

U.S. Fish and Wildlife Service Finalizes Revamp of Eagle Permit Rule:

What You Need to Know

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On December 16, 2016 the U.S. Fish and Wildlife Service (Service) published a final rule (Final Rule) revising its 2009 regulations establishing requirements for issuance of permits for “non-purposeful take” of bald and golden eagles (Eagle Permit Rule) under the Bald and Golden Eagle Protection Act (16 U.S.C. 668-668d) (BGEPA). The Final Rule was accompanied by a final Programmatic Environmental Impact Statement (PEIS) analyzing the potential impacts of the rule under the National Environmental Policy Act (NEPA). The Final Rule will become effective January 17, 2016. Applicants who submit complete eagle take permit applications within 6 months of the Final Rule’s effective date can choose to obtain coverage under the 2009 regulations or the provisions of the Final Rule.

The old Eagle Permit Rule was hampered by confusing terminology, ambiguous requirements, and overly stringent or limiting standards that have frustrated efforts by wind energy developers to obtain and the Service to issue eagle take permits. The changes in the Final Rule are intended to create a more efficient and consistent permitting program. It seeks to do so with a variety of substantive changes, many of which should be genuinely helpful, but some of which raise important questions and concerns of their own. In other cases the Service has missed or declined the opportunity to adopt needed reforms, potentially undermining the success of the Final Rule.

Expanded Availability of Eagle Take Permits

The Final Rule expands the availability of permits for both bald and golden eagles. The annual nationwide take limit for bald eagles without compensatory mitigation will increase from 1,103 eagles annually under the 2009 Eagle Permit Rule to 3,742 bald eagles in the continental U.S. and 3,776 bald eagles in Alaska. The take limit for golden eagles will remain at zero unless compensatory mitigation is provided. However, the Final Rule does authorize the issuance of permits for take of golden eagles east of the 100th meridian, which has been prohibited since the 2009 adoption of the Eagle Permit Rule.

Availability of 30-Year Permits

One of the most troubling limitations in the original Eagle Permit Rule was its limitation on the maximum duration of permits to five years. Wind energy projects generally have 20-30 year lifespans and those that require eagle take coverage require it for their full operational life. The lack of certainty regarding the availability or terms of a permit renewal raised serious concerns for both developers and their potential investors. The American Wind Energy Association (AWEA) lobbied hard against this limitation, and in 2013 the Service issued a rule extending the maximum duration of permits to 30 years. However, in 2014 that rule was challenged by conservation groups, and in 2015 a federal court vacated the rule on grounds that the Service had not adequately analyzed the effect of the rule under NEPA.

The Final Rule once again makes permits available with a 30-year duration, and that element of the rule is analyzed in the PEIS. However, the provision still comes with caveats that potential permittees must consider carefully. While permits may be issued for 30 years, the Final Rule requires that the permit be reviewed by the Service every five years, at which time the Service will evaluate the effectiveness of measures to reduce take, the level of compensatory mitigation, and the eagle’s population status. Under the Final Rule, long-term permits (more than five years) are required to include adaptive management provisions that provide additional actions to be taken if eagle take approaches or reaches the amount authorized within a given time frame. However, provided permittees are in compliance with their eagle take permit including the take levels and adaptive management measures included therein, the Service has indicated in the preamble to the Final Rule that the five-year review will consist primarily of updating the take estimates and related compensatory mitigation requirements for the next five-year period taking into consideration previously observed levels of take. Importantly, any additional conservation measures implemented based on the five-year review will be limited to those described in the adaptive management plan for the permit unless authorized take levels are exceeded or the permittee is out of compliance with permit conditions.

This limitation is a significant departure from and improvement upon the Proposed Rule, which would have allowed the Service to require permittees to undertake additional conservation or mitigation measures beyond those originally contemplated in the permit if the Service deemed the measures both reasonably practicable and likely to reduce risk to eagles. The change should provide project developers with additional certainty regarding actions they could be required to take to comply with their eagle take permits and brings eagle take permits more in line with incidental take permits (ITPs) for endangered or threatened species issued under the Endangered Species Act (ESA).

Adoption of New Terminology

The original Eagle Permit Rule established separate categories for “standard permits,” which authorize take of eagles in an identifiable timeframe and location, and “programmatic permits” which authorize take that is recurring and not in a specific, identifiable timeframe and/or location. Recognizing that this terminology was inconsistent with other permit programs and a source of confusion, the Service eliminated the distinction between the two types of permits in the Final Rule. The Service also dropped the cumbersome terminology “non-purposeful take” in favor of the more familiar term “incidental take.” Under the Final Rule there will be a single type of permit available, referred to as an eagle incidental take permit. These changes help establish greater consistency with the Service’s ITP program under the ESA.

Adoption of Practicability Standard

Under the 2009 Eagle Permit Rule, programmatic permits required implementation of advanced conservation practices (ACPs), which are defined as measures that represent the best available techniques to reduce eagle disturbance and ongoing mortality to a level where remaining take is “unavoidable.” Standard permits only required applicants to reduce potential take to a level that is “practicably unavoidable,” but the Service acknowledged that it is difficult to distinguish between these “unavoidable” standards. The “unavoidable” standard is also a far more rigorous standard than the “maximum extent practicable” standard under the ESA, as “unavoidable” does not allow consideration of the cost of a conservation measure or its proportionality to the project’s impacts. The Final Rule adopts the practicability standard for all eagle incidental take permits, requiring applicants to avoid and minimize impacts to eagles to the maximum extent practicable, where practicable is defined as “available and capable of being done after taking into consideration existing technology, logistics, and cost in light of a mitigation measure’s beneficial value to eagles and the activity’s overall purpose, scope, and scale.” It is this change that warrants elimination of the distinction between standard and programmatic permits, which in turn eliminates the need for the concept of ACPs. This change further brings the criteria for obtaining an eagle take permit more in line with the criteria for obtaining an ITP for endangered or threatened species under the ESA, resulting in a level of familiarity and understanding that should help facilitate the processing of eagle incidental take permits.

Revision of the Preservation Standard to Focus on Local Area Populations

The BGEPA requires that any authorized take of eagles be “compatible with the preservation” of bald eagles and golden eagles. This clause, referred to as the BGEPA preservation standard, was defined by the Service in the 2009 Eagle Permit Rule to mean “consistent with the goal of maintaining stable or increasing breeding populations.” The Final Rule revises this definition to “consistent with the goals of maintaining stable or increasing breeding populations in all eagle management units (EMUs) and the persistence of local populations throughout the geographic range of both species.” To achieve this newly stated goal of persistence of local populations, the Final Rule incorporates a local area population (LAP) cumulative effects analysis, previously included in the Eagle Conservation Plan (ECP) Guidance, into the permit issuance criteria. In order to issue an eagle take permit the Service must find that cumulative authorized take does not exceed 5% of the LAP¹, or alternatively, demonstrate why allowing take to exceed this 5% limit is still compatible with the preservation of eagles. Take above 5% of the LAP can be authorized only if permit conditions would actually result in a reduction of take for currently operating projects or where compensatory mitigation is implemented to offset impacts to eagles within the LAP.

The Service states in the preamble to the Final Rule that defining the eagle preservation standard in this way, and analyzing in the PEIS the effects of take within both EMUs and LAPs, will reduce the analytical burden for each permit decision and allow the Service to make permitting decisions at an expedited rate. In the PEIS, the Service analyzed the effects of authorizing take of up to 5% of the LAP along with a qualitative analysis of unauthorized take and determined that it is compatible with the preservation of eagles, which should allow for a streamlined, tiered NEPA analysis for individual permits. However, the incorporation of the LAP concept into the permit issuance criteria could limit the availability of permits in certain areas compared with the 2009 rule, which could prove problematic.

The Service also specifically indicated in the Federal Register notice that the PEIS includes an analysis of effects to eagles under NEPA for projects (1) that will not take eagles at a rate that exceeds (individually or cumulatively) the take limit of the EMU (unless take is offset); (2) that would not result in authorized take (individually or cumulatively) in excess of 5% of the LAP; and (3) for which the applicant will mitigate using an approach the Service has already analyzed (e.g., power pole retrofitting) or a Service-approved

¹ The LAP is defined as the bald or golden eagle population within the area of the project bounded by the natal dispersal distance for each respective species, 109 miles for golden eagles or 86 miles for bald eagles. The LAP is estimated using the average eagle density of the EMU where the activity or project is located.

third-party mitigation program. For projects that meet these three criteria, the use of a tiered NEPA process should result in a far more efficient and expeditious permitting process. Projects that do not meet these three criteria can still obtain authorization, but would likely require individual NEPA review of their effect on eagles. The idea of streamlining the NEPA analysis for individual eagle take permits is a welcome one, as the NEPA review process invariably adds significant time and expense to the permitting timeline.

Compensatory Mitigation Requirement Clarified

The 2009 Eagle Permit Rule lacks specificity regarding when compensatory mitigation is required, stating that “[a]dditional compensatory mitigation will be required only (1) for programmatic take and other multiple take authorizations; (2) for disturbance associated with the permanent loss of a breeding territory or important traditional communal roost site; or (3) as necessary to offset impacts to the local area population.” The Service acknowledges in the preamble to the Final Rule that it has required compensatory mitigation on a case-by-case basis somewhat inconsistently. This has resulted in additional uncertainty during the permit review process and potential unequal treatment of applicants.

To remedy this issue, the Final Rule includes standardized requirements for compensatory mitigation. Specifically, the Final Rule requires compensatory mitigation where the permitted take is inconsistent with management goals (i.e., where cumulative authorized take exceeds the EMU take thresholds analyzed in the PEIS or 5% of the LAP). Compensatory mitigation may also be required when available data indicate that cumulative unauthorized mortality exceeds 10% of the LAP. Since take limits for golden eagles are set at zero throughout the United States, all permits for golden eagle take must incorporate compensatory mitigation. The Service has indicated in the preamble to the Final Rule that compensatory mitigation for authorized take of golden eagles must be designed to offset take at a 1.2 to 1 mitigation ratio. In contrast, compensatory mitigation for bald eagles would not be required so long as take levels remain below the EMU take limits analyzed in the PEIS and cumulative take does not exceed 5% of the LAP.

In addition to clarifying when compensatory mitigation is required, the Final Rule specifies that all compensatory mitigation must be implemented within the same EMU and emphasizes the use of a broader range of mitigation options. Under the 2009 Eagle Permit Rule the Service required a high degree of confidence in the effectiveness of mitigation options. In practice this limited mitigation strictly to power pole retrofits, a costly option with limited availability. In the preamble to the Final Rule, the Service suggests that compensatory mitigation may additionally include conservation banking, in-lieu fee programs, and other third-party mitigation projects or arrangements, and indicates that it intends to develop guidance for alternative types of mitigation projects. However, it is important to note that third-party mitigation options are not yet available for mitigating eagle take, and the Service does not identify specific mitigation alternatives in the preamble or include information on when such guidance might be available.

When compensatory mitigation is required for long-term permits, permittees must provide sufficient mitigation to offset predicted take over the first five years of project operation under the permit. If data demonstrates that eagle impacts are less than originally permitted, “unused” mitigation credits can be carried forward to the next five-year review period. The preamble to the Final Rule indicates that the Service will require the applicant to commit to the method and funding for compensatory mitigation prior to permit issuance. For long-term permits, it is unclear if this commitment must include funds for the entire permit term or simply the first five years of project operation under the permit. Regardless, the flexibility provided in the Final Rule to allow applicants to pursue a wider variety of scientifically defensible mitigation measures may have a significant positive effect on the ability to meet the regulatory standard and obtain an eagle incidental take permit.

Requirement for Standard Pre-Construction Surveys and use of Bayesian Collision Risk Model (CRM)

One of the most controversial aspects of the Eagle Permit Rule and the subsequent ECP Guidance has been the required pre-construction eagle survey protocol and the use of a Bayesian fatality prediction model to assess eagle risk and estimate take. In the Proposed Rule, the Service proposed to codify the very extensive and prescriptive pre-construction survey protocols set forth in Appendix C of the ECP Guidance by incorporating Appendix C by reference. In a welcome change of course, the Final Rule does not explicitly incorporate these protocols by reference in their entirety. Rather, it includes certain pre-construction survey standards based on the specific recommendations in the ECP Guidance. These requirements represent the minimum level of information and sophistication in sampling design the Service will accept in support of an eagle incidental take permit application for wind facilities. Specifically, applicants must include pre-construction survey information collected according to the following standards:

- Surveys must consist of point based recordings of bald eagle and golden eagle flight activity (minutes of flight) within a three-dimensional cylindrical plot (the sample plot). The radius of the sample plot is 2,625 feet (ft) (800 meters (m)), and the height above ground level must be either 656 ft (200 m) or 82 ft (25 m) above the maximum blade reach, whichever is greater.
- The duration of the survey for each visit to each sample plot must be at least 1 hour.
- Sampling must include at least 12 hours per sample plot per year for 2 or more years. Each sample plot must be sampled at least once per month, and the survey start time for a sampling period must be selected randomly from daylight hours.
- Sampling design must be spatially representative of the project footprint, and spatial coverage of sample plots must include at least 30 percent of the project footprint. Sample plot locations must be determined randomly.

The preamble to the Final Rule appears to provide flexibility in the methodology used to calculate take estimates by allowing applicants to use any “credible, scientifically peer reviewed model” to generate eagle take estimates. However, ultimately this flexibility is of little consequence because the preamble indicates that the Service will use the Bayesian CRM to predict fatalities and establish take limits in eagle take permits for wind facilities. The alternative models used by applicants will simply be compared to the CRM over time and those that demonstrate better predictive performance may be formally incorporated into the process for estimating permit take limits at some point in the future. The Service’s decision not to adopt a more realistic model or expressly allow greater flexibility and consideration of different approaches is a missed opportunity that may prove to be a significant hindrance to the success of the framework set forth in the Final Rule in facilitating and expediting the issuance of eagle incidental take permits.

No Requirement for Resolution of Legacy Take

The Proposed Rule suggested that permits might not be available for existing operating projects that have taken eagles without authorization (whether prior to or after the adoption of the 2009 Eagle Permit Rule) unless the applicant entered a settlement agreement with the Service to resolve its liability for that “legacy” take. The Final Rule does not include that requirement, eliminating what might have been a very troubling obstacle to permitting for those projects that need it most. Instead, the Final Rule requires the Service to determine only that issuance of a permit will not interfere with any ongoing enforcement action for legacy take at a project. Further, the Service will now account for the ongoing incidental take that is occurring at existing projects since prior to 2009 as part of the population baseline, eliminating the need for compensatory mitigation to offset that take.

Third Party Monitoring Required for Long Term Permits

The Final Rule requires that for all permits with durations longer than five years, monitoring must be conducted by qualified, independent entities approved by the Service. Monitors must report directly to the Service and provide a copy of the reports and materials to the permittee. This requirement for third-party monitoring reporting directly to the Service was not included in the Proposed Rule and represents a departure from the practice for ITPs under the ESA, as well as the voluntary monitoring that most operators perform in accordance with Land-Based Wind Energy Guidelines under the Migratory Bird Treaty Act. It may put contractors in difficult or untenable situations where they are performing the monitoring for a client under one or both of those other programs and have to report certain of their findings to the client and others directly to the Service. It also eliminates the opportunity for review and clarification or corrections by the client, leading to the possibility of erroneous data entering the public record unnecessarily.

Missed Opportunities

For all of the steps forward in the Final Rule compared with the 2009 Eagle Permit Rule and even the Proposed Rule, the Service still missed several key opportunities to further clarify certain requirements and establish an efficient permit regime. Perhaps the most notable such omission is the Service’s decision not to adopt a revised definition for “low-risk” projects that could be applied across all EMUs. That would have allowed it to provide for expedited permitting of qualifying projects without the need for extensive, pre-application surveys, which in turn would have allowed the Service and industry to focus their resources on projects with more significant impacts. However, the Service indicated that it was unable to develop a suitable definition that would still result in accomplishing the conservation goals of the Proposed Rule. Instead, it is seeking further comment on how to define “low-risk” and intends to keep those comments on file for a potential future rulemaking. Considering the time and resources involved in these rulemakings, however, the likelihood of such a rulemaking occurring any time soon is dubious at best.

Conclusion

It is clear that the Service recognized many of the fatal flaws in the original Eagle Permit Rule and made a genuine effort to address some of the biggest issues. The changes to the eagle permitting program set forth in the Final Rule will expand the availability and duration of permits, replace the “unavoidable” standard for avoidance and minimization measures with a more reasonable “maximum extent practicable” standard, and make permits easier and more attractive to obtain by offering greater clarity and flexibility in mitigation while potentially streamlining the NEPA process for individual permits. However, the Final Rule still falls short in several areas, most notably by maintaining some overly conservative survey protocols and the Bayesian fatality estimation model, and failing to establish a class of low-risk projects for which expedited permits could be made available. Nevertheless, the Final Rule is generally a positive development. Under the 2009 Eagle Permit Rule, the permit process had devolved into an inefficient and interminable process burdened by unattainable standards and disproportionately stringent requirements. It bears watching how effectively the various Service regional and field offices will implement the new rule, but the hope is that eagle incidental take permits will now be attainable, and will become a more common if not routine component of the siting and permitting process for wind energy facilities.

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