Client Alert

August 2015

Federal District Court Sets Aside US Fish and Wildlife Service Rule Authorizing 30-Year Eagle Take Permits

The US Fish and Wildlife Service ("Service") can no longer issue 30-year eagle take permits. On August 11, 2015, the US District Court for the Northern District of California set aside a Service rule that authorized the issuance of programmatic permits for the incidental take of bald and golden eagles under the Bald and Golden Eagle Protection Act ("BGEPA") with a term of up to 30 years. In a lawsuit challenging the 30-year permit rule brought by the American Bird Conservancy and several individual plaintiffs, the court ruled that the Service failed to comply with the procedural requirements of the National Environmental Policy Act ("NEPA") in issuing the rule because it had not prepared either an Environmental Impact Statement ("EIS") or an Environmental Assessment explaining why an EIS was not necessary. The court set aside the rule and remanded the matter to Service for further consideration. *Shearwater v. Ashe,* No. 14-cv-02830 (N.D. Cal., Aug. 11, 2015)

The Service issued its first regulations authorizing permits under BGEPA for the take of eagles incidental to otherwise lawful activities in September of 2009. The maximum term for an incidental take permit under these regulations was five years. In December of 2013, in response to concerns expressed by the wind power industry that a permit term more closely aligned with the useful life of the typical commercial-scale wind energy project was needed, to facilitate the development and financing of such projects, the Service issued a rule amending the regulation to extend the maximum permit term from five years to 30 years. The Service concluded that this regulatory change qualified for a "categorical exclusion" from the normal NEPA review requirements both as an action that was "primarily administrative in nature" and "for which the environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively, or case-by-case." The court ruled that the Service had not adequately explained the basis for its conclusion that either of these categorical exclusions properly applied to this rulemaking action, and expressed doubt that any such conclusion could be justified in light of the administrative record for the rulemaking (which included a number of internal communications in which Service personnel expressed the view that a full NEPA review was required to consider the potential impacts of increasing the maximum permit term from five years to 30 years).

The court also ruled that even if one of the cited categorical exclusions otherwise properly applied to the 30-year permit rulemaking, the Service was precluded from relying on such exclusion due to "extraordinary circumstances" indicating that the action nonetheless may have a significant effect on the environment. Under the Service's NEPA regulations, such "extraordinary circumstances" exist where the action has "highly controversial environmental effects." The court found that the Service failed to give an adequate explanation for its determination that effects of increasing the maximum term of take permits to 30 years were not highly controversial in light of substantial documentation in the record of conflicting expert opinion regarding the environmental impact of the rule.

As a result of the court's ruling, the Service is no longer authorized to issue incidental eagle take permits with a term of more than five years. It remains possible that the rule could be reinstated as a result of a successful appeal by the Service, and the Service has 60 days from the district court's ruling to file a notice of appeal. Otherwise, the Service would have to undertake another rulemaking to extend the maximum permit term beyond five years. While the court left open the possibility that the Service could

once again rely on a categorical exclusion to avoid NEPA review for such a rulemaking as long as the agency were to articulate a more compelling justification, the prospects of successfully defending that approach against the inevitable legal challenge seem doubtful in light of the rest of the court's analysis. If the Service were to determine that it must conduct an NEPA review for any subsequent rulemaking to extend the maximum permit term, even if limited to just an Environmental Assessment, it will likely be several years before any final rule would be issued.

The practical effect of this ruling is to increase the cost and reduce the benefit of obtaining eagle take permit coverage for a wind energy project. Although the now vacated 30-year permit rule included a five-year review process that could have resulted in new permit conditions, or even the revocation of a permit, that process was less onerous and less uncertain than the process now required to renew the permit every five years. As a result, project developers may be less inclined to seek permit coverage, and in some cases may choose instead to rely on voluntary mitigation measures to minimize the risk of an eagle take and to best position themselves for favorable prosecutorial discretion under the Service's Land-Based Wind Energy Guidelines.

A copy of the court's decision is available here.

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