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ENERGY AND ENVIRONMENTAL LAW

Threatened, Endangered Species Playing Role in Project Planning

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Special to the Legal

Rusty patched bumble bees, part of a group of native pollinators with an economic value of $3 billion per year in the United States, are declining in number. Rusty Patched Bumble Bee (Bombus affinis), according to the U.S. Fish & Wildlife Service Endangered Species. Historically, the species inhabited 28 states throughout the eastern United States and the upper Midwest, including Pennsylvania and New Jersey. Due to habitat loss, intensive farming, disease, pesticides, and global climate change, the decline in the Rusty Patched Bumble Bee has been so severe that in 2017, the bee was listed as endangered by the federal government. As with a number of other federally and state listed threatened and endangered species, individuals interested in real estate development or other projects should take note because protecting these species will become increasingly more important in the land development permitting process.

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The Endangered Species Act (ESA) of 1973 arguably has the most teeth of any wildlife conservation law ever enacted, in part by the creation of a list of threatened and endangered species to which certain protections are afforded, 16 U.S.C.. Sections 1538-1539. Once a species is added to the list, neither individuals of the species nor its critical habitat can be "taken." The ESA defines "take" as to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, collect or to attempt to engage in any such conduct, 50 C.F.R. Section 402.02. In 1982, in an attempt to lessen conflicts between listed species and economic development activities, Congress authorized and 'incidental take" permit—a take that is "incidental to, and not the purpose of,

the carrying out of an otherwise lawful activity." This amendment to the ESA also requires that prospective project developers who obtain an incidental take permit create, execute, and secure funding for a habitat conservation plan (HCP) to reduce the damage to the affected species.

Notably, the protections afforded threatened and endangered species by the ESA has proven to be effective. Since 1969, 99 percent of listed species have been protected from extinction. The Endangered Species Act: a Wild Success, Center for Biological Diversity, http://www.biologicaldiversity.org/campaigns/esa_wild_success. However, even as the species' habitat improves and the species begins to recover, only about 1 percent of listed species have been delisted. Thus, as threatened and endangered species begin to become more populated but remain listed, there is a greater chance that real estate developers and other project proponents will encounter, and have to deal with, threatened and endangered species concerns.

As real estate developers know, federal, state and local governments require a number of permits and approvals as part of the land development process. At the federal level, if the prospective development could contribute to the discharge of dredged or fill material in waters of the United States, including wetlands, the developer may need to obtain a permit under Section 404 of the Clean Water Act from the U.S. Army Corps of Engineers.

Section 402 of the federal Clean Water Act requires that entities disturbing more than one acre of ground also obtain a permit pursuant to the National Pollution Discharge Elimination System (NPDES) program, 33 U.S.C. Section 1342. Authority to issue these permits, generally called NPDES stormwater permits, has been delegated by the federal government to many states, including Pennsylvania and New Jersey.

The states also implement their own permitting programs. For example, in Pennsylvania, a water obstruction and encroachment permit, also known as a Chapter 105 permit issued by the Pennsylvania Department of Environmental Protection (PADEP), is necessary for projects in, on, over or under waters of the Commonwealth, including wetlands. Typically, applicants for a Chapter 105 permit will complete a joint permit application for both Chapter 105 and Section 404 permits.

Embedded within all PADEP permit applications for Section 404, Chapter 105, and NPDES stormwater permits is a Pennsylvania Natural Diversity Inventory (PNDI) review. The PNDI review helps ascertain whether the potential project impacts threatened or endangered plant or animal species or their habitat. The Pennsylvania Conservation Explorer is an online tool, available to the public, that supplies a PNDI environmental review screening.

In New Jersey, the U.S. Fish & Wildlife Service (USFWS) plays a similar role in permitting. The USFWS collaborates with the New Jersey Department of Environmental Protection (NJDEP) in the review of permits for projects in the coastal region and freshwater wetlands. Within the permit application process, New Jersey requires a data request from the Natural Lands Management Natural Heritage Database.

The USFWS has its own database, known as the Information for Planning and Conservation (IPaC) website. If a preliminary screening from one of the tools mentioned above, or a similar review conducted in other states, returns a "hit" for a federally or state listed threatened or endangered species, then the proposed project may affect an area where an endangered or threatened species is likely to be present, and the jurisdictional agency will need to be notified. The project proponent then has to work with the jurisdictional agency to avoid, minimize or mitigate the potential for an effect in the species

or its habitat. In some instances, this might include an intensive study of the area by a qualified consultant to determine whether or not the species actually resides in the location of the proposed project. The jurisdictional agency can either issue a clearance document agreeing that the species is likely to be absent from the potential project area, or if it is present, require further inquiry into ways the proposed project can be modified to avoid adverse impacts to the affected species.

With respect to adverse impacts to federally listed species, a determination of whether an incidental take is probable consists of a two-step inquiry. A project proponent should determine: whether the listed species will be exposed to one or more aspects of the proposed project that may influence its activity or condition (stressors); and how the exposed species will respond to the stressors. These analyses necessitate the identification of key features of the species' life cycle, habitat and habitat use, and the stressors that might be introduced by the potential project. If the analysis leads to the conclusion that a species is likely to be exposed to a stressor, the project proponent must determine how the species would respond. If it appears that a species will respond negatively to one or more of the proposed project's stressors, the project proponent can institute conservation measures to mitigate the negative effects. Examples of conservation measures include restoration and maintenance of high quality habitat, carefully planned and implemented land management practices, and careful use of pesticides, among others techniques. The purpose of such measures is to limit the potential occurrence of an incidental take.

If a proposed project is likely to result in the taking of the species and it is impracticable to avoid the take even after the implementation of conservation measures, a project proponent will have to apply for and receive an incidental take permit for federally listed species, and similar approvals from the appropriate jurisdictional agencies for state-listed species. Pursuant to federal law, the permit application process for an incidental take permit also requires that the applicant design and implement a Habitat Conservation Plan as well as fulfill any other measures that reduce the probability of an incidental take.

Project proponents should take the potential for adverse impacts to threatened and endangered species seriously, since the courts appear to be opening the door to more criminal prosecutions of individuals who take listed species without a permit, see *WildEarth Guardians v. U.S. Department of Justice,* No. CV-13-00392-TUC-DCB (D. Az) (June 21).

With the rapid depletion of natural habitats for various plant and animal species, the listing of threatened and endangered species at the state and federal levels will become more prevalent, causing increased conflicts with potential development projects. Project proponents would be wise to select experienced consultants and counsel to assist them in navigating the approval process, or they may get stung by the regulatory process.

—Peyton Carper, a summer associate at the firm, assisted in developing this article. •

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