

Endangered Species Legislation, Renewable Energy Developments and Action for Climate Change: Conflict or Co-Existence?



Dr Ted Christie, Environmental Lawyer & Mediator – 22 August 2016 ¹

"If we cannot put solar power in the Mojave Desert, I don't know where the hell we can put them."

California's Governor Arnold Schwarzenegger (2010)

The above statement was made in response to a proposed [solar-energy project on part of California's Mojave Desert](#). The project was supported by national environmental groups - *but not the site* - because of the possible loss of around 15 square kilometres of the habitat of a threatened desert tortoise.

In the past, conflicts on private (*or freehold*) and public (*leasehold*) lands over habitat loss and fragmentation and the conservation of biodiversity have been restricted to *existing land uses* for a wide range of human use activities e.g. agriculture, grazing, timber, mining and urban development. Litigation, including environmental prosecutions initiated by Government agencies, has been one outcome.

It may well be the case that past litigation triggered by this conflict, brought under environmental legislation, may represent the tip of the iceberg.

As *new forms of land use* proliferate, and which are quite different from existing land uses, the risk of future litigation is as real as it has been in the past. But the Government Agency, not the landholder, may be the subject of future litigation.

Renewable Energy Developments and Threatened Species

Renewable energy developments have the potential to adversely impact the habitat that is critical for the survival of threatened species e.g. through habitat loss, degradation or fragmentation.

Wind turbines, transmission lines and solar panel arrays can also lead to animal mortality through collisions; as well as causing animals to be displaced from their habitat.

Competing Land Use Interests: Renewable Energy Developments

There is no dispute that renewable sources of energy are a positive action for combatting climate change.

Nor is there any dispute that there is a continuing global need for the conservation of biodiversity; or that the rate of biodiversity decline is a significant global problem.

The clash between the needs for conservation of threatened species and renewable energy developments that lead to a low carbon economy is a classic example of a land use conflict.

There are competing interests that focus on either the conservation of threatened species or on development.

The question is what steps should Government, industry and the community take to ensure that co-existence between competing land uses – not conflict and litigation – will prevail in the future?

Renewable Energy and Litigation: The United States Experience

In the United States, environmental legislation, such as the Federal *Endangered Species Act of 1973* - has already become an obstacle for proposed renewable energy developments. Law suits have been brought under this statute by opponents of renewable energy developments.

The outcome of litigation is that a proposed renewable energy development may not be approved, delayed or modified.

Paradoxically, some lawsuits opposing renewable energy developments in the United States have been initiated by the green movement - notwithstanding green support for renewables and a low carbon economy.

In December 2010 [the Sierra Club](#) – a major NGO in the United States - commenced an action to sue the California Energy Commission over its approval of a solar thermal project. At issue, were the impacts of proposed renewable energy development on rare and threatened plant and wildlife and the effectiveness of mitigation measures for their conservation.

Another major NGO in the United States, the [Natural Resources Defense Council](#), released maps of thirteen States in the western United States showing

areas of land where the habitat was critically important to wildlife and which needed to be avoided by renewable energy developments.

Litigation risk associated with large-scale renewable energy projects, and impacts on threatened species, continues today in the United States: -

- *Oregon Natural Desert Association; Audubon Society of Portland v. Jewell, Secretary of The Interior, Bureau of Land Management (2016)*: The issue - impacts of the wind energy project, to be constructed on 4250 hectares in Oregon, on the greater sage grouse.
- *Bundorf v Jewell, Secretary of The Interior, Bureau of Land Management (2015)*: The issue - an industrial wind energy project on 3640 hectares in Nevada, having 87 industrial scale wind turbines over 120 metres high. Whether inadequate assessment of potential threats to the golden eagle, desert tortoises, and bats.

Endangered Species Legislation in the United States and Australia

There is one significant difference between the United States and Australia in the legal obligations provided in endangered species legislation.

For both countries, the first step is to list a species threatened by extinction into a specific category for conservation (e.g. “*vulnerable*”, “*endangered*”) according to the likelihood of extinction i.e. if no conservation action is taken to address the threat to the species.

However, for the United States, the habitat that is critical for the survival of each listed species, must be defined and identified at the same time as listing.

But this is not the case in Australia under endangered species legislation. For example, under Commonwealth (*Environment Protection and Biodiversity Conservation Act, 1999*) and Queensland (*Nature Conservation Act 1992*) legislation, the critical habitat of a threatened species is not determined at the time of listing – but at a later time e.g. when a “recovery plan” or a “conservation plan” is prepared.

This means that the habitat critical for the survival of a threatened species may be unknown, for some time, following its listing.

This situation would create scientific uncertainty if a siting decision for a renewable energy development had to be made.

Not only does the legal meaning provided in Queensland's statute for "*critical habitat*" refer to habitat that is essential for the conservation of protected native wildlife – but also extends so that critical habitat "*may include an area of land that is considered essential for the conservation of protected wildlife, even though the area is not presently occupied by the wildlife.*"

Avoiding Conflict and Litigation and Achieving Co-Existence

There are two cornerstones for resolving conflict between competing interests for the conservation of threatened species and the use of a site for a renewable energy development:

- The critical habitat of a listed species must be known; and
- All sectors of society that share an interest in action for biodiversity must be meaningfully involved in the decision-making process.

Unlike the United States (and the UK/EU), Australia has no legislative obligations or policies, that provide a range of options integrating ecological and economic considerations to resolve conflicts over the conservation of threatened species and development.

Creative options that have been applied, globally, include:

- Enhancing, restoring or re-creating critical habitat that has been fragmented or destroyed;
- Tradeable units of "conservation credits", based on critical habitat, to facilitate economic development at the regional level, have also been proposed.

Without the availability of creative options to provide mutual gain for competing conservation and development interests, finding solutions to avoid conflict sites over the siting of renewable energy developments would be limited.

Conclusions

1. Co-existence between the conservation of threatened species and renewable energy developments can prevail over future siting decisions for renewable energy developments, if Government involves industry and the community – *farming/grazing, green, Indigenous and local* - in joint action and shared responsibility in site decision-making.
2. The community have to live with the outcome of a siting decision. They need to have trust and confidence in decisions made by Government for renewable energy planning and development in their region. All scientific information that is relevant and reliable must be made readily available to the community and in a form that is understood.
3. **NIMBY-ism** (“*Not in My Back Yard*”) needs to be replaced by **NIMBI-ism** (“*Now I Must Be Involved*”).
4. Conflict and **litigation** must be avoided, otherwise history may repeat: Future renewable energy development proposals may follow the same pathway as existing land uses, in the past, when critical habitat and endangered species are in issue.

End Note

¹ This is an update of the original article posted on 12 April 2011.