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The New 2013 Eagle Conservation Plan Guidance: Certainty for the Industry or Dust in the Wind?

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The new Eagle Conservation Plan Guidance issued by the U.S. Fish & Wildlife Service (“FWS”) presents an interesting question for wind project developers and operators – does it really provide greater certainty and reduce liability exposure?

The Problem

The Migratory Bird Treaty Act¹ (“Bird Act”) and the Bald and Golden Eagle Protection Act² (“Eagle Act”) prohibit the “taking” of migratory birds and eagles, and impose criminal and civil (Eagle Act only) liability for violations. Over twenty years ago, the FWS and the Department of Justice began applying the Bird Act and Eagle Act to industrial settings when avian deaths or injuries were caused by other illegal activities, such as unpermitted oil spills. More recently, the government has threatened or brought criminal enforcement action against owners and operators of industrial facilities for incidental mortalities – i.e., in those cases where a facility is operating in compliance with the law and without environmental incident, but where protected avian species fly into industrial equipment and operations (e.g., waste retention ponds, air emission control equipment, power wires). Several cases have litigated whether these types of incidental mortalities constitute “take” within the meaning of the Bird Act and Eagle Act. These situations would seem to be indistinguishable from one where the owner of a building into which a bird flies is prosecuted for an illegal “take.” However, the few courts that have considered these questions are split on the issue.³ While the Eagle Act provides some

¹ 16 U.S.C. § 701, *et seq.*

² 16 U.S.C. § 668, *et seq.*

³ Industrial “take” not covered: *Newton County Wildlife Ass’n v. U.S. Forest Serv.*, 113 F.3d 110, 115 (8th Cir. 1997); *United States v. Brigham Oil & Gas L.P.*, 2012 WL 120055, *6 (D.N.D. Jan 17, 2012); *United States v. Chevron*, 2009 WL 3645170, *3 (W.D. La. Oct. 30, 2009); *Mahler v. U.S. Forest Serv.*, 927 F. Supp. 1559, 1579 (S.D. Ind. 1996); *Citizens Interested in Bull Run, Inc. v. Edrington*, 781 F. Supp. 1502, 1510 (D. Or. 1991) (“I further find that the Act was intended to apply to individual hunters and poachers . . .”); *United States v. Ray Westall Operating, Inc.*, No. CR 05-1516-MV (D.N.M. Feb. 25, 2009).

Industrial “take” covered: *United States v. Apollo Energies, Inc.*, 611 F.3d 679, 682, 689-91 (10th Cir. 2010); *United States v. Moon Lake Electric Ass’n, Inc.*, 45 F. Supp. 2d 1070, 1084-85 (D. Colo. 1999); *United States v. Corbin Farm Serv.*, 444 F. Supp. 510, 532 (E.D. Cal. 1978), *aff’d on other grounds*, 578 F.2d 259 (9th Cir. 1978); *United States v. FMC Corp.*, 572 F.2d 902, 908 (2d Cir. 1978); *United States v. Rollins*, 706 F. Supp. 742, 745 (D. Idaho 1989); *North Slope Borough v. Andrus*, 486 F. Supp. 332, 361-62 (D.D.C. 1980), *aff’d in part, rev’d in part on other grounds*, 642 F.2d 589 (D.C. Cir. 1980); *United States v. CITGO*, 2012 U.S. Dist. LEXIS 125996 at *3, *23 (S.D. Tex. 2012).

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protection because it only imposes liability for “knowing” takes, the Bird Act contains no “scienter” requirement. One U.S. Circuit Court was sufficiently troubled by this that it grafted a “proximate cause” or notice requirement as essential elements of a Bird Act prosecution, even though it is a strict liability statute.⁴

The FWS, which administers both laws, has sought to assert jurisdiction over industrial activities by developing policies, guidance, and even regulations governing the “unintentional take” of migratory birds or eagles. The FWS appears to acknowledge that it is inevitable that some birds will fly into industrial facilities, such as wind turbines. To address this concern, the FWS created an Eagle Permit program to authorize unavoidable takes of bald and golden eagles under the Eagle Act, but has yet to issue a permit.⁵ No programmatic eagle take permits are allowed under the Bird Act, however, so even with a permit, wind project developers and operators still must rely on the FWS’s prosecutorial discretion under that statute. The FWS has developed several iterations of guidance documents providing instructions to the regulated community regarding how it can best avoid violating these laws. While manufacturing, oil, natural gas, and transmission line operators have faced these issues for years, it appears that the wind energy industry – which has rapidly expanded within and around known avian habitat – is a new target for prosecution under the Bird and Eagle Acts.

Latest Guidance

The FWS recently released the latest revision of its Eagle Conservation Plan Guidance, Module 1 – Land-Based Wind Energy, Version 2 (“2013 Guidance”).⁶ Originally issued in draft form in January 2011, the 2013 Guidance provides a possible pathway to wind energy developers and operators for obtaining programmatic eagle take permits in accordance with the Eagle Act and the Eagle Permit Rule.⁷ The 2013 Guidance also supplements FWS’s 2012 Land-Based Wind Energy Guidelines (“WEG”)⁸ and could reduce the risk of prosecution if followed, even if birds are still lost as a result of wind turbines. Whereas the WEG broadly addresses wildlife considerations at wind energy facilities, the 2013 Guidance provides specific guidance for bald and golden eagles. Like all other guidelines, while seeking to offer some certainty to the industry, the 2013 Guidance carefully and clearly notes that it is not binding on the industry or FWS.

⁴ *Apollo Energies*, 611 F.3d 679.

⁵ There is a certain irony to the fact that “incidental take” permits are specifically authorized with respect to endangered species under the Endangered Species Act, 16 U.S.C. § 1531, *et seq.*, but not migratory birds or eagles that are not listed as threatened or endangered.

⁶ Available at: http://www.fws.gov/windenergy/eagle_guidance.html (last accessed May 23, 2013).

⁷ 50 C.F.R. § 22.26. The Eagle Permit Rule authorizes FWS to issue permits to take bald eagles and golden eagles “‘for the protection of . . . other interests in any particular locality’ where the take is compatible with the preservation of the bald eagle and the golden eagle, is associated with and not the purpose of an otherwise lawful activity, and cannot practicably be avoided.” Whether FWS has the authority under the Eagle Act to issue these regulations, and whether these regulations as issued are consistent with the Eagle Act is beyond the scope of this alert. For example, if the statute only imposes liability on “knowing” takes of eagles, why would a permit be needed for injury to an eagle that is unintentional?

⁸ 77 Fed. Reg. 17,496 (March 26, 2012). The WEG superseded FWS’s *Interim Voluntary Guidelines to Avoid and Minimize Wildlife Impacts from Wind Turbines*, which were published for comment in 2003. See 68 Fed. Reg. 41,175 (July 10, 2003).

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The 2013 Guidance

The overarching objective of the 2013 Guidance is to offset the short- and long-term negative effects of wind energy facilities on eagle populations.⁹ The 2013 Guidance sets out to accomplish this goal by:

1. Explaining FWS's recommendations about how to conserve bald and golden eagles during the course of siting, constructing, and operating wind energy facilities;
2. Providing in-depth guidance about the specific legal protections afforded to bald and golden eagles and how wind energy developers and operators can comply with regulatory requirements;
3. Describing how an Eagle Conservation Plan ("ECP") – while voluntary – is the preferred vehicle to satisfy the regulatory requirements under 50 C.F.R. § 22.26; and
4. Promoting the acquisition of biological data that the wind energy industry can use to support permit applications for eagle takes.

The 2013 Guidance is not prescriptive and recognizes the inherent uncertainty in this area. Like the WEG, it is based entirely on voluntary compliance by the wind industry. Moreover, FWS acknowledges in the 2013 Guidance that it has a limited understanding of the potential impacts of wind energy projects to eagles and how to address them. Due to the uncertainty about local and regional scale impacts – and how to effectively manage them – FWS does not recommend any specific conservation practices. Rather, FWS recommends “an adaptive management framework predicated, in part, on the precautionary approach for consideration and issuance of programmatic eagle take permits.”¹⁰

Adaptive management techniques “consist[] of case-specific considerations applied within a national framework” that *may* include “operational adjustments at individual projects at regular intervals where deemed necessary and appropriate.”¹¹ The 2013 Guidance does this through a five-stage approach, similar to the five-tiered approach in the WEG. The five-stage approach outlines an eagle-specific decision-making process for each stage of project development to avoid, minimize, and mitigate for impacts.¹² Ultimately, “[i]mplementation of the final ECP **must reduce predicted eagle take, and the population level effect of that take**, to a degree compatible with regulatory standards to justify issuance of a programmatic take permit”¹³ Compatibility with regulatory standards means maintaining a stable or an increasing breeding eagle population.

Changes from the Draft Eagle Guidance

As compared to the 2011 draft Eagle Conservation Plan Guidance, the 2013 Guidance attempts to clarify several issues about how to develop an ECP. Notably, pre- and post-construction surveys to evaluate potential impacts to eagles are recommended for a period of no less than two years, as compared to three years in the 2011 draft guidance.

⁹ ECPG at 4-5.

¹⁰ *Id.* at 9.

¹¹ *Id.*

¹² *Id.* at 17.

¹³ *Id.* (emphasis added).

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The 2013 Guidance maintains the FWS's position that a permit is only intended to authorize the *unavoidable* "take" of eagles, that is, only *after* implementation of advanced conservation practices ("ACPs") designed to eliminate or reduce eagle fatalities and disturbances.¹⁴ ACPs are defined to mean "scientifically supportable measures that are approved by FWS and represent the best available techniques to reduce eagle disturbance and ongoing mortalities to a level where remaining take is unavoidable."¹⁵ However, FWS acknowledges that "there are currently no available scientifically supportable measures that will reduce eagle disturbance and blade-strike mortality at wind projects," and, as such, FWS "has not currently approved any ACPs for wind-energy projects."¹⁶ Nonetheless, FWS states that it will work with industry to develop ACPs for wind projects as part of the programmatic take permit process on an "experimental" basis (because the ACPs "would not yet meet the definition of an ACP in the eagle permit regulation").¹⁷ FWS also states that it will negotiate a "*cost cap*" with project developers or operators before issuance of a permit to provide financial certainty of operational costs.¹⁸

As in the draft guidance, FWS states that applicants must "reduce the effect of permitted unavoidable mortality to a no-net-loss standard through compensatory mitigation for the duration of the permitted activity."¹⁹ FWS also says that compensatory measures may also be necessary to offset permitted disturbance and take by providing substitute resources or environments in order to achieve the regional no-net-loss objective.²⁰ To account for local and regional impacts, FWS urges project developers or operators seeking a permit to agree with the agency on "the number of eagle fatalities to mitigate and what actions will be taken if actual eagle fatalities differ from the predicted number."²¹

How the 2013 Guidance Addresses Operating Facilities

Though both the WEG and the 2013 Guidance apply to all wind energy facilities, both guidance documents speak primarily to an audience of developers and operators in the initial stages of facility siting and development. For existing wind facilities, both guidance documents apply somewhat differently, and as a result, may not reduce the uncertainty nor provide existing facilities with the same benefits of voluntary compliance that may apply to pre-construction facilities. For example, under the 2013 Guidance, existing facilities may be subject to a different calculus with respect to unavoidable take, a different analysis for take thresholds and mitigation triggers, and different recommendations for post-construction monitoring. Those differences are not fully explained in the guidance.

The Conundrum – Apply for a Permit? Just Follow the Guidance? Do Something Else?

There seem to be two possible reasons for following the guidance: (1) doing so could increase the chances of obtaining a permit for "incidental takes" of eagles; and (2) doing so could reduce exposure to liability for incidental take, even if a permit is not sought or granted.

¹⁴ *Id.* at 10.

¹⁵ 50 C.F.R. § 22.3.

¹⁶ ECPG at 10.

¹⁷ *Id.*

¹⁸ *Id.* (emphasis added).

¹⁹ *Id.* at 11.

²⁰ *Id.* at 8, 11.

²¹ *Id.*

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FWS has stated that compliance with the 2013 Guidance is not necessary to meet regulatory requirements or to qualify for an eagle take permit.²² Nor does compliance provide any assurance that FWS will issue a permit or not prosecute a wind company if there are avian deaths or injuries attributed to collisions with equipment. Indeed, it is possible that endeavoring to follow the guidance and then departing from it could increase liability exposure. However, the 2013 Guidance may provide some sense of how to comply with the regulatory requirements, avoid unintentional take of eagles, and develop the information needed for a programmatic permit.²³ If a programmatic eagle take permit is issued and followed, it may provide some protection from Eagle Act liability for the unintentional take of bald or golden eagles.

However, a programmatic permit issued under the Eagle Act *does not* shield wind developers and operators from liability under the Bird Act. The Bird Act precludes the “take” of any protected migratory bird, of which eagles are a subset. While one would think the more specific statute – the Eagle Act – would preclude a parallel prosecution under the Bird Act, the government has not clearly committed to that position. As a result, a wind developer or operator must rely on the Department of Justice and FWS’s exercise of enforcement discretion to avoid Bird Act liability, even if a programmatic permit has been obtained under Eagle Act.

Without a programmatic permit, wind developers and operators who rely on the WEG or 2013 Guidance – i.e., through the development and implementation of an Avian Protection Plan (“APP”) or an ECP – may reduce their exposure to some extent should a “take” occur. The FWS states that following the guidance would be a driving factor in deciding whether to exercise enforcement discretion under either the Bird Act or Eagle Act.²⁴

As noted above, although the 2013 Guidance recommends an ECP when applying for a permit, an ECP is not necessary.²⁵ An ECP may be a stand-alone document or part of a larger bird and bat strategy (e.g., an APP) as described in the WEG. Regardless of format, an ECP or APP will be expected to satisfy the requirements in 50 C.F.R. § 22.26.²⁶ However, because FWS employees will be trained in the procedures and approaches of the 2013 Guidance, facilities that use other approaches should expect a longer review process.²⁷

Why not follow the guidance? Going down that path could commit the developer to unknown and unpredictable obligations. Even starting down this path could create greater exposure if the developer finds that there are irreconcilable differences with FWS and another path needs to be pursued. Will the government argue that a developer’s failure to complete the process outlined in the guidance constitutes “wanton disregard” for eagles for purposes of criminal prosecution? Will the developer need to make sure the “record” of its efforts to comply with the guidance demonstrates good faith?

Conclusion

The 2013 Guidance provides wind project developers and operators with more refined recommendations about how to comply with current regulations and how to obtain an eagle take permit under Eagle Act. However, because no permits have yet been issued and because a wind

²² *Id.* at iii, 5.

²³ *Id.* at ii-iii.

²⁴ *Id.* at iii, vi; WEG at 6.

²⁵ ECPG at iii, 5.

²⁶ *Id.* at iii.

²⁷ ECPG at 5.

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facility would not have complete protection from liability even with a permit, it remains to be seen what advantage is to be gained by applying for and obtaining a permit.

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