Client Alert

March 2015

DC District Court Affirms Indiana Bat Take Permit for Ohio Wind Energy Facility

On March 18, 2015, the US District Court for the District of Columbia rejected a challenge to an incidental take permit for the endangered Indiana bat issued by the US Fish and Wildlife Service (FWS) for the Buckeye Wind Power Project. *Union Neighbors United, Inc. v. Jewell,* Civ. No. 13-01435 (D.D.C. Mar. 18, 2015). In upholding the take permit, the court endorsed the FWS's position that the statutory permit standard was satisfied upon a determination that the authorized take was fully offset by the permit applicant's proposed mitigation efforts, and it was not necessary for the FWS also to determine whether the take could be further avoided or whether additional mitigation was practicable.

The Endangered Species Act (ESA) prohibits the taking of any listed endangered species. 16 U.S.C. § 1538(a)(1)(B),(G). Section 10 of the ESA provides an exemption from this prohibition for take that is incidental to otherwise legal conduct and that "will not appreciably reduce the likelihood of the survival and recovery of the species in the wild." *Id.* § 1539(a)(2)(B). Section 10 authorizes the FWS to issue a take permit if it finds that the applicant "will, to the maximum extent practicable, minimize and mitigate the impacts of such taking." *Id.*

The Buckeye Wind Project is a 100-turbine wind generating facility under development in Champaign County, Ohio. The endangered Indiana bat occurs in the vicinity of the project site during summer months, and migrates past the facility in the spring and fall. The developer applied to the FWS for a permit authorizing incidental take of Indiana bats expected to result from collisions with turbine blades. In 2013, the FWS issued a take permit authorizing a total of 130 bat takes over a 25-year period. To minimize take, the permit required the use turbine cut-in speeds between 5.0 and 6.0 meters/second (compared to the manufacturer-specified cut-in speed of 3.5 m/s) combined with feathering of the turbine blades below the cut-in speed, as proposed by the developer in a Habitat Conservation Plan (HCP) prepared in support of the permit application. To mitigate the impacts of the projected take, the permit required the developer to acquire and permanently protect 217 acres of priority Indiana bat habitat, as also proposed in the HCP.

A local environmental group, Union Neighbors United, Inc., filed suit seeking to invalidate the permit. The group's principal argument was that the FWS failed to first "minimize" the risk of take before determining the level of mitigation required to offset any take that could not be avoided. In particular, the group argued that the FWS should have set the cut-in speed at 6.5 m/s, which it claimed would further reduce bat take by a substantial amount. (Furthermore, under the group's reading of the statute, because it would have been possible in this case to avoid most if not all take of Indiana bats by curtailing all turbine operations at night for seven months of the year, any plan to operate during these periods arguably would not meet the statutory requirement to minimize take "to the maximum extent practicable.") The court held that the group's interpretation of the permitting standard was not compelled by the statutory text, however, and deferred to the FWS's position that the minimization and mitigation requirements are met where the authorized take is fully offset by mitigation. In so holding, the court expressly followed an earlier decision from a federal district court in California, *National Wildlife Federation v. Norton*, 306 F. Supp. 2d 920 (E.D. Cal. 2004), in which the court rejected the argument that a developer must "mitigate as much as the developer could possibly afford."

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The *Union Neighbors United* decision is a welcome development in the case law for any wind energy project which requires a permit to authorize the take of an endangered species. In such a case, as long as the developer is prepared to implement a mitigation program sufficient to offset all take incidental to the operation of the facility, in most cases it should be possible to avoid onerous operational constraints solely to further reduce the level of take or mitigation requirements far greater than necessary to offset the authorized take simply because such additional mitigation is arguably "affordable." In addition, by finding the statutory requirement to minimize and mitigate take "to the maximum extent practicable" to be ambiguous, and thus deferring to the FWS's interpretation, this decision should help project developers defend take permits from collateral attack.

A copy of the court's decision is available here.

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