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# Currently evolving natural resource risks for renewable energy development

BY BROOKE MARCUS WAHLBERG AND BRIAN FERRASCI-O'MALLEY

**R**enewable energy development, and associated investment and acquisition, continues at a breakneck pace with no signs of slowing down. Risks under natural resource laws continue to play a prominent role in development and financing.

In the past few years, there have been significant regulatory and judicial developments in the natural resources realm that affect renewable energy development. Expected activity in all three branches of government will also affect renewable energy development. The recent and forthcoming actions will affect risk assessments for new renewable energy developments and prompt revisiting of risk assessments for operational projects.

## Regulatory and legislative changes

The 2019 amendments to the Endangered Species Act (ESA) made headlines, but in large part, their effects on developers

will be subtle. Whether these amendments will endure will depend on courts and the Biden administration. The most significant immediate impacts to renewable energy development are seen when wide-ranging species become listed and are therefore subject to the protections of the ESA. The listing process can be long and fraught with litigation, but once listed, the impact of the protections is immediate.

The US Fish and Wildlife Service (USFWS) is expected to make listing decisions on several wide-ranging species over the next year or so. These include iconic species such as the monarch butterfly, and the USFWS is expected to make a proposed determination for that species in December 2020. Beyond the monarch, many other species of pollinators have been targeted for listing consideration, and pollinator-focused siting and permit conditions for wind and solar energy development have made their way

into state and local permits and ordinances throughout the US.

Bat species also continue to be a concern for wind-energy development, and the USFWS expects to make listing decisions concerning the northern long-eared bat, tricolored bat and little brown bat over the next couple of years. These species occur throughout most of the US. Listed bat species have impacted renewable energy development for over a decade. Already, there are dozens of wind energy applicants in the queue to obtain ESA permits for coverage of the Indiana bat. Listing decisions on these three species could significantly expand the number of projects falling within the range of listed bat species and subject to increased regulatory risk.

The scope of the Migratory Bird Treaty Act (MBTA) continues to be an open question. MBTA enforcement actions in the millions of dollars have been taken against wind energy developers. A final rule clarifying that the

MBTA does not apply to incidental take that occurs from renewable energy development and operation currently sits with the Office of Information and Regulatory Affairs and may be finalised prior to inauguration day. If finalised, the rule will almost certainly be challenged, likely in the same court that recently invalidated a legal interpretation premised on the same reasoning as the pending rule.

Legislative action could also override any regulatory changes. The Migratory Bird Protection Act takes the opposite stance of the final rule and would clarify that the MBTA's prohibitions do extend to incidental take and would direct USFWS to create a permit programme for wind and solar projects. If this bill is introduced next Congress, it is possible it could gain traction even in a split Congress.

The Bald and Golden Eagle Protection Act (BGEPA) will see a revamp in 2021. Wind, solar and battery storage project proponents have pursued and obtained eagle permits for projects across the US. The backlog in permit processing has resulted in significant delays in obtaining permits. Under court settlement, USFWS is required to propose amendments to its eagle permit programme by August 2021. While these amendments would not change the overall prohibitions, the amendments could make an eagle permit more accessible, thereby lessening the number of renewable energy projects exposed to BGEPA enforcement.

Any projects obtaining federal permitting, funding or right of ways will now be subject to the 2020 amendments to the National Environmental Policy Act (NEPA) regulations. The rules, in large part, seek to streamline the NEPA process. However, the amendments are currently the subject of several legal challenges and face an uncertain future in a Biden administration. Federal agencies relying on the NEPA amendments to authorise a permit, funding or right of way will face additional scrutiny from any project opponents.

### Impactful court rulings

The past year has also seen a number of federal court opinions that have been impactful, and at times disruptive, to renewable energy development. The most notable of these was likely the April 2020 decision by a Montana district court that vacated the US Army Corps of Engineers' (Corps) Nationwide Permit (NWP) 12 and enjoined the Corps from authorising any dredge or fill activities under NWP 12 until the agency completed consultation with USFWS under ESA section 7.

The court later revised its order to vacate NWP 12 only as it relates to the construction of new oil and gas pipelines and that order is currently on appeal in the Ninth Circuit. But the district court's decision spawned a handful of NWP 12-based challenges to other linear projects and may indicate that the rest of the 2017 NWPs, some of which are relied upon by renewable energy project developers, are vulnerable to similar challenge. The Corps has proposed a new set of NWPs, which would replace the 2017 NWPs, but has so far elected not to conduct an ESA section 7 analysis as the litigation plays out in the Ninth Circuit. If the Corps continues on its current path, the new NWPs could be subject to the same challenges unless and until the ongoing litigation resolves the questions surrounding the need for an ESA section 7 consultation.

As discussed above, USFWS expects to make a listing decision concerning the northern long-eared bat relatively soon. This was mandated by a January 2020 decision by a DC district court, which remanded USFWS' decision to list the northern long-eared bat as "threatened" rather than "endangered" back to the agency. The plaintiffs in that case have asked the court to order USFWS to issue a new proposed rule and final listing determination for the northern long-eared bat within 18 months. In contrast, the agency has argued it would need until around August 2023 to issue a final listing determination for the species. An

order setting the USFWS' listing timeline will likely be issued before the end of the year.

2020 was also a big year in the MBTA arena, as a New York district court struck down the Department of the Interior (DOI) Solicitor's Opinion M-37050 in which the Solicitor asserted that incidental or unintentional take of bird species protected by the MBTA was not prohibited by that statute. DOI has appealed the district court's order to the Second Circuit, though it is uncertain whether the Biden administration will continue pursuit of this appeal, leaving the district court's vacation of Opinion M-37050 in place.

Finally, renewable energy projects face risk from NEPA-related litigation. A number of groups and states filed suit this year challenging the 2020 amendments to the NEPA regulations. While these lawsuits are still in the early stages, a negative outcome could imperil current and future projects that rely on permits, funding or rights of way authorised under the 2020 amendments. We have also seen renewable energy project opponents use NEPA lawsuits to challenge individual projects.

For example, two avian conservation groups recently sued the Department of Energy and the Corps over the funding and authorisation of what would be the first commercial offshore freshwater wind energy project constructed in the US. This and other lawsuits indicate that renewable project proponents should also consider potential NEPA problems when assessing potential risks to project development.

### Conclusion

In summary, renewable energy development faces evolving risks under the various natural resource laws. Recent regulatory and judicial results highlight the potential for projects to be impacted and even disrupted. The pending change in presidential administration further clouds the risk calculus for renewable energy project proponents. ■

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