

Wind Power Webinar Follow up Questions & Answers

Questions were asked after the webinar by participants and answered by Melinda Taylor, the Executive Director of the University of Texas School of Law's Center for Global Energy.

1. **Could you expand about the United States Fish Wild Service (USFWS) consultation for species proposed for listing? Is it required or is it a proactive approach that covers a project in the event that the species becomes listed before a project gets approved?**
 - A. Consultation with or permission from the USFWS is NOT required for species that have not yet been listed (i.e., candidate species). It is possible to work with the Service to obtain a Candidate Conservation Agreement with Assurances (CCAA) that would cover incidental take of the species should it become listed in the future. Generally, the standard for Service approval of a CCAA is pretty stringent. The regulations say that a CCAA can be approved only in the conservation practices it contains would be sufficient to preclude the need for listing if all landowners in the species' range undertook the same practices.

2. **For offshore facilities regarding the Marine Mammal Protection Act (MMPA), some think the line of attack for offshore wind power would certainly be construction (pile driving, vessel movements), but for operational phases, you may have noise. Could you expand on that?**
 - A. For offshore facilities, the federal regulatory frameworks that can be used to challenge them include the Coastal Zone Management Act, the Rivers and Harbors Act, and the Clean Water Act, as well as the Endangered Species Act (if there are any in the vicinity) and, possibly, the Marine Mammal Protection Act. With respect to noise, a complaining citizen would have difficulty making a nuisance case, I would think, based on high noise levels for facilities offshore or in coastal areas. I suppose it's possible that noise could "harm" a listed endangered marine species, but it would be a difficult case to make.

3. **With no federal nexus, no apparent impacts to listed species, complete avoidance of jurisdictional waters of the United States, or any other local regulations or zoning requirements, is there anything else stopping a developer from building a wind farm?**
 - A. No, if there are no local zoning or land use restrictions, no state sitting requirements, and no required federal permit, then no permission is required and the developer can proceed with construction. It's important to remember, however, that ignorance is not a defense to either the Endangered Species Act or Migratory Bird Treaty Act. If it turns out that the facility harms ("takes") a listed endangered species, the operator can be held liable under the Endangered Species Act (ESA), as well as, with the Migratory Bird Treaty Act (MBTA).

4. **Could you expand more about permitting through the federal agencies? The ESA and resource permitting process is more familiar.**
 - A. See number 8 below

5. If there is no federal nexus, no impact to jurisdictional waters of the US, no impact to cultural resources, and no impact to critical habitat or any listed species, aside from local zoning, what other rules or regulations could have an impact on a wind farm developer in building a wind farm?

A. See number 3

6. Are there any standards or guidance on establishing thresholds of significance related to bird and bat impacts upon which mitigations can be used in wind turbine installations to lessen those impacts to levels that are less than significant?

A. Nothing official to my knowledge, I would suggest contacting Kathy Boydston at Texas Parks and Wildlife, who participated in the federal advisory committee, to obtain information on this point.

7. If a species is proposed for listing under the ESA, when would a project need to consult with USFWS? Is it always required or is it a proactive approach that would cover the project proponent if that particular species becomes listed prior to project approvals?

A. (See above)

8 I would have liked to hear more about permitting through the federal agencies. The ESA and resource permitting process is more familiar.

A. There are multiple agencies that can be involved if the facility is to be located offshore. Here is a quick list:

Rivers and Harbors Act, section 10 – need permit prior to “obstructing or altering” navigable water of the US, administered by the Corps of Engineers.

National Environmental Policy Act (NEPA) – environmental review required for all “major federal actions.”

Coastal Zone Management Act – determination of consistency with state coastal plan is required, administered by National Oceanic & Atmospheric Administration (NOAA) and state coastal agency (ex. Texas General Land Office (GLO)).

Navigation and Navigable Waters – need a navigation aid permit (markings and lighting), administered by the Coast Guard.

Navigational Hazard to Air Traffic’ administered by Federal Aviation Administration (FAA); has to do with lighting.

National Historic Preservation Act, administered by Department of the Interior (DOI). Requires consultation on protection of historic resources, including shipwrecks.

Magnuson-Stevens Fishery Conservation and Management Act, administered by National Marine Fisheries Service. Conserves fish stocks; designates "essential fish habitat" within which certain activities are restricted.

National Marine Sanctuary Act -designates "marine protected areas", administered by NOAA.

Endangered Species Act

Marine Mammal Protection Act, administered by USFWS and National Marine Fisheries Service (NMFS); prohibits "take".

Submerged Lands Act, grants a lease for public land held in trust by the government, administered by Minerals Management Service (MMS); however, does not apply to Great Lakes.

9. Where would you go within the State system to actually see a permit application (Utility Commission, Texas Commission Environmental Quality (TCEQ), etc) and are they required to have a copy on file at the local level i.e. area library etc like Superfund TCEQ sites are required to do?

A. The Public Utility Commission is the responsible agency; however, I do not know if they are required to have copies on file.

10. When does Federal Energy Regulatory Commission (FERC) get involved with wind power vs. the other federal agencies?

A. Federal Energy Regulatory Commission is involved in the interstate transmission of power; however, they are not involved in licensing wind farms.

11. How would this apply to wind power opportunities on Indian Reservation Lands? What are the types of regulatory challenges there?

A. All of the federal laws that apply to wind development on other types of land apply to Indian Reservations. Specific tribes may have additional land use restrictions, permitting requirements, and the like.

12. Could you expand on the Bald and Golden Eagle Protection Act?

A. The act prohibits the take or possession and/or commerce in bald and golden eagles. Take includes to "pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, etc". There are civil and criminal penalties in the law which can be quite substantial (\$250,000 for a felony violation). Take is permitted by the USFWS for certain purposes (scientific research, Native American ceremony, for example). It is also possible to obtain a "non-purposeful take" permit, if a proposed activity is likely to wound or kill an eagle. The USFWS website cautions landowners and project proponents to seek one of these permits if eagles are known to nest in the vicinity of the project and could be harmed. Below is a link to the USFWS website that describes the permits.

<http://www.fws.gov/midwest/MidwestBird/EaglePermits/baeatakepermit.html>

13. I would like to hear more discussion on the topic in regards to National Environmental Policy Act (NEPA); however, it might just be something that requires a separate webinar.

- A. It is a complicated question, but generally speaking an environmental review is required whenever a federal agency is involved in permitting an activity that constitutes a “major federal action.” If the Corps of Engineers is involved in permitting a wind farm off shore or in wetlands onshore, or if endangered species may be affected so that authorization under the ESA is required, NEPA is triggered. Either an environmental assessment (EA) or an environmental impact statement (EIS) must be prepared by the permitting agency (in reality, the applicant usually prepares the documentation). The issue of whether EA or an EIS is appropriate is itself worthy of lengthy discussion.

14. With the National Historic Preservation Act (NHPA) question; my experience is that property owners will grasp at any straw. The only project I have ever had stopped at the PUC was visual impacts to an National Register of Historic Places (NRHP) property. Moreover, traditional landscapes have been an emergent issue on any project with visual strong attributes. Could you expand on how a project can be vulnerable to any landowner or interested party (including tribes that must be contacted) who wants to find an issue to stop a project?

- A. As the questioner points out, there is some opposition from rural landowners to wind farms for various reasons. I was recently surprised to read some negative material from the Texas Wildlife Association (TWA), for example, because TWA is usually supportive of landowners’ rights to develop their property. If a landowner wishes to oppose a wind project, he/she will no doubt look for any “hook” available – endangered species, historic features, wetlands, adequacy of NEPA analysis if federal permits are involved, and so on. My best advice is to cover your bases; that is, anticipate any and all opposition, maintain an open line of communication with local law makers as well as landowners, and be sure and obtain any permits and authorizations that arguably could be required.