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Eagle Take Permit Program Revamped – Longer Permits and Clearer Mitigation Requirements

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The United States Fish and Wildlife Service (“USFWS”) recently proposed revisions to its regulations authorizing take of bald and golden eagles.¹

The Bald and Golden Eagle Protection Act (“BGEPA”) imposes criminal and civil penalties against “whoever . . . shall take . . . any bald . . . or any golden eagle, alive or dead, or any part, nest, or egg thereof . . .”² “Take” is broadly defined to mean “pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, molest or disturb.”³ The United States has expressed its intent to pursue companies that violate BGEPA.⁴

Compounding the problem, since 2009, when the USFWS first issued a rule authorizing the incidental take of eagles, few permits have issued even though many companies have filed permit applications.⁵ This has created uncertainty within the regulated community and made it more difficult to develop wind energy projects in certain areas. Uncertainty has also resulted from a successful legal challenge to USFWS’s last effort to revise this rule. That challenge saw USFWS’s rule struck down for failure to perform the proper analysis under the National Environmental Policy Act (“NEPA”).⁶

The proposed revisions to the permit program are intended to limit the unpermitted take of eagles. The USFWS expects that the overall restructuring of the permit program will allow a more streamlined and less onerous permit application process.⁷ Two of the key features of the revised rule clarify when compensatory mitigation is required and extend permit coverage from five to thirty years. Overall, the USFWS hopes to attract more take permit applicants by lessening the burden on those applicants. USFWS hopes this will increase the number of permittees and opportunities for compensatory mitigation.⁸

The proposed revisions may prove important to wind power companies. BGEPA take permits serve an important role for wind power companies because they provide a shield from the criminal and civil liability that could result from unintentional take. The proposed revisions seek to streamline the permitting process and allow more wind energy companies and others to take advantage of this important liability shield. This makes wind power

¹ Eagle Permits, Revision to Regulations for Eagle Incidental Take and Take of Eagle Nests (Proposed Rule), <http://www.fws.gov/migratorybirds/pdf/management/EagleRuleRevisions-ProposedRule.pdf>.

² 16 U.S.C. § 668(a)-(b). The statute provides for an element of scienter with respect to the imposition of criminal penalties.

³ *Id.*

⁴ <http://www.globalpowerlawandpolicy.com/2014/03/dojs-bird-in-the-hand-mbta-and-bgepa-enforcement/>

⁵ As of August 2014, USFWS had issued only one bald eagle take permit.

<https://www.milbank.com/images/content/1/7/17638/NAW1408-21.pdf>.

⁶ For a discussion of the revisions to the eagle take rule since 2009, see <http://www.klgates.com/eagles-back-in-the-nest-fws-30-year-eagle-take-rule-vacated-less-than-two-years-after-implementation-09-02-2015/>.

⁷ Eagle Permits, Revision to Regulations for Eagle Incidental Take and Take of Eagle Nests (Proposed Rule), at 7–8, 25 <http://www.fws.gov/migratorybirds/pdf/management/EagleRuleRevisions-ProposedRule.pdf>.

⁸ *Id.*

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development more predictable and provides a more stable regulatory environment—both of which are important given the long-term nature of wind power projects.

The comment period for the proposed rule is open until July 5, 2016.⁹

Backdrop for the Proposed Rule

USFWS first authorized the incidental take of bald and golden eagles in 2009. The rule that was enacted in 2009 remains in effect today.¹⁰ It sets the maximum duration for standard and programmatic take permits at five years, with an option to submit a request for renewal at the end of the five-year period. With each renewal request, USFWS has “the opportunity, in a new decision, ‘to re-evaluate the permit conditions if more take is occurring than anticipated,’ as well as to address any other factors bearing on whether the permit should be renewed or modified.”¹¹ When seeking a renewal, the applicant must establish that “the requested take during the subsequent five years would be ‘compatible with the preservation of the bald eagle or golden eagle.’”¹²

Since 2009, the USFWS has expanded its efforts to study eagle populations, and it recently released a status report.¹³ The report contains good news for bald eagles. Bald eagle populations in the United States are steadily increasing.¹⁴ USFWS estimates that the population of bald eagles in the United States is around 143,000, compared with 126,000 in 2009, which itself is up from 2007 estimates.¹⁵ Bald eagle populations are expected to continue increasing until they reach equilibrium between 197,000 and 228,000 birds.¹⁶

The golden eagle population has been relatively stable in recent years.¹⁷ According to the USFWS, underlying demographic trends suggest the population may be declining toward a lower equilibrium of about 26,000 golden eagles compared with USFWS’s estimates of around 34,000 golden eagles in both 2009 and 2014.¹⁸

Meanwhile, USFWS is increasing efforts to stop unpermitted take by expanding the permit program. USFWS is hoping that this will increase the number of permittees and opportunities for compensatory mitigation.¹⁹ If the proposed rule were finalized and more wind energy companies sought coverage under the permit program, then the USFWS would have greater access to more data about eagle behavior, risk, and mortality in and around wind facilities.

⁹ http://www.fws.gov/news/ShowNews.cfm?ref=new-science-provides-foundation-for--proposed-changes-to-service%E2%80%99s-&_ID=35640.

¹⁰ For a discussion of the eagle take rule since 2009, see <http://www.klgates.com/eagles-back-in-the-nest-fws-30-year-eagle-take-rule-vacated-less-than-two-years-after-implementation-09-02-2015/>.

¹¹ See *Shearwater v. Ashe*, No. 14-CV-02830-LHK, at 6 (N.D. Cal. Aug. 11, 2015).

¹² *Id.* at 7.

¹³ <http://www.fws.gov/migratorybirds/pdf/management/EagleRuleRevisions-StatusReport.pdf>.

¹⁴ See *Eagle Permits, Revision to Regulations for Eagle Incidental Take and Take of Eagle Nests (Proposed Rule)*, <http://www.fws.gov/migratorybirds/pdf/management/EagleRuleRevisions-ProposedRule.pdf>, at 11–12.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 12–13.

¹⁸ *Id.*

¹⁹ *Id.* at 7–8, 25.

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Key Provisions of the Proposed Rule

The proposed rule seeks to clarify when compensatory mitigation will be imposed as a condition of take permitting.

For golden eagles, USFWS takes a “no-net-loss” approach—compensatory mitigation will always be required.²⁰ This is because the proposed rule would maintain the present 0% allowable take limit for golden eagles and require one-to-one compensatory mitigation.²¹ This reflects the negative trend USFWS has observed in golden eagle population growth.

For bald eagles, compensatory mitigation depends on the quantity of local take. Under the proposed rule, take would be calculated using the concept of “Local Area Populations” (“LAP”).²² The LAP concept is based on wind power guidelines contained in an Eagle Conservation Plan Guidance (“ECPG”) document.²³ A LAP measures existing population and take within 86 miles of the boundary of a project for bald eagles (109 miles for golden eagles).²⁴ If projected take within the relevant LAP would exceed 5% of the bald eagle population on an annual basis, compensatory mitigation will likely be required.²⁵ It may be required in other circumstances too—USFWS retains discretion to impose compensatory mitigation in almost any case²⁶—but take in excess of 5% of the LAP annually is expected to be the most common scenario triggering compensatory mitigation. Other triggering scenarios would include take in areas where unpermitted, human-caused eagle mortality exists at levels higher than the national average.²⁷

USFWS also states that it will “encourage” the use of certain compensatory mitigation strategies such as in-lieu fee programs, mitigation/conservation banks, and other established mitigation programs and projects.²⁸

Equally important, the proposed rule would increase the allowable permit duration.²⁹ Under the old rule, permit duration was capped at five years. The proposed rule would make the same change USFWS made in its most recent revisions (which were ultimately struck down) by increasing the cap to 30 years. However, the proposed rule would also require periodic reviews every five years for long-term permits.³⁰ During reviews, permit conditions could be added, including new conditions not contemplated in the original permit.³¹ This could be a flashpoint for litigation on this rule given the success of the most recent NEPA-based challenge to USFWS’s last effort to expand permit duration. If no take is observed during a five-year cycle, unused mitigation credits carry forward to the next cycle.³² To facilitate

²⁰ *Id.* at 31.

²¹ *Id.*

²² *Id.* at 19–21.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 31–32.

²⁶ Under the rule, USFWS could impose mitigation “if otherwise necessary to maintain the persistence of local eagle populations throughout their geographic range.” *Id.* at 33.

²⁷ *Id.* at 32–33.

²⁸ *Id.* at 33. Compensatory mitigation also must take place within the boundaries of the relevant Eagle Management Unit (“EMU.”) *Id.* at 31.

²⁹ *Id.* at 24–26.

³⁰ *Id.*

³¹ *Id.* at 26.

³² *Id.* at 34.

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review and permitting, the proposed rule adopts ECPG protocols for surveys, fatality predictions, and monitoring.³³

The proposed rule would change the standard for granting take permits for both bald and golden eagles. To begin, it would eliminate the existing distinction between “standard” (i.e., one-time take) and “programmatic” (i.e., ongoing take) permits.³⁴ It would also establish a more permissive standard for longer-duration permits. Under the old standard, take was allowed for programmatic permits only in amounts that were “unavoidable.”³⁵ The new standard would permit take in amounts that are “practicably unavoidable,” with “practicable” defined to mean “available and capable of being done after taking into consideration existing technology, logistics, and cost in light of a mitigation measure’s beneficial value to eagles and the activity’s overall purpose, scope, and scale.”³⁶ As a result, the old regime’s “Advanced Conservation Practices” would be replaced by “practicable” best management practices.³⁷

The proposed rule would make several subtler changes as well. The proposed rule changes a number of key definitions in ways that are likely to have some impacts on the details of the permitting process.³⁸ The proposed rule also creates new boundaries for “Eagle Management Units” that reflect the flight paths of migratory birds.³⁹ In addition, the proposed rule would change the name of permits from “non-purposeful use” to “incidental take” permits, mirroring the nomenclature used in the Endangered Species Act.⁴⁰ The proposed rule would also increase permitting fees, with five-plus-year permits costing \$36,000 plus an additional \$15,000 every five-year review cycle.⁴¹

In addition, the rule also makes modest changes to eagle nest take standards.⁴² For example, nests could be removed for anticipated emergencies and to avoid anticipated structural hazards *before* those contingencies materialize if they are expected to occur during egg-laying season.⁴³

Lastly, the preamble to the proposed rule suggests golden eagle take may for the first time be allowed in the Eastern United States.⁴⁴ Previously, USFWS had instituted an outright ban on golden eagle take permits east of the 100th meridian. USFWS signals in its rulemaking document that it may lift the ban to expand the permit program and increase opportunities for compensatory mitigation.⁴⁵ This change is not written into the proposed rule itself, but is mentioned in documents associated with the rulemaking.

³³ *Id.* at 27–28.

³⁴ *Id.* at 22–23.

³⁵ *Id.* at 23–24.

³⁶ *Id.* at 24.

³⁷ *Id.*

³⁸ *See, e.g., id.* at 13–14.

³⁹ *Id.* at 17–19.

⁴⁰ *Id.* at 22.

⁴¹ *Id.* at 26–27.

⁴² *Id.* at 36–40.

⁴³ *Id.* at 38–39.

⁴⁴ *Id.* at 7–8, 47.

⁴⁵ *Id.*

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Conclusion

Whether the revised rule will have the intended effect of reducing unpermitted take and expanding compensatory mitigation remains to be seen. The final rule will be telling with regard to how the USFWS will balance the differing needs of bald versus golden eagles and create a more straightforward permitting program.

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