

Energy Alert

May 5, 2016

If you only read one thing . . .

- The U.S. Fish and Wildlife Service (Service) has issued a Proposed Rule to revise its bald and golden eagle regulations.
- The Proposed Rule, if finalized, would extend the maximum permit duration for a non-purposeful or incidental eagle take from five years to 30 years.



U.S. Fish And Wildlife Service Issues Proposed Rule To Revise Its Bald And Golden Eagle Regulations

On May 4, the U.S. Fish and Wildlife Service (Service) issued a proposed rule titled *Eagle Permits; Revisions to Regulations for Eagle Incidental Take and Take of Eagle Nests*, which seeks to revise the Service's bald and golden eagle conservation and management program under the Bald and Golden Eagle Protection Act (the Proposed Rule). The Proposed Rule and its supporting materials are available on the Service's website at <http://www.fws.gov/birds/management/managed-species/eagle-management.php>. The Service has set a 60-day comment period for the Proposed Rule, making July 5, 2016, the deadline for submitting comments.

The Service promulgated its original eagle regulations in 2009. In its Proposed Rule, the Service seeks to revise the 2009 regulations by setting new objectives for eagle management, addressing how eagle populations will be managed and monitored, directing how data on permitted eagle mortality will be obtained and used, and modifying the eagle take permitting requirements. What will likely be the most controversial aspect of the Proposed Rule is the Service's proposal to extend the maximum permit duration for a non-purposeful or incidental take from five years to 30 years. (The Service's prior rulemaking in 2013 that authorized 30-year permits was met with stiff opposition, and was ultimately struck down by a Federal Court for failure to comply with the National Environmental Policy Act (NEPA).) The Service, however, continues to take the position that a 30-year permit duration is needed to allow permits to align better with the longer term duration of the industrial activities, most notably wind farms, that could pose a threat to eagles.

A 30-Year Take Permit

Under the Proposed Rule's permitting provisions, a permit holder would be authorized to "take" a set number of eagles – which includes disturbing, injuring or killing eagles – in the course of undertaking an otherwise lawful activity for a period of up to 30 years. Applicants seeking permits must agree to

implement measures to minimize and avoid eagle takes and, in the case of golden eagles, must fund conservation measures designed to protect more than one eagle for every eagle expected to be taken. The Service is also proposing to require permit holders to consult with the Service every five years during the permit term to ensure that the permitted activity is not exceeding the expected take levels and, where exceedances are occurring, the Service may impose additional avoidance, minimization or compensation requirements on permittees.

Supporting Documents

In support of its Proposed Rule, the Service has issued a Draft Programmatic Environmental Impact Statement (DPEIS) under NEPA and a report titled *Bald and Golden Eagles, Status, Trends and Estimation of Sustainable Take Rates in the United States*. The PEIS analyzes the proposed revisions to the eagle permit regulations, establishment of new Eagle Management Units (EMUs) based upon eagle flyways and different take levels for bald and golden eagles. The Service's Report that accompanies the Proposed Rule and PEIS compiles current research on eagle population sizes, status and survival rates; serves as the biological basis for the Proposed Rule and DPEIS' preferred alternative; and provides recommended take limits.

Change in Permit Fees

The Proposed Rule also changes the permitting fee structure for commercial permittees seeking a permit of five years or longer. Under the new structure, in addition to paying a \$36,000 application fee, permittees must pay a \$15,000 administration fee every five years to cover the costs of the five-year evaluation and the development of any additional avoidance, minimization or compensation requirements, as needed.

Contact Information

If you have any questions regarding this alert, please contact:

Ian A. Shavitz

ishavitz@akingump.com

+1 202.887.4590

Washington

Edward Zaelke

ezaelke@akingump.com

+1 213.254.1234

Los Angeles

Daniel Sinaiko

dsinaiko@akingump.com

+1 213.254.1211

Los Angeles

Thomas Dupuis

tdupuis@akingump.com

+1 213.254.1212

Los Angeles

John Marciano

jmarciano@akingump.com

+1 202.887.4450

Washington