Renewable energy: Streamlining review under NEPA and the ESA

By David M. Ivester and Christian L. Marsh

As the nation seeks economic recovery, renewable energy projects are regarded as a way to spur the economy and promote a sustainable energy future. But even renewable energy poses environmental risks, and reviewing and mitigating those risks are regarded among the impediments to overcome to develop such resources. In some respects, though, environmental protection statutes, particularly the National Environmental Policy Act (NEPA) and Endangered Species Act (ESA), afford opportunities to streamline the environmental review process.

Programmatic environmental review is sometimes initiated by an agency as a means of coping with its workload by reviewing many projects sharing similarities; other times it is initiated by project proponents as a means of minimizing duplicative or repetitive review of common issues and streamlining the process for project approvals. These efforts have met with varying levels of success. A number of such reviews have been completed or begun recently in the renewable energy field, including programmatic environmental impact statements (EISs) for wind, geothermal, transmission, and solar projects addressing cross-cutting issues on federal lands or regional conservation plans for renewable projects within discrete geographic areas (e.g., California's high desert or the Central Flyway).

Tiering environmental review under NEPA

Most environmental laws typically focus on specific media (such as air, water, or land), specific activities (such as surface mining or releases of hazardous substances), or specific places, flora, or fauna (such as wilderness areas or endangered species). NEPA, however, regulates all of these areas by requiring federal agencies to ascertain, disclose, and consider the environmental implications of their proposed actions before approving or undertaking them by preparing and considering relatively brief environmental assessments (EA) or, if "significant" environmental effects may result, more detailed EISs.

Although NEPA does not mention program EAs or EISs, the Council on Environmental Quality (CEQ) has encouraged federal agencies to consider program-level review of activities that are related geographically (including actions occurring in the same general location, such as a body of water, region, or metropolitan area), generically (including actions that have relevant similarities, such as common timing, impacts, alternatives, methods of implementation, media, or subject matter), or by stage of technological development (including federal or federally assisted research, development, or demonstration programs for new technologies that, if applied, could significantly affect the environment). 40 C.F.R. § 1502.4(c). In a program EIS, agencies can address activities, impacts, and mitigation measures in more general, conceptual terms than in an EIS for a specific project. CEQ has observed "[f]or example, when a variety of energy projects may be located in a single watershed, or when a series of new energy technologies may be developed through federal funding, the overview or area-wide EIS would serve as a valuable and necessary analysis of the affected environment and the potential cumulative impacts of the reasonably foreseeable actions under that program or within that geographical area." *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations* (*Forty Questions*), No. 24b, 46 Fed. Reg. 18026, 18033 (1981). Tiered, program-level review need not always involve a full EIS and can be tailored to an alternative process that reflects the "[agency] mission's activities and takes into account the public's need for information and involvement." Dinah Bear, *Some Modest Suggestions for Improving Implementation of the National Environmental Policy Act*, 43 Nat. Resources J. 931, 936 n.18 (2003) (noting that the Bonneville Power Administration's use of tiered Records of Decision was upheld by the courts). Perhaps the primary advantage of a program EIS is the prospect that agencies may later "tier" from that EIS and, thus, streamline the review of subsequent projects. As CEQ puts it, "[a]gencies are encouraged to tier their environmental impact statements to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for discussion at each level of environmental review." 40 C.F.R. § 1502.20. Thus, whenever "a subsequent [EIS] or [EA] is then prepared on an action included within the entire program or policy (such as a site-specific action) the subsequent [EIS] or [EA] need only summarize the issues discussed in the broader [EIS] and incorporate discussions from the broader [EIS] by reference and shall concentrate on the issues specific to the subsequent action." *Id.*; *see also* 40 C.F.R. § 1508.28; *Forty Questions* 24c. If a program EIS

Published in *Trends* Volume 42 Number 2, November/December 2010.

adequately discusses the impacts, alternatives, and mitigation measures pertinent to a specific project, an agency may use that EIS to fulfill its obligation under NEPA to review the project's impacts. *Headwaters, Inc. v. Bureau of Land Management*, 914 F.2d 1174 (9th Cir. 1990). Otherwise, an agency may find it necessary or prudent to prepare a project-specific EA or EIS that tiers off the program EIS but offers further detail on project-specific issues not fully aired in the program EIS. *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208 (9th Cir. 1998).

As occurs with many programmatic documents, project proponents often face the issue of time when planning individual actions. Tiering may not be appropriate where the previous, broad-scale NEPA document is outdated or for which there is new information requiring the original analysis to be revisited. And it can be of little use, or even problematic, if the individual project precedes the programmatic document and there are incongruities between the two.

Programmatic review under the ESA

The ESA prohibits any person from "taking" an endangered or threatened species without authorization by the U.S. Fish & Wildlife Service or National Marine Fisheries Service (Services). 16 U.S.C. § 1538(a)(1)(B). Section 7 calls on federal agencies to consult with the Services to ensure that any actions they authorize, fund, or carry out are not likely to "jeopardize" the continued existence of any listed species or result in the "destruction or adverse modification" of the designated "critical habitat" of any such species. 16 U.S.C. § 1536(a)(2). Toward this end, whenever a federal agency finds that its "action," such as issuance of a permit, "may affect" listed species or designated critical habitat, the agency must initiate "formal consultation" with the pertinent Service about that action. 16 U.S.C. § 1536; 50 C.F.R. § 402.14. At the conclusion of the consultation process, the Service renders a "biological opinion;" if the action would result in the "take" of the species an "incidental take statement" prescribing conditions on which take will be allowed is included. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14. Section 10 authorizes the Services to permit any person to take listed species incidental to other lawful activities on certain conditions, including implementation of a habitat conservation plan. 16 U.S.C. § 1539(a). Like NEPA, the ESA does not mention programmatic review. Unlike NEPA, however, there are no regulations for tiering under the ESA. The Services nonetheless have developed vehicles for doing just that. *Gifford Pinchot v. U.S. Fish & Wildlife Serv*., 378 F.3d 1059, 1067–68 (9th Cir. 2004) (approving tiered analysis). Under section 10, for example, the Services have approved activities of varying size, scope, complexity, and duration, including regional multi-species habitat conservation plans that provide broad coverage from ESA liability for particular activities in a specified region and for an extended period of time (e.g., fifty years). Under section 7, the Services typically consult with federal agencies separately on each action the agencies undertake, fund, or permit. Sometimes though, the Services and federal action agencies will agree to consult on multiple actions of a similar type or occurring in a specified area in a single programmatic biological opinion. Individual projects that conform to criteria prescribed in the programmatic biological opinion may then be approved by a much abbreviated process—either a concurrence letter or an abbreviated opinion.

In the absence of regulations, courts have developed some standards for programmatic biological opinions. They must be thorough and include strict conditions for subsequent site-specific consultations (*NRDC v. Rodgers*, 381 F. Supp. 2d 1212, 1228 n.27 (E.D. Cal. 2005)); cannot completely defer analysis of particular types of impacts to future site-specific consultations (*Pacific Coast Federation of Fisherman v. National Marine Fisheries Service*, 482 F. Supp. 2d 1248, 1267 (W.D. Wash. 2007)); and cannot defer an incidental take statement (*Center for Biological Diversity v. United States Fish & Wildlife Service*, 623 F. Supp. 2d 1044 (N.D. Cal. 2009); *but see Western Watersheds Project v. Bureau of Land Management*, 552 F. Supp. 2d 1113, 1138-39 (D. Nev. 2008) (approving deferral of an incidental take statement where further consultation will occur when project-specific activities are authorized)). And when tiering from an earlier analysis, a subsequent biological opinion or effects analysis should take care not to rely on a previous analysis that is flawed. *Natural Resources Defense Council v. Kempthorne*, 2008 U.S. Dist. LEXIS 111588 (E.D. Cal. 2008) (Bureau of Reclamation's negotiation on certain water contracts failed to satisfy section 7 when the agencies relied on a previous biological opinion that did not consider the impacts of water deliveries on Delta smelt).

Opportunities for streamlining review on renewable energy projects

Renewable energy projects are facing some of the same questions that have plagued the agencies for years. First and foremost, programmatic review on a large scale can take time, and some renewable energy projects have struggled with how or whether to make use of broader programmatic review processes when the individual projects are anticipated to precede, rather than follow, the final programmatic EIS. With no formal tiering process under the ESA and perhaps a lack of assurances, some renewable projects have been hesitant to make use of programmatic biological opinions and are opting for incidental take permits instead.

At the same time, renewable energy projects are particularly conducive to broad programmatic review under NEPA and the ESA due to the level of commonality in the impacts and issues that arise in review and in the need to address cumulative impacts. Renewable resources also tend to have similar geographic needs (e.g., open desert areas with high solar capacity, wind corridors, and geothermally productive areas), with similar cross-cutting impacts to species habitat and migration, water, visual/aesthetic resources, noise, transmission corridors, water, waste, compatible land uses, and access. With federal and state efforts to fast track a number of renewable projects, and with the number of projects already underway or completed, there may be little need for program-level review for those projects that are already ahead of the process. Still, a number of opportunities and potential benefits remain. Indeed, perhaps the boom in renewable energy will lead to commonsense reform in these areas.

David Ivester *and* **Christian Marsh** *are partners at Briscoe Ivester & Bazel LLP in San Francisco, where they specialize in natural resource, water, and land-use matters involving endangered species and NEPA.*