



United States Department of the Interior

FISH AND WILDLIFE SERVICE
Washington D.C. 20240



In Reply Refer To
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December 18, 2017

Memorandum

To: Regional Directors, Regions 1-8
Assistant Director, Ecological Services
Chief, National Wildlife Refuge System
Chief, Office of Law Enforcement

From: Assistant Director for Migratory Birds
(sgd/ Jerome Ford)

Subject: Pre-construction Eagle Survey Waivers under Certain Exceptional Circumstances
for Wind Energy Projects

The purpose of this memorandum is to clarify and expedite the approval of waivers of the pre-construction survey requirements for certain wind projects under the 2016 bald and golden eagle incidental take permit regulations (50 CFR § 22.26(d)). This guidance pertains only to the categories of projects listed below. This guidance does not preclude the Service from granting waivers in other circumstances, which will continue to be granted on a case-by-case basis for exceptional circumstances in conformance with the regulations.

The authority to issue this guidance is pursuant to the Bald and Golden Eagle Protection Act (16 U.S.C. 668–668d). The implementing regulations of the Eagle Act (50 C.F.R. 22.26) require specific pre-construction protocols for wind energy companies applying for an eagle incidental take permit, but provide for a waiver under “exceptional circumstances.” (§ 22.26(d)(3)(ii)–(iii).

This guidance applies to wind projects that were already operational when the pre-construction survey protocols became mandatory, as well as those that were too far along in the planning process to practicably comply with the newly required survey protocols. The Service will grant waivers from the two-year pre-application survey requirements for wind energy projects in the following circumstances:

- 1) Projects that were operational prior to January 17, 2017, the effective date of the eagle incidental take rule revisions;
- 2) Projects not yet operational, to which the Service, prior to the date of this memorandum, has communicated that their survey efforts were sufficient;

- 3) Projects not yet operational, for which construction schedules and/or contractual obligations for activities to occur prior to January 17, 2019 prevent the project from completing two years of pre-construction eagle use surveys in the manner specified in 50 C.F.R. 22.26(d)(3)(ii)(A-F).

For applicants that fall under the categories above, the Service will use the following approaches to estimate eagle take to be authorized under the permit.

1. Projects operational prior to January 17, 2017.

The Service will accept applications from existing facilities with pre-construction survey data that does not meet the 2016 regulatory requirement at subsection (d)(3)(ii) because those facilities cannot now conduct pre-construction surveys at their already-operational facilities. Already-operational wind projects, including “repowering” projects, represent “exceptional circumstances” because the requirement to conduct pre-construction surveys using the specific protocols in the regulations was intended to apply only to projects that are not yet built. Permitting offices will determine if available fatality monitoring data is of sufficient quality to be used in the Service’s collision risk model for determining authorized take levels.

For operational and repowering wind project applications where no usable survey data exists, the Service will estimate eagle take by running its collision risk model using the existing priors only. These priors, if not updated with any exposure (i.e. eagle use) data, will generally produce more conservative (higher) take predictions and will decrease the risk that actual take will be underestimated.

Before issuing a permit to an operational wind facility where eagle take has occurred, the permit office should coordinate with the Service’s Office of Law Enforcement (OLE) to ensure the permitting process will not interfere with possible enforcement actions. Civil or criminal settlement agreements that result from OLE investigation may provide additional opportunities to establish requirements for pre-application fatality surveys that increase our confidence in the fatality prediction for the project.

2. Projects not yet operational, to which the Service, prior to the date of this memorandum, has communicated that their survey efforts were sufficient.

If the Service, in working with the applicant, has communicated that their survey efforts were sufficient, we will not require that applicant to comply with the 2016 pre-construction survey provisions. A waiver is appropriate for these applicants because the Service has already determined that existing data and/or methods were sufficient to predict the project’s risk to eagles.

3. Projects not yet operational, for which construction schedules and/or contractual obligations for activities to occur prior to January 17, 2019 prevent the project from completing two years of pre-construction eagle use surveys in the manner specified in 50 C.F.R. 22.26(d)(3)(ii)(A-F).

This category of projects cannot complete two years of pre-construction surveys due to fixed construction schedules and /or contractual obligations that preclude conducting the two-year surveys if data were not collected prior to the effective date of the revised regulations. The Service will determine if available preconstruction survey data are of sufficient quality to be used in the Service's collision risk model for determining authorized take levels.

Where no usable survey data exists, the Service will estimate eagle take by running its collision risk model using the existing priors only. These priors, if not updated with any exposure (i.e. eagle use) data, will generally produce more conservative (higher) take predictions and will decrease the risk that actual take will be underestimated.

For all of the above categories of projects, depending on the quality and amount of data that are available and the relative risk of the project to eagles, more intensive eagle fatality monitoring under the permit may be required to more expediently determine the actual level of take at the project. Enhanced fatality monitoring data will allow for timely implementation of adaptive management measures to further reduce the risk of taking eagles in excess of authorized levels.