



## Fish and Wildlife Service Proposes Changes to Eagle Protection Regulations

On May 6, 2016, the U.S. Fish and Wildlife Service (“FWS”) [proposed changes](#) to its regulations under the Bald and Golden Eagle Protection Act. FWS is accepting comments on the proposed rule until July 5, 2016.

### Background

The Bald and Golden Eagle Protection Act (“Act”), originally passed in 1940, protects bald eagles and golden eagles by prohibiting the take, possession, sale, purchase, barter, transport, export, or import of any bald or golden eagle. The term “take” is defined broadly to include activities that would molest or disturb eagles. Depending on their location, many development projects have the potential to result in eagle take. For instance, housing, highway, and other expansion projects could cause habitat loss or fragmentation. Within the energy industry in particular, eagles could potentially be harmed by collisions with power distribution lines or wind turbines. Solar facilities can also result in heat trauma to eagles, including exhaustion or dehydration.

The Act authorizes take in circumstances where it is compatible with continued eagle preservation and is

necessary to protect an interest in a particular locality. Permissible take is currently divided into two categories—individual instances of take and programmatic take—that each carry additional requirements for reducing any extra, unnecessary take that may occur as a result of permitted activities. For activities that cause an individual instance of take, any additional take must be “practicably” unavoidable. For activities where take is recurring, or programmatic, the permit holder must implement advanced conservation practices so that any remaining take is unavoidable. The maximum permit duration for both types of nonpurposeful take is five years under the current regulations.

In 2013, motivated in part by a desire to facilitate the development of energy projects, FWS amended its regulations to extend the maximum term of nonpurposeful take permits to 30 years for activities that could result in recurring take. In 2015, the U.S. District Court for the Northern District of California struck down the new rule on the grounds that FWS should have conducted environmental review under the National Environmental Policy Act (“NEPA”) prior to amending the rule.<sup>1</sup> The maximum term of all nonpurposeful take permits therefore reverted back to five years.

<sup>1</sup> See *Shearwater v. Ashe*, No. 14-CV-02830-LHK, 2015 WL 4747881, at \*15 (N.D. Cal. Aug. 11, 2015).

FWS's most recent proposal again contemplates significant changes to the process of obtaining and maintaining a permit for nonpurposeful take. This time around, FWS included a Draft Programmatic Environmental Impact Statement under NEPA that analyzes the proposal's effects. FWS also prepared a status report estimating the current state of bald and golden eagle populations. The goal of FWS's proposed changes, some that mirror the 2013 rule, is to reduce harmful eagle disturbance by improving the permit program and stopping unpermitted take. Through these proposed changes, FWS hopes to increase compliance with the Act, clarify compensatory mitigation standards, and simplify permit requirements.

## Type and Length of Permits

One key revision consolidates the two types of nonpurposeful take permits and increases the maximum permit term to thirty years. To streamline the permitting process and avoid confusion, the proposed rule would eliminate the distinction between individual instances of take and programmatic take in favor of one "incidental take" permit. The incidental take permit would require an applicant to reduce remaining take according to the "practicably unavoidable" standard, 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." By also extending the maximum life of such permits to thirty years, FWS asserts the proposed rule would reduce the burden on entities that participate in long-term activities affecting eagles and encourage applicants to comply with the Act rather than risk violations.

## Compensatory Mitigation Requirements

In another key change, FWS's proposal outlines requirements for when compensatory mitigation is required. Currently, the Act does not include specific compensatory mitigation regulations to determine when a party must engage in additional conservation efforts to make up for impacts that were not avoided or minimized. The proposed rule requires compensatory mitigation where permitted take exceeds eagle management unit take thresholds, and such mitigation must "ensure the preservation of the affected eagle species by reducing

another ongoing form of mortality by an amount equal to or greater than the unavoidable mortality, or increasing carrying capacity to allow the eagle population to grow by an equal or greater amount."

The compensatory mitigation in FWS's proposal varies by eagle type. The proposed rule explains that because the bald eagle population has increased, whereas the golden eagle population has potentially declined, compensatory mitigation requirements should be more strict for golden eagles than for bald eagles. For golden eagles, FWS proposes to maintain a zero percent allowable take limit: compensatory mitigation would always be required to offset any authorized take "at a greater than one-to-one ratio to achieve a net benefit to golden eagles to achieve an outcome consistent with the preservation of golden eagles as the result of the permit."

For bald eagles, compensatory mitigation would depend on the quantity of local take according to local area populations ("LAPs"), which measure bald eagle population within 86 miles of the boundary of a project. The proposed rule would likely require compensatory mitigation if projected bald eagle take within the relevant LAP would exceed five percent of the bald eagle population on an annual basis. FWS would, however, retain discretion to impose compensatory mitigation in other cases as well.

In addition, FWS's proposal states that it will encourage certain compensatory mitigation strategies in addition to traditional power pole retrofits—the only form of compensatory mitigation used to date. The proposed rule specifically mentions compensatory mitigation efforts such as in-lieu fee programs, mitigation/conservation banks, and other established mitigation programs and projects.

## Periodic Review

Despite increasing the length of take permits, FWS suggests that the revisions would continue to support the bald eagle and golden eagle populations. Under the new rule, FWS would conduct periodic review of permits issued with a longer term to reassess fatality rates, effectiveness of measures to reduce take, the appropriate level of compensatory mitigation, and eagle population status. If FWS found that bald eagles and golden eagles were not satisfactorily protected, it

could require a permit holder to take additional conservation measures to retain a permit.

## Fee Increases

The proposed rule would also increase permit fees. Rather than requiring a \$1,000 fee for programmatic permits and \$500 for standard permits, the new regulations would charge commercial applicants \$2,500 for a five-year term and \$36,000 for terms greater than five years. The latter would also accompany a \$15,000 administrative fee every five years to account for the cost of FWS's maintenance evaluation.

## Eagle Nest Take Standards

In addition to revising the nonpurposeful take regulations, FWS's proposed rule makes minor changes to eagle nest take standards. For example, under the proposed rule, an entity could lawfully remove eagle nests in anticipation of emergencies and to avoid expected structural hazards if the predicted events are likely to occur during egg-laying season.

## Implications

Although many development projects have the potential to cause eagle take, very few permits have been sought or granted. As FWS recognized in its proposed rule, the five-year permit term, which is substantially shorter than the expected lifetimes of most activities that could result in eagle take, was one of the primary factors discouraging project proponents from seeking permits. Thus, the return to the 30-year permit term will likely be welcome by the regulated community. However, the proposed rule raises other considerations for project proponents, including increased permit costs and more demanding mitigation requirements. In addition, the proposed 30-year permit term remains controversial among some conservation groups. FWS may therefore face additional challenges to the rule, and applicants may encounter intensified scrutiny of proposed permits. Although take is prohibited, eagle take permits are not required. The decision

about whether to apply for an eagle take permit will continue to involve an assessment of the risks associated with potentially unauthorized takes and any certainty that can be obtained through the permitting process.

## Lawyer Contacts

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at [www.jonesday.com/contactus/](http://www.jonesday.com/contactus/).

### Charles T. Wehland

Chicago  
+1.312.269.4388  
[ctwehland@jonesday.com](mailto:ctwehland@jonesday.com)

### Kevin P. Holewinski

Washington  
+1.202.879.3797  
[kpholewinski@jonesday.com](mailto:kpholewinski@jonesday.com)

### Casey F. Bradford

Atlanta  
+1.404.581.8119  
[cbradford@jonesday.com](mailto:cbradford@jonesday.com)

### John A. Rego

Cleveland  
+1.216.586.7542  
[jreg@jonesday.com](mailto:jreg@jonesday.com)

### Mary Beth Deemer

Pittsburgh  
+1.412.394.7920  
[mbdeemer@jonesday.com](mailto:mbdeemer@jonesday.com)

### Alina Fortson

Chicago  
+1.312.269.1542  
[afortson@jonesday.com](mailto:afortson@jonesday.com)

### Thomas M. Donnelly

San Francisco  
+1.415.875.5880  
[tmdonnelly@jonesday.com](mailto:tmdonnelly@jonesday.com)

### Jennifer M. Hayes

Pittsburgh  
+1.412.394.7992  
[jhayes@jonesday.com](mailto:jhayes@jonesday.com)

### G. Graham Holden

Atlanta  
+1.404.581.8220  
[ggholden@jonesday.com](mailto:ggholden@jonesday.com)

### Anna Claire Skinner

Atlanta  
+1.404.581.8047  
[askinner@jonesday.com](mailto:askinner@jonesday.com)

*Abigail C. Bosch, a summer associate in the Chicago Office, assisted in the preparation of this Commentary.*