

# Eagle Take Permits For Wind Farms - Will They Fly?

By Matthew Ahrens & Meghan Gabriel

**O**n July 31, the U.S. Fish and Wildlife Service (FWS) issued the first ever eagle take permit. Although it has been nearly five years after regulations authorizing such permits went into effect, the permit - which was issued to EDF Renewable Energy with respect to the Shiloh IV wind project in Solano County, Calif. - may be a sign of things to come. In its June 26 press release, the FWS stated that this permit will set “a precedent for proactive and collaborative eagle conservation at wind farms in northern California and beyond.” EDF noted that “the process wasn’t always the smoothest, but in the end, we believe that wind turbines and eagles can co-exist, so the journey was worthwhile.”

Obtaining an eagle take permit is beneficial from both a conservation and business perspective because the permit seeks to protect eagles while also providing the project with a level of regulatory certainty.

However, until more are issued, it remains to be seen whether, when and to what extent eagle take permits will become a regular requirement for other wind farms or how much time will be required for the underlying application process.

The Bald and Golden Eagle Protection Act (BGEPA) prohibits the “taking” of bald and golden eagles, and a violation can result in significant civil and criminal fines and penalties. In

2009, the FWS published BGEPA permit regulations that authorize permits for the limited non-purposeful take of eagles when the take is the result of an otherwise-lawful activity. Under the regulations, wind projects could potentially be eligible for programmatic permits to authorize recurring take that is unavoidable even after the implementation of advanced conservation practices.



Although enforcement for the take of eagles and other protected birds by wind projects has been minimal to date, due to the increased public attention on wind projects’ impacts to wildlife and the enforcement action against Duke Energy last year, prosecution for BGEPA violations may be on the rise. This has generated increased interest regarding the use of eagle take permits as a measure to assist the FWS with protecting eagle

populations while providing a level of certainty regarding BGEPA enforcement for projects that could otherwise pose a risk to eagles.

However, until last month, an eagle take permit had never been issued to a project in any industry. Although the FWS encouraged developers to apply for take permits and to prepare eagle conservation plans (ECPs) in accordance with the Eagle Conservation Plan eagle guidance issued by the FWS in May 2013, the chances of obtaining an eagle take permit and the terms of any such permit were far from certain.

Based on the agency’s press release and the fact that the first eagle take permit has been issued, it appears likely that the FWS may more frequently recommend that developers apply for eagle take permits for projects with the potential to disturb eagles or result in eagle fatalities. Many developers, especially those that already comply with the FWS eagle guidance, may give more weight to such recommendations now that a precedent for such a permit has been set.

Nonetheless, the feasibility of obtaining an eagle take permit remains unknown. Furthermore, although the FWS eagle guidance was designed to streamline and expedite the process for permitting wind project development while providing protection to eagles, there is no legal mandate to comply with the FWS eagle guidance,

and not all wind projects will need to obtain an eagle take permit. In addition, although the FWS estimates the application period will significantly decrease when the issuance of eagle permits can become routine, the application process might remain difficult, at best, for any particular project.

Even if the application process does indeed become more streamlined and expedited, applications are likely to remain both time-consuming and potentially costly. An eagle take permit qualifies as a federal action and triggers the need for a comprehensive environmental review under the National Environmental Policy Act (NEPA), which will include monitoring of a project's potential impact to eagles. The FWS has estimated that applicants should anticipate a processing time of four to 24 months for a programmatic take permit, depending, in part, upon the scope of the NEPA review. Unless and until more permits are issued, it is difficult to assess the certainty of these time estimates.

Opportunities for public comment and challenge are built into the application process, which can lead to extensive delays, a more comprehensive NEPA review, amendments to the permit application and additional mitigation obligations. The amount of public support or opposition will vary from project to project. According to the FWS, only 32 comments were received during the NEPA review for the Shiloh IV project, none of which required substantive changes to the NEPA review or the proposed eagle take permit.

### **Five or 30 years?**

Under the BGEPA permit regulations, eagle take permits can have a maximum term of five years. However, in response to comments requesting a longer term in order to provide lasting certainty, on Dec. 9, 2013, the FWS extended the maximum term to 30 years to correspond with the operational life of most wind projects. Such permits will still require a review of the project every five years,

and depending on the findings of the review, the project may be required to undertake additional conservation measures.

Although the 30-year extension was supported by the wind industry, as the longer permit term provided certainty for developers and lenders alike, it generated strong opposition from several environmental groups, including some many of whom had supported the eagle take permit with a five-year term. In fact, on June 19, the American Bird Conservancy filed suit in federal court charging the Department of the Interior and the FWS with violations of the NEPA and the BGEPA in connection with the issuance of the 30-year term extension.

On June 20, the FWS announced that it intends to conduct a NEPA review of the eagle permitting process as part of its ongoing effort to review and revise policies for managing impacts to eagles as wind power continues to expand. The NEPA assessment will review proposed revisions to the BGEPA permit regulations, including, among other things, the duration rule. This announcement kicked off a 90-day public comment period, which will end in September. The NEPA process could take up to 18 months or longer, depending on the scope of the FWS' review; therefore, revised regulations are unlikely to be issued before the end of 2015 at the earliest.

According to the FWS, at least one application for a 30-year eagle take permit is pending. However, until the legal challenges regarding the maximum permit term are settled, the viability of obtaining a 30-year take permit will remain uncertain and developers may elect to seek a five-year term.

### **Going forward**

The FWS will likely begin issuing more eagle take permits for proposed and operating projects, and more applications will likely be submitted. Even if an eagle take were to occur by a permit applicant prior to the issuance of a permit, pending eagle take permit applications and compliance

with the BGEPA permit regulations and FWS eagle guidance will likely be taken into consideration by the FWS when it determines whether to pursue enforcement thereof. Nonetheless, prior to permit issuance, there will be no "get out of jail free" card for eagle takes.

Even after issuance of the first eagle take permit, the likelihood of obtaining an eagle take permit and a project's liability for adversely impacting eagles without a permit remains in uncharted territory until more permits are issued. Given the pending NEPA review and legal challenge with respect to the 30-year term, it is unclear at this point how the eagle permitting process may evolve over the next couple of years. According to the FWS, approximately 20 applications for eagle take permits are pending, which is a very low percentage of the total number of proposed and operating wind farms. The length of time for the application process, the cost of the application, the likelihood of issuance, and the possible terms and conditions for any permit are project specific and currently difficult to predict.

Because the BGEPA permitting process is still evolving, it is advisable for developers to consult with the FWS and local wildlife agencies as early as possible and to build into the project timeline additional time for the preparation of an eagle conservation plan and application for an eagle take permit in case potential impacts to eagles are unavoidable. The decision about whether any project will need to seek a permit will be unique and will depend on a complex analysis of the project's site and risk profile, as well as an assessment of the likelihood a project may result in a take of a bald or golden eagle.

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*Matthew Ahrens is of counsel and Meghan Gabriel is associate in the environmental practice area at law firm Milbank, Tweed, Hadley & McCloy. They can be reached at [mahrens@milbank.com](mailto:mahrens@milbank.com) and [mgabriel@milbank.com](mailto:mgabriel@milbank.com), respectively.*