

Locke Lord QuickStudy: USFWS Spreads Its Wings – Final Eagle ?Permit Rule Embodies ?New Approach to Troubled Permit ?Process

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On February 12, 2024, the U.S. Fish and Wildlife Service (“USFWS” or “Service”) issued a long-awaited final rule revising its eagle permit program under the Bald and Golden Eagle Protection Act (15 U.S.C. 668-668d) (“BGEPA”). The rule governs the issuance of incidental take permits for qualifying wind energy generation projects, power line infrastructure, activities that may cause bald eagle disturbance take, and bald eagle nest take. The revised, final rule differs substantially from the proposed rule that USFWS issued in late 2022. While some problematic or questionable aspects remain, the Service dropped some of the most problematic provisions of the proposed rule and has even incorporated some innovative concepts into the final rule. On balance – and on paper – the final rule is much improved from the proposal and should be a significant improvement upon the previous eagle permit rule. However, whether that will in fact be the case remains to be seen and will depend in large part on how the Service implements the rule and how it fills in some of the blanks for which guidance or conditions have not yet been provided.

Previous Rules Did Not Fly

BGEPA prohibits the take, possession, and transportation of bald and golden eagles except pursuant to regulations permitting the “taking” of eagles when such take is “necessary. . . for the protection of other interests in any particular locality,” and provided the taking is compatible with the preservation of eagles. 16 U.S.C. 668a (known as the “preservation standard”). In 2009, after the bald eagle was delisted under the Endangered Species Act, USFWS established a permit program for incidental take of eagles and eagle nests under BGEPA. Incidental take is defined as “foreseeable take that results from, but is not the purpose of, an activity.”

The 2009 eagle permit rule was critically flawed in a number of ways, and only a handful of permits were issued as a result. Thus, in 2016, USFWS revised its eagle permit rule to, among other things, extend the maximum term of incidental take permits from five to 30 years, impose preconstruction survey requirements for wind energy projects, and implement take analysis requirements to comply with the preservation standard. Unfortunately, the 2016 rule was still significantly flawed, and those flaws were compounded by certain policies adopted by the Service that made it extremely difficult and extraordinarily costly to obtain and comply with a permit. Thus, the number of permits issued is still only in the dozens despite the “market” for permits being substantially larger than that.

In a renewed attempt to address the problems with the rule and encourage participation in the program by industry, the USFWS tried again to remedy the flaws in its eagle permit program and issued a proposed rule in September 2022 that included significant revisions to the structure of the BGEPA permit regulations. In the proposed rule, USFWS proposed to create a general permit program for incidental eagle take from wind energy projects meeting certain criteria based on location and risk thresholds, and significantly revise the existing project-specific eagle permit regulations.

The public comment period for the proposed rule closed in December 2022. It attracted substantial comment and criticism relating to the general permit program's structure and many other aspects of the proposal. It is clear from the final rule issued last week that, much more than during its previous attempts at crafting a reasonable permit program, the USFWS listened to the comments it received from the regulated community and made an effort to address some of the more problematic aspects of its proposal. The final rule represents a significant restructuring of the eagle permit program and incorporates some novel concepts that the Service would not have considered even a year ago. Following is a brief summary of some of the key components of the final rule and how it differs from the proposal and the existing rule.

Hatching A New Approach

The final rule expands upon and clarifies the types of permits available for incidental take of eagles and their nests. It provides for the issuance of four different categories of permits, for: (i) incidental take of eagles from wind energy facilities, (ii) incidental take of eagles from power lines, (iii) non-lethal disturbance of eagles, and (iv) removal of nests. The rule also establishes two different types of permits within these categories: general and specific. This summary focuses on the provisions governing incidental take of eagles from wind energy facilities, although many aspects of the wind energy permits are shared with the other categories as well.

General Permits

As expected, the final rule creates a general permit option that provides for expedited permit coverage for projects with relatively consistent and low risk to eagles, and requires implementation of well-established avoidance, minimization, and compensatory mitigation measures. The USFWS has not yet published the conditions that will apply to general permits. Applicants can obtain coverage under the general permit by registering with the USFWS, paying an administrative fee, and submitting an application certifying that they meet the eligibility criteria and will follow the permit conditions and reporting requirements. The administrative fee is based on the size of the project. General permits are limited to a five-year term but are eligible for renewals. Projects utilizing the general permit must include coverage for both eagle species regardless of risk. This condition was carried over from the proposed rule despite significant opposition from industry, as it is potentially burdensome for projects that have no demonstrated need for golden eagle coverage and the accompanying compensatory mitigation costs that come with it.

Eligibility for the general permit for wind energy facilities is based on eagle relative abundance and proximity to eagle nests. All of a project's turbines must be in an area with relative abundance below the regulatory threshold for that area, and all turbines must be located at least two miles from any golden eagle nest and 660' from any bald eagle nest. Notably, the Service accounted for the possibility that projects under a general permit may no longer meet these criteria when it comes time for renewal if eagle abundance in the area has increased or eagles

have built a nest nearby during the initial permit term. In such circumstances, the project may still renew its general permit coverage provided it is otherwise in compliance with the permit conditions and has taken fewer than four eagles of each species during the five-year term.

The USFWS estimates that more than 80 percent of existing wind turbines in the lower 48 states may be eligible for general permits (general permits are not available in Alaska, Hawaii or for offshore wind projects). However, projects that are not eligible may request a letter of authorization from USFWS to apply for a general permit. The Service will issue the authorization if it determines that the take rates at the project are likely to be consistent with or lower than eagle take rates expected at similar-sized wind facilities that qualify for a general permit.

General permits require the implementation of mitigation for both species at a fixed rate specific to the Eagle Management Unit applicable the project. The mitigation must be satisfied through the purchase of eagle credits either from a USFWS-approved conservation bank or a USFWS-approved in-lieu fee program. The rule does not address how the Service will handle a situation where sufficient credits are not available within the EMU for a project claiming the general permit, and it remains to be seen whether this provision will prove to be a bottleneck to obtaining general permit coverage in certain areas.

Specific Permits

The final rule makes extensive changes to the project-specific permit regime (referred to simply as specific permits). As under the 2016 rule, specific permits can be issued for a term of up to 30 years, but in a welcome change the Service has dropped the requirement for five-year reviews, instead conducting reviews on an as-needed basis. In addition, there are now three tiers of specific permits for take from wind energy facilities. Tier 1 is for projects that could qualify for a general permit with only minor modifications to the general permit conditions, have site-specific data for calculating fatality estimates or can use the Service's general fatality estimation process, and agree to use a Service-approved conservation bank or in-lieu fee program for mitigation, and for which the Service can use a categorical exclusion from NEPA.

Tier 2 is for projects that are more complex and require more site-specific evaluation for fatality estimation and more extensive modifications to the general permit conditions, including negotiation of compensatory mitigation or other requirements. Those Tier 2 permits that require more than 275 hours of USFWS staff time for review and processing make up the third tier, confusingly referred to as Tier 2 with a reimbursable agreement rather than simply Tier 3.

Among the more notable changes in the specific permit regime from the previous eagle permit rule and the proposed rule is the Service's decision not to apply take limits to permitted projects for compliance purposes. The Service will track estimated take within each eagle management unit (EMU) and local area population (LAP) for purposes of determining compensatory mitigation requirements, but permitted projects do not risk exceeding permit limits based on estimated take from the Evidence of Absence tool or another estimator. This represents a new approach to permit compliance by the Service. It resolves many of the confounding issues with previous permit regimes and should be a welcome development within the regulated community.

Another positive aspect of the final rule is the Service's decision to drop the ill-conceived scheme in the proposed rule for the Service to perform pooled monitoring at wind facilities funded by permit fees. That proposal was

problematic for a number of reasons, including regarding access to the project site by Service personnel, manpower and resource availability, and a significant financial burden on permittees. Instead, the final rule calls for “concurrent monitoring,” or monitoring performed by the permittee’s O&M personnel. The Service will publish standards for this monitoring under specific permits but will only require third-party monitoring when addressing compliance concerns, applying controversial approaches, or when otherwise warranted.

Applications for specific permits must specify the expected method of compensatory mitigation. The Service will use the site-specific fatality estimate to determine the amount of mitigation required. Mitigation for golden eagles must be performed at ratio of 1.2:1. As with general permits, Tier 1 specific permits must use a Service-approved conservation bank or in-lieu fee program, but Tier 2 permits can submit an alternative mitigation plan. Existing projects that have been operating since prior to the initial eagle permit rule on September 11, 2009 and obtain a permit under the new rule are considered part of the baseline and are not required to perform compensatory mitigation.

Timing to Leave the Nest

The final rule becomes effective April 12, 2024, two months after its publication. USFWS anticipates that general permit registration for wind energy and power line projects will be available starting on May 6, 2024. General permit registration for disturbance of eagles and take of eagle nests is anticipated to be available starting on July 8, 2024.

Many developers have had applications for eagle permits pending for well over a year, in some cases for several years. Those applications may have been held up in various stages of processing by the Service, or in many cases the applicants have requested the application be put on hold pending release of the final rule in hopes that the project may qualify for a general permit or that the conditions for specific permits would be more favorable. Now that the final rule has been issued (albeit that key guidance on monitoring and other permit conditions has not yet been released), those with pending applications have until August 12, 2024 to choose whether to have their applications processed under the new regulations or under the 2016 regulations. It bears close watching to see whether the implementation of the new rule goes smoothly or, perhaps more likely based on past experience, the multi-year backlog of permit applications will overwhelm the Service and result in significant delays in processing, especially for specific permits.

Locke Lord has counseled numerous clients in obtaining eagle take permits since the 2009 rule was released, and will be closely following the Service’s development of permit conditions, monitoring requirements, and other implementation issues for this new rule. We encourage you to contact the authors with questions regarding the new rule or to discuss your company’s permitting strategy.

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