



Federal Natural Resource Law and the Intersection of Linear Infrastructure

UT LAW CLE Studio Webcast

Presented by
Rebecca H. Barho
& Brooke M. Wahlberg

January 24, 2020

Introduction

- Linear infrastructure projects have received extensive media coverage in recent years in relation to impacts on the environment and historic resources.
- This presentation covers the federal natural resource laws and how they intersect with construction and operation of linear infrastructure projects.



FEDERAL NATURAL RESOURCE LAWS

- Endangered Species Act (ESA)
- Bald and Golden Eagle Protection Act (BGEPA)
- Migratory Bird Treaty Act (MBTA)
- Clean Water Act (CWA)
- National Historic Preservation Act (NHPA)
- National Environmental Policy Act (NEPA)



Endangered Species Act

- Administered by U.S. Fish and Wildlife Service (USFWS) and National Marine Fisheries Service
 - USFWS relevant for land-based and freshwater species
- Prohibits take of endangered species (Section 9)
 - Take can result from habitat impacts or from direct impacts
- Two ways to obtain authorization for take that may occur incidental to renewable energy development
 - Section 7 (Consultation) – federal nexus required
 - Section 10 (HCPs) – private actions on non-federal lands
- Violations of ESA can result in criminal or civil penalties
- Citizen suit provision in ESA section 11(g)

Take Prohibition

- Take: Defined by ESA section 3 to mean “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”
- “Harm” has been defined by regulation (50 CFR 17.3) to mean:

an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

Incidental Take Authorization

- **Section 7 (Consultation) – federal nexus present**
 - Federal action agency must evaluate effects of its action (permit issuance, funding, etc.) on listed species and ensure against jeopardy.
 - Can be an informal or formal consultation.
 - If agency concludes that federal action is likely to adversely affect listed species or critical habitat, formal consultation is required and the USFWS will prepare a biological opinion.
 - If effects will result in incidental take, USFWS can issue an incidental take statement (ITS).
 - ITS authorizes take of listed species and sets forth conservation measures to minimize the impacts of take.
 - For hard-to-detect species, the burden to quantify take can be expensive.
 - Fourth Circuit has recently invalidated biological opinions for pipelines on the grounds that the quantification was not specific enough for bats and other species.
 - Often involves mitigation costs even though mitigation is not required or even mentioned in Section 7.
 - Consultation timeframe is 135-days, sort of.

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

Title search: Federal Natural Resource Law and Development of Linear Infrastructure

Also available as part of the eCourse

[Federal Natural Resource Law and Development of Linear Infrastructure](#)

First appeared as part of the conference materials for the 2020 STUDIO WEBCAST Federal Natural Resource Law and Development of Linear Infrastructure session

"Federal Natural Resource Law and Development of Linear Infrastructure"