Wind Energy and Eagles

“The Permit”

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Topics Covered

• Background on BGEPA
• Programmatic Eagle Take Permit
• First out of the Chute: Shiloh IV
Bald and Golden Eagle Protection Act
Background

- The BGEPA (1940) prohibits anyone, without a permit issued by the Secretary of the Interior, from "taking" bald eagles, including their parts, nests, or eggs.
- “Take” is defined as pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, destroy, molest or disturb. Note: disturbance.
- Criminal penalties:
  Maximum penalty of $5,000 and one year imprisonment for first conviction and $10,000 and two years for second conviction. The violator could also be subject to a $100,000 penalty under the Criminal Fines and Improvement Act of 1987 for a misdemeanor, and $250,000 for a felony conviction. An organization could be held liable for penalties of $200,000 and $500,000 for a misdemeanor and felony conviction, respectively.
- Civil penalties
  Maximum fine of $5,000 per violation.
Eagle Take Permit Program

- In 2009, new rules allowing a take permit to be issued where the taking is associated with but not the purpose of the activity and cannot practically be avoided.
- Take permits must be compatible with the BGEPA goal of maintaining a stable or increasing population.
- Individual v. programmatic permits
  - One time (e.g. Native American cultural take) v. ongoing take (wind project)
- Authorized take can be issued for disturbance, not just mortality
- Originally, permit limited to 5 years (renewable).
- In 2013, USFWS issued a new rule extending the maximum term for programmatic take permits to 30 years.
Eagle Take Permit Program (continued)

Take permitted under four main conditions:

• Take is necessary to protect legitimate interests
• “Consistent with the goal of stable or increasing breeding populations.”
• “No Net Loss” to breeding populations.
• Take cannot be practically avoided.
• Compensatory mitigation will be provided for any remaining take.
Golden Eagle Programmatic Take Permit Program

• "If avoiding take is not practicable, the project proponent may apply for a take permit. **A permit is not required to conduct any particular activity, but is necessary to avoid potential liability for take cause by the activity.**"
  *Fed. Reg. Vol. 74, No. 175 at 46841*

• "A programmatic permit is **optional.**"
  *Fed. Reg. Vol. 74, No. 175 at 46842*

• But like fire insurance ...
The Shiloh IV Project

- Montezuma Hills, Solano County California
- 100 MW, 50 turbine project
- Repower and infill project
- Removed approximately 230 Kennetech legacy turbines
- EIR prepared by Solano County to support CUP
- Operational December 2012
Shiloh IV Project Area
Wind Projects in Priority Wind Area

Shiloh IV Project Area
Shiloh IV Eagle Take Permit

- First eagle take permit issued to Shiloh IV Wind Energy Project in July 2014
- 5 year permit (renewable)
- Projects mortality using Bayesian model: very conservative
- Allows take of up to 5 eagles over 5 years
- Advanced Conservation Practices
- If take exceeds expectations: adaptive management set forth in the Stepwise Table
  - Includes the possibility of visual deterents, intensified monitoring, radar, curtailment
  - Measures considered “experimental”
- Compensatory Mitigation to eliminate take elsewhere: 133 Power Pole retrofits
  - Must retrofit power poles within 1 year of permit issuance
  - Mitigation may be “banked” if there are fewer than 5 eagles taken in 5 years
NEPA Review

• EA/FONSI
• What is the project?
• Alternatives
• Cumulative impacts
  – 140 mile radius local area population (includes Altamont)
  – Acknowledgement of greater than 5% take of population in local area population
Why did the Shiloh IV Take Permit Take So Long?

• Shiloh IV was a “poster child” for a take permit:
  – Repower/infill
  – Low eagle mortality
  – The “un-Altamont”

• Nonetheless, permit process was lengthy:
  – Started process in 2011
  – Not issued until 2014
Timing, (continued)

• First permit
  – FWS wanted to “get it right”

• FWS desire to validate the Bayesian model

• NEPA issues: what was “project”

• Negotiations over the stepwise table
F. You are authorized under the Bald and Golden Eagle Protection Act (Eagle Act) to incidentally take (injure or kill) a total of 5 golden eagles (Aquila chrysaetos) during operations and maintenance activities as described in the ECP. Take is allowed only within the five-year duration of this permit. Take must be incidental to otherwise lawful activities associated with the operations and maintenance activities as described in the ECP, and as authorized herein. Specifically:
Compensation for Legacy Take

• Issuance of Shiloh IV permit has spawned initiative at FWS to obtain compensation for legacy take at existing wind projects
  – 5 year statute of limitations

• Discussions occurring between FWS and wind operators about obtaining take authorization for existing assets and payments to compensate for past take
30 Year Permit

- A 30 year permit rule announced in 2013
- American Bird Conservancy filed lawsuit in June, 2014 in federal court to set aside 30 year permit rule
  - Claims violations of BGEPA, NEPA, APA
- FWS taking additional public comments on the 30 year rule
- Comment period ends September 22
Conclusion

Eagle take permits are a new and likely permanent part of the permitting landscape.

Process should get easier and faster as more permits are issued.

Stay tuned for how FWS will apply 5% goal and 30 year permit rule.