



U.S. Fish & Wildlife Service Finalizes Eagle Permit Program Revisions, Announces Intent to Prioritize Bald & Golden Eagle Protection Act Enforcement

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On December 16, 2016, the U.S. Fish and Wildlife Service (Service) issued a long-awaited final rule (Rule) revising the regulations that govern the Service's eagle take permit program (Eagle Permit Program) under the Bald and Golden Eagle Protection Act (BGEPA). The Eagle Permit Program has been plagued with controversy since its inception in 2009. The Service has processed very few eagle take permits, despite stable or increasing eagle populations and dozens of pending applications. This revision is the second update to the Eagle Permit Program. In 2015, the U.S. District Court for the Northern District of California struck down portions of the Service's 2013 amendment to the Eagle Permit Program that extended the maximum permit term to 30 years. This Rule reinstates the 30-year permit term maximum in addition to making numerous other significant changes to the 2009 rule. While the Service carried forward many of the changes seen in the May 2016 proposed rule, (Proposed Rule) the Rule introduces some changes to the Proposed Rule in response to public comments.

Emphasizes Applicability to All Persons/Industries. The Rule reiterates that the Eagle Permit Program applies to any person or industry that may incidentally take eagles, real estate, mining, utility, and transportation sectors.

Announces Increased Prioritization of Enforcement. The Rule announces the Service's intent to prioritize BGEPA enforcement efforts with the hopes of increasing incentives for project proponents to seek permits to cover take that is currently unpermitted but which might meet the requirements for coverage under an incidental take permit.

Redefines the Preservation Standard and Moves to Eagle Management Units. The Rule redefines the Preservation Standard—the standard by which the Service administers the Eagle Permit Program—to include consideration of local area populations (LAPs). The Rule also moves away from the previously-used Bird Conservation Regions and adopts eagle management units (EMUs) that align with migratory flyways. The Rule establishes take limits within each EMU, and, under the Rule, it is now possible to obtain eagle take permits for golden eagles east of the 100th meridian. The Service's new definition of the Preservation Standard means that a permit application for take of either eagle species will be reviewed against EMU take limits, the amount of permitted take within a LAP, and the Service's estimation of unpermitted take that may be occurring within a LAP. The results of this review will impact whether eagle take permits are available within a given LAP, the amount of compensatory mitigation required of the applicant, and whether the Service can tier its permit-specific National Environment Policy Act analysis off of the programmatic environmental impact statement that the Service completed for the Rule.

Introduces Practicability Concept into Permit Issuance Criteria. The Rule also revises the criteria that an applicant must meet in order to obtain an eagle take permit. Where previously an applicant was required to demonstrate that any take was unavoidable even with the implementation of Advanced Conservation Practices (ACPs), the Rule removes any reference to ACPs and, instead, incorporates consideration of practicability into the permit issuance criteria. This practicability inclusion is similar, but not identical, to the maximum extent practicable standard used in Endangered Species Act (ESA) section 10 permitting decisions for take permits for endangered and threatened species.

Establishes Thirty-Year Permits with Five-Year Reviews. Under the new Rule, the 30-year permit term (or any permit term over five years) requires regular reviews at 5-year intervals. The Service's Proposed Rule included 5-year reviews where any aspect of an eagle take permit's terms and conditions could change at each review. A departure from the Proposed Rule, the Rule added limitations on what the Service may ask of a permittee during a 5-year review if the permittee is in compliance with its permit. These limitations function similarly to the No Surprises rule in the ESA section 10 permit context.

Sets Permit Fees. Fees for both the 5-year and 30-year permit options are significantly higher than those required for other federal wildlife permits—a 5-year eagle take permit carries with it an application fee of \$2,500, and the application fee for an eagle permit with a term between 5 and 30 years is \$36,000 with an additional administrative fee of \$8,000 for each 5-year review.

Requires Third Party Monitoring. Permittees with permit terms of greater than five years are now required to use a third-party for mortality monitoring. The third party will provide monitoring reports directly to the Service and provide a copy of results to the permittee.

Delineates Wind-Energy-Specific Survey Requirements and Collision Risk Models. Despite language reiterating that the Rule is not industry-specific, the Rule continues to focus on the wind energy industry. The Rule includes minimum preconstruction survey standards for the wind industry such as at least two years of monthly preconstruction data to support a permit application. The Service will also continue to apply the Bayesian collision risk model (CRM) to estimate fatalities at wind energy projects. The Bayesian CRM overestimates take 80% of the time; in the Rule, the Service acknowledges the conservative outputs of the Bayesian CRM, though the Service states that it will continue to stand by its 80% approach until data support a more reliably accurate CRM.

Clarifies Compensatory Mitigation. The Rule expresses the Service's intent to expand compensatory mitigation options beyond power pole retrofits and encourages the use of mitigation banks and in-lieu fee programs to accomplish any required offset for authorized eagle mortality. However, no eagle mitigation banks have yet been established, and the Service will be working with stakeholders to develop guidance for various eagle mitigation types. Importantly, the Service states in the Rule preamble that, based on current population data (provided in the 2016 population report), compensatory mitigation for bald eagles will not be required in most circumstances. The Rule also establishes the compensatory mitigation ratio for golden eagles at 1.2:1. These compensatory mitigation requirements may change based on permitted and unpermitted take levels within an LAP.

Contemplates Resolution of Legacy Take. The Proposed Rule included language requiring applicants to resolve preexisting, or legacy, take prior to obtaining an eagle take permit. The Rule, however, does not require resolution of legacy take, but legacy take will be factored into the Service's review of a permit application. An applicant will remain liable for any unresolved legacy take that has not already been precluded by the five-year statute of limitations.

Provides for Grandfathering. Until July 14, 2017, applicants that submit a complete application can elect whether to apply under the provisions of the regulations as promulgated in 2009 or as promulgated in the instant Rule.

The Service declined to include several key improvements to components of the Eagle Permit Program that would provide predictability and clarity for the regulated community. The Rule states the Service's intent to prepare guidance for eagle-specific compensatory mitigation, low-risk permitting pathways, guidance for other industries, and updates to the wind energy industry CRM, but without providing any completion dates. The timing, content, and availability of these outstanding guidance documents could have a significant effect on the success of the Eagle Permit Program.

It remains to be seen how President-elect Trump's administration will react to the revised Eagle Permit Program. The new administration could take any number of actions such as proposing to withdraw the Rule, prioritizing guidance that eases the Rule's implementation, or deemphasizing enforcement of BGEPA. Environmental groups and regulated industry alike may also challenge the Rule in court. The Rule constitutes a significant reworking of the Eagle Permit Program; however, the current political climate and the potential for judicial challenges may limit the longevity and impact of at least some of the Rule's provisions.