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California Federal Court Strikes Down FWS Rule for 30-Year Eagle Incidental Take Permits

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In 2013, the U.S. Fish and Wildlife Service ("FWS") issued a rule increasing the maximum duration from five to 30 years of programmatic permits under the ***Bald and Golden Eagle Protection Act*** to "take" bald or golden eagles incident to otherwise lawful activities. That rule was challenged by environmentalists in the U.S. District Court for the Northern District of California. On August 11, 2015, the court granted summary judgment for the plaintiffs and remanded the rule. As a result, for now, 30-year incidental take permits are no longer available to wind energy and other projects under the Eagle Act.

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Under FWS regulations, a "programmatic take" refers to cases of potential harm to eagles that is "recurring" and "occurs over the long term." The FWS had enacted in 2009 a rule authorizing such programmatic take permits for a maximum term of five years. It became evident as a practical matter, however, that such permits were too short to enable sufficient financing and planning decisions for large energy and infrastructure projects with a projected lifetime of decades. Accordingly, FWS in 2013 extended the maximum term to 30 years, with a stated focus on wind power projects. Importantly, the new rule did not eliminate the requirement for ongoing monitoring for the effectiveness of mitigation measures, reviews by FWS and operators every five years, or the FWS' ability to modify or revoke the permit before the end of its term. Yet, it did provide more certainty for developers that the five-year review would not be treated as a de novo exercise for existing operations.

The court focused its analysis on the plaintiffs' claim under the National Environmental Policy Act ("NEPA"), and held that FWS had not conducted sufficient NEPA review to support its 30-year permit rule. Specifically, FWS attempted to utilize a categorical exclusion, which is the most streamlined form of NEPA compliance, rationalizing that the change in maximum permit term (and other changes in the 2013 rule) were administrative in nature. The court disagreed, finding that the agency should have prepared an Environmental Assessment or a full-blown Environmental Impact Statement explaining the potentially significant environmental effects of the longer permit term. In doing so, the court repeatedly pointed to an unusually condemning administrative record for FWS, containing agency staff's, Tribes', and environmental groups' expressions of opposition to the new 30-year permit term and calls for more in-depth NEPA review. For example, according to the record, the FWS Director instructed staff: "Don't do more NEPA. Don't do an EA, they will only want an EIS."

The practical import of this court decision remains to be seen. As the court acknowledged, FWS is currently reconsidering its Eagle Act regulations and has initiated a new NEPA scoping process. *See* 79 Fed. Reg. 35,564 (June 23, 2014). This process may obviate an appeal to the Ninth Circuit. The court also did not preclude FWS from re-adopting a 30-year programmatic permit rule, so long as any new rule is accompanied by a sufficient NEPA analysis of potential environmental impacts from that rule.

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