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[4910-13]

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Docket No. FAA-2016-9284]

Applicability of National Environmental Policy Act (NEPA) to Federal Aviation Administration (FAA) Review of Airport Wildlife Hazard Management Plans

AGENCY: Federal Aviation Administration (FAA), DOT

ACTION: Notice and Request for Comments.

SUMMARY: The Federal Aviation Administration (FAA) Office of Airports is clarifying a program guidance letter issued in 2006 concerning how federal environmental laws apply to FAA approval of a new or updated airport Wildlife Hazard Management Plan (WHMP). Recent issues and questions have arisen that make it necessary to update and clarify the guidance. The clarified policy includes circumstances where the FAA would approve WHMPs, and delineate which individual measures in a plan the airport may implement based upon a categorical exclusion without further environmental review or coordination. In contrast, other measures might be subject to a higher level of review and interagency coordination prior to approval. The FAA is publishing this for notice and comment prior to implementation.

DATES: Written comments must be received on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN FEDERAL REGISTER]**.

ADDRESSES: Send comments identified by docket number FAA-2016-9284 using any of the following methods:

- **Federal eRulemaking Portal:** Go to <http://www.regulations.gov> and follow the online instructions for sending your comments electronically.
- **Mail:** Send comments to Docket Operations, M-30; U.S. Department of Transportation

(DOT), 1200 New Jersey Avenue, SE., Room W12-140, West Building Ground Floor, Washington, DC 20590-0001.

- Hand Delivery or Courier: Take comments to Docket Operations in Room W12-140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- Fax: Fax comments to Docket Operations at 202-493-2251.

Privacy: The FAA will post all comments it receives, without change, to <http://www.regulations.gov>, including any personal information the commenter provides. Using the search function of the docket web site, anyone can find and read the electronic form of all comments received into any FAA docket, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, etc.). DOT's complete Privacy Act Statement can be found in the Federal Register published on April 11, 2000 (65 FR 19477-19478), as well as at <http://DocketsInfo.dot.gov>.

Docket: Background documents or comments received may be read at <http://www.regulations.gov> at any time. Follow the online instructions for accessing the docket or go to the Docket Operations in Room W12-140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Mr. Elliott Black, Director, Office of Airport Planning and Programming. Mailing address: Federal Aviation Administration, 800 Independence Ave., SW, Washington, D.C. 20591. Telephone: (202) 267-8775. Email address: Elliott.Black@faa.gov.

SUPPLEMENTARY INFORMATION:

Authority. 49 United States Code (USC) §44706 (“Airport operating certificates) and 14 CFR Part 139.337 (“Wildlife Hazard Management”); and 42 United States Code [U.S.C.] §§ 4321-4335 National Environmental Policy Act (NEPA).

Title 14 CFR part 139 §139.337 (“Wildlife hazard management”) requires in part that when the FAA determines that a wildlife hazard management plan is needed, the certificate holder must formulate and implement a plan using the wildlife hazard assessment as a basis. The plan must provide measures to reduce or eliminate wildlife hazards to air carrier operations, and be submitted to (and approved by) the FAA prior to implementation.

In 2006, the FAA’s Office of Airports issued Program and Policy Guidance Letter 92 (“Policy 92”) to address questions about the applicability of the National Environmental Policy Act (NEPA) to FAA approval of WHMPs, and the certificate holder’s implementation of those plans.¹ That policy referred in part to Section 209 of FAA Order 5050.4B, “National Environmental Policy Act (NEPA) Implementing Instructions for Airport Actions” (April 28, 2006), which addressed the applicability of NEPA to an approval of a WHMP required under 14 CFR Part 139.

Recent litigation concerning the snowy owl at an airport in New York and coordination with federal resource agencies on plan updates has led to closer scrutiny of some of the language contained in Section 209 of FAA Order 5050.4B. The language may have created some

¹ Available online at http://www.faa.gov/airports/airport_safety/wildlife/.

confusion, because it may appear to some readers to focus on NEPA requirements primarily in the context of Airport Improvement Program (AIP) grants or Airport Layout Plan (ALP) approvals. The FAA will similarly explain in an upcoming revision of Order 5050.4B that NEPA applies to the federal action of approving the WHMP and that this environmental review is typically sufficient for any related AIP grant or ALP approvals. The approval of the WHMPs is considered to involve sufficient discretion that NEPA (and other federal environmental laws) apply.

In the meantime, the FAA is proposing to revise the 2006 “Policy 92” document (“Applicability of National Environmental Policy Act to Federal Aviation Administration Mandated Wildlife Hazard Management Plans”) to clarify the process and procedures. The revised policy would read as follows:

Proposed Text of Revised Policy 92. When the FAA requires the holder of an Airport Operating Certificate to prepare a new or updated² Wildlife Hazard Management Plan (WHMP), the Certificate Holder must submit the plan to the FAA for approval before implementation [§139.337(e)].

The FAA’s approval of a WHMP is a federal action subject to the National Environmental Policy Act (NEPA). In addition, WHMPs may include measures that are subject to related federal actions of airport layout plan approval and/or federal funding. Section 209 of FAA Order 5050.4B, “National Environmental Policy Act (NEPA) Implementing Instructions for Airport

² For purposes of this FRN, every reference to “WHMP” should be read as “new or updated WHMP,” because the same provisions apply to either circumstance.

Actions” (April 28, 2006), addressed the applicability of NEPA to a WHMP required under Part 139. However, insofar as that section may have been read by some to focus primarily on airport actions implementing WHMPs that involved AIP grant funding and/or airport layout plan approval, and to suggest that these actions were handled distinctly from plan approval for purposes of NEPA, it may have led to some misunderstanding. NEPA applies to the federal action of approving WHMPs. This environmental review is typically sufficient for any related AIP grant or ALP approvals. As a matter of federal or state law, the certificate holder may also be subject to permitting or licensing requirements for its actions in implementing discrete WHMP measures. FAA considers whether there is a reasonable assurance of obtaining these permits and licenses in reviewing approval of the plan under NEPA.

The FAA must consider the existence of extraordinary circumstances when determining whether to categorically exclude approval of any or all WHMP measures. In our experience, airport certificate holders will often be able to implement many, if not all, measures under a WHMP based upon a categorical exclusion. The measures in most plans qualify for a categorical exclusion because they are not reasonably expected to significantly change land use management or cause environmental impacts. Most of the measures in a WHMP also have independent utility from other measures because they address different safety concerns. However, under certain circumstances, an EA or EIS may be required prior to FAA approval of a WHMP, and/or prior to the certificate holder’s implementation of certain measures within an approved WHMP.

The effect of this clarification will be to set forth in more detail how and why the FAA and airport sponsor, consistent with independent utility and requirements to consider extraordinary circumstances, may delineate certain measures in the Plan for approval based upon categorical

exclusion while identifying others that trigger special purpose environmental laws like ESA Section 7 for further environmental review prior to approval. In other words, the measures in the plan that do not trigger special purpose laws may be approved by the FAA, provided they have independent utility and otherwise qualify for categorical exclusion. The FAA may then conditionally approve the plan as to the remaining measures pending any further required environmental review.

Responsibilities and Procedures:

- **Certificate Holders.** The Certificate Holder is responsible for monitoring wildlife hazards and initiating required coordination with the FAA early enough to mitigate risks while complying with all applicable environmental laws and regulations. The Certificate Holder is responsible for identifying any protected environmental resources (e.g., threatened and endangered species, wetlands, archeological sites) on or near the airport. It is the Certificate Holder's responsibility to contact the appropriate FAA Airports Regional Office or Airports District Office to provide any information required in support of the environmental review process for all measures within the WHMP. The Certificate Holder is responsible for implementing measures of the WHMP only after they have received the required environmental approvals, unless an emergency condition compels the Certificate Holder to take immediate steps in order to protect the safety of air transportation. In such circumstances, the Certificate Holder must immediately alert the FAA of the emergency circumstances so that FAA may follow emergency provisions in applicable environmental laws such as NEPA and the ESA.³ The Certificate Holder is responsible for compliance with 14 CFR Part 139.337 ("Wildlife Hazard Management") as well as all applicable Federal,

³ FAA's emergency procedures are outlined in section 807 of FAA Order 1050.1F.

state and local environmental laws and regulations. For plan components/measures not covered by categorical exclusions, certain findings and determinations required under special purpose laws, requirements, regulations, or orders may need to be completed before FAA can approve them.⁴

- **Safety Inspectors.** The FAA’s designated Airport Certification Safety Inspector (ACSI) must review all WHMPs that are required for compliance with §139.337(f). The ACSI must coordinate approval of the WHMP with the FAA Environmental Protection Specialist (EPS), and should involve the EPS as early as possible in the process in order to help identify and address potential environmental issues as expeditiously as possible. The FAA’s approval of new WHMPs and updates to WHMPs is normally categorically excluded under FAA Order 1050.1F⁵, paragraph 5-6.2(e)⁶, provided there are no extraordinary circumstances. If there is evidence of protected environmental resources (e.g., threatened and endangered species, wetlands, archeological sites) on or near the airport, an environmental review associated with the WHMP must address how the implementation of wildlife control measures might impact these resources, and clearly identify any required mitigation measures and associated regulatory/permit requirements.

The ACSI will coordinate with the FAA’s EPS to determine whether any measures of the WHMP may require NEPA review beyond a categorical exclusion, and to ensure compliance with any other applicable environmental law. Approval letters will indicate which measures

⁴ FAA Order 1050.1F Desk Reference describes laws, regulations, and orders in addition to NEPA that must be complied with before approving a proposed Federal action.

⁵ “Environmental Impacts: Policies and Procedures” (dated July 16, 2015)

⁶ Previously paragraph 308e in FAA Order 1050.1E.

are not yet approved for implementation due to a need for additional FAA NEPA or special purpose law compliance, which measures are approved with conditions that the Certificate Holder must satisfy prior to implementation of the measure, and which measures are approved outright and ready for implementation.

- **Environmental Protection Specialists (EPS's).** The EPS will coordinate with the ACSI to review all available information to determine whether FAA may categorically exclude the approval of any or all of the WHMP measures comprising the WHMP in accordance with paragraph 5-6.2(e) of FAA Order 1050.1F, or whether any may require preparation of an Environmental Assessment (EA) or Environmental Impact Statement (EIS). To avoid segmentation, the FAA's EPS will, as part of the review of extraordinary circumstances, consider whether any measures considered for approval under a categorical exclusion are connected to other measures that may require further environmental review or interagency coordination. The EPS will provide the ACSI with language (for inclusion in the letter to the Certificate Holder) explaining which measures and aspects of the Plan are approved, approved with conditions (like obtaining a 404 permit) but without requiring further FAA action, or disapproved or requiring further environmental analysis or consultation by FAA. The EPS will also advise the Certificate Holder regarding which agency is responsible for coordination with the applicable resource agencies.⁷ If there are additional environmental reviews needed before the Certificate Holder can implement a specific action, the EPS will help draft conditions requiring such coordination and completion of the environmental review before implementation of the action is undertaken by the Certificate Holder.

⁷ The FAA is also reviewing its Policy and Guidance Letter 78 (dated June 21, 2004), which addresses Section 7 consultation with the U.S. Fish & Wildlife Service (USFWS) under the Endangered Species Act (ESA). The FAA will either update, revise or rescind that policy as appropriate after coordination with the USFWS.

Certification Status: Certificate Holders should note that, pursuant to Section 139.337(e), FAA's approval of a WHMP satisfies their requirements as long as the Certificate Holder implements the approved provisions and works to obtain approval of the remaining measures. To the extent there are measures that require additional NEPA review and/or other interagency coordination, the Certificate Holder may not implement those measures unless and until the FAA and/or the appropriate resource agency have reached a favorable environmental determination. The Certificate Holder must then carry out the approved measures to remain in compliance with Part 139 certification requirements. This does not relieve the Certificate Holder of their responsibility to continue to monitor wildlife hazards and take relevant and appropriate measures to minimize the risks, to the extent permissible under the WHMP and all applicable environmental laws and regulations.

If the WHMP has no measures that can be implemented immediately, the Certificate Holder must consider and document interim mitigation measures, in consultation with the FAA's ACSI and EPS. For example, if the WHMP calls for certain depredation measures which require approval by the U.S. Fish & Wildlife Service, then the Certificate Holder may commit to monitoring wildlife numbers and activities, and seek under any available emergency provisions to conduct the least invasive measure in the interim. In extraordinarily rare circumstances, it may be possible for a Certificate Holder to demonstrate that wildlife hazards represent such an immediate threat to the safety of the traveling public that the emergency provisions of NEPA and the Endangered Species Act offer some latitude for interim action. This would be rare, however, because the FAA expects Certificate Holders to monitor wildlife hazards and initiate required coordination early enough to mitigate risks while complying with all applicable environmental

laws and regulations.

Applicability to non-139 airports: The FAA encourages all airport operators to actively monitor and manage wildlife hazards on and near the airport environs. Other airports (such as those that are certificated under 14 CFR Part 139 but that have not had a triggering event that would mandate a WHMP, or for airports not certificated under Part 139) are still encouraged to undertake Wildlife Hazard Assessments or Wildlife Hazard Site Visits, and to establish and implement WHMPs when justified.⁸ However, the FAA would not approve such plans, so unless implementation of the WHMP required a change to the ALP, or involved federal funding, there would most likely be no Federal action from the FAA's perspective. Airport owners and operators would have to comply with all applicable Federal environmental laws and regulations related to any measures contained within such WHMPs if they have the potential to impact threatened and endangered species, wetlands, archeological sites or other protected environmental resources. The FAA would make its expert wildlife and environmental resources available to the airport in such circumstances, and may support interagency coordination if necessary depending upon the proposed measures.

Effective date: Once the FAA has received and reviewed any comments submitted in response to this *Federal Register* notice, the FAA will publish a final revision of Policy 92, which will be effective as of the date of its publication for any new or updated WHMP that has not yet been submitted to the FAA for review and approval as of that date. However, this does not relieve

⁸ The FAA previously issued a *Federal Register* notice for public comment on December 10, 2012 (77 FR 73511). The FRN presented a clarification of Grant Assurance #19 (Operation and Maintenance), which would have clarified the expectation for all federally-obligated airports to conduct Wildlife Hazard Site Visits (WHSVs) or Wildlife Hazard Assessments (WHAs). Based in part on comments received in response to that *Federal Register* notice, the FAA has decided not to proceed with this clarification at this time.

airport Certificate Holders of their responsibilities for additional permitting and interagency coordination that may already be required under applicable federal environmental laws for implementation of certain measures, even if those measures were submitted as part of a WHMP that was previously approved by the FAA but not yet implemented.

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