

Federal District Court sets aside 30-Year Eagle Take Permit

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On August 11, 2015, a United States District Court judge halted a years-long effort by the United States Fish & Wildlife Service (“FWS”) to smooth the federal permitting path for wind energy. *Shearwater et al. v. Ashe*, No. 14-CV-02830-LHK (N. D. Cal.)(August 11, 2015). Specifically, the judge set aside a rule allowing for activities such as wind energy projects to kill bald eagles and golden eagles for up to 30 years.

FWS’s efforts began back in the current administration’s first year with the first ever authorization for either individual or programmatic take permits of bald or golden eagles under the Bald and Golden Eagle Protection Act (“BGEPA”) of 1940. (Decision at p. 6) The FWS explained at the time that “the rule limits permit tenure to five years or less because factors may change over a longer period of time such that a take authorized much earlier would later be incompatible with the preservation of the bald eagle or the golden eagle.” (Decision at p. 7, citing 74 Fed. Reg. at 46,856). As explained in the court’s decision, the FWS downplayed anticipated use of the new permits for wind energy projects, stating that “the wind power facility could obtain a programmatic permit only ‘[i]f [advanced conservation practices] can be developed **to significantly reduce the take’ resulting from ‘the operation of turbines.’” (Decision at p. 8, citing 74 Fed. Reg. 46,842)(emphasis supplied).**

Shortly after adopting its new 5-year rule, however, there was a significant increase in wind energy projects. Decision at p. 9. In response, the FWS developed its Eagle Conservation Plan Guidance, a voluntary guidance, which introduced advanced conservation practices or ACPs for the wind energy sector, including experimental ACPs (i.e., scientifically unproven). *Id.*

The wind energy industry, although undoubtedly pleased to have secured a programmatic take permit for the accidental or incidental killing of bald and golden eagles, commented on the 5-year permit program, complaining that a 5-year permit was unworkable in that projects were developed for a useful life of twenty to thirty years, and the shorter permit term made financing difficult. As a result of its concern that wind energy projects were not able to get permits as a result of the uncertainty of potential future regulatory changes regarding the killing of eagles, FWS proceeded with efforts to move to a 30-year permit “as soon as possible.” Decision at p. 10. The court notes that “**[a]t bottom, FWS issued the Proposed 30-Year Rule ‘[b]ecause the industry has indicated that it desires a longer permit.’” *Id.*(emphasis supplied).**

Internal debate ensued at the FWS regarding the proposed 30-year permit rule. Despite concerns and staff opinions that an EIS would be needed to support the rule, FWS Director Dan Ashe

instructed his staff not to conduct further NEPA work, that an NGO lawsuit was unlikely, and to proceed. *Id.* at p. 13-16. The rule was finalized and effective as of January 8, 2014. A lawsuit followed five months later.

The FWS's efforts to accommodate wind energy development and facilitate additional permitting through its 5-year and 30-year eagle take permits appear to pre-date the recent Clean Power Plan, which notably incentivizes the development of wind and other non-emitting energy sources. The effort, though, certainly is consistent with the Clean Power Plan and this administration's encouragement of renewable energy sources.

In its August 11th ruling, the court concluded that FWS failed to comply with NEPA, set aside the 30-year rule and remanded the rule for further consideration by FWS. During the remand of the rule, the 5-year permit should still be available as an option for applicants.

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