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Wind Energy Operators Need Eagle Eyes For New Rules

Law360, New York (January 07, 2014, 5:48 PM ET) -- On Dec. 9, 2013, the U.S. Fish and Wildlife Service ("FWS") published in the Federal Register a final rule to extend the maximum term for programmatic "take" permits under the Bald and Golden Eagle Protection Act ("Eagle Act") to 30 years, subject to a recurring five-year review process throughout the permit life.[1] The new rule represents a significant change, since under the current rule FWS programmatic permits for incidental "take" of bald and golden eagles could extend only for five years.

The change is designed to facilitate responsible development of renewable energy and other projects that operate for multiple decades, and to provide more certainty for project proponents, all while continuing to conserve eagles. However, the new permitting regime brings with it a number of unanswered questions, including: (1) how the FWS will implement the new permitting program, particularly with respect to the adaptive management facet of the five-year check-ins; (2) whether the availability of 30-year programmatic permits will bring increased pressure on developers and operators to apply for "take" coverage; and (3) how coordination through the new permitting program will affect enforcement/prosecution under the Eagle Act and other avian statutes.

Background

The Eagle Act provides for the protection of bald and golden eagles by prohibiting the "take" of eagles, and their parts, nests, or eggs, unless allowed by permit.[2] The Eagle Act regulations define "take" to include "pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, molest, or disturb."[3]

On Sept. 11, 2009, the FWS issued a final rule establishing new permit regulations under the Eagle Act for the nonpurposeful "take" of eagles.[4] These regulations provided for both standard permits, which authorize individual instances of "take," and programmatic permits, which authorize recurring "take" that is unavoidable even after conservation measures are implemented. However, due to the five-year maximum term of the programmatic permits and the much longer duration of many large-scale projects, most project proponents opted not to seek a programmatic permit.

Based on comments from proponents of renewable energy projects and others, on April 13, 2012, the FWS issued a proposed rule to extend the maximum term for programmatic permits to 30 years.[5] According to the FWS, it became evident that the five-year term limit imposed by the regulations needed to be prolonged to correspond to the duration of projects.

The New Rule

The new rule extends the maximum term for programmatic permits to 30 years. This expanded term applies only to the nonpurposeful "take" of eagles. Importantly, the regulations authorize the FWS to issue programmatic permits for "disturbance" in addition to "take" resulting in mortalities.

Although the final rule allows the FWS to issue programmatic permits for terms of up to 30 years, the regulations direct the FWS to base the time period of the programmatic permit on "the duration of the proposed activities, the period of time for which 'take' will occur, the level of impacts to eagles, and the nature and extent of mitigation measures incorporated into the terms and conditions of the permit."[6] Importantly, the rule requires the FWS to evaluate each permit issued for more than five years at five-year intervals.[7]

These evaluations will reassess fatality rates, effectiveness of conservation measures, the appropriate level of compensatory mitigation and eagle population status.[8] Depending on the findings of the five-year review, the FWS may impose new permit conditions, including requiring implementation of additional conservation measures, updating monitoring requirements, and revising compensatory mitigation requirements.[9] The FWS may even suspend or revoke a permit.[10] This ability to "reopen" the permit conditions means that developers will continue to face significant uncertainty and economic risk, arguably rendering the 30-year term of permits under the new rule somewhat illusory. The full impact of this provision will obviously depend on how it is implemented by the FWS over time.

In this regard, the new rule reflects a renewed commitment to adaptive management practices as a means of ensuring reduced take. The FWS has made clear that only applicants who commit to adaptive management measures will be considered for permits with terms longer than five years. Structuring projects in a manner that facilitates the study and implementation of such measures will be more critical than ever to minimizing the cost of avoidance measures and compensatory mitigation that may be imposed over the life of the project.

The new rule also increases the fees charged for processing programmatic permit applications to better reflect the cost of developing adaptive conservation measures and monitoring the effectiveness of terms and conditions of the permit.[11] For projects deemed "low risk," there is a separate fee category with significantly lower fees.[12]

The new rule goes into effect on Jan. 8, 2014, but the FWS will continue to solicit input on all aspects of the rule through the advance notice of proposed rulemaking ("ANPR").[13] To that end, the FWS will hold a series of regional workshops in early 2014 with an opportunity to submit written comments. The ANPR will focus on three key issues: (1) standard for programmatic permits; (2) mitigation requirements and options; and (3) the FWS's interpretation of the Eagle Act "Preservation Standard." Based on the ANPR discussion, the FWS plans to move forward with additional rulemaking "in the near future."

Analysis

There is no legal requirement that project developers or operators apply to obtain a programmatic eagle "take" permit under the Eagle Act, but the risk of proceeding without "take" authorization has been significantly increased by issuance of the new rule. The Eagle Act provides for civil and criminal penalties for unpermitted "take" that is "knowing" or done "with wanton disregard."[14] First offenders may be fined up to $5,000 per violation and sentenced to up to one year in jail, and repeat offenders can be fined up to $10,000 per violation and sentenced to up to two years in jail.[15] Felony convictions carry a maximum fine of $250,000 or two years of imprisonment.[16] In addition, even greater fines may be imposed under the Alternative Minimum Fines Act.[17]

Although the industry norm prior to the FWS's release of the final Eagle Conservation Plan Guidance ("ECP Guidance") in April 2013 was to not pursue programmatic permits (due, in part, to the five-year term limitation in the 2009 final rule), the FWS is now putting increased pressure on developers to secure "take" coverage, including through actual and threatened prosecution for past violations. Perhaps the strongest evidence of this trend is the recent settlement agreement between Renewables and the U.S. Department of Justice regarding 14 golden eagle fatalities at Duke Energy's Top of the World Windpower Project and Campbell Hill Windpower Project in Wyoming.

Given this new normal there is now a heightened risk of proceeding without "take" coverage even where risk to eagles is relatively low. As such, project operators and developers should assess their projects and craft appropriate strategies to comply with the Eagle Act, including development of an eagle conservation plan to support the issuance of a programmatic permit. Because the issuance of an eagle "take" permit is a federal action that requires compliance with the National Environmental Policy Act, including the preparation of an environmental assessment or environmental impact statement, project schedules must account for the NEPA timeline.

Coordinating with the FWS to develop an eagle conservation plan to support the issuance of a programmatic permit may also help shield operators and developers from enforcement/prosecution under the Migratory Bird Treaty Act ("MBTA"). Because the tiered approach set forth in the ECP Guidance tracks the tiered approach set forth in the FWS's Land-Based Wind Energy Guidelines and the applicant must demonstrate compliance with other federal wildlife statutes as part of the NEPA process, seeking "take" coverage under the Eagle Act may be one of the more effective MBTA compliance strategies. This is particularly relevant in light of the Duke Energy Renewables settlement, which resolved charges brought under the MBTA.

While the full implications of the new rule are still unclear, the needle has clearly moved towards a more normalized permitting process with greater risks for those who opt not to participate.

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[1] 78 Fed. Reg. 73,704 (Dec. 9, 2013).

[2] 16 U.S.C. § 668.

[3] 50 C.F.R. § 22.3.

[4] 74 Fed. Reg. 46,836 (Sept. 11, 2009).

[5] 77 Fed. Reg. 22,267 (Apr. 13, 2012).

[6] 78 Fed. Reg. at 73,725.

[7] Id.

[8] Id.

[9] Id.

[10] Id.

[11] Id. at 73,723.

[12] Id.

[13] 77 Fed. Reg. 22,278 (Apr. 13, 2012).

[14] 16 U.S.C. § 668(a).

[15] Id.

[16] See, e.g., United States v. Moon Lake Elec. Ass'n, 45 F. Supp. 2d 1070, 1071, 1073-74 (D. Colo. 1999) (denying respondent's motion to dismiss because the Eagle Act and the Migratory Bird Treaty Act apply to both intentionally and unintentionally harmful takings of migratory birds, and therefore the electrocution of 38 birds of prey by respondent's power lines subjected respondent to prosecution under the Acts).

[17] 18 U.S.C. 3571.