30-Year Eagle Take Permit Term Remanded on Procedural Grounds

08.13.2015 | By Brooke M. Marcus

On August 11, 2015, the United States District Court for the Northern District of California found that the U.S. Fish and Wildlife Service ("Service") had inappropriately relied on a categorical exclusion under the National Environmental Policy Act ("NEPA") when promulgating a rule under the Bald and Golden Eagle Protection Act ("BGEPA") extending the maximum programmatic eagle take permit term (the "Rule"). *Shearwater v. Ashe*, Case No. 5:14-cv-02830-LHK. While the court found the Service's NEPA analysis lacking, and therefore remanded the matter back to the Service so that it could complete the necessary environmental review for the Rule, the court rejected plaintiffs' assertion that the Service had failed to satisfy its obligations under the Endangered Species Act ("ESA"). Thus, while the decision may foreclose the issuance of a 30-year take permit in the near term, the Service could conceivably be issuing 30-year permits in the not too distant future, assuming that the Service remains committed to establishing an eagle take permit with a 30-year term.

The Rule was an amendment to the existing permit program for "take" of Bald or Golden Eagles established in 2009 under BGEPA. Programmatic eagle take permits authorize ongoing eagle "take" that may occur incidental to various activities, including the operation of transmission lines, wind energy facilities, airports, etc. "Take" as used in BGEPA includes possession, sale, purchase, barter, offer for sale, transportation, export or import of Bald or Golden Eagles, alive or dead, or any part, nest, or egg thereof. 16 U.S.C. § 668(a). Promulgated in December 2013, the Rule amended the existing eagle permitting regulations to allow for programmatic eagle take permits to have a maximum term of 30-years. 79 Fed. Reg. 73,704 (Dec. 9, 2013) (codified at 50 C.F.R. §22.26(i)). The Rule also included a 5-year "reopener" requirement, at which time the Service could adjust permit terms such as eagle take estimates, monitoring requirements, and mitigation.

The Rule helped address one of the many functional issues that had plagued the eagle permitting program. In particular, it helped align programmatic eagle take permits with the types of projects for which the permits are needed. That is, those projects most likely to apply for programmatic eagle take permits are projects

such as wind energy facilities and electric and distribution transmission lines whose risk of eagle take can extend over the life of projects, often up to 30-years.

The Service concluded that the Rule was categorically excluded from NEPA based on two alternative premises. First, that the Rule was administrative or financial in nature. Second, that the Rule's environmental effects are too broad, speculative or conjectural to lend themselves to meaningful analysis, and application of the Rule would be subject to the NEPA process on a case by case basis. The Service also found no extraordinary circumstances existed that would prohibit the application of a categorical exclusion.

The plaintiffs, led by the American Bird Conservancy and Debra Shearwater, did not challenge the substance of the Rule. Rather, the lawsuit challenged only procedural requirements under NEPA and consultation requirements under the ESA. In particular, the bulk of plaintiffs' claims hinged on the propriety of the Service's conclusion that the Rule was categorically excluded from NEPA review. Plaintiffs also characterized the Rule as an inappropriate accommodation to the wind energy industry. Given that the regulatory assurances of obtaining a permit for the life of a wind energy project significantly impacts the ability of a project to obtain financing, the American Wind Energy Association intervened as a Defendant-Intervenor to represent wind industry interests.

With regard to plaintiffs' NEPA claim, the court found that the Rule was more than administrative in nature, that the effects of the maximum permit term extension were not too broad or speculative to lend themselves to meaningful analysis, and that significant controversy existed so as to bar the use of a categorical exclusion. In support of this finding, the court cited emails from Service staff disagreeing with the categorical exclusion determination of higher-level Service officials.

As for the ESA section 7 claim, the court found that the plaintiffs failed to present any evidence that the Service had not met its obligations under the ESA.

The practical implications of the court's decision for those seeking programmatic eagle take permits are limited. In the short term, only five-year programmatic eagle take permits can be obtained. However, only a handful of programmatic eagle take permits (all for 5-years or less) have been issued since the establishment of the permitting program in 2009 due to underlying issues with the permit program as a whole. The Service is expected to publish a proposed rulemaking that is likely to revise significantly many aspects of the 2009 eagle permit rule. See *Eagle Permits; Changes in the Regulations Governing Eagle Permitting, 77 Fed. Reg. 22278 (Apr. 13, 2012).* The current Unified Agenda of Federal Regulatory and Deregulatory Actions states that the proposed rule is expected to be published in spring of 2016. If the Service remains committed to establishing a programmatic eagle take permit with a 30-year term, it could either conduct a separate NEPA analysis and republish the Rule, or it could include the permit term extension in the forthcoming proposed rulemaking, in which case the NEPA review would be included as part of the greater NEPA review for the larger rulemaking.