

Client Alert

October 2016

US Fish and Wildlife Service Announces Decision to Issue Five-Year Eagle Take Permit for California Wind Energy Facility

On November 2, 2016, the US Fish and Wildlife Service (the Service) announced its intention to issue a permit authorizing the take of up to three golden eagles during the five-year permit term for the 48-turbine Alta East Wind facility in Kern County, California. The announcement was contained in a notice published in the Federal Register ([available here](#)), which also announced the availability of the Service's Finding of No Significant Impact (FONSI) for the issuance of the permit. The permit is to be issued 30 days following the publication of the Federal Register notice.

This is only the second "programmatic" permit issued by the Service pursuant to its authority under the Bald and Golden Eagle Protection Act (BGEPA) since the Service first issued regulations providing for eagle take permits in 2009. The permit will have a term of five years, and thus will need to be renewed if it is to remain effective for the life of the project. A Service rule authorizing eagle take permits for up to 30 years was set aside by a federal court in August of 2015. *Shearwater v. Ashe*, No. 14-cv-02830 (N.D. Cal., Aug. 11, 2015). The Service proposed a new rule in May of 2016 that would once again authorize programmatic permits for up to 30 years, see 81 Fed. Reg. 27934 (May 6, 2016), but until that proposal is finalized, five years remains the maximum term for an eagle take permit.

As described in the FONSI ([available here](#)) prepared by the Service under the National Environmental Policy Act (NEPA), the permit will impose a number of conditions to ensure that the risks to eagles from the operation of a facility are minimized and that the authorized take will result in no net loss to eagle populations in the area, including:

- A requirement that the project employ a biological monitor during daylight hours for the life of the project who would watch for eagles approaching the facility and who would be "authorized to implement curtailment of all turbines at the Alta East facility when an eagle is observed within 1 mile of any turbine(s)."
- Monthly eagle fatality monitoring for all turbines for at least the first year after the permit is issued. The monitoring requirements thereafter would be determined through coordination between the Service and the project operator based on the results of the first year of monitoring.
- Compensatory mitigation to offset the authorized eagle take in the form of retrofitting up to 138 electric utility poles to reduce the likelihood of avian collision or electrocution.

In determining the final permit conditions, the Service selected elements from several of the alternatives that were evaluated in the Environmental Assessment (EA) required to satisfy the Service's obligations under NEPA. Notably, the requirement for curtailment was not among the mitigation measures proposed in the applicant's Eagle Conservation Plan (ECP). Moreover, the alternatives considered in the EA contemplated curtailment at only four turbines located on a ridgeline whenever an eagle is observed within one mile of one of these four turbines. It appears that under the terms of the final permit all of the turbines at the facility will be subject to curtailment due to the proximity of an eagle. The details of the

curtailment protocol are not clear from the documents made available by the Service in connection with this announcement. The FONSI states a that “a detailed curtailment protocol would be implemented as described in the Final ECP” for the project, but the ECP attached to the FONSI indicates that the development of a curtailment protocol would only take place as an adaptive management measure if the three-eagle take threshold is reached prior the expiration of the permit term. Perhaps this ambiguity will be resolved by the specific terms of the permit when it is issued next month.

While the Service’s issuance of this second eagle take permit is an encouraging sign that such permits may start becoming more readily obtainable, it also highlights the risk that the permit may come at the cost of agreeing to a curtailment protocol that is broader than the applicant may have proposed or anticipated at the outset of the permitting process.

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