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50 CFR Parts 13 and 22

Protection of Eagles and Authorizations Under the Bald and Golden Eagle Protection Act for Take of Eagles; Final Rule and Proposed Rule

Protection of Eagles and National Bald Eagle Management Guidelines; Notices

DEPARTMENT OF THE INTERIOR**Fish and Wildlife Service****50 CFR Part 22**

RIN 1018-AT94

Protection of Eagles; Definition of "Disturb"**AGENCY:** Fish and Wildlife Service, Interior.**ACTION:** Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (the Service), are codifying a definition of "disturb" under the Bald and Golden Eagle Protection Act (Eagle Act). Given that the Eagle Act's prohibition against disturbance applies to both bald and golden eagles, the definition will apply to golden eagles (*Aquila chrysaetos*) as well as bald eagles (*Haliaeetus leucocephalus*).

If the bald eagle is delisted, the Eagle Act will be the primary law protecting bald as well as golden eagles. The Eagle Act prohibits unregulated take of bald and golden eagles and provides a statutory definition of "take" that includes "disturb." Although disturbing eagles has been prohibited by the Eagle Act since the statute's enactment in 1940, the meaning of "disturb" has not been explicitly defined by the Service or by the courts. To define "disturb," we considered Congressional intent, the common meaning of the term as applied to the conservation intent of the Eagle Act, and the working definitions of "disturb" currently used by Federal and State agencies to manage eagles. This definition of "disturb" will apply to eagles in Alaska, where the bald eagle has never been listed under the ESA, as well as eagles throughout the 48 contiguous States. (Eagles do not occur in Hawaii.)

In addition to this final rule, the Service is publishing three related documents elsewhere in today's **Federal Register**: a notice of availability of the final environmental assessment for the definition of "disturb"; a notice of availability for National Bald Eagle Management Guidelines; and a proposed rule to codify additional take authorizations under the Eagle Act.

DATES: This rule goes into effect on July 5, 2007.

FOR FURTHER INFORMATION CONTACT: Eliza Savage, Division of Migratory Bird Management, (see **ADDRESSES** section); or via e-mail at: Eliza_Savage@fws.gov; telephone: (703) 358-2329; or facsimile: (703) 358-2217.

SUPPLEMENTARY INFORMATION:

Background

On February 16, 2006, in anticipation of possible removal (delisting) of the bald eagle in the 48 contiguous States from the List of Endangered and Threatened Wildlife under the Endangered Species Act (ESA) (16 U.S.C. 1531 *et seq.*), we proposed a regulatory definition of "disturb" under the Bald and Golden Eagle Protection Act (Eagle Act) (16 U.S.C. 668-668d) to guide post-delisting bald eagle management (71 FR 8265). The Service concurrently proposed two other related actions: (1) A notice of availability of draft National Bald Eagle Management Guidelines (Guidelines) (71 FR 8309, February 16, 2006); and (2) a reopening of the comment period on our proposal to remove the bald eagle from the List of Endangered and Threatened Wildlife under the ESA (71 FR 8238, February 16, 2006). On May 16, 2006, we extended the 90-day comment period on those actions by 30 days, to June 19, 2006 (71 FR 28293). Fifty-five respondents commented on both the definition of disturb and the draft Guidelines. Eighteen commented on the definition only and 31 commented on the Guidelines only.

The definition of "disturb" we proposed on February 16, 2006 read: "*Disturb* means to agitate or bother a bald or golden eagle to the degree that interferes with or interrupts normal breeding, feeding, or sheltering habits, causing injury, death, or nest abandonment." On December 12, 2006, we made available a Draft Environmental Assessment (DEA) of our proposed definition of "disturb," and announced its availability through a notice in the **Federal Register** (71 FR 74483). In the DEA, we considered a definition slightly modified from the definition proposed in February as our preferred alternative. The definition was reworded for purposes of clarity, and included a definition of "injury," a term used in the definition of "disturb." During this round of public comment, we received 1,977 comments, approximately 1,875 of which were very similar to one another.

The definition of disturb we are codifying through this rulemaking is a modification of the definition we identified as our preferred alternative in the DEA and reflects our consideration of the various concepts raised to us in the comment processes. The following definition of "disturb" will be codified in regulations at 50 CFR 22.3: "Disturb means 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." The final definition thus reduces uncertainty, adds clarity, and appropriately implements the Eagle Act.

The definition was reworded from the preferred alternative in the DEA to address concerns expressed about enforceability and predictability. The earlier definitions we had proposed required injury, death, or nest abandonment to have occurred, whereas the final definition includes the phrase "or is likely to cause," with the result that all actions that are likely to cause the biologically significant event (injury, loss of productivity, or nest abandonment) by agitating and interfering with eagles will constitute disturbance, whether or not the harm is documented. Requiring actual injury, death, or nest abandonment was viewed as creating uncertainty as to whether a disturbance has taken place or whether it will, since death or injury will almost always occur at a later date and sometimes a different location. It also implies that actual harm will have to be proven to have taken place, which would make the prohibition difficult to enforce without evidence of a dead or injured eagle. The final definition is more consistent with the separate elements used in the Eagle Act to define "take" as well as how the term "disturb" has been applied in the past for managing eagles. We are not aware of any local, State, Federal, or tribal guidance or regulation that interprets the term "disturb" to require a threshold as severe as wounding or death.

We believe the addition of the phrase "likely to cause, based on the best scientific information available" in the final rule increases predictability and is the logical outgrowth of the comment process. Many commenters, including numerous state wildlife agencies and our own Office of Law Enforcement, encouraged us to incorporate a "likelihood" clause for purposes of predictability and enforceability. Without such a clause, similar actions may be treated differently, depending on their outcome. Additionally, the phrase is consistent with the goal of the Eagle Act of protecting eagles by preventing injury. The Service will use the best available information to predict the likely outcomes of an action or activity. If it is clear an action is likely to cause one of the negative results, there is a high degree of predictability that the disturbance will occur in

violation of the Eagle Act. It is at this time, when the actor is contemplating the action, that predictability is important, because that is when alternatives are available.

In addition to immediate impacts, this definition also covers impacts that result from human-caused alterations initiated around a previously used nest site during a time when eagles are not present, if, upon the eagle's return, such alterations agitate or bother an eagle to a degree that injures an eagle or substantially interferes with normal breeding, feeding, or sheltering habits and causes, or is likely to cause, a loss of productivity or nest abandonment.

Because one of the criteria for disturbance in the proposed definition of "disturb" was "injury," we proposed in the DEA to define "injury" to clarify our intent. We included the following definition of "injury" as part of our preferred alternative in the DEA: "*Injury* means a wound or other physical harm, including a loss of biological fitness significant enough to pose a discernible risk to an eagle's survival or productivity." We intended this definition to clarify that "injury" is not restricted to a wound in which skin is torn or bruised, or bones are broken. Defining "injury" to include a decrease in biological fitness of the eagle significant enough to affect productivity would clarify that interference with feeding and sheltering habits can cause disturbance short of the eagle being wounded or killed. The inclusion of decreased productivity in the definition of "injury" underscored the biological premise that preservation of eagles depends on protection from disturbance when feeding and sheltering as well as when nesting. In this final rule, we do not define "injury" separately because the final definition of "disturb" directly incorporates the phrase "decrease in its productivity," removing the need for a separate definition of "injury."

A decrease in productivity refers to the reproductive capacity of the eagle(s). A decrease in productivity can be caused by events that occur at various stages of an eagle's life cycle. For example, a decrease in productivity can occur because eagles are not fit enough after the wintering season to breed (e.g., if they have not adequately fed or sheltered). A decrease in productivity can also occur after eagles have initiated breeding behaviors; for example, if they do not lay eggs or lay fewer eggs than would be expected based on the best scientific information available, due to interruptions in their normal behavior. It may also occur if eggs do not hatch after being exposed to extreme heat or cold in the absence of the adults, or

when nestlings do not survive long enough to fledge because they are not adequately fed by adults due to interference at an important foraging area. All of these outcomes can be caused by factors unrelated to human activity. A decrease in productivity is only a prohibited disturbance if it is the result, or likely to be the result, of activities by humans that agitate and bothers the birds and substantially interferes with breeding, feeding, or sheltering behavior.

The final definition removes the reference to death, since "injury" is a broader term than "death" and encompasses injury that results in death. Also, as several commenters noted, killing eagles is already prohibited under the Eagle Act, so it is not necessary to repeat that prohibition within the definition of "disturb." We also note that a definition of "disturb" that required death or injury might be vulnerable to a claim that the definition renders the word "disturb" as surplusage, given that the Eagle Act's definition of "take" separately lists the terms "kill" and "wound."

We also note that the only court to have addressed the relationship between the prohibitions of the ESA and the Eagle Act stated:

Both the ESA and the Eagle Protection Act prohibit the take of bald eagles, and the respective definitions of "take" do not suggest that the ESA provides more protection for bald eagles than the Eagle Protection Act * * *. The plain meaning of the term "disturb" is at least as broad as the term "harm," and both terms are broad enough to include adverse habitat modification. (*Contoski v. Scarlett*, Civ No. 05-2528 (JRT/RLE), slip op. at 5-6 (D. Minn. Aug 10, 2006).)

In any event, the final definition cannot—and does not—broaden the protections provided by the Eagle Act, but merely clarifies the meaning of the protection that exists.

Response to Comments on the Definitions Identified in the February 16, 2006, Proposed Definition and the Draft Environmental Assessment

Comment 1: The Service needs to formally grandfather existing ESA take authorizations under section 10 permits and section 7 biological opinions.

Service response: If the bald eagle is delisted, the Service will honor existing ESA incidental take authorizations. At least until we complete a rulemaking for permits under the Bald and Golden Eagle Protection Act, we do not intend to refer for prosecution the take of any bald eagle under the Migratory Bird Treaty Act of 1918, as amended (16 U.S.C. 703-712), or the Bald and Golden

Eagle Protection Act of 1940, as amended (16 U.S.C. 668-668d), if such take is in full compliance with the terms and conditions of an incidental take statement issued to the action agency or applicant under the authority of section 7(b)(4) of the ESA or a permit issued under the authority of section 10(a)(1)(A) or 10(a)(1)(B) of the ESA. Consistent with its authority under the Eagle Act, the Service has proposed in today's **Federal Register**, a separate rulemaking to establish criteria for issuance of permits to authorize the "take" of bald and golden eagles. We address previous ESA authorizations for incidental take of bald eagles in that rulemaking, which, if finalized, would extend comparable authorizations under the Eagle Act.

Comment 2: The Service should provide assurances to persons who received "authorizations" granted through letters of technical assistance while the bald eagle was listed under the ESA.

Service response: The nature and degree of assurances that were provided by letters of technical assistance will not be altered by removal of the bald eagle from the list of threatened wildlife under the ESA.

Comment 3: A new incidental take permitting system needs to be developed under the Eagle Act. A mechanism is needed to address situations where incidental take will be unavoidable (e.g., highway maintenance, bald eagles nesting at the end of an airport runway). An incidental take permit would provide conservation benefits because it would allow the Service to work with applicants to establish mitigation measures that can provide a net benefit to eagles and other wildlife. Moreover, a permit mechanism with associated monitoring and reporting requirements would provide the Service with valuable data and information about the real effects of activities on eagles, allowing the Service to modify management practices accordingly. The Eagle Act provides for this type of incidental take authorization by inclusion of the following language: "Whenever, after investigation, the Secretary of the Interior shall determine that it is compatible with the preservation of the bald eagle or the golden eagle to permit the taking, possession, and transportation of specimens thereof " or that it is necessary to permit the taking of such eagles for the protection of wildlife or of agricultural or other interests in any particular locality, he may authorize the taking of such eagles pursuant to regulations which he is

hereby authorized to prescribe" (16 U.S.C. 668a).

Service response: We agree with this comment and have proposed a take permit regulation, published in today's **Federal Register**, that would authorize the take of bald and golden eagles under certain conditions, including requirements for conservation measures and monitoring. The regulations we have proposed would (1) establish a take permit under the Eagle Act, (2) extend Eagle Act authorizations comparable to the authorizations granted under the ESA to entities who continue to operate in full compliance with the terms and conditions of permits issued under ESA section 10 and incidental take statements issued under ESA section 7, and (3) authorize take of eagle nests that pose a risk to human safety or to the eagles themselves.

Take permits would be issued under 50 CFR part 22, Eagle Permits. The permits would also provide any necessary authorization under the Migratory Bird Treaty Act, as implemented through 50 CFR 22.11(a), which states, "You do not need a permit under parts 17 and 21 " for any activity permitted under this part 22 with respect to bald and golden eagles." The take permit provisions would primarily authorize disturbance of eagles. However, the regulations could also authorize other take of eagles where such take cannot be avoided. For example, take could be authorized for a utility that follows best management practices for minimizing eagle mortalities. Even the use of best management practices cannot ensure that eagles will not be killed by a collision with power lines, and the regulation could cover such take.

Comment 4: As currently written, harm to eagles would have to be proven after the fact, despite the widespread knowledge that many effects on eagles have predictable results. The definition restricts enforcement to incidents where death, injury, or nest abandonment has already occurred. In addition, the injury or death will almost always occur at a later date and sometimes a different location. This type of after-the-fact cause and effect relationship would make violations too difficult to legally establish, and would seriously compromise law enforcement and fail to protect eagles. Another unfortunate result will be that equally culpable acts will be treated differently depending on whether a dead or wounded eagle is recovered. Neither the actor nor the government can know whether the action is lawful or unlawful.

Service response: We agree with these concerns. To address them, we modified the definition to make clear that it encompasses impacts to eagles that cause "or are likely to cause" injury, decreased productivity or nest abandonment. This definition no longer restricts enforcement to situations where death, injury, or nest abandonment has already occurred. The definition codified by this rule therefore facilitates law enforcement, avoids the use of the term "kill," which is also defined in the Eagle Act as a take, adds predictability for the regulated public by treating similar actions the same way, and ensures better protection for eagles.

Comment 5: The threshold impacts of death, injury, and nest abandonment are too extreme. The regulatory definition of "disturb" should be closer to the plain meaning of the term in common usage, which does not imply any such severe results. Furthermore, the Eagle Act already makes it illegal to "wound" and "kill" eagles, so the proposed definition is largely redundant.

Service response: The modifications we describe in our preceding response address these concerns in part. In addition, see the discussion in the Final Environmental Assessment explaining why defining "disturb" as simply causing a physiological response in an eagle is inconsistent with the intent of the BGEPA.

Comment 6: The Eagle Act only prohibits intentional and non-incidental take. "Disturb" can only apply where the act is intentionally directed at eagles.

Service response: We do not agree that the Eagle Act protects eagles only from actions intentionally directed at them, and that "disturb" was not meant to apply to other indirect or incidental impacts to eagles. Such an interpretation is too large a deviation from the common usage of the word "disturb," which more often than not refers to incidental impacts (e.g., her tranquility was disturbed by the neighbor's leaf blower). Also, Congress reaffirmed the Eagle Act's prohibition of incidental take in 1978, when it amended the Eagle Act to authorize the issuance of permits to take golden eagle nests. Without the amendment, mining companies faced violating the Eagle Act by incidentally taking golden eagles during mining operations.

Comment 7: The Eagle Act only applies where an act was committed "knowingly or with wanton disregard." The definition should incorporate that requirement.

Service response: This comment fails to discern between the criminal provisions of the Act, which require

those elements, and the civil provisions, which do not. Congress specifically left that phrase out of the Eagle Act section addressing civil penalties (16 U.S.C. 668(b)), signaling that civil violations are subject to strict liability standards. For criminal violations, since the statute already limits those to acts that are conducted "knowingly or with wanton disregard" (16 U.S.C. 668(a)), there is no reason to repeat the phrase within the definition of "disturb."

Comment 8: The definition should require a negligent standard of conduct in order to add fairness, objectivity, and a predictable standard to the proposed regulation. We see nothing in the overall definition of take to imply that Congress wanted the Eagle Act to punish good faith or innocent conduct.

Service response: Criminal penalties under the Eagle Act already require a negligent standard conduct. Therefore, innocent conduct committed in good faith is not subject to criminal prosecution. As noted in our preceding response, Congress deliberately enacted a strict liability standard for civil penalties, a standard that uniformly applies to each prohibition of the act. Even so, the Service has rarely, if ever, brought any kind of enforcement action under the Eagle Act against a person acting in good faith, even where eagles have been killed. Also, to reduce the possibility that people will innocently violate the Eagle Act by disturbing eagles, we have developed Guidelines for how to conduct activities to minimize the potential for inadvertent disturbance. As stated in the Guidelines, we will prioritize enforcement efforts to focus on violations committed without regard to the consequences of the actions and the availability of conservation measures such as those recommended in the Guidelines. We also have proposed permit regulations to establish a means by which a person can gain authorization to take eagles, and thereby avoid criminal or civil liability.

Comment 9: The definition inappropriately incorporates habitat protection, which is not authorized by the Eagle Act.

Service response: The Service agrees that the Eagle Act is not a habitat management law, however, there is a difference between protecting habitat per se, and protecting eagles in their habitat. The proposed and final definitions protect eagles from certain effects to the eagles themselves that are likely to occur as the result of various activities, including some habitat manipulation.

Comment 10: The proposed definition will not satisfy the Eagle Act's

conservation goals; it should be revised to explicitly include habitat modification or degradation.

Service response: The Eagle Act contains no provisions that directly protect habitat except for nests. Individual members of the species are protected from certain effects to themselves that are likely to occur as the result of various human activities, including some habitat manipulation. Activities that disrupt eagles at nests, foraging areas, and important roosts can wound, kill, or disturb eagles, each of which is specifically prohibited by the Eagle Act. Therefore, eagle nests, important foraging areas, and communal roost sites are accorded protection under the Eagle Act to the degree that their loss would disturb or kill eagles.

Comment 11: The definition of disturb should not apply to feeding or sheltering eagles or to the impacts of activities that take place outside the nesting season.

Service response: The Eagle Act's stated goal is the preservation of the bald eagle and the golden eagle. We are aware of no provision of the Eagle Act or its legislative history to suggest that, in enacting the law, Congress intended to protect only breeding eagles from disturbance, and only during the nesting season. Activities that disrupt eagles at foraging areas and important roosts can lead to decreased productivity, injury, or death.

Comment 12: Under the proposed definition, "injury" is not defined and could be interpreted narrowly to equate with "wound." If so, the prohibition against disturbing eagles will have no meaning independent of the Eagle Act's other prohibitions against wounding and killing eagles, unless a nest is abandoned. The proposed definition would provide little protection for eagles at communal wintering sites and foraging areas, since neither wounding nor death is likely to be directly connected to the disruption of feeding or sheltering behavior, even though such disruption can affect survival and productivity.

Service response: We agree that the definition proposed on February 16, 2006 (71 FR 8265), did not adequately protect nonbreeding eagles. Because the threshold requirement was injury, death, or nest abandonment, the definition could have been interpreted to mean that, aside from the scenario of nest abandonment, an eagle would have to be wounded (e.g., cut or bruised) or killed to have been disturbed. We believe that threshold was too high and did not adequately protect eagles other than when they are nesting (when nest abandonment is an issue) and was

inconsistent with the statutory definition of "take" because "wound" and "kill" were separate specified elements of "take." To address this weakness, the preferred alternative of our DEA included a definition of "injury" to clarify that it includes a "loss of biological fitness significant enough to pose a discernible risk to an eagle's survival or productivity." That definition better protects non-breeding eagles from disturbance at foraging areas and winter roost sites, where human activity is unlikely to actually wound or kill an eagle, but may have serious effects on long-term viability. Although the final rule does not contain a separate definition of "injury," it instead incorporates such elements into its definition of "disturb."

Comment 13: Including nest abandonment in the definition raises the possibility that a one-time departure from the nest could constitute nest abandonment. "Nest abandonment" needs to be defined in the regulation to exclude mere flushing from the nest.

Service response: The Service defined "nest abandonment" in the glossary to the draft Guidelines (see 71 FR 8309, February 16, 2006), which have now been finalized after considering comments received from the public (see our notice of availability in today's **Federal Register** and our Web site at <http://www.fws.gov/migratorybirds/baldeagle.htm>). We do not believe it is necessary to also include this definition in the final rule.

Comment 14: Nest abandonment should not be included in the definition of disturb. If no injury or death has occurred, then nest abandonment should not be of concern. The proposed definition would apply to situations in which adult eagles do not return to a particular tree to nest, on either a temporary or permanent basis, without adverse biological effect and for a variety of reasons not related to human activity. This leaves far too much discretion to the individual enforcement authorities at FWS, and creates an impossible burden of proof for those trying to implement projects or engage in needed maintenance activities. Also, there is no clear standard as to the contribution of human activity to nest abandonment. This will result in strict liability regardless of whether their activity can be shown to have caused the abandonment.

Service response: First, nest abandonment is not always due to interference from humans. Nest abandonment caused by non-human factors is not a violation of the Eagle Act. The fact that similar outcomes can be brought about by other factors is no

reason not to regulate human-caused outcomes. This is similar to other actions and results prohibited by the Eagle Act and many other statutes. For example, all eagles die eventually, whether or not someone kills them. This does not prevent the Service from enforcing the Eagle Act's prohibition against killing eagles. Only "nest abandonment caused by intentional human activity that disturbs eagles would be subject to criminal prosecution. We view the standard set in this definition as sufficiently high to avoid capturing activities conducted according to a reasonable standard of care based on readily available guidance, and therefore we disagree that it creates an impossible burden of proof for those attempting to comply.

Enforcement authorities will continue to exercise the discretion they have (which arguably will be reduced substantially merely by the promulgation of this clarifying regulation) in a reasonable manner. As far as the concern regarding strict liability, the inclusion of "nest abandonment" would not result in strict liability any more than many legal prohibitions, including the Eagle Act's prohibition against killing eagles. In any case, even strict liability requires a showing of causation. In fact, the burden of proof would be greater for nest abandonment. First, the Service would have to demonstrate that an eagle was agitated or bothered, then that there was substantial interference with normal breeding, feeding, or sheltering behaviors, then that the activity, based on the best scientific information available, either caused or was likely to cause the abandonment.

Second, nest abandonment may have an adverse biological impact even without an eagle being killed or injured. Nest abandonment prior to egg-laying will generally have a negative effect on eagle productivity unless the eagles use an alternate nest without significant delay. Therefore, eagle populations can be affected by nest abandonment without the occurrence of actual injury or death of nestlings or eggs.

Third, even where eagles re-nest elsewhere and successfully breed, the disturbance will have a long-term effect on eagles if the interference continues until the nest is no longer viable. The Guidelines suggest that, after five years of disuse, nests may no longer merit protection from disturbance. When human activities completely surround the nest at close proximity, eagles will usually not re-use the nest. After five years, the nest site would be lost for all intents and purposes, and may result in a significant biological impact on eagles. In Florida, for example, many biologists

believe that bald eagles have been nesting in closer proximity to humans and to one another because available nest sites are limited, leading to speculation that eagle populations in Florida will not significantly increase from current size, due to a lack of available nest sites. If so, the loss of a nest site will result in a decrease in the eagle population. The Eagle Act specifically protects nests. That statutory protection recognizes that nests are biologically significant structures constructed in specific locations selected by eagles because of the presence of various ecological factors necessary for survival and productivity.

Comment 15: The Service should add the word "premature" before nest abandonment to clarify that it does not include the scenario where eagles do not occupy a nest in a given year, switching to another nest nearby, or building a new nest and not using the old one.

Service response: The guidelines provide for consideration of impacts to nests and alternate nests. Alternate nests are important to eagle productivity, and are protected by the Eagle Act.

Comment 16: Including nest abandonment in the definition extends liability beyond proximate cause and results in too much uncertainty for the public. Landowners need to know in advance whether their actions might disturb eagles. The proposed definition does not provide enough certainty.

Service response: With regard to its prohibition of disturbance, the Eagle Act is concerned with a result of an action (with respect to the eagle), rather than the action itself. This is a common feature of wildlife laws. (Such laws, including the Eagle Act, also directly prohibit actions, such as importing or shooting at the protected species.) A level of uncertainty is inherent in any statute that prohibits results, rather than actions, as one can never be sure what the results of a particular action might be. However, to minimize this uncertainty as much as possible while maintaining consistency with the statutory language, in response to the comments received we have revised the definition to include the phrase "or is likely to cause." Inclusion of this phrase will enable people to better predict when their actions may violate the Eagle Act by disturbing eagles, particularly in conjunction with the guidance provided by the Guidelines, which publicize our recommendations for avoiding disturbance. To further reduce uncertainty, we have proposed regulations, published separately in today's **Federal Register**, that would

provide for issuance of permits for take of eagles; obtaining such a permit would essentially eliminate any remaining uncertainty.

Comment 17: If an eagle returns from its wintering grounds to the vicinity of its nest at a heavily altered site but never returns to the actual nest because the landscape has changed very drastically, the habitat modification might not be a disturbance under the proposed definition, but it should be.

Service response: We do not believe that the Eagle Act was meant to prohibit habitat modification that is undetected by eagles, so if the eagle(s) never return to the site at all, the habitat alterations should not be per se attributed as the cause. However, we do intend that the definition still applies to a situation where eagles, as part of their normal nesting behavior, return to the vicinity of the nest, but the habitat alterations are so vast in scale that the eagles become agitated as a result, alter their behavior, and never return to the nest itself.

Comment 18: The extension of the proposed definition to "impacts that result from human-induced alterations initiated around a previously used nest site during a time when eagles are not present" is unreasonable and places an impossible burden on landowners. If "nest abandonment" remains in the definition of disturb, it should be defined narrowly to mean "premature abandonment of an active nest during the nesting season."

Service response: We disagree that the prohibition against disturbance should exclude impacts to eagles that occur after the activity takes place. Such an exclusion would mean that an activity that causes eagles to abandon a nest could qualify as a disturbance if the eagles were present, but not if the activity was conducted when eagles were away from the nest, whether for a season or a few hours—even if the reaction of (and effect on) the eagles is identical in both cases.

Comment 19: Disturbance should not require injury, death, or nest abandonment. Too many problems are occurring in Alaska because of people feeding eagles, and the definition of disturb should make the practice illegal without requiring such a high threshold.

Service response: Although the Eagle Act does not directly prohibit feeding eagles, the final definition protects eagles from situations where eagle feeding is likely to injure eagles.

Comment 20: Although stated in the preamble, the definition needs to be clearer that the death or injury can occur to eagles other than those that are disturbed (e.g., young or eggs).

Service response: The wording of the final definition more clearly conveys that "disturb" incorporates the injury of an eagle other than the one that was agitated or bothered.

Comment 21: The definition should specifically exclude impacts to nests that have not been used for 5 years, to mirror the draft Guidelines, which state "The likelihood that an alternate nest will again become active decreases the longer it goes unused. If you plan activities in the vicinity of an alternate bald eagle nest and have information to show that the nest has not been active during the preceding 5 nesting seasons, the recommendations provided in these guidelines for avoiding disturbance around the nest site may no longer be warranted."

Service response: We do not agree that the regulatory definition of "disturb" is the appropriate vehicle to transmit Service recommendations regarding the likelihood of eagle nest re-use. Such recommendations are more appropriately housed under the Guidelines, as written. The Service will prioritize enforcement efforts under the Eagle Act to focus on violations committed without adhering to the Guidelines.

Comment 22: Disturb should be defined to explicitly exclude any impacts resulting from activities conducted in accordance with a State-approved Bald Eagle Management Plan.

Service response: We do not believe it is appropriate or that the Eagle Act affords us the discretion to establish a definition that would differ in application from State to State. The Eagle Act is a Federal statute, and the prohibitions it contains have general applicability throughout the United States.

Comment 23: A permit for intentional take of nests needs to be available. Situations arise where the location of eagle nests jeopardizes human safety, or the eagles themselves.

Service response: We agree that a permit regulation may be warranted to authorize removal or relocation of eagle nests under limited circumstances. We have proposed a regulation, published separately in today's **Federal Register**, to establish a permit process in the near future that would include such a provision.

Comment 24: More discussion needs to be included as to how the definition will affect golden eagle management.

Service response: Due to different geographic preferences, human activities are less likely to conflict with golden eagles than bald eagles. Because fewer activities have the potential to disturb golden eagles, the effect of

defining “disturb” will be relatively small in relation to golden eagles in comparison to bald eagles. However, we recognize that disturbance caused by human activities can still be an issue with respect to golden eagles. We intend to more fully address golden eagle disturbance as part of the National Environmental Policy Act assessment of the Eagle Act take permit regulations we are proposing.

Comment 25: The Eagle Act was meant to protect eagles from significant stress that affects their ability to forage, nest, roost, breed, or raise young. Any activity that causes such stress should be considered a violation of the Act.

Service response: The final definition of “disturb” encompasses impacts that, based on the best scientific information available, are likely to cause injury to an eagle, or a decrease in its capacity to reproduce. In contrast to the approach suggested by the commenter, however, the definition provides a measure of predictability to the regulated community by indicating thresholds that can be detected or anticipated by the actor or someone trying to enforce the law.

Comment 26: The definition should prohibit “repeated displacement” of eagles from their nests and roosts.

Service response: To the degree that repeated displacement of eagles from their nest is associated with injury or nest abandonment, it can be a useful indicator of disturbance. However, temporary impacts such as “repeated displacement” are not relevant unto themselves to the preservation of eagles; they are relevant only if they produce the likelihood of meaningful biological effects.

Comment 27: In the definition of “injury” the phrase “pose a discernible risk” (to an eagle’s survival or productivity) should be removed because it’s speculative and hypothetical. Instead, the definition should require that the eagle actually dies or doesn’t breed, rather than capturing effects that only “risk” such an outcome. The ESA definition of “harm” requires actual injury or death.

Service response: The ESA definition of “harm” does require injury or death, but “harass” requires only the “likelihood of injury.” We see no reason to assume that “disturb” would resemble “harm” rather than “harass,” and we find limited utility in comparing either ESA term to the Eagle Act’s prohibition of “disturb.” All three are distinct definitions, and “disturb” is from a separate statute enacted 33 years before the ESA. It is useful to compare the ESA terms with “disturb” in order to determine certain types of sentence

construction that may hinder or facilitate compliance with and enforcement of the statute. Having done this comparison, we initially thought that the phrase “pose a discernible risk” was helpful in those regards. To require that the death or loss of productivity be documented could make it difficult to enforce the prohibition. The final definition of disturb no longer incorporates the phrase “pose a discernible risk,” but it does include “or is likely to cause,” which we believe is both readily understandable and will help prevent adverse effects to eagles.

Comment 28: (From numerous airport authorities) We are concerned about maintaining airport safety in light of the risk of air strikes with eagles and the prohibition against disturbing them.

Service response: We appreciate the gravity of these concerns. However, we see no reasonable definition of disturb that would exclude the intentional harassment and displacement of eagles necessary to remove eagles from the vicinity of airports, while adequately protecting eagles from many other potentially disturbing activities that would adversely affect them. Permits are already available and routinely issued under 50 CFR 22.23

(Depredation) to intentionally haze eagles at airports for purposes of human safety. We agree that a permit regulation may be warranted to authorize removal or relocation of eagle nests under circumstances of human health and safety such as at airports. We have proposed a regulation to establish a permit process that includes such a provision (published separately in today’s **Federal Register**).

Comment 29: In light of the Service’s April 15, 2003, Migratory Bird Permit Memorandum, it would be helpful if the Service would clarify whether removal of an unoccupied eagle nest would constitute a violation of the Migratory Bird Treaty Act (MBTA) (16 U.S.C. 703–712) or the Eagle Act.

Service response: As explained in the memorandum referenced by the commenter, it is illegal to collect, possess, and by any means transfer possession of any nest of a species protected by the MBTA, but the MBTA does not contain any prohibition that applies to the destruction of a bird nest alone (without birds or eggs), provided that no possession occurs during the destruction. Thus, destruction of unoccupied nests with no prohibited impacts to a migratory bird (or egg) does not require a MBTA permit. However, the public should be made aware that, while destruction of a nest itself is not prohibited under the MBTA, nest removal that results in the unpermitted

take of migratory birds or their eggs is illegal and fully prosecutable under the MBTA. Furthermore, some unoccupied nests are legally protected by statutes other than the MBTA, including nests of bald and golden eagles. The Eagle Act protects nests from removal by a number of means, including its inclusion of the term “molest” as part of “take” (16 U.S.C. 668c). Congress reaffirmed the Eagle Act’s protection of inactive nests when it amended the Act in 1978 to direct the Secretary of the Interior to make permits available for incidental take of inactive golden eagle nests for resource development and recovery operations. A permit would not be necessary if such take were not otherwise prohibited by the Act.

Comment 30: Does the removal of large trees occasionally used by roosting and perching eagles constitute a violation of the Eagle Act?

Service response: Removal of trees is not in itself a violation of the Eagle Act. The impacts of such action can be a violation, however, if the loss of the trees kills an eagle, or agitates or bothers a bald or golden eagle to the degree that results in injury or interferes with breeding, feeding, or sheltering habits substantially enough to cause a decrease in productivity or nest abandonment, or create the likelihood of such outcomes. However, if the large trees are only occasionally used, the probability of such an outcome is lower than if the trees were within a traditional communal roost site or were the primary perch trees used by eagles in an important foraging area.

Comment 31: The definition should include protection of traditional nest and roost sites during seasons of the year when eagles are not present.

Service response: The Eagle Act does not directly protect habitat (except nests), but manipulation of important eagle use areas, including nests and communal roosts, that results in a prohibited “take” under the Eagle Act would constitute a violation of the Act. Therefore, roost sites are accorded protection under the definition to the degree that their loss would result in eagle disturbance. For example, if destruction of an important bald eagle winter roost site would agitate the eagles that roost there and interfere with feeding and/or sheltering significantly enough to decreasing productivity, then the roost destruction could constitute a violation.

Comment 32: The definition should include communal roost abandonment as explicitly as it addresses nest abandonment. The phrase “nest abandonment” should be replaced with

nest abandonment or communal roost abandonment.”

Service response: While many communal roost sites are identified and well documented, some may not be. The Guidelines define “communal roost sites” as “[a]reas where bald eagles gather and perch overnight “ and sometimes during the day in the event of inclement weather. Communal roost sites are usually in large trees (live or dead) that are relatively sheltered from wind and are generally in close proximity to foraging areas. These roosts may also serve a social purpose for pair bond formation and communication between eagles. Many roost sites are used year after year.” Although many communal roost sites are well known to the public, such as at Mason Neck Wildlife Refuge in Virginia, a satisfactory definition of “communal roost site” that would clearly distinguish all of the important areas upon which eagles depend from all other habitat where eagles might sometimes gather and roost has not (to our knowledge) been put forward by eagle biologists, State agencies, or other wildlife managers. Further, because of the lack of documentation of traditional use of all such areas, we believe it would be problematic to explicitly reference communal roost site abandonment in the same manner as nest abandonment.

Comment 33: Long-term habitat protection will be critical to continued recovery and management of bald eagles throughout the nation. The lack of regulatory protection for concentration areas and foraging habitats will result in the degradation of habitats necessary for both nesting and non-breeding eagles. Protection of nest sites will not be enough to sustain eagle populations, which rely on a matrix of habitats to meet their life-cycle requirements. The definition of “injury” should be broadened to specifically include disturbance to essential habitats as under the definition of “harm” in the ESA.

Service response: Habitat manipulation can amount to a violation of the ESA if it “harms” a protected species, meaning injures or kills it (by impacting essential behavior patterns). Although there is no specific reference to habitat in the definition of “disturb,” habitat degradation can also cause a prohibited disturbance under the Eagle Act, and not just around nest sites, to the extent the activity results in injury, decreased productivity, or nest abandonment.

Comment 34: The phrase “agitate or bother” should be removed since the Eagle Act’s intent is to prevent physical

harm of eagles. The terms could be interpreted to include non-physical harms.

Service response: In order for disturbance to occur, the agitation or bother must lead to injury, or substantially interfere with breeding, feeding, or sheltering to the degree that causes, or is likely to cause, decreased productivity or nest abandonment. Each of these outcomes is a physical harm. Without the phrase “agitate or bother,” the definition would no longer require a direct effect on one or more eagles. This would broaden the definition’s applicability. For example, excessive agricultural runoff might then be said to “disturb” eagles since it might interfere with breeding, feeding, or sheltering, and cause decreased productivity. We do not believe such a broad application was intended by Congress when it included the term “disturb” in the definition of take in the Eagle Act.

The word “directly” should be added to the definition before “causes” in order to meet the “knowingly” standard of the Eagle Act.

Service response: Adding “directly” would not affect whether the act was committed knowingly, since the potential outcome (loss of productivity, death, or nest abandonment) is still a result of the action, whether direct or not. Whether the actor sees the result is immaterial to whether he knew at the time he acted that his conduct would probably result in disturbance. The latter is at issue in the Eagle Act. (The Eagle Act’s standard that an act be committed “knowingly or with wanton disregard” only applies to criminal violations. Civil violations do not require this standard.) Additionally, we specifically do not intend disturbance to be limited to situations where the outcome is immediately evident. The Eagle Act makes no distinction between immediate or direct effects to eagles and those that can reasonably be foreseen, as evidenced by its prohibition of eagle poisoning, and our enforcement of cases where the poisoning was secondary but foreseeable. The Guidelines, and our staff, are available to the public to assist in determinations of what activities are likely to result in a violation of the Eagle Act.

Comment 36: Unlike bald eagles, golden eagles are not on the Federal List of Endangered and Threatened Wildlife. Therefore, there is no need to buttress Eagle Act protections for golden eagles to compensate for bald eagle delisting pursuant to the ESA.

Service response: The Eagle Act equally protects both species of eagles from disturbance. The statute treats golden eagles somewhat differently than

bald eagles in that it provides broader authority to permit certain otherwise prohibited activities in relation to golden eagles (16 U.S.C. 668a). However, the prohibition against disturbance applies in the same way to both species under the Act (16 U.S.C. 668(a) and (b)).

Comment 37: Under the ESA, permits were available for incidental take of bald eagles. Many project proponents who have relied on such authorizations will be put in an untenable position if the Service issues a final delisting decision before incidental take regulations are in place.

Service response: We recognize the difficult position in which many developers, transportation officials, and others will find themselves (without a means to authorize take of bald eagles) if the bald eagle is delisted before the time that regulations for a take permit are finalized. The Service intends to place a high priority on completing the rulemaking that would establish a permit program authorizing “take” of eagles, as appropriate, while maintaining the statute’s requirement of protection and conservation of bald and golden eagles. In the interim, the Service will use the Guidelines and provide technical assistance to the public to minimize the “take” of eagles. As a result of the court-ordered deadline, the Service is required to issue a final decision on the delisting by June 29, 2007 (extended from February 16, 2007), which does not allow enough time to promulgate a final rule for a permit program before a decision on delisting is due. See *Contoski v. Scarlett*, Civil No. 05–2528 (JRT–RLE) (D. Minn. August 10, 2007).

Required Determinations

Energy Supply, Distribution or Use (E.O. 13211). Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. Because the definition promulgated herein is similar to the current working interpretation of “disturb,” this rule is not expected to significantly affect energy supplies, distribution, and use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

Regulatory Planning and Review (E.O. 12866). This rule is a significant regulatory action subject to review by the Office of Management and Budget (OMB). OMB makes the final determination of significance under Executive Order 12866.

a. The Service does not anticipate that this rule will have an effect of \$100 million or more on the economy. This

rule defines an existing statutory term in a manner largely consistent with how it is currently interpreted by State and Federal agencies.

b. This rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency. This rule deals solely with governance of bald and golden eagle take in the United States. No other Federal agency has any role in regulating bald or golden eagle take. Although some other Federal agencies regulate activities that impact wildlife (including eagles) and such impacts may constitute take, the definition of "disturb" promulgated by this rule is similar to existing operative interpretations of the term.

c. This rule does not alter the budgetary effects of entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients. No entitlements, grants, user fees, or loan programs are associated with the regulation of bald or golden eagle take.

d. This rule may raise novel legal or policy issues.

Regulatory Flexibility Act. The Department of the Interior certifies that this document 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.*), as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA), 5 U.S.C. 804(2).

Description of Small Entities Affected by the Rule. This rule applies to any individual, government entity, or business entity that undertakes or wishes to undertake any activity that may disturb bald or golden eagles. It is not possible to define precisely or enumerate these entities because of uncertainty concerning their plans for future actions and incomplete scientific knowledge of which activities in specific cases will disturb bald or golden eagles. Small entities that are most likely to engage in activities that may disturb bald or golden eagles include: Small businesses that are engaged in construction of residential, industrial, and commercial developments; farms; small timber companies; small mining operations; and small governments and small organizations engaged in construction of utilities, recreational areas, and other facilities. These may include tribal governments, town and community governments, water districts, irrigation districts, ports, parks and recreation districts, and others.

Expected Impact on Small Entities. The rule defines the term "disturb," which is contained in the definition of "take" in the Eagle Act. Thus,

"disturbance" is already prohibited under the law. This rule promulgates a definition that is consistent with the Service's former interpretation of "disturb" for bald eagle management under the Eagle Act, and thus does not further restrict human activity. This codification of the Service's definition of "disturb" does not impose any new reporting, recordkeeping, or other compliance costs on any small entities. Promulgation of the rule and the accompanying Guidelines provides clear guidance to all parties that engage in activities that could potentially disturb eagles. Promulgation of the rule and Guidelines may decrease the costs of complying with the Eagle Act by reducing uncertainty and enhancing resolution of potential conflicts between human activities and eagles. The decreased costs are expected to be minimal. Therefore, this rule will not have a significant effect on small entities.

Unfunded Mandates Reform Act. In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*):

a. This rule will not "significantly or uniquely" affect small governments. A Small Government Agency Plan is not required. This rulemaking will not impose a cost of \$100 million or more in any given year on local or State government or private entities.

b. This rule will not produce a Federal mandate of \$100 million or greater in any year; *i.e.*, it is not a "significant regulatory action" under the Unfunded Mandates Reform Act. Revisions to State regulations are not required; codifying the definition of "disturb" under the Eagle Act does not require any future action by State or local governments.

Takings (E.O. 12630). In accordance with Executive Order 12630, the rule does not have significant takings implications. This is an interpretive rule, defining the statutory term "disturb" under the Eagle Act. The rule promulgates a definition of "disturb" that is consistent with working definitions currently applied to private property, and will be used in conjunction with Guidelines that provide greater flexibility than existing guidelines used by the Service to advise landowners of how to minimize disturbance to eagles. 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 States' ability to manage themselves or their

funds. Defining a term within the prohibitions of the Eagle Act will not result in significant economic impacts because this definition is consistent with the meaning of the term as currently interpreted by the Service and the States. 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 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 are no potential effects. This rule will not interfere with Tribes' ability to manage themselves or their funds.

Paperwork Reduction Act. This rule does not contain information collection requirements. 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.

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.*). The Notice of Availability for the final environmental assessment is published elsewhere in today's **Federal Register**.

List of Subjects in 50 CFR Part 22

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

■ 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 22—EAGLE PERMITS

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

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

■ 2. Section 22.3 is amended by revising the heading and introductory paragraph and adding the definition for "disturb" in alphabetical order to read as follows:

§ 22.3 Definitions.

In addition to definitions contained in part 10 of this subchapter, the following definitions apply within this part 22:

* * * * *

Disturb means 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.

* * * * *

Dated: May 23, 2007.

Todd Willens,

Acting Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 07-2694 Filed 6-4-07; 8:45 am]

BILLING CODE 4310-55-P

DEPARTMENT OF THE INTERIOR**Fish and Wildlife Service****50 CFR Parts 13 and 22**

RIN 1018-AV11

Authorizations Under the Bald and Golden Eagle Protection Act for Take of Eagles**AGENCY:** Fish and Wildlife Service, Interior.**ACTION:** Proposed rule.

SUMMARY: In anticipation of possible removal (delisting) of the bald eagle from the List of Threatened and Endangered Wildlife under the Endangered Species Act (ESA), the U.S. Fish and Wildlife Service (“we” or “the Service”) is proposing new permit regulations to authorize the take of bald and golden eagles under the Bald and Golden Eagle Protection Act (Eagle Act), generally where the take to be authorized is associated with otherwise lawful activities. Second, we are proposing regulatory provisions to provide take authorization under the Eagle Act to ESA section 10 permittees who continue to operate in full compliance with the terms and conditions of their existing permits. Additionally, these proposed permit regulations would establish permit provisions for intentional take of eagle nests in rare cases where their location poses a risk to human safety or to the eagles themselves.

DATES: We will accept written comments on this proposed rule until September 4, 2007.

ADDRESSES: You may submit comments and other information, identified by RIN 1018-AV11, by any of the following methods:

- Mail or hand-delivery: Division of Migratory Bird Management, Attn: RIN 1018-AV11, U.S. Fish and Wildlife Service, 4401 N. Fairfax Drive, MBSP-4107, Arlington, Virginia 22203.
- E-mail:

EaglePermitRegulation@fws.gov. Include “RIN 1018-AV11” in the subject line of the message. Please submit electronic comments in plain text files, avoiding the use of special characters and encryption.

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions on the site for submitting comments.

FOR FURTHER INFORMATION CONTACT:

Eliza Savage, Division of Migratory Bird Management, U.S. Fish and Wildlife Service, 4401 North Fairfax Drive, Mailstop 4107, Arlington, Virginia 22203-1610; or 703-358-2329.

SUPPLEMENTARY INFORMATION:**Public Comments Solicited**

We are soliciting public comments on this proposed rule. You may submit your comments by any one of the methods provided in the **ADDRESSES** section. The comment due date is listed in the **DATES** section. All submissions we receive must include the agency name and Regulatory Identification Number (RIN) for this rulemaking, which is 1018-AV11. In the event that our Internet connection is not functional, please submit your comments by the alternate methods mentioned in the **ADDRESSES** section. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

The Director of the Service will take into consideration the relevant comments, suggestions, or objections that are received by the comment due date indicated above in **DATES**. These comments, suggestions, or objections, and any additional information received, may lead the Director to adopt a final rulemaking that differs from this proposal.

Background

The Bald and Golden Eagle Protection Act (16 U.S.C. 668-668d) (Eagle Act) prohibits the take of bald 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 is listed under the ESA (16 U.S.C. 1531 *et seq.*), authorizations for incidental take of bald eagles have been granted through the ESA’s section 10 incidental take permits and ESA’s section 7 incidental take statements, issued with assurances that the Service would exercise enforcement discretion in relation to violations of the Eagle Act and Migratory Bird Treaty Act (16 U.S.C. 703-712) (MBTA). Upon delisting, all prohibitions contained in the ESA, such as those that prescribe the take of bald eagles, would 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”; the broadest of these terms is “disturb.” “Disturb” has now been defined by the Service 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.” (See the final rule defining “disturb” under the Eagle Act, published in today’s **Federal Register**.)

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. The regulatory definitions of “harm,” “harass,” and “disturb,” differ from each other; but overlap in many ways. The only court to have addressed the relationship between the prohibitions of the ESA and the Eagle Act stated:

Both the ESA and the Eagle Protection Act prohibit the take of bald eagles, and the respective definitions of “take” do not suggest that the ESA provides more protection for bald eagles than the Eagle Protection Act* * *. The plain meaning of the term “disturb” is at least as broad as the term “harm,” and both terms are broad enough to include adverse habitat modification. (*Contoski v. Scarlett*, Civ No. 05-2528 (JRT/RLE), slip op. at 5-6 (D. Minn. Aug 10, 2006).)

Currently, there is no regulatory mechanism in place under the Eagle Act that permits take of bald or golden eagles comparable to under the ESA. We propose to add a new section at 50 CFR 22.26 to authorize the issuance of permits to take of bald and golden eagles on a limited basis. The regulations would be applicable to golden eagles as well as bald eagles. In comparison with requirements under the ESA, the permitting process we are proposing under the Eagle Act would be less burdensome for the public to comply with, while continuing to provide appropriate protection for bald and golden eagles. Take of bald or golden eagles would be authorized only where it is determined to be compatible with the preservation of bald and golden eagles and cannot practicably be avoided.

We propose to use expedited procedures under this new permit process to issue Eagle Act permits for take in compliance with previously granted ESA section 7 incidental take statements. The expedited permitting

process would also be used to provide Eagle Act authorization for take of bald eagles where the bald eagle was the only listed species covered by an ESA Habitat Conservation Plan (HCP). We are also proposing regulatory revisions to 50 CFR 22.11 to allow persons with a valid ESA section 10 permit that covers multiple species in addition to the bald or golden eagle (and is therefore still a valid permit even if the bald eagle is delisted) to continue to use that permit as the Eagle Act authorization for the same activity as it relates to bald or golden eagles. This provision would also apply to the take of bald and golden eagles that are covered as non-listed species in future HCPs.

Finally, we propose to add a new section at 50 CFR 22.27 to authorize the removal of bald and golden eagle nests that pose a hazard to human safety or to the welfare of eagles. We also propose to introduce and define certain terms under the Eagle Act. Permit issuance under § 22.26 and § 22.27 would be governed by the permit provisions presently in 50 CFR parts 13 and 22, and new provisions we are proposing to add to § 22.26 and § 22.27.

History

Prior to the arrival of Europeans, the bald eagle population in the lower 48 contiguous States is estimated to have been 250,000 to 500,000 birds. The first declines in bald eagle populations began in the mid to late 1800s. Shooting of eagles for feathers and trophies, various forms of predator control, and loss and conversion of habitats contributed to the general decline in numbers until the mid-1940s (U.S. Fish and Wildlife Service 1999). Widespread concern for the future of the bald eagle led Congress to pass the Bald Eagle Protection Act in 1940 (16 U.S.C. 668–668d). The Act prohibited, among other things, the taking, possession, and sale of bald eagles or their parts, eggs, or nests. When passed, the Act did not apply in the then-territory of Alaska. In 1953, after lengthy studies demonstrated that bald eagles did not affect salmon population levels, the remaining bounties on eagles in Alaska were eliminated. The Act was amended in 1959 to include Alaska. The law was further amended in 1962 to protect the golden eagle, in part because of the difficulty in distinguishing golden eagles from immature bald eagles. It was then renamed the Bald and Golden Eagle Protection Act.

Passage of the Eagle Act and promulgation of eagle regulations (50 CFR part 22) probably eliminated many of the major threats to eagles throughout

the United States, and may have helped to slow the decline of eagle numbers. However, the widespread use of organochlorine pesticides after World War II created a persistent threat to the survival of the bald eagle in the continental United States. Beginning in the late 1940s, dichloro-diphenyl-trichloroethane (DDT) was extensively used for mosquito control and later as a general crop pesticide. As DDT use increased, the chemical and its metabolites began to accumulate in the prey base of the bald eagle and later in the tissues of the eagles consuming contaminated prey. By the early 1960s, the ability of bald eagle populations to replace themselves had decreased drastically, and bald eagle numbers plummeted. A partial survey conducted by the National Audubon Society in 1963 documented just 487 active nests in the lower 48 contiguous States. Productivity was considered lower than that required to sustain the population.

On the basis of this steep decline, the bald eagle population south of 40° North latitude was included on the first list of endangered species (32 FR 4001, March 11, 1967), pursuant to the precursor law to the current Endangered Species Act. DDT use was banned in the United States in 1972. Increases in the eagle population were gradual due to the persistence of DDT in the environment, however, and the bald eagle was included on the ESA's List of Threatened and Endangered Wildlife when the ESA was passed in 1973. In 1978, the ESA listing was amended to classify the bald eagle as endangered in the lower 48 contiguous States except in five northern States, where it was listed as threatened (43 FR 6233, February 14, 1978).

With the protection afforded by the ESA and the decline in DDT contaminant levels in the environment and in the bald eagle's food sources, the species experienced a dramatic comeback. In 1990, there were an estimated 3,035 occupied breeding areas in the lower 48 states. By 1994, the bald eagle population had increased 462% over the levels documented in 1974. The increase was sufficient to allow reclassification to threatened in the lower 48 States (60 FR 36000, July 12, 1995). Bald eagle population growth and productivity exceed most of the goals established in the various ESA recovery plans. The Service proposed to remove the bald eagle from the List of Threatened and Endangered Wildlife on July 6, 1999 (64 FR 36454). 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.

The ESA provides broad substantive and procedural protections for listed species but at the same time allows significant flexibility to permit activities that affect listed species. In particular, the ESA provides that we may authorize the incidental take of listed wildlife in the course of otherwise lawful activities (sections 7(b)(4) and 10(a)(1)(B), respectively). Nationwide, since 2002, the Service has issued an average of 52 incidental take statements per year that covered anticipated take of bald eagles under the ESA's section 7. During that same 5-year period, we issued about two (1.8) incidental take permits per year under the ESA's section 10(a)(1)(B) for bald eagles. The requirements, including minimization, mitigation, or other conservation measures, of those ESA authorizations have been more than adequate to achieve the standard of "preservation" for the bald and golden eagle that is required by the Eagle Act for the issuance of take permits. Therefore, we provided assurances with each section 7 incidental take statement and section 10 permit that we would "not refer the incidental take of a bald eagle for prosecution under the Migratory Bird Threat Act of 1918, as amended (16 U.S.C. 703–712), or the Bald and Golden Eagle Protection Act of 1940, as amended (16 U.S.C. 668–668d) if such take was in compliance with the terms and conditions of an incidental take statement issued to the action agency or applicant under the authority of section 7(b)(4) of the ESA or a permit issued under the authority of section 10(a)(1)(B) of the ESA."

If the bald eagle is delisted, the permitting of incidental take under the ESA would no longer occur except possibly in the context of certain multi-species HCPs that were applicable to both listed and non-listed species. In that event, however, a mechanism would still be needed to address take that may be permitted pursuant to the Eagle Act. 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).

Until now, we have not promulgated 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.

Description of the Proposed Rulemaking

Take Permit Regulations Under Proposed 50 CFR 22.26

We are proposing a new permit regulation under the authority of the Eagle Act for the limited take of bald and golden eagles “for the protection of * * * other interests in any particular locality” where such permits are consistent with the preservation of the bald and golden eagle, and the take is associated with, and not the purpose of an otherwise lawful activity, and such take cannot practicably be avoided. “Practicable” in this context means capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.

We anticipate that generally such take permits would authorize activities which could cause an eagle to be disturbed by human activities in proximity to eagle nests, important foraging sites, and communal roosts; however, in some limited cases, where other forms of take besides disturbance are unavoidable, we anticipate that a permit may be issued under this section for such other form of take.

“Unavoidable” in this context means the activity is necessary for the public welfare, and all practicable, industry-accepted measures to minimize the take are in effect. In the case of airports, for example, the permit could cover take that might occur even when the airport is meeting the obligations of its Wildlife Hazard Management Plan (e.g., hazing

wildlife and discouraging nesting and roosting by designing infrastructure to be as inhospitable as possible).

We do not anticipate that permits issued under these proposed regulations will significantly affect eagle populations. Bald eagle populations are currently growing at a rate that we expect will continue to outpace any population effects (primarily through decreased productivity) caused by disturbance. Furthermore, all permittees will be required, as part of their permit conditions, to carry out conservation measures to mitigate impacts to eagles. The statutory requirement that the authorized activities be compatible with the preservation of bald and golden eagles ensures the continued protection of the species while allowing some impacts to individual eagles. For purposes of the regulations we are proposing here, we consider take to be compatible with the preservation of the bald and golden eagle if it will not result in a decline, either at the national or regional level, that could necessitate (among other factors) a designation of an avian species by Partners in Flight (PIF) to their Continental Watch List¹ (the rate of decline that serves as a threshold for that list is more moderate than what would lead to ESA listing (or relisting)). The Service already uses that threshold rate of decline to manage migratory birds; it serves as a primary element in our determination of whether a migratory bird species is of conservation concern. We do not intend to rely on any PIF determination of changed status, and we would not tie any future action on our part with any action by PIF. Rather, we believe it would be sensible and consistent to apply a criterion we already use for migratory bird management, as the threshold level of decline that would not be compatible with the preservation of the bald and golden eagle.

We propose to use modeling in evaluating the level of take which we can permit compatible with this statutory threshold, and taking into consideration the cumulative effects of all permitted take, including other forms of lethal take permitted under this section, against the backdrop of other causes of mortality and nest loss. Due to

the inherent limits of monitoring to detect precise fluctuations in bald 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 intend to use the best available data, including data from post-delisting monitoring by States, the Breeding Bird Survey, and fall and winter migration counts to assess the status of eagle populations and adjust permitting criteria on an ongoing basis as appropriate. However, consistent with the preservation mandate of the Eagle Act, we do not anticipate that the cumulative impacts of the activities permitted by these regulations will cause declines in bald and golden eagle populations.

As part of the forthcoming release for public comment of a draft environmental assessment under the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*) (NEPA), we intend to determine the most meaningful population scale for measuring population impacts using available data (including average natal dispersal distances) and to delineate regional populations that are relatively distinct for management purposes. Our preliminary analysis to date indicates there may be utility in classifying bald eagle populations into nine regional populations (plus some highly isolated sites) for purposes of assessing impacts to bald eagles under these regulations. We intend to perform a similar analysis for golden eagles, to determine the geographic delineations most applicable for management purposes.

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. The Service has developed National Bald Eagle Management Guidelines (Guidelines) as a tool for landowners, project proponents, and the general public engaged in activities in the vicinity of bald eagles (see our notice of availability of the Guidelines published separately in today’s **Federal Register**). The Guidelines are also available at <http://www.fws.gov/migratorybirds/baldeagle.htm>). The Guidelines 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,

¹ Panjabi, A. O., E. H. Dunn, P. J. Blancher, W. C. Hunter, B. Altman, J. Bart, C. J. Beardmore, H. Berlanga, G. S. Butcher, S. K. Davis, D. W. Demarest, R. Dettmers, W. Easton, H. Gomez de Silva Garza, E. E. Iñigo-Elias, D. N. Pashley, C. J. Ralph, T. D. Rich, K. V. Rosenberg, C. M. Rustay, J. M. Ruth, J. S. Wendt, and T. C. Will. 2005. The Partners in Flight handbook on species assessment. Version 2005. Partners in Flight Technical Series No. 3. Rocky Mountain Bird Observatory Web site: <http://www.rmbo.org/pubs/downloads/Handbook2005.pdf>.

and foraging areas and how to avoid such disturbance.

By adhering to the Guidelines, landowners and project proponents will be able to avoid bald eagle disturbance under the Eagle Act most of the time. We anticipate only rarely issuing permits for take associated with activities that adhere to the Guidelines because the great majority of such activities will not take bald eagles. 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, however, permits would not be issued for routine activities such as hiking, driving, normal residential activities, maintenance of existing facilities, where take could occur but is unlikely, and would be unreasonably difficult to predict and/or avoid. If unusual circumstances exist, however, where the risk of disturbance may be higher than normal, we will consider issuing a permit to authorize the potential impacts of such activities. 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. When evaluating the take that may result from an activity for which a permit is sought (*e.g.*, residential development), we would consider the effects of the preliminary activity (construction) as well as the effects of the foreseeable ongoing future uses (*e.g.*, activities associated with human habitation).

The impacts and threshold distances that we would consider will not be limited to the footprint of the initial activity if it is reasonably foreseeable that the activity will lead to adverse secondary prohibited impacts to 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 nest may not disturb eagles during the construction phase, but the ensuing high levels of boat traffic

through the area during peak feeding times is likely to 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.

As part of this rulemaking, the Service is also seeking public comment on differences between bald and golden eagle tolerance to human activity. Most of the scientific literature and anecdotal evidence pertaining to disturbance is in reference to bald rather than golden eagles; however various raptor biologists have suggested that golden eagles may be more sensitive to some types of human activity than bald eagles. The National Bald Eagle Management Guidelines were developed for bald eagles and some of the recommendations contained in that document may not be appropriate for avoiding golden eagle disturbance. We therefore strongly encourage the public to provide information and data on golden eagle disturbance, and scientifically-based recommendations for buffers sizes, timing restrictions, and other measures to avoid such disturbance. If warranted, we will develop separate criteria for evaluation of golden eagle take permits. In any event, all take permits for golden eagles still must be based on a determination that it is consistent with the preservation of the species.

We acknowledge there is considerable uncertainty with respect to how both species of eagles react to human activity. To decrease uncertainty and ensure that the disturbance component of the proposed eagle take permit regulation is neither unnecessarily burdensome to the public nor incompatible with the preservation of eagles, we would require permittees to provide basic post-activity monitoring by determining whether the nest site, communal roost, or important foraging area continues to be used by eagles for the 3 years following completion of the activity for which the permit was issued. Where an activity is covered by a management plan that establishes monitoring protocols (*e.g.*, an airport Wildlife Habitat Management Plan), the permit may specify that monitoring shall be conducted according to the pre-existing management plan. Reporting data, including supplemental data collected by the Service from some permittees' project areas, would be employed in a formal adaptive resource-management context to assess whether or not the estimated probability of disturbance adequately describes the

relationship between the distance of the activity and the occurrence of disturbance for both species of eagle. If not, the relationship would be re-evaluated using data collected from permittees, as well as other sources, and this regulation and the associated National Management Guidelines will be revised appropriately.

Permit application process and evaluation criteria. Permits would be available to Federal, State, municipal, or Tribal government; corporations and businesses; associations; and private individuals. Except for persons who were previously authorized to incidentally take eagles under ESA's section 7 and 10 (where the eagle was the only covered listed species), we propose to use the following information to make permit determinations. The permit application would have to include a detailed description of the activity that will likely cause the disturbance or other take of eagles; maps and photographs (preferably digital) that depict the locations of the proposed activity and the eagle nests, foraging areas, and concentration sites where eagles are likely to be affected by the proposed activity (including the latitude and longitude of the activity area and important eagle-use area(s) and the distance(s) between those areas); the number of eagles that are likely to be taken and the likely form of that take (*e.g.*, disturbance or other take); whether or not the important eagle-use area is visible from the activity area, or if screening vegetation or topography blocks the view; the nature, extent, duration, and distance from the eagle-use area of existing activities similar to that being proposed; the date the activity will start and is projected to end; an explanation of how issuance of the permit will protect other interests in a particular locality; an explanation of why avoiding the take is not practicable; a description of the measures proposed to minimize and mitigate any resulting impacts on eagles; a certification that the proposed activity is in compliance with applicable local, State, and Federal laws and regulations; and other information we may request specific to that particular proposal, consistent with the information collection requirements of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

The Service may provide technical assistance in development of permit applications. In many cases, the Service may be able to recommend measures to reduce the likelihood of take, obviating the need for a permit. The technical assistance 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 practically 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 bald eagles and whether reasonable modifications to the project will alleviate the probability of take. In addition, State natural resources agencies may also be able to provide information pertaining to the number and location of eagle nests and other important eagle-use areas within the area potentially affected by the activity.

To determine whether to issue a permit, we would consider a number of factors including (1) whether practicable measures can be taken to reduce the probability of take, and (2) whether the resulting level of take is compatible with the preservation of bald or golden eagles. Factors we would consider include the magnitude of the impacts of the activity; individual eagles' known prior exposure to, and history with, the activity; whether alternative suitable eagle nesting, roosting, and/or feeding habitat is available to the eagles affected by the activity; visibility of the activity from the eagle's nest, roost, or foraging perches; and practices proposed by the applicant to reduce potential disturbance of the activity on eagles. In cases where our evaluation of these additional factors and the best scientific information available leads to the conclusion that disturbance will likely occur, we would assess whether that disturbance is likely to lead to the loss of one or more eagles or the permanent loss of a nesting territory, communal roost site, or important foraging area. We would also consider the potential cumulative effects of other similar authorizations.

For applications for activities that are likely to result in eagle mortalities, we would assess whether the take is unavoidable even where the project proponent is using best management practices (BMPs) to avoid the take. Permits would authorize anticipated lethal take only where BMPs are being fully implemented.

Although we cannot precisely predict the population impact of each take authorization when evaluating individual permit applications, we will periodically assess overall population trends along with annual report data from permittees and other information to assess how likely future activities are to result in loss of one or more eagles, a decrease in productivity of bald or golden eagles, and/or the permanent loss of a nest site, communal roost site, or important foraging area; and how such outcomes will likely affect

population trends, taking into consideration the cumulative effects of other activities that take eagles and eagle mortalities due to other factors. We do not expect population declines as the result of the authorizations granted through these proposed regulations. However, it is also possible external factors could arise that negatively affect eagle populations. Whatever the cause, if data suggest population declines are approaching a level where additional take would be incompatible with the preservation of the eagle (as interpreted above for purposes of this rulemaking), we would refrain from issuing permits until such time that the take would be compatible with the preservation of the bald or golden eagle. However, based on preliminary analysis, we believe the 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.

Certain general conditions would be included in eagle take permits. The permittee must comply with any avoidance, mitigation, and/or conservation measures required by the permit. If the permit expires or is suspended or revoked before the required measures are completed, the permittee remains obligated to carry out those measures necessary to mitigate for take that has occurred up to that point. Permittees must allow Service personnel 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 the areas where take would be permitted, we would 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 Director within 60 days of such 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, he or she should contact the Service to determine if a permit amendment is required to retain the level of take authority desired.

We intend to develop implementation guidance to address procedural details

of the permitting process, similar in role and format to the Service's Section 7 and HCP Handbooks. The guidance will cover time frames for permit issuance, identification of project impacts, appropriate mitigation measures, monitoring, and other specifics of the permit process, in order to ensure consistency in implementation throughout the Service. We encourage the public to provide input on these types of issues as part of this rulemaking. We will use this public input to craft draft implementation guidance, which will be subject to a public notice and comment process before being finalized.

Eagle Act Authorizations for Entities Operating Under ESA Authorizations and Exemptions

Take prohibited under the ESA is, in many instances, also prohibited under the Eagle Act. Both statutes prohibit killing, wounding, pursuing, shooting, capturing, and collecting the protected species. The ESA additionally prohibits anyone from harming or harassing listed species, while the Eagle Act makes it illegal to molest or disturb bald or golden eagles. The regulatory definitions of "harm," "harass," and "disturb," differ somewhat from each other; however they do overlap in several ways, with the result that a majority of actions considered likely to incidentally take (harm or harass) eagles under the ESA will also incidentally take (disturb) eagles under the Eagle Act.

Under the ESA, we authorized take of bald eagles using the permit provisions of section 10 for non-Federal entities or the consultation provisions of section 7 for Federal agencies. The regulations here proposed would extend Eagle Act authorizations to holders of existing ESA authorizations as seamlessly as possible under the laws. The mechanism through which these regulations will provide this authorization is two-fold. First, it provides for expedited processing of Eagle Act permits to entities previously authorized to take eagles under section 7 incidental take statements and section 10 incidental take permits where the bald eagle was the only listed species covered in the Habitat Conservation Plan. Second, we are proposing regulatory provisions to provide take authorization under the Eagle Act to ESA section 10 permittees where the bald eagle was one of several listed species, including future permittees (where the bald or golden eagle is included in the HCP as a covered nonlisted species) as long as the permittees remain in full compliance

with the terms and conditions of their ESA permits.

Section 10(a)(1)(B) of the ESA authorizes incidental take permits for activities included in a Habitat Conservation Plan (HCP). A handful of permits authorize incidental take of golden eagles for ESA purposes (should the golden eagle be listed in the future), where they are included in HCPs as covered non-listed species. All these permits were issued with a statement of enforcement discretion from the Service that provided assurances that the Service would not refer any take of bald or golden eagles for prosecution under the Eagle Act, as long as the take was in full compliance with the terms and conditions of the permit and HCP, including that the permittee carried out all conservation measures required by the permit. Thus, none of these incidental take permits or incidental take statements provided explicit authorization for take under the Eagle Act. While the bald eagle was protected under the ESA, these assurances also conveyed the Federal Government's commitment to make no additional conservation demands of permittees who were fully implementing the conservation measures within their HCPs.

If the bald eagle is delisted, all of these ESA permits would continue to provide viable authorizations under the ESA, except where the bald eagle was the only ESA-listed species covered by the permit (addressed below). For permits where the bald eagle was one of multiple ESA-listed species, the permit remains in effect and would continue to provide the same authorizations for bald eagles based on the original conditions; the only difference being that the bald eagle would be converted from a "covered listed species" to a "covered non-listed species" under the ESA permit after delisting.

The Eagle Act provides that bald eagles may not be taken unless a permit is first procured from the Secretary of the Interior. Because a permit from the Secretary of the Interior was already obtained under ESA section 10(a)(1)(B), the provisions we are proposing would ensure a second permit (under the Eagle Act) is not required. We propose to amend Eagle Act regulations at 50 CFR 22.11 to extend Eagle Act authorizations comparable to the authorizations granted under the ESA to entities who continue to operate in full compliance with the terms and conditions of permits issued under ESA section 10. Failure to abide by the section 10 permit requirements would, however, void this Eagle Act regulatory permit authorization.

The new provision would also apply to take associated with any future ESA section 10 Habitat Conservation Plans that specifically include eagles as covered, non-listed species. An applicant for an ESA section 10(a)(1)(B) permit for incidental take of ESA-listed species may obtain ESA "no surprises" assurances for take of bald or golden eagles by including them as a covered, non-listed species in the ESA section 10(a)(1)(B) permit. To include a species under the ESA permit, the issuance criteria for an ESA section 10(a)(1)(B) permit must be satisfied. The Service recognizes that the measures required to cover the bald or golden eagle under an ESA incidental take permit (which is crafted to safeguard federally listed species, including those that may be listed in the future) are sufficient to protect the species relative to the Eagle Act standard of preservation of the species if it is not listed under the ESA. Thus, take authorized under the ESA and its conservation standard is, we believe, inherently "compatible with the preservation of the bald and golden eagle" that is required by the Eagle Act. Therefore, the new provisions at § 22.11 would extend Eagle Act permit coverage for the take of eagles included as a non-listed species under future ESA 10(a)(1)(B) permits, as long as the permittee fully complies with the terms and conditions of the permit.

For existing ESA section 10(a)(1)(B) incidental take permits where the bald eagle was the only ESA-listed species, the ESA permit will be null and void if the bald eagle is delisted. However, the requirements, including mitigation or other conservation measures, of existing ESA section 10 authorizations would continue to be adequate to achieve the preservation of the species that is required by the Eagle Act. Therefore, as long as the recipients of such permits continue to fully comply with the terms of those permits, the Service would continue to honor its statement that we will not refer take authorized under the permit for prosecution under the MBTA or Eagle Act until regulations are in place to grant, and the permittee has had a reasonable opportunity to apply for, comparable take authorizations under the Eagle Act. Because the Eagle Act requires that an actual permit be procured before a bald eagle may be taken, the proposed new provisions at § 22.11 would not apply to ESA incidental take permits where the bald eagle was the only ESA-listed covered species, since the ESA permit will no longer be effective if the bald eagle is delisted. We intend to use an expedited process to issue Eagle Act permits under

proposed § 22.26 to entities that held ESA incidental take permits for bald eagles where the bald eagle was the only covered listed species, to cover take of eagles that has not yet occurred. The sole evaluation criterion we believe is necessary for these expedited permits would be whether the entity is in full compliance with the terms and conditions of a previously issued ESA section 7 incidental take statement or ESA section 10 incidental take permit with respect to the take of eagles.

Applications for these permits would be given priority in processing by the Service, and as long as the permittee is in full compliance with the terms and conditions of his ESA permit, the Service would expeditiously issue an Eagle Act permit with identical terms and conditions. We would continue to honor these ESA authorizations as effectively valid authorizations under the MBTA and Eagle Act during an interim period that will afford these existing permittees a reasonable opportunity to see and obtain an Eagle Act permit, as long as the permittee remains in full compliance with the terms and conditions of the prior ESA authorization.

We propose to use the same expedited permit issuance process to provide Eagle Act authorization for take that was previously covered under the ESA's section 7. Section 7 requires Federal agencies, in consultation with the Service, to ensure that the activities they carry out, fund, or authorize do not jeopardize the continued existence of listed species, or result in the destruction or adverse modification of critical habitat. When a Federal agency is not able to avoid adverse effects to listed species or critical habitat, the Service must issue a biological opinion as to whether the effects constitute jeopardy to the species or adverse modification of critical habitat. If the Service concludes that the agency action will not cause jeopardy or adverse modification, or the agency adopts reasonable and prudent alternatives to avoid jeopardy or adverse modification, then the Service provides an incidental take statement with the biological opinion. The incidental take statement specifies the anticipated level of take and exempts that take from the prohibitions of section 9 of the ESA. Section 7 incidental take statements that cover take of bald eagles, while the species remains listed under the ESA, include a statement of enforcement discretion similar to the language found in section 10 permits, stating that the Service would not refer for prosecution under the Eagle Act any take of bald eagles that resulted from activities

conducted in accordance with the terms and conditions of the incidental take statement. We propose to issue expedited take permits to grant formal Eagle Act authorization for take that has not yet occurred but was previously covered under ESA section 7 incidental take statements issued under the authority of section 7(b)(4) of the ESA, as long as the recipients of those authorizations continue to fully comply with the terms and conditions of the incidental take statement. We would continue to exercise enforcement discretion during the period before these regulations are finalized.

Some take of bald eagles has been authorized under the ESA's section 10(a)(1)(A) permits for Scientific Purposes and permits for Enhancement of Propagation or Survival (*i.e.*, Recovery permits). Permits for Scientific Purposes authorize take of listed species resulting from scientific research and monitoring activities. Permits for Enhancement of Propagation and Survival authorize take of listed species resulting from establishment and operation of captive or otherwise controlled propagation programs as well as activities included in a Safe Harbor Agreement. Most such section 10(a)(1)(A) permits also contained a specific reference that they were authorizing take under the Eagle Act. However, a few such permits referenced authority only under the ESA, and would no longer be in effect if the bald eagle is delisted. For those 10(a)(1)(A) permits that did not specifically reference authority to take under the Eagle Act, and where the take has not yet occurred, the permittee will need to obtain an Eagle Act authorization by applying for a permit under 50 CFR 22.21 (Eagle Act Scientific and Exhibition Permits). In the meantime, we intend to use enforcement discretion as long as the permittee continues to operate within the terms and conditions of the ESA permit.

Some activities determined to cause a take under the ESA may be determined not to cause a take under the Eagle Act. If an activity determined to cause take under the ESA is also determined to cause take under Eagle Act, some of the requirements for take authorization under the ESA may be found by the Service as not necessary for take authorization under the Eagle Act. Therefore, persons previously granted take authority under the ESA for the take of bald and golden eagles who could be granted comparable take authority under the Eagle Act through these proposed regulations may request a reevaluation from the Service to

determine whether they could benefit from reevaluation of permit conditions.

Eagle Nest Take Under Proposed 50 CFR 22.27

Some eagles nest on or near electrical transmission towers, communication towers, airport runways, or other locations where they create hazards to themselves or humans. Regulations under this section, § 22.27, would authorize removal and/or relocation of eagle nests in what we expect to be the rare cases where genuine safety concerns necessitate the take (*e.g.*, where a nest tree appears likely to topple onto a residence, at airports to avoid collisions between eagles and aircraft, or for a nest located on an electrical transmission tower that interferes with necessary maintenance of the utility and jeopardizes the eagles' safety). Where practicable, nests should be relocated to 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.

These permits would be issued only in cases of a determination that the requested action is necessary to address actual safety concerns. Additionally, some § 22.26 permits that authorize disturbance could also result in the permanent loss of a nest site, even without actually "taking" the nest. Those take permits that are most likely to result in the permanent loss of a nest site would therefore also need to be considered when assessing the impact of permits to move or remove nests in order for the Service to determine that the permits issued remain consistent with the statutory requirement for preservation of the species. We would not issue take permits under § 22.26 and § 22.27 of this part if and when we were to determine that this statutory standard was not being met. As part of adaptive management, we will also take into account eagle occupation of new territories. If eagles continue to occupy new nest sites, the number of eagle nests that we could permit to be permanently lost may increase. We will use the best available scientific data regarding bald and golden eagle use of new nest sites, as well as abandoned and lost nest sites, to adjust the threshold accordingly.

New and Modified Definitions Under 50 CFR 22.3

We propose to amend the regulatory definition of "take," as applied to bald

eagle nests, to ensure consistency with the statutory prohibition of unpermitted eagle nest destruction. For this reason, we propose to add the term "destroy" to the regulatory definition of "take." We propose to define "eagle nest" as a "readily identifiable structure built, maintained, or used by bald or golden eagles for breeding purposes." This definition is based on, and would replace, the existing "golden eagle nest" definition, in order to apply with respect to both species. We therefore propose to remove the existing definition of "golden eagle nest" from the list of definitions. We also propose to introduce a new term in the permit regulations under 50 CFR 22.26: "important eagle-use area." This term refers 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 propose the following definition for "important eagle-use area": "an eagle nest, foraging area, or communal roost site that eagles rely on for sheltering and 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 (*i.e.*, disturbed) by the activity because of the higher probability of interference with breeding, feeding, or sheltering behaviors at those areas.

Revisions to General Permit Conditions at 50 CFR Part 13

As part of establishing the new permit authorizations under 50 CFR 22.26 and 22.27, we propose to amend 50 CFR 13.12 to add the proposed permit types to be issued under 50 CFR 22.26 and 22.27. We also propose to 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 Office of Management and Budget (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 § 22.26 take permit, we propose a \$500 permit application fee and a \$150 permit amendment fee except that no application fee would be charged persons who have previously received an ESA authorization for the same take. For the § 22.27 nest take permit, we propose a \$300 permit application fee and a \$150 permit amendment fee. While higher than many other Service permit application processing fees, these proposed fees are comparable to those assessed for other migratory bird permits and reflect the relative 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. The statutory authority to charge fees for permits and certificates is found in 31 U.S.C. 483(a), which provides that a Federal agency may charge fees for services including permits and certificates to make these services "self-sustaining to the extent possible."

However, the proposed permit application process would be significantly less burdensome for the applicant than the current 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. Plans 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 Eagle Act permit does not require the habitat analysis and is less extensive and easier to compile (see (b)(1)(i) of the proposed rule).

We estimate it would cost the Service approximately \$2,400 to process most § 22.26 take applications, and \$1,200 to process § 22.27 permits for emergency nest take. Service biologists at GS-11 to 13 grade levels on the Office of Personnel Management General Pay Schedule, with support of GS-9 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; 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.

Altogether, we estimate that it would take Service employees approximately 80 hours to process a § 22.26 permit application and approximately 40 hours to process a § 22.27 application for emergency take of an eagle nest.

Therefore, an application fee of \$500 would offset only about 20% of the cost to the Government of responding to a request for a § 22.26 take permit. The \$300 application fee for the nest take permit would recoup about 25% of the cost of processing that permit application.

Endangered Species Act Consideration

Section 7(a)(2) of the Endangered Species Act (ESA) of 1973, as amended (16 U.S.C. 1531 *et seq.*), requires all Federal agencies to "insure that any action authorized, funded, or carried out * * * is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat." This proposed rule is currently being reviewed pursuant to section 7 of the ESA. Section 7 consultation, if needed, will be concluded before this rule is finalized.

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. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

Regulatory Planning and Review (E.O. 12866). In accordance with the criteria in Executive Order 12866, the Office of Management and Budget (OMB) has designated this rule as a significant regulatory action because it raises novel legal or policy issues.

a. This proposed rule would not have an annual economic effect of \$100 million or adversely affect an economic sector, productivity, jobs, the environment, or other units of the government. A brief assessment to clarify the costs and benefits associated with this proposed rule follows.

The Service is currently assembling data to estimate the number and impact of permits that would likely be issued under this proposed rule. We are requesting public comment on the

economic effects of the rule to help us with this analysis. Specifically, we are requesting information on the following:

(1) How much will it cost to assemble the necessary information to apply for a take permit?

(2) How much will it cost to comply with (including monitoring and reporting) a take permit?

(3) Will you be more likely to apply for an eagle take permit under the proposed regulations compared to under the ESA?

(4) If you plan to apply for a permit, what type of activities do you plan to conduct that might require an eagle take permit, and where would the take likely occur?

(5) If you have a previously issued ESA section 7 authorization or section 10 permit and plan to apply for an expedited permit, how much will it cost to assemble the necessary information to apply for the permit?

Proposed Change. This rule would provide for the authorization of activities with impacts to bald eagles and golden eagles under the Bald and Golden Eagle Protection Act (Eagle Act). As such, the public would have the opportunity to apply for permits to authorize the take of bald and golden eagles under the Eagle Act. Any authorizations for take in Alaska would be new. Most authorizations for take of golden eagle anywhere in the United States would be new.

Baseline. Establishing the status quo is complicated because more than one rule pertaining to bald eagles is being promulgated within the next year. Most notably, it is anticipated that bald eagles may be delisted before this permitting rule is finalized. If the bald eagle is removed from the List of Threatened and Endangered Wildlife under the Endangered Species Act (ESA), management of the bald eagle would fall primarily under the Eagle Act. Currently, unlike under the ESA, there are no regulations under the Eagle Act that authorize associated take of eagles. Thus, there would be an unknown length of time during which no new eagle take permits would be authorized between any eagle delisting under ESA, a decision on which must be made by June 28, 2007, as the result of litigation, and the finalization of this permitting rule under the Eagle Act. Furthermore, only a portion of existing bald eagle permits and consultations would continue to be valid after the delisting of the bald eagle. The costs and benefits would result from (1) the authorization of take of bald and golden eagles throughout the United States under proposed § 22.26, (2) the number of permits for emergency take of eagle

nesses throughout the United States under proposed § 22.27, and (3) the reauthorization of activities for which take was previously allowed under the ESA but would not be valid after the delisting of the bald eagle. This analysis does not assess the impacts of delisting the bald eagle. Under the ESA, the final determination to delist the bald eagle will be based solely on the best available scientific and commercial data.

Costs Incurred. In general, the costs incurred due to the proposed 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 proposed regulations. However, due to various factors (explained further below), we expect that demand for eagle take permits will increase, from about 54 authorizations per year under the ESA to approximately 300 permits per year under the Eagle Act. Therefore, if we use the current number of authorizations issued under the ESA as a baseline, approximately 246 permit applications would be new and some of these entities would bear the higher permit application fee costs 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 proposed permit application versus the requirement to create a Habitat Conservation Plan (HCP) under the ESA).

Persons conducting activities under the terms and conditions of previously issued ESA section 7 and section 10 (where the bald eagle was the only listed species) authorizations would need new, expedited permits under the Eagle Act, but would not be charged a permit application fee, and so would incur minimal additional costs.

We are proposing a \$500 permit application processing fee for the § 22.26 take permit and a \$300 permit application processing fee for the emergency nest-take permit. Both permit types would require a \$150 fee

for permit amendments. We anticipate receiving about 300 § 22.26 take permit applications nationwide annually, and about 5 § 22.27 emergency nest take permits. (We anticipate that we will issue permits in nearly all these cases, 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 10 permits may need amendment annually. We expect about two thirds of the applicants to be Federal, State, local, or tribal governments, none of which are required to pay a permit application or amendment fee. Therefore, we estimate that annual application fees and amendments would total approximately \$51,050 (100 permits × \$500 fee + 2 permits × \$300 fee + 3 amendments × \$150 fee). There would be no fee for processing annual reports. These permit fees would be new costs related to this proposed 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. However, the permit application process would be significantly less burdensome than the current 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. Plans 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 Eagle Act permit does not require the habitat analysis and is less extensive and easier to compile (see (b)(1)(i) of the proposed rule). Information such as latitude and longitude are publicly available (e.g., Google Earth). The majority of people could submit this information to the Service without the need to hire a consultant, especially with the help of local and state government staff who are usually willing to provide assistance with location and distance information between project and eagle nest/use location. 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, consultants would need to be engaged to address a multitude of other factors in addition to impacts to eagles, so additional costs related to Eagle Act authorizations would be minimal. We seek input from the public regarding anticipated costs, and will adjust this analysis based on that input.

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. There will be some costs associated with this process. Although these costs are not the result of this permit regulation, but stem from the statutory prohibitions against taking eagles, we nevertheless, encourage the public to provide input to help us assess what these costs may be.

Costs would also be incurred by current projects that are in process and are delayed and future projects that are not initiated due to the lack of new eagle permits after delisting. 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 would incur administrative costs due to this proposed rulemaking. We do not have a firm basis on which to confidently foretell how much demand there will be for permits under these proposed regulations. We cautiously estimate the number of eagle take permits would increase under the rule from an average of 54 authorizations currently issued under the ESA to 300 Eagle Act permits, annually. We expect an increase because: (1) Many smaller projects will no longer be able to get under the umbrella of a Federal project when seeking authorization to take bald eagles; (2) after delisting, it will be more acceptable and less burdensome to get a permit to take eagles; (3) eagle populations are increasing; and (4) permits will be available for golden eagle take. The cost of issuing 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 a permit in addition to a biological opinion. On average, we estimate it will cost the

Service approximately \$2,400 to process the average permit application under § 22.26 and \$1,200 to process the average permit application under § 22.27. Assuming approximately 300 § 22.26 permit applications and 5 § 22.27 emergency nest take permits annually, the annual new costs associated with issuance of permits to the Service would total approximately \$721,000 (300 new § 22.26 permits × \$2,400) + (5 § 22.27 nest take permits × \$1,200).

The Service will also incur the cost of providing technical assistance, even where no permit is issued. The workload associated with each such consultation would be lower on average than for cases where a permit is required, but we believe it would not be insubstantial. 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) to be about 600 per year, resulting in \$360,000 in increased costs to the Service from technical consultations. In our preliminary analysis, we estimate that new administrative costs for the Service to implement this rule will be about \$1.1 million per year. (This estimate includes only the costs to regional and field offices for actual implementation of the permit program, and does not include costs associated with the development and maintenance of the program (e.g., rulemaking, responding to Freedom of Information Act requests, budget formulation, etc), which will be borne by the Service's Migratory Bird and Endangered Species program offices).

Benefits Accrued. Under the proposed rule, benefits to the public would accrue from issuance of permits to take bald and golden eagles throughout the United States. In general, benefits would 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 would 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. As a result, most take of golden eagles throughout the United States that would be authorized by the permits issued under these proposed regulations could result in new development and activities that could not have proceeded legally without this proposed rule. We expect 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, if this proposal is adopted, we anticipate issuing approximately 300 take permits per year, about 246 more authorizations per year than we have issued while the bald eagle has been listed as a threatened species under the ESA; and approximately 5 emergency nest-take permits. 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. We are conducting an environmental assessment (EA) of the effects of this rulemaking and will make a draft of the EA available to the public for review and comment before this rulemaking is finalized.

b. This rule would not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency. This rule deals solely with governance of bald and golden eagle take in the United States. No other Federal agency has any role in regulating bald and golden eagle take, although some other Federal agencies regulate activities impacting wildlife (including eagles) and these impacts may constitute take.

c. This rule would not alter the budgetary effects of entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients. No entitlements, grants, user fees, or loan programs are associated with the regulation of bald and golden eagle take.

d. OMB has determined that this rule may raise novel legal or policy issues; therefore this rule has been reviewed by OMB.

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 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.

The proposed 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 300 § 22.26 take permit applications nationwide annually, and about 5 § 22.27 emergency nest take permits. As noted under the Regulatory Planning and Review section above, we anticipate issuing approximately 300 § 22.26 take authorizations per year are expected to be granted across the United States if this proposed rule is adopted, and approximately 5 emergency nest-take permits. Based on past permit authorizations under the ESA, we anticipate approximately one-third of new permit applicants would be small businesses. If 100 applicants 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 upon the type of activity in which each business engages. As noted in the E.O. 12866 section of the preamble, 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, an applicant will have to pay \$500 for a take permit, \$300 for an emergency permit, 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, the permit application process would be significantly less burdensome than the current ESA. Moreover, 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 significant.

The Department of the Interior certifies that this rule would 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.*). The Service invites comment from members of the public who believe there would be a significant impact on small businesses.

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. Would not have an annual effect on the economy of \$100 million or more. The principal economic effect of the rule would be to allow the general public 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 would be an increase in the number of applications for permits under this rule compared to the number of people who seek authorization under the ESA, even though not all activities that require ESA authorization would require Eagle Act authorization. All small entities that benefited from the issuance of permits under the ESA would continue to benefit from permits issued under this rule.

b. Would 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 would not significantly affect costs or prices in any sector of the economy. This rule would 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 their 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.

c. Would 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 proposed regulation would establish 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 would benefit

U.S. enterprises. There is no anticipated negative economic effect to small businesses resulting from this proposed 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 proposed permit regulations that would be established through this rulemaking would 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 would not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than \$100 million per year. Revisions to State regulations would not be significant; all States in which the bald eagle occurs already have their own laws regarding bald eagles, including permitting mechanisms.

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 would 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 proposed 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 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 are no potential effects. This rule would not interfere with Tribes' ability to manage themselves or their funds. Although it would implement a new eagle-take-permit policy that would be available on tribal lands, the option to acquire the permit would be the same on all lands in the United States. This rule would not affect the operations of the eagle distribution system of the National Eagle Repository.

Paperwork Reduction Act. This proposed rule contains information collection requirements. We 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. In accordance with the requirements of the Paperwork Reduction Act (PRA), we are asking OMB to approve this proposed information collection. 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 part 22) and general permit regulations (50 CFR part 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. We collect standard information for all permits, such as the name of the applicant and the applicant's address, telephone and fax numbers, and e-mail address.

We are proposing two additional forms to be used as (1) the application for a § 22.26 take permit (FWS Form 3-200-71), and (2) the application for emergency take of eagle nests under § 22.27 (FWS Form 3-200-72). The additional information we would collect on FWS Form 3-200-71 is presented in § 22.26(b) of this proposed regulation, and the additional information we would collect on FWS Form 3-200-72 is presented in § 22.27(b). We are proposing to use a new form (FWS Form 3-202-15) as the annual report form for the § 22.26 eagle take permit (FWS Form 3-202-15). The additional information that would be collected on the report form is presented in § 22.26(e) of this

proposed regulation. 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 approximately 200 non-Federal applicants will apply for eagle-take permits and 3 non-Federal applicants will submit applicants for

emergency nest take permits. We believe the annual burden hours for non-Federal entities will be 5,251 as indicated in the table below.

Activity/requirement	Annual no. of respondents (non-Federal)	Total annual responses	Completion time per response (hrs)	Total annual burden hrs	Total burden cost to public (\$30/hr)
FWS Form 3-200-71—permit application	200	200	10	2,000	\$60,000
FWS Form 3-202-15—annual report §22.26 & monitoring	300	300	10	3,000	90,000
FWS Form 3-200-72—permit application	3	3	6	18	540
Monitoring and reporting for § 22.27 permit	3	3	6	18	540
Amendments to permits	6	6	2	12	360
Recordkeeping—§ 22.26-27	*203	*203	1	203	6,090
Totals	512	512	5,251	\$157,530

*Not included in totals—respondents are the same as for permit applications.

We invite interested members of the public and affected agencies to comment on these proposed information collection and recordkeeping activities. Comments are invited on: (1) Whether or not the collection of information is necessary for the proper performance of the functions of the Service, including whether or not the information will have practical utility; (2) the accuracy of our estimate of the burden for this collection; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on applicants.

Send your comments and suggestions on this information collection to the Desk Officer for the Department of the Interior at OMB-OIRA at (202) 395-6566 (fax) or OIRA_DOCKET@OMB.eop.gov (e-mail). Please provide a copy of your comments to Hope Grey, Information Collection Clearance Officer, Fish and Wildlife Service, MS 222-ARLSQ, 4401 North Fairfax Drive, Arlington, VA 22203 (mail); (703) 358-2269 (fax); or hope_grey@fws.gov (e-mail).

National Environmental Policy Act. We have considered this proposed action and determined that we will prepare an environmental assessment (EA) in compliance with the National Environmental Policy Act of 1969. The

public will be invited to participate in this process and will be provided an opportunity for review and comment on the draft EA, when completed.

Clarity of this regulation. Executive Order 12866 requires each agency to write regulations that are easy to understand. We invite your comments on how to make this rule easier to understand, including answers to questions such as the following: (1) Are the requirements in the rule clearly stated? (2) Does the rule contain technical language or jargon that interferes with its clarity? (3) Does the format of the rule (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce its clarity? (4) Would the rule be easier to understand if it were divided into more (but shorter) sections? (5) Does the description of the rule in the **SUPPLEMENTARY INFORMATION** section of the preamble help you to understand the proposed rule? What else could we do to make the rule easier to understand?

Send a copy of any comments about how we could make this rule easier to understand to: Office of Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street, NW., Washington, DC 20240. You may also e-mail comments on the clarity of this rule to: Exsec@ios.doi.gov.

List of Subjects

50 CFR Part 13

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

50 CFR Part 22

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

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

PART 13—[AMENDED]

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 § 13.11(d)(4) by adding two entries under “Bald and Golden Eagle Protection Act” in the table, 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	50 CFR 22	500	150
Eagle Nest Take—Safety Emergency	50 CFR 22	300	150

Type of permit	CFR citation	Fee	Amend-ment fee
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3. Amend § 13.12(b) by adding to the table the following entries in numerical order by section number under “Eagle permits” to read as follows:

§ 13.12 General information requirements on applications for permits.

Type of permit	Section
Eagle permits:	
Eagle Take	22.26
Eagle Nest Take—Safety Emergency	22.27

PART 22—[AMENDED]

4. The authority citation for part 22 is amended 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 § 22.1 by revising the first sentence to read as follows:

§ 22.1 What is the purpose of this part?

This part controls the taking, possession, and transportation within the United States of bald and golden eagles and their parts, nests, and eggs for scientific, educational, depredation control purposes; for the religious purposes of American Indian tribes; and to protect other interests in a particular locality.

- 6. Amend § 22.3 as follows:
 - a. By removing the definition of “Golden eagle nest.”
 - b. By revising the definition of “Take” to read as set forth below; and
 - c. By adding new definitions for “Eagle nest” and “Important eagle-use area” to read as set forth below.

§ 22.3 What definitions do you need to know?

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

Important eagle-use area means an eagle nest, foraging area, or communal roost site that eagles rely on for

sheltering and 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.

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

7. Amend § 22.4(b) by revising the first sentence to read as follows:

§ 22.4 Information collection requirements.

(b) We estimate the public reporting burden for these reporting requirements to vary from 1 to 10 hours per response, with an average of 3 hours per response, including time for reviewing instructions, gathering and maintaining data, and completing and reviewing the forms.

- 8. Amend § 22.11 as follows:
 - a. By revising the first sentence of the introductory text to read as set forth below;
 - b. By redesignating paragraphs (a), (b), and (c) as paragraphs (b), (c), and (d); and
 - c. By adding a new paragraph (a) to read as set forth below.

§ 22.11 What is the relationship to other permit requirements?

You may not take, possess, or transport any bald eagle (*Haliaeetus leucocephalus*) or any golden eagle (*Aquila chrysaetos*), or the parts, nests, or eggs of such birds, except as allowed by a valid permit issued under this part, 50 CFR part 13, 50 CFR part 17, and/or 50 CFR part 21 as provided by § 21.2, or authorized under a depredation order issued under subpart D of this part.

(a) A valid permit that covers take of eagles under 50 CFR part 17 constitutes a valid permit issued under this part for any take authorized under the permit issued under part 17 as long as the permittee fully complies with the terms and conditions of the permit issued under part 17.

Subpart C—Eagle Permits

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

§ 22.26 Eagle take permits.

(a) *Purpose and scope.* This permit authorizes: (1) Take of bald and golden eagles for the protection of other interests in any particular locality, where such permits are consistent with the preservation of the bald and golden eagle, and the take is associated with, and not the purpose of, the activity, and cannot practicably be avoided; or

(2) Take of bald eagles that complies with the terms and conditions of a previously granted section 7 incidental take statement, or a section 10 incidental take permit where the bald eagle was the only listed covered species, under the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

(b) *Applying for an eagle take permit.* (1)(i) For applications under paragraph (a)(1) of this section, you are advised to coordinate with the Service as early as possible for technical assistance in assembling your permit application package and for advice on whether a permit is needed. The Service will provide guidance on developing complete and adequate application materials and will determine when the application form and materials are ready for submission. Completed applications (Form 3–200–71) must contain the general information and certification required by § 13.12(a) of this subchapter, and the information listed below:

(A) A detailed description of the activity that the permittee believes will likely cause the disturbance or other take of eagles;

(B) The species and number of eagles that are likely to be taken and the likely form of that take;

(C) Maps and digital photographs that depict the locations of the proposed activity and the eagle nests, foraging areas, and concentration sites where eagles are likely to be affected by the proposed activity (including the GPS coordinates of the activity area and eagle-use area(s) and the distance(s) between those areas);

(D) For activities that are likely to disturb eagles, whether or not the important eagle-use area(s) is visible from the activity area, or if screening vegetation or topography blocks the view;

(E) The nature and extent of existing activities in the vicinity similar to that

being proposed, and the distance between those activities and the important eagle use area(s);

(F) The date the activity will start and is projected to end;

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

(H) An explanation of why avoiding the take is not practicable, or for lethal take, why it is unavoidable;

(I) A description of measures proposed to minimize and mitigate the impacts; and

(J) Other information the Service may request specific to that particular proposal and consistent with the information collection requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

(ii) You are responsible for conducting any field surveys that we need for your application to be complete, including compiling data on the location and status of eagle nests and important use areas within the affected area.

(iii) Send completed permit 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.

(2) For applications under paragraph (a)(2) of this section, your application must consist of a copy of the applicable section 7 incidental take statement or section 10 incidental take permit issued pursuant to the Endangered Species Act (ESA), and a certification that you are fully complying with the terms and conditions of the ESA authorization.

(c) *Evaluation of applications.* (1) In our evaluation of permit applications under paragraph (a)(1) of this section, we will consider a number of factors, including whether practicable measures can be undertaken that would minimize the probability of take, and whether the take to be permitted is compatible with the preservation of bald or golden eagles. Factors to be considered may include the magnitude of the impacts of the activity; individual eagles' prior exposure to, and history with, the activity; visibility of the activity from the eagle's nest, roost, or foraging perches; whether alternative suitable eagle nesting, roosting, and/or feeding habitat is available to the eagles affected by the activity; and practices that will be employed by the applicant to reduce the potential take of eagles. In cases where our evaluation of these additional factors leads to the conclusion that disturbance or other take will likely occur, we will assess whether that take

is likely to lead to a decrease in eagle population size. If a population decrease is likely, we will assess whether or not that decrease is compatible with the long-term preservation of bald and golden eagles. For applications for activities that are likely to result in eagle mortalities, we will assess whether the activity is necessary for the public welfare and whether the project proponent is using Best Management Practices (BMPs) to prevent the take. Permits will authorize anticipated lethal take only where BMPs are fully implemented.

(2) For applications under paragraph (a)(2) of this section, we will evaluate whether you are in full compliance with the terms and conditions of the applicable Endangered Species Act authorization.

(d) *Required determinations.* (1) Before we issue a permit under (a)(1) of this section, we must find that:

(i) The taking is necessary to protect an interest in a particular locality, and for lethal take, the activity is also necessary for the public welfare;

(ii) The applicant has minimized impacts to bald eagles to the extent practicable, and for lethal take, the taking will occur despite application of BMPs;

(iii) The taking is compatible with the preservation of bald and golden eagles, including the cumulative effects of other similar existing and anticipated activities.

(2) For a permit under (a)(2) of this section, you are in full compliance with the terms and conditions of an ESA authorization for eagle.

(e) *Permit conditions.* (1) For permits issued under paragraph (a)(1) of this section, 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:

(i) You must comply with any minimization, mitigation, or other conservation measures determined by the Director as reasonable to assure the preservation of eagles and practicable given the proposed activity, and which are included in the terms of your permit;

(ii) You must monitor eagle use of important eagle-use areas potentially affected by your activities for up to 3 years or as set forth in a separate management plan, as specified on your permit. You must submit an annual report 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:

(A) Information on eagle use of the important eagle-use areas potentially affected.

(B) Description of the human activities conducted at the site when eagles were observed.

(iii) 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).

(iv) 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 continue to retain take authorization.

(v) Notwithstanding the provisions of § 13.26 of this subchapter, you remain responsible for any outstanding minimization, mitigation, or other conservation measures required under the terms of the permit for take that occurs prior to expiration, suspension, or revocation of the permit.

(2) For permits issued under paragraph (a)(2) of this section, you must comply with all terms and conditions of your authorization issued under section 7 or section 10 of the Endangered Species Act.

(f) *Permit duration.* (1) The duration of each permit issued under paragraph (a)(1) of this section will be designated on its face, and will be based on the duration of the proposed activities and mitigation measures.

(2) The duration of a permit issued under paragraph (a)(2) of this section is that designated on the face of the applicable Endangered Species Act incidental-take authorization.

22.27 Removal of eagle nests for safety emergencies.

(a) *Purpose and scope.* A permit may be issued under this section to facilitate removal or relocation of an eagle nest where its location poses a threat to public safety or to the eagles themselves. Where practicable, the nest should be relocated to 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. However, the Service retains the discretion in appropriate instances to issue permits to remove nests that we determine cannot be relocated. The permit may authorize take of eggs or nestlings if present. The permit may also authorize the take of eagles (i.e., disturbance) associated with and resulting from the removal of the nest.

(b) *Applying for a permit to take eagle nests for safety needs.* Before compiling and submitting your permit application, you should contact your local U.S. Fish and Wildlife Service Ecological Services Office. We may make an on-site assessment to verify that the location of the nest poses a threat to human or eagle safety. Send a completed application (Form 3-200-72) and permit application fee 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. Your application must contain the general information and certification required by § 13.12(a) of this subchapter, and the information listed below:

(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;

(2) Why the removal of each nest is necessary to alleviate safety concerns;

(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, and if active, the nestlings or eggs; and

(7) Other information the Service may request specific to that particular proposal and consistent with the information collection requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

(c) *Evaluation criteria.* In our evaluation of permit applications, we will consider whether the purpose for which the nest would be taken is a legitimate emergency safety concern, and whether the take of the nest is consistent with the preservation of bald and golden eagles.

(d) *Conditions.* (1) Any take of nestlings or eggs must be conducted by a qualified, permitted, designated agent, and all nestlings and eggs must be immediately transported to foster/recipient nests or a rehabilitation

facility permitted to care for eagles until such time as they can be placed in foster/recipient nests.

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

(3) You must submit a report of activities conducted under the permit to the Service within 30 days after the permitted take occurs.

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

(5) 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 and when it is practicable to do so.

(e) *Tenure of permits.* The tenure of any permit to take eagle nests under this section is 1 year from the date of issuance, unless a shorter period of time is prescribed on the face of the permit.

Dated: May 23, 2007.

Todd Willens,

Acting Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 07-2697 Filed 6-4-07; 8:45 am]

BILLING CODE 4310-55-P

DEPARTMENT OF THE INTERIOR**Fish and Wildlife Service**

RIN 1018-AT94

Protection of Eagles; Definition of "Disturb"**AGENCY:** Fish and Wildlife Service, Interior.**ACTION:** Notice of availability: Final environmental assessment.

SUMMARY: We, the U.S. Fish and Wildlife Service, announce the availability of a Final Environmental Assessment (FEA) evaluating the possible effects of defining "disturb" under the Bald and Golden Eagle Protection Act (Eagle Act), and a Finding of No Significant Impact for the preferred alternative. We prepared the environmental assessment as part of the National Environmental Policy Act process. Based on public comments received on the draft environmental assessment (DEA) and proposed rule defining disturb, we modified the preferred alternative in the FEA, and have adopted the modified version of the preferred alternative as the final definition of "disturb" under the Eagle Act. The final rule codifying the definition of "disturb" is published elsewhere in today's **Federal Register**.

ADDRESSES: You may obtain a copy of this FEA by visiting our Web site at <http://www.fws.gov/migratorybirds/> or by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**.

FOR FURTHER INFORMATION CONTACT: Eliza Savage, Division of Migratory Bird Management, U.S. Fish and Wildlife Service, at 703-358-2329, or via e-mail at Eliza_Savage@fws.gov.

SUPPLEMENTARY INFORMATION:**Background**

On February 16, 2006, we published in the **Federal Register** a proposed rule (71 FR 8265) to define "disturb" under the Eagle Act (16 U.S.C. 668-668d). The proposed rule would add a definition for "disturb" to regulations at 50 CFR 22.3 in anticipation of possible removal (delisting) of the bald eagle in the 48 contiguous States from the List of Endangered and Threatened Wildlife under the Endangered Species Act (16 U.S.C. 1531 et seq.). If the bald eagle is delisted, the Eagle Act will become the primary law protecting bald eagles. The rule sought to define the term "disturb" in a manner consistent with the language and intent of the Eagle Act and thereby provide a predictable standard to guide bald eagle management following delisting. We opened a public

comment period on the proposed rule until May 17, 2006. On May 16, 2006, we published a notice extending the comment period until June 19, 2006 (71 FR 28294).

On December 12, 2006, we announced the availability of a DEA of our proposed definition of "disturb" through a notice in the **Federal Register** (71 FR 74483). In the DEA, we considered a definition slightly modified from the definition proposed in February 2006 as our preferred alternative. The definition was reworded for purposes of clarity, and included a definition of "injury," a term used in the definition of "disturb." During this round of public comment, we received 1,977 comments, approximately 1,875 of which were very similar. We considered all comments, and the definition of "disturb" we are codifying in our rulemaking (the preferred alternative of the FEA) is a modification of the definition we identified as our preferred alternative in the DEA. The final rule codifying the definition of "disturb" is published elsewhere in today's **Federal Register**.

In the FEA, under Alternative 1, we would not define "disturb." Disturbance would remain a prohibited act under the Bald and Golden Eagle Protection Act (16 U.S.C. 668-668d), without further regulatory interpretation. Under Alternative 2, the definition of "disturb" would be based on immediate effects to individual birds. We would define "disturb" as having a direct effect, as evinced by immediate behavioral response on the part of a bald eagle or a golden eagle, without consideration for secondary, biologically significant events. Alternative 4 would define "disturb" such that the disturbing action must be intentionally directed at eagles and cause injury or death. The preferred alternative (Alternative 3) defines "disturb" to encompass effects to individual birds that are likely to result in an adverse biological impact:

"Disturb means 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."

Dated: May 16, 2007.

Todd Willens,

Acting Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 07-2696 Filed 6-4-07; 8:45 am]

BILLING CODE 4310-55-P

DEPARTMENT OF THE INTERIOR**Fish and Wildlife Service****National Bald Eagle Management Guidelines****AGENCY:** Fish and Wildlife Service, Interior.**ACTION:** Notice of availability.

SUMMARY: This notice advises the public that National Bald Eagle Management Guidelines are available to the public.

ADDRESSES: Copies of the National Bald Eagle Management Guidelines can be obtained by writing to: Eliza Savage, U.S. Fish and Wildlife Service, Division of Migratory Bird Management, 4401 North Fairfax Drive, Mail Stop MBSP-4107, Arlington, VA 22203. The guidelines may also be obtained via the Internet at: <http://www.fws.gov/migratorybirds/baldeagle.html>.

FOR FURTHER INFORMATION CONTACT: Eliza Savage, Division of Migratory Bird Management, (see **ADDRESSES** section); or via e-mail at: Eliza_Savage@fws.gov; telephone: (703) 358-2329; or facsimile: (703) 358-2217.

SUPPLEMENTARY INFORMATION: In anticipation of the possible removal of the bald eagle from the list of threatened species under the Endangered Species Act (16 U.S.C. 1531 et seq.), the Service has developed National Bald Eagle Management Guidelines to provide guidance to land managers, landowners, and others as to how to avoid disturbing bald eagles. After delisting, the Bald and Golden Eagle Protection Act (Eagle Act) (16 U.S.C. 668-668d) becomes the primary law protecting bald eagles. The Eagle Act prohibits take of bald and golden eagles and provides a statutory definition of "take" that includes "disturb."

The Service developed National Bald Eagle Management Guidelines, a draft of which was made available for public comment February 16, 2006 (71 FR 8309). We received 86 comments on the guidelines, which we took into consideration in developing this final document. The guidelines provide the public information to help prevent disturbance of bald eagles and recommend additional non-binding practices that can benefit bald eagles.

In addition to this notice, the Service is publishing three related documents elsewhere in today's **Federal Register**: a final rule, codifying the Eagle Act definition of "disturb"; a notice of availability of the final environmental assessment for the definition of "disturb"; and a proposed rule to codify additional take authorizations under the Eagle Act.