

LEGAL UPDATES

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## Service

Energy Regulation

# Proposed Rule Changes Could Improve Eagle Permitting Process

The U.S. Fish & Wildlife Service (the Service) published proposed revisions to the eagle “take” permit regulations in the *Federal Register* on May 6, 2016. If adopted, the proposed rules could make the permit process less onerous for wind energy project developers and other companies that engage in activities with the potential to disturb, injure, or kill bald and golden eagles.

## Background

The Bald and Golden Eagle Protection Act (BGEPA) prohibits the “taking” of bald and golden eagles except when authorized. One permit established by the existing regulations authorizes the take by removal, relocation, or destruction of eagle nests, while another authorizes non-purposeful take by disturbance, injury, or killing of eagles if the take is incidental to an otherwise lawful activity. Because projects can often be designed to minimize the destruction of eagle nests, the permit authorizing the incidental take of eagles is generally of more significant concern to wind energy project developers.

However, as a result of deficiencies inherent in the existing permit program, some developers decide to risk violating the take prohibition and facing enforcement. For instance, there is a general perception that eagle take permits are not issued in a timely manner, and the potential need for eagle take permits is only increasing due to the expansion of wind energy operations. In addition, the Service acknowledges that the existing five-year permit term is “unnecessarily burdensome” for companies engaged in longer-term activities and “had the unintended effect of discouraging proponents of longer-term activities from applying for permits, despite the risk of violating the statute.”

The Service has therefore proposed revising the existing rule to add clarity and increase implementation and compliance while providing further protections to bald and golden eagles.

## Revisions

### *Clarified Criteria for Permit Issuance*

The existing permit rule requires the Service to determine that the “preservation standard” is met. The standard requires a determination that any take of eagles authorized by permit is “compatible with the preservation of bald eagles or golden eagles” in that the take is “consistent with the goal of maintaining stable or increasing breeding populations.” The proposed revisions to the preservation standard would modify it to mean “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.” The Service is also considering realigning eagle management units (EMUs) along flyways to better reflect regional populations and migration patterns, and has proposed incorporating the local area population (LAP) cumulative effects analysis now contained in agency guidance. These changes are intended to ensure the long-term survival of both species with sufficient distribution in EMUs.

In addition, the Service has proposed eliminating the existing distinction between “standard” permits and “programmatic” permits. Applicants for standard permits must currently reduce potential take to “practicably unavoidable” levels, while applicants for programmatic permits must implement advanced conservation practices to reduce eagle disturbance and mortality to a level where take is “unavoidable.” Going forward, all permits will simply be “incidental take permits” for which applicants will have to meet the “practicably unavoidable” standard. “Practicable” is defined to mean “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.”

The Service notes that under this proposed management approach, the annual take limit would be 4,200 bald eagles nationwide, compared with the 2009 limit of 1,103. The allowable take of golden eagles will remain at zero unless offset by compensatory mitigation.

### *Extended Permit Terms*

Permits issued under the existing rule authorize take of eagles for a maximum of five years. The Service has proposed extending the maximum permit term to 30 years and reassessing the permit every five years for factors including eagle fatality rates, the effectiveness of measures to reduce take, the appropriate level of compensatory mitigation, and eagle population status to determine whether additional conservation measures may be required.

## *Standardization of Compensatory Mitigation Requirements*

Under the existing regulations, the Service requires mitigation on a case-by-case basis. The proposed rule would establish standardized compensatory mitigation requirements for all golden eagle take or if the cumulative authorized take would exceed 5 percent of the LAP.

An in-lieu fee program would allow applicants to contribute to a compensatory mitigation fund rather than developing individual mitigation measures, although mitigation on a project-by-project basis, through use of conservation banks, or other programs would still be a permissible way to meet mitigation requirements.

### **What This Means to You**

Adoption of the rule as proposed could significantly impact development of wind energy projects by streamlining and adding predictability to the permitting process, increasing the allowable take of bald eagles, and providing for permits that authorize long-term activities.

The Service has noted that “permitting long-term activities that are likely to incidentally take eagles, including working with project proponents to minimize the impacts and secure compensatory mitigation, is far better for eagle conservation than having companies avoid the permitting process altogether because they perceive the process as overly onerous.”

Perhaps most significantly, the Service is developing a draft programmatic environmental impact statement that analyzes eagle take within certain levels, so it will no longer be necessary to perform a project-by-project National Environmental Policy Act analysis.

Submission of comments on the proposed rule could impact provisions that are ultimately adopted by the Service. Comments must be submitted by July 5, 2016.

### **Contact Us**

For additional information on how the proposed rule might impact your business or your clients, or if you'd like assistance filing comments on the proposed rule, please contact Ali Nelson at 303.749.7263 or Jim Goettsch at 816.983.8257, both members of Husch Blackwell's Energy & Natural Resources team.