

SEPTEMBER 2016

VOL. 16-8

PRATT'S

ENERGY LAW

REPORT



EDITOR'S NOTE: THE BUZZ ON ELECTRIC VEHICLE CHARGING

Victoria Prussen Spears

WHY YOUR LOCAL ELECTRIC VEHICLE CHARGING STATION DOESN'T (AND SHOULDN'T) LOOK LIKE YOUR LOCAL GAS STATION

A. Christopher Young, Marc D. Machlin, and Erica Hall Dressler

WIND ENERGY: USFWS ISSUES DRAFT REVISIONS TO EAGLE INCIDENTAL TAKE RULE

Andrew C. Bell

FEDERAL COURT UPHOLDS FERC'S APPROACH ON LNG ENVIRONMENTAL PERMITTING AND SHIFTS FOCUS TO CHALLENGES TO DOE'S ENVIRONMENTAL REVIEW

David L. Wochner, John L. Longstreth, Sandra E. Safro, Michael L. O'Neill, and Gillian R. Giannetti

OCC ISSUES HANDBOOK ON OIL AND GAS EXPLORATION AND PRODUCTION

LENDING Donald E. Malecki, Sean W. Moran, James D. Newell, Mark Pfeiffer, Hank Pool, and William H. Schorling

EPA'S PLAN TO MAKE SWEEPING NEW CHANGE TO REGULATION OF METHANE EMISSIONS FROM EXISTING OIL AND GAS SOURCES AND POTENTIAL NEXT STEPS

Paul D. Tanaka, Michael Saretsky, and Michael J. Mahoney

HYDRAULIC FRACTURING

DEVELOPMENTS Eric Rothenberg, John D. Renneisen, Kelly McTigue, Brian Kenyon, Jesse Glickstein, and Sylvia Sermons

Pratt's Energy Law Report

VOLUME 16

NUMBER 8

SEPTEMBER 2016

Editor's Note: The Buzz on Electric Vehicle Charging Victoria Prussen Spears	295
Why Your Local Electric Vehicle Charging Station Doesn't (And Shouldn't) Look Like Your Local Gas Station A. Christopher Young, Marc D. Machlin, and Erica Hall Dressler	297
Wind Energy: USFWS Issues Draft Revisions to Eagle Incidental Take Rule Andrew C. Bell	305
Federal Court Upholds FERC's Approach on LNG Environmental Permitting and Shifts Focus to Challenges to DOE's Environmental Review David L. Wochner, John L. Longstreth, Sandra E. Safro, Michael L. O'Neill, and Gillian R. Giannetti	314
OCC Issues Handbook on Oil and Gas Exploration and Production Lending Donald E. Malecki, Sean W. Moran, James D. Newell, Mark Pfeiffer, Hank Pool, and William H. Schorling	319
EPA's Plan to Make Sweeping New Change to Regulation of Methane Emissions from Existing Oil and Gas Sources and Potential Next Steps Paul D. Tanaka, Michael Saretsky, and Michael J. Mahoney	323
Hydraulic Fracturing Developments Eric Rothenberg, John D. Renneisen, Kelly McTigue, Brian Kenyon, Jesse Glickstein, and Sylvia Sermons	327

QUESTIONS ABOUT THIS PUBLICATION?

For questions about the **Editorial Content** appearing in these volumes or reprint permission, please email:

Jacqueline M. Morris at (908) 673-1528

Email: jacqueline.m.morris@lexisnexis.com

For assistance with replacement pages, shipments, billing or other customer service matters, please call:

Customer Services Department at (800) 833-9844

Outside the United States and Canada, please call (518) 487-3000

Fax Number (518) 487-3584

Customer Service Web site <http://www.lexisnexis.com/custserv/>

For information on other Matthew Bender publications, please call

Your account manager or (800) 223-1940

Outside the United States and Canada, please call (518) 487-3000

ISBN: 978-1-6328-0836-3 (print)

ISBN: 978-1-6328-0837-0 (ebook)

ISSN: 2374-3395 (print)

ISSN: 2374-3409 (online)

Cite this publication as:

[author name], [*article title*], [vol. no.] PRATT'S ENERGY LAW REPORT [page number]
(LexisNexis A.S. Pratt);

Ian Coles, *Rare Earth Elements: Deep Sea Mining and the Law of the Sea*, 14 PRATT'S ENERGY
LAW REPORT 4 (LexisNexis A.S. Pratt)

This publication is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are registered trademarks of Reed Elsevier Properties Inc., used under license. A.S. Pratt is a registered trademark of Reed Elsevier Properties SA, used under license.

Copyright © 2016 Reed Elsevier Properties SA, used under license by Matthew Bender & Company, Inc. All Rights Reserved.

No copyright is claimed by LexisNexis, Matthew Bender & Company, Inc., or Reed Elsevier Properties SA, in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material may be licensed for a fee from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

An A.S. Pratt® Publication

Editorial Office
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862
www.lexisnexis.com

MATTHEW  BENDER

Editor-in-Chief, Editor & Board of Editors

EDITOR-IN-CHIEF

STEVEN A. MEYEROWITZ

President, Meyerowitz Communications Inc.

EDITOR

VICTORIA PRUSSEN SPEARS

Senior Vice President, Meyerowitz Communications Inc.

BOARD OF EDITORS

SAMUEL B. BOXERMAN

Partner, Sidley Austin LLP

ANDREW CALDER

Partner, Kirkland & Ellis LLP

M. SETH GINTHER

Partner, Hirschler Fleischer, P.C.

R. TODD JOHNSON

Partner, Jones Day

BARCLAY NICHOLSON

Partner, Norton Rose Fulbright

BRADLEY A. WALKER

Counsel, Buchanan Ingersoll & Rooney PC

ELAINE M. WALSH

Partner, Baker Botts L.L.P.

SEAN T. WHEELER

Partner, Latham & Watkins LLP

WANDA B. WHIGHAM

Senior Counsel, Holland & Knight LLP

Hydraulic Fracturing Developments

ERIC ROTHENBERG

Partner, O'Melveny & Myers LLP

Pratt's Energy Law Report is published 10 times a year by Matthew Bender & Company, Inc. Periodicals Postage Paid at Washington, D.C., and at additional mailing offices. Copyright 2016 Reed Elsevier Properties SA, used under license by Matthew Bender & Company, Inc. No part of this journal may be reproduced in any form—by microfilm, xerography, or otherwise—or incorporated into any information retrieval system without the written permission of the copyright owner. For customer support, please contact LexisNexis Matthew Bender, 1275 Broadway, Albany, NY 12204 or e-mail Customer.Support@lexisnexis.com. Direct any editorial inquires and send any material for publication to Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway Suite 18R, Floral Park, New York 11005, smeyerowitz@meyerowitzcommunications.com, 347.235.0882. Material for publication is welcomed—articles, decisions, or other items of interest to lawyers and law firms, in-house energy counsel, government lawyers, senior business executives, and anyone interested in energy-related environmental preservation, the laws governing cutting-edge alternative energy technologies, and legal developments affecting traditional and new energy providers. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher.

POSTMASTER: Send address changes to Pratt's Energy Law Report, LexisNexis Matthew Bender, 121 Chanlon Road, North Building, New Providence, NJ 07974.

Wind Energy: USFWS Issues Draft Revisions to Eagle Incidental Take Rule

*By Andrew C. Bell**

This article summarizes key aspects of the United States Fish and Wildlife Service's proposed rule to revise its eagle permitting program under the Bald and Golden Eagle Protection Act, with particular focus on elements relevant to the wind energy industry.

The United States Fish and Wildlife Service (“USFWS”) recently released a proposed rule to revise its eagle permitting program under the Bald and Golden Eagle Protection Act.¹ Among other things, the rule revision (“Rule Revision”) focuses on eagle permit issuance criteria and compensatory mitigation standards of particular relevance to the wind industry. A supporting environmental impact review and an eagle demographics report accompanied the Rule Revision.

Wind developers are likely to find the Rule Revision an improvement for the most part, as it would reestablish the 30-year permit program, propose a more realistic, “practicable” threshold for adequate avoidance and minimization measures, and create an in-lieu mitigation fee program. These improvements may come at a price, however, particularly through a heavier emphasis on local effects and higher compensatory mitigation ratios.

BACKGROUND

The Bald and Golden Eagle Protection Act (“BGEPA”) prohibits “take” of bald and golden eagles except as authorized under regulations prescribed by the Secretary of the Interior (“Secretary”).² On September 11, 2009, after preparing an Environmental Assessment (“EA”) and issuing a Finding of No Significant Impact under The National Environmental Policy Act (“NEPA”), USFWS published a final rule authorizing take of eagle nests and the non-purposeful take of bald and golden eagles associated with an otherwise lawful activity (“Permit Rule”).³

The Permit Rule established two non-purposeful take permit regimes; one

* Andrew C. Bell is a partner at Marten Law PLLC advising clients on the permitting of large-scale energy and real estate development projects on private lands in California and on federal public lands across the western United States. He may be contacted at abell@martenlaw.com.

¹ 16 U.S.C. 668-668d; 81 Fed. Reg. 27972 (May 6, 2016).

² 16 U.S.C. § 668a.

³ 74 Fed. Reg. 46836 (Sep. 11, 2009); *see* 50 C.F.R. § 22.26. The Permit Rule defines “take”

for standard permits authorizing individual instances of take that cannot be practicably avoided, and a second for programmatic permits authorizing recurring take that is unavoidable even after implementation of “advanced conservation practices.”⁴ The Permit Rule authorized programmatic permits for a term of up to five years.⁵

In February 2011, USFWS published a draft Eagle Conservation Plan guidance document intended to show how to prepare an Eagle Conservation Plan in furtherance of a BGEPA permit request (“Eagle Guidance”).⁶ USFWS received extensive comment. Wind energy developers used this opportunity to request extension of the programmatic take permit term from five to 30 years to better correspond to the operational life of wind energy projects and thereby provide greater certainty for potential project financiers and investors.⁷ However, members of the environmental community strongly recommended retaining the five year rule, asserting persistent uncertainty regarding the effects of wind projects on eagles and the need for continued public involvement.

On April 13, 2012, USFWS initiated two additional rulemakings, a proposed rule to extend the maximum term of programmatic permits from five to 30 years (“Duration Rule”), and, separately, an Advance Notice of Proposed Rulemaking requesting input on all other aspects of the 2009 non-purposeful take regulations except for permit duration.⁸

USFWS issued a substantially revised, final version of the Eagle Guidance in May 2013 and, on December 9, 2013, issued the final Duration Rule pursuant to a categorical exclusion under NEPA.⁹ The final Duration Rule included an additional provision for the streamlined review of “low-risk” programmatic permits where an applicant could demonstrate a risk of less than 0.3 eagle mortalities per year.¹⁰

On June 19, 2014, the American Bird Conservancy made good on a

to include “pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, destroy, molest, or disturb.” 50 C.F.R. § 22.3.

⁴ The Permit Rule defines “advanced conservation practices” as “scientifically supportable measures that are approved by the Service and represent the best available techniques to reduce eagle disturbance and ongoing mortalities to a level where remaining take is unavoidable.” 50 C.F.R. § 22.3.

⁵ 74 Fed. Reg. 46878 (Sep. 11, 2009).

⁶ 76 Fed. Reg. 9529 (Feb.18, 2011).

⁷ See, 78 Fed. Reg. 73705 (Dec. 9, 2013).

⁸ 77 Fed.Reg. 22267, 22278 (April 13, 2012).

⁹ 78 Fed.Reg. 25758 (May2, 2013); 78 Fed.Reg. 73704 (Dec. 9, 2013).

¹⁰ 50 C.F.R. 13.11(d)(4), fn. 2.

long-standing threat by filing a complaint for declaratory and injunctive relief against adoption of the final Duration Rule in U.S. District Court, Northern District of California.¹¹

On June 23, 2014, USFWS issued a Notice of Intent for the preparation an EA or EIS to support a full-scale reassessment of the agency's eagle permitting program.¹² The notice stated that agency staff implementing the permit regulations identified "a number of priority issues for evaluation," including: eagle population management objectives; programmatic permit conditions; compensatory mitigation; and evaluation of low-risk (or low-effect) permits.¹³

On August 11, 2015, the Federal District Court agreed with the American Bird Conservancy, holding that the USFWS had impermissibly used a categorical exclusion and should have performed a more thorough NEPA review.¹⁴ The USFWS did not appeal the decision, presumably because the Draft Environmental Impact Statement ("EIS") for the rule revision was almost complete and fully assessed the effects of the 30-year rule.

USFWS issued the Rule Revision and its associated NEPA document on May 4, 2016.

USFWS'S DRAFT BGEPA RULE REVISION

The following summarizes key aspects of the Rule Revision and its preamble, with particular focus on elements relevant to the wind energy industry.

New, More Local, Eagle Preservation Standard

The Rule Revision would mirror the Eagle Guidance by changing the 2009 eagle preservation standard to increase protections at the local scale. Specifically, USFWS would manage eagles at a level: "consistent with the goals of maintaining stable or increasing breeding populations *in all eagle management units and persistence of local populations throughout the geographic range of both species.*"¹⁵

The USFWS parses this revised standard to define "population" as one of four eagle management units ("EMUs") redrawn to follow one or more of four specific migratory flyways in North America; "persist" as stable with a 2009

¹¹ Complaint for Declaratory and Injunctive Relief, *Shearwater v. Ashe*, No. 14-CV-02830-LHK (N.D. Cal. Aug. 11, 2015).

¹² 79 Fed. Reg. 35564 (June 23, 2014).

¹³ *Id.* at 35566.

¹⁴ *Shearwater*, *supra* note 11.

¹⁵ 81 Fed. Reg. 27972 (May 6, 2016).

population baseline; and “long-term” as 100 years.¹⁶

To implement this new preservation standard, USFWS would codify aspects of the Eagle Guidance that seek to avoid extirpation of local area populations (“LAPs”) by limiting authorized cumulative take rates to no more than five percent of each LAP, where the population of the LAP is estimated by assuming eagle densities at the same level as the larger EMU within which the LAP is located.¹⁷ A LAP analysis would be required for each permit application. An exceedance of the five percent limit would only be allowed if it promotes the preservation of eagles, such as through the application of compensatory mitigation within the LAP.¹⁸

Thirty-Year Incidental Take Permits under a “Practicable” Avoidance Standard

The Rule Revision would reinstate the 30-year Duration Rule—this time with the support of an EIS—to allow permits of up to 30 years with five-year permit evaluations. But, while the original 30-year rule limited five-year conservation measure adjustments to those contemplated at the time of permit issuance, the Rule Revision does not.¹⁹

The Rule Revision would also allow golden eagle incidental take permits east of the 100th Meridian for the first time, thereby expanding the permit program (and, practically speaking, USFWS enforcement) across the eastern half of the country.

Under the current rule, programmatic permits are conditioned upon implementation of advanced conservation practices (“ACPs”) representing the “best available techniques” to reduce eagle take to a level where remaining take is “unavoidable.”²⁰ Recognizing the unavoidable standard as impractical, USFWS now proposes to replace both it and the ACP concept with a new standard requiring implementation of all “practicable” measures to reduce impacts to eagles. Under the new standard “practicable” means: “available and capable of being done after taking in consideration existing technology, logistics, and cost in light of a mitigation measure’s beneficial value to eagles and

¹⁶ *Id.* at 27937.

¹⁷ *Id.* at 27938 (USFWS acknowledges in the same section that more custom-tailored limits may evolve over time as LAP data improve, but the average EMU density concept will control for the time being).

¹⁸ *Id.* at 27938–27939.

¹⁹ *Id.* at 27940.

²⁰ 50 C.F.R. 22.3.

the activity's overall purpose, scope, and scale.”²¹

The Rule Revision proposes to eliminate the “low-risk” permit concept, acknowledging that the low-risk standard of 0.3 takes per year is impossible to meet.²² That said, the USFWS is still willing to entertain the concept if presented with sufficient evidence of a reasonable standard.²³

Finally, to avoid confusion, USFWS proposes to replace the term “nonpurposeful take” with “incidental take” and do away with the distinction between standard (*i.e.*, one-time) take permits and programmatic take permits. Only one permit, an incidental take permit, would remain for incidental take of eagles.

Legacy Takes

Projects that have caused eagle takes since the eagle rule was first adopted in 2009 would be subject to USFWS's eagle take “settlement agreement” template.²⁴ Such “legacy” takes would have to be resolved, or be in the process of resolution, for a take permit to be issued.²⁵

Prosecutorial Discretion

In the preamble to the Rule Revision, USFWS declines requests for a process that would protect pending permit applicants from prosecution, citing a lack of resources.²⁶ However, the preamble does state: “If project proponents are engaged in the permitting process in good faith . . . they should have a reasonable expectation that any take . . . will have a low priority for enforcement by the Service.”²⁷

Compensatory Mitigation

Up until now, power pole retrofits have been the only form of compensatory mitigation available to permit applicants. The Rule Revision would change this by creating conservation banks and in-lieu fee programs.²⁸ USFWS would also entertain customized mitigation solutions. While the Rule Revision would focus on take occurring within a LAP, compensatory mitigation would be

²¹ 81 Fed. Reg. 27972–27973 (May 6, 2016).

²² *Id.* at 27962.

²³ *Id.*

²⁴ *Id.* at 27964.

²⁵ *Id.* at 27975.

²⁶ *Id.* at 27965.

²⁷ *Id.*

²⁸ *Id.* at 27944.

available outside the LAP, within the larger applicable EMU.²⁹

Compensatory mitigation at an offset ratio of greater than 1:1 would be required of any take in excess of applicable take thresholds. USFWS would set an annual take threshold of 4,200 for bald eagles, an almost four-fold increase since 2009.³⁰ The take threshold for golden eagles would remain at zero, however, with compensatory mitigation exceeding a 1:1 ratio required for every golden eagle take.³¹

Regardless of project-specific take levels, compensatory mitigation would also be required if the project contributed to a cumulative take level within the LAP of more than five percent for authorized take and/or more than 10 percent for unauthorized take.³² USFWS cautions that mitigation ratios likely will vary to ensure an adequate “buffer” in the event that new mitigation approaches prove to be less effective than anticipated, particularly pertaining to customized proposals originating from the permit applicant.³³

Holders of 30-year permits would have to fund compensatory mitigation in five year increments, with mitigation adjustments made every five years.³⁴ No additional mitigation would be required if no take occurred within the first five years of the permit.³⁵ If less than anticipated take occurred, permittees could “carry forward” unused compensatory credits to the next five-year review period.³⁶ However, USFWS expressly reserves the right to require new avoidance and minimization measures at each five-year review if they can be implemented without unreasonable cost.³⁷

NEPA Review

USFWS intends NEPA review of eagle take permits to rely solely on the Programmatic EIS prepared for the Rule Revision, and avoid the need for additional NEPA review, if the following standards are met: (i) the project will not take eagles at a rate that exceeds, individually or cumulatively, the take limit of the EMU unless such takes are offset; (ii) the project does not result in individual or cumulative authorized take in excess of five percent of the LAP;

²⁹ *Id.* at 27941, 27946.

³⁰ *Id.* at 27937.

³¹ *Id.* at 27941.

³² *Id.*

³³ *Id.* at 27941–27942.

³⁴ *Id.* at 27942.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 27955.

and (iii) the applicant agrees to use a USFWS-approved mitigation bank to offset authorized mortalities.³⁸

Projects that do not meet these criteria would require individual NEPA review.³⁹ Individual review could also be required if USFWS determines unpermitted take within the LAP to be excessive.⁴⁰

To the extent individual NEPA reviews are required, USFWS acknowledges that such reviews would be limited to the effects of the permit, not the project as a whole.⁴¹ USFWS also expressly recognizes that applicants can prepare Environmental Assessments.⁴²

IMPLICATIONS

Restoration of the 30-year Duration Rule is a clear, positive step for the wind industry because it removes the risk perceived by financiers of having to renew a permit every five years. This is hindered, however, by continuation of the Duration Rule's five-year review requirement and, now, by the Rule Revision's proposal to further tighten that review by allowing USFWS to impose entirely new, unanticipated avoidance and minimization measures every five years. It will therefore be important to work with USFWS to define limits up-front, in the original permit.

Given that the original 30-year Duration Rule was challenged in court, applications for long-term permits beyond five years may stall until the Programmatic EIS underlying the Rule Revision is tested in court. The thoroughness of USFWS's responses to comments on the draft EIS from third parties such as the American Bird Council will therefore be particularly important.

Replacing ACPs and an "unavoidable" take standard with a "practicable" avoidance and minimization standard is a positive, pragmatic development. The change should make it easier for wind companies to obtain eagle permits without having to commit to excessive or unproven minimization measures, such as radar systems, which USFWS itself admits are currently impracticable (a noteworthy development in its own right).⁴³

Codifying the bright-line five percent take standard of the Eagle Guidance

³⁸ *Id.* at 27945.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 27951.

⁴² *Id.*

⁴³ *Id.* at 27953.

(instead of adopting a qualitative standard) facilitates streamlining of NEPA reviews by allowing the USFWS to programmatically analyze impacts up-front. The consequent potential for relying solely on the programmatic EIS for NEPA review of each eagle permit is especially promising, although the practice will face scrutiny from opposing interests. Robust documentation of NEPA adequacy at the permit-level will be important.

The greater emphasis on protecting local populations could increase compensatory mitigation burdens by converting a voluntary LAP standard into a mandatory one. It could also encourage claims arguing for detailed NEPA review and/or denial of the permit due to a showing of excessive background levels of unauthorized take.⁴⁴

Requiring compensation for post-2009 legacy takes is a significant development because it codifies USFWS's emerging practice into a condition of permit issuance. Resolution of legacy takes would be standard under the Rule Revision.

USFWS's acknowledgement that prosecution is unlikely during good-faith pursuit of an eagle permit should afford a degree of comfort to those operating wind projects before a permit is issued. However, USFWS could take the further step of categorically protecting all applicants pursuing a permit in good-faith. A good-faith determination would impose a negligible burden on those administering the application. If USFWS is truly serious about trying to reduce golden eagle mortality rates by encouraging more permit applications, then such protections seem to be in everyone's interest.

Creating mitigation banks and in-lieu fee mechanisms as alternatives to power pole retrofits is an important development, particularly as the number of authorized takes grow under the eagle program. However, it remains an open question as to whether USFWS can create these programs in a timely manner.

Finally, the repeated emphasis in the draft Rule Revision on mitigation ratios greater than 1:1 may run the risk of a constitutional violation. USFWS justifies higher ratios as necessary to ensure take occurs at sustainable levels.⁴⁵ But mitigation lacking "rough proportionality" with the impacts of a project can violate the takings clause of the Fifth Amendment.⁴⁶ Simply put, mitigation in excess of a 1:1 ratio could be disproportionate to the impacts of a project and therefore impermissible. That could be the case here if the USFWS proposes higher mitigation ratios for permitted projects in part to "make up" for all unauthorized takes, such as by deliberately overestimating take for roughly 80

⁴⁴ *Id.* at 27939.

⁴⁵ *Id.* at 27959.

⁴⁶ *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 3595 (2013).

percent of issued permits without a mechanism for reimbursement if the first five years do not result in take.⁴⁷

CONCLUSION

The Rule Revision is a welcome improvement over the existing eagle program, although not without some areas of concern to the wind industry. When viewed in a larger context, the Rule Revision is a central component of an emerging, comprehensive wind industry “playbook” for the incidental take of bald and golden eagles. The Rule Revision, the Duke and PacifiCorp settlements of 2013 and 2014, and the EDF Renewable Energy “template” agreement of 2014,⁴⁸ all combine to outline an enforcement framework that did not exist three years ago. This framework reduces uncertainty for the wind industry, but, as is often the case, greater regulatory certainty can entail tighter restrictions.

⁴⁷ 81 Fed. Reg. 27941, 27955 (May 6, 2016).

⁴⁸ *Id.* at 27964.