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Endangered Species and Wildlife – Mitigation as Risk Management

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I. Introduction

Incorporating mitigation as a mechanism to manage risk in the development of renewable energy projects should be done with careful consideration of the requirements of the program and the effects it may have on the project. Mitigation as used herein is a mechanism whereby certain property is set aside and designated for conservation to compensate for the effects that a project may, or is likely to, have on a particular species or group of species that are protected by state and/or federal law(s). This paper will generally describe the federal and certain state wildlife laws that incorporate mitigation, the policy guidance (or lack thereof) coming from Washington regarding mitigation, ways mitigation can come about, the package of documents that are required by using mitigation and types of mitigation available, followed by a discussion of the impacts mitigation may have on projects as well as some special considerations.

II. Federal Wildlife Laws

Mitigation can arise under various aspects of federal wildlife laws. Some basic context and the primary ways in which mitigation can arise are described in greater detail in the following subsections.

a. Endangered Species Act

The U.S. Fish and Wildlife Service ("Service") administers the Endangered Species Act ("ESA"), beginning with the listing of species as either "threatened" or "endangered." Whether a species is listed as "threatened" or "endangered" is a determination of the imminence of extinction (i.e. endangered species are more imminently endangered of extinction than threatened species). 16 U.S.C. § 1532. Listing a species requires a formal rulemaking process. The ESA allows for the public to petition the Service to list species, and

the ESA provides time frames by which listing determinations must be made in response to a petition. 16 U.S.C. § 1533. In reality, however, the listing process often takes several years.

"Take" is defined as, "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532. This definition includes the term "harm," which is defined by regulation to mean ""an act which actually kills or injures wildlife. Such an 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." 50 C.F.R. § 17.3.

The ESA provides two authorization pathways for otherwise lawful activities that may result in take of listed species. Private parties that have determined their activities (on private lands) are reasonably certain to result in take of listed species can apply for an incidental take permit ("ITP') under ESA section 10. 16 U.S.C. §1539. An application for an ITP must be supported by a Habitat Conservation Plan ("HCP"). The Service will review the HCP against the issuance criteria set forth in ESA section 10(a)(1)(B). One criterion is that the applicant's HCP demonstrates that "the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of [the estimated take]." 16 U.S.C. 1539 (a)(2)(B). Therefore, mitigation is an express requirement for those seeking ITPs.

The other authorization pathway is through ESA section 7 for those activities that have a federal nexus. For example, projects with Clean Water 404 permits or those that require a right-of-way from the Bureau of Land Management trigger review under ESA section 7. During the section 7 review process (known as a "consultation"), the relevant federal agency will consult with the Service to evaluate the effects of the federal action (i.e. permit approval or ROW grant) on listed species.

A consultation can be informal or formal and must be concluded prior to the agency completing its action. If the action agency concludes that the activity is not likely to result in adverse effects to a listed species and the Service concurs, then informal consultation will conclude with the action agency's assessment and the Service's letter of concurrence. The concurrence letter may be contingent on the project proponent implementing certain conservation measures. If the Service concludes that the federal action is likely to adversely affect listed species, then a formal consultation will occur, and the Service will prepare a

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