



Sandra Snodgrass

Partner
303.295.8326
Denver
ssnodgrass@hollandhart.com

Key Provisions of the U.S. Fish and Wildlife Service's Draft Revisions to the Eagle Permit Rule

Insight — 5/10/2016

On May 4, 2016, the U.S. Fish and Wildlife Service (Service) released its much-anticipated draft revisions to the eagle take permit rule under the Bald and Golden Eagle Protection Act (BGEPA).¹ The Service also concurrently released a Draft Programmatic Environmental Impact Statement (DPEIS) to satisfy its obligations under the National Environmental Policy Act (NEPA) for the rulemaking and a status report on bald and golden eagles, which serves as the biological basis for the proposed revisions and environmental analysis in the DPEIS.² Here are the key revisions of the proposed rule.

BGEPA Preservation Standard

- BGEPA requires the Service to determine that any eagle take that it authorizes is "compatible with the preservation of bald eagles or golden eagles."³ Under the current eagle permit rule, the Service defines this preservation standard to mean "consistent with the goal of maintaining stable or increasing breeding populations."⁴
- The Service now proposes to modify that standard 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." Note that this revised standard incorporates new geographic-based considerations related to eagle management units and local populations.
- The Service explains that this revised standard seeks "to ensure the persistence of bald and golden eagle populations over the long term with sufficient distribution to be resilient and adaptable to environmental conditions, stressors, and likely future altered environments." The agency further explains that "population" means eagle management unit (which the Service is proposing to define by modified flyways); "persist" means stable with 2009 as the baseline; "long-term" means 100 years; and "sufficient distribution" means avoiding the extirpation of local area populations by limiting Service-authorized take rates to less than or equal to 5% of each local area population.
- The Service is proposing to define "local area population" as "the bald or golden eagle population within the area of a human activity or project bounded by the natal dispersal distance for the

respective species. The [local area population] is estimated using the average eagle density of the [eagle management unit(s)] where the activity or project is located."

- Based on this revised standard, the Service has proposed an annual (unmitigated) take limit of 4,200 bald eagles nationwide, compared to the take limit of 1,103 established in 2009. For golden eagles, the take limit is still set at zero, meaning that any authorized take will need to be offset by compensatory mitigation. However, unlike the 2009 rule, the Service is now allowing the issuance of golden eagle take permits east of the 100th meridian.

Maximum Permit Duration

- The original permit rule that the Service issued in 2009 only allowed for five-year eagle take permits with the potential for renewal.⁵ On December 9, 2013, the Service extended the maximum permit duration to 30 years.⁶ However, last year, a federal district court overturned the extension of the permit duration, finding that the Service failed to comply with NEPA.⁷
- In these draft revisions, the Service is once again proposing to extend the maximum permit duration to 30 years, with substantive re-evaluation of long-term permits every five years that could result in additional conservation requirements. The issuance of the DPEIS is intended to resolve the NEPA violation found by the district court.

Criteria for Issuing Permits

- The current regulations contain two types of eagle take permits—standard and programmatic. For standard permits, which authorize one-time take, the Service must determine that the take cannot practicably be avoided.⁸ For programmatic permits, which authorize ongoing take over the life of a project, the Service must determine that the take is unavoidable even though advanced conservation practices are being implemented.⁹
- The Service is now proposing to eliminate the distinction between standard and programmatic permits. Instead, there would be a single eagle incidental take permit.¹⁰
- The Service is also proposing to eliminate the requirement for advanced conservation practices. Instead, all permittees would be required to avoid and minimize impacts to eagles to the maximum degree practicable, bringing BGEPA's requirements more in line with those under the Endangered Species Act. Practicable would 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."

Compensatory Mitigation Requirements

- The Service acknowledges that the current rule lacks specificity with regard to when compensatory mitigation will be required and that the 2009 preamble was somewhat inconsistent in its

discussion of compensatory mitigation, which has led to inconsistent treatment of permittees. To rectify this issue, the Service is proposing to standardize the compensatory mitigation requirements.

- For any permit authorizing take that would exceed the established take limits, the Service is proposing to require compensatory mitigation that must ensure the preservation of the affected eagle species by (1) reducing another ongoing form of mortality by an amount equal to or greater than the unavoidable mortality or (2) increasing carrying capacity to allow the eagle population to grow by an equal or greater amount.
- Under the proposed revisions, the Service may also require compensatory mitigation when cumulative authorized take, including the proposed take, would exceed 5 percent of the local area population or when available data indicate that cumulative unauthorized mortality would exceed 10 percent of the local area population.
- Unlike the current recommended compensatory mitigation approach for eagle take permits, which focuses primarily on power pole retrofitting to reduce risk of mortality, the Service has indicated that it will encourage the use of in-lieu fee programs, mitigation and/or conservation banks, and other established mitigation programs and projects. The agency intends to facilitate an in-lieu fee program to allow permit applicants to contribute to a compensatory mitigation fund as an alternative to developing individual mitigation measures for each project.
- The proposed revisions regarding compensatory mitigation encompass many of the elements of the Secretary Jewell's Order 3330 on Improving Mitigation Policies and Practices of the Department of the Interior, the Department's strategy report under that order, the recent Presidential Memorandum on Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment, the associated Department of the Interior manual provision on Landscape-Scale Mitigation, and the Service's proposed revised policy on mitigation.¹¹

Application Fees

- The Service is proposing the following permit application fees: \$36,000 for a permit a duration of five years or longer (comparable to the current fee for programmatic permits); \$2,500 for permit of a duration less than five years for commercial applicants (increased from \$500); and \$500 for homeowner applicants (no change).
- The Service is proposing to increase the amendment fees for those permits from \$150 to \$500, except that the amendment fee for homeowners would remain at \$150.
- For permits with terms longer than five years, the Service intends to assess an administration fee of \$15,000 every five years for permit review, an increase from the current fee of \$2,600.
- For eagle nest take permits, the application fees would increase

from \$500 to \$2,500 for a single nest and from \$1,000 to \$5,000 for multiple nests. The fee for a homeowner application for a nest take permit would remain at \$500.

To date, the Service has focused its eagle permitting guidance and processing efforts on the wind industry. Nevertheless, because the existing rule and these proposed revisions apply broadly to eagle take in general, companies in any industry that anticipate the need for obtaining an eagle incidental take permit in the future should consider commenting on these proposed revisions. Comments on the proposed rule are due to the Service by June 5, 2016.

¹The proposed rule revisions were published in the Federal Register on May 6, 2016. See 81 Fed. Reg. 27,934 (May 6, 2016). The advanced notice of proposed rulemaking was issued over four years ago. See Revisions to Regulations Governing Take Necessary To Protect Interests in Particular Localities, 77 Fed. Reg. 22,278 (April 13, 2012).

²The DPEIS and status report are available at <http://www.fws.gov/birds/management/managed-species/eagle-management.php>.

³16 U.S.C. § 668a.

⁴Eagle Permits; Take Necessary To Protect Interests in Particular Localities, 74 FR 46,836, 46,837 (Sept. 11, 2009).

⁵74 Fed. Reg. at 46,878.

⁶Changes in the Regulations Governing Eagle Permitting, 78 Fed. Reg. 73,704 (Dec. 9, 2013).

⁷*Shearwater v. Ashe*, 2015 WL 4747881 (N.D. Cal. August 11, 2015).

⁸50 C.F.R. § 22.26(a)(1).

⁹*Id.* § 22.26(a)(2).

¹⁰The Service is proposing to dispense with the awkward term of "nonpurposeful permit" and refer to them as "incidental take permits," despite the overlap with that type of permit under the Endangered Species Act.

¹¹Further information regarding these compensatory mitigation efforts is available [here](#) and [here](#).

Subscribe to get our Insights delivered to your inbox.

This publication is designed to provide general information on pertinent legal topics. The statements made are provided for educational purposes only. They do not constitute legal or financial advice nor do they necessarily reflect the views of Holland & Hart LLP or any of its attorneys other than the author(s). This publication is not intended to create an attorney-client relationship between you and Holland & Hart LLP.

Substantive changes in the law subsequent to the date of this publication might affect the analysis or commentary. Similarly, the analysis may differ depending on the jurisdiction or circumstances. If you have specific questions as to the application of the law to your activities, you should

seek the advice of your legal counsel.