

EAGLES BACK IN THE NEST: FWS 30-YEAR EAGLE “TAKE” RULE VACATED LESS THAN TWO YEARS AFTER IMPLEMENTATION

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On August 11, 2015, the United States District Court for the Northern District of California struck down a U.S. Fish and Wildlife Service (the "Service") regulation that increased the maximum duration of programmatic permits for the incidental "take" of bald and golden eagles from five to thirty years ("the 30-Year Rule")¹. The decision sets aside the 30-Year Rule and leaves its fate in the hands of the Service, with potentially negative consequences for those entities that interact with avian resources. Without the 30-Year Rule, entities like wind farms—where avian interaction is effectively unavoidable—face serious questions related to securing permit coverage for their operations and prosecution for incidental take of eagles.

Moreover, until the 30-Year Rule is either reshaped through the administrative process or challenged on appeal, the previous rule—with its five year permit term and need for reapplication/NEPA review every five years—remains in place. Reapplication will trigger administrative burdens for both the permittee and the Service, with respect to both meeting the requirements of NEPA and the potential for appeals.

REGULATORY BACKGROUND

The Bald and Golden Eagle Protection Act ("BGEPA") imposes criminal and civil penalties against "whoever . . . shall take . . . any bald . . . or any golden eagle, alive or dead, or any part, nest, or egg thereof" ² "Take" is broadly defined to mean "pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, molest or disturb."³ BGEPA has been construed and aggressively used by the United States to prosecute industrial activities that adversely impact eagles, regardless of careful planning to avoid take and lack of intent. Although the BGEPA was enacted in 1940, there was no permit program authorizing incidental take for almost seventy years.

The Service, which implements BGEPA, first authorized the incidental take of bald and golden eagles in 2009. The initial rule set a maximum duration for individual and programmatic take permits at five years, with an option to submit a request for renewal at the end of the five-year period ("the 5-Year Rule"). With each renewal request, the Service would have "the opportunity, in a new decision, 'to re-evaluate the permit conditions if more take is occurring than anticipated,' as well as to address any other factors bearing on whether the permit should be renewed or modified."⁴ When seeking a renewal, the applicant would have to establish that "the requested take during the subsequent five years would be 'compatible with the preservation of the bald eagle or golden eagle.'"⁵ Permit renewal decisions under the initial 5-Year Rule were affirmative agency actions subject to the National Environmental Policy Act ("NEPA").⁶

The Service proposed a new rule in April 2012 that would "extend the maximum term for programmatic permits to 30 years" (the "30-Year Rule").⁷ The stated purpose of the revised rule was to "facilitate the development of renewable energy and other projects that are designed to be in operation for many decades," and to "provide more certainty to project proponents and their funding sources, while continuing to protect eagles"⁸ The Service did not prepare an Environmental Impact Statement ("EIS") or Environmental Assessment ("EA") when issuing the 30-Year Rule because it considered the revision from 5 to 30 years to be administrative in nature, and thus categorically excluded from NEPA's requirements. Despite strong opposition from non-profit conservation organizations, Indian tribes, other governmental agencies, and from within the Service itself, the Service issued the final rule in December 2013 "extend[ing] the maximum term for programmatic permits to 30 years."⁹

The Final 30-Year Rule provided for an internal agency review of programmatic eagle take permits every five years, and required that permittees submit reports to the Service documenting eagle fatality data or other site-specific, relevant information. The Service would then make this data available to the public, and would review the data to determine if additional reporting or mitigation measures were needed—and ultimately, whether the permit would be renewed.

The Service concluded that the revised rule was categorically excluded from NEPA because (1) several provisions of the rule were administrative in nature and (2) the rule's "environmental effects were too broad, speculative, or conjectural to lend themselves to meaningful analysis and [would] later be subject to the NEPA process, either collectively, or case-by-case."¹⁰ In reviewing its reliance on this categorical exclusion ("CatEx") against the DOI's list of extraordinary circumstances, the Service found that none applied to the final rule. The Service also concluded that the Final 30-Year Rule was exempt from Endangered Species Act ("ESA") consultation requirements¹¹ because the rule "[would] not affect endangered or threatened species or designated critical habitat."¹² The Final 30-Year Rule took effect on January 8, 2014.

THE CASE

Eagle aficionados, observers, and conservancy groups filed suit in June 2014 challenging the 30-Year Rule. Plaintiffs asserted that FWS failed to comply with NEPA and the ESA when increasing the maximum duration of programmatic permits for incidental take of eagles from five to thirty years. The court found that Plaintiffs were unable to point to evidence in the record to support their ESA claims, but found that the Service violated NEPA's procedural requirements by failing to undertake an EA or EIS. The court held that the Service "failed to show an adequate basis in the record for deciding not to prepare an EIS—much less an EA—prior to increasing the maximum duration for programmatic eagle take permits by sixfold."¹³

Categorical Exclusions

As noted above, in declining to conduct NEPA review prior to promulgating the Final 30-Year Rule, the Service relied, in part, on a two-part CatEx to support its determination. Under this CatEx, any "[p]olicies, directives, regulations [or] guidelines" that are of an administrative nature or "whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA

process, either collectively or case-by-case," are categorically excluded from NEPA review unless any extraordinary circumstances apply.¹⁴ 43 C.F.R. § 46.210(i). The court rejected the Service's reliance on the CatEx, finding that "because [the Service] did not adequately explain its reliance on . . . [the CatEx] as a basis for avoiding further NEPA review . . . [the Service's] application of the [CatEx] was unreasonable."¹⁵

Administrative in Nature

Addressing each of the Service's CatEx arguments in turn, the court first reviewed the Service's determination that the rule's provisions were administrative in nature, finding that the "evidence before the Court" established that they were not.¹⁶ The court noted that regulations that "increase the barriers to public involvement" are not purely administrative, and that there would be less public participation for a permit that is reviewed once over a thirty-year period than there would be for a permit that is reviewed six times during that same period of time.¹⁷ The court reasoned that the 30-Year Rule also included the substantive change of shifting the burden to the Service "to determine every five years whether any changes to the permit are necessary."¹⁸ The court disagreed with FWS that the primary purpose of the 30-Year Rule was to reduce the agency's administrative burden; rather, the primary purpose, in the court's view (as gleaned from the record), was to facilitate the development of renewable energy—particularly in the wind sector.

Finally, the court pointed to internal agency communications advocating for NEPA review and criticizing the agency's chosen path as "cause for the Court to find a NEPA violation."¹⁹ The Service argued that reliance on these communications was misplaced because the communications concerned the proposed and not the final version of the 30-Year Rule, and thus were referencing an antiquated version that was devoid of safeguards such as "five-year review, public information, and permit modification or revocation procedures."²⁰ The court rejected this argument, finding, in part, that several of the internal criticisms occurred well after the five-year review provisions were first proposed. The Service also argued that it finalized the 30-Year Rule subject to "minor modifications," and that "these minor changes adequately 'addressed' the criticism from [the Service's] own NEPA experts."²¹ The court similarly rejected this argument, noting the Service's failure to elaborate or to "cite any evidence in the record to support their assertion."

Environmental Effects Too Broad, Speculative, or Conjectural and Will Later be Subject to NEPA Review

The court next addressed the Service's argument that the 30-Year Rule was categorically excluded from NEPA's review process because the effects of the rule were "too broad, speculative, or conjectural to lend themselves to meaningful analysis" and "[would] later be subject to the NEPA process, either collectively or case-by-case."²³ The court first pointed to inadequacies in the Service's arguments, finding that the Service did not offer any explanation "beyond the assertion that the rule 'will be broadly implemented,'" and that such cursory statements were insufficient.²⁴ The court also rejected the Service's argument that the effects of the 30-Year Rule could not be meaningfully analyzed; the court reasoned that the very fact that an EA had been conducted and extensive analysis undertaken as part of the initial 5-Year Rule proved otherwise. The court also rejected the Service's argument that any environmental effects would be "purely conjectural," noting that the Service failed to point to anything in the record to support their assertion.²⁵ Because the Service failed to establish the first prong of the

second portion of the CatEx, the court declined to address whether the Service "erred in finding that the environmental effects of the Final 30-Year Rule 'will later be subject to the NEPA process, either collectively or case-by-case.'"²⁶

Extraordinary Circumstances

The final step in the court's NEPA analysis involved rejecting the Service's argument that "extraordinary circumstances" did not exist to negate the rule's exclusion under the CatEx.²⁷ The court found that even if either of the two portions of the CatEx applied to FWS's 30-Year Rule, "extraordinary circumstances" precluded the Service from relying on the CatEx. Plaintiffs argued that at least four extraordinary circumstances applied to the Final 30-Year Rule, and the court found that there was "substantial evidence in the record" indicating that at least one of the "extraordinary circumstances" listed in the regulations—namely, that the Final 30-Year Rule may have "highly controversial effects" on bald and golden eagles—applied.²⁸ The court pointed to the bounty of criticisms lobbed against the Service and contained within the record, and noted that the Service's response was limited to one declaratory sentence that "the effects of this rule are not highly controversial . . ."²⁹ The court found that the Service "failed to meet its burden to provide a 'well-reasoned explanation' demonstrating that these responses to the Final 30-Year Rule do not suffice to create a public controversy based on potential environmental consequences."³⁰ The court then found—again—that because the FWS "failed to adequately address concerns raised by its own experts," the agency's action should be set aside and remanded for further reconsideration."³¹

Path Forward

It is unclear whether the post-*Shearwater* landscape will include more litigation or the Service's initiation of a regulatory proceeding to address deficiencies in the 30-Year Rule. If the Service were to appeal, it is uncertain whether the Service would prevail; however, an appeal would present the Service with an opportunity to (1) evaluate the application of CatEx in the context of actions that are administrative and (2) evaluate the application of NEPA in the context of impacts that are indeterminate or unknowable. As of this article's date of publication, however, FWS has remained silent as to both the *Shearwater* decision and suggestions for a path forward. Because this case involves federal agency litigants, any party wishing to file a notice of appeal has an extended period of sixty days in which to do so.³² Regardless of whether the 30-Year Rule's fate is decided by a panel of appellate judges or by agency personnel in a rulemaking, industry participants may wish to participate in any ensuing process—either as *amici* in appellate litigation or by filing comments in a rulemaking proceeding—to ensure that the serious questions facing the industry do not go unanswered.

Notes:

[1] *Shearwater v. Ashe*, No. 14-CV-02830-LHK (N.D. Cal. Aug. 11, 2015).

[2] 16 U.S.C. § 668(a)-(b). The statute provides for an element of scienter with respect to the imposition of criminal penalties.

[3] 16 U.S.C. § 668(a)-(b). The statute provides for an element of scienter with respect to the imposition of criminal penalties.

[4] *Shearwater*, at 6.

[5] *Id.* at 7.

[6] NEPA is a procedural statute "that provides the necessary process to ensure that federal agencies take a hard

look at the environmental consequences of their actions." *Id.* at 2. NEPA requires federal agencies to prepare detailed Environmental Impact Statements ("EIS") for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). A federal agency may prepare an Environmental Assessment ("EA") to evaluate whether an EIS is required. 40 C.F.R. § § 1501.3, 1501.4, 1508.9.

[7] 77 Fed. Reg. 22,267, 22, 267 (Apr. 13, 2012).

[8] *Id.* at 22,275.

[9] *Id.* at 22,267.

[10] *Id.* at 22,267.

[11] The ESA requires federal agencies to "insure that any action authorized, funded, or carried out by [the] agency . . . is not likely to jeopardize the continued existence of any endangered species" *Id.* at 5. Formal consultation under the ESA is required if a proposed action "may affect" an endangered species. *Id.* Agencies may also first initiate informal consultation with FWS. *Id.*

[12] *Id.* at 16.

[13] *Id.* at 44.

[14] See *infra* Part II.B.

[15] See *infra* Part II.B.

[16] *Id.* at 29. The court noted that it was "not entirely clear that [the Service], in promulgating the final 30-Year Rule, relied on the 'administrative' portion of the [CatEx] to avoid NEPA review . . . [r]ather, [the Service] stated that 'several provisions of this rule are specifically administrative or financial in nature.'" *Id.*

[17] *Id.* at 28-29.

[18] *Id.* at 31.

[19] *Id.* at 31.

[20] *Id.* at 31.

[21] *Id.*

[22] *Id.*

[23] *Id.* at 34. Defendants must establish both prongs of the second portion of the CatEx, i.e., they must establish that the effects of the rule are too broad, speculative, or conjectural and that it will later be subject to NEPA review. *Id.* at 34, 37; see also 43 C.F.R. § 46.210(i).

[24] Shearwater, at 35.

[25] Shearwater, at 35.

[26] *Id.* at 37.

[27] "[A]n agency 'must provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect. Before a [CatEx] may be invoked for a particular agency action, the agency must 'determine whether [the action] meets any of the extraordinary circumstances.' It is well established that 'an agency may not use a CatEx when extraordinary circumstances exist.' In such extraordinary circumstances, a categorically excluded action would nevertheless trigger preparation of an EIS or an EA." *Id.* at 37-38 (internal citations and quotations omitted).

[28] *Id.* at 38; see also 43 C.F.R. § 46.215(c). The court noted that a proposal is "highly controversial" when "substantial questions are raised as to whether a project may cause significant degradation of some human environmental factor, or there is a substantial dispute about the size, nature, or effect of the major Federal action." *Shearwater*, at 38-39. While the existence of opposition in and of itself is insufficient to meet this standard, the burden is on the agency to explain why the opposition does not rise to the level of being "highly controversial." *Id.*

at 39.

[29] *Id.* at 43.

[30] *Id.*

[31] *Id.* at 43-44.

[32] F. R. APP. P. 4(a)(1)(B)(ii).

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