

U.S. Department of the Interior, Fish and Wildlife Service

**Record of Decision
For the
Programmatic Environmental Impact Statement for the
Eagle Rule Revision**

Through this Record of Decision (ROD), the U.S. Fish and Wildlife Service (Service) updates its management objectives for bald and golden eagles and revises the federal eagle incidental take permit regulations and eagle nest take permit regulations codified at 50 Code of Federal Regulations (CFR) sections 22.26 and 22.27, as described in Alternative 5 of the Final Programmatic Environmental Impact Statement (PEIS) for the eagle rule revision. This ROD includes brief summaries of the alternatives considered, the public involvement process, and the rationale for selecting Alternative 5.

Background

The Bald and Golden Eagle Protection Act (Eagle Act) (16 United States Code [USC] 668–668d) prohibits take of bald eagles and golden eagles except pursuant to federal regulations. The Eagle Act allows the Secretary of the Interior to issue regulations to authorize the “taking” of eagles for various purposes, including the protection of “other interests in any particular locality.” The Service’s eagle incidental take permit regulations require avoidance, minimization, and compensatory mitigation measures to reduce and offset detrimental impacts to eagles while providing increased certainty for project proponents and other persons engaged in activities that result in incidental take of bald and golden eagles. Bald eagle populations continue to expand throughout their United States range. Golden eagles in the coterminous U.S. may be declining toward a lower population size. Unauthorized sources of human-caused mortality may be a significant factor affecting population trends and size for golden eagles.

The Service’s purpose and need for federal action, as presented in the draft and final PEIS, is to establish updated management objectives and an amended permitting framework that will ensure the preservation of eagles and promote compliance by streamlining regulatory requirements and increasing certainty for those engaged in otherwise lawful activities. The Service needed to conduct this action because the current regulations have proven difficult to implement for complex projects within a reasonable timeframe and without consuming a disproportionate share of the Service’s increasingly limited resources. The Service also needed to update the regulations to account for new information on the status of bald and golden eagles and incorporate that information into an updated permitting and management framework.

Alternatives Considered

In the draft PEIS, the Service considered five alternatives for managing bald and golden eagles and revising the permit regulations, including a no-action alternative (Alternative 1) as required under the Council on Environmental Quality’s regulations (40 CFR 1500-1508).

Eagle Rule Revision Record of Decision

Alternative 1, No Action. Under Alternative 1, we would assume no change from current management. The Eagle Act Eagle Management Units (EMUs), which are the geographic scale the Service uses to manage eagle populations would remain at the Bird Conservation Region (BCR) level for golden eagles and, for bald eagles, EMUs roughly correspond to the Service's regional organizational structure, which is composed of eight regions. Take limits for both species would remain at the levels established in 2009, and the permit regulations would not be revised.

Management Common to All Action Alternatives. Alternatives 2, 3, 4, and 5 contain various elements in common. The Service would establish an EMU for golden eagles east of the 100th meridian and would allow issuance of permits for incidental take of golden eagles in the eastern United States. Take levels for golden eagles in the eastern U.S. would be set at zero unless the take is offset. Revisions to eagle permit regulations include new and modified definitions for various regulatory terms; standardized compensatory mitigation requirements; modified permit issuance criteria; required protocols for surveys and monitoring; and increases in some permit application processing fees.

Alternative 2, Current EMUs, Liberal Take. Under Alternative 2, eagle populations would be managed using the current eagle management units (EMUs). EMUs for the bald eagle would be in a configuration that roughly approximates Service regions. EMUs for the golden eagle would be based on Bird Conservation Regions (BCRs) west of the 100th meridian, with BCRs east of the 100th meridian combined into one EMU. Unmitigated take limits would be set at 0% for golden eagles and 8% of populations for bald eagles in most EMUs, with lower rates proposed in the Southwest (4.5%) and Alaska (0.7%). Compensatory mitigation would be required for, and limited to, permits that would exceed EMU take limits. Compensatory mitigation for take above EMU take limits would be offset at a 1:1 ratio for bald and golden eagles.

Alternative 3, Current EMUs, Conservative Take. Under Alternative 3, EMUs would be the same as in Alternative 2. Unmitigated take limits would be set at 0% for golden eagles and 6% of populations for bald eagles in most EMUs, with lower rates proposed in the Southwest (3.8%) and Alaska (0.8%). Incidental take permits could be issued for up to 30 years, with permit reviews every five years. Compensatory mitigation designed to offset impacts at a 1:1 ratio would be required for any permitted take that exceeds EMU take limits. Separate and distinct from compensatory mitigation to offset take above the EMU take limit, a minimum level of compensatory mitigation would be required for each take permit. A permit administration fee for longer-term permits would be assessed at \$15,000 every five years to support the Service's ability to conduct the five-year evaluations.

Alternative 4, Flyway EMUs, Liberal Take. Under Alternative 4, EMUs for bald eagles would be aligned with the Atlantic, Mississippi, Central, and Pacific flyways used by the Service and its partner agencies to manage other species of birds, with the Pacific Flyway divided into three EMUs: southwest, mid-latitude, and Alaska. EMUs for golden eagles would also follow the flyways, with the Mississippi and Atlantic flyways combined into one EMU. Unmitigated take limits would be set at 0% for golden eagles and 8% of populations for bald eagles in most EMUs, with lower rates proposed in the Southwest (4.5%) and Alaska (0.7%). The maximum duration of an incidental take permit would remain at five years. The local area population (LAP)

Eagle Rule Revision Record of Decision

cumulative effects analysis would be incorporated into the regulations. Compensatory mitigation would be required for all permits that exceed EMU take limits and for some permits that exceed LAP take limits; compensatory mitigation would be required if necessary for the permit to be compatible with the preservation of eagles, and compensatory mitigation would be at a 1:1 ratio. The definition of “compatible with the preservation of eagles” would be modified to incorporate greater protection at more local scales.

Alternative 5, Flyway EMUs, Conservative Take (Preferred Alternative). Under Alternative 5, EMUs for the bald eagle would coincide with the flyways with the same modification as in Alternative 4. Unmitigated take limits would be set at 0% for golden eagles and 6% of populations for bald eagles in most EMUs, with lower rates proposed in the Southwest (3.8%). Incidental take permits could be issued for up to 30 years, with permit reviews every five years. Compensatory mitigation would be required for permits that exceed EMU take limits, and some permits that exceed LAP take limits; compensatory mitigation would also be required if necessary for the permit to be compatible with the preservation of eagles. Compensatory mitigation would be designed to offset take at a ratio of 1:1 for bald eagles and 1.2:1 for golden eagles for take that exceeds EMU take limits. The definition of “compatible with the preservation of eagles” would be modified to incorporate greater protection at more local scales. The LAP cumulative effects analysis would be incorporated into the regulations. The permit administration fee to support the Service’s ability to conduct the five-year evaluations for longer-term permits would be assessed at \$8,000 every five years (changed from \$15,000 in the May 6, 2016 proposed rule).

Public Involvement

The Service initiated the public scoping phase by publishing an Advance Notice of Proposed Rulemaking in April of 2012 (77 FR 22278, Apr. 13, 2012). We published a Notice of Intent initiating the NEPA process in June of 2014 (79 FR 35564, June 23, 2014). We held public scoping meetings in Sacramento, California; Minneapolis, Minnesota; Albuquerque, New Mexico; Denver, Colorado; and Washington, DC, between July 22, 2014, and August 7, 2014. We also developed a website, <http://www.eaglescoping.org>, where the public could find the same information that was presented at the public meetings. Links to the Service e-mail for public comments were included on the site. We received a total of 536 comments during the public comment period. Upon removal of duplicates, there were a total of 517 unique comments.

The Service then developed the Draft PEIS and proposed rule revisions, which we released for a 60-day public review and comment period (81 FR 27934, May 6, 2016). We received 780 comments on the proposed rule and Draft PEIS from states, tribes, non-governmental organizations, industry associations, individual companies, and members of the public. We considered all comments received during the Draft PEIS review period in preparing the Final PEIS.

We are making this Record of Decision, Final PEIS, Final Rule, and supporting documents available to the public on our website at: <https://www.fws.gov/birds/management/managed-species/eagle-management.php>.

Decision

The Service selects Alternative 5 as described in the Final PEIS. Alternative 5 will best fulfill the purpose and need for the action for the following reasons.

- Alternative 5 is expected to result in a significant increase in implementation of conservation measures to protect eagles due to numerous provisions of the revised eagle permit regulations that are designed to increase compliance, bringing more activities under permits. Such provisions include, but are not limited to:
 - The ability for most permittees to tier NEPA requirements for permit issuance to the analysis provided by the Final PEIS, which will streamline and shorten the permitting process;
 - The ability to issue permits with terms that exceed five years, which will better accommodate long-term projects that incidentally take eagles; and
 - Incorporation of a “practicability” standard for avoiding and minimizing impacts.

The conversion of existing and future unauthorized take to authorized take will reduce the negative effects of those activities on eagles by requiring implementation to the maximum degree practicable of measures to avoid and minimize take, and where necessary, offsetting compensatory mitigation.

- The conservative authorized take limits in this alternative will better protect bald eagles, while having little effect on the regulated community because requests for permits are not expected to approach take limits in most EMUs. For golden eagles, the take limit is the same under all alternatives – zero.
- Alternative 5 requires compensatory mitigation for golden eagles at a 1.2 to 1 ratio, which will help prevent or arrest a potential decline in current golden eagle populations by reducing the impacts of unauthorized human-caused take. Alternative 5 is expected to have little impact on the continued growth of bald eagle populations.
- Alternative 5 would base EMUs on the four migratory bird flyways, better accounting for movements of eagles, and meaning that:
 - compensatory mitigation can be targeted to beneficially affect eagles throughout their annual range, and
 - project proponents will have more flexibility in choosing compensatory mitigation options.
- The definition of “compatible with the preservation of eagles” and the incorporation of the local area population cumulative effects analysis into the regulations will result in better protection of eagle populations on a more local scale.
- The adaptive management process enabled by issuance of longer-term permits will provide the Service with data and other vital information that can help the agency

better track human causes of eagle mortality, identify measures that can be implemented to reduce those impacts, and better manage eagle populations.

Environmentally Preferable Alternative

The definition of “environmentally preferable alternative” (40 CFR 1505.2(b)) is different from that of the preferred alternative. The environmentally preferred alternative generally causes the least damage to the environment and best protects natural and cultural resources. For this PEIS, our preferred alternative, Alternative 5, is also the environmentally preferable alternative. Under Alternative 5, eagles will be best protected for the reasons described above. Alternative 5 is also likely to have more beneficial than adverse impacts to other migratory birds due to implementation of mitigation measures that will benefit other birds as well as eagles as more projects come under permit authorization. In addition, Alternative 5 is expected to have more beneficial effects on cultural values and resources because of the enhanced protections it affords to eagles as well as the tribal consultation that will occur as more owners and operators of projects that result in unauthorized take of eagles seek—and adopt the measures required to obtain—permits.

Factors Considered in making this Decision

In reaching this decision the Service reviewed and considered the following: the mandates and authorities provided by the Eagle Act; the current status and trends of bald and golden eagle populations; the impacts identified in Chapter 3 of the Draft and Final PEIS; and relevant issues, concerns, and opportunities presented by agencies, organizations, and individuals throughout the planning process.

Measures to Minimize Environmental Harm

Mitigation of impacts to eagles is a central component of the management approach the Service is adopting. Mitigation is achieved at the individual permit level, as required by the final regulation and Alternative 5 of the PEIS. The Eagle Act requires that any take the Service authorizes to protect “interests in any particular locality” must be “necessary.” To meet that standard, all permittees must avoid and minimize impacts to the extent practicable in order to qualify for a permit. The Eagle Act requires permit issuance to be “compatible with the preservation of eagles,” which is defined in the regulations as “consistent with the goals of maintaining stable or increasing” eagle populations. To meet this standard, the Service requires that any take authorized above the conservative EMU take limits of Alternative 5 is offset with compensatory mitigation. Additionally, the best available information indicates that ongoing levels of human-caused mortality of golden eagles likely exceed the sustainable take rate, potentially significantly. Accordingly, with golden eagles possibly in decline, permits for golden eagle take will require a base mitigation ratio of 1.2 to 1 for each eagle authorized to be taken. This approach, along with the required avoidance and minimization measures, will ensure that permit issuance meets the preservation standard of the Eagle Act.

Compensatory mitigation may include conservation banking, in-lieu fee programs, and other third-party mitigation projects or arrangements. In approving compensatory mitigation

Eagle Rule Revision Record of Decision

mechanisms and actions, the Service will ensure the application of all necessary ecological, procedural, monitoring, and administrative standards.

Findings Required by Law Other Laws and Executive Orders

The proposed action complies with all federal laws and executive orders related to federal rulemaking, including: the Administrative Procedure Act (5 U.S.C. §§ 551–559); the Regulatory Flexibility Act (5 U.S.C. §§ 601 *et seq.*); Executive Orders 12866, 13563, 13132, 13175, and 13211; the Paperwork Reduction Act of 1995 (44 U.S.C. §§ 3501–3521); the National Environmental Policy Act (42 U.S.C. §§ 4321 *et seq.*); and the Endangered Species Act (16 U.S.C. §§ 1531–1544).

For Further Information

Questions about the Final PEIS and final regulations may be directed to Eliza Savage, Eagle Rule Revision Project Manager, (703) 358-2329 or eliza_savage@fws.gov.



Director

12.13.2016

Date