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U.S. Fish and Wildlife Service Proposes Revisions to Eagle Take Permit Regulations

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On September 30, 2022, the US Fish and Wildlife Service (Service) issued a proposed rule in the Federal Register that would revise the regulations for the eagle take permit program under the Bald and Golden Eagle Protection Act.[1] In the proposed rule, the Service notes that bald eagle populations are increasing at a considerable rate, which is increasing the instances of human-eagle interactions and the need for eagle take permits.[2] With respect to golden eagles, fewer wind-energy projects are seeking eagle take permits than the Service expected, due in part to burdensome permit-processing requirements, which has resulted in continued unauthorized golden eagle take without offsetting conservation actions.[3] Thus, the Service's stated goal of its proposed revisions is "to increase the efficiency and effectiveness of permitting, facilitate and improve compliance, and increase the conservation benefit for eagles."[4]

The Service is proposing to create a new Subpart E in the 50 C.F.R. Part 22 regulations, which would include provisions regarding the administration of specific and general permits for incidental take, compensatory mitigation requirements, incidental take permits for three specific activity types, and take of eagles nests.[5] The following is a summary of the key provisions in the proposed rule.

Proposed General Permits[6]

The Service is proposing general permits for four categories of activities: incidental take at wind-energy generation facilities, incidental take by power-line infrastructure, disturbance take of bald eagles, and bald eagle nest take. The availability of general permits is intended to simplify and expedite the permitting process by (1) allowing applicants to self-identify eligibility and certify that they meet the eligibility criteria and (2) eliminating the need for Service review prior to obtaining the permit.

To ensure that applicants are interpreting and using the general-permit program appropriately, the Service intends to conduct annual audits for a small percentage of all general permits. The Service is proposing to limit the duration of general permits for incidental take to a maximum of five years[7] and for disturbance take or nest removal to a maximum of one year. The general permits would include terms and conditions that require the implementation of avoidance and minimization measures, methods for discovering dead or injured eagles at the project (for permits that authorize incidental take), reporting requirements, and satisfaction of any applicable

compensatory mitigation obligations.

Incidental Take at Wind-Energy Generation Facilities. For a wind-energy generation project to be eligible for a general permit, it must meet the seasonal eagle abundance thresholds specified in the regulations for each species,[8] be sited greater than 660 feet from bald eagle nests and greater than two miles from golden eagle nests (regardless of nest status),[9] and have had fewer than four eagle mortalities of either species discovered at the project.[10] The general permit would authorize take of both species without a specific number on the face of the permit.

Incidental Take at Power-Line Infrastructure. To qualify for a general permit for incidental take of eagles by power lines, the permittee must (1) ensure that all new construction and reconstruction of poles is electrocution-safe,[11] as limited by the need to ensure human health and safety; (2) implement a reactive retrofit strategy following all electrocutions of eagles;[12] (3) implement a proactive retrofit strategy to convert all existing infrastructure to electrocution-safe;[13] (4) implement an eagle collision response strategy;[14] (5) for new construction and reconstruction, incorporate information on eagles into siting and design considerations as practicable; (6) implement an eagle-shooting response strategy;[15] and (7) train personnel to scan for eagle remains when onsite and implement internal reporting and recordkeeping procedures. It is unclear how the potential increase in power-pole retrofits that may be implemented under this category of general permit may affect the current use of power-pole retrofits to offset the incidental take of other permittees under individual permits.

Disturbance Take of Bald Eagles. This proposed general permit would authorize disturbance of bald eagles by specific activities (such as building and linear infrastructure construction, alteration of shorelines or vegetation, recreation activities, etc.) taken in proximity to bald eagle nests, generally within the distances outlined in the National Bald Eagle Management Guidelines.[16] The proposed rule states that the permittee would have to implement measures to avoid and minimize nest disturbance, but it does not specify what those measures would entail. The proposed rule also indicates that activities occurring farther from bald eagle nests than the distances specified would not require a permit because they are unlikely to cause disturbance. It likewise confirms that both hazing activities and activities conducted adjacent to a communal roost or foraging area do not constitute eagle disturbance and do not require a permit.[17] General permits would not be available for disturbance take of golden eagles.

Permits for Take of Bald Eagle Nests. This general permit would authorize bald eagle nest take for emergency,[18] health and safety,[19] or a human-engineered structure,[20] or, if located in Alaska, for other purposes.[21] The general permit would authorize bald eagle nest removal from the nesting substrate at the location requested as well as at the location of any subsequent nesting attempts by the eagle pair within one-half-mile of the location requested for the duration of

the permit. General permits would not be available for take of golden eagle nests.

Monitoring Requirements

The Service is proposing to remove the current third-party monitoring requirement from eagle incidental take permits, including specific permits. For general incidental take permits, the Service intends to use the permit application and administration fees for program-scale monitoring (in lieu of current project-scale monitoring required of the permittee) to verify the compatibility of the general-permit program with the preservation of eagles and to better understand the program's impacts. The Service would perform more rigorous systematic fatality monitoring on a program-wide basis rather than individual applicants being required to fund and conduct more rigorous fatality monitoring a project-specific basis.[22] The Service is proposing to compile information on general permits issued on an annual basis.

Most general permit holders would still have some monitoring requirements. For the wind-energy and power-line incidental take general permits, the permittee would have to train relevant employees to recognize and report eagle take as part of their regular duties, including visually scanning for injured eagles and eagle remains during inspections, maintenance, repair, and vegetation management at and around project infrastructure. For disturbance permits, the permittee would have to implement monitoring of in-use nests that is sufficient to determine whether nestlings have fledged from the nest and submit this information on its annual report. No monitoring would be required under a one-year nest removal general permit.

Compensatory Mitigation

Under the proposed rule, any permit authorizing take that would exceed the applicable Eagle Management Unit (EMU) take limit will require compensatory mitigation. In addition, a permit may require compensatory mitigation when the Service determines that the persistence of the local area population of an eagle species in the project area may not be maintained. For specific permits, the mitigation providers for compensatory mitigation may include conservation banks, in-lieu fee programs, or permittee-responsible mitigation. However, if a general permit requires compensatory mitigation, it must be in the form of obtaining required credits from a Service-approved third-party mitigation provider.

For wind-energy general permits, the Service is proposing to require compensatory mitigation at a fixed rate for each EMU using formula-based on the hazardous volume of the project in cubic-kilometers. The hazardous volume of a project would be calculated as the number of turbines multiplied by 0.200 π(d/2)∧2, where d is the diameter of the blades in kilometers. The Service has proposed the following eagle credits rates: Atlantic/Mississippi EMUs – 6.56 eagles/km^3, Central EMU – 7.88 eagles/km^3, and Pacific EMU – 11.48 eagles/km^3.

No compensatory mitigation is proposed for power-line incidental take

general permits beyond the required reactive and proactive retrofits. The Service is also not proposing any compensatory mitigation for general bald eagle disturbance or general bald eagle nest-take permits.[23]

Permit Fees

The proposed permit fees vary for the proposed general permits. For incidental take by wind-energy generation, the application fee is $500, and the permit-administration fee is $2,625 per turbine. The Service has explained that the high administration fee is to fund the systematic, program-level monitoring efforts the Service is proposing to undertake in lieu of project-specific monitoring. For incidental take by power lines, the proposed application fee is $500, and the proposed permit-administration fee is $5,000 for each state for which the power-line entity is seeking authorization. For the bald eagle disturbance and nest-take general permits, the application fee is $100, with no administration fee.

Comments on the proposed rule are due by November 29. The Service is holding virtual information sessions for the general public on October 20 at 12 p.m. Eastern and November 3 at 2 p.m. Eastern. Because this proposed rule represents a significant change to the eagle take permit process, we strongly encourage the regulated industry to undertake a careful review of the proposed rule's provisions, as well as the Service's explanation in the preamble, and submit relevant comments.

[1]16 U.S.C. § 668-668d.
[2]Fish and Wildlife Service, Permits for Incidental Take of Eagles and Eagle Nests, Proposed Rule, 87 Fed. Reg. 59,598, 59,599 (Sept. 30, 2022).
[3]*Id*. at 59,600. Although there are more than 1,000 wind-energy projects in the US, the Service has received fewer than 100 applications for eagle take permits such projects and has issued only 26 permits since the promulgation of the 2016 eagle permit rule. Id. at 59,602.
[4]*Id*. at 59,598.
[5]Note that the Service is not proposing substantive revisions to regulations regarding golden eagle nest take associated with resource development or recovery operations, currently codified at 50 C.F.R. § 22.75. It is only proposing to redesignate it as 50 C.F.R. § 22.325, slightly modify the section title, and remove the introductory sentences regarding the Office of Budget and Management.
[6]The proposed rule defines “general permit” as “a permit that is issued to an individual or entity with nationwide or regional standard conditions for a category or categories of activities that are substantially similar in nature.” 87 Fed. Reg. at 59,624-25.
[7]Upon expiration of a general permit for incidental take, applicants could reapply and obtain a new five-year general permit.
[8]The Service is proposing a process that would allow exceptions for existing projects where most of the turbines satisfy the abundance thresholds. Project proponents would be able to determine whether a specific project satisfies the abundance thresholds using publicly available, online mapping resources. Due to a lack of abundance data, the Service is proposing not allowing the use of general permits for wind-energy projects in Alaska at this time.
[9]If a new nest is constructed within two miles of project infrastructure after

issuance of a general permit, the project would no longer meet eligibility criteria for a general permit; it could continue to operate under the general permit through the duration of the permit term but would not be eligible for future general permits.

[10]The Service is assuming that the minimal monitoring proposed for general permits would detect only 15 to 20% of all eagles killed at the project; thus, with four detections, as many as 23 could go undetected. If the project proponent discovers the take of four eagles of any one species during the tenure of the general permit, it must notify the Service and implement adaptive management. The project would continue to be authorized to incidentally take eagles through the term of the existing general permit but would be denied eligibility for future general permits for incidental take.

[11]The Service has proposed to define "electrocution-safe" as a "power-pole configuration that minimizes eagle electrocution risk by using a design that provides sufficient separation between phases and between phases and grounds to accommodate the wrist-to-wrist or head-to-foot distance of an eagle or by covering exposed parts with insulators to physically separate electricity from eagles."

[12]The Service has proposed to define a "retroactive retrofit strategy" as a "plan to respond to incidents where eagles are electrocuted or killed." The proposed rule states that a total of 11 poles (typically the pole that caused the electrocution and five poles in each direction) or a half-mile segment must be retrofitted, whichever is less.

[13]The permittee must convert one-tenth of infrastructure that is not electrocution-safe as of the effective date of the general permit to electrocution-safe during the duration of the permit. Upon renewal of the general permit, the same number of poles must be retrofit, such that all poles are retrofit within 50 years or by the expiration of the tenth, five-year general permit.

[14]This strategy must outline the steps to identify, assess, and respond to the collision. The response options should consider eagle collisions in the engineering design (e.g., burial, rerouting, or reduction in the number of wires), habitat modification, and line marking.

[15]As the name suggests, this strategy is a "plan to respond to eagle-shooting events where one or more eagles are discovered near power-line infrastructure and the cause of death is shooting."

[16]These distances are typically 660 feet of an in-use bald eagle nest or 330 feet of any bald eagle nest, except that the distance for aircraft use is 1,000 feet and for intermittent noises, such as blasting, is one-half mile. The proposed rule states that disturbance caused by agriculture, mining, and oil and gas operations would not be eligible for a general permit.

[17]However, the Service cautions that hazing activities in close proximity to an in-use nest could still result in disturbance through disruption of breeding activity.

[18]The Service has proposed to define "nest take for emergency" as "[t]ake of an in-use or alternate eagle nest where necessary to alleviate an existing safety emergency, or to prevent a rapidly developing safety emergency that is otherwise likely to result in bodily harm to humans or eagles while the nest is still in use by eagles for breeding purposes."

[19]The Service has proposed to define "nest take for health and safety" as "[t]ake of an in-use eagle nest prior to egg-laying or an alternate eagle

nest, when the removal is necessary to ensure public health and safety."
[20]The proposed definition of "nest take for human-engineered structure" is "[t]ake of an in-use eagle nest prior to egg-laying or an alternate eagle nest that is built on a human-engineered structure and creates, or is likely to create, a functional hazard that renders the structure inoperable for its intended use."
[21]The Service is proposing to define "other purposes" as "[t]ake of an alternate eagle nest, provided the take is necessary to protect an interest in a particular locality and the activity necessitating the take or the mitigation for the take will, with reasonable certainty, provide a net benefit to eagles."
[22]For the Service to be able to implement this systematic, program-level monitoring, general permit holders must consent to allow such monitoring at their projects.
[23]However, based on the definition of nest take for "other purposes," it appears that the general permit for nest removal in Alaska would likely require compensatory mitigation to meet the net-benefit standard of that category.

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