

BMHAVOCATS

Development of PV projects in France : beware of protected species!



Anouk DARCET-FELGEN, Avocat au Barreau de Paris et du Luxembourg, Partner

Laurence Duriez, Avocat au Barreau de Paris

On the basis of European Union Directives¹, French regulations have for more than 10 years established a principle of strict protection regarding the “protected species” (“espèces protégées”).

Developers of PV projects in France have for a long time and often because of a lack of information missed the issue. Yet, some local environmental authorities have recently and sometimes brutally brought them back to sobering reality.

An accurate knowledge of the species present at the project’s site allows the developer to plan measures to prevent and reduce the impacts on protected species. If these measures are sufficient, no administrative formality related to the regulation of protected species will be necessary. Otherwise, a request for derogation shall be addressed to the administration.

For the derogation to be granted, the request file must be carefully prepared and the assistance of specialized lawyers is highly recommended.

¹ Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds codified by Directive 2009/147/EC of 30 November 2009; Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora

What are the regulations applying to protected species?

After having been condemned several times by the Court of Justice of the European Union, France has transposed the European Directives on the conservation of wild birds and the conservation of natural habitats and of wild fauna and flora, applicable to protected species, in its Environmental Code by the Agricultural Orientation Law of 5 January 2006².

The principle is that whenever a specific interest or the necessity of conserving biological heritage justifies the conservation of non-domestic animal species or non-cultivated plant life, the law prohibits, among other things, the destruction, alteration or degradation of animal or plant species listed in various ministerial

² Law No. 2006-11

orders as well as the degradation of their specific environment³.

Derogations may, however, be granted by the Prefect (Préfet)⁴ or the Minister in charge of nature protection⁵, depending on the kind of species at stake, but obtaining this derogation is often a real uphill battle, as it is subject to three very stringent cumulative conditions⁶:

- there shall be no other satisfactory solution;
- the derogation shall not adversely affect the maintenance in a favourable state of conservation of the populations of species concerned in their natural area of distribution;
- the exemption shall be justified by one of the five grounds restrictively listed in Article L. 411-2, I, 4° of French Environmental Code, the only one applicable to PV projects being the *"imperative reasons of overriding public interest"*.⁷

If a derogation is necessary, the works can only start after that derogation has been obtained. Failing that, the administration could issue a stop-work order and require that the developer regularises the situation within a certain time⁸. Carrying out a project without

having requested a derogation when it was necessary also may result in criminal sanctions⁹.

What are the issues at stake?

The appetite for large ground-mounted solar power plants in France shows no sign of decreasing¹⁰. Those projects are subject to the obtaining of a building permit and the achievement of an environmental impact assessment (EIA) and of a public inquiry¹¹ as long as their overall power capacity is over 250 kWp.

Regulations applicable to building permits being independent from regulations related to protected species, developers have to ensure that their projects comply with the latter.

Over the last few years and regarding ground-mounted solar power plants, local environmental authorities in some French regions, sometimes receiving information from associations opposed to large-scale projects, have made this very stringent legislation into their playground by "inviting" project

³ Article L. 411-1 of French Environmental Code

⁴ Article R. 411-6 of French Environmental Code

⁵ Article R. 411-8 of French Environmental Code

⁶ Conseil d'Etat, 9 October 2013, No. 366803

⁷ Article L. 411-2, I, 4° of French Environmental Code

⁸ Article L. 171-8 of French Environmental Code

⁹ Article L. 415-3 of French Environmental Code

¹⁰ According to a recent announcement, six major developers of PV projects plan to develop and erect the largest ground-mounted solar power plant in Europe with an overall power capacity of 930 MWp.

¹¹ Articles R. 421-1 and R. 421-9 of French Land-Planning Code, articles R. 122-8, II, 16° and R. 122-3 of French Environmental Code

developers in a systematic manner to submit a derogation request file.

Our experience has been such that derogation request files shall be prepared with the utmost consideration, all the more since the Prefect's and local environmental authorities' demands as to the content of the file do not always emerge clearly from the provisions of the Law.

How to prevent the issues from arising?

To avoid any risk of violation of the regulations on protected species, a developer of ground-mounted PV projects shall first identify in the EIA the species benefiting from protection present on the site of the project and in its immediate vicinity as well as the effects of the project on these species.

After having conducted the studies, developers must plan and lay down in the EIA measures to prevent any impact of the project on protected species. If these measures are not sufficient, some further measures to reduce the impact must be planned and also described in the EIA.

Wherever a "significant residual impact" ("impact résiduel significatif") still exists according to the EIA despite the application of measures

planned to prevent and reduce the impacts of the project, a derogation shall be requested. Thus, the third part of the well-known principle of European and national Law "Prevent, Reduce, Compensate" applicable to EIAs shall not be considered to assess whether a derogation is necessary, which is very often overlooked by the developers.

Once the developer has come to the conclusion that a derogation is necessary, it shall include in its derogation request file an environmental assessment¹² which identifies:

- a. the species benefiting from protection measures at the site of the project and in its immediate vicinity,
- b. the numbers of their populations as well as
- c. the effect of the project on these populations and neighbouring populations.¹³

The assessment shall also describe the measures planned to prevent or, failing that, to reduce and, as a last resort, to offset the negative impact of the project on the affected population of the protected species. According to the Circular of 21 January 2008, the compensatory measures must have a real

¹² This environmental assessment differs from the one required to obtain the building permit under Article R. 122-2 of French Environmental Code.

¹³ Circular DNP/CFF No. 2008-01 of 21 January 2008

probability of success, be based on the best available knowledge and experience and be implemented before the beginning of the works or, where this is compatible with their effectiveness, at least simultaneously.

Derogations can only be granted if the applicant demonstrates that all the above mentioned conditions are met¹⁴.

Account shall also be taken of the following points in the derogation request file:

- Regarding the absence of “other satisfactory solutions”: the developer shall demonstrate that all possible means were sought to avoid having to request a derogation. The appraisal of whether an alternative is satisfactory or not must be founded on objectively verifiable factors, such as scientific and technical considerations. The solution finally selected must be limited to the extent strictly necessary to resolve the specific problem or situation.
- Regarding the duty “not to adversely affect the maintenance in a favourable state of conservation of the populations of species concerned”: the developer has to describe in the derogation request file the initial state of conservation and to demonstrate that various parameters (population dynamics, range, sufficient habitat, prospects of

long-term viability)¹⁵ will be maintained. With or without compensatory measures, the effect of the derogation granted must be neutral or positive on the conservation status of the concerned species¹⁶.

- Regarding the “imperative reasons of overriding public interest”: French administrative jurisdictions balance the public interest invoked by the applicant and the interest of species conservation¹⁷. The Montpellier Administrative Tribunal¹⁸ held that PV projects are in line with French energy policy and therefore meet the criterion of the “imperative reason of overriding public interest” to be demonstrated to obtain the derogation.

In summary, the regulations on protected species and the procedure to obtain a derogation are complex and should not be understated by developers of PV projects. The avoidance of the significant risks linked with those regulations requires technical and legal expertise and support from the very beginning of the development of the project.

¹⁵ Article 1 (i) of Directive 92/43/EEC

¹⁶ Circular DNP/CFF No. 2008-01 of 21 January 2008

¹⁷ Marseille Administrative Court of Appeal, 14

September 2018, No. 16MA02626; Nantes

Administrative Court of Appeal, 13 July 2018, No.

15NT00013; Marseille Administrative Court of Appeal,

25 June 2018, No. 17MA02587

¹⁸ Montpellier Administrative Tribunal, 28 November

2017, No. 1601676

¹⁴ Conseil d’Etat, 9 October 2013, No. 366803