologists, not bureaucrats
 - Very minimal regulations – predominantly guidance and policy memos, HCP Handbook

USFWS Regions



Migratory Bird Treaty Act

- First adopted in 1918 to implement treaty with Great Britain/Canada and later Mexico aimed at curbing trade in feathers.
 - Over 800 bird species listed
 - Live or dead birds
- Unlawful “at any time, by any means or in any manner, to pursue, hunt, take, capture, kill . . .” a migratory bird.
 - Misdemeanor: 6 mos. prison/\$15,000 fine
 - Strict liability, selective enforcement
- MBTA authorizes USFWS to issue take permits
 - “Unless and except as permitted by regulations made as hereinafter provided”
 - Permits available but not incidental take
 - Late in Obama administration, USFWS was contemplating developing a MBTA permit program

MBTA Jurisdiction Limited

Several recent cases held that the MBTA does not prohibit incidental take

- District courts in Louisiana in New Mexico in 2009 held that Congress did not intend to criminalize conduct that was not directed at birds, but which incidentally and proximately caused bird deaths
- *U.S. v. Brigham Oil and Gas, L.P.* (D.ND 2012): Court found that to “take” or “kill” under the MBTA requires intentional actions directed at migratory birds, not accidental or incidental death through lawful commercial activity.
 - The MBTA definition is more narrowly worded than the ESA definition, which includes broader terms such as “harass”

Circuits split on the issue:

- Second and Tenth Circuits have held MBTA does apply to incidental takes
- Eight and Ninth Circuits have held that MBTA requires deliberate acts intentionally directed at migratory birds

MBTA Jurisdiction in Question

- Fifth Circuit joined Eighth and Ninth in 2015 with decision in *U.S. v. Citgo Petroleum*
 - Citgo fined \$2 million in 2014 for convictions on five counts of MBTA violations for operating uncovered oil tanks at Corpus Christi refinery
 - “One does not reduce an animal to human control accidentally or by omission; he does so affirmatively.”
 - Absence of “harm” or “harass” in MBTA definition of “take” was important to court’s interpretation

MBTA Jurisdiction in Question

- Solicitor's M-Opinion (M-37041) – Jan 10, 2017
 - Supported FWS' long-standing legal interpretation
 - "MBTA's broad prohibition on taking and killing migratory birds by any means and in any manner includes incidental taking and killing."
 - Suspended pending review on February 6, 2018
- Solicitor's M-Opinion (M-37050) – Dec 22, 2017
 - Permanently withdraws and replaces Opinion M-37041
 - MBTA's "prohibitions on pursuing, hunting, taking, capturing, killing, or attempting to do the same apply only to affirmative actions that have as their purpose the taking or killing of migratory birds, their nests, or their eggs."
 - "Neither the plain language of the statute nor its legislative history support the notion that Congress intended to criminalize, with fines and potential jail time, otherwise lawful conduct that might incidentally result in the taking of one or more birds."

BGEPA Permitting

- USFWS issued Eagle Permit Rule in 2009,
 - Developed by Office of Migratory Birds without consultation with Ecological Services
 - Provided for permits for incidental take that cannot be practicably avoided
 - Ongoing “programmatic” take must be “unavoidable” even after the implementation of “advanced conservation practices” (ACPs)
 - Authorized take must be “consistent with the goal of stable or increasing breeding populations” on a regional basis
 - Set threshold of acceptable golden eagle take at zero across all regions – requiring equal offset for all authorized take

BGEPA Permitting

- 2013 Eagle Conservation Plan Guidance
 - Imposes more stringent requirements than under ESA. Take must be “unavoidable” after application of “advanced conservation practices”
 - No ACPs actually approved
 - Permit term limited to 5 years, with no guarantee of renewal or conditions of renewal
 - Multi-year eagle use surveys and nest surveys. Application of Bayesian model results in overly conservative recommendations
 - Required compensatory mitigation for take, but only one accepted form of mitigation (power pole retrofits)
 - *Only two permits issued to date*

BGEPA Permitting

- USFWS issued rule extending maximum permit term to 30 years in 2013.
 - Rule challenged by American Bird Conservancy, reversed by Northern District of California in August 2015 on NEPA grounds (no EA performed)
 - Not purely administrative in nature, *may* have a significant environmental effect

BGEPA Permitting

- 2016 Eagle Permit Rule and Programmatic EIS
 - Triples nationwide annual take limit for bald eagles without compensatory mitigation. Golden eagle take authorized east of 100th meridian, but compensatory mitigation required
 - Allows 30 year permit terms, but with 5-year reviews to evaluate take levels and limits. Additional conservation measures could be required consistent with adaptive management measures in ECP
 - Replaced “unavoidable” standard with “maximum extent practicable” standard from ESA, which allows for consideration of cost and available technology. ACP concept dropped
 - BGEPA “preservation standard” (consistent with goal of stable or increasing breeding populations) applied on Eagle Management Unit scale. Authorized take cannot exceed 5% of Local Area Population without compensatory mitigation
 - Requires standard pre-construction surveys (2 years) and use of Bayesian collision model
 - Compliant applications can tier off of PEIS; otherwise waiver or individual NEPA required

ESA Permitting

- Section 9 – Take Prohibition
 - Take defined as “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct”
- Permit Pathways
 - Section 7 – Federal agencies (including USFWS) must consult with USFWS on actions that may affect a listed species
 - Results in issuance of Biological Opinion regarding jeopardy
 - Can result in issuance of Incidental Take Statement authorizing take based on implementation of reasonable and prudent measures
 - Section 10 - Permits
 - 10(a)(1)(A) – Enhancement of Survival Permits
 - 10(a)(1)(B) – Incidental Take Permits

ESA Permitting

Section 10(a)(1)(b) Permits

- For take incidental to an otherwise lawful activity
- Requires development of a Habitat Conservation Plan (HCP) describing impact of take, measures to minimize and mitigate to maximum extent practicable, adaptive management, changed and unforeseen circumstances, financial assurance and consideration of alternatives to the take
- Incidental take permits (ITPs) generally require NEPA (EA or EIS) and internal Section 7 consultation
- ITP process generally requires 2 years or more, can require 4-5 years or more
- ITPs cannot be required to construct a project, only recommended
- Avoidance measures may be preferable to an ITP

ESA Permitting

- Listed/candidate species are widespread, affecting project development in both traditional and renewable energy industries
 - Pipeline/transmission lines: Indiana & northern long-eared bats, American burying beetle, freshwater mussels, et al.
 - E&P: Dunes sagebrush lizard, greater sage grouse, lesser prairie chicken, black-footed ferret, et al.
 - Wind: Indiana & northern long-eared bats, whooping cranes, sage grouse, lesser prairie chicken, et al.

ESA's Increasing Reach

Recent litigation has expanded influence of the ESA and USFWS activity

- *Center for Biological Diversity v. Salazar* (06/11)
 - Suit by CBD to compel USFWS to make initial or final listing decisions on hundreds of candidate species
 - Settlement with USFWS requires Service to act on listing petitions for 757 candidate species by 2018
- *WildEarth Guardians v. Salazar* (09/11)
 - Suit by WEG over USFWS failure to act on listing petitions for hundreds of candidate species
 - 252 candidate species by September 2016
 - 21 candidate species in Texas alone

The ESA and Bats

- *Beech Ridge* decision (2009)
 - *Animal Welfare Institute, et al., v. Beech Ridge Energy LLC, et al.* (D.Md 2009)
 - Invenergy project in WV consisting of 122 turbines over 300 acres (ridgetop)
 - 40 turbines constructed at time of decision
 - Plaintiffs in citizen suit alleged that construction and operation of the project would “take” Indiana bats in violation of ESA §9
 - Invenergy argued that Indiana bats do not fly at rotor height, and no Indiana bats had ever been confirmed as killed at any wind project

The ESA and Bats

- *Beech Ridge* decision (2009)
 - Court concluded by preponderance of evidence standard that Indiana bats are present at the site.
 - Evidence incl. mist-netting survey results, acoustic survey data, and expert testimony
 - No Indiana bats actually captured at site
 - Court found that other bat species had been killed by wind farms, and Indiana bat no less susceptible to mortality than other bats
 - *“Based on the evidence in the record...like death and taxes, ... there is a virtual certainty that Indiana bats will be harmed, wounded, or killed imminently by the Beech Ridge Project, in violation of §9 of the ESA, during the spring, summer and fall.”*
 - Enjoined operation of existing turbines b/t 4/15 – 11/15, and from constructing any additional turbines until Section 10 ITP obtained

The ESA and Bats

- *Beech Ridge* fallout
 - Pre-emptive injunction despite no prior take of the subject species at any wind project, and no direct evidence of species presence at the project site (no mist net captures)
 - Habitat and hibernacula in the vicinity
 - Court concluded that wholly future violations are within the scope of the Act
 - SEC. 9(a)(1) Except as provided in sections 6(g)(2) and 10 of this Act, with respect to any endangered species of fish or wildlife listed pursuant to section 4 of this Act it is unlawful for any person subject to the jurisdiction of the United States to . . . (B) take any such species within the United States or the territorial sea of the United States
 - Prohibition is against take only, not development or project operation

The ESA and Bats

- Fowler Ridge
 - 355 turbine project operated by BP Wind Energy in western Indiana
 - Very low risk site:
 - Sited on 73,000 acres of agricultural land, no summer habitat in the area
 - No prior records of Indiana bat occurrence in Benton county. Nearest known winter population 105 miles away in Illinois
 - Indiana bat casualty discovered in fall of 2009, and another in 2010. Bats presumed to have been migrating through project area on return to hibernacula
 - If a take can occur at a site like Fowler Ridge, it can occur at any project

Going Batty – Shortcomings of the ESA

- The ESA's HCP process is fundamentally oriented towards habitat impacts
 - Very term “Habitat Conservation Plan” implies minimization and mitigation measures that focus on conservation of habitat
 - Suited to projects where take is the result of impacts to habitat – e.g. tree/brush clearing for real estate development
 - Easy to calculate take number
 - Easy to identify appropriate type and amount of mitigation
- With wind farms and bats, especially in Midwest, the concern is collision risk
 - Many projects have NO impact on habitat, even during construction
 - Difficult to estimate take, detect mortality, and replace dead bats

Midwest Wind Energy MSHCP

- USFWS Region 3 organized 8 member states (Illinois, Indiana, Iowa, Michigan, Minnesota, Missouri, Ohio, Wisconsin) to submit Section 6 grant application. Approved in 2010.
- Goal to develop a regional MSHCP for wind development to reduce administrative burden on Service, states, and industry, and coordinate conservation strategies and activities
- Process led by states, with IN as administrator and coordination/mitigation framework by The Conservation Fund
- Covered species include Indiana, northern long-eared and little brown bats, bald eagles, interior least tern, Kirtland's warbler, piping plover

Midwest Wind Energy MSHCP

- No formal role for industry, no applicant
 - USFWS relying on General Conservation Plan guidance
 - Led by AWEA, wind industry formed coalition (WEBAT) to intervene in process.
- Major challenges and innovations:
 - Multiple permit structures: Template and Master Permit
 - Avoidance and minimization measures
 - Monitoring and adaptive management framework based on new Evidence of Absence statistical framework developed by USGS
 - Section 7 consistency review process
- Effort ultimately stalled, likely dead, due to inability to reach consensus on these issues, and lack of consistency within USFWS

Permitting Wind In the Meantime

- Dozens of existing projects in operation, many more under construction
- Project financing is the ultimate driver
- Several projects operating under technical assistance letters (TALs)
 - Require avoidance (6.9 m/s) and mortality monitoring
- 6 projects have obtained ITPs (4 in Region 3), including Beech Ridge and Fowler Ridge
 - Several more underway, but many stuck on adaptive management for years
 - Growing disparity between HCP requirements in R3 and R5

ESA Trends

- USFWS seeking ways to manage the administrative burden from potential new listings and ITP applications
- Voluntary Conservation Plans
 - Both USFWS and states/industry prefer to avoid species listings
 - VCPs developed by public-private coalitions have been relied upon by USFWS in reaching negative listing determinations for two species recently – dunes sagebrush lizard and greater sage grouse

ESA Trends

- “Threatened” listings with 4(d) rules
 - In some cases, USFWS may determine that listing is necessary, but requiring individual ITPs is not practical or necessary
 - Section 4(d) of ESA allows USFWS to issue “special take rules” for threatened species only, authorizing incidental take of a threatened species if consistent with an approved conservation plan or terms set forth in the special take rule
 - Individual permits and review not necessary
 - AMMs may or may not be necessary
 - Northern long-eared bat, Lesser prairie chicken

Conclusion/Q&A

Ben Cowan

Locke Lord LLP

bcowan@lockelord.com

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