DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Parts 13 and 22

[FWS-R9-MB-2008-0057; 91200-1231-9BPP-L2]

RIN 1018-AV81

Eagle Permits; Take Necessary To Protect Interests in Particular Localities

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: In conjunction with release of a final environmental assessment of this action, the U.S. Fish and Wildlife Service (''we'' or ''the Service'') is finalizing permit regulations to authorize limited take of bald eagles (*Haliaeetus leucocephalus*) and golden eagles (*Aquila chrysaetos*) under the Bald and Golden Eagle Protection Act (Eagle Act), where the take to be authorized is associated with otherwise lawful activities. These regulations also establish permit provisions for intentional take of eagle nests under particular, limited circumstances.

DATES: This rule goes into effect on November 10, 2009.

FOR FURTHER INFORMATION CONTACT: Eliza Savage, Division of Migratory Bird Management, via e-mail at *eliza_savage@fws.gov;* telephone: 703-358-2329; or U.S. Fish and Wildlife Service, 4401 North Fairfax Drive, Mailstop 4107, Arlington, Virginia 22203-1610.

SUPPLEMENTARY INFORMATION:

Background

These final regulations authorize the limited take of bald eagles and golden eagles under the Bald and Golden Eagle Protection Act (Eagle Act) (16 U.S.C. 668–668d), where the take to be authorized is associated with otherwise lawful activities. These regulations also establish permit provisions for intentional take of eagle nests where necessary to ensure public health and safety and in other limited circumstances. We proposed these regulations on June 5, 2007 (72 FR 31141) and provided a 90–day public comment period, which closed on September 4, 2007. The Service received approximately 21,500 comments, about 21,400 of which are essentially identical. Thirty-five respondents provided substantive input that was helpful in crafting final regulations. The 35 respondents consisted of: one Federal agency, three tribes, six State conservation agencies, four flyway committees (associations of State conservation agencies), one State department of transportation, five environmental non-governmental organizations (NGOs), four industry associations, three law firms/consultants on behalf of Florida development companies, two power companies, one Federal reclamation project, one airport, three rail transportation companies (commenting together), and three private citizens.

We released a draft environmental assessment (DEA) of the action on August 14, 2008 (73 FR 47574) and re-opened the public comment period on the proposed rule with some revisions noted in the August 14 **Federal Register** notice. During that 30–day comment period, we received 58 comments from: one airport, three electric utilities, three Federal agencies, ten individuals (non-tribal), five industry associations, nine NGOs, one conglomeration of railroad companies, 13 State agencies, three flyway committees, one transportation association, three Native American tribal members one tribal Department of Natural Resources, three tribes, and two confederations of tribes.

Based on public comment received on the June 5, 2007 proposed rule, new information compiled through the process of drafting the DEA, and public comment on the DEA and re-opened rule, we developed this final rule, the final environmental impact assessment (FEA), and a Finding of No Significant Impact. Along with a variety of small changes, this final rule contains the following significant additions and revisions from the June 5, 2007, proposed rule:

- The rule was split into two rules to be finalized separately from one another. The original proposal to extend (or ''grandfather'') Eagle Act take authorization to take previously authorized under the Endangered Species Act (ESA) (16 U.S.C. 1531 *et seq.*) has been separated from the remainder of the provisions in order to finalize the ''grandfathering'' provisions more expeditiously. Those provisions were published as a final rule on May 20, 2008 (73 FR 29075).
- We modified our interpretation (provided in the June 5, 2007, proposed rule) of the statutory mandate that permitted take be ''compatible with the preservation of the bald eagle or the golden eagle.'' In the original proposal, we proposed to use the standard that regional and national eagle populations not decline at a rate greater than 0.54% annually. In this final rule, we interpret the ''preservation'' standard to allow actions that are consistent with the goal of stable or increasing breeding populations.
- The rule includes new issuance criteria to ensure that, except for safety emergencies, Native American religious needs are given first priority if requests for eagle take permits exceed take thresholds that are compatible with the preservation of the bald eagle or the golden eagle.
- The rule no longer provides different issuance criteria for lethal versus non-lethal take. Rather, it contains separate provisions for programmatic take versus individual instances of take.
- We amend the existing Eagle Depredation Permit regulations at 50 CFR 22.23 to extend permit tenure from 90 days to up to 5 years for purposes of hazing eagles. The purpose of these revisions is to enable issuance of permits that combine programmatic authorizations provided under § 22.23 and the regulations in this final rule. We are also taking the opportunity to revise terminology throughout § 22.23 to clarify that we can issue permits under that section to prevent or resolve safety emergencies as well as to protect agriculture and wildlife.
- The rule expands (from the June 2007 proposed rule) the purposes for which eagle nests may be taken to include take necessary to ensure public health and safety. The proposed rule limited nest removal to emergencies where human or eagle safety was imminently threatened.
- Nest take permits may be issued for projects that will provide a net benefit to eagles (including projects where the net benefit is the result of compensatory mitigation measures).
- Permits may also be issued to take eagle nests built on human-engineered structures where the nest interferes with the intended use of the structure.
- The rule redefines some terms and includes new definitions for a number of additional terms used in the regulations.

The Bald and Golden Eagle Protection Act (16 U.S.C. 668-668d) (Eagle Act) prohibits the take of bald eagles and golden eagles unless pursuant to regulations (and in the case of bald eagles, take can only be authorized under a permit). While the bald eagle was listed under the ESA, authorizations for incidental take of bald eagles were granted through the ESA's section 10 incidental take permits and ESA's section 7 incidental take statements, both of which were issued with assurances that the Service would exercise enforcement discretion in relation to violations of the Eagle Act and Migratory Bird Treaty Act (MBTA) (16 U.S.C. 703-712). Upon delisting, all

prohibitions contained in the ESA, such as those that prescribe the take of bald eagles, no longer apply. However, the potential for human activities to violate Federal law by taking eagles remains under the prohibitions of the Eagle Act and the MBTA. The Eagle Act defines the ''take'' of an eagle to include a broad range of actions: ''pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, or molest or disturb.'' ''Disturb'' is defined in regulations at 50 CFR 22.3 as: ''to agitate or bother a bald or golden eagle to a degree that causes, or is likely to cause, based on the best scientific information available, (1) injury to an eagle, (2) a decrease in its productivity, by substantially interfering with normal breeding, feeding, or sheltering behavior, or (3) nest abandonment, by substantially interfering with normal breeding, feeding, or sheltering behavior.''

Many actions that are considered likely to incidentally take (harm or harass) eagles under the ESA will also disturb or otherwise take eagles under the Eagle Act. Until now, there was no regulatory mechanism in place under the Eagle Act to permit take of bald or golden eagles comparable to incidental take permits under the ESA. This rule adds a new section at 50 CFR 22.26 to authorize the issuance of permits to take bald eagles and golden eagles on a limited basis. The regulations are applicable to golden eagles as well as bald eagles. We will authorize take of bald or golden eagles only if we determine that the take (1) is compatible with the preservation of the bald eagle and the golden eagle and (2) cannot practicably be avoided. For purposes of these regulations, ''compatible with the preservation of the bald eagle or the golden eagle'' means ''consistent with the goal of stable or increasing breeding populations.'' Although the biologically-based take thresholds for permitting under these regulations will be based on regional populations (as explained below and in more detail in the FEA), we will also consider other factors, such as cultural significance, that may warrant protection of smaller and/or isolated populations within a region.

We are adding a second new section at 50 CFR 22.27 to authorize the removal of bald eagle and golden eagle nests where (1) necessary to alleviate a safety hazard to people or eagles, (2) necessary to ensure public health and safety, (3) the nest prevents the use of a human-engineered structure, or (4) the activity, or mitigation for the activity, will provide a net benefit to eagles. We are also promulgating new definitions under the Eagle Act to clarify terms used in the permit regulations. Permit issuance under § 22.26 and § 22.27 will be governed by the permit provisions presently in 50 CFR parts 13 and 22, and new provisions we are finalizing as § 22.26 and § 22.27.

In our June 5, 2007, proposed rule, we also proposed certain provisions to extend Eagle Act authorizations to persons previously granted authorization to take eagles under the ESA. We split the rulemaking into two separate rules and finalized the ESA-related provisions separately on May 20, 2008 (73 FR 29075).

Most rules take effect 30 days after **Federal Register** publication; however, more time is needed to work out important details about how this program will be implemented. Therefore this rule has an effective date of 60 days after publication in the **Federal Register**. We are drafting implementation guidance, and will release it for public notice and comment before officially adopting it. Although the implementation guidance will not be finalized by the rule's effective date, the extra 30 days will help promote consistency in the initial permit administration, and we can begin issuing permits using the draft guidance.

History

On August 8, 2007, the bald eagle was removed from the List of Threatened and Endangered Wildlife (72 FR 37345, July 9, 2007). The final delisting rule also constituted our final decision that the Sonoran Desert population of bald eagles did not qualify as a distinct population segment (DPS), and was therefore not a listable entity under the ESA. Our finding on the status of the Sonoran Desert population was challenged in court. A March 5, 2008, ruling by the U.S. District Court for the District of Arizona (*Center for Biological Diversity* v. *Kempthorne,* CV 07-0038-PHX-MHM (D. Ariz)) ruled in favor of the plaintiffs. As a result of the court order, we published two documents in the **Federal Register**. First, on May 1, 2008, we published a final rule reinstating ESA threatened status for bald eagles in the Sonoran Desert area of central Arizona (73 FR 23966). The final rule also included a map showing the geographic area where bald eagles are protected as a threatened species. Second, on May 20, 2008, we published a notice initiating a status review for bald eagles in the Sonoran Desert area of central Arizona (73 FR 29096). Once the status review is completed, we will issue a 12–month finding on whether listing these bald eagles as a DPS under the ESA is warranted, and if so, whether that DPS should be listed as threatened or endangered.

We estimate the current number of breeding pairs in the 48 contiguous States to be over 9,700. Bald eagles were never listed as threatened or endangered in Alaska, where we currently estimate bald eagles to number between 50,000 and 70,000 birds, including approximately 15,000 breeding pairs. Bald eagles do not occur in Hawaii.

Under sections 7(b)(4) and 10(a)(1)(B) of the ESA, we may authorize the incidental take of listed wildlife that occurs in the course of otherwise lawful activities. Thus, while the bald eagle was listed under the ESA in the lower 48 States (and where it is still listed, i.e., the Sonoran Desert area of central Arizona), two mechanisms were available to authorize take that was associated with, but not the purpose of, a human activity. Eagle take that was prohibited under the ESA is, in many instances, also prohibited under the Eagle Act. Now that the bald eagle is delisted (except for the Sonoran Desert population), a mechanism is needed to authorize take of bald eagles pursuant to the Eagle Act. The mechanism should also be available to authorize take of golden eagles, which were never listed as threatened or endangered under the ESA, as long as it is crafted with sufficient safeguards to ensure the preservation of both species.

The Eagle Act provides that the Secretary of the Interior may authorize certain otherwise prohibited activities through promulgation of regulations. The Secretary is authorized to prescribe regulations permitting the ''taking, possession, and transportation of [bald or golden eagles] . . . for the scientific or exhibition purposes of public museums, scientific societies, and zoological parks, or for the religious purposes of Indian tribes, or . . . for the protection of wildlife or of agricultural or other interests in any particular locality,'' provided such permits are ''compatible with the preservation of the bald eagle or the golden eagle'' (16 U.S.C. 668a). In accordance with this authority, the Secretary has previously promulgated Eagle Act permit regulations for scientific and exhibition purposes (50 CFR 22.21), for Indian religious purposes (50 CFR 22.22), to take depredating eagles (50 CFR 22.23), to possess golden eagles for falconry (50 CFR 22.24), and for the take of golden eagle nests that interfere with resource development or recovery operations (50 CFR 22.25). This rulemaking establishes permit regulations to authorize eagle take ''for the protection of . . . other interests in any particular locality.'' This statutory language accommodates a

broad spectrum of public and private interests (such as utility infrastructure development and maintenance, road construction, operation of airports, commercial or residential construction, resource recovery, recreational use, etc.) that might ''take'' eagles as defined under the Eagle Act.

In accordance with the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), we have prepared a final environmental assessment (FEA) of this action. You can obtain a copy of the FEA from *http://www.fws.gov/migratorybirds/baldeagle.htm*.

Description of the Rulemaking

Take Permit Regulations Under 50 CFR 22.26.

We promulgate a new permit regulation under the authority of the Eagle Act for the limited take of bald eagles and golden eagles ''for the protection of . . . other interests in any particular locality'' where the take is compatible with the preservation of the bald eagle and the golden eagle, is associated with and not the purpose of an otherwise lawful activity, and cannot practicably be avoided. ''Practicable'' in this context means ''capable of being done after taking into consideration, relative to the magnitude of the impacts to eagles (1) the cost of remedy compared to proponent resources; (2) existing technology; and (3) logistics in light of overall project purposes.''

We anticipate that permits issued under this regulation will usually authorize take that occurs in the form of disturbance; however, in some limited cases, a permit may authorize lethal take that results from but is not the purpose of an otherwise lawful activity. Programmatic take (take that is recurring and not in a specific, identifiable timeframe and/or location) will be authorized only where it is unavoidable despite implementation of comprehensive measures developed in cooperation with the Service to reduce the take below current levels (see discussion below, under ''Programmatic permits''). This type of authorization can be extended to industries, such as electric utilities or transportation industries, that currently take eagles in the course of otherwise lawful activities but who can work with the Service to develop and implement additional, exceptionally comprehensive measures to reduce take to the level where it is essentially unavoidable. A programmatic take permit could also be issued to State and Federal agencies that take eagles in the course of their activities (e.g., construction and maintenance of roads and other critical infrastructure) if they adopt such advanced conservation measures.

Purposeful take will not be authorized under this permit. In rare cases where purposeful take may be necessary to avoid incidental take (such as relocating birds or a nest from a critical project area), it may be authorized under 50 CFR 22.23 (for purposeful take of eagles to protect agriculture, wildlife, and other interests), 50 CFR 22.25 (take of golden eagle nests for resource development and recovery operations), or new 50 CFR 22.27 (take of nests for health and safety). The latter regulation is finalized as part of this rulemaking. Where appropriate, the Service will issue a single permit that combines authorizations provided under the various regulations. For example, an airport that meets the obligations of its Wildlife Hazard Management Plan and adopts measures developed in cooperation with the Service to minimize the potential for take of eagles, could be issued a programmatic permit under these regulations (§ 22.26) that would be valid for up to 5 years to authorize eagle take that occurs as the result of unavoidable collisions between eagles and planes. One of the stipulations of the permit would likely be the requirement to haze eagles in the vicinity of airports, which in some cases could constitute disturbance (for example, to prevent eagles from re-nesting at a hazardous location). Because this hazing is intentional and the effects on the eagles purposeful, it does not meet the issuance criteria for the § 22.26 permit, which requires the taking to be associated with, but not the purpose of, the activity. Therefore, we would issue the permit with the combined authority of both § 22.26 and § 22.23. However, the regulations at § 22.23 had previously limited permit tenure to 90 days because the need for programmatic authorization was not contemplated at the time that regulation was developed. In order to have the ability to extend this type of authorization to ''Advanced Conservation'' programmatic permittees, we are amending the regulations at § 22.23 to allow permits to also be valid for up to five years. We are also taking the opportunity to make additional minor revisions throughout § 22.23 to clarify that we may issue permits under that section to alleviate safety emergencies, and not just to protect agriculture, wildlife or other interests from depredating eagles. Hazing eagles at airports has been the primary purpose for which we have exercised this option, but there may be other scenarios where eagles are not depredating on any resource or private property, but their presence poses a danger to themselves or to people (e.g. at uncovered landfills where eagles may ingest toxic substances). Other than these clarifying revisions, including to the section title, and amending the permit tenure, we are not making any substantive revisions to the regulations at § 22.23 in this rulemaking.

Population Assessment and Take Thresholds. Permit issuance will be conditioned on various criteria, the most important of which is that the permitted take is compatible with the preservation of the bald eagle and the golden eagle. The statutory requirement that the authorized activities be compatible with the preservation of bald eagles and golden eagles ensures the continued protection of the species while allowing some impacts to individual eagles. For purposes of these regulations, ''compatible with the preservation of the bald eagle and golden eagle'' means ''consistent with the goal of stable or increasing breeding populations.''

In our June 5, 2007, proposed rule, we proposed to use 0.54% as the threshold rate of decline, which is the rate of decline used by Partners in Flight (PIF) as one of the factors for designating an avian species to their Continental Watch List. However, steady declines, even as small as 0.54% annually, would cumulatively result in an unacceptably large decrease in eagle populations over time. For this and other reasons (see Responses to Public Comments), we agree that the original proposed management scenario was not sufficiently conservative and will instead adopt as our management goal increasing or stable breeding populations.

In the DEA and notice re-opening of the comment period on the rule (73 FR 47574, August 14, 2008), to elucidate the statutory standard of ''preservation of the bald eagle or the golden eagle,'' we proposed the following terminology: ''maintaining increasing or stable populations.'' We continue to support the essential meaning of that standard, but recognized that it could be misapplied to constrain any authorization of take because any take of a bald or golden eagle by some degree results in a population decrease, even if short-term and inconsequential for the long-term preservation of the species. Thus, if interpreted so narrowly, the word ''maintaining'' would render us unable to authorize any take. Therefore, we are revising our interpretation of ''preservation of the eagle'' to read ''consistent with the goal of stable or increasing breeding populations.'' The

phrase ''consistent with the goal of'' will allow take that is compatible with long-term stability or growth of eagle populations. Adding the word ''breeding'' clarifies the significance of the number of breeding pairs for maintaining or growing populations, versus floaters (non-breeding adults). For more discussion on the biological basis for distinguishing between breeding eagles and floaters, see the FEA.

To establish management populations for bald eagles, we used natal populations (eagles within the median natal dispersal range of each other, estimated at 43 miles) in our evaluation in order to look at distribution across the landscape. Being able to see where natal populations appear sparser, rather than concentrated, allows us to determine natural boundaries between regional eagle populations, reducing the risk that we would issue take permits in any one regional management area in a manner that is disproportionate to the population in the area.

We acknowledge that this approach is somewhat subjective, and that the regional management populations delineated are not, in most cases, genetically or even demographically isolated. However, we believe the approach does serve to identify biologically-based, regional populations at a scale meaningful for eagle conservation. The Service's goal in managing bald eagles at this scale is to ensure permitted take does not negatively affect the species' status in any regional management population.

Because the management populations delineated by this approach roughly correspond to the Service's organizational structure made up of eight Service Regional Offices, we will manage bald eagles based on populations within the eight Service Regions, with some shared populations. Permits will be administered by Service Regions in coordination with each other, especially where a management area lies in more than one Service Region. We plan to evaluate this management and administrative approach regularly, at least once every five years.

For golden eagles, available data on distribution are not as spatially precise as data for bald eagles. We will manage take of golden eagles according to thresholds set at the Bird Conservation Region (BCR) level because the only range-wide estimates available for golden eagles are BCR-scale population estimates. BCRs are ecologically distinct regions in North America with similar bird communities, habitats, and resource management issues. Developed by a mapping team at the first international meeting of the North American Bird Conservation Initiative (NABCI) in 1998, BCRs are an application of the framework of nested ecological units delineated by the Commission for Environmental Cooperation (CEC).

Because Service Regions are not administered according to BCR boundaries, we will administer permits by Service Regional Permit offices. Service Regions would coordinate closely when issuing permits to ensure that the threshold for that BCR is not exceeded. Unfortunately, there is little reliable recent data for breeding golden eagles. Many States have not had the resources to conduct monitoring of golden eagle populations, in some cases for up to 20 or more years. However, we will base thresholds on existing data and modeling until better data become available. As discussed further below and in greater detail in the FEA, the best available data we have for golden eagles indicate modest declines in the four BCRs that constitute 80 percent of its range in the lower 48 states. As a result, until we have additional data to show that populations can withstand additional take, we are deferring implementation of the new permit types for golden eagles, except for safety emergencies and programmatic permits. We will continue to issue historically-authorized take permits under existing permit types at the level of take carried out under those permits (average over 2002-2007).

We will use modeling to evaluate the level of take we can permit that is compatible with this statutory threshold, taking into consideration the cumulative effects of all permitted take, including other forms of lethal take permitted under this section and other causes of mortality and nest loss. Due to the inherent limits of monitoring to detect precise fluctuations in bald eagle and golden eagle numbers, coupled with the uncertainty as to whether individual actions being permitted will in fact result in a ''take,'' we cannot precisely correlate each individual permit decision with a specific population impact. However, we will periodically re-calibrate regional take thresholds, using the best available data, including reporting data from permittees, data from post-delisting monitoring (for bald eagles), WEST surveys (for golden eagles), the Breeding Bird Survey, and fall and winter migration counts to assess the status of eagle populations and adjust permitting thresholds on an ongoing basis as appropriate.

In our June 5, 2007, proposed rule, we stated that our preliminary analysis indicated that demand for permits under these regulations, and the effects of issuing those permits, including mitigation measures, would not be significant enough to cause a decline in eagle populations from current levels. (We recognized that take of bald eagles in the Southwest would need to be extremely limited, if permitted at all.) However, further analysis indicates that there are additional populations where a relatively modest level of demand for take permits could exceed the level of take that would be compatible with maintaining current population levels, particularly for golden eagles.

A 2006 survey (Good and others, 2007) showed decreasing golden eagle populations in two BCRs. A draft report of 2007 surveys in the same areas (BCRs 9, 10, 16, and 17, hereinafter WEST areas) found decreasing golden eagle populations in two BCRs, one of which was the same as the previous report (Good and others, 2008). Kirk and Hyslop (1998) indicated that golden eagle populations may be declining in some areas of Canada. Good and others (2004) estimated that there were just over 27,000 golden eagles in the 4 BCRs in which the species is of conservation concern. These BCRs encompass much of the western U.S. population and most of the North American population of this species. Breeding bird surveys and migration counts are inconclusive but suggest lowered reproduction rates in the western United States, possibly due to habitat alteration and loss, with concomitant declines in prey (Kochert and others, 2002). A preliminary report on the 2008 surveys in the WEST areas showed population declines in all four BCRs covered in the survey, an area which is believed to contain approximately 80% of the golden eagle population in the lower 48 states.

These new permits represent a somewhat different approach to eagle management and have significant policy implications and uncertainties. Those uncertainties and stochasticity (natural variability in vital rates affecting population trends) for both species support a more conservative approach than we proposed in our DEA, which proposed capping threshold at $\frac{1}{2}$ maximum sustainable yield (MSY). The MSY is the greatest harvest rate over an indefinite period that does not produce a decline in the number of breeding adults in the population.

For a number of reasons (outlined in the following discussion) we intend to initially cap permitted take of bald eagles at 5% estimated annual productivity. This approach is consistent with the recommendations made by Millsap and Allen (2006) for

permitting take of various raptor species for falconry purposes. For golden eagles west of 100 degrees West longitude, including in Alaska, we will initially implement this rule only insofar as issuing take permits based on levels of historically authorized take, safety emergencies, and take permits designed to reduce ongoing mortalities and/or disturbance. Future projects seeking programmatic permits would need to minimize their own take of golden eagles to the point that it is unavoidable and also reduce take from another source to completely offset any new take from the new activity. Estimates of golden eagle population size in Alaska are coarse, based upon even fewer data sources than in the lower 48 states, and juvenile survival may be significantly lower, so management would therefore need to be conservative. In addition, McIntyre *et al.* (2008) suggested that conservation strategies for migratory golden eagles require a continental approach.

For golden eagles east of 100 degrees West longitude, we will not issue any take permits unless necessary to alleviate an immediate safety emergency. We do not have enough data on rates of golden eagle mortality in the eastern U.S. to issue programmatic take permits.

Our modeling showed there would be negative effects to the floater portion of the bald eagle population (using population trend data from Florida) at ½ MSY and even some minor effects with setting take at 5% of estimated annual productivity. Floaters, for which monitoring is rarely conducted, serve to buffer populations from decline in times when productivity does not offset mortality, and also serve to provide a buffer for unforeseen effects to populations. Importantly, the models did not factor in the cumulative impacts that were discussed in the DEA. Furthermore, the lack of annual monitoring to ensure we are not having a negative effect on populations, particularly when the thresholds we are establishing would be in effect for five years, compels us to adopt the more conservative approach. Some commenters, including eagle experts in various parts of the U.S. believe the DEA's population numbers and survival rates for bald eagles may have been too high for some areas of the country.

Additionally, the caps recommended in Millsap and Allen were in the context of falconry, where removal of birds from the population has no associated impacts to habitat, whereas many permits issued under both these new regulations will have long-term or permanent habitat-related impacts in addition to the removal of an individual from the population. Therefore, we believe that caps should be no less conservative than recommended for falconry take.

The lower take thresholds also reflect the cultural significance of both species. Cultural significance is not limited to Native American religious purposes, but encompasses a broad cultural regard for both species. Although collected by some Native American tribes for ceremonial purposes, the overall cultural value placed on bald eagles and golden eagles is generally quite distinct from the value of harvesting them. This fact warrants a different, significantly more conservative approach than for managing game bird populations wherein allowable take approaches MSY.

We intend, through a structured coordination process with States and tribes, to develop monitoring and research adequate to both resolve current uncertainties in the data and to provide enhanced ability to detect the effects of the permit program. If, after implementation for a time period commensurate with the normal population cycles of the eagle, data then indicate take thresholds can be increased in certain regions, we will increase thresholds accordingly to allow more take. One factor that should allow us to increase take thresholds in some regions for both species is the implementation of advanced conservation measures through programmatic permits to reduce ongoing take that is currently unauthorized. (See our discussion below under ''Programmatic Permits.'') For more detailed discussion of population modeling and permitting thresholds, please see our final environmental assessment of this action, available on our website at *http://www.fws.gov/migratorybirds/baldeagle.htm*.

To address the possibility that demand exceeds our scientifically-based take thresholds, the final regulation contains permit issuance criteria to ensure that requests by Native Americans to take eagles from the wild—where the take of live, wild eagles is absolutely necessary to meet the religious purposes of the tribe, as opposed to the use of feathers and parts that may be obtained from the National Eagle Repository—are given first priority over all other take, except as necessary to alleviate safety emergencies. (Permit regulations governing take and possession of eagles by Native Americans are set forth in 50 CFR 22.22) The American Indian Religious Freedom Act (42 U.S.C. 1996), sets forth Federal policy to protect and preserve the inherent right of American Indians to express and exercise their traditional religions, including but not limited to, access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

If emergency and Native American religious needs can be met, the issuance criteria further provide that programmatic permit renewals are given third priority. Projects to promote and maintain public health and safety have fourth priority. For golden eagle nest take permits, resource development and recovery operations have fifth priority. Assuming those interests can be met, bald eagle take for other interests may be permitted as long as total take authorizations do not surpass 5% estimated annual productivity for the regional bald eagle population. Initially, until we have data to show that golden eagles can withstand additional take, we will issue permits at historically-authorized take levels under existing permits, for emergency take, and for programmatic take (west of 100 degrees West longitude). If, in the future, data and modeling suggest golden eagle populations can support additional take, we would, in accordance with the prioritization criteria, begin to authorize golden eagle take at up to 1% of annual productivity, unless information available at that time demonstrates that higher levels of take can be supported (following Millsap and Allen 2006).

The Service's Regional Directors each will be responsible for developing a structured allocation process consistent with the rule's prioritization criteria to be implemented in each Service Region if there is evidence that demand for take will exceed take thresholds for either species of eagle.

Because we need, at least initially, to limit take permits for golden eagles to historically-authorized take levels, we will use the prioritization issuance criteria from this rule to guide permit decisions with regard to allocating all golden eagle take permits. For example, in Service Region 2, the Service has issued permits to take 28 golden eagles per year on average from 2002 – 2007 under the various permit types that allow take (e.g., scientific collecting, depredation, Native American religious purposes, etc.). On average, 23 of the golden eagles were taken for Native American religious purposes. If next year, the demand from qualified Native Americans increases to 28, we will issue *all* the available take permits (28) to Native Americans—unless there is a need to take eagles to alleviate a safety emergency (to protect either eagles or

people from physical harm or death), in accordance with the prioritization order.

A wide variety of activities, including various types of development, resource extraction, and recreational activities near sensitive areas such as nesting, feeding, and roosting sites, can disrupt or interfere with the behavioral patterns of bald eagles. We developed National Bald Eagle Management Guidelines (NBEMG or Guidelines) as a tool for landowners, project proponents, and the general public engaged in activities in the vicinity of bald eagles. The NBEMG are available at *http://www.fws.gov/migratorybirds.baldeagle.htm*. The NBEMG address potential negative effects of human activities on bald eagles, based on observed bald eagle behavior, and provide guidance on what types of activities are likely to cause bald eagle disturbance at varying distances to nests, communal roosts, and foraging areas, and how to avoid such disturbance.

We intend to use the *Draft U.S. Fish and Wildlife Service Raptor Conservation Measures* (soon to be released for public notice and comment) as interim guidance for golden eagle disturbance, until species-specific guidance can be developed. When referring to both the NBEMG and the *U.S. Fish and Wildlife Raptor Conservation Measures* in this rulemaking document, we refer to both documents together as ''guidelines'' with a lower case ''g.''

By adhering to the guidelines, landowners and project proponents should be able to avoid eagle disturbance most of the time. If avoiding disturbance is not practicable, the project proponent may apply for a take permit. A permit is not required to conduct any particular activity, but is necessary to avoid potential liability for take caused by the activity.

Disturbance may also result from human activity that occurs *after* the initial activities (e.g., residential occupancy or the use of commercial buildings, roads, piers, and boat-launching ramps). In general, we do not intend to issue permits for routine activities such as hiking, driving, normal residential activities, and ongoing use of existing facilities, where take could occur but is unlikely. New uses or uses of significantly greater scope or intensity may raise the likelihood that eagles will be disturbed, and as such could require authorization for take under these regulations.

To assess whether the Service's predictions regarding the likelihood of disturbance are generally sound, and thereby ensure that permit requirements are not unnecessarily burdensome to the public and are adequately protecting eagles, we will require permittees to provide basic post-activity monitoring (described below) by determining whether the nest site, communal roost, or important foraging area continues to be used by eagles for up to three years following completion of the activity for which the permit was issued, depending on the form and magnitude of the anticipated take and the objectives of the associated conservation measures. Where an activity is covered by a management plan that establishes monitoring protocols (e.g., an airport Wildlife Hazard Management Plan), the permit may specify that monitoring shall be conducted according to the pre-existing management plan.

We will use reporting data, as well as supplemental data we collect from some permittees' project areas, to ascertain how the activity actually affected the eagles in the area. With this information, we may be able to adjust take thresholds if take does not occur. The report data also will help us to assess how likely it is that future activities will result in loss of one or more eagles, a decrease in productivity of bald or golden eagles, and/or the permanent abandonment or loss of a nest site, communal roost site, or important foraging area. The outcome of disturbance permits, recorded in this way, may allow us to recalibrate the number of annual permits available in a Service Region, and to refine recommendations in future versions of the guidelines regarding buffer distances, timing of activities, and other practices that minimize take of eagles.

Although the information we will ask permittees to provide is relatively basic—whether eagles are observed at the nest, roost site or foraging area—we realize that reporting will not always be accurate. In addition to errors, some permittees may (unjustifiably) be concerned about law enforcement and may under-report take without fully understanding that the take has been authorized by their permits and thus is not a violation of the law. Overall, however, we expect most permittees will make a good-faith effort to honestly report eagle use of the area, resulting in a substantial body of useful information we do not otherwise have the resources to collect.

Along with annual report data, we will periodically assess overall population trends of both species of eagles, taking into consideration the cumulative effects of other activities that take eagles and eagle mortalities due to other factors. Based on the modeling we will use to set take thresholds, we do not expect population declines as the result of the authorizations granted through these regulations. However, it is also possible that external factors could arise that negatively affect eagle populations. Whatever the cause, in order to ensure that take is compatible with the preservation of the bald or golden eagle, we will not issue permits for take within a regional eagle population without sufficient data indicating the take will not result in a population decline.

Programmatic permits. The June 2007 proposed rule distinguished between lethal and non-lethal take (e.g., disturbance), and proposed that lethal take would be authorized only if it was unavoidable even when Best Management Practices (BMPs) were followed. We revised this concept to remove the distinction between lethal and non-lethal take, and replace it with a distinction between individual or ''one-time'' [1] take versus programmatic take. A programmatic permit will be available to industries or agencies undertaking activities that may disturb or otherwise take eagles on an on-going operational basis. We are defining ''programmatic take'' as ''take that (1) is recurring, but not caused solely by indirect effects, and (2) occurs over the long term and/or in a location or locations that cannot be specifically identified.'' The second criterion is the one that distinguishes programmatic take from any other take that has indirect effects that continue to cause take after the initial action. It is the key factor that makes programmatic take programmatic.

We define ''programmatic permit'' as ''a permit that authorizes programmatic take. A programmatic permit can cover other take in addition to programmatic take.'' We can issue programmatic permits for disturbance as well as take resulting in mortalities, based on implementation of ''advanced conservation practices'' developed in coordination with the Service. ''Advanced conservation practices'' (ACPs) refers to scientifically-supportable measures that are approved by the Service and represent the best-available techniques to reduce eagle disturbance and/or ongoing mortalities to a level where remaining take is unavoidable. The Federal Highway Administration is an example of an agency for which this streamlined

[1] By describing the standard (non-programmatic) permit as authorizing ''individual'' or ''one-time'' take, we do not mean to infer that only one eagle can be taken under a standard permit, or that if more than one eagle is taken, the take must occur simultaneously. We use the term, ''one-time'' for lack of a better word to refer to take is quantifiable and of a specified amount.

approach may benefit the agency and eagles. A programmatic take permit may be appropriate for industries such as the energy and transportation providers, among others, if they elect to work with the Service to develop ACPs. The ACPs and plan specifications will then become permit conditions, along with monitoring and reporting requirements more comprehensive than those for individual take permits. Programmatic permits are designed to provide a net benefit to eagles by reducing ongoing unauthorized take. Accordingly, programmatic permit conditions will be designed to provide ongoing long-term benefits to eagles. Recipients of programmatic permits must perform more rigorous monitoring than is required for standard, individual take permits.

Because the requirements for obtaining programmatic take authorization are designed to reduce take, the take authorized by programmatic permits for ongoing activities will not be subtracted from regional thresholds, nor would they be subject to the prioritization criteria. The reductions in take that result from implementation of new measures to reduce take from ongoing activities under programmatic permits may allow the Service to increase take thresholds and make additional permits available for other activities likely to result in take.

Applicants for programmatic permits for *new* activities will be subject to the same rigorous standards and may also be required to apply conservation measures at other sites (possibly owned or operated by a third party) where eagles are taken by existing operations. The purpose of the off-site measures would be to reduce take to a level that offsets some or all of the new take from the applicant's activity. The degree to which the applicant would be required to offset the take will depend on the status of eagle populations in the region; if populations of the particular eagle species are robust, the Service may not require any off-site reductions in take. However, if regional populations cannot absorb significant new take, the Service may require the project proponent to completely offset the effects of the new activity with reductions in take elsewhere.

To encourage potential applicants to seek programmatic permits (versus standard permits), the regulations contain issuance criteria that give priority to those seeking renewal of programmatic permits. These criteria will provide programmatic permittees with some assurance (though never an absolute guarantee) that previously authorized levels of take from on-going operations will continue to be authorized in the future. Programmatic permit renewals will have third priority, after (1) safety emergencies, and (2) take necessary to meet Native American religious needs, but before (4) non-emergency public health and safety.

A programmatic permit is optional. Entities that engage in programmatic take and who wish to obtain authorization for the take can choose whether to apply for the programmatic take permit or apply for standard permits for individual takes. One advantage of opting for the programmatic permit is it would remove liability comprehensively. It also lessens concern about whether additional take can be authorized under take thresholds in the future. The disadvantage is that the process of working with the Service to develop the permit conditions is likely to be time-consuming and more expensive than seeking a standard permit. Also, implementation of the ACPs will in most cases require substantial resources. In the long term, however, depending on the scale of an applicant's operations, programmatic permits should be the most economical approach for authorizing long-term or wide-ranging take of eagles.

A programmatic permit is not available where the only long-term take is due to indirect effects from an initial action. Programmatic take is the direct result of ongoing operations. The following are e*xamples of programmatic take:*

1. A railroad that routinely strikes eagles feeding on carcasses on the tracks.

2. Utilities that kill eagles through collisions and electrocutions from contact with power lines.

3. Ongoing disturbance at a port due to vessel traffic and/or other port operations.

4. Construction and maintenance of highways throughout a State or other jurisdiction that routinely disturbs eagles.

5. Airports that periodically (but immediately upon discovery) need to remove eagle nests to protect human and eagle safety.

Below are examples of what is not programmatic take:

1. Construction of a boat ramp, with or without long-term indirect effects that take eagles (boat traffic).

2. Construction of a port when eagles are disturbed by pile driving and other construction activities.

3. Construction of a single highway, or multiple highways, where eagle take can be projected to occur at particular locations and during specific project phases.

Although we define ''programmatic take'' as take that results from an activity and not from the activity's indirect effects, many activities that result in programmatic take will also have adverse indirect effects on eagles. Therefore, most programmatic permits will authorize other take in addition to the programmatic take, to cover the indirect effects. The Service will consider indirect effects of activities under both types of permits, first when deciding whether to issue the permit, and again when establishing conservation measures. Because programmatic permits are designed to reduce take to the level where it is unavoidable, if there are ACPs that will reduce take caused by indirect effects, those ACPS will be required conditions of the programmatic permit.

As further illustration of the differences between programmatic and standard permits, and the need to consider indirect effects under both, the following are two distinct activities that each directly take eagles and also have indirect effects that continue to take eagles; however, only one programmatically takes eagles and can be covered with a programmatic take permit.

First, a large housing development provides buffers around each nest on the property as recommended by the Service to avoid disturbing eagles. However, due to various constraints, the developer is unable to avoid impacts to the eagles' prey base, resulting in take of eagles in the form of lost productivity or abandonment of nesting territories. In this case, the construction of the development is not ongoing. What continues are the indirect effects of depriving eagles of their prey base. Therefore, the take caused by the housing development is not programmatic take, and to be authorized, would have to be covered under a standard permit.

Our second example is a company interested in siting a wind-power facility. We are currently unaware of any measures that would eliminate eagle mortalities when turbines are sited in golden eagle habitat (including migration corridors). If ACPs can be developed to significantly reduce the take, the operator may qualify for a programmatic take permit, since the ongoing mortalities are the direct result of the operation of the turbines. In addition to measures designed to reduce take directly, ACPs should also include measures to reduce indirect effects that contribute to the level of take, such as ensuring the project site does not

provide enhanced habitat for small mammals that eagles feed on, which would attract eagles to the area and increase the likelihood of collision with turbines.

Permit application process. Permits are available to Federal, State, municipal, or tribal governments; corporations and businesses; associations; and private individuals, all of which are subject to the prohibitions of the Eagle Act. Persons and organizations that obtain licenses, permits, grants, or other such services from government agencies are responsible for their own compliance with the Eagle Act and should individually seek permits for their actions that may take eagles. Government agencies must obtain permits for take that would result from agency actions that are implemented by the agency itself (including staff and contractors responsible for carrying out those actions on behalf of the agency).

The final regulations do not specify what information an applicant must submit to apply for an eagle take permit or to file an annual report, other than that he or she must submit a complete application form, including any required attachments to apply for a permit, and for annual reporting, the permittee must submit all the information required on the report form. By avoiding codification of application and reporting requirements, we can revise application and reporting requirements without undergoing the time-consuming rulemaking process. However, the public will have the opportunity to provide input on the content of these forms. All forms must be approved by the President's Office of Management and Budget (OMB) every three years, and as part of that process, all new forms and all changes to forms are subject to public review via a series of notices in the **Federal Register**. The forms we will use when this rule takes effect were subject to the OMB and public review process while this rule was being developed.

The new Service permit application Form 3-200-71 requires the following information from the applicant as part of the application process (in addition to the requirements of § 13.12(a) of this subchapter, which apply to all types of permits issued by the Service):

1. A detailed description of the activity that will cause the disturbance or other take of eagles;

2. The species and number of eagles that will be taken and the likely form of that take;

3. Maps and digital photographs that depict the locations of the proposed activity, including the area where eagles are likely to be taken;

4. For activities that are likely to disturb eagles (versus other take),

a. Maps and digital photographs of the eagle nests, foraging areas, and concentration sites where eagles are likely to be disturbed by the proposed activity (including the geographic coordinates of the activity area and important eagle-use area(s) and the distance(s) between those areas);

b. Whether or not the important eagle-use area(s) is visible from the activity area, or if screening vegetation or topography blocks the view; and

c. The nature and extent of existing activities in the vicinity that are similar to the proposed activity, and the distance between those activities and the important eagle-use area(s);

5. The date the activity will start and is projected to end;

6. An explanation of what interests(s) in a particular locality will be protected by the take, including any anticipated benefits to the applicant or to the public;

7. An explanation of why avoiding the take is not practicable, including at a minimum, a description of why take cannot be avoided after taking into consideration, relative to the magnitude of the impacts to eagles, (1) the cost of the remedy comparative with proponent resources; (2) existing technology; and (3) logistics in light of overall project purposes; or

8. For programmatic take, why take is unavoidable; and

9. A description of measures proposed to offset the detrimental impact of the proposed activity on the regional eagle population.

The Service's Ecological Services Field Offices may provide technical assistance prior to development of permit applications. In many cases, the Service may be able to recommend measures to reduce the likelihood of take, negating the need for a permit. The technical assistance that we provide from the field will reduce the number of applications to our permit offices for activities that (1) are unlikely to take eagles, or (2) can practicably be modified to avoid the take. The Service may elect to conduct an on-site assessment to determine whether the proposed activity is likely to take eagles and whether reasonable modifications to the project will alleviate the probability of take. In addition, State and tribal natural resources agencies may also be able to provide information pertaining to the number and location of eagles, eagle nests and other important eagle-use areas within the area potentially affected by the activity.

Application Evaluation Process. An initial consideration is whether take is likely to occur. Ideally, most potential applicants whose activities will not likely result in take will be dissuaded from applying for a permit after voluntary technical consultation with a Service field biologist. If, after an application is submitted, the Service determines that take is not likely to occur, we may issue the permit (if permit issuance criteria are met); however, if we do not consider take likely to occur, we will not subtract the authorized take from Regional take thresholds—unless follow-up monitoring reveals that it did actually occur.

Our primary consideration when issuing permits under this regulation is whether the take would be compatible with the preservation of the bald eagle and the golden eagle, including consideration of the cumulative effects of other permitted take and additional factors affecting eagle populations. When evaluating the take that may result from an activity for which a permit is sought (e.g., residential development), we will consider the effects of the preliminary activity (construction) as well as the effects of the foreseeable ongoing future uses (activities associated with human habitation). The impacts and threshold distances that we will consider will not be limited to the footprint of the initial activity if it is reasonably foreseeable that the activity will lead to adverse indirect effects on eagles. For example, when evaluating the effects of expanding a campground, in addition to considering the distance of the expansion from important eagle-use areas, we would consider the effects of increased pedestrian and motor traffic to and from the expanded campground. In many cases, the potential for take could be greater as a result of the activities that follow the initial project. For example, the installation of a boat ramp 500 feet from an important eagle foraging area may not disturb eagles during the construction phase, but the ensuing high levels of boat traffic through the area during peak feeding times may cause disturbance. Trail construction 400 feet from a nest is generally unlikely to take eagles, but if the trail will be open to off-road vehicle use during the nesting season, we would need to consider the impacts of the vehicular activity as part of the impacts of the trail construction.

If demand will exceed regional take thresholds (see above discussion under *Population Assessment and Take Thresholds*), the permit office will need to evaluate how the proposed activity

should be prioritized in accordance with the Regional structured allocation process established to ensure the Service adheres to the prioritization issuance criteria set forth in § 22.26(e) and § 22.27(d)(5) of the regulations.

We must then consider whether the take is associated with the permanent abandonment or loss of a nest site, territory, or other important eagle-use area. In reality, this evaluation would be tied to our primary consideration of whether the take would be compatible with the preservation of the bald eagle or the golden eagle because take associated with the loss of an important eagle-use area will generally have larger population impacts than a single, one-time disturbance. Depending on the magnitude of the impacts, the potential take could exceed the thresholds we establish as necessary to safeguard eagle populations. If so, we must deny the permit unless the applicant commits to compensatory mitigation measures that would offset the take to the level where it is compatible with the preservation of eagles.

Additional evaluation criteria include whether: (1) the take is necessary to protect a legitimate interest in a particular locality; (2) the take is associated with, but is not the purpose of the activity; (3) the take cannot practicably be avoided (or for programmatic authorizations, the take is unavoidable); and (4) the applicant has minimized impacts to eagles to the extent practicable, and for programmatic authorizations, the taking will occur despite application of Advanced Conservation Practices developed in coordination with the Service.

Before issuing a permit, we will consult with federally-recognized tribes if issuance of the permit might affect traditional tribal activities, practices, or beliefs. The Service's obligation to consult on a government-to-government basis with Native American tribes is set forth in Executive Order 13175, Consultation with Indian Tribal Governments (Nov. 6, 2000) and the Service's own ''Native American Policy'' (*http://www.fws.gov/nativeamerican/Graphics/Native_Amer_Policy.pdf*). The areas where eagles would be taken have the potential of being regarded as areas of traditional religious and cultural importance to Indian tribes, commonly referred to as Traditional Cultural Properties (TCP). Eagles are highly significant species for Native American culture and religion, and as such they might be viewed as contributing elements to a TCP. Take of one or more eagles from a TCP area could potentially be considered an adverse effect to the TCP. Eagles also have cultural significance to the wider American public, with the result that the Service will need to consider the concerns of any party with cultural interest in eagles, eagle nests, and eagle habitat under Section 106 of the National Historic Preservation Act (NHPA) (16 U.S.C. 470). (For more discussion on the NHPA, see our discussion in the **Required Determinations** section below under *National Historic Preservation Act*.)

Permit Conditions. Under the Service Mitigation Policy (46 Fed. Reg. 7644-7663, January 23, 1981) and the President's Council on Environmental Quality regulations (40 CFR Part 1508.20 (a-e)), mitigation includes: avoidance, minimization, rectification, reduction over time, and compensation for negative impacts, in this case to bald eagles and golden eagles. Under these regulations, all permittees will be required to avoid and minimize the potential for take to the degree practicable, and for programmatic permits, to the point where take is unavoidable.

Depending on the scale of the take, and the particular circumstances, the Service may require rectification (taking corrective action) and/or reduction over time from some permittees. However additional compensatory mitigation will be required only (1) for programmatic take and other multiple take authorizations; (2) for disturbance associated with the permanent loss of a breeding territory or important traditional communal roost site; or (3) as necessary to offset impacts to the local area population. Because our take permit thresholds are population-based, we have already determined before issuing each individual take permit that the population can withstand that level of take. Therefore, compensatory mitigation for one-time, individual take permits will not typically be necessary for the preservation of eagles. This approach is based on our analysis of *regional* population thresholds, and does not preclude a State or tribe from requiring additional mitigation for impacts authorized by a State or tribal permit or authorization within its jurisdiction. However, we intend to work with States and tribes to ensure that the total mitigation required of applicants by the Service and the State and/or tribe does not exceed what is appropriate to offset impacts to eagles from the proposed activity.

These regulations contain general conditions that will apply to all permits we issue under this section. If the permit expires or is suspended or revoked before the required measures are completed, the permittee will remain obligated to carry out those measures necessary to mitigate for take that has occurred up to that point. Permittees must allow Service personnel, or other qualified persons designated by the Service, access to the areas where take is anticipated, within reasonable hours and with reasonable notice from the Service, for purposes of monitoring eagles at the site(s). Although we do not anticipate the necessity for ongoing monitoring by the Service at the majority of permit locations, we will use the data collected from limited site visits to reevaluate, as appropriate, the recommendations we provide in the guidelines as well as through case-by-case technical assistance to ensure that eagles are adequately protected without unnecessarily hindering human activity.

If a permit is revoked or expires, the permittee must submit a report of activities conducted under the permit to the Service's Regional Migratory Bird Permit Office within 60 days of the revocation or expiration. The permit provides take authorization only for the activities set forth in the permit conditions. If the permittee subsequently contemplates different or additional activities that may take eagles, he or she must contact the Service to determine if a permit amendment is required to retain the level of take authority desired. Additionally, the validity of all permits issued under these regulations is conditioned on the permittee's compliance with all applicable Federal, tribal, State, and local laws and regulations governing the activity. Thus, if conduct of the activity violates State, tribal, or other laws, the Federal authorization granted by this permit is invalid.

We are defining one term in § 22.26 that will apply only to the regulations in that section and not to eagle permits, generally. ''Eagle'' under § 22.26 means ''a live bald eagle (*Haliaeetus leucocephalus*), live golden eagle (*Aquila chrysaetos*), a bald eagle egg, or a golden eagle egg.'' Eagle take under § 22.26 is limited to live birds and eggs, and excludes non-living specimens, feathers, parts, and nests.

We are in the process of developing implementation guidance to address procedural aspects of the permitting process. The guidance will cover time frames for permit issuance; identification of project impacts; appropriate mitigation measures; monitoring; coordination with States, tribes, and other Federal agencies; compliance with environmental reviews; and other specifics of the

permit process, in order to ensure consistency in implementation throughout the Service. We will work with interested States and tribes in developing the implementation guidance, and the general public will also have the opportunity to provide input once we make a draft available through a notice in the **Federal Register**.

Eagle Nest Take Under 50 CFR 22.27

Some eagles nest on or near electrical transmission towers, communication towers, airport runways, or other locations where they endanger themselves or create a hazard to humans. Regulations under this section, § 22.27, authorize removal and/or relocation of active and inactive eagle nests in what we expect to be the rare cases where genuine safety concerns necessitate the take. Examples include: (1) a nest tree that appears likely to topple onto a residence; (2) at airports to avoid collisions between eagles and aircraft; and (3) to relocate a nest built within a reservoir that will be flooded. Compensatory mitigation will sometimes but not always be required when nests must be removed for safety emergency purposes.

This permit will also be available to take *inactive* nests only, in three additional types of situations. First, we may issue a permit to remove an inactive eagle nest where, although the presence of the nest does not create an immediate safety emergency, the take is necessary to ensure public health and safety. For purposes of this regulation, ''necessary to ensure public health and safety'' means ''required to maintain society's well-being in matters of health and safety.'' For example, if the take would be compatible with the preservation of the eagle, and there is no practicable alternative to nest removal, a permit could be issued under this section to remove an inactive eagle nest located in the only feasible site for a hospital that is needed in a particular locality.

Second, a permit may be issued to take an inactive nest that is built on a human-engineered structure and creates a functional hazard that renders the structure inoperable for its intended use. For example, recently in Alaska, a pair of bald eagles nested on a crane that was temporarily not being used by the crane operator. Under these regulations, after waiting out the eagles' breeding cycle, the crane operator could be issued a permit to remove the inactive nest and reclaim the use of his crane.

Finally, the nest could be removed for an activity that will provide a net benefit to eagles, or for any purpose if the permittee conducts or secures mitigation measures that more than offset the impacts of removing the nest, creating a net benefit to eagles. For example, we may issue a permit to take a nest where necessary to carry out a habitat restoration project that will enhance habitat for eagles. Also, a homeowner could potentially obtain a permit to remove one of multiple nests in a territory, one which has not been used for several years, if compensatory mitigation measures will produce a net benefit to eagles (e.g., the landowner donates a permanent conservation easement to protect the riparian area where the nesting pair and wintering eagles traditionally forage). The scale of mitigation will depend on the degree of biological impact. To remove a nest from what is apparently the only viable nest site in a territory would have a greater biological impact than in the example just provided, and more mitigation might be necessary in order to realize a net benefit to eagles.

Where the nest would be taken for purposes other than to alleviate an immediate threat to safety, two additional criteria must be met before we may issue the permit. First, we may not issue the permit unless alternative suitable nesting and foraging habitat is available. Second, compensatory mitigation is required in every case.

Except for applications associated with safety emergencies, prior to authorizing nest removal, we will review the availability of potential alternative suitable habitat (nest substrate, foraging areas, etc.) and the distance to those areas, in order to reasonably assess the likelihood of total loss of the territory. When known, we will consider such factors as the number of nests in a particular breeding pair's nesting territory and the last known date when the nest under consideration for take was used, in order to try to assess the relative value of the nest to the breeding pair. We will also consider the density of surrounding territories and the nests within those territories to evaluate the ability of the area to support a displaced pair and assess whether the loss of a particular nest may have negative local population impacts. For overall permit management, we will consider local-area population effects within the species-specific natal dispersal distances (43 miles for bald eagles, 140 miles for golden eagles). However, we believe it would be too burdensome to ask the proponent to provide data on that large a scale. We have found, in implementing the resource-recovery permit for take of inactive golden eagle nests (50 CFR 22.25), that data within a 10-mile radius of the nest provides us with adequate information to evaluate many of the factors noted above.

Where practicable, nests should be relocated, or a substitute nest provided, in a suitable location within the same territory from which they were removed to provide a viable nesting site for breeding purposes of eagles within that territory, unless such relocation would create a similar threat to safety. Permits may also be issued to remove nests when it is determined by the Service that the nests cannot be relocated.

We may issue programmatic nest take permits under this section if the permittee commits to comprehensive measures (ACPs) to reduce the need for take. For example, programmatic authorization could be an appropriate means of authorizing take at airports that, despite scientifically-based measures developed in coordination with the Service to reduce take, cannot completely avoid some take in the form of disturbance and emergency nest removal (when nests are discovered despite diligent efforts to prevent eagles from occupying the area). Authorizing programmatic nest take, where such comprehensive measures are being taken by airports to reduce take, will help to minimize ''last minute'' nest removal emergencies, thus providing better protection from liability for the airports and enhanced protection of eagles.

We envision that there will be a need for permits that combine the two types of authorizations we are creating through this regulation (§ 22.26 and § 22.27), and perhaps additional authorizations as well. In such cases, we will usually issue one permit with dual (or multiple) authorizations. For example, to ensure safety at airfields, we would evaluate the airfield's wildlife hazard management plan to determine if it uses a progressive approach that starts with measures to reduce the presence of features attractive to eagles and ends with nest removal as a final option. If the management-plan components are adequate for protection of eagles, they would then become part of the permit conditions. The programmatic permit will not require re-application each year, but may be valid for up to 5 years, at which time the applicant could submit a request for renewal. There are annual reporting requirements and an option for the Service to re-evaluate the permit conditions if more take is occurring than anticipated. A permit such as described would be issued under the multiple authorities of existing § 22.23 (as revised by this rulemaking to extend permit tenure), new § 22.26, and new § 22.27.

As with other eagle take permits, nest take permits issued under § 22.27 will be subject to the take thresholds discussed earlier and more fully in the final environmental assessment of this action.

Similar to our approach to § 22.26 and some other recent Service regulations, we have not codified the application requirements within the regulation so we can more easily modify them based on new information and public input gathered through the triennial OMB information collection process (see above discussion under § 22.26, *Permit Application Process*). The current application form we will use for this regulation requires applicants to submit the following information:

(1) The number of nests proposed to be taken, whether the nest(s) is a bald eagle or golden eagle nest, and whether the nest(s) is active or inactive; and if known, whether it has been active in the 5 preceding breeding seasons.

(2) Why the removal of the nest(s) is necessary, including the interest to be served in a particular locality;

(3) A description of the property, including maps and digital photographs that show the location of the nest in relation to buildings, infrastructure, and human activities;

(4) The location of the property, including latitude and longitude;

(5) The length of time for which the permit is requested, including beginning and ending dates;

(6) A statement indicating the intended disposition of the nest(s), and if active, the nestlings or eggs;

(7) A calculation of the bald eagle or golden eagle area nesting population, including an appropriately-scaled map or plat showing the location of each eagle nest used to calculate the area nesting population unless the Service has sufficient data to independently calculate the area nesting population. (Not applicable for immediate safety emergencies.)

(8) A description of the avoidance, minimization, and mitigation measures the applicant proposes to reduce take and offset the detrimental impact of the permitted activity. (Not applicable for immediate safety emergencies.)

Even though the application form does not require applicants to describe proposed mitigation measures in cases of safety emergencies, we may require compensatory mitigation as a permit condition if appropriate to offset the detrimental impacts to eagles.

New and Modified Definitions Under 50 CFR 22.3

These regulations revise three definitions and codify 13 new terms in § 22.3, the section of eagle permit regulations that defines terms and is applicable to all eagle permit regulations in part 22. We amend the regulatory definition of ''take,'' to add the term ''destroy,'' to apply to bald eagle nests, to ensure consistency with the Eagle Act's intention to prohibit unpermitted eagle nest destruction. We define ''eagle nest'' as a ''readily identifiable structure built, maintained, or used by bald eagles or golden eagles for breeding purposes.'' This definition is based on, and replaces, the existing ''golden eagle nest'' definition, in order to apply with respect to both species. We are removing the existing definition of ''golden eagle nest'' from the list of definitions.

Similarly, this rule replaces the old definition ''inactive nest'' with a new definition that differs primarily insofar as it includes bald eagles as well as golden eagles. The new definition reads: ''a bald eagle or golden eagle nest that is not currently being used by eagles as determined by the continuing absence of any adult, egg, or dependent young at the nest for at least 10 consecutive days immediately prior to, and including, at present. An inactive nest may become active again and remains protected under the Eagle Act.'' All nests are protected by the Eagle Act, whether active or inactive, and the take of any nest requires a permit. The reason for distinguishing between active nests and inactive nests and for defining the term ''inactive nest'' is because the new nest-take-permit regulation, as well as existing regulations for take of golden eagle nests for resource development and recovery operations (50 CFR 22.25), regulate nests differently depending on whether they are currently active or inactive. Under existing § 22.25, a permit may be issued only for inactive nests. Under the regulations being finalized by this rulemaking, a permit can be issued for an active nest only if the location of the nest poses an immediate threat to safety. This definition is intended to be applied only to questions of whether or not a nest may be taken with reduced risk of associated take of birds. It is not intended to convey any other biological status, nor will it be the only criterion for permit evaluation.

We are codifying the term ''important eagle-use area'' in these permit regulations under § 22.26 to refer to nests, biologically important foraging areas, and communal roosts where eagles are potentially likely to be taken as the result of interference with breeding, feeding, or sheltering behaviors. We define ''important eagle-use area'' as ''an eagle nest, foraging area, or communal roost site that eagles rely on for breeding, sheltering, or feeding, and the landscape features surrounding such nest, foraging area, or roost site that are essential for the continued viability of the site for breeding, feeding, or sheltering eagles.'' This term refers to the particular areas, within a broader area where human activity occurs, where eagles are more likely to be taken (e.g., disturbed) by the activity because of the higher probability of interference with breeding, feeding, or sheltering behaviors at those areas.

To clarify terms used within the definition of ''important eagle-use area,'' we define ''foraging area'' to mean ''an area where eagles regularly feed during one or more seasons.'' We define ''communal roost site'' as ''an area where eagles gather repeatedly in the course of a season and shelter overnight and sometimes during the day in the event of inclement weather.'' Not all foraging areas and communal roost sites are important enough such that interfering with eagles at the site will cause disturbance (resulting in injury or nest abandonment). Whether eagles rely on a particular foraging area or communal roost site to that degree will depend on a variety of circumstances—most obviously, the availability of alternate, suitable sites for feeding or sheltering.

''Territory'' is defined as ''a defended area that contains, or historically contained, one or more nests within the home range of a mated pair of eagles.'' ''Cumulative effects'' means ''the incremental environmental impact or effect of the proposed action, together with impacts of past, present, and reasonably foreseeable future actions.'' We define ''indirect effects'' as ''effects for which a proposed action is a cause, and which may occur later in time and/or be physically manifested beyond the initial impacts of the action, but are still reasonably likely to occur.''

The regulations include the requirement that an applicant have avoided and minimized impacts to eagles to the maximum extent practicable. ''Practicable'' is defined as ''capable of being done after taking into consideration, relative to the magnitude of the impacts to eagles (1) the cost of remedy comparative with proponent resources; (2) existing technology; and (3) logistics in light of overall project purposes.'' For programmatic permits, the comparable standard is ''maximum degree achievable,'' defined as ''the standard at which any take that occurs is unavoidable despite implementation of Advanced Conservation Practices.''

''Necessary to ensure public health and safety'' is one criterion for obtaining a nest removal permit, and it is a criterion for prioritization in the regulations for both new permit types if demand exceeds take thresholds. We define it as ''required to maintain society's well-being in matters of health and safety.'' ''Safety emergency'' means ''a situation that necessitates immediate action to alleviate a threat of bodily harm to humans or eagles.'' Safety emergencies take precedence over take that is merely necessary to ensure public health and safety (as does take necessary for Native American religious use and renewal of programmatic permits). We may issue a permit to remove an active eagle nest in a safety emergency, but not for any other purpose.

We are defining ''programmatic take'' as ''take that (1) is recurring, but not caused by indirect effects (2) occurs over the long term and/or in a location or locations that cannot be specifically identified.'' We define ''programmatic permit'' as ''a permit that authorizes programmatic take.'' A programmatic permit can cover other take in addition to programmatic take. We can issue programmatic permits for disturbance and as well as take resulting in mortalities, based on implementation of ''advanced conservation practices'' developed in coordination with the Service. ''Advanced Conservation Practices'' means ''scientifically-supportable measures that are approved by the Service and represent the best-available techniques to reduce eagle disturbance and ongoing mortalities to a level where remaining take is unavoidable.''

Since § 22.26 does not apply to nests or non-living eagle parts, with regard to that section, we define ''eagle'' to mean only live eagles or eggs. This definition does not apply within any regulations other than § 22.26.

Revisions to Permit Regulations at 50 CFR 22.28

On May 20, 2008, the Service published regulations creating a new permit category at 50 CFR § 22.28 to provide expedited Eagle Act permits to entities authorized to take bald eagles through ESA section 7 incidental take statements (73 FR 29075, May 20, 2008). That new permit category applies to past section 7 take statements as well as any that may have been issued after the rule took effect. (e.g., for take of Sonoran Desert nesting bald eagles, or if bald eagles or golden eagles were ESA-listed in any other portion of their respective ranges). Now that a permit is available to authorize eagle take not associated with an ESA take authorization, for purposes of accountability and consistency, the same process and procedures should be used to authorize take under the Eagle Act regardless of whether it was also exempted under ESA section 7. Accordingly, as part of the regulations we are promulgating today, we are amending the regulations at § 22.28 to restrict their application to section 7 incidental take statements issued prior to the date today's rule becomes effective. For any incidental take exempted under ESA section 7 that is authorized after the date specified in DATES and that also constitutes take under the Eagle Act, the only permit that is available to provide Eagle Act take authorization is the § 22.26 permit being finalized herein. Therefore, except for take authorized through ESA section 10 permits (which confer authority to take under both the ESA and the Eagle Act under the new provision at 50 CFR § 22.11), any take we authorize that is associated with, but not the purpose of an activity, would be provided under the single regulatory authority we are finalizing today, 50 CFR § 22.26, rather than 50 CFR § 22.28.

Revisions to Information Collection Requirements at 50 CFR 22.4

This section describes the requirement that Federal information collections, such as permit applications and report forms related to Federal permits, be reviewed and approved by the OMB. It also provides the approval number(s) (OMB Control Numbers) for the forms used to collect information related to eagle permits. We are removing the language describing the average reporting burden for all the collections related to eagle permits because that figure varies as new forms are added or removed and we are no longer required to provide this estimate.

Revisions to General Permit Conditions at 50 CFR 13

As part of establishing the new permit authorizations under 50 CFR 22.26 and 22.27, we amend 50 CFR 13.12 to add the new permit types to be issued under 50 CFR 22.26 and 22.27. We also amend 50 CFR 13.11(d), the nonstandard fee schedule, to establish application-processing fees (user fees) for the permits. The general statutory authority to charge fees for processing applications for permits and certificates is found in 31 U.S.C. 9701, which states that services provided by Federal agencies are to be ''self-sustaining to the extent possible.'' Federal user-fee policy, as stated in OMB Circular No. A-25, requires Federal agencies to recoup the costs of ''special services'' that provide benefits to identifiable recipients. Permits are special services authorizing identifiable recipients to engage in activities not otherwise authorized for the general public.

For the standard § 22.26 take permit and the § 22.27 nest take permit, we will assess a $500 permit application fee and a $150 permit amendment fee. For programmatic permits under either permit type, the application fee is $1,000 and the amendment fee is $500. While higher than many other Service permit application processing fees, these fees are comparable to those assessed for other migratory bird permits relative to the level of review necessary to process and evaluate an application for a permit to take eagles or to remove eagle nests under the authorities of the Eagle Act. [2] Furthermore, we expect these fees to make up less than half the permit-processing costs to the Service.

The typical permit-application process will be less burdensome for the applicant than the permit process under the ESA, since an HCP is not required. Preparing an HCP can be time-consuming and is usually delegated to a professional consultant. HCPs often cover large geographic areas—some larger than a million acres—and set forth terms and mitigation measures designed to protect species for up to 100 years. In contrast, the information required to apply for an individual Eagle Act permit does not include an extensive habitat analysis, is easier to compile, and will require less information, since permits will be valid for no more than five years.

Service biologists at GS-11 to 13 grade levels on the Office of Personnel Management General Pay Schedule, with support of GS-7 staff, would be responsible for pre-application technical assistance; reviewing and determining the adequacy of the information provided by an applicant; conducting any internal research necessary to verify information in the application or evaluate the biological impact of the proposed activity; assessing the biological impact of the proposed activity on the bald or golden eagle; evaluating whether the proposed activity meets the issuance criteria; preparing or reviewing NEPA documentation; determining consistency with other laws such as the

[2] The notable exception is the permit-application-processing fee for take of golden eagle nests for resource recovery and development operations under 50 CFR 22.25, which is currently set at $100. We intend to propose a regulation in the near future to raise the processing fee to a level commensurate with the processing fees for the new § 22.27 nest take permit.

section 106 of the NHPA; coordination and consultation with States and tribes; and preparing either a permit or a denial letter for the applicant. To evaluate the impact of the proposed activity, Service biologists may also need to visit the location to examine site-specific conditions.

Programmatic permits will take considerably longer to craft and process. We expect most industry-wide or agency-wide standard practices for programmatic permits would be developed with the respective entities and Service staff who work on policy development in the Washington Office, in coordination with Service Regions. We anticipate that some programmatic permits, particularly early ones will require the Service to convene and lead meetings of workgroups representing the entities seeking permits. The workgroups would develop metrics for establishing/quantifying baseline effects through estimates or a sampling scheme; identify the best-available techniques and mutually-approved standard practices for minimizing the likelihood of take of eagles; and develop standards for system or program risk analyses, guidance for determining reasonable timeframes for completion of any required retro-fitting, standards and guidelines for effective monitoring programs and reports of eagle take to the Service, and measurable criteria for evaluating the implementation and efficacy of practices. Over the long term, we estimate it will take about 100 Service staff hours to process the average programmatic take permit. The programmatic permits we develop initially will likely take longer, as will large-scale and more complex programmatic permits. Those may take up to 400 Service staff hours to prepare.

We estimate it will cost the Service approximately $1,750 to process the average § 22.26 permit application, including $940 for pre-application technical assistance from Field Office biologists, and $810 for the Regional Migratory Bird Permit Office once it receives the application. For § 22.27 permits, we estimate the cost to the Service to be $1,950. We estimate it will cost the Service about $650 to amend the average permit. The average programmatic permit application under either § 22.26 or § 22.27 is likely to cost the Service $5,000. We estimate the average cost to the Service for substantive amendments to programmatic permits to be $1,500. These estimates include technical assistance provided by the Field Office, as do the hourly estimates below.

On average, we estimate that it will take Service employees approximately 42 hours to process each individual § 22.26 permit application, approximately 46 hours for each § 22.27 permit application for take of an eagle nest, and approximately 120 hours for a programmatic permit under either permit type. Therefore, an application fee of $500 will offset only about 28% of the cost to the Government of responding to a request for a § 22.26 and about 25% of the cost of processing a § 22.27 nest-take-permit application. The $150 standard amendment fee will make up about 27% of the Service's costs. The $1,000 programmatic permit application fee will recoup about 20% of the permit processing cost to the Service. The $500 programmatic-permit amendment fee will recoup about 33% of the cost to the Service. Although these fees are not high enough to allow the Service to recoup even half the cost of issuing them, they are significantly higher than other permit application processing fees we assess. The fees associated with these regulations must be manageable to small business owners, home owners, and other members of the public who may find a higher fee prohibitive.

Economic Analysis

A brief assessment to clarify the costs and benefits associated with this rule follows:

Change. This rule will provide for the authorization of activities that take bald eagles and golden eagles under the Bald and Golden Eagle Protection Act (Eagle Act). Under the rule, the public will have the opportunity to apply for permits to authorize the take of bald eagles and golden eagles under the Eagle Act. Some incidental take of eagles was previously authorized under the Endangered Species Act, primarily bald eagles covered by an incidental take statement issued pursuant to ESA section 7. Some bald eagle take was authorized under ESA section 10 incidental-take permits. Twelve ESA section 10 permits authorized take of golden eagles as covered listed species. However, ESA take authorization for eagles has not been issued in Alaska, where neither species of eagles was ever listed under the ESA. Thus, any authorization for take in Alaska would be newly available. Authorizations for take of bald eagles and golden eagles are expected to increase from what was authorized under the ESA.

Baseline. The costs and benefits will result from (1) the authorization of take of bald eagles and golden eagles throughout the United States under § 22.26, and (2) the number of permits for take of bald eagle and golden eagle nests throughout the United States under § 22.27.

Costs Incurred. In general, the costs incurred due to the rule would relate to the costs of assembling the necessary information for the permit application, permit fees, and the costs of monitoring and reporting requirements associated with the permit. As explained below, it is difficult to predict the number of applications the Service should anticipate under these regulations. However, due to various factors, we expect that demand for eagle-take permits will increase, from about 54 authorizations per year under the ESA to approximately 910 permits per year under the two new Eagle Act permit regulations. Therefore, using the current number of authorizations issued under the ESA as a baseline, approximately 856 permit authorizations would be new.

Some of these entities (those that are non-governmental) would bear the higher permit application fees under the Eagle Act as compared to the current fee for an ESA incidental-take permit (to capture a more equitable share of the costs to the Service that would otherwise be borne by taxpayers), although many applicants will be State, local, tribal, or Federal agencies, which are exempt from application processing fees for Service permits. Costs for other aspects of the permit-application process will generally be lower than costs associated with the ESA section 10 permit application process (e.g., less information needs to be compiled and provided to the Service as part of this permit application versus the requirement to create a Habitat Conservation Plan (HCP) under the ESA).

We are establishing a $500 permit application processing fee for the standard § 22.26 take permit and standard § 22.27 nest-take permit. Each of these permit categories will require a $150 fee for permit amendments. Programmatic permits under both regulations require a $1,000 processing fee and a $500 amendment fee. We anticipate receiving about 1,120 take permit applications under § 22.26 nationwide annually, and 20 applications for programmatic permits under § 22.26. We estimate receiving 70 nest-take-permit applications under § 22.27 and 20 applications for programmatic nest-take permits. (We anticipate that we will issue permits in response to the majority of these applications, particularly the programmatic permit applications, because applicants will already have coordinated with the Service before applying for a permit, and many project proponents will have either adjusted their projects so as not to need a permit

or concluded that a permit will not be issued for the take associated with the proposed project. The remaining potential applicants are those who are likely to need and qualify for a permit.) Approximately 60 standard permits and 16 programmatic permits may need amendment annually.

We expect about half of the applicants for both types of permits to be Federal, State, local, or tribal governments, none of which are required to pay a permit-application processing fee or amendment-processing fee. Therefore, we estimate that annual application fees and amendments will total approximately $320,000 (560 permit applications under § 22.26 x $500 fee, + 35 nest-take-permit applications under § 22.27 x $500 fee, + 20 programmatic permit applications x $1,000 fee, + 30 standard amendments x $150 amendment fee, + 8 amendments to programmatic permits x $500 amendment fee). There is no fee for processing annual reports.

These permit fees would be new costs related to this rule. There may be additional costs associated with the permit process, which may include mitigation costs and, if the applicant engages a consultant or attorney, consultant and legal fees. The information required to apply for an individual Eagle Act permit is less extensive and easier to compile than permits under the ESA. Information such as latitude and longitude are publicly available (e.g., Google Earth). The majority of people will be able to submit this information to the Service without the need to hire a consultant, especially with the help of local and State government staff who may be willing to provide assistance with location and distance information between the project and the eagle nest or use area. The Service will direct applicants to available, free or inexpensive tools and services for obtaining the necessary information.

Larger project proponents may prefer to hire consultants. Consultant fees could range from $300 to many thousands of dollars, depending on the scale of the project, but presumably still would be cost-effective, as compared to avoiding the take, since the choice is the applicant's to make. In many cases, for larger projects, project proponents will have hired consultants to address a multitude of other factors unrelated to impacts to eagles, so additional costs related to Eagle Act authorizations would be minimal.

We anticipate that there will be many instances where project proponents approach the Service, and based on preliminary coordination with us, adjust project plans to reduce the likelihood of take to the point where no permit is needed, and none is therefore issued. Some costs will be associated with this process. However, these costs are not the result of this permit regulation, but stem from the statutory prohibitions against taking eagles.

Costs may have been incurred related to current projects that are in process and are delayed and potential projects that were not initiated due to the lack of availability of ESA permits during the period after the bald eagle was delisted in most parts of the lower 48 States and prior to Eagle Act take permits becoming available under this rule. These costs would be attributed to the determination to delist the bald eagle. Therefore, this analysis does not quantify these costs.

In addition to costs to the public, the Service will incur administrative costs due to this rulemaking. We do not have a firm basis on which to confidently predict how much demand there will be for permits under these regulations. We estimate that the number of eagle-take permits will increase under the rule from an average of 54 authorizations previously issued under the ESA, to 830 Eagle Act § 22.26 take permits, 40 nest-take permits issued under § 22.27, and 40 programmatic permits issued under both regulations, annually. We expect an increase because: (1) many smaller projects will no longer be able to get under the ESA section 7 ''umbrella'' of a Federal project when seeking authorization to take bald eagles; (2) following delisting, it is now more acceptable and less burdensome to get a permit to take eagles; (3) most bald eagle populations are increasing; (4) permits will be available for golden eagle take, and (5) ESA take permits were not issued in Alaska, but Eagle Act permits may be issued there under these permit regulations.

The cost of issuing most permits will decrease, but many authorizations similar to those we previously granted under section 7 of the ESA (where the consultation covered numerous species in addition to bald eagles) would now require the issuance of an Eagle Act permit in addition to a biological opinion. On average, we estimate it will cost the Service approximately $1,750 to process the average § 22.26 permit application (including pre-application technical assistance). Assuming approximately 1,120 permit applications under § 22.26, 70 nest-take-permit applications under § 22.27, 40 programmatic permit applications, 60 standard permit amendments, and 16 programmatic amendments, per year, the annual costs associated with processing permit applications to the Service would total approximately $2,348,500 (1,120 x $1,750 for § 22.26 permit applications, + 70 x $1,950 for § 22.27 nest-take-permit applications, + 40 x $5,000 for programmatic-permit applications, plus 60 x $600 for standard amendments, plus 16 x 1,000 for programmatic amendments).

The Service will also incur the cost of providing technical assistance, even where no permit is issued. The workload associated with each such consultation will generally be less than for situations where a permit is issued, but it will often be substantial. We estimate the average technical consultation will require 20 hours of staff time, and we anticipate the number of such consultations not resulting in permits will be about 800 per year, resulting in $628,000 in increased costs to the Service from technical consultations. All estimated costs for staff time include salary and benefits.

Overall, we estimate that new administrative costs for the Service to implement this rule will be over $3 million per year, including the costs to Regional and Field Offices for actual implementation of the permit program, plus costs associated with the development and maintenance of the program (e.g., training, developing implementing policies, responding to Freedom of Information Act requests, budget formulation, etc.), which will be borne by the Service's Migratory Bird and Ecological Services program offices.

Benefits Accrued. Under the rule, benefits to the public will accrue from issuance of permits to take bald eagles and golden eagles throughout the United States. In general, benefits will include increased value in land that can now be developed or harvested for timber, as well as the elimination of the risk and future costs associated with the potential unpermitted take of eagles that could occur from the development activities. Benefits will depend on the level of potential future growth associated with the authorized permit activity.

Only minimal take of golden eagles (as covered non-listed species in HCPs) has been authorized under the ESA prior to proposing this rule. However, because population data indicate that take of golden eagles should be extremely limited, we anticipate issuing only a minimal number of new take authorizations for golden eagles under these new regulations. Some take of golden eagles throughout the United States that may be authorized by these regulations may result in new development and activities that could not have proceeded legally without this

rule. We expect that economic benefits may accrue as a result of the implementation of this rule for oil and gas development operations, farming and ranching operations, mining companies, utilities, the transportation sector, and private land owners.

Overall, we anticipate issuing approximately 910 take permits per year, under both regulations. We have completed a final environmental assessment (FEA) of the effects of this rulemaking, which is available on our website at *http://www.fws.gov/migratorybirds/baldeagle.htm*). Under the FEA, we developed take thresholds that will guide permit issuance to ensure that take is compatible with the preservation of the bald eagle and the golden eagle. As a result, we anticipate that the amount of take that will be requested and authorized under this permit regulation will not significantly affect bald or golden eagle populations.

Response to Public Comments

Unless otherwise noted, each subject heading includes all substantive comments we received on both the June 5, 2007, proposed rule and the proposed revisions to the rule noted in our August 14, 2008, notice re-opening of the comment period on the rule and announcing the availability of the DEA. We are responding to the comments concerning the environmental analysis, population modeling, take thresholds, and other aspects of the DEA in the FEA. Copies of the FEA are available at *http://www.fws.gov/migratorybirds/baldeagle.htm*.)

Populations and Take Thresholds.

(The comments addressed under this heading were all made on the June 5, 2007, proposed rule. Comments addressing populations and take thresholds that we received after release of the draft environmental assessment are addressed in the FEA.)

Comment: The use of the Partners in Flight (PIF) threshold for rate of population decline beyond which permits would not be issued is inappropriate. The PIF threshold is unacceptable because it amounts to a 15% loss over 30 years.

Service response: The final regulation caps the number of permits we can issue with thresholds designed to ensure increasing or stable breeding populations. Our reasoning is based on the fact that steady declines, even as small as 0.54% annually, the rate we proposed in the June 5, 2007, proposed rule (72 FR 31141), will cumulatively result in an unacceptably large decrease in population over time. Accordingly, we are establishing take thresholds consistent with the goal of stable or increasing breeding populations.

Therefore, for purposes of this regulation, ''compatible with the preservation of the bald eagle and the golden eagle'' means ''consistent with the goal of stable or increasing breeding populations.'' Although take thresholds are based on regional populations, the regulation requires the Service to consider additional factors, such as cultural significance, that may warrant protection of smaller and/or isolated populations within a region.

We anticipate no more than modest increases in bald eagle populations in the future. We have no evidence at this time that leads us to expect any increase in golden eagle populations. Golden eagles appear more likely to experience declines, due to loss of prey base, disturbance, and loss of habitat due to resource extraction activities, and other factors. For more discussion on population thresholds, see our FEA of this action.

Comment: The appropriate population threshold on which to base the number of permits that can be issued (to be compatible with the preservation of the bald eagle and the golden eagle) should be ''no negative impact on the eagle's population growth rate.''

Service response: We disagree with this comment. Even if considered a desirable goal, maintaining the same growth rate indefinitely is unrealistic. How large a population is ideal for either species of eagle depends on a range of factors, but as with any other species, there are ecological limits that weigh against and ultimately prevent continuous growth. Although we do not predict either species of eagle will become overabundant in the foreseeable future, some regional populations of bald eagles will likely level out after reaching an ecologically-sustainable size. To prohibit human activity within those areas because the growth rate of eagles has slowed would overly burden people without any benefit to eagles.

Comment: The Service should clarify the relationship between the permit regulation and the draft bald eagle post-delisting monitoring plan (PDMP). The PDMP data will not be adequate for purposes of detecting the rate of decline the Service will use for permitting purposes, and neither will the other monitoring sources referenced in the rule. The Service should instead apply a harvest model that takes into consideration current population trend and assumes that permits issued will result in take.

Service response: We acknowledge that our description in the June 5, 2007, proposed rule of how we intended to analyze appropriate levels of take was not as clear as it could have been (72 FR 31141). Our intent was always to use modeling, similar to harvest modeling we conduct for other migratory bird species.

The PDMP is a national-level monitoring plan designed to detect declines that would merit reconsideration of the bald eagle as threatened or endangered under the ESA, whereas the population trends on which we would base take thresholds under this take permit regulation will be smaller in scale and at levels that are below the detectability of the PDMP.

To establish take thresholds for this permit regulation, we will rely on the best data we can obtain, including the sources noted in the proposed rule. We will use models to ascertain how much take could be permitted before causing impacts to eagle populations that would not be compatible with the preservation of the species. If we have inadequate data to run the models and no other means of assessing the status of the population where the take will occur, we may not be able to determine that the take is compatible with the preservation of the species. If we are unable to make that determination, we cannot authorize take under the Eagle Act.

Comment: Take thresholds should be assessed based on the national population as a whole. (The commenter did not provide a basis for this recommendation.)

Service response: Under the ESA, listing and delisting decisions must be made purely on the basis of the ''best scientific and commercial data available.'' Effects on the economy are excluded from the analysis, as are other human social or cultural values beyond those furthered by the ESA. Because the Eagle Act is not delimited by such statutory constraints, and because protecting regional and local populations of bald eagles and golden eagles is culturally important to the American people, this regulation interprets compatibility with the preservation of the species to include maintaining regional and locally-important populations. Take thresholds would be based on modeling of regional population data, but within a regional population, as part of our evaluation of take applications, we will take into consideration factors that may warrant protection of more localized populations, including the cultural significance of a local population.

Comment: In addition to the nine bald eagle management populations mentioned in the proposed rule, the

Service needs to assess eagle populations by State and NABCI bird conservation area, or local areas. Otherwise some regional and local populations would be threatened. Local populations can be of unique importance, including to the public.

Service response: We are using the NABCI bird conservation regions (BCRs) to manage golden eagle populations, further broken down by portion of BCR within each Service Region. For bald eagles, we are not using nine management populations as we referred to in the proposed rule. Instead, to establish management populations for bald eagles, we used natal populations to look at distribution across the landscape, allowing us to determine rough natural ''boundaries'' between regional eagle populations. Because the management populations delineated by this approach roughly correspond to the Service's organizational structure made up of 8 Service Regional Offices, we will manage bald eagles using populations within Service Regions, with some adjustments, explained in more detail in the FEA.

Regarding the concern that local populations will not be adequately protected, as part of our evaluation of take applications, we will take into consideration biological and human-induced pressures on, and cultural significance of, more localized populations. In evaluating whether the take is compatible with the preservation of the eagle, we must consider cumulative effects, which will help ensure adverse impacts are not concentrated in one locality.

Comment: The regulations should explicitly state that permits will be denied if the population declines to the threshold level.

Service response: The regulations explicitly state that before issuing a permit, the Service must determine that the take is compatible with the preservation of the bald eagle or the golden eagle, which is the statutory mandate. If data indicate populations at either national or regional scales are declining, depending on the source and severity of the decline, the Service may establish lower take permit thresholds where appropriate or suspend permitting until data confirm the population can support take.

Comment: The Service provides no assurances that bald eagles in Arizona will be protected. Arizona bald eagles must be considered separately.

Service response: As explained in greater detail within our FEA, we will not issue permits that would result in declines in the Sonoran Desert bald eagle population. Permit thresholds for all regions of the U.S. will be consistent with the goal of stable or increasing breeding populations.

Comment: The proposed rule stated that, if populations decline to the threshold level, the Service will refrain from issuing permits ''until such time that the take would be compatible with the preservation of the bald or golden eagle.'' That statement should be amended to add ''unless human life may be impacted.''

Service response: Depending on what factors are responsible for the decline and whether the decline is likely to be short-term (part of a recurring population cycle) or long-term, the Service may not need to suspend permit issuance, and may merely reduce the number of permits issued. However, if the breeding population is reduced to the degree that issuance of a permit would be incompatible with the preservation of the bald eagle or the golden eagle, we cannot issue that permit and remain in compliance with the Eagle Act, which authorizes the Secretary of the Interior to issue take permits only if he finds that the take would be compatible with the preservation of the bald eagle or golden eagle (16 U.S.C. 668a). Fortunately, in the majority of cases, emergency take will meet that standard, since many threats to human life that could be caused by eagles may also threaten the eagles themselves. For example, if for human safety purposes, a utility needed to remove a nest to prevent an electrical fire or an airport needed to haze eagles to prevent them from nesting near runways, the authorized take would prevent both eagle and human mortalities. Because issuing a permit in these types of situations would prevent harm to the eagle, the action would be compatible with the preservation of the eagle.

Nevertheless, to ensure that safety emergencies can be legally redressed, we are adding issuance criteria to the regulations to ensure that take associated with safety emergencies is given priority over take for any other purpose.

Comment: The statement that permits will be issued on a limited basis raises concerns that a predictable incidental take process will not be available.

Service response: The Service has the responsibility to implement certain laws that protect wildlife, including eagles. The Eagle Act contains a mandate that take of eagles be compatible with the preservation of the species. Unlimited authorizations for take would be compatible with the preservation of the bald eagle and the golden eagle only if demand for permits remains below the level that would cause population declines. If demand is higher than that threshold, we must limit the number of permits we issue. Hence, the availability of permits will depend on the level of demand and the availability of reliable data reflecting healthy eagle populations. In addition, the process will be predictable in that the take thresholds for each year in each region will be known.

Comment: Since the Service cannot issue permits unless the take will be compatible with the preservation of the species, meaning that permits cannot be issued without adequate data, the Service should consider either requiring permittees to contribute to monitoring efforts, or making the availability of permits expressly contingent on there being in place a monitoring program sufficiently rigorous to detect the threshold decline upon which permit issuance will be predicated.

Service response: As discussed earlier in the preamble, and more fully in the FEA, we have reduced initial take thresholds for both species, capping permitted take for bald eagles at 5% of estimated annual productivity and for golden eagles at historically-authorized take levels. This more conservative approach will buffer the natural variability in vital rates affecting population trends and, perhaps more importantly, ensure against gaps in our data.

''Other interests in a particular locality''

Comment: The Service states that the Eagle Act's authority for granting the proposed permits stems from the Act's provision that the Secretary of the Interior may issue permits ''for the protection of wildlife or of agricultural or other interests in a particular locality.'' The final rule must define ''other interests.'' Without doing so, the rule is an overbroad interpretation of the Eagle Act because it ignores the fact that ''other interests'' is associated with ''wildlife'' and ''agricultural'' interests, and does not comport with the remainder of the statute's provisions restricting the purposes for which take can be authorized.

The proposal is not consistent with the Eagle Act because it would authorize take for any purpose or activity, whereas the statute clearly intended to limit the purposes for which take could be authorized. Furthermore, the proposal fails to show what ''other interests'' have been jeopardized by the long-standing legal prohibition on taking eagles. At the very least, the Service needs to delineate what ''other interests'' will qualify for the permit. The proposal's over-broad interpretation

of ''other interests,'' would allow permits for a vastly broader range of purposes than is currently authorized under the MBTA, which is nonsensical, since the Eagle Act clearly restricts take to certain purposes, whereas the MBTA can authorize take wherever it is consistent with the treaties.

Service response: We read Congress's inclusion of the phrase ''or other interests in any particular locality'' as intended to ensure that other interests besides wildlife and agricultural claims would be able to seek remedy through a permit issued pursuant to regulations. In drafting the statute as it did, Congress gave the Secretary broad discretion to determine what types of other interests might be jeopardized by the broad protections afforded to eagles. When the statutory language was developed, the perception that eagles were a significant threat to livestock was widespread. Today, the American economy is comprised of numerous additional ''interests'' that have largely supplanted ranching in many areas of the country. These ''other interests'' provide jobs and support our infrastructure and quality of life, and by so doing merit similar protection as agriculture and livestock. Therefore these regulations provide a means to authorize eagle take to protect ''other'' interests such as transportation needs, electric utility maintenance, residential and commercial development, forestry, resource development and recovery, and other public and private interests.

Comment: In contrast to the restrictive process for authorizations for Native American religious use, the Service here proposes a sweeping process for allowing a broad spectrum of public and private interests to take eagles where their locations stand in the way of development and utility interests. The disparate treatment between these approaches must be reconciled.

Service response: The process by which we issue permits to Native Americans for take of eagles from the wild and permits for possession of eagle parts and feathers from the National Eagle Repository are the least restrictive means of doing so while protecting other compelling interests. Unlike under the permit regulations we are finalizing through this rulemaking, we do not require any mitigation or other conservation measures to offset the impacts of Native American religious take permits.

Furthermore, the effect of issuing permits under this proposed regulation will not impinge on Native Americans' access to eagles for religious/ceremonial use. This regulation includes provisions to ensure that, if overall demand for authorizations to take eagles approaches what would be compatible with the preservation of the bald eagle or the golden eagle, requests related to Native American religious/ceremonial use will be authorized before other requests for take.

Scope and Criteria of § 22.26

Comment: The proposed rule states that a permit may be issued when several criteria are met including where ''the take cannot practicably be avoided.'' The use of a ''practicable avoidance'' standard is inconsistent with the Eagle Act because it elevates cost and overall project concerns over protecting bald eagles. The Eagle Act provides that take should be authorized only where it is *necessary* to protect a legitimate interest, not merely a facilitating factor. The applicant should have to affirmatively demonstrate that, in the absence of the permit, the legitimate interest cannot be met, and the applicant must not be allowed to define the goals in an overly narrow manner.

Service response: We agree with the commenter that the goal for which the take is necessary must not be defined too narrowly by the applicant. For example, if a municipality is installing a bike trail with the goal to create a trail with an unbroken view of the river, it may be more difficult to avoid disturbing eagles along the river, than were the goal less narrowly defined—for example, to create a bike path that loosely parallels the river. Where possible, interests should be defined broadly enough to allow plans to be reasonably modified if necessary to protect bald eagles or golden eagles.

We do not agree that the practicable avoidance standard elevates the interest of the project proponent over eagles because whether the impact can practicably be avoided is only one of the factors we will weigh before issuing a permit, and it is secondary to whether the take will be compatible with the preservation of the bald eagle or the golden eagle. Nevertheless, to address this concern, when we re-opened the comment period on the regulation in August 2008, we modified the proposed definition of ''practicable'' to incorporate the need to consider the feasibility of the action relative to the scope of the impact on eagles. The final definition of ''practicable'' reads: ''capable of being done after taking into consideration, relative to the magnitude of the impacts to eagles (1) the cost of remedy comparative with proponent resources; (2) existing technology; and (3) logistics in light of overall project purposes.''

Comment: The applicant should not have to show that the take cannot practicably be avoided or that he has minimized impacts to the extent practicable. The language is similar to that used under the Clean Water Act section 404 wetlands permit program, which raises the concern that the Service will require applicants to conduct a detailed alternatives analysis test, including consideration of project purpose and alternative project sites. The Service should identify the authority under the Eagle Act for requiring that impacts be minimized to the extent practicable.

Service response: The Eagle Act stipulates that permits may be issued where the take is *necessary* to protect ... other interests in any particular locality (italics added for emphasis). Some could argue that, to be *necessary*, a thing is absolutely required and cannot be omitted or avoided. We believe a less strict interpretation is reasonable and justified to ensure that human activity is not overly restricted, and so interpret ''necessary'' as something that cannot *practicably* be avoided. In short, we view the practicability standard as less burdensome than other reasonable interpretations of the statute's purpose and intent, and therefore appropriate to adopt for purposes of this rulemaking.

Comment: Take authorized by these permits should be limited to activities that benefit the public welfare.

Service response: The Eagle Act does not limit take to activities that benefit the public as opposed to private interests. The statute specifically provides that take can be authorized to protect agriculture, which in this case primarily meant privately-owned livestock.

Comment: The Service should model the regulation on the U.S. Army Corps of Engineers' requirements for avoidance, minimization, and mitigation of unavoidable impacts, and these should be clearly set forth in the regulation.

Service response: While it was not our goal to model this proposed rule on Corps' regulations, the Service's official mitigation policy as set forth in the U.S. Fish and Wildlife Service Manual (501 FW 2) and reflected in this rule, is based on a similar tiered approach to reducing the overall impact of activities, beginning with avoidance and minimization, and requiring compensatory mitigation for large-scale activities with greater impacts.

Comment: Permits for take that results in mortality should be issued only for human health and safety.

Service response: Our goal and responsibility under the Eagle Act is to

preserve bald eagles and golden eagles, which we interpret and define as consistent with the goal of stable or increasing breeding populations of both species, but not protecting each and every eagle. Take that results in a loss of productivity and take that results in mortality must be assessed primarily in terms of affects to the regional and local area populations. Depending on the age and breeding status of an individual eagle, some take that results in mortality will have less impact than some disturbance take. Therefore, we believe there is no rationale to enact a prohibition on take that results in mortality—versus take in the form of disturbance—for commercial purposes.

Comment: There is a big difference between lethal vs. non-lethal take in terms of the significance of the eagle as a sacred being for Native Americans. Native Americans will not support lethal take for commercial purposes.

Service response: First, see our preceding response. We will, however, when appropriate, undertake consultation with tribes that may be affected by the lethal take of an eagle on a case-by-case basis, and will consider the cultural and spiritual significance of eagles and how take that results in mortality could adversely affect tribal cultural values at that time.

Comment: Where take resulting in mortality is authorized for an industry or other non-tribal entity, tribal members should be given the opportunity to physically take the eagles.

Service response: If feasible and appropriate, we may encourage a tribe that applies to take eagles to take ones that would otherwise be taken under the regulations herein. However, as a generality, we think it will be difficult to meet the purposes of both permits with a single take. Tribes that qualify for a take permit must certify that the take itself is an integral aspect of the religious ceremony in order to justify why an eagle from another source will not meet the tribe's needs. In other words, presenting the tribe with an eagle carcass will not suffice. Most eagle mortalities authorized under the permit regulations at § 22.26 are ''non-controllable,'' that is, the timing and location of each take is not precisely known before it occurs. When discovered, the carcasses of eagles killed under these permits will be sent to the National Eagle Repository to meet the religious needs of tribal members where the take itself is not necessary to carry out the religious ceremony for which eagle parts and feathers are sought. This provision provides an equitable opportunity for members of all federally-recognized tribes to use feathers and parts from such eagles for religious purposes.

Comment: The consideration of secondary impacts must be in the regulations, not just the preamble.

Service response: We agree, and have added language addressing consideration of secondary impacts—now denoted as ''indirect effects''—to the regulations under § 22.26 at (e)(1), (e)(2) and (f)1, and under § 22.27 at (b)(7) and (e)(1).

Comment: Secondary impacts will sometimes affect eagles that are known to breed, feed, or shelter on tribal land, and the tribes should be consulted before a permit is issued that would affect such eagles.

Service response: Before issuing a permit under these regulations, the Service will consider whether proposed plans might affect tribal rights to trust resources. If the Service determines that such effects might occur, we will notify the affected tribe(s) and consult with them if requested.

Comment: The use of ''means test,'' requiring the Service to consider ''the cost of a remedy comparative with proponent resources'' in determining whether a measure is practicable, is arbitrary and will result in more stringent requirements for project proponents with more financial means, rather than basing measure purely on what is practical.

Service response: In fact, we do believe that more stringent measures are appropriate for project proponents with more financial means. The plainest meaning of ''practicable'' is ''capable of being done.'' Greater resources, financial and otherwise, enhance capability and increase options. For example, a large landowner will generally have more options when designing a project than a small landowner. Thus, a large land-holding company building on 500 acres should be able to site proposed buildings farther from a communal roost than would a private homeowner on a 2-acre lot. Similarly, if the potential remedies for avoiding the take entail more money as opposed to more land, a proposed, large commercial project that is likely to take eagles may be able to alter the project design in a manner that requires additional financial resources but avoids the take, and still make enough money to be profitable.

Comment: Concentration areas need more protection than is proposed. The Service should designate areas like the Chesapeake Bay as critical to the continued recovery and maintenance of bald eagles, and establish higher standards for permitting take in those areas.

Service response: The commenter's suggestion is beyond the Service's authority under the Eagle Act. However, to the degree that the Chesapeake Bay and other areas are critical to the preservation of bald eagles, take in those areas will be more highly scrutinized, since we must consider compatibility with the preservation of the eagle before issuing a take permit. Part of that assessment will be an analysis of cumulative impacts, which will help safeguard particular localities that are critical for bald eagles.

Comment: The same consideration of whether alternative habitat is available that is proposed to be used for nest take should also be a criterion for disturbance permits when the disturbance is associated with the permanent loss of a nest, foraging area, or roost site.

Service response: We agree with this comment and have added this consideration to § 22.26(e), *Evaluation of applications.*

Prioritization Criteria

Comment: There needs to be a system of prioritization. Otherwise, the demand will threaten to reverse population recovery.

Service response: Recognizing the possibility that demand could exceed what would be compatible with the preservation of the bald or golden eagle in certain regions, we established regional take thresholds and will not issue permits in excess of those limits. We agree with the commenter that a system of prioritization is needed in case demand runs up against the thresholds, particularly in light of other types of eagle take permits we issue. Therefore, in the event demand exceeds take thresholds, the regulations include issuance criteria to ensure eagle take permits are issued according to following prioritization order:

1. Safety emergencies (§ 22.23 and new §§ 22.26 and 22.27);

2. Native American religious use for rites and ceremonies that require eagles be taken from the wild (§ 22.22);

3. Renewal of programmatic permits (§§ 22.26 and 22.27, and possibly other sections);

4. Non-emergency activities necessary to ensure public health and safety (§ 22.23 and new §§ 22.26 and 22.27);

5. (For golden eagle nests only) resource development and recovery operations (§ 22.25);

6. Other interests (§§ 22.21, 22.22, 22.23, and new § 22.26).

Comment: The Service should give priority to projects that are in the public interest.

Service response: If demand exceeds take thresholds that would be compatible with the preservation of the bald eagle or the golden eagle, we will prioritize Native American religious and cultural use and activities that serve the public interest over those that would largely benefit private or commercial interests.

Comment: Will the criteria giving Native Americans preference for eagle take mean that they will get depredating golden eagles instead of falconers?

Service response: Yes; although this rulemaking is separate from the regulations governing take of depredating eagles, the same principals that underlie the prioritization criteria in this regulation would apply to take of depredating golden eagles. Thus, if both a tribe (for religious purposes) and falconer request possession of such an eagle, we will give priority to the tribe.

Comment: The provisions giving first priority to tribes should require them to take from areas with the highest thresholds (if location not dictated by their religion).

Service response: If demand is greater than take thresholds in a given region, and a tribe requesting take can practicably take an eagle in another region that has take thresholds that are higher than demand while meeting the religious needs of the tribe, we may require the tribe to take the eagle in that other region.

Comment: The prioritization criteria and allocation process could affect the ability of the U.S. Department of Agriculture's Wildlife Services' program to manage depredating golden eagles.

Service response: The prioritization criteria could affect Wildlife Services' management of depredating golden eagles in rare cases. Where feasible and in accordance with tribal religious needs, if requests for take exceed take thresholds, we will direct tribes to take depredating eagles that would otherwise be taken by Wildlife Services or falconers.

Relationship to the National Bald Eagle Management Guidelines

Comment: The rule is unclear as to whether a permit is required for take that results from activities conducted in accordance with the Guidelines and other best management plans. The final rule should explicitly state that compliance with the Guidelines amounts to a de facto permit, or at least creates a presumption of compliance with the Eagle Act. The new bald eagle management scheme in Florida clearly states that no permit will be required for activities that conform to the Guidelines. The Service should do the same.

Service response: The State of Florida's new bald eagle management scheme is based on Florida law and does not require a permit to take bald eagles. Our regulations are authorized by the Eagle Act, which specifically requires a permit to take bald eagles. Therefore, we cannot do as Florida has done, that is: promulgate regulations that authorize some take without a permit. We believe take is generally unlikely to occur when our Guidelines are used to conduct of activities near eagles. Therefore, most activities that clearly conform to the recommendations provided by the Guidelines would not necessitate a permit. However, adherence to the Guidelines is not always as straightforward as simply keeping the project footprint 330 or 660 feet from an eagle nest, based on a category of activities. The Guidelines are *guidance*, and do not dictate what effects will *actually* happen to eagles from any particular activity. Many activities entail a variety of impacts, sometimes to eagles in more than one location, sometimes as the result of subsequent, foreseeable effects. Accordingly, to avoid take of eagles, more than the immediate project footprint should be considered. Also, some activities will not fit neatly into the categories provided in the Guidelines, and sometimes special circumstances may be present that make take more or less likely to occur. Examples of such circumstances include unusually open topography, acoustic anomalies, scarcity of alternative resources in a particular vicinity, and so forth. In summary, ''adherence to the Guidelines,'' is not a simple formula that will uniformly predict whether take will occur.

Comment: The Service should consider ways to allow for minor exceptions to the Guidelines without requiring a permit.

Service response: See our response to the preceding comment. We do not prohibit or authorize exceptions to the Guidelines. All we can prohibit or authorize are certain impacts to eagles. Anyone may choose to ignore the Guidelines, and that choice requires no authorization from us. However, if an eagle is disturbed or otherwise taken without a permit, it will be a violation of the Eagle Act.

Comment: The Service should make permits available for activities that conform to the Guidelines. At the very least, the Service should issue ''No-take'' letters to give landowners written protection from take liability for activities consistent with the Guidelines.

Service response: Due to the limited staff and resources of our agency, we want to discourage applications for permits to cover take of eagles that is in fact unlikely to occur. We believe our conservation mission is better served by helping the public reduce the likelihood of take by providing permits in appropriate circumstances where take is likely (and cannot practicably be avoided). If, after an application is submitted, the Service determines that take is not likely to occur, we may issue the permit (if permit issuance criteria are met); however, if we do not consider take likely to occur, we will not subtract the authorized take from Regional take thresholds—unless follow-up monitoring reveals that it did actually occur.

Comment: The Service should use the various guidelines that have been developed for specific States or regions when evaluating take.

Service response: The guidelines developed by different States and regions largely predate the Federal regulatory definition of ''disturb.'' To the degree that ''disturb'' has been interpreted relatively consistently by the different State and Federal agencies that developed the various guidance, those documents were useful to us when we developed our National Bald Eagle Management Guidelines. Because the Guidelines are designed to prevent an impact (disturbance) that is a Federal prohibition, we believe that a single set of recommendations for avoiding a violation of that prohibition should be applied throughout the United States. This in no way precludes States from enforcing their own statutory and regulatory protections for eagles, and applying their own guidance for minimizing State-prohibited impacts to eagles.

Mitigation

Comment: The proposed rule was unclear as to whether mitigation will be required for every permit issued, and also as to the range and types of mitigation that will be used.

Service response: Mitigation includes: avoidance, minimization, rectification, reduction over time, and compensation for negative impacts. Under these regulations, all permittees are required to avoid and minimize the potential for take to the degree practicable, and for programmatic permits, to the point where take is unavoidable.

Depending on the scale of the take, and the particular circumstances, the Service may require rectification and/or

reduction over time from some permittees. Additional compensatory mitigation will usually be required only for (1) programmatic take, and other multiple take authorizations; (2) disturbance associated with the permanent loss of a breeding territory or important traditional communal roost site; or (3) as necessary to offset impacts to local area populations. The take thresholds associated with this permitting process will ensure that each authorized take, along with cumulative take, is compatible with the preservation of bald eagles and golden eagles. Permit issuance is based on our making a finding that the population can withstand the take that will be authorized without experiencing a decline. Therefore, compensatory mitigation for one-time, individual take permits will not typically be necessary for the preservation of eagles. For projects with long-term impacts and/or impacts of a greater magnitude, compensatory mitigation will generally be required to reasonably offset the magnitude of the impacts.

We are developing implementation guidance to ensure consistency in how these permits are administered. Mitigation will be addressed in more detail in that document, which will be made available for public notice and comment before being finalized. Some compensatory mitigation options we are considering at this point include: purchase and preservation of habitat or potential habitat; use of conservation easements to protect important eagle-use areas or potential nest sites; and contributions to a fund established to benefit eagles.

Comment: Requiring compensatory mitigation for every permit will create a disincentive for landowners who would seek a permit in lieu of following the Guidelines.

Service response: Permit issuance is predicated on the requirement that the take cannot practicably be avoided and that the applicant has proposed avoidance and minimization measures to the extent practicable. Under those circumstances, if the applicant can practicably avoid the take, he must. Requiring additional compensatory mitigation should have no effect on whether the applicant can follow the Guidelines.

Comment: The final rule itself (and not just the preamble) must be explicit that secondary, foreseeable impacts will be assessed for purposes of determining what mitigation will be required.

Service response: The rule provides that we must consider reasonably foreseeable secondary impacts when assessing the overall level of take. Also, we added language to the permit conditions at § 22.26(c)(1) that requires the Service to consider indirect effects for purposes of determining whether compensatory mitigation is appropriate.

Comment: Mitigation must be geared to preservation of the local/regional population.

Service response: Avoidance and minimization are inextricably tied to the local population. Generally, rectification and reduction over time also benefit the local population. Ideally, as provided in our Service Mitigation Policy, the benefits of compensatory mitigation would accrue to the area where the take will occur and second priority would be in proximity to that area. However, if compensatory mitigation within or in proximity to the planning area is not practicable or a significantly larger benefit could be realized in another locality or region, the permit may include mitigation measures that benefit eagles in a different locality.

Comment: Any funding from mitigation should be used to protect eagle habitat.

Service response: We agree that protecting eagle habitat should be a high priority. However, there may be other beneficial uses for mitigation funds—for example to support surveys and population monitoring.

Comment: The Service must affirmatively describe the required minimization measures within the terms and conditions of the permit. As written, the rule allows the applicant to propose his or her own measures.

Service response: The project proponent must provide as part of his or her application a description of the measures to which he or she is prepared to commit. Without that information, we cannot evaluate the overall impact of the project. If the proposed measures are not adequate, we will not issue the permit as proposed. The regulations preclude us from issuing a permit if the applicant has not proposed measures to minimize impacts to the degree practicable. In such a case, we will work with the applicant to develop stronger minimization measures or we must deny the permit. In reality, we will often work with the applicant during the application process, so the terms and conditions proposed by the applicant have already been evaluated by us when we receive the completed application. The final terms and conditions will be explicitly spelled out on the permit.

Comment: Mitigation funding should be required and should go to States to compensate for their monitoring costs.

Service response: As explained above, we will not always require compensatory mitigation for take that we think is likely to amount to a one-time loss of productivity. Also, compensatory mitigation may not be in the form of payment. For example, it might be fulfilled by donation of an easement. If compensatory mitigation is required in the form of payment to a fund established to offset the impacts of take, the disposition of those funds will depend on various factors, such as whether the funds could be used to benefit local eagle populations and whether the Service has entered into agreements with the State or tribe to apply such funding. If States or tribes conduct surveys and monitoring of bald or golden eagles, mitigation funds could be directed to help offset the costs.

Comment: The rule should allow compensatory mitigation only in extraordinary circumstances.

Service response: We interpret this comment to mean that the Service should always require avoidance and minimization, and not allow compensatory mitigation to take the place of such measures. We agree, and the regulations require that applicants for both types of permits must take all practicable steps to avoid and minimize take. If this condition is not met, the regulations do not allow us to issue a permit.

Comment: The Service needs to clarify which Service program office (Ecological Services or the Migratory Bird Program), will be responsible for determining impacts and how much take will occur. It is important that the Service adopt a consistent methodology across regions.

Service response: Evaluation of impacts will be consistent across Service Regions and between Service programs, which will all be using national implementation guidance (to be developed) addressing this and other aspects of permit issuance.

Comment: Compensatory mitigation should not exceed the level of measurable impacts.

Service response: We agree with this comment, but note that compensatory mitigation will rarely precisely counteract impacts to eagles. In reality, for the largest impacts, compensatory mitigation is more likely to fall short of, rather than exceed impacts, since it is difficult to replace the loss of territory or communal roost site with creation of new ones.

Comment: If an applicant conducts avoidance and minimization to the point where take will likely be avoided, he will probably want a permit to justify his efforts, resulting in a bigger workload than the Service appears to be anticipating.

Service response: We now anticipate a larger workload than when we proposed the June 2007 rule, partially because of the demand from project proponents who re-design projects to avoid take. First, the process of providing them with the technical assistance needed to avoid the take may require significant staff resources from our Ecological Services biologists, and second because our Migratory Bird Permit Offices will still need to consider every permit application we receive and either deny or issue a permit. For this reason, we discourage permit applications from people who are not likely to take eagles. However, issuing permits to some of these applicants will provide a benefit: the permittees will be required to monitor the activity site and report how eagles react to the activity, providing us with valuable information on whether take that we believe is unlikely to occur does not in fact occur.

Comment: Will compensatory mitigation be required for removal of nests that are of low biological value?

Service response: We are unlikely to require compensatory mitigation for removal of nests that have very low biological value.

Permit Conditions

Comment: The public should be given the opportunity to comment on each permit after public notice.

Service response: While bald eagles were listed under the ESA, the public was provided an opportunity to comment before the Service issued each section 10 incidental take permit that authorized take of eagles. That process is a statutory requirement of the ESA (16 U.S.C. 1539(a)(2)(B)). The Eagle Act has no such requirement. While that does not preclude us from creating such a requirement under these regulations, we do not believe a public-comment period for each permit would provide an additional benefit to eagles that would justify the regulatory burden on the public and on our limited staff and resources.

Comment: The permit must be specific as to how much take is authorized and how it will occur. Otherwise, the permit may inadvertently grant indemnity for all take, whether anticipated or not.

Service response: Most permits will be specific as to how much take is authorized and how and roughly when it will occur. The exception will be programmatic permits, which will authorize take for large-scale and or long-term activities where take is anticipated but the exact amount, location, and timeframes are impossible to identify. Rather than ''grant indemnity for all take,'' programmatic permits will authorize only the take that occurs despite implementation of stringent ACPs designed to reduce take to the point where it is essentially unavoidable (yet anticipated). The overall effect of these types of permits will be a reduction in mortalities and other adverse impacts to eagles.

Comment: Permits should not specify exact numbers of authorized take. Rather, levels of take should be identified regionally.

Service response: Levels of take will be identified regionally in order to establish population thresholds up to which take can be authorized. However, each permit (except programmatic permits designed to reduce ongoing take) will authorize a specific amount of take to ensure that the cumulative take authorized under all the permits in a region does not exceed the regional population threshold.

Comment: The time period for a permit should be identified. Permits should not exceed one year.

Service Response: Each permit will have a limited tenure specified on the face of the permit. These final regulations limit the tenure for all permits to five years or less. Many projects are multi-year projects, and a 1–year tenure would introduce unnecessary uncertainty for a project proponent that cannot identify exactly when the take will occur. Receiving applications for the same take in consecutive years would also create more work for our permit offices without providing any benefit to eagles. That said, the rule limits permit tenure to five years or less because factors may change over a longer period of time such that a take authorized much earlier would later be incompatible with the preservation of the bald eagle or the golden eagle. Accordingly, we believe that five years is a long enough period within which a project proponent can identify when the proposed activity will result in take.

Comment: The rule should provide for inspections at any hour with no notice from the Service.

Service Response: The rule provides that the Service, or a designated agent, may inspect the area ''where eagles are likely to be affected, at any reasonable hour, and with reasonable notice from the Service, for purposes of monitoring eagles at the site(s).'' The purpose of the inspection is to determine whether eagles are using the site, not to surprise and scrutinize the permittee's activities.

Comment: The final rule should contain provisions for review, denial, modification, and revocation. Of particular concern is the potential situation where populations decline unexpectedly, or new information reveals the take would not be compatible with the preservation of the bald or golden eagle.

Service response: Provisions for review, denial, modification, and revocation, and other general processes and procedures that apply to all the types of permits the Service issues are found in 50 CFR part 13. For that reason, we do not reiterate those provisions within each section of regulations that govern individual permit types. Regarding the scenario raised by this commenter, 50 CFR 13.28(a)(5) provides that a permit may be revoked if ''the populations of the wildlife or plant that is the subject of the permit declines to the extent that continuation of the permitted activity would be detrimental to maintenance or recovery of the affected population.''

Comment: The rule should address unanticipated take by specifying that the permittee must contact the Service immediately and apply for a new permit.

Service response: We have added language to the rule requiring the permittee to contact the Service if unanticipated take occurs. As to whether a new permit would be required, that will depend on the circumstances. Some situations may be more appropriately addressed by amending the existing permit or taking some other action.

Monitoring

Comment: Monitoring should not be required of the permittee. It is the responsibility of the Service. A three-year monitoring period is overly burdensome and would not result in useful information. Public reporting is not accurate or timely. The Service should develop a research project to monitor eagles to obtain accurate information.

Service response: The monitoring that will be required of the permittee is relatively minimal yet will serve several important purposes. The monitoring simply entails observing periodically, during the season(s) when eagles would normally be present, the area where the take is likely to occur and noting whether eagles continue to nest, roost, or forage there. Even this minimal monitoring will be important, however, because it will provide the Service with the best information available as to how human activities impact eagles. If we find that take does not occur as frequently as we anticipated, we can adjust the recommendations we provide in management guidelines and technical assistance. Also, if demand for take is

high enough to approach take thresholds, ascertaining that it did not occur under some permits could enable us to issue other permits where we otherwise would not. We know that reporting will not always be accurate, but even so, it is our best available option for garnering this data, since we do not have the staff and resources to monitor every site ourselves.

Comment: The Service needs to provide methodology for monitoring. The Service should be more specific as to what information is required by ''information on eagle use of important eagle-use areas potentially affected.''

Service Response: The monitoring requirements are relatively simple and require little in the way of methodology. The annual report form requires the permittee to submit the dates, times and numbers of eagle sightings at the important use areas where eagles are likely to be affected. Also, the report requires monitoring the site(s) periodically during the season that eagles normally breed, feed, or shelter in the area, at a time of day when eagles are most likely to be in the vicinity, if applicable (e.g., for communal roosts in the evening; for foraging areas, in the morning or afternoon).

Comment: The rule should require that monitoring be conducted by professional raptor biologists. Permittees will not be able to ascertain whether eagles adopt alternative nest sites or how the permitted activity may have affected the dynamics of a communal roost or feeding area.

Service response: We agree that more extensive monitoring would be very useful for purposes of understanding how eagles are affected by human activities. However, we expect that many permittees will not have the resources to hire professional biologists to perform that service. Our agency also does not have the resources to monitor all project sites. Therefore, the rule requires very minimal monitoring that the average person can easily perform. However, the rule also provides that the permittee must allow the Service or a designated representative to visit the area for purposes of monitoring eagle use. During those visits, we should be able to collect more extensive information regarding the dynamics of eagle behavior at the site. Although we do not have the capacity to carry out that function at the majority of permit sites, we can use the data we collect from the limited site visits to extrapolate eagle responses to permitted actions over a larger geographic scale.

Comment: The post-delisting monitoring plan should be adequate for purposes of monitoring bald eagles.

Service response: The PDMP is a national-level plan designed for an entirely different purpose than the monitoring that would be required under this permit regulation. The purpose of the PDMP is to detect declines in bald eagle populations that could trigger relisting. The purpose of the permittee's monitoring requirements in this rule is to ascertain whether permitted take actually occurs.

Comment: Is a permittee (such as an electric utility) only required to implement post-activity monitoring for three years after the initial construction of the site or for ongoing unavoidable take? Will its monitoring plan need Service approval, and will the results need to be furnished to the Service?

Service response: Monitoring is related to the activity that is likely to take eagles. If a project is likely to take eagles during an initial construction phase, but take is unlikely to occur during the subsequent, ongoing use of the facility, then monitoring may be required for up to three years after the construction is completed. If the ongoing activity is likely to take eagles, then the monitoring may be required for up to three years after cessation of the activity. For programmatic permits, the permitted industry may develop, in coordination with the Service, a specific, more extensive monitoring protocol, adherence to which would be a condition of the permit. Otherwise, as discussed above, monitoring for most permits is relatively straightforward and will not require any plan that needs approval from the Service. Monitoring results will need to be reported on an annual basis to the Service, for as long as monitoring is required.

Comment: Monitoring and report data should be provided to the State, particularly when activities could affect nesting results during State surveys.

Service response: We will make monitoring and report data available to States and tribes whenever requested (to the degree allowable by laws such as the Privacy Act). As with other data we collect, as well as data collected by the States and tribes, we support the sharing of information that pertains to joint interests between our governments.

Comment: The proposal's reliance on permittee self-monitoring is misplaced and threatens the long-term preservation of eagles. A detailed plan for achieving compliance, consistency, and confidentiality is needed. The rule should require monitoring to be conducted by a disaffected third party approved by the Service. Permittees should pay into a fund for experienced, independent organizations to provide or verify data.

Service response: We may include a requirement that monitoring be conducted by a third party as a permit condition for some larger projects and programmatic permits. However, although it might sometimes improve accuracy, we do not think it would be reasonable to require all permittees to enlist a third party to conduct the required monitoring. Also, we are not confident that enough disaffected third-party entities would be available to permittees in every location. We believe most permittees will try to provide accurate information. To increase the chances of that, we added language to the annual report form emphasizing that (1) filing an accurate report is a condition of the permit and (2) reporting the absence of eagles from the monitoring site will not, by itself, affect the continued validity of the permit.

Application and Issuance Process

Comment: The proposed rule requires the permit applicant to provide a certification that the proposed activity is in compliance with local, State, and Federal laws. What is meant by ''certification''? Who is responsible for this evaluation?

Service response: We meant that the application form would require the applicant to sign a statement that the proposed activity is in compliance with other applicable laws. However, we have revised the draft application form. It no longer requires that certification, but instead asks the applicant to state whether he or she has obtained the State or tribal authorizations necessary to conduct the activity. All of our migratory bird and eagle-related permits contain the standard condition that the Federal authorization is not valid unless the activity complies with all other applicable laws, including State and local laws. Permits issued under this regulation will include that condition and clarify that the activity must also be in accordance with any applicable tribal laws.

Comment: Can a landowner apply for a permit for multiple takes in an entire area of ownership that is not contiguous?

Service response: A landowner can apply for as many takes as he or she wants in different locations. However, each take we authorize will have to meet the permit-issuance criteria (e.g., it must be compatible with the preservation of the eagle, cannot be practicably avoided, etc.). Depending on the particular circumstances and in order to ensure that issuance criteria are met, we may authorize only a portion of the requested take (or all or none).

Comment: The Service should be required to coordinate with State wildlife agencies when issuing permits. The Service should work with the States to develop implementation guidance to avoid incompatibilities.

Service response: We intend to work with States to establish protocols for coordination between the Service and States during the permit process.

Comment: The rule should contain timelines for how long the Service can take to issue permits. Projects are often subject to very specific construction and financing constraints.

Service response: Timelines for permit issuance do not belong in a regulation, but rather in internal implementation guidance. We plan to include target processing times in the implementation guidance associated with this permit program.

Comment: The Service should establish the expectation for and a process of pre-application consultation to direct potential applicants, establish the need for a permit, and protect the eagle resource. It is essential that the Service make technical assistance readily available to advise project proponents regarding how to avoid impacts and to help in preparation of permit applications. However, it appears that neither the Service nor the States have the resources for technical assistance and consultation with applicants. Who will be providing this service (and how) needs to be addressed.

Service response: We agree that technical assistance is a vital customer service. It enables us to provide our best advice as to whether take will occur and how to avoid or minimize any take, and at the same time reduces uncertainty for the public. It will also reduce unnecessary permitting workload and better protect eagles. For these reasons, we are committed to providing technical assistance early in the process to the extent our limited staffing and resources will allow.

Comment: The requirement that the applicant be responsible for field surveys and providing data on the location of nests and important-use areas is overly onerous and would make it difficult to apply for a permit.

Service response: We removed this language from the regulation because many projects will not require field surveys and we felt that language might intimidate people whose activities were relatively straightforward. Nevertheless, it is the applicant's responsibility to provide us with a complete application before we can process it. We will assist those in need to the degree our staffing and resources allow.

Comment: Provisions should be added for expedited permit issuance for emergency situations. Under the ESA, there are provisions for emergency take that the Service should adopt for eagles, wherein the take can be documented through emergency consultation done after the emergency response has been completed.

Service response: The Eagle Act does not allow the Service to authorize bald eagle take without issuing a permit (16 U.S.C. 668a). We will make every effort to expedite issuance of a permit in situations where take is unavoidable due to an emergency. If circumstances are such that a permit cannot be issued prior to the take in cases of genuine emergencies despite the best efforts of the parties involved, we are unlikely to refer such take for prosecution under the MBTA or the Eagle Act. Procedures for addressing emergency take will be addressed in implementation guidance.

Comment: Any eagle take permit must be reviewed under section 106 of the National Historic Preservation Act (NHPA) because any such take has the potential to affect historic properties and culturally significant sites. Eagle nests and other sites where eagles are present may be considered culturally significant to Native Americans as well as other American citizens, requiring the Service to conduct a cultural-resource assessment prior to issuing these permits.

Service response: We appreciate this comment, and will comply with Section 106 on a case-by-case basis when issuing permits that have the potential to result in effects on historic properties. We also plan to consult with appropriate stakeholders, including tribes, to develop State or regional agreement to govern how the Service will comply with the NHPA when issuing permits to take eagles in specific States or regions.

Comment: Even if not on tribal land, eagles, eagle nests, and other sites have cultural significance to many Native American tribes and tribal members. For that reason, tribes should be consulted before any eagle take permit is issued.

Service response: Before issuing a permit, we will consult with federally-recognized tribes if issuance of the permit may adversely affect their traditional tribal activities, practices, or beliefs; or if issuance of the permit may adversely affect the tribe's ability to regulate, protect, provide services to, or otherwise govern their tribal membership, lands and resources. We plan to work with tribes to develop guidance for us to use when processing permits to manage and resolve tribal concerns.

Comment: The proposal implies that permits will never be denied because the number of anticipated applications (300) is the same as the number of permits the Service anticipates issuing (300) (see discussion under *Regulatory Planning and Review at 72 FR 31148).* Will the Service not deny any permit applications?

Service response: Our intent is to use technical assistance at the Field Office level to minimize potential take from proposed activities. Service Field Office biologists will assist project proponents by assessing whether take is likely to occur and how it can be avoided or minimized. The Field Office should also inform applicants if permits will not be available to them because they do not meet the issuance criteria or because take thresholds for the species preclude further issuance of permits. If this process works successfully, most people who actually submit applications for permits will qualify for a permit. Thus, the pre-application process will reduce take and the need for permits, and serve as a filter through which qualifying applicants will pass before submitting a completed application. For that reason, we anticipate issuing permits for the majority of the complete applications we receive.

We have increased our estimates of permit applications received and permits issued to 1,168 applications received and 910 permits issued, annually, under both new permit regulations.

Comment: The Service should consider ways to allow its Ecological Services Field Office staff to handle bald eagle and golden eagle permitting on behalf of the Migratory Birds Division. Field Office biologists have experience and established relationships with project proponents such as State departments of transportation. Also, having to work with multiple offices will place a burden on applicants. Permitting should be done in conjunction with any ESA consultation that needs to be done as part of the proposed project.

Service response: We agree that technical assistance should be streamlined where feasible to address the requirements necessary to comply with more than one regulatory program. In accordance with Service Mitigation Policy (501 FW 2), we will provide assistance to project proponents in crafting conservation measures early in the planning phases of projects so that all conservation mandates are integrated into the project rather than introduced later in the planning process. In many cases, other trust resources such as wetlands or endangered and threatened

species may be affected in addition to eagles. Many requests for eagle-take authorization will be associated with projects that have a Federal nexus, including energy, transportation, water, and restoration projects, and thus could be assessed in conjunction with the section 7 consultation process. The Service's Ecological Services Field Office staff provide conservation planning assistance that uses a streamlined approach to incorporate the requirements of multiple environmental reviews into a single integrated process.

For example, as provided in our Habitat Conservation Planning Handbook, we recommend ''integration of the National Environmental Policy Act (NEPA) analysis with the other planning and environmental review requirements'' so that ''all procedures run concurrently rather than consecutively.'' Thus, for projects that involve other planning and review requirements in addition to under the Eagle Act, the Field Offices would integrate the assessment of the impacts of the eagle take authorization into the NEPA process.

After projects are designed with the technical assistance provided by our Field Offices, the project proponent will submit his or her completed application to the Regional Migratory Bird Permit Office for processing.

Comment: Permits should be expedited for recipients of technical assistance letters. Recipients of technical assistance letters that authorized activities inconsistent with the National Bald Eagle Management Guidelines may be subject to Eagle Act prosecution.

Service response: Technical assistance letters did not provide any authorization to take eagles. The only means available to gain authorization to take eagles under the ESA was by means of the permit issued under section 10 or an incidental take statement issued under section 7. The role of technical assistance letters was to inform the landowner or project proponent that the Service did not consider take likely to occur. Generally we issued these letters after providing technical assistance to the project proponent that included recommended modifications to the planned activity to minimize the possibility of take, and after the project proponent agreed to incorporate the measures. Technical assistance letters do not authorize take should it occur despite the recommended measures; only a permit or incidental take statement could absolve a person of liability for take of eagles. In situations where these letters were issued and the activity proceeds, there is no Eagle Act violation unless an eagle is disturbed or otherwise taken, regardless of whether the activity was consistent with the National Bald Eagle Management Guidelines.

If take does occur, the Service is unlikely to prioritize enforcement actions against a party that followed the Service's written advice (in the form of the technical assistance letter) as to what steps were necessary to avoid taking eagles. Furthermore, although take of bald eagles under the Eagle Act can be authorized only by permit, it is not our goal to encourage applications for permits to cover take of eagles that is in fact very unlikely to occur. We believe our conservation mission is better served by helping the public reduce the likelihood of take, and to provide permits in appropriate circumstances where take is likely (and cannot practicably be avoided).

Comment: The approval process should give ''substantial weight'' to findings of consistency with a State management plan where such plans are consistent with the Eagle Act's goal of preservation of the eagle (examples: FL and MD Chesapeake Bay Critical Area Program).

Service response: We encourage consistency with State management plans. However, the need for Eagle Act authorization is not based on State land-use planning or habitat protection. Though we recognize the vital importance of those tools in protecting eagles, the Eagle Act directly protects eagles, eggs, and nests, rather than habitat. State management plans such as the ones cited by the commenter are designed to help guide development away from areas that may be more important to eagles or other wildlife or natural resources. To the degree that a take that is consistent with a State management plan may be more compatible with the preservation of the bald eagle or the golden eagle, we are more likely to authorize it. However, we will evaluate it under the statutory mandate of the Eagle Act rather than a State management plan. At the same time, we plan to establish protocols for coordination with States and tribes during the permit review process. Some will desire a greater degree of coordination than others, but we will involve the States and tribes in developing processes for coordination between agencies.

Comment: The Service needs to address how it will ensure compliance with State regulations, particularly in light of the need to protect local populations. Because most States do not have a regulatory process to address much of this take, the Service should clearly state that its Regional Offices will coordinate closely with and receive approval (if requested) from any State where take would be authorized. Also, States need to be kept apprised of the level of take currently authorized in each management population. A nationwide database accessible to the States or regular (e.g., bi-weekly) reports to the States may be needed.

Service response: As discussed above, we will coordinate with States and tribes as appropriate. The level of coordination may differ from State to State (and tribe) depending to some degree on how closely each wants to be involved. However, we do not currently envision seeking approval from the State or tribe for each permit we issue. The permit is a Federal authorization for an impact to eagles that would otherwise be prohibited under Federal law. If the State or tribal law also prohibits the action, the Federal permit does not insulate the permittee from liability under such State and tribal laws. In addition to our direct communications with States and tribes, we will try to ensure that permit applicants understand the need to comply with State and tribal laws and regulations.

We like the idea of a database we could make available to States and tribes, and may pursue that option if we have the resources to do so. Biweekly reports are probably not a realistic option due to limited staffing and busy schedules, but are not out of the question. At a minimum, we anticipate working with the Flyway Nongame Technical Committees to keep them apprised of applications that are likely to be of high interest, as well as pending and issued permits in their States. We hope to establish a process comparable to the Flyway structure, but comprised of representatives from tribal wildlife agencies to allow us to share information with tribes in a coordinated manner.

Comment: To ensure that State programs for eagle management are considered before permits are issued, the Service should develop a comprehensive compilation of State regulations for both species, including how take is defined and regulated in each State, and it should be published in the final EA.

Service response: We agree that a compilation of State and tribal regulations could be useful and have included a simplified version of such in Appendix B of the FEA. However, to do full justice to the complexity and nuances of the different approaches taken by States and tribes in protecting eagles would require considerably more

time, effort and resources than we have been able to supply for such an effort at this time. There is enormous variation in how States and tribes manage eagles. Some have no regulations that pertain to eagles specifically, some are habitat management plans, some are permit programs, but the prohibitions are not the same as Federal prohibitions, while others have similar or even stricter prohibitions but completely different issuance criteria for permitting. This high degree of variability may be difficult to capture in a single, user-friendly compilation. More effective, at least for the short term, will be for each Service Regional Migratory Bird Office to familiarize themselves with the laws and regulations of States and tribes within their respective regions that apply to eagle management. We already operate in this manner when issuing other types of permits. For example, we will not issue a permit to possess a red-tailed hawk in Hawaii, because Hawaii regulations do not allow raptors within the State.

Comment: The government should give the tribes notice of all pending and future applications for permits, particularly where eagles may be affected on or near tribal lands.

Service response: As with States, some tribes will want closer coordination with us than others. We plan to work with each tribe that is interested to establish implementation protocols regarding the level of coordination desired by the tribe.

Comment: The regulation needs to include stronger, more explicit language regarding the need to be compliant with tribal law.

Service response: The requirement to be in compliance with other laws and regulations is a standard condition of all Service Migratory Bird permits and it is spelled out on the face of each permit. However, to ensure this condition is given sufficient weight, we have added the following new regulatory language to the permit conditions in both § 22.26 and § 22.27: ''The authorization granted by permits issued under this section is not valid unless you are in compliance with all applicable Federal, tribal, State, and local laws and regulations applicable to take of eagles.''

Comment: The Service should issue programmatic permits to the Corps, other Federal agencies, and State agencies, allowing them to provide take authority subject to their own programs where they are consistent with the Eagle Act's requirements.

Service response: Our ability to delegate permit authority to outside agencies is limited because the Eagle Act does not allow take of bald eagles unless a permit is procured from the Secretary of the Interior. However, within our statutory authority and to the degree that is compatible with the preservation of eagles, we intend to explore ways of streamlining the permit-issuance process, which might include issuing a ''Master permit'' to other agencies, allowing them to allocate take authorization where needed. One of many complicating factors is that requests for permits may exceed what would be compatible with eagle preservation in some areas, in which case the issuance criteria governing prioritization to certain interests (safety emergencies, Native American religious needs, and so forth) will come into play. If permits are ''re-distributed'' by a third party, the coordination needed to ensure the prioritization issuance criteria are met could be rather challenging.

Programmatic Permits

Comment: The June 2007 proposed rule suggested that permits for lethal take would only be available if the take was unavoidable and best management practices (BMPs) are being implemented. The proposed definition of ''unavoidable'' is flawed because it relies on industry-accepted measures for avoiding take, but in most circumstances, industry-accepted measures will not be all that can be done to avoid take. Are the BMPs limited to those developed specifically for the purpose of reducing eagle mortality? What would happen if different BMPs proscribe conflicting actions? Clarification is needed as to what constitutes lethal take; disturbance can sometimes result in eagle mortalities.

Service response: Our reference to BMPs caused understandable confusion because it was interpreted to mean any type of industry-accepted BMPs for the conduct of the activity, regardless of whether the BMPs were designed to reduce eagle mortalities or serve some entirely unrelated function (such as human safety and hygiene). Our intent was that the BMPs would have to be designed to reduce eagle mortalities and other take of eagles. We have revised this part of the rule. Rather than referencing BMPs, we are clarifying that we will work with industries to develop what we are calling ''Advanced Conservation Practices'' (ACPs), designed specifically to reduce take of eagles (and sometimes other migratory birds). Implementation of ACPs will qualify some entities for programmatic take permits, and can be used to authorize ongoing unavoidable disturbance as well as unavoidable mortalities. The ACPs will be developed by the applicant in coordination with the Service and will be scientifically-supportable measures representing the best-available techniques designed to reduce disturbance and ongoing mortalities to a level where remaining take is unavoidable.

Comment: Will lethal take permits be issued for industries that have no such measures?

Service response: These regulations allow us to authorize take that results in mortality as long as the issuance criteria for a standard permit under this section are met, but would not allow us to issue a permit for programmatic take without development and implementation of ACPs.

Comment: Programmatic permits will increase mortalities by giving the perpetrators a ''free pass.''

Service response: The design and intent of programmatic permits is exactly the opposite of what the commenter suggests. Programmatic permits will be issued and valid only where the applicant/permittee implements rigorous conservation measures to reduce take to the point where it is unavoidable.

Comment: The regulation should be clear that development of programmatic permits will entail coordination with States where the activity will occur.

Service response: We envision close coordination with States and tribes when developing programmatic permits. We will address such in forthcoming implementation guidance, which we intend to develop in coordination with States and tribes, as well as the general public, via a public comment period.

Comment: The Service should codify programmatic permit conditions through the **Federal Register** process.

Service response: Programmatic permits are designed to reduce mortalities and other take. In our view, a public comment period for each programmatic permit would not provide an additional benefit to eagles sufficient to justify the delay, regulatory burden, and the substantial additional resources from our agency needed to navigate the **Federal Register** process.

Comment: Programmatic permits are not acceptable unless the Service retains the authority to decide what constitutes advanced conservation practices, required mitigation, and how much take is unavoidable.

Service response: Although we will develop ACPs in coordination with applicant industries and other entities, the Service will make the final decision as to what measures constitute the ACPs that will serve as required conditions of programmatic permits.

Comment: Current best management practices such as those developed by the Avian Power Line Interaction Committee (APLIC) should be the baseline, and more should not be required to get a permit.

Service response: The voluntary recommendations for avoiding avian mortality developed by APLIC are much more comprehensive than any we are aware of for other industries. However, most utilities that have adopted them have done so in a relatively piecemeal manner, using some recommendations in some areas, applying others in different places, and very rarely implementing all the measures that could be used to reduce eagle mortalities. Furthermore, there are practices over and above what APLIC recommends that could further reduce take in some situations. Programmatic permits are premised on the permittee implementing all achievable measures to reduce take to the point where it is unavoidable.

Comment: Programmatic permits must include provisions to safeguard local populations (geographic limits) and mechanisms to restrict permits when and where populations decline. Programmatic permits should contain provisions subjecting them to revocation if eagle take resulting from the activity is greater than anticipated.

Service response: We have added the following language to both permit regulations: ''The Service may amend, suspend, or revoke programmatic permits if new information indicates that revised conditions, suspension, or revocation is necessary to safeguard local or regional eagle populations.''

Comment: Programmatic permits should be issued for multi-year periods to provide certainty.

Service response: Most programmatic permits will be issued for the full five years that a permit can be valid under these regulations. Furthermore, renewal of programmatic permits will have priority over other permits for eagle take except to address safety emergencies and meet the religious needs of tribes.

Comment: There should be no time limit for programmatic permits because they are based on the premise that there is nothing more the permittee can do to minimize take.

Service response: We expect that circumstances will often change such that the original ACPs may no longer be considered the most effective measures that could be adopted. There are likely to be technological advances in some industries that would warrant adoption of new, more effective conservation measures. Also, new information regarding eagle biology, behavior, and responses to the permitted activity may warrant re-examination of the effects of the permitted activity and re-evaluation of the permit conditions.

Comment: Programmatic permittees should not be subject to enhanced monitoring and reporting requirements; so long as the ACPs are being carried out, no further information should be necessary for the Service to know as far as population impacts are concerned.

Service response: See our response to the comment above. Also, the monitoring we will require for programmatic permits will not be large-scale population monitoring (such as the bald eagle post-delisting monitoring plan). Rather, the monitoring required of programmatic permittees will be focused on assessing how effective the ACPs actually are, how much take is actually occurring, and overall eagle presence and use of the project area. This type of information will be critical for evaluating the impact of the permit program on eagles, as well as for crafting future guidance for minimizing human impacts outside the permitting program as necessary to maintain healthy eagle populations.

Comment: The final rule must provide for the situation where there are no practicable ACPs that can mitigate ongoing, unavoidable take.

Service response: There are probably very few situations where nothing can be done to reduce impacts to eagles. All sorts of factors will be in play, such as timing and siting of the activity; timing and siting of surrounding activities being conducted by different entities that can come to the table; technological advances; additional staff; and other factors. Creativity may be required in some cases to find effective, achievable measures. However, in the rare situation where all parties agree that nothing can be done to decrease the take from an activity that is a legitimate interest in a particular locality, compensatory mitigation can be used, and the measures required for compensatory mitigation would need to result in a reduction of take at a different location and/or from a separate activity. Those measures would be the ACPs for the permit.

Comment: The final EA and regulation should make clear that the permitted entity may implement measures that do not fully avoid or minimize take where doing so is not within the authority of the entity.

Service response: Generally, if measures to reduce take are outside the authority of the entity, then liability for the take rests elsewhere too. Usually, whoever has the authority to affect the level of take will be the entity responsible for the take. There will be some situations where one industry takes eagles in part because of the actions of another entity. Even then, however, the liability would usually be shared. An example would be a railroad company with trains that sometimes strike bald eagles that are attracted to an artificially baited site nearby. The person feeding the eagles may be in violation of the Eagle Act because of its prohibition on disturbance, since the feeding interferes with normal feeding behaviors and results in injury of eagles, which meets the definition. However, the railroad company is also in violation, since its trains are actually killing eagles. In a situation this straightforward, enforcing against the feeder would be appropriate, and would reduce eagle mortality to a point where the only remaining, effective measures to further reduce take would be the railroad company's responsibility. If one entity's actions are not themselves a violation but do contribute to a violation on the part of another entity, we envision that a dialogue would be necessary between the two actors to arrive at joint measure to reduce take. We may aid in the process of dialogue if we have the resources, but the responsibility to comply with the Eagle Act preceded the existence of this permit program, and remains with the actors regardless of the availability of these permits.

Comment: The process for developing industry metrics should be set forth in the rule.

Service response: At this time, we have not established a process for developing industry metrics. We plan to do so as part of crafting implementation guidance. There will be an opportunity for public notice and comment before any such process is formalized.

Comment: The final rule should make clear that industry standards can be developed over time as various entities from different locations (with different conditions) apply for permits, and it is not necessary for the entire industry to be regulated with a national standard.

Service response: Yes, our intent mirrors what the commenter suggests: we anticipate that ''an industry'' will often be a single large utility, or one major railroad line, or one transportation agency. Circumstances for that single entity may be quite different than for a comparable entity in another part of the U.S., warranting ACPs that might be ineffective or counterproductive if applied elsewhere. ''An industry'' could also be an association of participating smaller entities who will be permitted under the standards developed by the association.

We agree that industry standards will evolve over time. After several programmatic permits are in place for one type industry, we may, in developing ACPs for another entity within the same industry, arrive at superior measures that can be achieved. If appropriate, those can be applied to the earlier programmatic permits when those permittees apply for renewal.

Comment: Programmatic permits should not include an estimate of mortality because: (1) it is too difficult to estimate; (2) even if the ACPs are effective, increasing eagle populations can still result in increased mortality, and (3) by definition, the ongoing operations will improve mortality rates.

Service response: We think estimates of mortality are possible. The Eagle Act requires that we determine that take is compatible with eagle preservation prior to issuing a permit. Therefore, if data on effects of an activity on eagles are so spotty that no estimate is possible, a permit may not be appropriate. The only activities that will qualify for programmatic permits are those that have been studied fairly rigorously in order to develop comprehensive ACPs to reduce take to the maximum level achievable. This level of research should typically yield data sufficient to develop reasonable estimates of eagle mortality before and after implementation of the ACPs.

Comment: Programmatic permits should not be issued for unlimited take; otherwise there will be no incentive to pursue additional methods to minimize take.

Service response: Programmatic permits will all include estimates of take. To ensure that take does not continue to be authorized if it exceeds the estimate and is incompatible with the eagle preservation, we added a condition to each regulation that we can amend, suspend, or revoke a programmatic permit if ''new information indicates that revised conditions, suspension, or revocation is necessary to safeguard local or regional eagle populations'' (§ 22.26(c)(7) and § 22.27(b)(8)).

Comment: It should be possible to meet the requirement that an applicant demonstrate reduced mortality before getting the permit via scientifically-based predictions, rather than requiring field data; many operations will not have good historical baseline with which to compare data.

Service response: If an applicant for a programmatic permit cannot establish a historical baseline, we may use estimates of take based on predictions generated by sound scientific research. This applies to development of ACPs, as well. It may not be feasible for an industry to demonstrate the effectiveness of the ACPs or to fully implement them prior to obtaining the permit. We envision that in many cases, programmatic permits will be issued before all ACPs are completely implemented; however, the validity of the permit is conditioned on implementation of ACPs where the take occurs. In other words, if ACPs are phased into a project, any take that occurs outside of the area where the required ACPs have not been implemented, is not authorized by the permit.

Comment: Programmatically authorizing eagle mortalities under the Eagle Act is of limited value to the power industry because utilities will still be liable under the Migratory Bird Treaty Act for incidental take of other birds, since no permit is available for incidental take under the MBTA.

Service response: No permit is currently available to authorize incidental take under the MBTA. However, many of the ACPs that would minimize eagle take will also reduce other avian mortalities with the result that utilities that implement the ACPs under these Eagle Act regulations will minimize take of other migratory birds in addition to eagles, decreasing their liability under the MBTA. The Service focuses its enforcement resources on investigating and prosecuting individuals and companies that take migratory birds without regard for the consequences of their actions and the law, especially when available conservation measures have not been implemented.

Comment: It would be impossible to demonstrate that all avoidable eagle mortality has been eliminated. Recommended practices cannot completely eliminate the risk of mortality. Programmatic permits should not be based on a standard of ''unavoidable''; rather, they should be based on the practicability standard applied to individual permits.

Service response: We agree it would be impossible to demonstrate that all avoidable eagle mortality has been eliminated. What we expect instead is that the permittee fully implement the ACPs agreed to by the Service as conditions of the permit, which are measures designed to reduce take to the maximum degree achievable. The standard for programmatic permits is higher than the practicability standard applied to ''individual'' permits because programmatic permits authorize more take on a larger scale than individual permits. Where an individual permittee's required conservation measures will factor in the ''cost of remedy comparative with proponent resources,'' a programmatic take permit will be available only if the applicant can implement all available, technically-achievable measures to reduce take. We believe this higher standard is necessary to protect eagles from large-scale and cumulatively significant take.

Comment: Will the development of programmatic permits be subject to NEPA? A full environmental analysis must be done on a case-by-case basis for programmatic permits.

Service response: Programmatic permits will each be subject to NEPA.

Comment: The regulations should include the requirement that industry standards required for programmatic permits must specifically include facility-siting criteria.

Service response: The location of facilities often can have significant impacts to eagles (e.g., wind farms), and some industries may be able to reduce take substantially by selecting particular sites over others. However, for other industries or entities seeking programmatic permits, location of facilities may not be a primary factor in reducing eagle take, and for that reason we have not included language in the regulations to require facility siting criteria as conditions of the permit. However, we intend to ensure that siting criteria are emphasized in the implementation guidance that we will develop for programmatic permits and adopted where applicable.

Definitions

Comment: Adding ''destroy'' to the ''take'' definition enlarges the statutory definition of ''take,'' but the Service has no authority to do so. The Service should say what the intended effect is of adding ''destroy'' to the definition of ''take.''

Service response: We have the authority to define ''take'' in a way that includes more than just the specific examples Congress included in the statutory definition. The Eagle Act, expressly states ''take *includes also* pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, molest or disturb.'' 16 U.S.C. 668c (emphasis added). If Congress had intended to restrict the definition to the terms included in the Act, it would have stated what take *means*, not what it *also includes*. The intended effect of adding ''destroy'' is to clarify the meaning of ''take'' in a way consistent with Congressional intent. Legislative history demonstrates that the Eagle Act was intended to protect nests from destruction, and we have previously

interpreted ''take'' to include ''destruction.'' However, as written, the statutory definition of ''take'' does not include any term that explicitly applies to nest destruction. Therefore, we are adding ''destroy'' to the regulatory definition to codify our long-standing informal interpretation and to ensure that the public has adequate notice of this interpretation.

Comment: By defining ''important eagle-use area,'' the Service has gone beyond its statutory authority. The definition ''appears to cast a wide regulatory net over areas that may be used by eagles'' by implying that eagle take permits will be required for activities within these areas. Also, who will determine what is ''essential'' to the viability of the eagle? What if the important eagle-use area is on someone else's property?

Service response: Defining a ''term of art'' is not the same as regulating it. Sometimes, as in this case, a definition can be used in order to refer to multiple objects by applying a single name to them as a group, eliminating the need to reiterate each component of the group whenever they are referenced.

In this case, because eagles can only be disturbed if their breeding, feeding, or sheltering behaviors are substantially interfered with, disturbance is likely to occur near important breeding, feeding, and roosting areas. Therefore, in assessing whether disturbance is likely to occur, it is logical to evaluate the relationship between the potentially disturbing activity and the important breeding, feeding, and sheltering areas. To more succinctly address this concept, we will use the term ''important eagle use-area'' to refer to one or more of the areas where eagles will potentially be disturbed by an activity. Naming this term in no way extends our regulatory reach over these areas, but rather provides a logical means to evaluate potential take. It does not matter on whose property the important eagle-use area is located; the important eagle-use area is not being regulated. What is regulated are certain impacts of an activity on eagles.

Finally, what is ''essential'' to the viability of the site for breeding, feeding, and sheltering eagles will depend on the various factors that affect the degree to which eagles depend on the site. Those best able to evaluate what is ''essential'' are likely to be State and Federal biologists or other eagle experts. Many important eagle-use areas are well-documented, and even where not specifically documented, bald eagles are relatively well-surveyed, and much is known about behaviors of eagles in particular localities.

Comment: Additionally, the terms within the phrase ''important eagle-use area'' need to be defined (e.g., ''foraging area,'' ''communal roost site''). ''Foraging area'' should be defined narrowly to mean only those areas used during migration and wintering periods at traditionally-used sites, perhaps as those ''containing traditionally-used concentrations of preferred prey.''

Service response: We agree that defining ''foraging area'' and ''communal roost site'' would be helpful and we have done so, as follows: ''foraging area'' means ''an area where eagles regularly feed during one or more seasons''; ''communal roost site'' means ''an area where eagles gather repeatedly in the course of a season and shelter overnight and sometimes during the day in the event of inclement weather.'' Not all foraging areas and communal roost sites are important enough such that interfering with eagles at the site will cause disturbance (resulting in injury or nest abandonment). Whether eagles rely on a particular foraging area or communal roost site to that degree will depend on a variety of circumstances—most obviously, the availability of alternate sites for feeding or sheltering.

Comment: ''Important eagle-use areas'' should include migration corridors.

Service response: We agree that take of eagles within migratory corridors is a significant concern with regard to certain activities, particularly wind-power facilities. However, we think the majority of applicants for individual permits will not be engaging in activities that are likely to take eagles in migration corridors, so have left them out of the definition of ''important eagle-use areas.''

Comment: ''Nest'' should be defined more narrowly than was proposed, to account for whether the structure was ever used, has been abandoned, or is occupied by great-horned owls, etc. The proposed definition is inconsistent with the five-year period specified in the Guidelines after which a nest can be considered abandoned for purposes of maintaining the buffers recommended in the Guidelines. The definition should limit nests to those that are maintained or used within twelve months.

Service response: The Guidelines do not define a nest as ''abandoned'' after five years. The Guidelines suggest that buffers may no longer be warranted after five years of disuse because the likelihood of disturbing eagles is decreased by that point. However, under the Guidelines, the term ''nest abandonment'' has no relation to that five-year period. The definition of ''nest abandonment'' in the Guidelines does not necessarily entail permanent rejection of the nest. In fact, the Guidelines specifically state that ''nest abandonment occurs when adult eagles desert or stop attending a nest and do not subsequently return and successfully raise young in that nest *for the duration of a breeding season*.'' NBEMG, p. 17 (emphasis added).

We based the definition of ''eagle nest'' on the existing regulatory definition of ''golden eagle nest'' (50 CFR 22.3), which has no expiration date. As we note in the Guidelines, the probability of disturbance occurring at a nest decreases the longer the nest goes unused. However, it would be arbitrary to state a time limit after which an eagle nest no longer meets the definition of a nest, given that suitable nest sites are limited in many areas of the country and are often re-occupied by eagles after many years of disuse. The definition provided by this rule is consistent with the long-standing definition of golden eagles nests and better satisfies the statute's intent to protect eagles by protecting nests: until the structure is no longer ''readily identifiable as a structure that is built, maintained, or used by eagles for purposes of reproduction,'' it is protected as a nest by the Eagle Act.

Comment: Clarification is requested as to whether the definition of ''nest'' includes alternate nests as well as the primary nest site.

Service response: To clarify that the definition includes alternate nests, we revised it by changing ''a'' to ''any.'' The definition now reads: ''any readily identifiable structure built, maintained, or used by bald eagles or golden eagles for the purpose of reproduction.''

Comment: The rule should use the definition of ''eagle nest'' already in the Code of Federal Regulations.

Service response: In addition to applying to bald eagle nests as well as golden eagle nests, the new definition differs from the old one in two ways. First, the new definition substitutes ''used'' for ''occupied'' in order to avoid confusion with the term as used in scientific literature where it has very specific connotations. Second, the new definition replaces ''for propagation purposes'' with ''for purposes of reproduction,'' because ''propagation'' sometimes refers to human-induced breeding, whereas ''reproduction'' more plainly means what is intended.

Comment: The definition of ''inactive nest'' is inconsistent with the National Bald Eagle Management Guidelines, which use the terms ''active nest'' and ''alternate nest.''

Service response: The NBEMG use the following terminology: An ''active nest''

is a nest that is attended (built, maintained or used) by a pair of bald eagles during a given breeding season, whether or not eggs are laid. An ''alternate nest'' is a nest that is not used for breeding by eagles during a given breeding season (NBEMG, pg. 17). The definition of ''inactive nest'' in these regulations is not consistent with the terminology applied in the Guidelines because the definitions serve different purposes. The Guidelines distinguish between ''active'' and ''alternate nests'' in order to recommend different practices to avoid disturbing eagles. An ''alternate nest'' as defined in the Guidelines is not the same concept as an ''inactive nest'' in the regulations. As defined in the Guidelines, an ''alternate nest'' can also be an ''active nest'' if it was attended during the breeding season, but not used for breeding. This distinguishes it from a nest that is completely unattended during the course of a breeding season (which had it been defined, might have been called an ''inactive nest,'' although that definition should also include any nest outside the breeding season). The Guidelines recognize that disturbance can only occur if eagles at some point notice something that agitates them (in addition to other factors), and therefore an eagle could be disturbed at an attended nest during the breeding season, thereby causing the attended nest to become alternate. Therefore, recommendations for conducting activities during the nesting season near nests that might go either way (might become alternate nests or might be used for breeding purposes), when no nest has yet been definitively selected by eagles in the territory, are as strong as for nests that are selected for breeding purposes.

In contrast, the regulations distinguish between nests that are not being used at present for breeding purposes (including the 10 days just prior to an egg being laid) to ensure there is no associated take of eggs or nestlings, and that eagles are not prevented from laying eggs in a nest they have selected to breed in that season. An ''inactive nest'' under the regulations would theoretically include some nests deemed ''active'' under the Guidelines if it was attended by eagles during that breeding season (at least 10 days prior), but not used for breeding purposes. The aim is different: eagles at that nest could have been disturbed during the earlier period when they attended the nest—hence its designation as ''active'' under the Guidelines to minimize that possibility. But if eagles are not using it for breeding purposes as evidenced by lack of attendance for at least 10 days (whether within or outside of the nesting season) its removal would have significantly different impacts to eagles than removal of a nest that is occupied or attended during the past 10 days for purposes of breeding, leading to the designation in the regulations of such nests as ''inactive nests.''

Comment: The definition of ''inactive nest'' is inconsistent with the existing definition.

Service response: The new definition is consistent with the old definition, which, in any case, is being removed. The new definition differs primarily in that it includes bald eagle nests as well as golden eagle nests. The second difference is replacement of the phrase ''absence of any adult, egg, or dependent young at the nest for 10 days before the nest is taken'' with ''continuing absence of any adult, egg, or dependent young at the nest for 10 consecutive days immediately prior to, and including, at present.'' The change serves dual purposes. First, it eliminates the inadvertent implication in the old definition that a nest cannot be inactive unless it has been taken. Second, it clarifies that the period of when the nest is not attended has to be current in order for the nest be considered inactive. The last difference is the addition of the following sentence: ''An inactive nest may become active again and remains protected under the Eagle Act.'' This sentence is included to clarify that nests that become inactive generally retain significant biological value to eagles, and are subject to the same prohibitions against take as active nests. None of these revisions are inconsistent with the old definition of ''inactive nest.''

Comment: Because an inactive nest may become active again and remains protected under the Eagle Act, there should be no distinctions in the level of protection afforded to active and inactive nests. Designation of the nest as inactive for the purposes of this rule might allow for easier granting of permits, even though such a nest might be the only nest structure within a particular pair's territory.

Service response: The reason for distinguishing between active nests and inactive nests and for defining the term ''inactive nest'' is because the new nest-take-permit regulation, as well as existing regulations for take of golden eagle nests for resource development and recovery operations (50 CFR 22.25), regulate nests differently depending on whether they are currently active or inactive. Under existing § 22.25, a permit may only be issued for inactive nests. Under the regulations being finalized by this rulemaking, a permit can be issued for an active nest only if the location of the nest poses an immediate threat to safety. This definition is intended to be applied only to questions of whether or not a nest may be taken with reduced risk of associated take of birds. It is not intended to convey any other biological status.

We will consider whether the nest is the only one in the territory. If the take is not necessary to alleviate a safety emergency, before issuing a permit we must find that ''suitable nesting and foraging habitat is available to the area nesting population of eagles to accommodate any eagles displaced by the nest removal'' (§ 22.27(e)(6)).

Comment: Is a nest considered ''abandoned'' under the Guidelines still protected by the Eagle Act? The rule should clarify how the Eagle Act applies in this case. Does it prohibit only removal of the structure?

Service response: A nest that has been abandoned is not necessarily *permanently* abandoned and remains protected under the Eagle Act. The NBEM Guidelines refer to nest abandonment as follows: ''Nest abandonment occurs when adult eagles desert or stop attending a nest and do not subsequently return and successfully raise young in that nest for the duration of a breeding season .... [N]est abandonment can occur at any point between the time the eagles return to the nesting site for the breeding season and the time when all progeny from the breeding season have dispersed'' (NBEMG, p. 17).

By ''a nest considered abandoned under the Guidelines,'' the commenter may have been referring to the Service's recommendations for nests that have not been active for five years, in which case the Guidelines suggest that the buffer distances the Service recommends around nests may not need to be maintained at that point, since, in general, the probability of disturbing eagles at nests that have not been attended for five years is decreased. However, as the Guidelines continue on to state, ''[t]he nest itself remains protected by other provisions of the Eagle Act, however, and may not be destroyed'' (NBEMG, pg. 11).

Comment: ''Territory'' should be defined in the regulation.

Service response: This comment was made on the June 5, 2007, proposed rule. The regulations governing nest removal (new § 22.27) use the term ''territory'' to refer to the area where a nest could potentially be relocated. When we released the DEA and re-opened the comment period on the rule,

we proposed to define ''territory'' as ''a defended area that contains, or historically contained, one or more nests within the home range of a mated pair of eagles, and where no more than one pair breeds at a time.''

Comment: The last 10 words in the proposed definition of ''territory'' (''where no more than one pair breeds at a time'') should be deleted, since this changes from year to year.

Service response: We deleted those last 10 words from the final definition so that it reads: ''[t]erritory means a defended area that contains, or historically contained, one or more nests within the home range of a mated pair of eagles.

Comment: The definition of ''territory'' should not include the word ''historically'' because that would encompass areas that eagles have not occupied for many years. Perhaps it could be modified to read ''recently contained'' or ''within 10 years.''

Service response: We considered removing the word ''historically'' and adding some limit to the time frame in which a territory could be considered a territory, but rejected the suggestion because a time frame would be arbitrary, and the phrase ''recently contained'' does not have any biological basis. Primarily, we opted to leave ''historically'' within the definition because the rule does not use the word ''territory'' to restrict or authorize any action. The statute itself does not protect or even reference territory. Its only use within these regulations is to refer to the area that will be considered when a nest can feasibly be relocated ''within the same territory to provide a viable nesting option for eagles within that territory, unless such relocation would create a similar threat to safety'' (§ 22.27(a)(2)).

Comment: The definition of ''practicable'' is of central importance and should be incorporated into the regulation.

Service response: We agree and have defined ''practicable'' in the regulation as ''capable of being done after taking into consideration, relative to the magnitude of the impacts to eagles: (1) the cost of remedy comparative with proponent resources; (2) existing technology; and (3) logistics in light of overall project purposes.'' The phrase ''relative to the magnitude of the impacts to eagles'' is important because whether something is practicable is relative to the risk of not doing it. If the adverse impact is small, it may be impracticable to undertake enormously costly measures to avoid it, but it if the impact will be extremely detrimental, increased measures may be deemed reasonable and practicable. For example, it may not be practicable to find a new site for a proposed large-scale wind turbine project in order to avoid disturbing one nesting pair of eagles, whereas it may be considered practicable to find an alternative if the site originally proposed was within a major migration corridor for golden eagles and would likely result in significant eagle mortalities.

Comment: The definition of ''practicable'' must not include any consideration of the applicant's financial resources. (Some commenters asserted such a consideration would result in too high a bar for large projects with resources, while others were concerned it would result in too low a bar because applicants will always claim not to have enough resources to avoid or minimize impacts.)

Service response: We believe ''practicable'' inherently encompasses consideration of what the proponent can muster and marshal towards achieving a goal, whether it be money, time, ingenuity, or other factors that contribute to the chances of being able to accomplish something. Our inclusion of the phrase ''the cost of remedy comparative with proponent resources'' was intended to confirm the integral role such a consideration plays in determining what is practicable. For more discussion on this issue, see our related responses to comments under the heading *Scope and Criteria of 22.26.*

Comment: The rule should define ''public welfare'' as ''the well-being of a community, state, region, or nation in matters of health, safety, or order.''

Service response: When we released the DEA and re-opened the comment period on the proposed rule, we proposed to base some aspects of the new permit programs on the concept of ''necessary for the public's welfare,'' which we proposed to define as ''needed to maintain society's well-being in matters of health, safety, and order.''

We would have used the concept when demand for take exceeds what is compatible with the preservation of the bald eagle or the golden eagle, to ensure that take that is necessary for the public's welfare be prioritized over other take for other purposes except for Native American religious use and safety emergencies. The concept would also have been central to issuance of eagle nest take permits under new § 22.27, expanding the reasons for which nests could be taken from safety emergencies only, to situations where the take is necessary to protect the public's welfare. However, as a number of commenters observed, the definition was unacceptably broad and subjective, particularly when used as a qualifying factor for nest removal. For example, it could be argued to include any activity that increases a locality's tax base, which could include any commercial activity, and this was not our intent because we do not believe it accords with Congressional intent underpinning the Eagle Act. Although the Eagle Act does incorporate protection of private interests (e.g., protection of livestock from depredating eagles), the language and legislative history of the statute convey a greater degree of protection for eagle nests than for individual eagles. For that reason, we replaced the over-broad term ''the public's welfare'' with the narrower concept of ''public health and safety.'' This will encompass projects that are genuinely necessary to protect people, while excluding projects that may have only intangible benefits incommensurate with the negative impact to eagles from removing a nest. The rule also provides that a nest may be taken for any purpose as long as there is a net benefit to eagles provided either by the activity itself or mitigation for the activity. Had we more time to develop this rule, we might consider adopting a permitting system wherein nests with lesser biological value could be removed for a broader range of purposes without requiring the permittee or activity to provide a net benefit to eagles. However, due to the importance of finalizing this rulemaking expeditiously, the analysis of the merits, complexities, and potential drawbacks of such an approach, if undertaken, will have to be addressed in the implementation guidance for this regulation or in a future rulemaking.

Comment: The definition of ''public welfare'' is too broad and vague and greatly exceeds the purposes for which golden eagle nest take now can be permitted. Clarification is needed as to what specific types of activities will fall under ''public welfare.''

Service response: We agree that ''the public's welfare'' was too vague a concept and very difficult to define. As discussed in the preceding response, the final rule incorporates the narrower concept of ''public health and safety.''

Comment: ''Public welfare'' should not include transportation projects, which should be treated like any construction or development.

Service response: We replaced the concept of ''the public's welfare with ''public health and safety,'' to provide parameters on what can qualify under the term. However, we intend that the concept of ''public health and safety'' will sometimes, though not necessarily always, apply to transportation projects.

For example, where a highway department proposes to modify a highway interchange to reduce a disproportionately high incidence of traffic accidents, if the modifications needed to improve safety cannot practicably avoid an eagle nest, the project may qualify for a nest removal permit, depending on whether the remaining permit issuance criteria can be met.

Comment: The rule should define ''cumulative impacts'' as ''the incremental environmental impact or effect of the proposed action, together with impacts of past, present, and reasonably foreseeable future actions. Cumulative effects can result from individually minor but collectively significant actions taking place over a period of time.''

Service response: We largely agree with this comment and have adopted the first sentence suggested by the commenter as the definition of ''cumulative effects'' within this rule. We omitted the second sentence because we believe it unnecessarily narrowed the definition by suggesting that cumulative impacts occur only over time, whereas cumulative impacts also can refer to multiple impacts from a variety of sources occurring concurrently with one another.

Comment: The rule should define ''indirect effects'' as ''effects caused by the action and which are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth-inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems. Indirect impacts include those impacts resulting from interrelated actions that are part of a larger action and depend on the larger action for their justification and from interdependent actions that have no independent utility apart from the proposed activity.''

Service response: The definition suggested by the commenter is too broad for the context of this regulation. Beyond what is appropriate for us to consider as part of the NEPA analysis (where one is required), we do not intend to base permit decisions on how growth enabled by a proposed action would affect air, water, and other natural ecosystems. The permit authorizes eagle take and the issuance criteria will include consideration of reasonably foreseeable secondary effects *on eagles* to ensure that authorized take is compatible with the preservation of the bald eagle or the golden eagle. To the degree that these secondary or ''indirect effects'' will foreseeably result in additional impacts to eagles, we will consider those impacts. However, impacts to air quality and water quality may require authorizations from other agencies, and the responsibility to authorize or prohibit such impacts is generally beyond our authority.

We agree with the commenter that a definition of secondary or indirect effects may be beneficial. In the proposed rule, we used the term ''secondary impacts'' to refer to impacts that result from an activity after an initial action (e.g. building a road has an impact, and the traffic that results is a secondary impact). We had considered using the term ''indirect effects'' but felt it was unsatisfactory because secondary impacts are often direct. They may occur somewhat later in time, but they are the direct result of the first action and may directly affect eagles (e.g., without the road having been built, there would be no vehicular traffic). However, the term ''secondary impacts'' has its own drawbacks; most notably it could be interpreted to omit any impacts that were tertiary or beyond. For that reason, and because ''indirect effects'' is used much more commonly, we are replacing the term ''secondary impacts'' with ''indirect effects.''

When we re-opened the comment period on the rule in August 2008, we proposed to define ''indirect effects'' as ''effects that are caused by an action and either occur later in time or are physically manifested beyond the immediate impacts of the action, but are still reasonably foreseeable.'' We modified that proposed definition to clarify that the proposed action can be a contributing factor to the effect and does not have to be the sole cause. The final definition of ''indirect effects'' under this rule is: ''effects for which a proposed action is a cause, and which may occur later in time and/or be physically manifested beyond the initial impacts of the action, but are still reasonably likely to occur.''

Comment: ''Indirect effects'' must include the requirement of a reasonably close causal relationship between the environmental effect and the alleged cause.

Service response: We agree with this comment, and will address this issue in more depth in the implementation guidance for these regulations.

Comment: The rule should require the Director to consider both cumulative impacts and indirect effects before concluding compatibility with preservation of the eagle.

Service response: The final rule requires the Service to consider indirect effects when assessing the scope of the impact, and it requires us to consider cumulative effects in determining whether the take will be compatible with the preservation of the bald eagle or the golden eagle.

Comment: ''Cumulative effects'' should not be considered because each permit application will be assessed at the time it is processed.

Service response: This comment appears to misunderstand the essential concept of cumulative effects, which no matter how defined, must include consideration of more than one effect at a time. The need to assess cumulative effects arises from the fact that combinations of effects can create impacts that would not result from a single effect, and which, in the case of eagles, could threaten their preservation. The assessment of cumulative effects will also be critical to protection of local eagle populations, since it will afford the Service a view of where a concentration of impacts may be occurring, a view that otherwise may not in every case be adequately examined during the permit-issuance process.

Comment: The definition of ''cumulative effects'' overreaches and is not supported by the Eagle Act. The regulations should adopt the approach the Service is imposing on itself in revisions to ESA interagency coordination regulations, that is: for the effect to be reasonably certain to occur, the Service must have clear and substantial information that the proposed action is an essential cause. It would put both statutes on the same definitional footing and eliminate confusion.

Service response: The revisions to ESA interagency coordination regulations have been withdrawn. Regardless, they pertained to a different statute, the ESA, and are not appropriate under the Eagle Act, which has separate standards and a different mandate. Also, the commenter appears to be merging the (now withdrawn) ESA section 7 definitions for ''cumulative effects'' and ''indirect effects.'' Under both the retracted and the reinstated ESA regulations, ''cumulative effects'' are limited to effects that are ''reasonably certain to occur.'' Preservation of the bald eagle and the golden eagle may not be achieved if the Service must carry the burden of proving an effect will occur before it can be prevented, which would effectively be the case if the only cumulative effects we could consider were those that are reasonably certain to occur. The ESA regulatory definition of ''cumulative effects'' is not related to the concept of an ''essential cause,'' as the

commenter mistakenly suggests. ''Essential cause'' was used under the withdrawn ESA section 7 regulations to clarify the definition of ''indirect effects.'' For purposes of permitting under the Eagle Act, we define ''cumulative effects'' as ''the incremental environmental impact or effect of the proposed action, together with impacts of past, present, and reasonably foreseeable future actions.''

Other

Comment: ''Absence of data'' should not be used to deny take authorization for infrastructure projects that promote public safety and welfare; rather the ''best available science'' should be used.

Service response: We certainly believe that the best available science should be used. However, the Eagle Act requires the Secretary of the Interior to determine that take will be compatible with the preservation of eagles before he or she may authorize the take. To permit take without sufficient data to show that it will not result in a decline in the eagle population would violate the statutory mandate.

Comment: Will any activities be exempt from the take provisions of the Eagle Act?

Service response: What is prohibited is ''take,'' not the activities that result in take. In any case, we cannot exempt any take of bald eagles from the permit requirement imposed by the Eagle Act. Any such exemption would have to be provided by an amendment to the Act by Congress.

Comment: In addressing the information-collection requirements of the Paperwork Reduction Act, the Service has probably underestimated the public reporting burden for completing an application. Forest Service staff estimate it will take 3-6 person-days to complete the application process.

Service Response: The reporting burden we provided was an estimate of the *average* hourly burden we anticipate. For large-scale activities such as the Forest Service management plans, the application process will be much longer than the average. Nevertheless, we have increased our estimate of the average hourly burden from 10 hours to 16 hours and added an estimate of 40 hours for a programmatic take permit. Some programmatic permits may take longer than that to develop; however, once ''templates'' have been developed for particular industries or activities, the process will be more streamlined for subsequent programmatic permits for similar activities.

Comment: Far more than 300 permits per year will be needed, partially due to the ''uncertainty caused by the definition of *disturb* and the fact that the guidelines are not possible to follow in general.'' The Service should revise its estimates to reflect the higher demand. The lower estimate is arbitrary and capricious and results in a cost estimate that is too low. The Service should provide documentation, evidence, or rationale for the time estimates.

Service response: We want to be clear about the fact that we do not have any reliable documentation or evidence to indicate how many people will seek permits under this regulation, and we received none from the public during the public comment period. These are new permit programs that will apply to a newly-delisted species (bald eagles) and a species for which no similar authorization was previously available (golden eagles). Having said that, we have increased our estimate to 1,168 permit applications and 910 permits issued under both regulations.

We do not agree that the number of permits is larger than it otherwise would be because of the ''uncertainty caused by the definition of disturb.'' In the past, disturb was not defined at all, and the new definition limits the pool of impacts that might otherwise have been considered disturbance in the absence of a definition by establishing a relatively high threshold that requires injury or nest abandonment. We also disagree that the National Bald Eagle Management Guidelines are not possible to follow in general. The Guidelines are more flexible than any guidance that proceeded bald eagle delisting and they recommend the smallest buffers that applied in any part of the country prior to delisting. In Alaska, parts of which have the highest density of bald eagles in the United States, no ESA permits to take eagles were ever available because the bald eagle was never listed under the ESA in Alaska. Since guidelines similar to our National Guidelines (but less flexible) have proven to be possible to follow in Alaska, we believe they can be workably applied in other parts of the U.S. where eagles are present in lower densities.

Finally, as provided in these regulations, we will only issue permits where the take cannot practicably be avoided, which will help minimize the number of permits.

Comment: The Service should avoid heightening regulatory burdens with regard to the golden eagle. Golden eagles cause damage to crops and livestock and the location of their nests can restrict agricultural activities on farms and ranches. They are only protected under the Eagle Act in order to better protect juvenile bald eagles, which they resemble. Golden eagles are plentiful and will tolerate a much higher level of take than bald eagles. Therefore the permit-application process and issuance criteria should be much less rigorous than for bald eagles.

Service response: Rather than heightening regulatory restrictions, this regulation provides a mechanism for authorizing impacts that otherwise would be prohibited. The Eagle Act prohibits take of both bald eagles and golden eagles. Accordingly, this regulation provides a means to authorize take of golden eagles as well as bald eagles.

The need to protect juvenile bald eagles was the third of three reasons Congress provided for extending Eagle Act protection to golden eagles. In a joint resolution amending the Act, Congress stated ''Whereas the population of the golden eagle has declined at such an alarming rate that it is now threatened with extinction; and Whereas the golden eagle should be preserved because of its value to agriculture in the control of rodents; and Whereas protection for the golden eagle will afford greater protection for the bald eagle...'' (Bald and Golden Eagle Protection Act Amendments of 1962, Pub. L. No. 87-884, 76 Stat. 1246 (1962).

Contrary to the statements made by the commenter that golden eagles are plentiful and will tolerate a higher level of take, our data indicate the opposite. In contrast to bald eagles, golden eagle populations do not appear to be increasing, and may be declining in some parts of their range, possibly due to loss of habitat to support their prey base. Overall, our data for golden eagles are not as comprehensive as for bald eagles, and, under the Eagle Act, we cannot issue take permits for golden eagles unless we have enough data to make the determination that the take to be authorized will be compatible with the preservation of golden eagles.

Golden eagles do sometimes prey on newborn livestock, and losses to individual producers can occasionally be significant. However, the economic benefit provided by golden eagles (as recognized by Congress) consuming rabbits, rodents and other prey that otherwise would damage crops likely far outweighs any economic losses to the agricultural industry.

Finally, golden eagles have enormous cultural significance to many Americans, particularly many Native Americans. Even without consideration of the other reasons why golden eagles were protected by Congress, the cultural and spiritual value accorded to golden eagles justifies the level of protection

they share with bald eagles under the Eagle Act.

Comment: The economic analysis should not be limited to a pre- versus post-delisting assessment. Rather, the Service should consider the costs of the regulatory program in comparison to other recovered species.

Service response: Comparing the costs of this permit program to the costs of making a similar permit available for other recovered species would yield little or no useful information because we have never before created a new permit regulation to authorize take of a recently-delisted species. Even had we done so, we doubt the comparison would be very useful because, unlike any other species, bald eagles and golden eagles are protected by the Eagle Act, and it is the unique protections of that statute that fundamentally shape this regulation.

Comment: The Service, by stating that it only rarely expects to issue permits for take associated with activities that conform to the guidelines, appears to have foreclosed the option to seek and gain assurance against prosecution under the Eagle Act through issuance of a permit.

Service response: While we will continue to discourage applications for take we believe is unlikely to occur, preferring to put our agency's limited resources towards our mission of conserving wildlife, we anticipate issuing some of these permits. The monitoring and reporting that will be required of permittees will be of value, since it will provide documentation we rarely would otherwise obtain: whether the activities we thought would not disturb eagles do result in take. Normally, permittee monitoring will be for activities that are likely to take eagles. In addition, the Service may exercise enforcement discretion by not referring such take for prosecution under the MBTA or the Eagle Act if it occurs despite the low probability.

Comment: Sensitive nest data maintained by States will be made public through the Freedom of Information Act (FOIA) process, jeopardizing the safety of the nest.

Service response: Although we do not share this State commenter's concern that eagle nests will be less protected if their location is known, we respect the State's intentions, and to the degree we can under law, we will honor its wishes to safeguard State nest data. However, we cannot circumvent the requirements of the FOIA.

Comment: The tenure of depredation permits for hazing eagles should not be increased because it could lead to abuse.

Service response: In addition to amending the eagle-depredation-permit regulations under § 22.23 to extend potential permit tenure to up to five years, we included the following language: ''We may amend, suspend, or revoke permits issued for a period of longer than 90 days if new information indicates that revised conditions, suspension, or revocation is necessary to safeguard local or regional eagle populations.''

Comment: Penalties for violations should be dramatically increased and the compensation used to develop and implement management plans.

Service response: The Service does not establish and cannot effect changes to penalties for violations of the Eagle Act and other statutes we enforce. Congress establishes the penalties.

Comment: Due to the unique circumstances of Alaska, the Service should develop streamlined procedures for ensuring that infrastructure projects can comply with the Eagle Act.

Service response: We intend to establish working groups with interested States and tribes to develop streamlined procedures to boost the efficacy of this permit program and enhance compliance with the Eagle Act.

Fees

Comment: The permit-processing fees must be higher to comply with the Service's mandate that permit programs be ''self-sustaining to the extent possible'' as required by 31 U.S.C. 9701(a). The program will drain money that should be used for important conservation needs.

Service response: The commenter is correct that the permit application processing fees associated with the new permits are not high enough to allow the Service to recoup even half the cost of issuing them. However, the fees are significantly higher than other permit application processing fees we assess. The fees associated with these regulations must be manageable to small business owners, home owners, and other members of the public who may find a higher fee prohibitive. We are establishing a higher application fee for programmatic permits: $1,000, with a $500 amendment processing fee.

Comment: The proposed fees are too high, especially when encouraging landowners in conservation efforts. The Service should consider a designation of ''low-effect'' permits for which a lower permit-application-processing fee would be charged. Also, the Service should consider a lower fee for private landowners and small businesses.

Service response: Permits are a ''service'' provided to specific individuals and individual corporations within the public at large. Our agency is directed by Congress and OMB to recoup the costs of permit programs where feasible. The lower the permit processing fees, the larger are the percentage of costs that must be shifted to taxpayers or diverted from other Service responsibilities. Therefore, we do not believe the $500 permit processing fee is unreasonable for applications for individual permits.

While we are not adopting the commenter's suggestion that application fees be less for ''low-effect'' permits, we are establishing a higher fee for permits that will take longer to process; the application-processing-fee for programmatic permits is $1,000. While the typical programmatic permit will likely cost the Service more than twice as much as the typical individual-take permit, we believe the $1,000 application fee, rather than a higher fee more in line with our processing costs, is justified because programmatic permittees will be required to undertake rigorous and potentially costly conservation measures.

Regarding the suggestion that fees be lower than $500 for private landowners and small businesses, if we did that, we would recoup an unacceptably small percentage of the costs of the permit program. Federal, State, tribal and local government agencies will likely constitute a large portion of applicants, but they are exempt from permit application fees. It is inappropriate to require the American taxpayer to bear all the costs of administering permits that primarily benefit private individuals. We believe that the fees associated with this rulemaking are a fair compromise between recouping all of our costs and ensuring that no one is disqualified because he or she cannot afford the permit application-processing fee.

Comment: The Service should not charge fees for tribal religious purposes.

Service response: We do not charge permit application processing fees for permits for tribal religious purposes. This regulation has no effect on our policy regarding such fees.

Permits for Take of Eagle Nests

Comment: The final rule should clarify that a safety emergency means a threat to life, not a threat to property.

Service response: The regulation includes the following definition of ''safety emergency'': ''a situation that necessitates immediate action to alleviate a threat of bodily harm to humans or eagles.'' However, the rule now provides that permits may be issued to remove inactive nests where

necessary to ensure public health and safety, which includes situations beyond immediate safety emergencies.

Comment: Nest removal permits should be available to avert severe financial impacts.

Service response: The plain language and legislative history of the Eagle Act prevent us from making permits available to remove eagle nests to reduce financial impacts. Congress amended the Act in 1978 to provide the Secretary of the Interior the ability to authorize take of golden eagle nests that ''interfere with resource development or recovery operations.'' Congress specifically did not include bald eagle nests in this narrowly-focused amendment, nor did it provide us with the ability to authorize golden eagle nest take for purposes as broad as financial impacts, even severe ones. Therefore, we interpret our authority to issue permits to take golden eagle nests as limited to purposes no broader than the 1978 amendment, and for bald eagle nests, even narrower. Take that is necessary to benefit eagles and protect public health and safety is conservative and falls within the narrow range of purposes for which we may issue eagle nest take permits for both species.

Comment: Relocation of nests is not always realistic. The final rule should not depend on that approach.

Service response: The regulation does not require that nests be relocated. It provides that ''[w]here practicable, the nest should be relocated, or a substitute nest provided, in a suitable site within the same territory to provide a viable nesting option for eagles within that territory, unless such relocation would create a similar threat to safety.'' The rule also specifically provides that permits may be issued under the regulation when nests cannot be relocated.

Comment: The rule should specifically state that the applicant must take all reasonable steps to minimize impacts to eagles before a nest is removed to ensure that all alternatives have been exhausted. Such alternatives would include take of nests outside of the breeding season. The applicant must be required to demonstrate that (1) the removal is in the public interest; (2) there is a clear threat to eagle or human safety; and (3) there is no alternative to removal that would alleviate the emergency.

Service response: Nests that need to be removed because they pose a safety hazard *should* be removed outside the breeding season. However, removing nests outside of nesting season is not always possible. Thus, the rule provides that, in a genuine safety emergency, active nests can be removed if necessary to prevent imminent death or physical injury to people or eagles. We have added provisions to the rule for programmatic authorizations to remove nests for situations where the need for nest removal will be ongoing (e.g., at some airports or for utilities that maintain power lines). Programmatic nest-removal permits would be available only when the applicant has developed comprehensive measures to reduce take to the degree practicable.

In response to the commenter's specific suggestions, we consider (1) redundant with (2) because any time there is a clear threat to eagle or human safety, correcting the situation will be in the public interest. The proposed rule already incorporated the substance of (2). We have added the language suggested under (3) to the evaluation criteria of the rule at § 22.27(d).

Comment: Nest-removal permits for airports should be guaranteed. Denial of such an application should not be an option.

Service response: A permit is never ''guaranteed.'' The statutory mandate that the take be compatible with the preservation of the bald eagle or the golden eagle must be met. Also, the permit will not be issued if there is an alternative to nest removal that would alleviate the threat to human and/or eagle safety or public welfare.

Comment: Airports are a good example of how safety issues are invoked when they do not actually exist. Airports have done a poor job of assessing risks before resorting to lethal take and habitat destruction.

Service response: Although airports are already subject to FAA regulations that require them to assess and mitigate for wildlife hazards (14 CFR 139.337(b) and (c)), this permit should improve the alternatives analysis that airports undertake because the programmatic nest-take permit will require permittees to undertake comprehensive measures to reduce take.

Comment: Emergency nest take will need to be authorized more than five times a year, largely due to airport safety concerns.

Service response: We based our estimate on the number of emergency situations that arose in the past few years. However, we have revised our estimate for the number of nest take permits we anticipate issuing from five permits a year to 48 permits per year. The higher estimate is based on the somewhat broader parameters established in the final rule for when nest take may be authorized, as well as our expectation that bald eagle populations will continue to grow in most regions. On the other hand, as airports develop comprehensive measures to reduce the need for take permits, we will issue them programmatic authorizations, lowering the total number of authorizations required.

Comment: The one-year tenure is not long enough to address the hazing needed to prevent re-nesting at airports.

Service response: Hazing requires a permit only if it is likely to result in disturbance as defined in regulation. Permits to haze eagles under those circumstances will not be authorized under either of the new permit categories, since § 22.26 applies only to take that is associated with, but not the purpose of the activity, whereas hazing is intentional; and § 22.27 authorizes nest take. Permits to haze eagles are already issued under existing regulations at § 22.23. However, those regulations until now did not allow us to issue permits for a period longer than 90 days. This rulemaking amends § 22.23 to allow an extended tenure of up to five years for hazing, only.

Comment: What if action is needed before a nest-removal permit can be issued? The proposed rule preamble states that it may take 40 hours to process such a permit. The time needs to be shorter and needs to be codified in the rule, or else a statement is needed that if the Service does not respond quickly enough, the take is authorized.

Service response: The rule estimates that it will take a total of 40 Service staff hours to process the nest-take permit, not 40 consecutive hours. More than one Service employee will need to participate in the process. We cannot authorize bald eagle take without issuing a permit. If a *bona fide* emergency response action must be taken before the permit can be issued, the Service may exercise enforcement discretion by not referring such take for prosecution under the MBTA or the Eagle Act.

Comment: An on-site inspection by the Service should be required before issuing a nest-take permit, for oversight.

Service response: We will not always be able to conduct an on-site inspection before issuing the permit. If the situation is an emergency, there may not be sufficient time for us to travel to the area. Second, some areas (e.g., parts of Alaska) may be remote, making travel expensive and time-consuming. Finally, due to limited staff resources, we will not necessarily have personnel available to conduct a site visit.

Comment: The rule should require the permittee to pay for any care needed for eggs or nestlings.

Service response: Active nests may only be taken in cases of *bona fide* safety emergencies. Therefore, care of viable eggs or nestlings will only be necessary in some emergency situations. Because emergencies are intrinsically unplanned, we do not consider it justified to ask the permittee to pay for rehabilitative care that may be necessitated by circumstances outside the permittee's control.

Comment: The rule should require mitigation payments for nest removal. Otherwise, it creates a financial incentive to remove nests.

Service response: Nest removal permits will be available only where: (1) necessary to alleviate a safety emergency; (2) necessary to ensure public health and safety; (3) the nest is built on, and obstructs the use of, a human-engineered structure; or (4) the project, or mitigation for project, will provide a long-term benefit to eagles. Under the first scenario, financial incentives are not germane. Under the second and third scenarios, some mitigation may be required, depending on the particular situation, including the availability of other nests in the territory, whether the applicant could have taken reasonable steps to prevent eagles from nesting on the structure, and other factors. Under (4), the permittee would be required to provide compensatory mitigation designed to provide a net benefit to eagles, that is, to more than compensate for the biological impacts of the nest removal. If, despite the cost of compensatory mitigation, the permittee profits from removing the nest, the profit should not be an issue, since the overall effect on eagles will be beneficial.

Comment: The rule should clarify that lethal take of eagles is not an option under this permit.

Service response: We added the following language to the final regulation: ''This permit does not authorize intentional, lethal take of eagles.''

Comment: The rule should provide that the permit ''will'' (rather than ''may'') authorize take of eagles, eggs, or nestlings associated with the removed nest to protect the permittee from liability due to incidental take.

Service response: The permit may or may not authorize take of eagles associated with nest removal, and where take is authorized, the method of take will be specified (e.g., collection and disposition of live nestlings, disturbance of adults, etc). For inactive nest take, authorization to take eagles in addition to the nest would usually not be necessary or appropriate.

Comment: A programmatic permit is needed for operations that need to remove nests regularly. For example, locations of all eagle nests on transmission and distribution facilities may not be known, complicating the permit process.

Service response: We agree with this comment and added provisions to the final regulation for programmatic nest removal ''provided the permittee complies with comprehensive measures that are developed in coordination with the Service, designed to reduce take to the maximum degree practicable.''

Comment: Will the new nest-take permit affect permits issued under 50 CFR 22.25 for take of golden eagle nests for resource-development-and-recovery operations?

Service response: The new permit for nest removal is unlikely to affect issuance of permits under § 22.25. Although, it includes permit issuance criteria that prioritize take for certain purposes over others, the interests that are prioritized above resource-development-and-recovery operations are compelling government interests: public health and safety, and upholding our trust responsibilities towards Native American tribes by ensuring that eagles continue to be available for religious ceremonies. Based on past history, we anticipate only a few requests to remove golden eagle nests for health and safety. Although regulations have existed for decades that would enable us to issue permits to tribes to take eagle nests for religious purposes, we have had only one such request to date. As such, we think the new nest take authorization under § 22.27 will not affect how we administer permits under § 22.25.

Comment: The provision to allow take of golden eagle nests during resource-recovery operations based on 10 days of nest inactivity is at odds with long-term occupancy of nests demonstrated by the species, and needs to be better evaluated.

Service response: The provision the commenter objects to is codified in existing regulations that predate this rulemaking. Nevertheless, we did re-examine the language during this rulemaking process, which extended the definition of ''inactive nest'' to apply to bald eagle nests in addition to golden eagle nests. As we explain in our discussion above regarding the new definition of ''inactive nest,'' the distinction between active and inactive nests is for the purpose of evaluating whether or not a nest may be taken with reduced risk of associated take of birds. The nest is protected under the Eagle Act whether active or inactive and may not be taken without a permit.

Comment: The rule should explicitly state that when evaluating whether suitable habitat is available, constructed nest platforms are not considered available suitable habitat. Otherwise, entire local populations could be displaced to nest platforms if a highway was to go through nesting habitat.

Service response: Suitable habitat might include constructed nest platforms if they are located in areas with adequate foraging and perching sites, and other features necessary for them to be viable breeding sites.

Comment: We strongly suggest including a narrower and more detailed definition of ''public's welfare,'' and a prioritization scheme where the highest priority for nest removal permits is given to ''projects that are determined to promote the greatest common societal and environmental good.''

Service response: We replaced the term ''the public's welfare'' with the narrower concept of ''public health and safety.'' For more discussion of this issue, see our response to a comment under *Scope and Criteria of 22.2.*

Comment: The definition of ''the public's welfare'' may be interpreted too narrowly for purposes of nest removal. The final rule should explicitly provide that infrastructure projects ''to maintain or expand domestic energy production and delivery fall within the scope of projects necessary for public welfare.''

Service response: Under this final rule, permits to remove eagle nests will be available only for safety emergencies, public health and safety, nests located on human-engineered structures where the nest interferes with the intended use of the structure, or for projects that provide a net benefit to eagles. Thus, we can issue a permit to remove a nest where necessary to protect *any* interest, including where necessary ''to maintain or expand domestic energy production,'' as long as the project proponent will implement conservation measures that provide an overall benefit to eagles greater than the adverse effect of nest removal (and the other permit issuance criteria are met).

Comment: A permit to take a nest for ''the public's welfare'' should be available whether the nest is active or inactive.

Service response: The Eagle Act requires the take to be *necessary* to protect an interest. Taking an active nest should only be necessary in a safety emergency; otherwise the take can be delayed until the nest is inactive so there is less risk of a loss of productivity and no risk of associated take of eggs or young.

Comment: Take of nests should not be allowed for anything other than a safety emergency.

Service response: Limiting nest take to safety emergencies has the potential to create unacceptable gridlock across the United States. Many projects and activities that benefit society would be disqualified, resulting in untenable degradation of social services and infrastructure.

Comment: The Service should not issue nest-take permits where the nest is the only structure in a territory or if its removal would interfere with future reproduction in that territory.

Service response: Where the take is not necessary to alleviate a safety emergency, we will consider whether the nest is the only one in the territory. Unless a safety emergency necessitates the nest removal, before issuing a permit under § 22.27, we must find that ''suitable nesting and foraging habitat is available to the area nesting population of eagles to accommodate any eagles displaced by the nest removal.''

Comment: The Service should not issue a programmatic nest permit to the Federal Aviation Administration for nationwide airport coverage because, with no biologists, it will err on the side of human safety and remove nests that pose little threat.

Service response: We do not anticipate issuing a single, nationally-applicable permit to the FAA. At this point, we envision issuing permits to individual airports and county or regional airport authorities.

Comment: The Service's estimate of only 30 programmatic nest take permits per year is too low. That many would probably be needed in Alaska alone.

Service response: We have increased our estimate of how many programmatic permits we will issue – but only by 10, to 40 permits, annually. Programmatic permits will be issued only where ACPs are implemented to reduce take to a level that is unavoidable. The process of developing most programmatic permits will be more time-consuming than for most individual permits, at least until we have developed ''templates'' applicable to other permits for the same or similar activities. Thus, we think it unlikely we will be issuing more than 40 such permits per year nationwide. The permits we are creating through this rulemaking are for take that is necessary, not take that is merely convenient or more profitable than avoiding the take.

Comment: The rule should include a separate nest-take category for situations where eagles nest on a pre-existing man-made structure.

Service response: We thought this idea had merit and added language to the final rule that provides for removal of nests that are built on human-engineered structures, creating ''a functional hazard that renders the structure inoperable for its intended use.''

Rulemaking Process

Comment: Tribal consultation should have been sought prior to proposing this regulation. How can the government claim to have considered cultural values without proper government-to-government consultation with the tribes?

Service response: We sent each federally-recognized tribe a letter soliciting input on this action when the proposed rule was published in the **Federal Register**. Even though the comment period was open for 90 days, we received only three letters from tribes and no requests to extend the comment period. The Service sent a second letter to the tribes when the DEA was released, and several Service Regional offices have hosted or attended meetings in order to clarify the Service's actions and hear tribal concerns. However, due to the need to promulgate permit regulations in an expeditious manner, there was not enough time to fully engage any tribes in formal government-to-government consultation during the rule-making period. We do intend to do so with interested tribes during the next phase: development of implementation guidance.

As part of developing the implementation guidance, we intend to work with tribes to establish protocols regarding the types of permit applications and potential actions on which individual tribes would like the Service to consult with them. We will also consider cultural values, including Native American cultural values as part of the NHPA's section 106 review. (See our discussion in the **Required Determinations** section below under *National Historic Preservation Act.*)

Comment: The comment period was too short for the public to provide meaningful input.

Service response: The initial comment period for the rule was 90 days, which is standard for a significant rule. We also re-opened the comment period on the rule for another 30 days when we released the DEA in August 2008. Therefore, the total length of time the rule was open for public comment (120 days) was longer than for most rules.

Comment: States should have been given a greater role in developing the regulation, particularly since it will require investment of significant State resources. The Service should delay completion of the regulations and form a work group with the State fish and wildlife agencies to develop more administratively- and economically-feasible regulations.

Service response: We did not delay completion of the regulations because there is a genuine, substantial, and impending public need for these permits. Without them, many activities, including critical infrastructure projects, that might disturb or otherwise take eagles have no means of gaining authorization for the take, and are either on hold or compelled to violate the law. Due to the need to promulgate the regulations without further delay, we were unable to coordinate closely with States and tribes during the rule-development phase. However, we plan to establish work groups with State and tribal representation to assist with development of implementation guidance for the regulations. The implementation guidance will address numerous important facets regarding administration of the permit program that have yet to be worked out, including how the Service will coordinate with States and tribes during the permit-application-and-processing phase.

Comment: The Service should delay implementation until it gets an adequate monitoring program in place for both species throughout the U.S. If the Service will not delay completion or implementation of the regulations, they should be enacted on a short-term basis, allowing the Service to work cooperatively with the States to develop a more comprehensive, data-driven permitting system.

Service response: If, after implementation, the regulations need revision, we can amend them. There is no need to finalize them with a built-in expiration clause. We agree that more data, monitoring, and surveys would be useful, and we plan to pursue possibilities for additional funding and partnerships to bolster the scientific data currently available for both eagle species.

Comment: The Service should publish the proposed rule with the changes noted in the DEA. Without being able to review the explicit regulatory changes in context, the public cannot adequately evaluate the proposal.

Service response: We believe the August 2008 Notice of Availability for the DEA and the DEA itself effectively described the changes that we were proposing from the rule we proposed in June 2007. Republishing a proposed rule incorporating the changes noted in the DEA would have triggered a number of

regulatory requirements that would have been onerous and—more important—time consuming. Due to the need to finalize the regulations expeditiously, we believe that the approach we took was in the best interests of the public.

Endangered Species Act Consideration

Consultation pursuant to section 7(a)(2) of the Endangered Species Act is not required for these regulations. The regulations do not directly or indirectly authorize any activities that would result in adverse effects to listed species, so they will not affect any listed species or critical habitat. We will conduct section 7 consultations on the issuance of any future permits where the authorized activities may affect listed species or critical habitat.

Required Determinations

Energy Supply, Distribution or Use (E.O. 13211). On May 18, 2001, the President issued Executive Order 13211 addressing regulations that affect energy supply, distribution, and use. E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This rule is not expected to significantly affect energy supplies, distribution, and use, except that it provides means to authorize otherwise-prohibited impacts to eagles that may be necessary in the course of supplying and distributing some energy in particular localities. This action is not a significant energy action, and no Statement of Energy Effects is required.

Regulatory Planning and Review (Executive Order 12866). The Office of Management and Budget (OMB) has determined that this rule is significant and has reviewed this rule under Executive Order 12866 (E.O. 12866). OMB bases its determination upon the following four criteria:

(a) Whether the rule will have an annual effect of $100 million or more on the economy or adversely affect an economic sector, productivity, jobs, the environment, or other units of the government.

(b) Whether the rule will create inconsistencies with other Federal agencies' actions.

(c) Whether the rule will materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

(d) Whether the rule raises novel legal or policy issues.

Regulatory Flexibility Act. Under the Regulatory Flexibility Act (as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever a Federal agency publishes a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions) (5 U.S.C. 601 *et seq.*). However, no regulatory flexibility analysis is required if the head of an agency certifies that the rule would not have a significant economic impact on a substantial number of small entities. Thus, for a regulatory flexibility analysis to be required, impacts must exceed a threshold for ''significant economic impact'' and a threshold for a ''substantial number of small entities.'' See 5 U.S.C. 605(b). SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule would not have a significant economic impact on a substantial number of small entities.

This rule may benefit a variety of small businesses including real estate developers and brokers (NAIC 531); construction companies (NAIC 23); forestry and logging (NAIC 113), farming (NAIC 111), and ranching operations (NAIC 112); tourism companies (NAIC 713); utility companies (NAIC 221); and others. Across the United States, there are 255,871 small real estate companies; 617,737 small construction companies; 9,596 small forestry and logging companies; 46,730 small tourism companies; and 10,173 small utility companies. We anticipate receiving about 1,140 §22.26 take permit applications nationwide annually, and about 90 § 22.27 nest take applications (including 20 applications for programmatic permits under each of the two regulations).

We anticipate issuing approximately 830 standard § 22.26 take authorizations across the United States, 40 standard nest-take permits, and 40 programmatic permits, per year. Based on past permit authorizations under the ESA, we anticipate approximately one-third of new permit applicants would be small businesses. If 303 permittees are small businesses within 4–6 different industries across the United States, the demand would not represent a substantial number of small entities in individual industries. The economic impact to individual small businesses is dependent on the type of activity in which each business engages. As noted in the economic analysis in the preamble above, permit applicants will incur some costs assembling the necessary information for the permit application, permit fees, and the costs of monitoring and reporting associated with the permit. For example, applicants will have to pay $500 for processing a permit application under § 22.26 and § 22.27, and $150 for permit amendments. In addition, particularly for larger projects, there may be consultant and/or attorney's fees ranging from a few hundred to thousands of dollars. However, if the permit applicant is successful, the economic benefits to the small entity should outweigh the economic costs of obtaining the permit. For some individual businesses, the benefit may be substantial.

The Department of the Interior certifies that this rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

Small Business Regulatory Enforcement Fairness Act (SBREFA). This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule:

a. Will not have an annual effect on the economy of $100 million or more. The principal economic effect of the rule will be to allow the general public, small businesses, industry and government agencies to obtain take permits that allow activities on their property where avoiding impacts to eagles is not practicable. We are anticipating that, due to increasing bald eagle populations, there will be an increase in the number of applications for permits under this rule compared to the number of people who sought authorization to take eagles under the ESA, even though not all activities that require ESA authorization would require Eagle Act authorization. All types of small entities that benefited from the issuance of permits under the ESA will continue to benefit from permits issued under this rule.

b. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions. Eagle take permits will not significantly affect costs or prices in any sector of the economy. This rule will provide a remedy that would allow various members of the general public to pursue otherwise lawful uses of their property where the activity will impact eagles. For example, a person wishing to build on his property in the vicinity of a bald eagle nest may apply under this proposed rule for a permit to disturb eagles, whereas the option would not be possible after delisting without the promulgation of these regulations. Another example would be a utility that wishes to

minimize eagle mortalities and liability to itself and so implements conservation measures to reduce take to the level where any remaining take is unavoidable and unauthorized. Whereas take of eagles is already prohibited by the Eagle Act, the permit represents an opportunity for the public to comply with the law, but it is not mandatory. These regulations make a permit available to authorize take that is currently prohibited under statute, enabling small businesses, industries, government agencies, corporations, and private individuals to conduct legitimate activities in accordance with the law.

c. Does not have a significant adverse effect on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. This regulation establishes a mechanism to permit effects from activities within the United States that would otherwise be prohibited by law. Therefore, the effect on competition between U.S. and foreign-based enterprises will be to benefit U.S. enterprises. There is no anticipated negative economic effect to small businesses resulting from this rule.

Unfunded Mandates Reform Act. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

a. This rule is not a significant regulatory action under the Unfunded Mandates Reform Act. A Small Government Agency Plan is not required. The permit regulations that are established through this rulemaking will not require actions on the part of small governments.

b. This rule is not a significant regulatory action under the Unfunded Mandates Reform Act. This rule does not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than $100 million per year.

Takings (E.O. 12630). In accordance with Executive Order 12630, the rule does not have significant takings implications. This rule could affect private property by providing owners the opportunity to apply for a permit to authorize take that would otherwise violate the Eagle Act. A takings implication assessment is not required.

Federalism (E.O. 13132). In accordance with Executive Order 13132, the rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. This rule will not interfere with the States ability to manage themselves or their funds. Changes in the regulations governing the take of eagles should not result in significant economic impacts because this rule would allow for the continuation of a current activity (take of eagles) albeit under a different statute (shifting from the ESA to the Eagle Act). The new regulatory process provides States the opportunity to cooperate in management of bald eagle permits and eases the process for permit applications. A Federalism Assessment is not required.

Civil Justice Reform (E.O. 12988). In accordance with Executive Order 12988, the Office of the Solicitor has determined that this rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order.

Government-to-Government Relationship with Tribes. In accordance with Executive Order 13175, Consultation and Coordination with Tribal Governments (65 FR 67249, Nov. 9, 2000); the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951); and 512 DM 2, we have evaluated potential effects on Federally-recognized Indian tribes and have determined that there may be potential effects. Although this rule neither interferes with tribes' ability to manage themselves or their funds nor affects the operations of the eagle-distribution system of the National Eagle Repository, it does implement a new eagle-take permit policy, and some tribes have asserted that take of eagles has significant cultural and spiritual effects on them.

To meet our trust responsibility to tribes with regard to the unique traditional religious and cultural significance of eagles to Native American communities, we intend to minimize impacts by consulting with interested tribes prior to implementation of this rule, and on a case-by-case basis when issuance of individual permits may affect particular tribes. In addition, this rule provides that take of eagles for Native American religious purposes be given priority over take for any other purpose except safety emergencies, which should help ensure that Native American religious needs are not affected by this rule.

When we initially proposed this rule in June 2007, we contacted each recognized tribe with a letter describing this action and soliciting input from the tribe. We received only three comments from tribes on the proposal. We sent a second letter to the tribes when we released the DEA and re-opened the comment period on the proposed rule. In response to our draft EA, we heard from five tribes, three tribal members, and three coalitions or confederations of tribes. The majority of these tribes either asked the Service to extend the comment period on the DEA and re-open rule, or asked the Service to delay finalizing the rulemaking until tribes were given the opportunity to consult with the Service on a government-to-government basis. We denied those requests because of the myriad of other interests that would go unmet if we did not complete and begin implementing the rule in an expeditious manner. However, as noted above, we will engage interested tribes in consultation as we develop the implementation guidance for these regulations.

National Historic Preservation Act. Section 106 of the National Historic Preservation Act of 1966, as amended (NHPA) (16 U.S.C 470 *et seq.*) requires Federal agencies to take into account the effects of their undertakings on historic properties. Federal agencies accomplish this by following the Section 106 regulations, ''Protection of Historic Properties'' (36 CFR part 800). The Section 106 regulations set forth a process by which agencies: (1) evaluate the effects of any Federal undertaking on historic properties (properties included in, or eligible for inclusion in, the National Register of Historic Places (National Register)); (2) consult with State Historic Preservation Officers, Tribal Historic Preservation Officers, and other appropriate consulting parties regarding the identification and evaluation of historic properties, assessment of effects on historic properties, and the resolution of adverse effects; and (3) consult with appropriate American Indian tribes and Native Hawaiian organizations to determine whether they have concerns about historic properties of religious and cultural significance in areas of these Federal undertakings.

Some tribes and tribal members may consider eagle nests and other areas where eagles are present to be sacred sites provided for in the American Indian Religious Freedom Act of 1978 (42 U.S.C. 1996) (see below). Such sites may also be considered properties of traditional religious and cultural importance to an Indian tribe (commonly referred to as Traditional Cultural Properties or TCPs), and as potential historic properties of religious and cultural importance under the NHPA. Such sites are not limited to currently recognized Indian lands, and they occur across the entire aboriginal settlement area. TCPs may be areas where eagles nest and have nested within living memory. Thus, a landform or landscape known for eagle

habitation—a ridgeline, canyon, lakeshore, river valley, mesa, mountain, etc.—may be considered by tribes as suitable for TCP designation.

According to the Section 106 regulations, a property is considered an historic property if it is listed on, *or eligible for* (emphasis added) listing on, the National Register. Therefore, a lack of formal listing does not lessen the need to consider a property; instead, it emphasizes the need for close coordination with appropriate parties at the project planning stage.

Because an eagle or eagle nest can be considered a contributing feature or element of a TCP or sacred site, issuance of the proposed permits for eagles could constitute an undertaking requiring compliance with Section 106 of the NHPA, and may also require government-to-government consultation with tribes. The Service would comply with Section 106 on a case-by-case basis for permits that have the potential to have effects on historic properties. Where issuance of a permit has the potential to affect a TCP, the Service Regional Migratory Bird Permit Office will coordinate with the Service Regional Historic Preservation Officer to ensure necessary NHPA consultations take place with the appropriate parties. We may deny permits or attach additional conditions if necessary to avoid, minimize, or mitigate adverse effects to historic properties. Nothing in these regulations limits the Service from including additional conditions on individual permits for this purpose.

If it is determined to be more efficient for all parties, the Service may consult with appropriate stakeholders to develop State or regional agreements that would govern and resolve compliance with the NHPA for the issuance of permits in specific States or regions.

American Indian Religious Freedom Act. The American Indian Religious Freedom Act (AIRFA) (42 U.S.C. 1996) sets forth Federal policy to protect and preserve the inherent right of American Indians to express and exercise their traditional religions, including but not limited to, access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites. Given the special trust relationship between the Federal Government and federally-recognized Indian tribes, the accommodation of tribal religious practices is in furtherance of the duty of the Federal Government to promote tribal self-determination. AIRFA would be construed in conjunction with the Service's trust responsibility to federally-recognized tribes. The Service has incorporated these principles into this regulation. To address the possibility that demand exceeds our scientifically-based take thresholds, the regulation contains permit-issuance criteria to ensure that requests by Native Americans to take eagles from the wild, where the take is necessary to meet the religious purposes of the tribe, are given first priority over all other take except, as necessary, to alleviate safety emergencies.

Paperwork Reduction Act. This rule contains new information collection requirements that require approval by the Office of Management and Budget. The OMB has approved these revisions under OMB Control Number 1018-0136, which expires on August 31, 2012. We have addressed all comments received on the proposed rule above in this preamble.

Title: Eagle Take Permits, 50 CFR 22.26 and 22.27.

Service Form Number(s): 3-200-71, 3-200-72, 3-202-15, and 3-202-16.

Affected Public: Individuals/households, businesses, and State, local, and tribal governments.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: On occasion.

Total Annual Nonhour Cost Burden: $261,250 associated with application or processing fees.

ACTIVITY/REQUIREMENT	ANNUAL NO. OF RESPONDENTS (non-Federal)	TOTAL ANNUALRESPONSES	COMPLE-TION TIME PER RESPONSE	TOTAL ANNUAL BURDEN HRS
FWS Form 3-200-71 – permit application (individual take)	746	746	16 hrs	11,936
FWS Form 3-202-15 – annual report & monitoring under §22.26	1,119	1,119	30 hrs	33,570
FWS Form 3-200-72 – permit application	46	46	16 hrs	736
FWS Form 3-202-16 monitoring & reporting for §22.27 permit	40	40	16 hrs	640
FWS Forms 3-200-71 and 72 – permit application (programmatic take)	26	26	40 hrs	1,040
Amendments to standard permits	40	40	6 hrs	240
Amendments to programmatic permits	10	10	20 hrs	200
Totals	**2,027**	**2,027**		**48,362**

We will use the information that we collect on permit applications to determine the eligibility of applicants for permits requested in accordance with the Eagle Act. Eagle permit regulations (50 CFR 22) and general permit regulations (50 CFR 13) stipulate general and specific requirements that when met allow us to issue permits to authorize activities that are otherwise prohibited.

All Service permit applications are in the 3-200 series of forms, each tailored to a specific activity based on the information requirements for specific types of permits. The application forms for other permits authorized under the Eagle Act are covered by OMB Control Number 1018-0022. After publication of this final rule, we will immediately incorporate the new information burdens for 22.26 and 22.27 into OMB Control Number 1018-0022.

We will use two additional forms as (1) the application for a § 22.26 take permit (FWS Form 3-200-71), and (2) the application for take of eagle nests under § 22.27 (FWS Form 3-200-72). We will use new FWS Form 3-202-15 as the annual report form for the § 22.26 eagle take permit, and new FWS Form 3-202-16 as the report form for the § 22.27 nest take permit. The information collected for eagle permits is part of a system of

records covered by the Privacy Act (5 U.S.C. 552(a)).

We estimate receiving 1,120 permit applications for individual takes under § 22.26; 70 applications for nest take permits under § 22.27; and 40 applications for programmatic permits under § 22.26 and § 22.27, annually. We expect about one third may be Federal Government agencies. Therefore, we estimate that approximately 746 non-Federal applicants will apply for eagle-take permits, 46 non-Federal applicants will submit applications for eagle nest take permits, and 26 non-Federal applicants will apply for programmatic permits. We estimate it will take an average of 16 hours to complete an application for an individual take permit. Programmatic permit applications will require more time, particularly at the outset as the first ones are developed for a given industry. As programmatic permits measures are developed for particular industries, the time it will take to apply for these permits will decrease. We estimate that the average programmatic take permit application will require 40 hours to prepare, although early programmatic permits that will serve as the ''prototypes'' for subsequent applications will require more time.

An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The public may comment, at any time, on the accuracy of the information collection burden in this rule and may submit any comments to the Information Collection Clearance Officer, Fish and Wildlife Service, Department of the Interior, 1849 C Street, NW., (Mailstop 222-ARLSQ), Washington, D.C. 20240.

National Environmental Policy Act. The Service has prepared an environmental assessment of this action, pursuant to the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 *et seq.*). Copies of the final environmental assessment are available on our website at *http://www.fws.gov/migratorybirds/baldeagle.htm*

Literature Cited

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List of Subjects in 50 CFR Part 13

Administrative practice and procedure, Exports, Fish, Imports, Plants, Reporting and record keeping requirements, Transportation, Wildlife.

List of Subjects in 50 CFR Part 22

Birds, Exports, Imports, Migratory Birds, Reporting and recordkeeping requirements, Transportation, Wildlife.

Regulation Promulgation

■ For the reasons described in the preamble, we amend Subchapter B of Chapter I, Title 50 of the Code of Federal Regulations, as set forth below:

PART 13—GENERAL PERMIT PROCEDURES

■ 1. The authority citation for part 13 continues to read as follows:

Authority: 16 U.S.C. 668a, 704, 712, 742j-1, 1374(g), 1382, 1538(d), 1539, 1540(f), 3374, 4901–4916; 18 U.S.C. 42; 19 U.S.C. 1202; 31 U.S.C. 9701.

■ 2. Amend the table in § 13.11(d)(4) as follows:

■ a. Under the heading ''Bald and Golden Eagle Protection Act,'' remove the entry for ''Eagle Depredation'' and replace it with a new entry for ''Eagle Take Permits—Depredation and Protection of Health and Safety''; and

■ b. Add four entries under ''Bald and Golden Eagle Protection Act'' in the table immediately following the entry for ''Eagle Transport—Native American Religious Purposes,'' to read as follows:

§ 13.11 Application procedures.

* * * * *

(d) * * *

(4) *User fees.* * * *

Type of Permit	CFR citation	Fee	Amendment Fee
* * * * * **Bald and Golden Eagle Protection Act**			
* * * * * * *			
Eagle Take permits—Depredation and Protection of Health and Safety	50 CFR 22	100	
* * * * * * *			
Eagle Take—Associated With but Not the Purpose of an Activity	50 CFR 22	500	150
Eagle Take—Associated With but Not the Purpose of an Activity—Programmatic	50 CFR 22	1000	500
Eagle Nest Take	50 CFR 22	500	150
Eagle Nest Take—Programmatic	50 CFR 22	1000	500
* * * * * * *			

* * * * *

■ 3. Amend the table in §13.12(b) as follows:
■ a. Under ''Eagle permits,'' remove the entry for ''Depredation control'' and replace it with ''Depredation and Protection of Health and Safety''; and
■ b. Add to the table the following entries in numerical order by section number to read as follows:

§ 13.12 General information requirements on applications for permits.

* * * * *

(b) * * *

Type of permit	Section
* * * * *	
Eagle permits:	
* * * * *	
Depredation and Protection of Health and Safety	22.23
* * * * *	
Eagle Take—Associated With but Not the Purpose of an Activity	22.26
Eagle Nest Take	22.27
* * * * *	

PART 22—EAGLE PERMITS

■ 4. The authority citation for part 22 continues to read as follows:

Authority: 16 U.S.C. 668–668d; 16 U.S.C. 703–712; 16 U.S.C. 1531–1544.

■ 5. Amend § 22.3 as follows:
■ a. By revising the introductory paragraph to read as set forth below;
■ b. By removing the definition of ''Golden eagle nest'';
■ c. By revising the definitions of ''Inactive nest'' and Take'' to read as set forth below; and
■ d. By adding new definitions for ''Advanced conservation practices'', ''Communal roost site'', ''Cumulative effects'', ''Eagle nest'', ''Foraging area'', ''Important eagle-use area'', ''Indirect effects'', ''Maximum degree achievable'', ''Necessary to ensure public health and safety'', ''Practicable'', ''Programmatic permit'', ''Programmatic take'', ''Safety emergency'' and ''Territory'' to read as set forth below.

§ 22.3 What definitions do you need to know?

In addition to the definitions contained in part 10 of this subchapter, and unless the context otherwise requires, in this part 22:

Advanced conservation practices means scientifically supportable measures that are approved by the Service and represent the best available techniques to reduce eagle disturbance and ongoing mortalities to a level where remaining take is unavoidable.

* * * * *

Communal roost site means an area where eagles gather repeatedly in the course of a season and shelter overnight and sometimes during the day in the event of inclement weather.

Cumulative effects means the incremental environmental impact or effect of the proposed action, together with impacts of past, present, and reasonably foreseeable future actions.

* * * * *

Eagle nest means any readily identifiable structure built, maintained, or used by bald eagles or golden eagles for the purpose of reproduction.

* * * * *

Foraging area means an area where eagles regularly feed during one or more seasons.

* * * * *

Important eagle-use area means an eagle nest, foraging area, or communal roost site that eagles rely on for breeding, sheltering, or feeding, and the landscape features surrounding such nest, foraging area, or roost site that are essential for the continued viability of the site for breeding, feeding, or sheltering eagles.

Inactive nest means a bald eagle or golden eagle nest that is not currently being used by eagles as determined by the continuing absence of any adult, egg, or dependent young at the nest for at least 10 consecutive days immediately prior to, and including, at present. An inactive nest may become active again and remains protected under the Eagle Act.

Indirect effects means effects for which a proposed action is a cause, and which may occur later in time and/or be physically manifested beyond the initial impacts of the action, but are still reasonably likely to occur.

Maximum degree achievable means the standard at which any take that occurs is unavoidable despite implementation of advanced conservation practices.

Necessary to ensure public health and safety means required to maintain society's well-being in matters of health and safety.

* * * * *

Practicable means capable of being done after taking into consideration, relative to the magnitude of the impacts to eagles, the following three things: the cost of remedy compared to proponent resources; existing technology; and logistics in light of overall project purposes.

Programmatic permit means a permit that authorizes programmatic take. A programmatic permit can cover other take in addition to programmatic take.

Programmatic take means take that is recurring, is not caused solely by indirect effects, and that occurs over the long term or in a location or locations that cannot be specifically identified.

* * * * *

Safety emergency means a situation that necessitates immediate action to alleviate a threat of bodily harm to humans or eagles.

Take means pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, destroy, molest, or disturb.

Territory means an area that contains, or historically contained, one or more nests within the home range of a mated pair of eagles.

* * * * *

■ 6. Amend § 22.4 as follows:
■ a. In paragraph (a), the first sentence, by adding ''and 1018-0136'' immediately following ''1018-0022''; and
■ b. By revising paragraph (b) to read as follows:

§ 22.4 Information collection requirements.

* * * * *

(b) Direct comments regarding any aspect of these reporting requirements to the Service Information Collection Control Officer, MS-222 ARLSQ, U.S. Fish and Wildlife Service, Washington, DC 20240, or the Office of Management and Budget, Paperwork Reduction Project (1018-0022 and 1018-0136), Washington, DC 20603.

■ 7. Amend § 22.23 by revising:
■ a. The section heading;
■ b. Paragraph (a) introductory text and paragraphs (a)(5) and (a)(6);
■ c. Paragraph (b) introductory text;
■ d. Paragraph (c) introductory text and paragraphs (c)(2) and (c)(3); and
■ e. Paragraph (d), to read as follows:

§ 22.23 What are the requirements for permits to take depredating eagles and eagles that pose a risk to human or eagle health and safety?

(a) *How do I apply for a permit?* You must submit applications for permits under this section to the appropriate Regional Director—Attention: Migratory Bird Permit Office. You can find addresses for the appropriate Regional Directors in 50 CFR 2.2. Your application must contain the information and certification required by § 13.12(a) of this subchapter, and the following additional information:

* * * * *

(5) Kind and number of livestock or domestic animals owned by applicant, if applicable;

(6) Kind and amount of alleged damage, or description of the risk posed to human health and safety or eagles; and

* * * * *

(b) *What are the permit conditions?* In addition to the general conditions set forth in part 13 of this subchapter B, permits to take bald or golden eagles under this section are subject to the following conditions:

* * * * *

(c) *Issuance criteria.* The Director will not issue a permit to take bald or golden eagles unless the Director has determined that such taking is compatible with the preservation of the bald or golden eagle. In making such determination, the Director will consider the following:

* * * * *

(2) Whether evidence shows that bald or golden eagles have in fact become seriously injurious to wildlife or to agriculture or other interests in the particular locality to be covered by the permit and the injury complained of is substantial, or that bald or golden eagles pose a significant risk to human or eagle health and safety; and

(3) Whether the only way to abate or prevent the damage caused by the bald or golden eagle is to take some or all of the offending birds.

(d) *Tenure of permits.* The tenure of any permit to take bald or golden eagles under this section is that shown on the face of the permit. We will not issue these permits for terms longer than 90 days, except that permits to authorize disturbance associated with hazing eagles from the vicinity may be valid for up to 5 years. We may amend, suspend, or revoke permits issued for a period of longer than 90 days if new information indicates that revised permit conditions are necessary, or that suspension or revocation is necessary, to safeguard local or regional eagle populations.

■ 8. Amend part 22, subpart C, by adding new § 22.26 and § 22.27 to read as follows:

Subpart C—Eagle Permits

* * * * *

§ 22.26 Permits for eagle take that is associated with, but not the purpose of, an activity.

(a) *Purpose and scope.* This permit authorizes take of bald eagles and golden eagles where the take is compatible with the preservation of the bald eagle and the golden eagle; necessary to protect an interest in a particular locality; associated with but not the purpose of the activity; and

(1) For individual instances of take: the take cannot practicably be avoided; or

(2) For programmatic take: the take is unavoidable even though advanced conservation practices are being implemented.

(b) *Definitions.* In addition to the definitions contained in part 10 of this subchapter, and § 22.3, the following definition applies in this section:

Eagle means a live bald eagle (*Haliaeetus leucocephalus*), live golden eagle (*Aquila chrysaetos*), a bald eagle egg, or a golden eagle egg.

(c) *Permit conditions.* In addition to the conditions set forth in part 13 of this subchapter, which govern permit renewal, amendment, transfer, suspension, revocation, and other procedures and requirements for all permits issued by the Service, your authorization is subject to the following additional conditions:

(1) You must comply with all avoidance, minimization, or other mitigation measures determined by the Director as reasonable and specified in the terms of your permit to compensate for the detrimental effects, including indirect effects, of the permitted activity on the regional eagle population;

(2) You may be required to monitor eagle use of important eagle-use areas where eagles are likely to be affected by your activities for up to 3 years after completion of the activity or as set forth in a separate management plan, as specified on your permit. Unless different monitoring protocols are required under a separate management plan approved by the Service and denoted on the permit, monitoring consists of periodic site visits, during the season(s) when eagles would normally be present, to the area where the take is likely to occur, and noting whether eagles continue to nest, roost, or forage there. The periodic monitoring is required for the duration of the activity that is likely to cause take (during the season(s) that eagles would normally be present). The frequency and duration of required monitoring *after* the activity is completed will depend on the form and magnitude of the anticipated take and the objectives of associated conservation measures, not to exceed what is reasonable to meet the primary purpose of the monitoring, which is to provide data needed by the Service regarding the impacts of human activity on eagles for purposes of adaptive management. Monitoring will not be required beyond 3 years after completion of an activity that was likely to cause take. For ongoing activities and enduring site features that continue to be likely to result in take, periodic monitoring may be required for as long as the data are needed to assess impacts to eagles.

(3) You must submit an annual report summarizing the information you obtained through monitoring to the Service every year that your permit is valid and for up to 3 years after completion of the activity or termination of the permit, as specified in your permit. If your permit expires or is suspended or revoked before the activity is completed, you must submit the report within 60 days of such date. Reporting requirements include:

(i) Whether eagles are observed using the important eagle-use areas designated on the permit; and

(ii) Description of the human activities conducted at the site when eagles are observed.

(4) While the permit is valid and for up to 3 years after it expires, you must allow Service personnel, or other qualified persons designated by the Service, access to the areas where eagles are likely to be affected, at any reasonable hour, and with reasonable notice from the Service, for purposes of monitoring eagles at the site(s).

(5) The authorizations granted by permits issued under this section apply only to take that results from activities conducted in accordance with the description contained in the permit application and the terms of the permit. If the permitted activity changes after a permit is issued, you must immediately contact the Service to determine whether a permit amendment is required in order to retain take authorization.

(6) You must contact the Service immediately upon discovery of any unanticipated take.

(7) The Service may amend, suspend, or revoke a programmatic permit issued under this section if new information indicates that revised permit conditions are necessary, or that suspension or revocation is necessary, to safeguard local or regional eagle populations. This provision is in addition to the general criteria for amendment, suspension, and revocation of Federal permits set forth in §§ 13.23, 13.27, and 13.28.

(8) Notwithstanding the provisions of § 13.26 of this subchapter, you remain responsible for all outstanding monitoring requirements and mitigation measures required under the terms of the permit for take that occurs prior to cancellation, expiration, suspension, or revocation of the permit.

(9) You must promptly notify the Service of any eagle(s) found injured or

dead at the activity site, regardless of whether the injury or death resulted from your activity. The Service will determine the disposition of such eagles.

(10) The authorization granted by permits issued under this section is not valid unless you are in compliance with all Federal, tribal, State, and local laws and regulations applicable to take of eagles.

(d) *Applying for an eagle take permit.*

(1) You are advised to coordinate with the Service as early as possible for advice on whether a permit is needed and for technical assistance in assembling your permit application package. The Service may provide guidance on developing complete and adequate application materials and will determine when the application form and materials are ready for submission.

(2) Your application must consist of a completed application Form 3-200-71 and all required attachments. Send applications to the Regional Director of the Region in which the disturbance would occur—Attention: Migratory Bird Permit Office. You can find the current addresses for the Regional Directors in §2.2 of subchapter A of this chapter.

(e) *Evaluation of applications.* In determining whether to issue a permit, we will evaluate:

(1) Whether take is likely to occur based on the magnitude and nature of the impacts of the activity, which include indirect effects. For potential take in the form of disturbance, this evaluation would include:

(i) The prior exposure and tolerance to similar activity of eagles in the vicinity;

(ii) Visibility of the activity from the eagle's nest, roost, or foraging perches; and

(iii) Whether alternative suitable eagle nesting, roosting, and/or feeding areas that would not be detrimentally affected by the activity are available to the eagles potentially affected by the activity.

(2) Whether the take is:

(i) Compatible with the preservation of the bald eagle and the golden eagle, including consideration of indirect effects and the cumulative effects of other permitted take and other additional factors affecting eagle populations;

(ii) Associated with the permanent loss of an important eagle use area;

(iii) Necessary to protect a legitimate interest in a particular locality; and

(iv) Associated with, but not the purpose of, the activity.

(3) Whether the applicant has proposed avoidance and minimization measures to reduce the take to the maximum degree practicable, and for programmatic authorizations, the take is unavoidable despite application of advanced conservation practices developed in coordination with the Service.

(4) Whether issuing the permit would preclude the Service from authorizing another take necessary to protect an interest of higher priority, according to the following prioritization order:

(i) Safety emergencies;

(ii) Native American religious use for rites and ceremonies that require eagles be taken from the wild;

(iii) Renewal of programmatic take permits;

(iv) Non-emergency activities necessary to ensure public health and safety; and

(v) Other interests.

(5) Any additional factors that may be relevant to our decision whether to issue the permit, including, but not limited to, the cultural significance of a local eagle population.

(f) *Required determinations.* Before we issue a permit, we must find that:

(1) The direct and indirect effects of the take and required mitigation, together with the cumulative effects of other permitted take and additional factors affecting eagle populations, are compatible with the preservation of bald eagles and golden eagles;

(2) The taking is necessary to protect a legitimate interest in a particular locality;

(3) The taking is associated with, but not the purpose of, the activity;

(4) The taking cannot practicably be avoided; or for programmatic authorizations, the take is unavoidable;

(5) The applicant has avoided and minimized impacts to eagles to the extent practicable, and for programmatic authorizations, the taking will occur despite application of advanced conservation practices; and

(6) Issuance of the permit will not preclude issuance of another permit necessary to protect an interest of higher priority as set forth in paragraph (e)(4) of this section.

(g) We may deny issuance of a permit if we determine that take is not likely to occur.

(h) *Permit duration.* The duration of each permit issued under this section will be designated on its face, and will be based on the duration of the proposed activities, the period of time for which take will occur, the level of impacts to eagles, and mitigation measures, but will not exceed 5 years.

§ 22.27 Removal of eagle nests.

(a) *Purpose and scope.*

(1) A permit may be issued under this section to authorize removal or relocation of:

(i) An active or inactive nest where necessary to alleviate a safety emergency;

(ii) An inactive eagle nest when the removal is necessary to ensure public health and safety;

(iii) An inactive nest that is built on a human-engineered structure and creates a functional hazard that renders the structure inoperable for its intended use; or

(iv) An inactive nest, provided the take is necessary to protect an interest in a particular locality and the activity necessitating the take or the mitigation for the take will, with reasonable certainty, provide a clear and substantial benefit to eagles.

(2) Where practicable and biologically warranted, the permit may require a nest to be relocated, or a substitute nest provided, in a suitable site within the same territory to provide a viable nesting option for eagles within that territory, unless such relocation would create a threat to safety. However, we may issue permits to remove nests that we determine cannot or should not be relocated. The permit may authorize take of eggs or nestlings if present. The permit may also authorize the take of adult eagles (e.g., disturbance or capture) associated with the removal or relocation of the nest.

(3) A programmatic permit may be issued under this section to cover multiple nest takes over a period of up to 5 years, provided the permittee complies with comprehensive measures that are developed in coordination with the Service, designed to reduce take to the maximum degree technically achievable, and specified as conditions of the permit.

(4) This permit does not authorize intentional, lethal take of eagles.

(b) *Conditions.*

(1) Except for take that is necessary to alleviate an immediate threat to human or eagle safety, only inactive eagle nests may be taken under this permit.

(2) When an active nest must be removed under this permit, any take of nestlings or eggs must be conducted by a Service-approved, qualified, and permitted agent, and all nestlings and viable eggs must be immediately transported to foster/recipient nests or a rehabilitation facility permitted to care for eagles, as directed by the Service.

(3) Possession of the nest for any purpose other than removal or relocation is prohibited without a separate permit issued under this part authorizing such possession.

(4) You must submit a report consisting of a summary of the activities conducted under the permit to the Service within 30 days after the

permitted take occurs, except that for programmatic permits, you must report each nest removal within 10 days after the take and submit an annual report by January 31 containing all the information required in Form 3-202-16 for activities conducted during the preceding calendar year.

(5) You may be required to monitor the area and report whether eagles attempt to build or occupy another nest at another site in the vicinity for the duration specified in the permit.

(6) You may be required under the terms of the permit to harass eagles from the area following the nest removal when the Service determines it is necessary to prevent eagles from re-nesting in the vicinity.

(7) You must comply with all avoidance, minimization, or other mitigation measures determined by the Director as reasonable and specified in the terms of your permit to compensate for the detrimental effects, including indirect effects, of the permitted activity on—and for permits issued under paragraph (a)(1)(iv) of this section, to provide a net benefit to—the regional eagle population.

(8) The Service may amend or revoke a programmatic permit issued under this section if new information indicates that revised permit conditions are necessary, or that suspension or revocation is necessary, to safeguard local or regional eagle populations.

(9) Notwithstanding the provisions of §13.26 of this subchapter, you remain responsible for all outstanding monitoring requirements and mitigation measures required under the terms of the permit for take that occurs prior to cancellation, expiration, suspension, or revocation of the permit.

(10) The authorization granted by permits issued under this section is not valid unless you are in compliance with all Federal, tribal, State, and local laws and regulations applicable to take of eagles.

(c) *Applying for a permit to take eagle nests.*

(1) If the take is necessary to address an immediate threat to human or eagle safety, contact your local U.S. Fish and Wildlife Service Regional Migratory Bird Permit Office (*http://www.fws.gov/permits/mbpermits/addresses.html*) at the earliest possible opportunity to inform the Service of the emergency.

(2) Your application must consist of a completed application Form 3-200-72 and all required attachments. Send applications to the Regional Director of the Region in which the disturbance would occur—Attention: Migratory Bird Permit Office. You can find the current addresses for the Regional Directors in §2.2 of subchapter A of this chapter.

(d) *Evaluation of applications.* In determining whether to issue a permit, we will evaluate:

(1) Whether the activity meets the requirements of paragraph (a)(1) of this section;

(2) The direct and indirect effects of the take and required mitigation, together with the cumulative effects of other permitted take and additional factors affecting eagle populations;

(3) Whether there is a practicable alternative to nest removal that will protect the interest to be served;

(4) Whether issuing the permit would preclude the Service from authorizing another take necessary to protect an interest of higher priority, as set forth in paragraph (e)(5) of this section;

(5) For take that is not necessary to alleviate an immediate safety emergency, whether suitable nesting and foraging habitat is available to accommodate eagles displaced by the nest removal; and

(6) Any additional factors that may be relevant to our decision whether to issue the permit, including, but not limited to, the cultural significance of a local eagle population.

(e) *Required determinations.* Before issuing a permit under this section, we must find that:

(1) The direct and indirect effects of the take and required mitigation, together with the cumulative effects of other permitted take and additional factors affecting eagle populations, are compatible with the preservation of the bald eagle or the golden eagle;

(2) For inactive nests:

(i) The take is necessary to ensure public health and safety;

(ii) The nest is built on a human-engineered structure and creates a functional hazard that renders the structure inoperable for its intended use; or

(iii) The take is necessary to protect a legitimate interest in a particular locality, and the activity necessitating the take or the mitigation for the take will, with reasonable certainty, provide a clear and substantial benefit to eagles;

(3) For active nests, the take is necessary to alleviate an immediate threat to human safety or eagles;

(4) There is no practicable alternative to nest removal that would protect the interest to be served; and

(5) Issuing the permit will not preclude the Service from authorizing another take necessary to protect an interest of higher priority, according to the following prioritization order:

(i) Safety emergencies;

(ii) Native American religious use for rites and ceremonies that require eagles be taken from the wild;

(iii) Renewal of programmatic nest-take permits;

(iv) Non-emergency activities necessary to ensure public health and safety;

(v) Resource development or recovery operations (under § 22.25, for golden eagle nests only);

(vi) Other interests.

(6) For take that is not necessary to alleviate an immediate threat to human safety or eagles, we additionally must find that suitable nesting and foraging habitat is available to the area nesting population of eagles to accommodate any eagles displaced by the nest removal.

(f) *Tenure of permits.* The tenure of any permit to take eagle nests under this section is set forth on the face of the permit and will not be longer than 5 years.

■ 9. Amend § 22.28 by revising paragraphs (a) and (b) to read as follows:

§ 22.28 Permits for bald eagle take exempted under the Endangered Species Act.

(a) *Purpose and scope.* This permit authorizes take of bald eagles (*Haliaeetus leucocephalus*) in compliance with the terms and conditions of a section 7 incidental take statement under the Endangered Species Act of 1973, as amended (ESA) (16 U.S.C. 1531 *et seq.*; 50 CFR 402, Subpart B) issued prior to the effective date of 50 CFR 22.26.

(b) *Issuance criteria.* Before issuing you a permit under this section, we must find that you are in full compliance with the terms and conditions contained in the applicable ESA incidental take statement issued prior to the effective date of 50 CFR 22.26 for take of eagles, based on your certification and any other relevant information available to us, including, but not limited to, monitoring or progress reports required pursuant to your incidental take statement. The terms and conditions of the Eagle Act permit under this section, including any modified terms and conditions, must be compatible with the preservation of the bald eagle.

* * * * *

Dated: May 18, 2009.

Will Shafroth,

Acting Assistant Secretary for Fish and Wildlife and Parks.

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