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Obtaining An ITP: What You Need To Know

An incidental take permit may shield wind developers from violating the Endangered Species Act. However, the process to obtain such a permit can be time-consuming and costly.

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Given its physical footprint and height, a utility-scale wind farm may inadvertently impact birds and bats protected under the federal Endangered Species Act (ESA). Therefore, many wind developers find themselves on a collision course with the ESA.

The ESA makes it unlawful to "take" – i.e., harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect – any wildlife species that the U.S. federal government has listed as endangered or threatened.

Liability under the ESA is strict; a developer can be penalized even if it did not intend to take an endangered species and can even face criminal fines or (in rare instances) prison, if it knowingly engaged in an activity that resulted in a take.

ESA liability concerns have taken on heightened importance in recent years because many parties, such as the government and financial lenders, are more closely scrutinizing environmental impacts. For example, the 2012 U.S. Fish and Wildlife Service (FWS) Wind Energy Guidelines encourage developers to monitor impacts on federally protected species post-construction.

Given the recent focus on wind-wildlife issues, developers are increasingly turning to the ESA's incidental take permit (ITP), which helps immunize a developer from ESA liability.

However, obtaining an ITP requires a substantial investment of time and money. A developer must weigh the known and substantial costs of seeking immunity under the ESA against the unknown – and potentially catastrophic – risk of citizen-driven litigation or government enforcement if the developer decides to press forward.

What is an ITP?

Congress has offered relief from the punitive nature of the ESA by allowing the FWS to issue an ITP to private developers.

An ITP allows the developer to "take" an endangered species if the take is "incidental to, and not the purpose of, the carrying out of an otherwise lawful activity."

As mentioned earlier, obtaining an ITP is an expensive and lengthy process. A developer's permit application must contain a complete description of the activity sought to be authorized, the species to be covered and a habitat conservation plan (HCP).

A developer typically hires a consultant to generate the HCP, which must describe, among other things, the impact of the proposed incidental taking, measures to minimize or mitigate any taking and an explanation of why alternatives to the incidental taking are not being adopted.

Before the FWS grants the permit, all interested parties must be given notice and an opportunity for public comment. The FWS must also conduct its own analysis of the environmental impact of the permit under the National Environmental Policy Act (NEPA) and engage in a consultation with the action agency under ESA Section 7.

Although the cost and time will vary depending on the scope of the permit sought, a developer may spend more than $250,000 over several years going through the ITP application process.

The FWS will issue an ITP if it is satisfied that the project is not likely to jeopardize the survival or recovery of the species at issue or adversely modify its critical habitat, the applicant will minimize and mitigate the impacts of a taking "to the maximum extent practicable" and the HCP is fully funded.

The trade-off for the investment of time and effort in the ITP process is immunity from ESA liability if an endangered species is inadvertently taken as a result of the construction or operation of the wind farm. This immunity protects a developer from both citizen suits (typically brought by environmental nonprofits or local citizens' groups) and federal enforcement actions brought by the FWS.

Although few ITPs for wind proj-

ects have been sought to date, we anticipate that applications for ITPs will increase substantially as post-construction monitoring becomes more commonplace and lender awareness of ESA liability risks increases.

Whether to seek an ITP is a critical choice for any developer whose project faces public opposition and may be a magnet for litigation. As described in the following sections, the level of litigation risk differs substantially between when a developer does and does not have an ITP.

Defending your ITP

Compliance with an ITP shelters a project developer against both private citizen suits and government enforcement actions under the ESA. Any litigation that may arise is brought against the government – not the developer – and is likely to be much less costly and time-consuming.

Section 11 of the ESA allows any individual or entity to file suit in federal court to enjoin an alleged violation of the act or its regulations. A case may be brought by any plaintiff who can assert an aesthetic, scientific or recreational interest in the preservation of a listed species and can show that this interest is being "imminently" threatened. Such a plaintiff may contend, for example, that the permit fails to sufficiently mitigate the impacts of a taking or lacks appropriate funding.

For at least three reasons, a challenge to an ITP is fought on terrain that is favorable to a developer.

First, the FWS, as a federal agency, receives broad deference from courts when it performs discretionary functions such as issuing ITPs. This deference is critical: It means that a court can overturn the scientific conclusions underlying the FWS' decision only if plaintiffs prove that the agency's action was arbitrary or capricious or violated some limitation of the ESA or another law.

Second, the court's analysis is usually limited to the original FWS administrative record. The developer receiving the ITP should intervene in the lawsuit in order to support the FWS and ensure that its own interests are being represented. But except in unusual cases, a plaintiff may not seek to expand the administrative record; thus, the developer will rarely be required to go to the time and expense of responding to document requests by the plaintiff.

Third, the case is typically decided only on briefing and without live testimony, substantially cutting down on defense costs.

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An ITP will likely be upheld as long as the developer has generated an adequate HCP; the FWS, in turn, has prepared an adequate environmental assessment or environmental impact statement for the issuance of the ITP as required by NEPA; the FWS has complied with the ESA's standards for issuance of an ITP; and the FWS has adequately consulted with itself on the issuance of the ITP under Section 7 of the ESA.

A legal challenge to an ITP will cost a developer time and resources and may delay or even shut down a project if successful. But as the next section demonstrates, defending a lawsuit without an ITP is likely to be more costly, protracted and risky.

Bracing for enforcement

Without the protection of an ITP, a developer leaves itself open to both citizen suits and federal enforcement actions brought directly against the developer. Either of these can cost a developer more time and resources than if it had initially obtained an ITP. A developer without an ITP faces the prospect of much more onerous citizen suits.

In this scenario, plaintiffs will sue a developer directly to enforce any applicable provisions of the ESA. Such a lawsuit is preceded by a notice of intent to sue. The notice is a prerequisite to a lawsuit in federal court; the plaintiff may not file the lawsuit until the 60-day notice period elapses.

A developer must take such a notice seriously and act well before a lawsuit is filed. Essential and immediate steps include engaging legal counsel, identifying and retaining testifying experts, and reaching out to plaintiffs in an effort to narrow or even resolve the dispute.

Often, a developer and a plaintiff can agree to mitigation measures that are less costly than litigation.

If a developer cannot reach a resolution within 60 days, it should be prepared to incur the time and expense of defending against a motion for a preliminary injunction of the project. If a court finds that a plaintiff has adequately alleged the developer has taken – or is reasonably certain to take – an ESA-listed wildlife species, the plaintiff will be entitled to full civil discovery. This means a plaintiff may request internal documents and communications relating to the wind project, as well as depositions of company officers and consultants.

Trial of a citizen suit, should the developer be unable to settle it, is expensive. The developer will incur substantial legal fees and will likely need to hire expert witnesses to counter the opinions of the plaintiff's experts.

In private citizen suits, a developer is not entitled to the same deference a court affords the scientific conclusions of a government agency. And the consequences of an adverse verdict can be catastrophic. If the plaintiff is able to prove that a listed species has been taken or is reasonably certain to be taken, a court may issue an injunction restricting or even halting construc-

tion of the wind farm, at least until the developer obtains an ITP. A court may also require a developer to pay the plaintiff's attorney fees and other legal costs. Ultimately, the costs of defending a lawsuit could dwarf any costs that would be incurred in seeking an ITP or helping the FWS defend it.

Given these risks, a wind farm developer should decline to pursue an ITP only if it concludes that an incidental take is highly unlikely and there is little risk that the project will be the target of a citizen suit under Section 11 of the ESA.

In order to determine the likelihood of a take, a developer must retain biological consultants early in the planning process – preferably consultants with experience handling wind projects. These consultants will study the presence of ESA-listed wildlife species or their suitable habitats, as well as the potential impacts of a wind farm on those species and habitats.

Even if a citizen suit can be forestalled, a developer without an ITP may still face a federal enforcement action. If the FWS has evidence that a project without an ITP has resulted in – or is likely to result in – the taking of an ESA-listed wildlife species, the agency has the authority to assess civil penalties of up to $37,500 per violation. In particularly egregious circumstances, it may also refer the case to the U.S. Department of Justice for criminal prosecution.

Often, the FWS will exercise its enforcement discretion and negotiate a settlement rather than pursue civil or criminal proceedings to completion.

Any settlement, however, is likely to include a requirement that the developer adopt additional measures to minimize and mitigate any take and obtain an ITP that may be more stringent than if the developer had originally chosen to get one. Of course, any settlement costs would be layered on top of costs incurred to defend against the enforcement action.

Because of the significant risks that ESA citizen suits and enforcement actions can pose, a developer that proceeds without an ITP is well advised to prepare for them and act accordingly.

First, it is critical that a developer build a robust scientific record demonstrating the absence of a listed species or the absence of a risk of take. A developer should ensure that its consultants are creating species-survey results that are defensible in court; it should even consider having the survey work peer-reviewed.

Second, a developer should heed any instructions or guidance from the FWS and state agencies or provide written responses with cogent reasons why it is not doing so.

Third, a developer should document any interactions with regulators (i.e., record all communications, including drafting meeting minutes and written confirmations of the substance of telephone conferences). A developer should also consider issuing Freedom of Information Act requests for all government records relating to the proposed wind development to ensure that there are no surprises within the government's files that might be revealed in court.

In the end, there is simply no surefire way to preclude a lawsuit if citizens are intent on stopping a wind project. Opponents of wind farms are often motivated by issues other than wildlife protection – for example, alleged aesthetic and auditory effects – but will use the ESA as a convenient litigation tool to stall or halt the project. Moreover, it is often difficult to forestall an FWS enforcement action once the agency has evidence that a listed species has been unlawfully taken.

While the conventional wisdom is that the ITP process is a major driver of permitting costs for wind energy development, once litigation risks are considered, declining to obtain an ITP may result in higher cost and risk to a project.

Unless available data indicates a low risk that a proposed wind farm will take a protected species, wind developers should seriously consider the safe and predictable – albeit lengthier – route of applying for an ITP. WP

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