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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Parts 13 and 22

[Docket No. FWS–R9–MB–2011–0094; FF09M20300-167-FXMB123109EAGLE]

RIN 1018–AY30

Eagle Permits; Revisions to Regulations for Eagle Incidental Take and Take of Eagle Nests

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service, propose revisions to the eagle nonpurposeful take permit regulations and eagle nest take regulations that we promulgated in 2009. Proposed revisions include the following: changes to permit issuance criteria and duration; definitions; compensatory mitigation standards; criteria for eagle nest removal permits; permit application requirements; and fees. The revisions are intended to add clarity to the eagle

permit regulations, improve their implementation, and increase compliance, while providing strong protection for eagles.

DATES: You may submit comments on the proposed rule until [INSERT DATE 60 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER]. The Environmental Protection Agency will soon publish a notice in the **Federal Register** with information on the deadline for submitting comments on the draft programmatic environmental impact statement. Comments on the information collection aspects of this rule must be received on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: *Document Availability:* A draft programmatic environmental impact statement (DPEIS) has been prepared in conjunction with preparation of this proposed rule. Both the proposed rule and the DPEIS are available at http://www.fws.gov/birds/management/managed-species/eagle-management.php and also at www.regulations.gov at Docket No. FWS–R9–MB–2011–0094.

Comments on the Proposed Rule and DPEIS: You may submit comments by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal: http://www.regulations.gov. In the Search box, enter FWS–R9–MB–2011–0094, which is the docket number for this rulemaking. Then click on the Search button. On the resulting page, you may submit a comment by clicking on "Comment Now!"

(2) *By hard copy:* Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–R9–MB–2011–0094; Division of Policy, Performance, and Management Programs; U.S. Fish and Wildlife Service, MS: BPHC; 5275 Leesburg Pike, Falls Church, VA 22041–3803.

Comments on the Information Collection Aspects of the Proposed Rule: You may review the Information Collection Request online at http://www.reginfo.gov. Follow the instructions to review Department of the Interior collections under review by OMB. Send comments (identified by 1018–AY30) specific to the information collection aspects of this proposed rule to both the:

- Desk Officer for the Department of the Interior at OMB–OIRA at (202) 295–5806 (fax) or *OIRA_Submission@omb.eop.gov* (email); and
- Service Information Collection Clearance Officer; Division of Policy, Performance, and Management Programs; U.S. Fish and Wildlife Service, MS: BPHC; 5275 Leesburg Pike; Falls Church, VA 22041–3803 (mail); or hope_grey@fws.gov (email).

See Public Comments under **SUPPLEMENTARY INFORMATION** for more information regarding submission of comments.

FOR FURTHER INFORMATION CONTACT: Eliza Savage, 703–358–2329 or *eliza_savage@fws.gov*.

SUPPLEMENTARY INFORMATION:

Executive Summary

The U.S. Fish and Wildlife Service proposes revisions to our regulations regarding the issuance of permits for certain activities involving eagles. We promulgated regulations covering authorization of nonpurposeful (incidental) take of eagles and take of eagle nests in

2009. Revisions to these permit regulations are needed to create a permitting framework that is more conducive to consistent administration by the Service and public compliance. Our goal is also to enhance protection of eagles throughout their ranges through implementation of avoidance and minimization of, and compensatory mitigation for, adverse impacts from otherwise lawful activities. The regulations are primarily codified in part 22 of title 50 of the Code of Federal Regulations.

The Service proposes a modified definition of the Eagle Act's "Preservation Standard," which requires that permitted take be compatible with the preservation of eagles. We also propose to remove the distinction between standard and programmatic permits, codify standardized mitigation requirements that comport with the Service's draft mitigation policy, and extend the maximum permit duration for eagle incidental take permits (50 CFR 22.26). These proposed regulations also present a number of additional revisions to the eagle incidental take and eagle nest take regulations at 50 CFR 22.27, as well as revisions to the permit fee schedule at 50 CFR 13.11; new and revised definitions in 50 CFR 22.3; revisions to 50 CFR 22.25 (permits for golden eagle nest take for resource development and recovery operations) for consistency with the § 22.27 nest take permits; and two provisions that apply to all eagle permit types (50 CFR 22.4 and 22.11).

Background

The Bald and Golden Eagle Protection Act (Eagle Act or BGEPA) (16 U.S.C. 668–668d) prohibits take of bald eagles and golden eagles except pursuant to Federal regulations. The Eagle Act allows the Secretary of the Interior to issue regulations to authorize the "taking" of eagles for various purposes, including the protection of "other interests in any particular locality"

(16 U.S.C. 668a). In 2009, the Service promulgated regulations at 50 CFR part 22 that established two new permit types for take of eagles and eagle nests (50 FR 46836, September 11, 2009) (Eagle Permit Rule). One permit authorizes, under limited circumstances, the take (removal, relocation, or destruction) of eagle nests (50 CFR 22.27). The other permit type authorizes nonpurposeful take (disturbance, injury, or killing) of eagles (50 CFR 22.26) where the take is incidental to an otherwise lawful activity. These regulations currently provide for standard permits, which authorize individual instances of take that cannot practicably be avoided, and programmatic permits, which authorize recurring take that is unavoidable even after implementation of advanced conservation practices.

The Eagle Act requires the Service to determine that any take of eagles the Service authorizes is "compatible with the preservation of bald eagles or golden eagles." We refer to this clause as the Eagle Act preservation standard. The preservation standard underpins the Service's management objectives for eagles. In the preamble to the final 2009 regulations for eagle nonpurposeful take permits, and in the final environmental assessment (FEA) of the regulations, the Service defined the preservation standard to mean "consistent with the goal of maintaining stable or increasing breeding populations" (74 FR 46838, September 11, 2009).

On April 13, 2012, the Service initiated two additional rulemakings: (1) a proposed rule to extend the maximum permit tenure for programmatic eagle nonpurposeful take permit regulations from 5 to 30 years, among other changes ("Duration Rule") (77 FR 22267), and (2) an advance notice of proposed rulemaking (ANPR) soliciting input on all aspects of those eagle nonpurposeful take regulations (77 FR 22278).

The ANPR highlighted three main issues for public comment: our overall eagle population management objectives; compensatory mitigation required under permits; and the

nonpurposeful take programmatic permit issuance criteria. As a next step, the Service issued a notice of intent to prepare an environmental assessment (EA) or environmental impact statement (EIS) pursuant to the National Environmental Policy Act (NEPA) (42 U.S.C. 4321 et seq.) (79 FR 35564, June 23, 2014). The Service then held five public scoping meetings between July 22 and August 7, 2014.

The Duration Rule was finalized on December 9, 2013 (78 FR 73704). However, it was the subject of a legal challenge, and on August 11, 2015, the U.S. District Court for the Northern District of California vacated the provisions that extended the maximum programmatic permit tenure to 30 years. *Shearwater* v. *Ashe*, No. CV02830-LHK (N.D. Cal., Aug. 11, 2015). The court held that the Service should have prepared an EA or EIS rather than apply a categorical exclusion under NEPA. The effect of the ruling was to return the maximum programmatic permit term to 5 years.

The Service has prepared a draft programmatic environmental impact statement (DPEIS) to analyze eagle management objectives and these proposed revisions to the 2009 eagle permit regulations. The draft DPEIS is available on the Service's website at: http://www.fws.gov/birds/management/managed-species/eagle-management.php and also at: www.regulations.gov at Docket No. FWS–R9–MB–2011–0094.

Bald eagle populations have continued to increase throughout the United States, increasing the potential need for permits for activities that may disturb, injure, or kill bald eagles. There has also been significant expansion within many sectors of the U.S. energy industry, particularly wind energy operations, and much more interest in permitting new long-term operations than was anticipated when the 2009 regulations were promulgated. At the same time, golden eagle populations are potentially declining, heightening the challenge of permitting

incidental take of this species for otherwise lawful activities. The 2009 permit regulations do not provide an optimal framework for authorizing incidental take under these circumstances. There is a general perception that the current permitting framework does not provide enough flexibility to issue eagle take permits in a timely manner. Indeed, few programmatic permits have been issued to date. When projects go forward without permit authorization, the opportunity to obtain benefits to eagles in the form of required conservation measures is lost and project operators put themselves at risk of violating the law.

Under the current management approach, established with the 2009 eagle permit regulations and FEA, permitted take of bald eagles is capped at 5 percent of estimated annual productivity (i.e., successful reproduction) of the population. Because the Service lacked data in 2009 to show that golden eagle populations could sustain any additional unmitigated mortality, the Service set take limits for that species at zero. This decision has meant that any new authorized take of golden eagles must be at least equally offset by compensatory mitigation (specific conservation actions to replace or offset project-induced losses by reducing take elsewhere).

In the FEA for the 2009 regulations and in the preamble to those regulations, the Service adopted a policy of not issuing take permits for golden eagles east of the 100th meridian. At the time, the Service determined there were not sufficient data to ensure that golden eagle populations were stable or increasing such that permitting take would not result in a decline in breeding pairs in this region. However, after further analysis, the Service has determined that some take can be permitted with implementation of offsetting mitigation. Rather than providing an increased level of protection for golden eagles, this policy has meant that activities that take golden eagles in the east continue to proliferate without implementation of conservation

measures and mitigation to address impacts to golden eagles that would be required as the result of the permitting process.

Since 2009, Service and U.S. Geological Survey (USGS) scientists have undertaken considerable research and monitoring to improve the Service's ability to track compliance with eagle management objectives and reduce uncertainty. Of particular significance, the Service has updated population estimates for both species of eagle and quantified uncertainty in those estimates. For the bald eagle, the Service now estimates substantially higher populations than was estimated in 2009, and allowable take limits will likely increase considerably across most of the country as a result (see further discussion below under Status of Eagle Populations).

For golden eagles, recent research indicates that the population in the coterminous western United States might be declining towards a lower equilibrium size. Additionally, the Service now has a much better understanding of the seasonal, annual, and age-related movement patterns of golden eagles. These data will be incorporated into an updated management framework.

In implementing the 2009 permit regulations, the Service has identified several provisions that could be improved for the benefit of both eagles and people, including the regulated community. One issue that has hampered efficient permit administration (of both eagle nonpurposeful take permits and eagle nest take permits) is the difficulty inherent in applying the standard that take must be reduced to the point where it is unavoidable, which the current regulations require for programmatic permits. Additionally, a lack of specificity in the regulations as to when compensatory mitigation is required can lead to inconsistencies in what is required of permittees.

The 5-year maximum duration for programmatic permits appears to be a primary factor discouraging many project proponents from seeking eagle take permits. Many activities that incidentally take eagles due to ongoing operations have lifetimes that far exceed 5 years. We need to issue permits that align better, both in duration and the scale of conservation measures, with the longer term duration of industrial activities, such as electricity distribution and energy production. Extending the maximum permit duration is consistent with other Federal permitting for development and infrastructure projects.

The Service undertook the 2012 ANPR, 2014 notice of intent and scoping meetings, and the DPEIS to improve the Service's permitting and conservation framework for eagles by addressing the problems noted above, among other issues. Moreover, since 2009, when the permits first became available, new developments, changing circumstances, and new information must be analyzed and incorporated into the Service's management objectives for eagles.

NEPA Scoping Process

The purpose of scoping is to provide interested agencies, stakeholder organizations, Native American tribes, and the public an opportunity to provide comments regarding potentially significant environmental issues and the scope of the environmental analysis, including alternatives, and help to inform the eagle management program and the Service decision to prepare either an EA or an EIS. Service staff implementing the 2009 eagle permit regulations identified a number of priority issues for evaluation during this scoping process, including the following: eagle population management objectives; programmatic permit conditions; compensatory mitigation; and criteria for nest removal permits.

Five public scoping meetings were held in Sacramento, Minneapolis, Albuquerque, Denver, and Washington, DC, between July 22, 2014, and August 7, 2014. Representatives from the Service were available to answer participants' questions and listen to their ideas and concerns. Approximately 213 people attended the meetings, and all were encouraged to submit written comments.

The Service also set up a website, http://www.eaglescoping.org, to serve as a "virtual meeting," where visitors could view the same information that was presented at the public meetings, including the overview video presentation and informational displays. Links to the Service e-mail for public comments were included on the site.

We received a total of 536 comments during the public comment period. Upon removal of duplicates, there were a total of 517 unique comments, of which many included additional attachments (e.g., scanned letters, one picture, and supporting documents). In addition to the comments received, two organizations provided spreadsheets with additional comments. First, the Friends of Blackwater provided a spreadsheet of 46 supporters of their comment. Secondly, the National Audubon Society provided a spreadsheet of 25,349 comments in support of their comment and 2,064 personalized comments. All comments were reviewed and considered.

Status of Eagle Populations

The Service is proposing to modify current management objectives for eagles established with the 2009 eagle permit regulations and FEA of the regulatory permitting system under the Eagle Act. Management objectives direct strategic management and monitoring actions and, ultimately, determine what level of permitted eagle take can be allowed. The Service recently completed a status report on bald and golden eagles: "Bald and Golden Eagles: Status, trends, and estimation of sustainable take rates in the United States" ("Status Report") (USFWS, 2016).

The Status Report is available at: http://www.fws.gov/birds/management/managed-species/eagle-management.php. It estimates population sizes, productivity, and survival rates for both species; irdsanalyzes the effects of unauthorized take of golden eagles; provides recommended take limits for both species and metrics for converting take in the form of disturbance to debits from the take limits; analyzes the cumulative effects of permitting take of up to 5% of local area populations (the population in the vicinity of a particular project or activity); and recommends a schedule of population surveys to regularly update population size estimates for both species. The Status Report is essentially a compilation of the most current research on the population status and trends of bald and golden eagles and as such serves as the biological basis for the revised regulatory management framework we are proposing in these regulation revisions and the preferred alternative in the DPEIS. The following discussion pertaining to the status of bald and golden eagle populations summarizes some of the information provided and explained in more detail in the Status Report, available at http://www.fws.gov/birds/management/managed-species/eagle-management.php.

The Service has estimated the population size for the bald eagle in the coterminous United States using a population model in conjunction with estimates of the number of occupied nesting territories in 2009. That population size estimate is 72,434, and when combined with a previous estimate of population size for Alaska (70,544) is 143,000. We derive our conservative estimate for the population size by using the 20^{th} quantile of the population size estimate distribution (the 20^{th} quantile is the point on the probability distribution where there is only a 20% chance of the estimate being lower than the true population size). The 20^{th} quantile represented 126,000 bald eagles for the United States in 2009. This number represents an increase from our population size estimate for the coterminous United States in 2007 (the year

data were gathered to support delisting under the Endangered Species Act), which was 69,000. We attribute the difference to improved monitoring and estimation efforts, as well as increases in bald eagle numbers. Both the population model and Breeding Bird Survey (BBS) estimates indicate bald eagle populations are continuing to increase throughout the coterminous United States.

We estimated future bald eagle populations using a conservative assumption that the number of suitable bald eagle nesting territories will not increase above the 2009 estimate. Given limitations of the data on Alaskan eagles and evidence from the BBS that bald eagle populations are growing more slowly there, we did not model projections for Alaska and assumed that Alaska's bald eagle population will remain stable (though demographic rates suggested continued growth is possible). With these constraints, our model forecasts that the number of bald eagles in the coterminous United States outside the Southwest will continue to increase until populations reach an equilibrium at about 228,000 (20^{th} quantile = 197,000) individuals. The model predicts that bald eagles in the Southwest will also continue to increase from the 2009 population estimate of 650 until reaching an equilibrium at about 1,800 (20^{th} quantile = 1,400) individuals. Again, these numbers are based on assumptions that underlying demographic rates and other environmental factors remain unchanged, and the predictions do not take into account forecasted changes in climate nor how such changes may affect bald eagle population vital rates and population size. These projections also assume food and other factors will not become limiting.

We estimated the total population size for the golden eagle in the coterminous United States and Alaska was 39,000 (20^{th} quantile = 34,000) in 2009 and 40,000 (20^{th} quantile = 34,000) in 2014. However, although the golden eagle population trend estimate based on current

surveys was stable, an estimate from a population model similar to that used for the bald eagle suggested the population in the western United States might be declining towards a lower equilibrium size of about 26,000 individuals.

Using unbiased cause-of-mortality data for a sample of 386 satellite-tagged golden eagles in the period 1997–2013, the Service estimated contemporary age-specific survival rates with and without current levels of anthropogenic mortality. Anthropogenic factors were responsible for about 56% of satellite-tagged golden eagle mortality, with the highest rates of anthropogenic mortality among adults (63%). We estimated the maximum rate of population growth for the golden eagle in the coterminous United States in the absence of existing anthropogenic mortality was 10.9% (20^{th} quantile = 9.7%). Sustainable take under these conditions is 2,000 individuals (20^{th} quantile = 1,600). The available information suggests ongoing levels of human-caused mortality likely exceed this value, perhaps considerably. This information supports the finding from the population model that golden eagle populations may be declining to a new, lower level.

For much more detailed information about the current population status and trends, see the Status Report available at: http://www.fws.gov/birds/management/managed-species/eagle-management.php.

Description of the Rulemaking

Preservation Standard

The Eagle Act requires that any authorized take of eagles be "compatible with the preservation" of bald eagles and golden eagles. We defined this preservation standard in the preamble to the 2009 regulations to mean "consistent with the goal of maintaining stable or increasing breeding populations." The Service now proposes to modify that standard and

incorporate it into the regulations to mean "consistent with the goals of maintaining stable or increasing breeding populations in all eagle management units and persistence of local populations throughout the geographic range of both species." The timeframe the Service used for modeling and assessing eagle population demographics is over the next 100 years (at least eight generations) for both eagle species relative to the 2009 baseline. This objective is consistent with Presidential, Department of the Interior, and Fish and Wildlife Service mitigation policies that aim to achieve a net benefit, or at a minimum, no net loss, of natural resources. (See the Service's mitigation policy (501 FW 2), Secretary's Order 3330, entitled "Improving Mitigation Policies and Practices of the Department of the Interior" (October 31, 2013), the Departmental Manual Chapter on Implementing Mitigation at the Landscape-scale (600 DM 6 (October 23, 2015)), and the Presidential Memorandum on Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment (November 3, 2015)).

The Service considered adoption of a purely qualitative preservation standard such as "to not meaningfully impair the bald or golden eagle's continued existence." However, a qualitative approach alone contains no standards for assessment, which could lead to inconsistent implementation between Service regions. Inconsistent implementation across Regions is a bigger concern with eagles than for many ESA-listed species because the range of both bald and golden eagles extends throughout the continental United States. Additional drawbacks to adopting a qualitative approach are that it is less compatible with formal adaptive management and does not provide a mechanism to assess cumulative impacts. Also, considerable quantitative information is available on eagle populations unlike many ESA-listed species, and to ignore these data or to independently reassess them for each permit is inconsistent with the Service's commitment to

use the best available information and practice the best science. For these reasons, the Service has elected not to adopt a qualitative preservation standard.

We propose to largely retain the quantitative approach we have used since 2009 because it is explicit, allows less room for interpretation, and can be consistently implemented across the country and across the types of activities that require permits. Our proposed approach, including the underlying population model, is consistent with other wildlife management programs, including the North American Waterfowl Management Plan and management of marine mammals under the Marine Mammal Protection Act.

Our proposed modified preservation standard—"consistent with the goals of maintaining stable or increasing breeding populations in all eagle management units, and persistence of local populations throughout the geographic range of both species"—seeks to ensure the persistence of bald and golden eagle populations over the long term with sufficient distribution to be resilient and adaptable to environmental conditions, stressors, and likely future altered environments. To implement that objective in a consistent, analytical, scientifically supportable manner, these key terms mean: "population" means eagle management unit (EMU); "persist" means stable with 2009 as the baseline; "long-term" means 100 years; and "sufficient distribution" means avoiding the extirpation of local area populations (LAPs) by limiting Service-authorized take rates to less than or equal to 5% of each LAP (see discussion below). We have estimated that an EMU population that meets these criteria has an approximately 50% (in the liberal DPEIS alternatives) or 80% (in the conservative DPEIS alternatives) likelihood of being "resilient and adaptable to environmental conditions and stressors and likely future environments" under the take rates analyzed, and assuming other conditions remain as they were over the time period the biological data used in the models were gathered.

The above criteria are used to populate national-, EMU-, and LAP-scale population models that allow the Service to determine take limits that are compatible with the preservation of eagles in this rule and associated DPEIS. In defining the eagle preservation standard in this way, and analyzing the effects of take within those take limits in the DPEIS, the analytical burden for each permit decision is greatly reduced, allowing the Service to make informed permitting decisions at an expedited rate.

The regulation revisions we are proposing are based on the amended definition of the preservation standard and the adoption of a relatively conservative approach to estimating population values and sustainable take rates based on the best available data and the Service's level of risk tolerance in the face of uncertainty. This relatively conservative approach is described below, and also in much more detail, along with alternative approaches and the scientific and technical information that underpins their analyses in the Status Report and the draft DPEIS.

We estimate there are about 143,000 bald eagles in the United States (including Alaska), and that populations continue to increase. Given their continued population growth above the 2009 baseline, there is considerable capacity to sustain take of bald eagles. Under our proposed management approach, the annual take limit would be 4,200 bald eagles nationwide. This compares to a take limit of 1,103 established in 2009.

We estimate golden eagles currently number about 40,000 individuals in the United States (including Alaska), and populations have been relatively stable around that size since the mid-1960s. We estimate the carrying capacity of golden eagles nationwide to be 73,000. We also have data indicating that population size is limited by high levels of anthropogenic mortality (i.e., populations could be larger were it not for ongoing high levels of unpermitted take), and

that adding additional mortality will likely cause populations to decline to a lower level. As a consequence, there is no opportunity for authorizing additional unmitigated take of this species without changing the population objective to a level lower than the 2009 baseline. Under our proposed management framework, we would operate under the conservative assumption that there is no sustainable take, and take limits would be zero, without compensatory mitigation to offset the take. However, even using the median values, rather than the 20^{th} quantile used in our preferred, conservative approach, take of golden eagles nationwide would still be set at zero, unless the take is offset by compensatory mitigation.

We are considering realigning EMUs to better reflect regional populations and migration patterns of both species. The Service and its partner agencies manage for migratory birds based on specific migratory route paths within North America (Atlantic, Mississippi, Central, and Pacific). Based on those route paths, State and Federal agencies developed the four administrative flyways that administer migratory bird resources. Both bald and golden eagles move over great distances seasonally and across years. There is a well-described annual seasonal migration of both species of eagles from northern regions southward in winter. An annual northward migration of bald eagles from southern regions is well-documented, and a similar northward migration of golden eagles that winter in southern regions has been recently discovered. The adoption of the administrative flyways as EMUs would better address geographic patterns of risk given the seasonal movement patterns of both species.

We propose to use the flyways as the EMUs for both species—with some modifications. Banding data recovery records indicate that banded eagles of both species were recovered more frequently in the same flyway EMU than in the same 2009 EMU. Given the relatively small size of the eastern golden eagle population and uncertainty about the distribution of that population

across the two eastern flyways, we are proposing to combine the Mississippi and Atlantic Flyways into one management unit for golden eagles. For bald eagles, data indicate the Pacific Flyway should be split into three management units: Alaska, Pacific flyway north of 40 degrees N latitude to the Canadian border, and Pacific flyway south of 40 degrees N latitude to the Mexican border. See the draft DPEIS for maps of the current and proposed EMUs.

To monitor eagle populations in the future and assess whether different take thresholds are appropriate, our plan, assuming we have sufficient appropriated funding, is to conduct surveys on a 6-year rotation: one set of paired summer–winter golden eagle surveys in the first and second and fourth and fifth years of each assessment period, and to conduct bald eagle surveys in years three and six.

Because the flyway management scale is larger than the EMUs currently in use, EMU take limits would also increase (for bald eagles; golden eagle take limits would be zero in all management units, unless offset), with the result that adoption of the flyways as EMUs could be less protective of eagle populations at more local scales. These proposed regulations include two provisions designed to increase protection of eagles at more local scales. First, as noted earlier, we propose to modify the preservation standard of the Eagle Act to include the goal of maintaining the persistence of local populations throughout the geographic range of both species. Also, we are proposing to codify this new definition in the regulations at 50 CFR 22.3. The definition would read: "Compatible with the preservation of the bald eagle or the golden eagle" means "consistent with the goals of maintaining stable or increasing breeding populations in all eagle management units, and persistence of local populations throughout the geographic range of both species."

In addition to codifying that modified definition for the preservation standard, these proposed regulations would also enhance protection of eagles at the local scale by incorporating a local area population (LAP) cumulative effects analysis into the permit issuance criteria. Currently, the LAP analysis is contained in a guidance document (Appendix F of the Eagle Conservation Plan Guidance, Module 1—Land-based Wind Energy (ECPG) (USFWS, 2013).

The LAP analysis involves compiling information on permitted anthropogenic mortality of eagles within a specified distance (derived from each eagle species' natal dispersal distance) of the permitted activities' boundary. If permitted eagle take exceeds 1% of the estimated population size of either species within the LAP area, additional take is of concern. If take exceeds 5% of the estimated population size within the LAP area, additional take is considered inadvisable unless the permitted activity will actually result in a lowering of take levels (e.g., permitting a repowered wind project that, in its repowered form, will take fewer eagles than before repowering).

The numerical size of the LAP is derived by expanding estimated eagle density at the eagle management unit scale, as set in the 2009 Final Environmental Assessment on the Eagle Take Rule, by the size of the LAP area. We acknowledge that this approach is somewhat simplistic for at least two reasons. First, as described previously, the eagle density estimates come from nesting or late-summer population surveys and do not account for seasonal influxes of eagles that occur through migration and dispersal. Second, this approach assumes that eagle density is uniform across the EMU, which is not the case. In most cases the first simplification leads to an underestimate of true density, particularly in core wintering areas during the non-breeding months, and as such serves as an added buffer against overharvest of local nesting eagles. Assuming uniform density leads to greater relative protection of areas with higher than

average eagle density within an EMU, and less relative protection in areas of lower density. Ideally, over time and with better information on resource selection and factors accounting for variation in density, as well as improved knowledge of seasonal changes in eagle density and population-specific movement patterns, the LAP analysis can be improved to more realistically account for the true LAP impacted by projects under consideration. For now, however, LAP take thresholds allow the Service to authorize limited take of eagles while favoring eagle conservation in the face of the uncertainty.

Since publication of the ECPG, the Service has updated natal dispersal distances (the linear distance between a bird's location of origin and its first breeding or potential breeding location) for both eagle species that are used to calculate LAPs. Those distances are currently 86 miles for bald eagles or 109 miles for golden eagles. These could change if additional data indicate the need for adjustment. The LAP cumulative effects analysis is described in more detail in the Status Report.

Currently the LAP cumulative effects analysis is used as guidance. Under these proposed regulations, the LAP analysis would be required as part of our review of each permit application. In order to issue a permit we must find that cumulative authorized take does not exceed 5% of the LAP, or we must demonstrate why allowing take to exceed that limit is still compatible with the preservation of eagles. One situation where we may issue a permit that would result in authorized take above 5% of the LAP is if a project is already in operation and the permit conditions would result in a reduction of take or compensatory mitigation that offsets impacts to eagles within the LAP. Unpermitted levels of eagle take within the LAP, if known, would also be considered in assessing the potential effects of the permit on the LAP.

Incorporation of the LAP 5% limit on authorized take into the regulations would facilitate individual permit decisions; instead of needing to evaluate under an independent NEPA analysis each project in the context of other authorized take within the LAP, along with the level of unauthorized take—which is difficult or impossible to precisely determine—we will have already analyzed the effects of authorizing take of up to 5% of the LAP in the draft DPEIS for these proposed regulations, along with a qualitative analysis of unauthorized take, and determined that it is compatible with the preservation of eagles.

The primary aim of requiring this LAP analysis is to prevent significant declines in, or extirpation of, local nesting populations. However, there is also increasing evidence of a strong tendency in both species of eagle to return to non-breeding areas (wintering areas, migration routes, and staging areas) (McIntyre et al. 2008, Mojica et al. 2008). The LAP take limits also provide protection from permitting cumulatively high levels of take of these eagles that winter or migrate through the LAP area.

The take authorized within the LAP take limits is in addition to an average background rate of anthropogenic mortality (ongoing human-caused eagle mortality, most of which is not currently permitted.) For golden eagles, background anthropogenic mortality is about 10% (see the Status Report). Thus, total anthropogenic mortality for a LAP experiencing the maximum permitted take rate of 5% averages about 15%. We do not have similar mortality information for bald eagles. While we do not know exactly what level of unauthorized anthropogenic take of bald eagles is occurring, we are reasonably certain that the take we authorize for bald eagles would also be over and above a level of preexisting ongoing unpermitted take. The level of ongoing unauthorized take of bald eagles may be similar to that of golden eagles; however, bald eagles have a maximum potential growth rate about twice that of golden eagles and thus are

more resilient to take. As part of the LAP analysis for both species, Service biologists would consider any available information on unpermitted take occurring within the LAP area; evidence of excessive unpermitted take would be taken into consideration in evaluating whether to issue the permit.

The Service considered developing specific eagle population size goals (other than the 2009 baseline) for each EMU and then using those targets to inform permit decisions within the EMUs. However, that approach is not feasible at this time given the technical and logistical complexities of working with State agencies and tribes to set population objectives at this scale within the timeframe of this action and the lack of fine-scale information on eagle populations that would be necessary.

Nonpurposeful (Incidental) Take Permits (50 CFR 22.26)

The Service proposes to change the name of what we have been calling "nonpurposeful take permits" to "incidental take permits." Incidental take is what § 22.26 permits authorize. We originally called them "nonpurposeful take" permits in order to avoid confusion with incidental take permits issued under the ESA for threatened and endangered species. However, we believe the term "nonpurposeful" has also caused confusion because it is not a commonly used word. We now see advantage in using the term "incidental" because the meaning of that term is better understood. Moreover, now that this permit system is relatively well established, the potential for confusion with the ESA incidental take permit system is much reduced. The change in nomenclature does not in any way affect the circumstances and manner in which these permits will be issued.

We propose to reduce the types of incidental take permits we can issue under § 22.26 from two to one. There would no longer be separate categories for standard and programmatic

permits. Having two separate categories has sometimes led to confusion. It is not always possible to distinguish between what should be authorized under a programmatic versus a standard permit. Also, the term "programmatic" in the sense we have been using it is sometimes misunderstood because it differs from how "programmatic" has been typically used in the regulatory arena. "Programmatic" in the more traditional sense means "following or relating to a plan or program." While we anticipate sometimes issuing permits to cover the effects of multiple activities within a given program (such as a military installation), our experience so far is that the more complex requests for permits we have had to date have been for single, long-term activities that have the potential to periodically take one or more eagles over the life of the project. To reduce confusion, we are proposing to eliminate the distinction between standard and programmatic permits. All § 22.26 permits would be simply "eagle incidental take permits" or just "incidental take permits."

Under the current (2009) regulations, the Service issues programmatic permits predicated on implementation of advanced conservation practices (ACPs) developed in coordination with the Service. ACPs are defined as scientifically supportable measures approved by the Service that represent the best available techniques to reduce eagle disturbance and ongoing mortalities to a level where remaining take is unavoidable (50 CFR 22.3).

In contrast, applicants for standard permits under the current regulations must reduce potential take to a level where it is "*practicably* unavoidable" (emphasis added). So, currently, programmatic permit applicants have a higher standard, at least theoretically. In reality, the term "unavoidable" is more ambiguous than it seems in theory; there is no clear distinction in practice between "practicably unavoidable" and "unavoidable." We are proposing to apply the "practicability standard" to all § 22.26 permits.

We propose to revise the definition of "practicable" by adopting the definition from the Service's proposed mitigation policy (see 81 FR 12379, March 8, 2016), slightly modified for specific application to eagle permits. The new definition would read: "available and capable of being done after taking into consideration existing technology, logistics, and cost in light of a mitigation measure's beneficial value to eagles and the activity's overall purpose, scope, and scale." This proposed revised definition captures the essential elements of the current definition, while promoting a consistent approach to how the Service applies compensatory mitigation requirements.

Because the concept of ACPs is based on reducing take to the point where it is unavoidable—versus "practicably unavoidable"—and applied to the category of programmatic permits, these proposed regulations remove the requirement for ACPs. As discussed above, all permittees would be required to avoid and minimize impacts to eagles to the maximum degree practicable. Although the ACP requirement would be removed, the Service would require potential permittees to implement all practicable best management practices and other measures and practices that are reasonably likely to reduce eagle take. Permit applicants that cannot reduce or compensate for take to levels that are compatible with eagle preservation will not qualify for a permit.

We believe the 5-year maximum permit term for permits is unnecessarily burdensome for entities engaged in long-term actions that have the potential to incidentally take bald or golden eagles over the lifetime of the activity. It has had the unintended effect of discouraging proponents of long-term activities from applying for permits, despite the risk of violating the statute. With longer-term permits, the Service has the ability to build more effective adaptive management measures into the permit conditions. This approach would provide a degree of

certainty to project proponents because they would have a greater understanding of what measures may be required to remain compliant with the terms and conditions of their permits in the future. This increased level of certainty allows companies to plan accordingly by allocating resources so they are available if needed to implement additional conservation measures to benefit eagles and maintain their permit coverage.

Although killing, injuring, and other forms of take of eagles are illegal without a permit, the Service cannot require any entity to apply for an eagle take permit (except under legal settlement agreements). Some project proponents build and operate without eagle take permits even in areas where they are likely to take eagles. When such building occurs, the opportunity to achieve avoidance, minimization, and other mitigation measures is lost. The Service believes that permitting long-term activities that are likely to incidentally take eagles, including working with project proponents to minimize the impacts and secure compensatory mitigation, is far better for eagle conservation than having companies avoid the permitting process altogether because they perceive the process as overly onerous.

Under these proposed regulations, the Service would evaluate each long-term permit at no more than 5-year intervals. These evaluations would reassess fatality rates, effectiveness of measures to reduce take, the appropriate level of compensatory mitigation, and eagle population status. Additional commitments with regard to conservation measures may be required of long-term permittees based on the 5-year permit evaluations. In 2013, when the maximum term of programmatic permits was extended from 5 to 30 years (a change subsequently vacated by court order in 2015), language was included in the regulations limiting additional conservation measures that could be required of the permittee to those contemplated at the time the permit was issued. However, that language was based on the requirement that all programmatic permittees

would be required to implement advanced conservation practices that reduce take to the point where it is unavoidable. Under this proposed rule, long-term permittees would be subject to the same criterion as holders of standard permits: They would be required to undertake all *practicable* measures to reduce take to the point where any remaining take is unavoidable. To ensure that eagles are adequately protected, based on the results of the 5-year evaluations, after negotiation with the permittee, the Service may require long-term permittees to undertake additional conservation measures other than those originally contemplated, if they are both practicable and reasonably likely to reduce risk to eagles based on the best scientific information available.

To recoup the cost of processing longer-term permits, which are generally complex due to the need to develop robust adaptive management measures, we propose to assess a $36,000 permit application processing fee for eagle incidental take permits of 5 years duration or longer. The permit processing fee for 5-year programmatic permit applications is $36,000 currently. A commercial applicant for an incidental take permit of a duration less than 5 years would pay a $2,500 permit application processing fee, an increase from the current fee of $1,000 for programmatic permits and $500 for standard permits. The higher fee better reflects the costs of processing those permits. The amendment fee for those permits would increase from $150 to $500. The incidental take permit application processing fee for homeowners would remain $500 and the amendment fee for those permits would also remain unchanged at $150. The proposed higher fees for commercial entities would recover a larger portion of the actual cost to the Service, including technical assistance provided to the potential applicant by the Service prior to receiving the actual permit application package. Commercial entities have the opportunity to recoup the costs of doing business by passing those costs on to their customers. For homeowner

permits, the fees would remain the same, even though Federal agencies are directed to recoup the full costs of processing permits. The reality is that many of the homeowners who justifiably need eagle permits would not be able to pay the actual full cost to the Service of providing technical assistance to the homeowner and processing their permit applications.

We propose to assess a $15,000 user fee called an Administration Fee every 5 years for long-term permits. This fee would cover the cost to the Service of conducting the 5-year evaluation and developing any appropriate modifications to the permit.

The Service has developed data standards, including protocols for pre-construction eagle surveys and a fatality prediction model for wind energy generation facilities. We propose to require that wind energy generation facility permittees use these models and protocols, which are contained in the Eagle Conservation Plan Guidance Module 1–Land-based Wind Energy (USFWS, 2013) ("ECPG"), available at: https://www.fws.gov/migratorybirds/pdf/management/eagleconservationplanguidance.pdf. These standards include the steps described in ECPG Appendix B for site-assessment prior to siting projects; pre-construction survey requirements in ECPG Appendix C; and the fatality prediction model from ECPG Appendix D. We are proposing to incorporate these standards by reference in accordance with 1 CFR part 51. These standards will also be available in hard copy upon request from the agency contact listed above.

The requirement to conduct surveys, fatality predictions, and monitoring using Service-approved ECPG protocols for wind energy generation facilities, and potentially for other industries in the future, will result in more efficient permitting decisions by the Service. Submission of inadequate data, or data gathered using methods the Service cannot verify to be

sound, has resulted in significant extra work and time from our staff to assess wind energy project impacts.

We recognize that the model recommended in the ECPG for predicting fatalities is considered by some to be overly simplistic in its current form. However, the use of standard protocols is an essential component of the Service's adaptive management process for the eagle permit program, which employs feedback loops between the initial survey data, the fatality prediction model, and the post-construction fatality estimates. Data from the latter process can be used to formally improve the fatality prediction model, thereby increasing the performance and complexity of the model as well as the Service's ability to accurately predict project impacts. If the Service's protocols are not followed, combining data from multiple projects is difficult if not impossible, and the Service and regulated community loses the ability to learn from the permitting process. Moreover, the Service has no formal way to improve the fatality prediction for a project that doesn't use our protocols in the future, thus those projects may have to endure higher fatality predictions over the life of the project than would otherwise be the case. Finally, the Service is not precluding permit applicants from collecting other data or using other models to assess risk, we are only requiring that the Service's protocols be among those that are used.

While we have not officially issued fatality prediction models or pre-application monitoring protocols for other activities, or finalized post-permitting monitoring protocols for any single activity, the Service has enough information about eagle behaviors and movements to recommend and approve monitoring protocols for activities other than wind energy generation on a project-specific basis during the technical assistance process. We encourage project proponents to coordinate with the Service as early as possible in the project planning process to ensure they are aware of any protocols we have recommended and that they use them

appropriately. Our goal is to establish additional formalized monitoring protocols for industries other than wind energy in the future.

Most permittees will be required to monitor for purposes of assessing whether and how much take occurs under the permit. Reported take would be based on performance of permit conditions establishing surveying and monitoring protocols. For permits for disturbance, such monitoring is likely to consist of regular visits to the proximity of the nest site or other important eagle-use area where disturbance is likely to occur to observe whether eagles are using the area. We expect that most long-term permits would authorize lethal take rather than disturbance. Holders of permits that authorize eagle mortalities would be required to use approaches to searching for injured and killed eagles and for estimating total take that use statistically rigorous, unbiased, estimators. Permittees would be required to document and report all eagles that are found, the methodologies employed to search for them (including whether or not they were detected as part of a formal survey methodology), and the methods used to estimate what the observed carcasses actually represent (the probability of detection). "Observed take" as used in these regulations refers to the amount of take that is arrived at based on adherence to these protocols.

The Service defines "mitigation" to sequentially include: avoidance, minimization, rectification, reduction over time, and compensation for negative impacts. The 2009 regulations lack specificity with regard to when compensatory mitigation will be required, and the preamble discussion of compensatory mitigation was somewhat inconsistent. In reference to nonpurposeful take permits, the preamble to the 2009 regulations contained the following language: "Additional compensatory mitigation will be required only (1) for programmatic take and other multiple take authorizations; (2) for disturbance associated with the permanent loss of

a breeding territory or important traditional communal roost site; or (3) as necessary to offset impacts to the local area population. Because permitted take limits are population-based, the Service has already determined before issuing each individual take permit that the population can withstand that level of take. Therefore, compensatory mitigation for one-time, individual take permits will not typically be necessary for the preservation of eagles" (74 FR 46844, September 11, 2009). Regarding the § 22.27 nest take permits, we indicated in the preamble that we would require compensatory mitigation for all permits except those issued for safety emergencies (74 FR 46845, September 11, 2009).

The Service also addressed compensatory mitigation in the 2009 FEA, which contained the following language: "For most individual take permits resulting in short-term disturbance, the Service will not require compensatory mitigation. The population-based permitting the Service will propose is based on the level of take that a population can withstand. Therefore, compensatory mitigation for individual permits is not necessary for the preservation of eagles. However, the Service will advocate compensatory mitigation in the cases of nest removal, disturbance or [take resulting in mortality] that will likely incur take over several seasons, result in permanent abandonment of more than a single breeding territory, have large-scale impacts, occur at multiple locations, or otherwise contribute to cumulative negative effects" (USFWS, 2009).

Because the 2009 regulations did not incorporate specific compensatory mitigation provisions, the Service has required compensatory mitigation on a case-by-case basis somewhat inconsistently, particularly for bald eagles, which has at times resulted in differing treatment of, and uncertainty for, permit applicants. Accordingly, this proposed rule includes standardized requirements for compensatory mitigation. In addition to the mitigation requirements set out in

this rule, the Service will implement these regulations in a manner consistent with Service, Departmental, and Presidential mitigation policies.

Since 2009, take limits for golden eagles have been set at zero throughout the United States. Accordingly, all permits for golden eagle take would exceed the take limits, and so must incorporate compensatory mitigation in order to authorize that take. A permittee would have to compensate for authorized take within the same EMU (except that we would allow for compensatory mitigation of take of Alaskan golden eagles throughout the migration and wintering range in the interior western United States and northern Mexico).

The best available information indicates that ongoing levels of human-caused mortality of golden eagles likely exceed sustainable take rates, potentially significantly. As a result, compensatory mitigation for any authorized take of golden eagles that exceeds take thresholds would be designed to ensure that take is offset at a greater than one-to-one ratio to achieve a net benefit to golden eagles to achieve an outcome consistent with the preservation of golden eagles as the result of the permit. Based on the uncertainty in the effectiveness of a particular compensatory mitigation practice, we are likely to require further adjustments to mitigation ratios to provide a buffer in the event that the planned mitigation is less effective than anticipated.

Under the various mitigation policies that govern Service permitting actions, compensatory mitigation must be in accordance with the management goal for the protected resource or species. For take that is within EMU take limits, compensatory mitigation is generally not needed because we can permit that take and still achieve our management goal. Cumulative authorized take exceeding 5% of the LAP would also generally require compensatory mitigation to ensure our eagle preservation standard is being met. An exception

would be when the EMU take limit is not exceeded (i.e., currently the case for bald eagles in all EMUs), the permitted take is already occurring, and the permit conditions would result in a reduction of take.

We may also require compensatory mitigation when there is an unusually high level of unauthorized eagle mortality in the LAP (for example, when the Service has information indicating that unauthorized take exceeds 10% of the LAP). The Service has no data to indicate that ongoing unauthorized take of bald eagles is less than that of golden eagles, and proposes to apply the LAP analysis and assessment of any known ongoing unauthorized take to bald eagles as well as golden eagles, as we have been doing while the LAP analysis remains guidance. Although exceeding 5% permitted take of the LAP will have significantly less dramatic effects to local bald eagle populations, States, tribes, and localities have communicated their interest in seeing regulatory safeguards to protect local bald eagles as well as golden eagles. In the near future, it is unlikely that cumulative authorized take of local area populations of bald eagles will exceed 5% anywhere in the country. The Service will continue to collect data to refine our understanding of cumulative mortality on both eagle species and may adjust take rates in the future.

Under these proposed regulations, the LAP analysis would be the formalized approach to documenting whether compensatory mitigation may be necessary to maintain the persistence of local eagle populations. However, there are other factors, particularly long-term and cumulatively, that could also create the need for compensatory mitigation to better protect or enhance populations. For example climatic changes can have direct and indirect effects on species abundance and distribution, and may exacerbate the effects of other stressors, such as habitat fragmentation and diseases. The conservation of habitats within ecologically functioning

landscapes is essential to sustaining the long-term persistence of populations. To ensure the Service has the tools to address such circumstances, this proposed rule would allow the Service to require compensatory mitigation "if otherwise necessary to maintain the persistence of local eagle populations throughout their geographic range."

The Service will encourage the use of in-lieu fee programs, mitigation and/or conservation banks, and other established mitigation programs and projects. We intend to facilitate the establishment of an in-lieu fee program to allow permit applicants to contribute to a compensatory mitigation fund as an alternative to developing individual mitigation measures for each project. All compensatory mitigation must comply with principles and standards set forth in Service and Departmental policy. Per these principles and standards, compensatory mitigation is considered after all appropriate and practicable avoidance and minimization measures are applied and must achieve the following: be sited to address broader ecological contexts; adhere to a mitigation planning goal; use best available science to ensure effectiveness; be additional to any existing or foreseeably expected conservation efforts; be durable and persist for at least the time-frame of the impacts; incorporate adaptive management; and account for uncertainty and risk. In approving compensatory mitigation mechanisms and actions, the Service will ensure the application of equivalent ecological, procedural, and administrative standards for all compensatory mitigation mechanisms. The Service prefers that compensatory mitigation is conducted prior to when the impacts of the action occur. Conservation banking can provide a source of advance credits.

Predictions about the effectiveness of compensatory mitigation measures have varying degrees of uncertainty. Under the current framework, the Service has required a relatively high degree of confidence in the effectiveness of very few compensatory mitigation options. We will

consider compensatory mitigation measures and programs that face more risk and uncertainty provided mitigation accounting systems factor in risk and adjust metrics, mitigation ratios, and the amount of required mitigation to account for uncertainty.

Where compensatory mitigation will be required, the applicant must commit to the funding and method that will be used prior to or upon permit issuance. For long-term permits, permittees would be required to provide offsetting mitigation to compensate for predicted take over 5 years. If no observed take has occurred in the first 5 years, the permittee need not pay for any additional mitigation. If reliable reported data demonstrates that a given permit holder/project is causing fewer impacts to eagles than originally permitted (e.g. actual take of eagles is lower than predicted), permittees can carry forward "unused" compensatory mitigation credits to the next 5-year review period.

We are proposing a change to the prioritization criteria that govern the order in which the Service will prioritize authorization of take if EMU take limits are approached. The priority after safety emergencies for Native American take for religious purposes that depends on take of wild eagles (and as such cannot be met with eagle parts and/or feathers from another source, such as the National Eagle Repository) will be amended slightly to apply to any increased need in take for religious purposes. In such cases, that take would not be part of the current baseline. Historical tribal take for religious use requiring take of eagles from the wild that has been ongoing, but not authorized, does not usually need to be prioritized because it is part of the baseline. Thus, any authorization of such previously unauthorized take would not affect EMU take limits. We also propose to delete the reference to rites and ceremonies because traditional take for religious and cultural purposes may not be limited to, or properly characterized as being part of, specific rites and ceremonies.

We propose changing the prioritization order by removing the priority for renewal of programmatic permits, since the regulations would no longer contain a separate category for programmatic permits.

The definition of "low-risk" projects that was established in the duration rule, which was subsequently vacated by the August 2015 district court decision *(Shearwater* v. *Ashe*, No. 5:14–cv–02830 LHK (Sep. 16, 2015), was counter-productive. "Low-risk" was defined in a footnote to 50 CFR 13.11(d)(4) as a project or activity that is unlikely to take an eagle over a 30-year period and the applicant for a permit for the project or activity has provided the Service with sufficient data obtained through Service-approved models and/or predictive tools to verify that the take is likely to be less than 0.03 eagles per year. This definition covers only those projects where take is essentially negligible, and, therefore, the project does not require a permit. The Service sees utility in redefining "low-risk" to include projects with a slightly higher probability of taking eagles, but which cumulatively will still be compatible with eagle management objectives.

However, despite seeking input from the public and considerable staff effort, we were unable to develop a definition of "low-risk" that could be applied throughout the United States while achieving the desired goals for such a category. The Service considered basing the low-risk category on (1) a flat number of eagles predicted to be taken, (2) a percentage of the local area population (LAP), (3) a hybrid of those two, and (4) the geographic and physical features of the area where the project will be located. Each of these approaches produced conflicting results due to the significant discrepancies that exist between eagle population densities and resilience, habitat variability, and project scales. Accordingly, we are not proposing a revised definition for low-risk projects in this proposed rule. We will continue to consider ways that a category of

lower risk projects could be defined for use in the future. If you have suggestions for how to define "low-risk" or low-impact" take of eagles, including how a general permit authorization should work or other approaches for authorizing such take, please submit them as indicated under **ADDRESSES.** While such comments would be outside the scope of this rulemaking action, we would keep them for consideration if we decide to pursue further rulemaking in the future.

Eagle Nest Take Permits (50 CFR 22.27)

Under the current § 22.27 eagle nest take regulations, the Service can issue permits for removal, relocation, or destruction of eagle nests where (1) necessary to alleviate a safety emergency to people or eagles, (2) necessary to ensure public health and safety, (3) the nest prevents the use of a human-engineered structure, or (4) the activity or mitigation for the activity will provide a net benefit to eagles. Only inactive nests may be taken except in the case of safety emergencies. Inactive nests are defined by the continuous absence of any adult, egg, or dependent young at the nest for at least 10 consecutive days leading up to the time of take.

As with § 22.26 incidental take permits, we propose to eliminate the distinction between programmatic and standard permits for § 22.27 nest take permits. The permit fee for removal or destruction of a single nest will remain at $500. A commercial applicant for a nest take permit for a single nest would pay a $2,500 permit application processing fee, an increase from the current fee of $500 for standard permits and $1,000 for programmatic permits. The amendment fee for those permits would also increase from $150 to $500. For permits to take multiple nests, the fee would be 5,000 versus 1,000 for programmatic permits currently. For homeowners, the nest take permit application processing fee and amendment fee would not change.

We are also proposing a number of relatively minor revisions to the nest take permit regulations at 50 CFR 22.27 and several revisions to definitions in 50 CFR 22.3 that apply to nest take permits. First, we propose to change terminology referencing the status of nests to better comport with applicable terms used in scientific literature. Nests that are not currently being used for reproductive purposes would be defined as "alternate nests," while nests that are being used would be "in-use nests." Some commenters suggested the latter be called "occupied nests," but we believe that term would cause confusion because nests are in use for breeding purposes prior to being physically "occupied" by nestlings or an incubating adult. Under our proposed definition, an "in-use nest" means "a bald or golden eagle nest characterized by the presence of one or more eggs, dependent young, or adult eagles on the nest in the past 10 days during the breeding season." This definition includes the period when adults are displaying courtship behaviors and are building or adding to the nest in preparation for egg-laying. We would define "alternate nest" as "one of potentially several nests within a nesting territory that is not an in-use nest at the current time." When there is no in-use nest, all nests in the territory are "alternate nests."

We propose to revise the definition of "eagle nest" from "any readily identifiable structure built, maintained, or used by bald eagles or golden eagles for the purpose of reproduction" to "any assemblage of materials built, maintained, or used by bald eagles or golden eagles for the purpose of reproduction." The words "readily identifiable" did nothing to clarify when a structure was or was not a nest since a structure might appear to be just a pile of sticks to one person, or an osprey nest to a second person, but clearly an eagle nest to someone familiar with eagle nests. The confusion caused by the words "readily identifiable" sometimes

put in jeopardy nests in the early stages of being built, or nests that are used from year to year but are substantially damaged during the non-breeding season by wind or weather.

We propose changes to enable the Service to issue a permit to remove an in-use nest to prevent a rapidly developing safety emergency that otherwise would be likely to result in bodily harm to humans or eagles while the nest is still in use for breeding purposes, instead of waiting until the emergency is exigent. Without this clarification, the Service has been faced with having to wait until the fully developed state of emergency had arrived, and the delay has sometimes been to the detriment of the eagles because, while the safety emergency developed, the breeding pair had the opportunity to lay eggs.

Current regulations provide that the Service can issue a nest take permit for an inactive (proposed "alternate") nest that is built on a human-engineered structure and creates a functional hazard that renders the structure inoperable for its intended use. We propose to change this provision to also allow for removal of an in-use nest prior to egg-laying to prevent the foreseeable functional hazard from coming to fruition. The proposed regulatory language would allow nest removal at an earlier stage that may allow for the eagles to re-nest elsewhere while also preventing the nesting eagles from rendering the human-made structure inoperable.

We also propose to remove the requirement that suitable nesting habitat be available in the area nesting population to accommodate displaced eagles for non-emergency nest take. The provision has been problematic because, in many healthy populations of bald eagles, suitable nest sites are all occupied. As part of the permit application review process, the regulations would retain consideration of whether alternate nest sites are available to the displaced eagles, but an affirmative finding would not be a requirement for issuing a permit.

Also, we propose to change the scope of consideration to the "nesting territory," not the "area nesting population," which is defined in current regulations as "the number of pairs of golden eagles known to have a resting [sic] attempt during the preceding 12 months within a 10-mile radius of a golden eagle nest." That definition was codified in 1982 when a new permit was established for removal or destruction of nests for resource development and recovery operations. In addition to the typo (i.e., "resting"), this definition is problematic in the context of bald eagles, not only because it omits reference to bald eagles, but also because a 10-mile radius around a bald eagle nest has no particular biological significance. For both species of eagles, consideration of whether the nesting pair may be able to use a different nest should focus primarily on the pair's nesting territory. In some cases, that determination may require looking beyond any known alternate nests in order to verify that those nests are not actually part of a different pair's nesting territory. However, it will not always require surveys of the area within the 10-mile radius of the nest that would be removed. We propose the following definition for "nesting territory": "the area that contains one or more eagle nests within the home range of a mated pair of eagles, regardless of whether such nests were built by the current resident pair." This definition would replace the current definition of "territory." The two definitions are functionally similar, but the one we are proposing is more in line with terminology used in the biological community.

Under the current regulations, if a nest containing viable eggs or nestlings must be removed, we require transfer of the nestlings or eggs to a permitted rehabilitator or placement in a foster nest. However, there are circumstances when such placement is simply not possible; for example, in Alaska the closest permitted rehabilitator may be a day's drive or more away. Nests with viable eggs or nestlings can be removed only in safety emergencies, and the requirement

has sometimes meant that the Service could not legally issue a permit necessary to alleviate the safety emergency. To address this problem, we propose to retain the requirement that nestlings and viable eggs be transported to a foster nest or permitted rehabilitator, but add a provision allowing the Service to waive the requirement if such transfer is not feasible or humane. The Service will determine the disposition of the nestlings or eggs in that scenario. Euthanasia may sometimes be the most humane option.

As with the prioritization criteria in § 22.26, these regulations would amend the prioritization criteria for nest take permits to remove any priority for allocation of take to renewal of programmatic permits because that permit category will be removed. Also, the prioritization for Native American religious take would be amended in the same manner as for § 22.26 incidental take permits (see earlier discussion).

These proposed regulations adopt mitigation standards for taking eagles nests under § 22.27 that are similar to those we are proposing for § 22.26. The exception is that permits issued under paragraph (a)(1)(iv) must apply appropriate and practicable compensatory mitigation measures as specified in your permit to provide a net benefit to eagles if the permitted activity itself does not provide a net benefit to eagles. Permits issued under paragraph (a)(1)(iv) are not limited to situations involving a safety or health issue or an obstruction to a manmade structure; they can be issued to take alternate (currently called "inactive") nests for any reason as long as there will be a net benefit to eagles scaled to the effects of the nest removal. If the activity itself has a net benefit, compensatory mitigation would not be required. For example, a nest might be flooded during a riparian restoration project undertaken to provide improved habitat for eagles. Where the activity itself does not benefit eagles, the net benefit must be through compensatory mitigation.

Several commenters suggested we eliminate the requirement for a "net benefit" for permits issued under paragraph (a)(1)(iv). In general, we believe the requirement to provide a net benefit is appropriate, particularly now that we will promote the use of conservation banks, in-lieu fee programs, and other third-party arrangements to carry out the necessary measures to benefit eagles. These types of programs can leverage relatively small amounts of funding to provide significant benefits on the ground. Also, many nests for which permits are sought for removal are lower quality nests, not having been used in some time and degraded, or alternate nests just being built. In those cases, the amount of compensatory mitigation may be relatively low. Additionally, in populations with high eagle density, the biological value of a single nest to eagle populations tends to be lower. Data shows that productivity in highly saturated eagle populations decreases due to nests being built in less than ideal locations in relation to food sources and/or increased competition and fighting among nesting pairs. In such situations, the required net benefit would reflect that lower biological value.

Permit Application Fees (50 CFR 13.11)

We also propose minor revisions to the permit application processing fee table in 50 CFR 13.11. We would remove the column for Administration Fees because those fees are applied only for eagle incidental take permits and not for any other type of Service permit listed in the table. The requirement for administration fees would be incorporated into § 22.26. The table would also include the updated fees we are proposing for incidental take permit for commercial entities, long-term incidental take permits, nest take permits for commercial entities, and nest take permits for multiple nests.

Scope of Eagle Regulations (50 CFR 22.11)

The Service would revise § 22.11(c) to replace "[Y]ou must obtain a permit under part 21 of this subchapter for any activity that also involves migratory birds other than bald and golden eagles, and a permit under part 17 of this subchapter for any activity that also involves threatened or endangered species other than the bald eagle" with "[A] permit under this part authorizes take, possession, and/or transport only under the Bald and Golden Eagle Protection Act and does not provide authorization under the Migratory Bird Treaty Act or the Endangered Species Act for the take, possession, and/or transport of migratory birds or endangered or threatened species other than bald or golden eagles." The original language was promulgated prior to the bald eagle being removed from the ESA List of Endangered and Threatened Wildlife as part of a final rule authorizing transport of eagle parts. The original intent of § 22.11(c), as explained in the final rule published in the **Federal Register**, was that a permit holder transporting items that contained not only eagle parts, but also parts of other species protected by the Endangered Species Act or the Migratory Bird Treaty Act, into or out of the country would need to ensure he or she possessed the applicable permits for those protected, non-eagle species in order to legally transport the item. *See* 64 FR 50467, September 17, 1999. However, this provision could be read to limit the Service's discretion to decide the appropriate manner of authorization for activities that affect other protected species outside the context of transportation of items containing eagle parts. For example, § 22.11(c) could be read to preclude the Service from using intra-Service section 7 consultation to analyze and exempt non-jeopardizing ESA take that may result from the Service's issuance of an Eagle Act permit to a project proponent. Thus, we are proposing to amend § 22.11(c) to ensure it does not limit our discretion to apply the appropriate authorization under the ESA or the MBTA for activities that involve other species protected by those statutes.

Golden Eagle Nest Take Permits for Resource Development and Recovery (50 CFR 22.25)

We are proposing several revisions to the regulations for permits for take of inactive golden eagle nests for resource development and recovery operations. The current regulations were codified in 50 CFR 22.25 in 1983. We propose to amend them to use terminology that is consistent with the § 22.27 eagle nest take permit regulations. Our intent in this rulemaking is to limit revisions to § 22.25 to those necessary for consistency with § 22.27, plus a few additional minor revisions, as explained below.

The proposed revisions include changing "inactive nest" to "alternate nest" and removing references to the "area nesting population." As with § 22.27 nest take permits (discussed above), the relevant area of consideration is the nesting territory. Rather than needing to evaluate whether there is suitable nesting habitat available within the area nesting population, the Service will consider whether alternate nests are available within the nesting territory. It may be appropriate in some cases to survey golden eagle nests within the 10-mile radius to determine whether nests assumed to be in the same territory as the one being removed are not actually in a different breeding pair's nesting territory. Loss of a nesting territory would not preclude the Service from issuing a permit, but such loss would be part of our consideration of whether the take is compatible with the preservation standard and what mitigation would be necessary.

We propose to add the phrase "and compatible with the preservation of golden eagles" to paragraph (b)(4) of the § 22.25 permit regulations. The introductory language for this permit regulation already specifies that the taking must be compatible with the preservation of golden eagles, but we believe it is important to clarify in paragraph (b)(4) that mitigation can be used to provide that compatibility. A final minor proposed revision is the addition of "and monitoring"

to paragraph (b)(4). We do, as a matter of course, require monitoring as a condition of these permits, so it makes sense to clarify in the regulation that we may do that.

Finally, we are proposing to replace the word "feasible" with "practicable" in reference to the mitigation that will be required, consistent with § 22.26, § 22.27, and agency mitigation policy.

Response to Public Comments on the 2012 ANPR and 2014 Notice of Intent to Prepare an Environmental Assessment or an Environmental Impact Statement

NEPA Process on This Action

Comment: NEPA analysis for individual projects is the biggest constraint associated with the current eagle take permit process. A programmatic analysis under NEPA would streamline and expedite the process for applicants and likely result in more participation by electric utilities and others, particularly for projects with relatively lower risk to eagles.

Comment: The Service should conduct a nationwide programmatic NEPA analysis on the issuance of eagle permits for electric utilities so that subsequent permit applications can be categorically excluded from additional NEPA analysis.

Service response: In addition to the cost to project developers, NEPA requirements for permitting individual projects have been responsible for a significant portion of the Service's time and effort in processing permit applications. We are developing a DPEIS in association with this rulemaking. The DPEIS programmatically analyzes eagle take within certain levels and the effects of complying with compensatory mitigation requirements to allow the Service to tier from the DPEIS when conducting project-level NEPA analyses. The DPEIS will cover the analysis of effects to eagles under NEPA if the project: (1) will not take eagles at a rate that

exceeds (individually or cumulatively) the take limit of the EMU (unless take is offset); (2) does not result in FWS authorized take (individually or cumulatively) in excess of 5% of the LAP; and (3) where the applicant agrees to use a FWS-approved offsetting mitigation bank to accomplish any required offset for the authorized mortality. Projects that do not meet these three criteria might still be authorized, but they would likely need to undergo individual NEPA review of their effects on eagles. We would also conduct a review of unpermitted take information available to us to assess whether the unpermitted eagle take in the LAP is excessive, and if that is the case, the project might still be authorized but may be subject to additional NEPA review.

With regard to using a categorical exclusion for projects that pose a low risk to eagles, we investigated the possibility of developing a new categorical exclusion for such projects. However, we were unable to define low risk in a manner that was workable nationwide (see above discussion of the "low-risk category").

Comment: The benefits of various activities that impact eagles should be analyzed in the EA or EIS. For example, renewable energy will benefit eagles and other wildlife by reducing carbon emissions, and utilities manage large water reservoirs that provide valuable foraging habitat for bald eagles.

Service response: While the primary purpose of the DPEIS is to analyze the effects of the Federal actions being undertaken (establishment of eagle management objectives and revised permit provisions), to the degree that beneficial effects to eagles can be anticipated from categories of activities, the DPEIS broadly analyzes those effects.

Tribal Consultation

Comment: To address the cultural value of eagles, the Service should consult face-to-face with the National Congress of American Indians and other tribal entities for their direction

on this issue.

Comment: In recognition of the continued lack of tribal engagement on these eagle matters, the Service should consult with and engage tribes, tribal religious and spiritual leaders, and tribal conservation and environmental experts regarding the development and implementation of Federal policies related to eagles.

Comment: The Service should integrate tribal consultation throughout the NEPA process for this rulemaking and for individual permit applications to take eagles by providing tribes with clear proposed rulemaking and permit application information in a timely manner, disseminating information to a wide tribal audience, and ensuring that in-person consultation meetings are conducted.

Comment: The NEPA analysis must consider the unique effects that eagle handling and eagle takes have on tribes. For example, topics for consideration should include: how a loss of eagles in an area where tribes are present will affect such tribes; the extent to which tribes can participate in handling the remains of eagles that are taken on reservation lands; protection of tribal cultural resources and historic properties by a project seeking a permit to take eagles; and whether procedures for handling eagle remains are consistent with tribal practices and beliefs.

Comment: Early and meaningful consultation with tribes should occur so the Service can use traditional ecological knowledge.

Service response: The Service reached out to all federally recognized tribes with a letter inviting government-to-government consultation in late 2013. We then met with interested tribes in person or through calls and web conferences. A list of the tribes the Service met with is provided in Table 6.2-1 of the DPEIS. We would and will consider tribal ecological knowledge that is provided by tribes. We continue to encourage tribes that wish to consult on this

rulemaking and eagle management in general to contact us to request meetings. In addition, the DPEIS associated with this rulemaking examines potential effects of this rulemaking on tribal resources, religion, and culture, and we encourage comment and feedback, (and consultation if requested) from tribes on that analysis.

At the individual project level, we invite consultation with tribes in the vicinity of projects requesting permits, as well as tribes with historical ties to the area who have advised us of their interest in consulting with the Service.

Population Management Objectives

Comment: The fact that the Service is on record in its FONSI on the 2009 permit regulations stating that it will not issue any permits for golden eagle take east of the 100th meridian is very troubling. Failure to do so will result in industrial wind development going ahead anyway without the NEPA analysis, public review, and conservation measures.

Comment: The Service should retain its stance against permitting any take of golden eagles east of the 100th meridian. If the Service is contemplating altering this policy, it should not be an internal decision; a public process is warranted.

Service response: We agree with the first commenter. The DPEIS analyzes the effects of issuing permits for golden eagle take across the United States, including east of the 100th meridian. The DPEIS analysis, with its associated public process, also addresses the concerns of the second commenter. We propose to issue permits to qualifying applicants in the eastern United States if the take will be offset and other required issuance criteria are met.

Comment: Golden eagle populations should be managed using western and eastern take thresholds rather than Bird Conservation Region (BCR)-based regional thresholds. Satellite

telemetry data (published and currently being collected) suggest a great deal of mixing across BCR boundaries.

Comment: Management of golden eagles by BCRs is problematic because most BCRs are large and span multiple jurisdictional boundaries; individual eagles may use multiple BCRs throughout the year; and a single BCR may host breeding, resident, and migratory eagles in different locations and/or times of year. Management should be at three scales: flyway, state, and local.

Comment: The Service should consider using the States as the Eagle Management Units (EMUs) for bald eagles.

Comment: The Service should treat Alaska as one EMU for both bald and golden eagles. A lack of information regarding golden eagle populations in Alaska does not justify the imposition of a rigid "no net loss" standard. When combined with the emphasis on management by EMUs, the Service has established a disproportionately high threshold for the approval of golden eagle take permits. Accordingly, in Alaska, the Service should discontinue the "no net loss" standard and the application of multiple EMUs for golden eagles, and should instead provide for a flexible approach to acceptable compensatory mitigation.

Service response: With the exception of management at the State scale, we are proposing an approach to golden eagle management that addresses the issues raised by the four comments above. As explained in more detail earlier in this preamble, we propose to use the flyways as EMUs but also incorporate a local area population cumulative take analysis in the permit decision process. Flyways more closely approximate eagle movement than the current EMUs, and the adoption of flyways would also provide more flexibility for where to apply compensatory mitigation. Under the management approach being proposed, limits for take of

golden eagles in Alaska, as in the rest of the Pacific Flyway and United States would remain at zero. However, because golden eagles from natal areas above 60 degrees N Latitude are usually migratory and much annual mortality occurs on migration or on the wintering grounds (McIntyre et al., 2008; Status Report), these proposed regulations would substantially increase flexibility in where compensatory mitigation for take of golden eagles in Alaska can be applied, extending it throughout the migration and wintering range of Alaskan golden eagles in the interior western U.S. and northern Mexico. Management at three scales would be overly complex in addition to the fact that State boundaries have no relation to eagle movements or migration patterns or to populations affected by a given project. Accordingly, we are not proposing to manage either species of eagle at the State scale. However, State management plays a crucial role in the management and conservation of eagles, thus we will continue to coordinate when issuing permits and partner with States on conservation initiatives.

Comment: The Service should revise its interpretation of the eagle preservation standard to apply to the national population of eagles and should, therefore, issue an eagle take permit if issuance would not reduce the likelihood of survival of the species of golden eagles and bald eagles nationally, rather than individual eagles or local or sub-regional populations.

Service response: Application of the preservation standard to only a national scale would not protect eagles throughout their ranges. For example, it would allow for loss of all bald or golden eagles on the east or west coast, or even everywhere but Alaska, which is not an effective or sufficiently protective management framework.

Comment: The Service should evaluate take not just in a regional context, but also taking into account its impact on local and national populations.

Comment: The Service should establish smaller local geographic units (as defined by

eagle biology and movement) in order to better assess project-level impacts and mitigation.

Service response: Protection of eagle populations across the flyways would protect eagles at the national scale. With regard to a more local scale, these proposed regulations add protection in two ways. First, we propose to modify and codify the Preservation Standard to include the goal of maintaining the persistence of local populations throughout the geographic range of both species. Second, these proposed regulations would incorporate the LAP cumulative effects analysis into the permit issuance criteria.

Comment: The Service should use smaller local geographic management units within the larger regional units, which would allow the Service to permit take in areas where the local breeding population exceeds the regional averages. It would also mean that replacement mitigation would not need to be tied to the larger regional population, but would be based on the local population.

Service response: The Service assesses local population impacts as part of the LAP assessment. However, at this time the fine-scale local population data that would be needed to assess eagle abundance at this scale in all seasons, and changes in that abundance between years, is not available. Thus the Service relies on estimates of average summer population density to approximate the size of local populations for this assessment. Moreover, effects on local populations are complicated by the fact that some currently unknown proportion of the fatalities associated with any activity almost certainly involves individuals not from the local breeding population (e.g., migrants). This assumption further complicates tying take rates to local eagle abundance and is the reason the Service allows offsetting mitigation at the larger scale of the EMU.

Comment: The Service should allow for take thresholds to be flexible in some cases to account for migrating, wintering, etc., eagles that come from other regions.

Service response: We do not have enough data in most cases to know whether the take from a particular permitted activity comprises more or less of the local breeding eagles than the average. As explained in our response to the question above, the Service allows offsetting mitigation at the EMU scale.

Comment: The Service should use the most current research and scientific information (for example, telemetry data) to redraw and update the EMU boundaries to more accurately reflect breeding territories, wintering ranges, and migration corridors for bald and golden eagles.

Service response: The Service considered and will continue to evaluate banding and satellite-tagged data on eagle movements as part of a reassessment of EMUs for this DPEIS. The Service's current proposal to use flyways to delineate EMUs is based on current data, including telemetry data.

Comment: The language in the Eagle Act that the Service refers to as the "Preservation Standard" does not apply to nonpurposeful take permits. Nonpurposeful take permits are not required to be compatible with eagle preservation. The phrase "compatible with the preservation of the bald eagle or the golden eagle" occurs within the first clause within section 668a of the Act, which applies to take from certain specified, narrow activities, including those for "scientific or exhibition purposes" and "for the religious purposes of Indian tribes." The preamble to the Eagle Permit Rule makes it clear that the authority for eagle take permits arises from the last half of the second clause of section 668a: "protection of … agricultural or other purposes." Since § 22.26 of the Eagle Permit Rule implements the second clause of section 668a of the Eagle Act with respect to the authorization of eagle take permits, it concerns a separate

class of activities than those enumerated in the first clause of section 668a. Therefore, nonpurposeful take permits should not be limited to situations compatible with the preservation of the golden eagle or bald eagle (the standard from the first clause).

Service response: While we understand the argument being made by this commenter, we believe it is more reasonable to conclude that Congress did not intend to allow the Secretary to issue permits that are incompatible with the preservation of eagles to protect any conceivable interest. In our view, as the agency responsible for interpreting and implementing the statute, it would be unreasonable to conclude that Congress limited take of eagles for particularly defensible interests, including research and Native American religious use, to sustainable levels while allowing unfettered take, regardless of the consequences, for other purposes. Therefore, we will not alter our interpretation of the statute, which takes into account the plain meaning of the Eagle Act's specific language, its purposes, its legislative history, and our consistent past agency practice.

Comment: The preservation standard should be based on increasing breeding populations, not just keeping them stable, and should apply to all populations in all areas where eagles have traditionally been found.

Service response: Under the current preservation standard, bald eagle populations have continued to grow, and our data and modeling, using conservative assumptions (see Appendix E of the DPEIS), estimate they will stabilize at approximately 260,000 individuals nationwide, up from approximately 174,000 in 2009. Ideally, golden eagle populations would also grow, but our data show populations have been mostly stable over the past 40 years, so an objective that called for increasing golden eagle populations would require addressing limiting factors that have been in place for at least 40 years. Our data show that the most significant limiting factor

for golden eagles is mortality, especially of adult eagles, caused by unpermitted anthropogenic sources. Our hope is that by converting currently unauthorized take to take authorized under permits requiring implementation of conservation measures to avoid and minimize take and offsetting compensatory mitigation for remaining take at a greater than one-to-one ratio, golden eagle populations can stabilize or modestly increase. As a final point of clarification, our management objective is not just to maintain stable populations, but rather to allow for stable or increasing populations.

Comment: The Service should remove the reference to "breeding" populations in the preservation standard and replace it with "consistent with the goal of stable or increasing populations." This change will better recognize recent findings clarifying the importance of subadults and floaters to eagle populations.

Service response: The Service does recognize the demographic importance of all age-classes of eagles, and believes a population objective that maintains the potential for stable numbers of breeders is protective of all ages. Recruits are available to replace breeders that die only if subadult and floating adult populations are healthy, and the Service's demographic models take this into account in our estimates of sustainable take rates, so we are proposing to retain the word "breeding" in the definition.

Comment: The Preservation Standard should incorporate the concept of resilience, requiring maintenance of "*resilient and* stable or increasing" breeding populations. For eagle populations to be resilient to change, multiple factors (size, genetic diversity, demographics) must be of sufficient quality to provide for long-term persistence.

Service response: The concept of resilience is already inherent in the preservation standard. Keeping "breeding" in the standard provides for resiliency: In order for breeding

populations to remain stable or increase over time, their size, genetic diversity, and other demographic factors must be sufficient to allow for the populations' continued resilience. Our proposal to add "persistence of local populations throughout the geographic range" to the preservation standard also helps ensure resiliency.

Comment: In order to effectively balance the population with development pressure, habitat loss, and other unanticipated impacts to the eagle population, a management goal of increasing the population would be a more conservative approach to protecting the eagle population.

Service response: A management goal of increasing populations would be more conservative in terms of authorizing take than the Service's current and proposed goal: maintaining stable or increasing breeding populations. We believe the latter is sufficiently protective and consistent with the plain language of the statute. It allows for increasing populations, as evidenced by the fact that bald eagle populations in the coterminous United States have continued to increase since the Service adopted the standard. At some point, bald eagle numbers will stabilize, however. We estimate that stabilization will occur in roughly 25–30 years with a population of about 230,000 nationwide, including Alaska. For golden eagles, populations are at about 40,000 individuals, but would, without unauthorized sources of anthropocentric mortality (shooting, collisions, etc.), be stabilized at approximately 70,000 individuals. Conversion of some of that unauthorized take into authorized take through permitting secures offsetting mitigation and other conservation measures and has the potential to increase golden eagle populations from their current equilibrium number.

Comment: The Service should replace the current "preservation" standard with "to not meaningfully impair the Bald/Golden Eagle's continued existence."

Comment: The alternative qualitative approach described in the scoping materials "to not meaningfully impair the bald or golden eagles' continued existence" is vague, ambiguous, and subject to interpretation. The suggestion that extinction is a threshold is alarming and contradicts the regulatory standard of the Eagle Act. While qualitative objectives may provide a larger degree of flexibility, they often rely far too heavily on the judgment of individuals, often working in isolation and overwhelmed with permit reviews.

Service response: We are proposing to maintain a quantitative approach to managing eagle populations for reasons discussed earlier in this preamble.

Comment: The Service should adopt a Qualitative Prevention approach rather than a Quantitative Allowance approach to allow for more flexibility to issue permits even if mitigation options are not available to fully compensate for impacts, thus increasing data collection as the result of monitoring required by the permit.

Service response: We have enough data to understand that additional take of golden eagles is not compatible with maintaining the current population unless the take is offset. Not using the data we have for the purported reason of obtaining more data would not be scientifically defensible.

Comment: We believe the quantifiable approach is far too cumbersome and makes for an overly complex management/permitting approach. Aside from reducing the complexity of analysis for and issuing permits, proceeding with a qualitative assessment approach would allow for greater flexibility in compensatory mitigation options than the quantitative approach—focusing more on "growing" eagles than saving them from other anthropogenic sources of mortality.

Service response: The quantitative approach reduces complexity at the permit issuance level because the allowable take limits are already established. A qualitative standard would require complete, independent population assessments for each permit, and would also make it challenging to assess cumulative impacts. Greater flexibility in where compensatory mitigation can be applied would be achieved under the proposed flyway EMU approach. The Service is also expanding mitigation options by establishing and encouraging the use of conservation banks and in-lieu fee programs, which, when available, will simplify mitigation requirements at the individual permit level. We agree that data collection from monitoring permitted activities is of high value. We do not agree that focus should be shifted from addressing anthropogenic sources of mortality. Not only are anthropogenic sources the ones most readily controlled, our data reflects that they are responsible for almost 60% of golden eagle mortalities.

Comment: The preservation standard currently implemented requires surveys and monitoring with the likely consequence that funds will be redirected from more important resource needs.

Service response: The Service has the responsibility to ensure that any take that we authorize is compatible with eagle preservation. Surveys and monitoring are a critical part of any responsible wildlife management framework that includes permitting take in populations that are already significantly affected by anthropogenic sources of mortality.

Comment: The Service should use both a quantitative and qualitative approach. The qualitative criteria could be used when there is not enough data in an area to set population objectives and take thresholds.

Service response: We disagree that a qualitative approach is warranted for setting regional population take limits in areas where we have insufficient data to say whether

permitting take will result in population declines. The Service has the statutorily mandated responsibility to make a positive determination that the take will be compatible with eagle preservation when issuing eagle take permits.

Comment: The Service should exercise caution when permitting lethal take of eagles where best science shows populations are compromised, or especially where populations are proven to be 'sink' populations.

Service response: We are proposing incorporation of the LAP cumulative effects analysis into the permit evaluation criteria for eagle incidental take regulations to better protect eagles at the local scale.

Comment: For golden eagle management units with adequate population data and robust populations, the Service should relax the "no net loss" standard and implement the permitting process at levels compatible with maintaining stable or increasing populations.

Service response: We would not require compensatory mitigation for take in populations that could withstand additional take without declines to levels below our population objective. Our data indicate golden eagles may already be experiencing higher take rates from unauthorized take than can be sustained. Accordingly, all take we authorize above EMU take limits must be offset.

Comment: The Service should adopt a low-risk tolerance (cautious approach) to management of golden eagles in the Southwest (Bird Conservation Region 16) because of changes in climate, land management and resource development, and continued human population growth.

Service response: We are proposing to adopt a risk-averse stance that minimizes the chances that our permit program will negatively affect the population trajectory of both

species. The take limits we are proposing are derived by using conservative estimates of population size and then using a conservative approach to determine how much take those (potentially underestimated) populations can absorb without experiencing declines. We also use compensatory mitigation to offset all take permitted that might exceed what is sustainable, and for golden eagles, are proposing to compensate for take at a greater than one-to-one ratio.

Comment: The Service should set population goals. Quantitative objectives allow States to measure progress towards goals, are an essential feature of adaptive management strategies, and are the best way to ensure that eagle populations remain secure.

Comment: Numerical population objectives alone are not sufficient to guide permitting decisions without appropriate take thresholds and/or caps for regional and local populations.

Service response: We agree that an ideal approach would include take limits and numerical population objectives based on conservation plans. We would like to develop specific eagle population objectives for each EMU and then use these objectives to inform permit decisions within the EMUs. However, this goal is not feasible at this time given the lack of fine-scale information on eagle populations that would be necessary. The technical and logistical complexities of working with State agencies and tribes to set population objectives within the timeframe of this action are impractical.

Comment: The ECPG and the 2009 permit regulations are inconsistent as to whether the maximum take thresholds are set at "1% of annual productivity" or "1% of population."

Service response: The ECPG and 2009 regulations differ purposefully with respect to the population component against which the take limit is applied. The reason for this difference is described in detail on page 80 of the ECPG. However, we are proposing to revise the current approach and base take limits on a percentage of the EMU population instead of estimated

annual productivity, making the regulations, in this respect, similar to the ECPG. We now believe it is more appropriate to track and manage take limits when they are based on applying a harvest rate to total population size, since take is occurring in all age classes, and we have conducted analyses to determine what take rates, when applied in this way, are compatible with our management objectives.

Comment: The Service should develop a new Maximum Sustained Yield take threshold model based on the take of adult individuals from the population, rather than the removal of juveniles (as was the basis for the 2009 FEA) because the removal of juveniles has less of an impact than removal of mature individuals.

Service response: The 2009 FEA used a harvest model that imposed take in proportion to abundance across all age classes. Take was not assumed to be restricted to juveniles. In the draft DPEIS for this action, the Service has updated and revised its modeling of the effects of take on eagle populations, and we continue to assume incidental take affects all age classes in proportion to abundance.

Comment: Eagle population status should be assessed every 5 years using the best scientific methodologies available.

Comment: The Service should reevaluate new information (data) that may affect management decisions or take permits on an annual basis. Incorporation of new, peer-reviewed research needs to occur quickly because predator populations can experience sudden, drastic changes.

Service response: Our intention is to assess population status every 6 years, but management decisions and issuance of take permits will incorporate the best available scientific information on an ongoing basis.

Comment: The current rulemaking should take this opportunity to address the differences between bald eagles and golden eagles in terms of their natural history, habitat requirements, and behavior and address how the management units, risk models, and mitigation measures planned for each reflect the conservation requirements of that species.

Service response: In general, regulations should include provisions that will apply based on the status, trends, and threats, as well as the natural history and behaviors, of the species they protect, no matter which species it is. For example, the ESA does not contain species-specific criteria, but its provisions adaptively apply to any species listed as threatened or endangered. The status of species tends to change over time. For example, 30 years ago, more restrictive provisions would have been appropriate for bald eagles than for golden eagles. To adequately encompass changes in population size and trend, the regulations should be designed to provide the appropriate level of protection for either and both species. These regulations propose to do that by incorporating take limits at the EMU level established in the DPEIS and adjusted in the future, through subsequent surveys and analysis. We also propose to require various analyses that are informed by differences between the two species based on their conservation status, as well as their natural history, habitat and prey requirements, and behaviors. Those differences underpin our management objectives and how we apply the regulations "on the ground." The DPEIS for this action and various guidance documents also reflects biological and behavioral differences between the species.

Comment: The revised management scheme needs to clarify whether take caps are hard or flexible. The Service has issued permits that exceed the 5% local area population cap but has not articulated under what circumstances ignoring the cap is acceptable and how it is consistent with the preservation standard.

Service response: Currently, the 5% local area population "cap" is guidance, not a hard limit. Under the proposed regulations, the Service would not issue permits that result in cumulative take within the LAP exceeding 5% unless the Service conducts additional analysis showing that permitting take over 5% of that LAP would not have a long-term detrimental effect to the LAP that would be incompatible with the preservation of eagles. Examples of situations where the Service may be able to sufficiently document that a permit authorizing take above 5% of the LAP would not be inconsistent with the preservation standard might include: If the project is already in operation and the permit conditions would result in a reduction of take; or compensatory mitigation will be applied within the LAP.

Comment: The Service should reconsider the position that "historic" or "baseline" types of take should not count against the take thresholds. Failure to evaluate these types of take will lead to an over-estimation of the Maximum Sustained Yield as described in the Final Environmental Assessment on the 2009 permit regulations.

Service response: Take thresholds (or limits) are measured against population sizes that existed in 2009 when the two new eagle take permit regulations were put in place. Those populations were experiencing a certain amount of take at that point that we are considering baseline for purposes of measuring how much additional take the populations can sustain while maintaining stable or increasing breeding populations. Take that was occurring prior to 2009 was reflected in the population level (golden eagles) or rate of growth (bald eagles) that existed in 2009. Accordingly, the Service's position when it established the 2009 take levels is that applicants seeking the newly available take permits for golden eagle take that had been occurring prior to 2009, or bald eagle take in the EMU where take limits were set at zero (i.e., in the Southwest), would not need to provide offsetting mitigation because the take is not additive to

already existing take levels. Those applicants would be required to avoid and minimize to the maximum degree practicable, with the goal of reducing take from their activities. Recent data indicate golden eagle populations would likely stabilize at a significantly higher population level if sources of unauthorized take are removed. Applicants for incidental take permits whose activities have been taking eagles prior to 2009 and have had more than 6 years to apply for permits may be required to address past take by entering a settlement agreement before being issued a permit for future take. Such agreements would require the company to undertake corrective actions and pay penalties for unpermitted past take, among other actions.

Comment: The Service should conduct an analysis to assess the relative contribution of 'historical' or 'baseline' types of take to the overall take that might be expected.

Service response: We are unsure if this commenter meant that we should analyze how much of the take we expect to permit will consist of take that was historical (ongoing prior to 2009), or that we should analyze how much take that will occur in the future, whether permitted or not, was historical. At any rate, we agree that a better understanding of how much eagle take was occurring prior to 2009 would be useful. There is not an abundance of data to inform us about the extent of different sources of take in years preceding 2009, but in 2015, we used survival rate estimates that omitted the fraction of mortality caused by anthropogenic activities, under the assumption that this artificially high mortality was keeping golden eagle populations at a lower equilibrium size than would otherwise be the case. This analysis suggested that, in the absence of ongoing anthropogenic take, and assuming food did not become limiting, the western U.S. golden eagle population would be stabilized at about 70,000 individuals, or 1.75 times its current size. Virtually none of that ongoing anthropogenic take is authorized.

We have attempted to research the extent of one form of historical take via the DPEIS on

this action: take for Native American religious use. More information about this type of take would allow the Service to better determine that the take can be considered baseline when we issue eagle take permits to tribes.

Permit Duration/Tenure

Comment: The EIS should include an alternative that returns to 5 years as the maximum permit duration and also the effects of not renewing a take permit after its 5-year duration.

Service response: Three of the five DPEIS alternatives include the provision that 5 years is the maximum permit tenure. Analyzing the effects of not renewing individual take permits after 5 years would be speculative at this stage and would need to be considered on a case-by-case basis.

Comment: The recent revisions to the permit regulations that allow for permits to be issued for up to 30 years endanger eagles. There is not enough data or analysis to support permits of this duration.

Comment: The extension of maximum permit tenure to 30 years is appropriate and will encourage project proponents to obtain eagle take permits and commit to the associated conservation measures that will benefit eagles.

Comment: The programmatic take permittees should be subjected to a 3-year renewal and review cycle. Technology in the wind industry is changing at a speed that long-term permit requirements would not be able to capture.

Comment: The maximum programmatic permit tenure should be 15 years with thorough and effective review every 5 years. These reviews should be independent of permittee-derived monitoring results.

Comment: The maximum permit tenure should be 20 years with the option for review

and permit renewal for an additional 10 years. However, this 20-year permit must require that post-construction monitoring occur annually in years 1–5 and then every third year for the balance of the permit.

Comment: For projects that will have a longer lifespan or a more lengthy Federal license or permit term, the Service should revise the regulations to retain the flexibility to grant programmatic take permits that extend beyond 30 years so that the permit term is coextensive with the life of the project, or at least consistent with the term of the Federal authorization.

Service response: We believe the 5-year maximum permit term is unnecessarily burdensome for businesses engaged in long-term actions that have the potential to incidentally take bald or golden eagles over the lifetime of the activity. It has also had the unintended effect of discouraging proponents of long-term activities from applying for permits, despite the risk of violating the statute. With longer term permits, the Service has the ability to build adaptive management measures into the permit conditions. This approach provides a degree of certainty to project proponents because they understand what may be required to remain compliant with the terms and conditions of their permits in the future. This information allows companies to plan accordingly by allocating resources so that they will be available if needed to implement additional conservation measures if necessary to remain in compliance with statutory and regulatory requirements.

The Service cannot require any entity to apply for an eagle take permit (except under legal settlement agreements), with the result that some project proponents build and operate without eagle take permits in areas where eagles are likely to be taken. The 5-year permit duration limit has exacerbated this situation for projects with lifetimes much longer than 5 years. When proponents choose to build projects without seeking permits because they perceive the

application burdens are too great, the opportunity to achieve mitigation and conservation measures is lost. The Service believes that permitting long-term activities that are likely to incidentally take eagles, including working with project proponents to minimize the impacts, and securing compensatory mitigation, is preferable to forgoing that opportunity because companies perceive the permit process as being more onerous than it should be. Enforcement becomes the other option when entities take eagles without permits, and the Service is actively engaged in numerous investigations focused on incidental take of eagles. However, regulatory compliance is vastly preferred over resorting to enforcement.

If the maximum permit tenure is extended to 30 years, the Service will evaluate each permit at no more than 5-year intervals. These evaluations will reassess fatality rates, effectiveness of measures to reduce take, the appropriate level of compensatory mitigation, and eagle population status. Additional commitments with regard to conservation measures may be required of long-term permittees at the 5-year permit evaluations. In 2013, when the maximum term of programmatic permits was extended from 5 to 30 years (struck down in 2015), language was included in the regulations limiting additional conservation measures that could be required of the permittee to those contemplated at the time the permit was issued. However, that language was based on the requirement that all permittees would be required to implement advanced conservation practices that reduce take to the point where it is unavoidable. As part of the Management Common to All Action Alternatives, long-term permittees would be subject to the same criterion as holders of standard permits have been under the current regulations: They would be required to undertake all practicable measures to reduce take and would no longer be required to implement ACPs to reduce take to the point where any remaining take is unavoidable. To ensure eagles are adequately protected, based on the results of the 5-year

evaluations, the Service may require long-term permittees to undertake additional conservation measures that are practicable and reasonably likely to reduce risk to eagles based on the best scientific information available.

With regard to the suggestion that maximum permit tenure should be longer than 30 years, we disagree at this time because 30 years should cover the duration of most projects that are likely to need incidental take permits and is a reasonable period in which to adaptively manage permitted activities without requiring a new permit. Permit renewal will be an available option for permitted projects that operate for longer than 30 years.

Comment: The regulations need to retain the provision that the Service may suspend or revoke permits if necessary to protect eagles.

Service response: Revocation and suspension remain discretionary options under these proposed regulations.

Permit Application Process, Permitting Decision Process, and Issuance Criteria

Comment: Some Service Regions have imposed a requirement that applicants prepare Service-approved Bird and Bat Conservation Strategies as part of the permit application. The regulations do not require this action, and evaluation of non-eagle species should not rise to the level of an approved plan for a Service decision in support of issuing an eagle take permit.

Service response: By regulation (50 CFR 13.21(c)), any permit "automatically incorporates within its terms the conditions and requirements of subpart D of this part and of any part(s) or section(s) specifically authorizing or governing the activity for which the permit is issued, *as well as any other conditions deemed appropriate and included on the face of the permit*" (emphasis added). Development and compliance with Bird and Bat Conservation Strategies to reduce take of other federally protected species is appropriate in light of the

Service's responsibilities under Federal wildlife protection laws.

Comment: The contents of the permit application form should be explicitly spelled out in the regulations. The preamble to the current regulations states that the application form requirements are purposefully absent so the Service can modify them without undergoing additional rulemaking. This lack of formal codification could lead to unintentional, predecisional actions by the Service, such as deeming applications incomplete.

Service response: The Service is required to have all its permit application forms approved by the Office of Management and Budget every 3 years. During that process a notice is published in the **Federal Register** allowing the public to comment on the contents of the forms. Incorporating the contents of the forms into each permit regulation would require the Service to undergo hundreds of additional rulemakings every 3 years, which would be redundant, costly, and impracticable.

Comment: It would be beneficial for the public and government agencies to clearly understand the approximate (or maximum) length of time it would take the Service to complete various eagle permit applications since the current process appears to differ from 50 CFR 13.11.

Comment: The regulations should establish a standardized timeline for review proportional to the risk posed to eagles by any given project.

Service response: We agree that implementation guidance containing approximate timelines for issuing eagle take permits would be beneficial. It is true that § 13.11 implies that permit application processing will take no more than 60 days because § 13.11(c) recommends applicants submit their applications at least 60 days prior to commencement of the activity requiring authorization. Part 13 applies to all Service permits, most of which are much simpler to process than eagle take permits. At present, there is considerable variation in the time it takes

to reach a decision on an eagle incidental take permit, depending on project duration, complexity, and other factors. Delays in processing permit applications are also sometimes due in part to applicants providing inaccurate or incomplete information in the application, including substandard data. In addition, since the 2009 regulations were put in place, the Service has been in the process of revising them. When the pace of revisions to the regulations slows so that we can expect a given set of rule provisions to be in place for the foreseeable future, and the Service is not continually making revisions to the regulations, we plan to develop implementation guidance given sufficient agency resources.

Comment: The regulations should specifically address the requirements for each type of permit. For example, they should clarify what level of studies and which types of documents are needed, the level of NEPA that is appropriate, and whether an ECP is required for each type of permit.

Service response: We do not agree that it is appropriate, or even possible, to set out in regulations stipulations as to what level of NEPA is required (i.e., categorical exclusion, EA, or EIS) for different types of permits or when an eagle conservation plan is required. There are too many project-specific factors to consider, including whether there is another Federal nexus, the level of controversy, the status of eagles in the area, the size and scale of the project, whether the issuance of a permit for the activity is precedent-setting, whether other trust resources will be affected, and more.

Comment: All environmental reviews for take permits should be published for public review and comment.

Service response: We publish a notice in the **Federal Register** to notify the public of their opportunity to review and comment on most environmental assessments and all environmental impact statements undertaken under NEPA.

Comment: The Final EA, final rule, and guidance do not specify the mechanism by which the NEPA document for individual projects should be prepared. The regulations should continue to allow the Service to accept applicant-prepared EAs to expedite the permitting process.

Comment: Independent, third parties not employed directly by the permittee should conduct the environmental assessment (EA). This could be accomplished by the permittee supplying funds for the EA managed by the Service.

Service response: NEPA regulations allow applicants to prepare EAs, and the preparation could be done in-house or by a third-party contractor. No matter who prepares an EA, the Service is responsible for the adequacy of the analysis on the effects of the permit issuance.

Comment: The Service should clarify that projects seeking take permits will be subject to NEPA analysis only in regard to the effects of the permit itself, and not the authorization of the project as a whole.

Service response: The NEPA analysis required when the Service makes a permit decision is based on the direct, indirect, and cumulative effects of the authorization and any mitigation tied to the authorization.

Comment: For the NEPA analysis on individual permits, the Service should use the project-specific NEPA already undertaken by other Federal agencies, rather than developing an additional NEPA document.

Service response: We prefer to be a cooperating agency and use other Federal agencies' NEPA analyses rather than using our very limited staff and resources to prepare a second NEPA document. However, it is sometimes the case that other Federal agencies have not taken a hard look at effects to eagles, particularly in light of the fact that such effects may change after the Service works with project proponents to reduce take. In such cases, we have needed to prepare an additional NEPA analysis. Additionally, we receive many permit applications from non-federal applicants for projects on private land. For those applications, the Service has the sole responsibility for completing the NEPA obligations. Under this DPEIS, we are analyzing the effects to eagles of authorizing take up to certain levels, which will allow us—and other agencies—to tier from the DPEIS when analyzing effects to eagles in most cases.

Comment: The regulations should apply the same standard for both an individual and programmatic take—that a take cannot be practicably avoided.

Comment: The criteria for issuing programmatic permits under the Eagle Act, consistent with the requirement for an Endangered Species Act incidental take permit, should require avoidance and minimization only to the maximum extent that take cannot practicably be avoided, and then mitigation for residual take that cannot otherwise be avoided.

Comment: An "unavoidable" standard could present a high threshold, where reliability, proven effectiveness, and cost are not considered in developing and implementing "advanced conservation practices." The cost of a conservation practice should have a reasonable relationship to the potential benefits derived from such a practice.

Comment: The Service should also amend the definition of ACPs, to ensure consistency with the change to the definition of "practicable," if the latter is adopted.

Comment: The standard for programmatic permits should not be reduced to what is practicable; "practicable" speaks to money. Birds should not be sacrificed so people can save money.

Comment: The standard for permitting programmatic take should not be weakened. The only factor that, at least theoretically, prevents developers from irresponsibly siting wind facilities is that remaining take must be unavoidable in order to be permitted. The Service must implement its own regulations requiring applicants to avoid and minimize take to the degree that remaining take is unavoidable, and not permit wind facilities at sites used by eagles for breeding, wintering, and migration. Under the "unavoidable" standard, developers should be forced to select sites outside of eagle habitat.

Comment: The "unavoidable" standard needs to be retained for programmatic permits because of the unique cultural stature of the bald eagle as our national symbol. The enacting clause of the Bald Eagle Protection Act of 1940 stated that the bald eagle "is no longer a mere bird of biological interest but a symbol of the American ideals of freedom."

Comment: The "unavoidability" criterion provides the needed pressure for technological advancement in conservation measures because it calls for the implementation of technically "achievable" measures even if some of those measures are costly, are not the current industry standard, or must be further technically developed.

Service response: For the reasons explained earlier in this preamble, the Service is proposing to eliminate the distinction between standard and programmatic permits and apply the practicability standard to all permits. In short, we believe there is no sound reason to allow consideration of cost, technology, and logistics for some permits and not for others. These proposed regulations would require potential permittees to implement all practicable best

management practices and other measures and practices that are reasonably likely to reduce eagle take.

Comment: To the extent that the Service amends the current issuance criteria for programmatic permits to align with the "practicable avoidance," the term "practicable" should be redefined as "capable of being done after taking into consideration, relative to the magnitude of the impacts to eagles: (1) the cost of the remedy for an actual measurable impact as compared to the overall benefit and utility of the project with respect to public interest; (2) existing technology; and (3) logistics in light of overall project purposes."

Service response: The problem with including consideration of the "overall benefit and utility of the project with respect to the public interest" is that this is a subjective criterion. For example, some might argue that expansion of an airport serves the public interest by increasing safety and convenience in flight choices, while others might point to the increased landfill, noise, and pollution as detrimental to the public interest.

Comment: Although a proponent's ability to pay can be a relevant factor in determining the extent of conservation measures, the determination should also consider the benefit to the species derived from the remedy. If the benefit to the species from an avoidance and minimization measure is low and the cost is high, the measure would not be considered "practicable."

Service response: We are proposing to adopt the Service's definition of "practicable" in our proposed revised Mitigation Policy (see 81 FR 12379, March 8, 2016). That definition includes consideration of "a mitigation measure's beneficial value to eagles."

Comment: The "practicable" standard should not take into account the project proponent's resources.

Service response: The proposed definition of "practicable" requires consideration of the activity's "purpose, scope, and scale" rather than "proponent resources."

Comment: The Service should make permitting decisions on a regional scale where multiple projects are proposed, rather than issuing mortality permits to each facility.

Service response: The option of issuing regional permits is available. We have not had a proposal upon which to make such a permitting decision. The potential applicants would be responsible for taking the initiative to organize a sound regional proposal for the Service to evaluate. Also, if there will be prohibited impacts to ESA-listed species as well as eagles, there is the option of developing an HCP and applying for an ESA incidental take permit that covers eagles as non-listed species.

Comment: Recommendations from wildlife agencies should be incorporated into the project planning.

Comment: State wildlife agencies should be consulted in the Federal eagle take permit process, including the Service internal, 5-year, non-public "reviews" of programmatic permit conditions for the 30-year life of a permit.

Service response: The Service involves State wildlife agencies to varying degrees based on the State's level of interest in the technical assistance phase (between initial contact by an applicant through the permit application process). We work with States that have an interest in coordinating with regard to our eagle permitting process. We would also work with those State agencies during the 5-year evaluations if long-term permits are established through this rulemaking.

Comment: The authorized level of take for all programmatic permits should be at least two eagles to avoid requiring immediate reevaluation of a permit upon the take of one eagle.

Service response: The Service's fatality prediction model is specifically designed to result in a 20% or lower chance of eagle take exceeding the permitted number, as long as the pre-construction monitoring data are representative of future eagle use in the project area. We believe this percentage is adequate to ensure the permitted number is not routinely exceeded. The point at which a formal reevaluation of a permit is required is set on a permit-by-permit basis, and not necessarily upon take of one eagle.

Comment: The permit review process should be transparent and open to full public review and comment procedures.

Service response: In our view, a public-comment period for each permit would not provide an additional benefit to eagles that would justify the regulatory burden. In general, permits for larger scale projects with significant impacts or that entail a high level of controversy will be analyzed in a NEPA document that will be released for public review and input. Public involvement may also be triggered at the permit review or renewal stage if FWS determines that supplemental NEPA analysis is required.

Comment: Areas of particular importance to eagles, such as migratory corridors and high-density nesting areas, should not be allowed for wind development or should have additional scrutiny in the permitting process.

Service response: In numerous Service guidance documents and in the technical assistance we provide at the project planning stage, we recommend that developers avoid areas that are important to eagles. However, we do not have the authority to prohibit development in areas that are important to eagles. Our role is to evaluate the level of impacts to eagles when a project proponent approaches us to inquire about a permit to authorize eagle take. We do not have the authority to approve or veto the actual project.

Data Collection and Analysis

Comment: Pre-construction surveys using rigorous methods standardized by the Service for wind energy development should be mandatory, not voluntary.

Comment: Two years of independent, pre-construction monitoring of eagle behavior, nesting, foraging, and migration should be required.

Comment: The Service or other third-party, professional biologists should conduct pre-construction surveys.

Service response: These proposed regulations would require applicants for permits with durations longer than 5 years to conduct a minimum of 2 years of pre-application surveys. Wind-energy generation facility operators would be required to use the survey methods we are proposing to incorporate by reference from the ECPG. The regulations would provide for waivers if the wind-energy project applicant submits, or the Service already possesses, sufficient documentation demonstrating a low likelihood of risk to eagles due to: physiographic and biological factors of the project site, or the project design (i.e., use of proven technology, micrositing, etc.); or that expediting the permit process will benefit eagles.

The Service does not have the resources to conduct pre-construction surveys and must rely on permit applicants to provide these data. The Service does carefully review the pre-construction survey data for accuracy and works with applicants to resolve any discrepancies before accepting the data as reliable and accurate. Use of Service-approved or recommended protocols would facilitate our review and allow us to better identify data gaps and other insufficiencies.

Comment: The ECPG recommends 20 hours per turbine per year of sampling effort, which is an amount far higher than suggested by simulations using the Bayesian fatality model.

The additional surveys do not provide a corresponding benefit in terms of estimating risk, but are imposing additional costs on developers. The sampling guidance should be revised to avoid over-sampling. Also, permittees discovered to have provided false information on their permit applications may be subject to criminal penalties under 18 U.S.C. 1001.

Service response: Appendix C of the Eagle Conservation Plan Guidance (Module 1, v2; hereafter, ECPG) discusses sampling effort in multiple contexts: (1) In terms of the effort that may be required to validate whether a project meets Category 3 criteria (e.g., no eagle fatalities will occur over a 30-year time span), and (2) in terms of the effort that the Service recommends when Stage 1 evidence supports possible project classification of Category 2 (e.g., an eagle take permit is recommended) and the main objective of the surveys is estimating risk in terms of predicted fatalities. Given the variability of natural systems, the current uncertainty in the site-specific factors that can increase the risk of eagle fatalities, and the sometimes inadequate information gathered during early site evaluation, intensive sampling is required to be reasonably certain that eagle take is not expected to occur and that the project would not require an eagle take permit.

The example in the ECPG that calculates 20 hours of sampling required per turbine is specific to a project with 40 2.5-MW turbines with a 100-m rotor diameter where the objective is to validate a Category 3 classification. For assessing risk of a potential Category 2 project, the ECPG recommends a minimum of 1 hour of observation per 800-meter survey plot per month, but at least 2 hours of observation per survey plot is warranted for a season for which Stage 1 evidence is ambiguous or suggests high use. The ECPG also recommends sampling at least 30% of the total footprint of the project hazardous area and that surveys should be conducted for at least 2 years prior to project construction.

The per-turbine effort for this minimum level of sampling will depend on turbine configuration and spacing. To accurately predict risk to eagles, sampling must provide data that are representative of eagle use at the site during all times of day across seasons and years. The benefit of additional data in terms of predicting risk will depend in part on the variability of eagle use at the site. The Service advises potential permit applicants to coordinate closely with the Service regarding the appropriate sampling effort, as sampling considerations are complex and depend in part on case-specific objectives.

Comment: The ECPG is intended to guide project proponents and Service personnel in evaluating risk to eagles and developing eagle conservation plans (ECPs) and permit applications. However, different Service Regions have developed modified guidance. The Service should ensure standardization of the guidance nationally.

Service response: Differences in regional recommendations for applying the ECPG are expected, and not inconsistent with the ECPG, which was designed to be an adaptable framework that provides for flexibility in application based on geographic and project-specific variability. However, the Service strives to be as consistent as possible, and regularly coordinates between Regions to foster consistent applications of our laws, regulations, policies, and guidance governing eagles.

Comment: As it is critical for assessing risk, the Service should require radar data at different times of the year and weather conditions to monitor activity and height of migratory birds flying through the area.

Service response: Our guidance does not exclude the use of radar. It allows the most appropriate field method to be selected based on site-specific factors. However, radar has so far not proven very useful or effective, either for monitoring or for curtailment. None of the current

radar systems are capable of providing reliable data on eagles (or raptors) at the necessary scales. That said, we are supporting testing, and if practicable technology is developed that provides useful and reliable data, we would likely require its use.

Comment: Fatality prediction models should be different for the two species based on the apparently different behavior and risk profiles of each species. The prior probabilities for exposure and collision of golden eagles are based on data at old wind facilities in the western United States and are unlikely to be representative of bald eagles and will overestimate project risk. The Service should replace these priors with empirical data on bald eagles at modern wind energy facilities.

Service response: We are aware of arguments that the Service wind collision probability model predicts high rates of bald eagle fatalities at wind facilities given the low number that have actually been reported. We do not disagree that bald eagles may prove to be less at risk from blade-strike mortality than golden eagles, but the data available to us are not sufficient to make that conclusion at this time. Reasons are: (1) the Service has yet to be provided with strong pre- and post-construction bald eagle use and fatality data from any wind project where there is high bald eagle use; (2) bald eagles congregate in larger numbers than golden eagles, and, while in those concentrations, they engage in social behaviors that may increase their risk to blade strikes at a project sited in such an area; (3) in some of the areas where bald eagles congregate, there are multiple fatalities each year of bald eagles that fly into static power distribution lines and vehicles, suggesting that as a species they do not possess a superior ability to avoid collisions; and (4) there is a thorough study in Norway that documents a substantial population-level negative effect of a wind facility there on a population of the closely related white-tailed eagle *(Haliaeetus albicilla)* as a result of blade-strike mortality. For all these

reasons, the Service currently determines that it is reasonable and prudent to consider bald eagles to be equally vulnerable to blade-strike mortality as golden eagles until verifiable data become available to estimate a specific collision probability for bald eagles. If data become available in the future demonstrating that bald eagles are less (or more) vulnerable to blade-strike mortality, we will revisit whether to draft a separate collision probability model for bald eagles.

Comment: Exposure-based models used to predict mortality during pre-construction risk assessments should be tested for accuracy, and new models should be developed that take cumulative impacts of all sources of mortality into account.

Service response: We agree, and the model framework the Service is using is specifically designed to easily incorporate new information gained through use and testing. We will periodically refine the model as new data are obtained.

Comment: The Eagle Conservation Plan Guidelines (ECPG) indicate that eagle nest surveys should be conducted in the project area, which it defines as the area within the project boundary plus a 10-mile radius surrounding the project. However, the 10-mile radius recommendation was based on golden eagles in the desert southwest and is of questionable value in other areas and unnecessary for bald eagles. The Service should develop appropriate national standardized criteria that are species-specific and based upon region-specific information.

Service response: This comment is not accurate. Appendix C of the ECPG, where the Stage 2 surveys are described, says, "If recent (i.e., within the past 5 years) data are available on spacing of occupied eagle nests for the project area nesting population, the data can be used to delineate an appropriate boundary for the project area as described in Appendix H. Otherwise, we suggest that project area be defined as the project footprint and all area within 10 miles." In Appendix H, the ECPG states, "Eagle nesting territories most likely to be affected by disturbance

from a wind project are those that have use areas within or adjacent to the project footprint. The Service will accept an assumption that all eagle pairs at or within the mean project-area inter-nest distance (as determined from the Stage 2 assessment) of the project boundary are territories that may be at risk of disturbance (e.g., if the mean nearest-neighbor distance between simultaneously occupied eagle territories in the Stage 2 assessment is 2 miles, we would expect disturbance to most likely affect eagles within 2 miles of the project boundary; Figures H-1 though H-4). Eagle pairs nesting within ½ the project-area mean inter-nest distance are the highest candidates for disturbance effects, and should receive special attention and consideration." Thus, the ECPG advocates surveying for eagle nests within the mean inter-nest distance of the project boundary, and only extending this distance out to 10 miles if recent data on nest spacing is not available.

Comment: There is a need for greater clarification on risk assessment and monitoring specifications/requirements for electric utilities and other industries, such as mining. The Service should develop eagle conservation plan guidance for these other industries.

Service response: We intend to develop guidance for other industries in the future, as resources allow.

Comment: All information generated for a proposed or operational wind energy project should be downloaded to a free, user-friendly Service docket to bring much needed transparency to the process.

Service response: We will consider developing a process that requires more transparency for projects going through the permit application process, although we note that such a process would not allow public access to any confidential business information or other trade secrets submitted to the Service by a project proponent.

Permit Conditions, Adaptive Management, Project Monitoring, and 5-year Reviews

Comment: An independent third party entity and not the permittee should conduct monitoring, with oversight by the Service. The party could be paid through a trustee by companies.

Service response: The Service is investigating the use of third party environmental compliance monitors. There are benefits to using third party monitors, particularly the more objective observation and reporting of wildlife injuries and mortalities. However, there can be considerable costs to using third party monitors, and so it may be considered unreasonably burdensome for some smaller operations. It may be a viable option for permits for large, utility-scale projects.

Comment: With regard to monitoring at wind power facilities, there is a need for peer-reviewed research-based risk models and standardized monitoring criteria.

Service response: These proposed regulations would require wind energy project permittees to use the monitoring protocols in the ECPG. We, along with USGS partners, have also published three scientific papers on methods and approaches that we recommend for estimating risk and fatality rates at wind projects, and we continue to work to improve these assessment tools. As it becomes clear which approaches are best, we intend to standardize monitoring protocols under permits to the maximum extent practicable. However, the best monitoring approach may differ under different site-specific conditions (e.g., the best monitoring approach at a low-risk site is likely to be different than the best approach at a high-risk site).

Comment: The regulations should provide that all data on bird mortality at specific wind energy sites be made available for meaningful stakeholder (public) review and analysis,

including analyses of the effectiveness of post-construction mitigation, and the status of experimental measures and adaptive management prescriptions.

Service response: The current regulations provide that eagle mortality reports from permitted facilities will be available to the public. We will also release mortality data on other migratory birds if we receive that data as a condition of the permit, provided no exemptions of the Freedom of Information Act (FOIA) (5 U.S.C. 552) apply to such a release. If we receive mortality data on a voluntary basis and we conclude it is commercial information, it may be subject to Exemption 4 of the FOIA, which prevents disclosure of voluntarily submitted commercial information when that information is privileged or confidential.

Comment: The revised rule should clarify what is required and what analysis is performed at 5-year reviews.

Comment: The 5-year reviews should account for eagles that abandon nests, eagles that continue to breed, any nest that is removed, and all eagle mortalities associated with the project.

Comment: Five-year permit reviews should be informal discussions bound by mitigation options and costs defined by the permit.

Service response: Under these proposed regulations, the 5-year evaluations would be more than informal discussions with permittees. During each 5-year review, we would reassess post-construction monitoring, take rates, including disturbance, fatalities; effectiveness of measures to reduce take; the appropriate amount and effectiveness of compensatory mitigation; and the status of the eagle population. Depending on the findings of the review, we may make changes to a permit as necessary, including updating fatality predictions for the facility; requiring implementation of additional conservation measures that are practicable for the permittee to implement; updating monitoring requirements; or adjusting compensatory mitigation

requirements. Additional post-implementation monitoring may be required to determine the effectiveness of additional conservation measures.

Comment: Five-year reviews create uncertainty for permittees. The Service should incorporate provisions similar to the Habitat Conservation Plan Assurance Rule for incidental take permits issued under the Endangered Species Act. This approach would provide regulatory assurances to permit holders and incorporate a greater degree of certainty in the 30-year programmatic permit process.

Service response: There is sufficient management uncertainty regarding this relatively new permit program to warrant the proposed 5-year reviews, including the need for data to refine population models, survey protocols and avoidance and minimization measures. We note that many ESA incidental take permits contain adaptive management provisions that may change management prescriptions or mitigation measures based on new information that are similar in purpose as the proposed 5- year reviews. Additionally, without such reviews, there would be detrimental effects to permittees if long-term permit conditions prove to be unnecessarily precautionary.

Comment: If the required post-construction monitoring determines take will exceed the pre-construction estimates, the project should be placed on a shorter reevaluation cycle.

Service response: Depending on the degree of discrepancy between predicted and actual take, the Service may need to take timely action to evaluate the permitted activity to determine whether the permittee must implement additional measures and/or contribute additional mitigation. However, one effect of adopting a conservative take projection model is that only 20% of projects are likely to exceed take. For 80% of the permits issued, take is expected to be overestimated. This situation helps to provide the permittee more certainty that the authorized

take level will not be exceeded in the majority of cases. While we have adopted such a model only for wind energy projects at this point, we hope to develop similar predictive models for other activities using information we gather under permits.

Comment: Trigger mechanisms that will require additional measures by the permittee must be clearly identified prior to permit issuance and spelled out in the permit.

Service response: We agree that reasonably foreseeable circumstances that may require additional mitigation should be identified and included in the permit conditions. Such circumstances include but are not limited to: a higher-than-anticipated take rate, take resulting from an unexpected source within the permittee's purview, or an unanticipated significant detrimental change in the status of the local area or regional eagle population. For long-term take permits, during the 5-year review periods the Service may require additional avoidance and minimization measures if such measures are likely to reduce take and are practicable for the permittee to implement. For example, if newer technology is shown to decrease eagle mortality or increase carcass detection, and could be implemented without unreasonable cost, employment of that technological advancement may be required.

Comment: The Service must retain the option not to renew a take permit at the 5-year review if the level of eagle kills exceeds the permitted threshold and may impact populations.

Service response: With regard to long-term permits, if these regulations result in the Service being able to issue permits with terms longer than 5 years, the Service will make any necessary amendments to the permit at each 5-year review, but will always retain the ability to suspend and/or revoke the permit in accordance with 50 CFR 13.27 and 13.28. For expiring permits, we intend to retain the ability to deny renewal of the permit in accordance with 50 CFR 13.22, and if renewal is not consistent with the permit issuance criteria of the regulation.

Renewal of a permit constitutes issuance of a new permit (see 50 CFR 13.11(d)(6)).

Comment: When changes to the permit terms and conditions are expected by the Service during the term of the permit, the permittee should be provided as much advance notice as possible to plan and budget for potential changes in mitigation requirements. Periodic meetings (e.g., annually) between the permittee and the Service would be appropriate to ensure that both parties are informed on any potential issues or concerns.

Service response: We agree that a permittee should be provided as much advance notice as possible about potential changes in mitigation requirements.

Comment: The 2013 revised regulations do not define what advanced conservation practices will consist of for long-term permits. Standards are needed for these advanced practices that evolve with changing science.

Service response: We are proposing to eliminate the requirement for ACPs. Permittees would still be required to implement all practicable measures to avoid and minimize take. As the commenter notes, practices and measures to reduce take evolve over time, even within a single industry. For that reason, and because the regulations are not specific to one industry, incorporation into the regulations of particular practices for all activities that may take eagles would not be feasible, nor would it be advisable, since doing so would mean the regulations would constantly need updating.

Comment: The Service should redefine ACPs as "scientifically supportable measures or testing of experimental measures that are approved by the Service to reduce eagle disturbance and ongoing mortalities to a level where remaining take cannot practicably be avoided."

Service response: We are proposing to remove the requirement to implement ACPs from the regulations. As part of requiring avoidance and minimization to the maximum extent

practicable, some permits require implementation of experimental measures that show promise for reducing take. Not only are such measures likely to reduce take at many projects, their inclusion as conditions of permits provides the opportunity to test their efficacy for wider use.

Comment: The Service should require the following measures at wind-energy projects: Increase frequency of turbine site inspection to search for physical evidence of mortality/injury event; develop and employ video surveillance and other technologies (impact alarms); and/or provide onsite personnel quarters to facilitate monitoring of larger wind farms.

Service response: The practices listed by this commenter are not demonstrated, effective best management practices at this time. However, the Service could require a permittee to conduct any of these activities as permit conditions if we determine such measures are effective, practicable, and necessary.

Comment: Minimization strategies should include seasonal curtailment during known periods of high avian use, as well as observation-based shutdown of turbines when eagles are within a specified distance of wind turbines. The cost of detection devices and methods to discourage eagles from using a site should be built into the project budget, as should the cost of temporary shutdown of the project, if necessary, during migrations.

Service response: These are all minimization strategies that are being evaluated. However, data collected so far are equivocal with respect to their effectiveness, at least in some situations, so as a result the Service is not currently proposing to require them universally at all projects. The Service does consider appropriate minimization strategies on a project-by-project basis, and we intend to require permittees to continue to test their effectiveness as part of the adaptive management process under permits and apply the strategies that turn out to be effective.

Comment: In a migration pathway, the use of radar to detect migrating raptors and on-the-ground observers should be considered during migration periods.

Service response: As we explained in an earlier response to a comment on our collision risk model for wind power, radar has not proven effective, at this point, for either monitoring or curtailment. If advances in technology result in radar systems that provide reliable data on eagles (or raptors), we would likely encourage their use.

Compensatory Mitigation

Comment: The regulations should require compensatory mitigation for all permits associated with (1) anticipated or known fatalities; (2) anticipated or known loss of productivity; and anticipated or permanent loss of an important use area, including breeding areas, nest sites, foraging areas, and migration corridors.

Comment: The regulations should make compensatory mitigation mandatory for all wind energy facilities and associated transmission towers and lines at which federally protected birds are being taken.

Comment: All industrial permittees should be required to provide compensatory mitigation in order to make preservation of eagles a priority for those companies.

Comment: Compensatory mitigation requirements should be required as replacement mitigation only for take that exceeds established take thresholds and for populations that are not healthy enough to sustain additional mortality.

Comment: There should be higher standards of avoidance and mandatory mitigation for: populations not able to sustain take, important eagle use areas, Important Bird Areas (IBAs) and other special protection areas, eagle migration corridors, and areas of high-value habitat—particularly areas known for eagle use for foraging, nesting, or concentrated migration activity.

Comment: Compensatory mitigation should not be required for all programmatic permits. The regulations should be amended to provide that compensatory mitigation will be considered on a case-by-case basis.

Comment: All lethal take of eagles should require compensatory mitigation.

Service response: One of the primary goals of these rule revisions is to increase consistency with regard to compensatory mitigation requirements. The approach we are proposing is to require compensatory mitigation only where the permitted take would otherwise be inconsistent with management goals (i.e., when it would be incompatible with the preservation of eagles). The requirement would apply to any take that would exceed EMU take thresholds. Compensatory mitigation may also be required in some cases when take would exceed LAP cumulative take limits, or if otherwise necessary to maintain the persistence of local eagle populations throughout their geographic range. Accordingly, these proposed regulations would not require compensatory mitigation only for lethal take or for all lethal take.

We also do not agree that compensatory mitigation should be required only for certain types of industries, or only for take that results from a commercial or industrial activity. Whether an entity is commercial does not, by itself, affect the degree of impacts to eagles. To the degree that industrial permits entail greater detrimental effects to eagles than a typical homeowner permit, those permittees will be required to contribute additional compensatory mitigation.

Comment: The regulations should require that conservation measures or monetary contributions be applied to the county where the impacts are generated.

Comment: Compensatory mitigation for impacts should be implemented within the local, or at least regional, area population to avoid creating local population sinks.

Comment: The Service should allow mitigation to occur outside the eagle management unit where the take occurred, based on whether the eagle(s) taken was migratory or resident, as long as those mitigation efforts help eagle populations in that EMU.

Service response: The approach we are proposing would require compensatory mitigation to be applied within the EMU where the take occurs, with the exception that effective mitigation for take of Alaskan golden eagles could occur in the Central Flyway as opposed to the Pacific Flyway because a substantial proportion of the mortality of golden eagles originating in Alaska occurs on migration or during winter in the interior western coterminous United States and north-central Mexico (McIntyre 2012). If we had the ability to know what percentage of eagles taken are from the breeding population of the EMU versus eagles that are wintering there or migrating through, we could allocate some compensatory mitigation for take of the non-breeding population, but we do not at present have the means to precisely calculate those numbers for most areas of the United States. A requirement to apply compensatory mitigation at a finer scale than within the EMU, whether at the county or local area population level, is not feasible to administer, and also would not account for migrating or wintering eagles. Allowing mitigation within the whole EMU better addresses take of eagles from outside the local-area breeding population. In most cases, allowing mitigation outside of the EMU may not sufficiently mitigate for project impacts, which we generally expect to affect eagles primarily within the EMU where the project is located.

Comment: The Service should develop metrics to address compensatory mitigation for impacts to eagles outside the breeding population (i.e., on wintering grounds and during migration).

Service response: We recognize that eagles taken under a permit do not all originate from the local breeding population around that project. However, just as eagles killed at a project do not all derive locally, eagles benefitting from mitigation to reduce mortality near a project also do not all derive from the project area. We agree that metrics are needed to better track whether wintering, migrating, or breeding eagles are impacted by a project, and we are working with academic and agency collaborators to develop a genetic/isotopic assignment test to allow us to better track the natal origins of eagles killed under each of our permits.

Comment: It is appropriate not to require compensatory mitigation for historic religious take by tribes; however, the Service should direct other permittees' mitigation efforts into the areas where the religious take occurs.

Service response: Compensatory mitigation would be carried out within the EMU where the take occurred, unless the Service has reliable data showing that the population affected by the take includes individuals that are reasonably likely to use another EMU during part of their seasonal migration. It may be appropriate in some instances to implement compensatory mitigation measures on tribal lands, but it would not be a requirement. We would encourage any interested tribe to work with applicants or applicable national/regional mitigation banks or in-lieu-fee programs to implement compensatory mitigation measures on its lands if the tribe wishes to do so.

Comment: Options for mitigation should include:

- An ammunition exchange in locations where eagles are impacted by lead;
- Funding for identification and carcass removal programs that would remove carcasses from areas where eagles collide with vehicles or trains;

- Habitat enhancement funding or purchasing mitigation lands through commercial habitat banks;
- Funding for appropriate research efforts;
- Reduction of unintentional poisoning;
- Implementation of a reward system to reduce poaching;
- Reduction of mortality from vehicle collisions and road kill-collisions through road kill-carcass removal efforts;
- Shifting to use of nontoxic ammunition via hunter education and voluntary lead abatement;
- Reduction of stock tank drowning;
- Implementation of a whistleblower rewards system to reduce poaching;
- A reduction of the impacts of secondary trapping;
- Funding of rehabilitation centers;
- Chelation to reduce lead levels in eagles;
- Funding of livestock depredation compensation programs to encourage landowners to protect eagles;
- Improved management of public recreational activities that reduce eagle productivity;
- Prey management programs;
- Habitat preservation;
- Habitat restoration;
- Reduction of unintentional poisoning;
- Captive-breeding programs;

- Utility line marking to prevent collisions;
- Nest discourager/excluder installation;
- Contributions to eagle management programs.

Service response: We believe some of these actions have greater potential than others to benefit eagles and compensate for permitted take. Whether compensatory mitigation is provided by the permittee or a third party like a conservation bank or in-lieu fee program, all mitigation will be held to the same high, equivalent standards. For mitigation actions with more uncertainty concerning their effectiveness in compensating for project impacts, mitigation accounting systems would be used to increase the amount of mitigation required.

Comment: Retrofitting cannot be the only replacement (offsetting) mitigation option available. A utility should have the opportunity to review proposed retrofitting and/or refuse. The Service needs to have flexibility on type of mitigation required.

Service response: Power line retrofitting is not the only compensatory mitigation approach allowed by the Service, a point that is repeatedly made in the ECPG. In addition, under this proposed rule, the Service will allow compensatory mitigation measures and programs that face more risk and uncertainty provided mitigation accounting systems factor in risk and adjust metrics, mitigation ratios, and the amount of required mitigation to account for uncertainty.

Comment: Mitigation should focus upon the replacement of suitable eagle habitat. Conservation of nest sites and potential nest sites in vulnerable areas should be a high priority in light of the continued loss of habitat and nesting sites. Habitat-based mitigation could include: (1) fire prevention measures in areas with golden eagle breeding territories that are at high fire risk, (2) removal and control of nonnative grasses, which are known to increase fire risk and may also decrease golden eagle prey abundance, and (3) conservation easements to protect known

golden eagle breeding territories that are at risk of residential, agricultural, or energy development.

Service response: All mitigation authorized in this proposed rule must meet the same high, equivalent standards. With reference to eagle permits, compensatory mitigation, when required, must consist of actions that either reduce another ongoing form of mortality to a level equal to or greater than the unavoidable mortality, or lead to an increase in carrying capacity that allows the eagle population to grow by an equal or greater amount. When we require compensatory mitigation, the mitigation must demonstrate it is effectively replacing lost eagles, is additional to what would have occurred without the mitigation, and is durable for at least the length of the impacts of the project.

Comment: Compensatory mitigation should not be applied to actions that are not already required by law. Power companies should be required to retrofit their own lines.

Comment: Compensatory mitigation should not be considered to offset the take if it would have been done anyway. Compensatory mitigation must consist of actions that are additive.

Comment: FWS should accept within-company mitigation for companies that have both wind facilities and power line infrastructure. This practice could streamline the mitigation process, facilitate assurances and accountability, and reduce administrative costs.

Service response: One of the most well-established methods for conserving and mitigating effects to eagles is power pole retrofits. This rule adopts Presidential and Department of the Interior principles for mitigation, including requiring that all mitigation be additional to what would have been reasonably expected to occur without the mitigation. For an entity to be able to work with a power pole owner to retrofit power poles that pose high risk to eagles, the

power line owner must demonstrate they are already taking appropriate and practicable steps to address their impacts to eagles by applying for an eagle take permit. Entities engaged in other activities with impacts to eagles, including units or subsidiaries of a company that owns power poles, seeking to retrofit power poles to mitigate for their effects on eagles would have to propose retrofits that are additional to what the power pole owner (or unit within the same company) has already committed in an eagle take permit.

Comment: The Service should establish minimum standards for utilities for which the retrofits are done to avoid creating disincentives for utilities to take responsibility for undertaking their own retrofits. The utility must: systematically identify high-risk poles; demonstrate that they have retrofitted, reframed, or otherwise responded appropriately to mortalities of eagles and other protected birds on their system; utilize avian-safe design standards that meet or exceed APLIC (Avian Power Line Interaction Committee) standards; have an implemented avian protection plan (APP); be able to maintain compensatory mitigation poles as avian-safe for the duration of the permit/agreement; and ensure that pole retrofitting is designed and installed correctly.

Service response: Electrocutions are among the leading cause of mortalities of golden eagles. The Service recommends that utilities with infrastructure that poses high risk to eagles work with the Service to implement conservation and mitigation measures and seek an eagle take permit. The commenter outlines many of the general standards this rule requires of any applicant for an eagle take permit: that the avoidance, minimization, and compensatory mitigation be proven effective through science-based means, adopt best management practices where they exist, and be durable for the length of the impacts to eagles. Full application of APLIC standards

could be incorporated into the terms of a permit to meet the avoidance and minimization standards of this proposed rule.

Comment: Permittees should have a choice as to whether to work directly with an electric utility or pay into a fund administered by an entity such as the National Fish and Wildlife Foundation.

Service response: Our general preference is that applicants provide compensatory mitigation via a mitigation in-lieu fee program or eagle conservation bank that we have previously approved, so Service staff and the permit applicant do not have invest time on each permit devising an appropriate mitigation approach. That said, if an applicant provides robust analysis to demonstrate an alternative form of mitigation method that will satisfy offsetting mitigation requirements, we may accept the alternative method. However, additional analysis under NEPA may be required, and the permit decision will be further delayed if the applicant cannot provide adequate documentation of the efficacy of the alternative mitigation.

Comment: A genetically diverse captive population of golden eagles must be obtained and maintained as a breeding population. Falconers are in a unique position to participate in compensatory mitigation projects, including obtaining golden eagles from the wild, maintaining them in good condition, rehabilitation, training, conditioning for release, and release to the wild to become successful members of an adult breeding population.

Comment: The regulations should explicitly provide that mitigation will be focused on conservation of wild birds rather than hacking captive-reared eagles as a mitigation measure.

Service response: The Service's position is that mitigation should be focused on conservation of wild birds for various reasons. Although we are looking at various methodologies for establishing a value for "replacing eagles," including the costs of raising an

eagle from an egg to release, we currently have numerous concerns about using a captive-bred population of golden eagles as an offsetting mitigation method. First, there is ample documentation that captive-bred birds, including raptors, have lower survival rates than their wild-born relatives (e.g., Brown et al. 2006). The lower survival rates are likely caused by a combination of lack of genetic diversity and deficiencies in behavioral learning and conditioning that contribute to greater rates of mortality. Second, even if survival of hacked eagles was comparable to that of wild-raised eagles, captive-rearing and release is not a very efficient means of accomplishing offsetting mitigation. For example, only about 20% of wild-fledged golden eagles survive to maturity, thus replacing one adult would require producing and releasing at least five young under the best of circumstances. Third, there is evidence of a high degree of natal philopatry (tendency to stay in or return to the home area) among golden eagles, in particular, meaning there may be important genetic structure in populations that would need to be taken into account in such a program. Releasing captive-bred eagles into a landscape where their primary sources of mortality are not being addressed and reduced would not serve much purpose. Overall, we believe that reducing ongoing mortality is a more effective means of offsetting added mortality, and for accomplishing golden eagle conservation in general.

Comment: Many projects have a long life span and a low possibility of "take." Here, the Service should provide a flexible method for implementing compensatory mitigation over time.

Comment: Given that the Service cannot predict when programmatic take will occur, benefits of proposed compensatory mitigation actions should accrue as early in the life of the project as possible.

Comment: The applicant should, after each 5-year review period, be able to apply unused mitigation credits by carrying them over to subsequent review periods. Alternatively,

these credits should be tradable or transferable.

Comment: Allowing companies to receive credits for excess compensation could lead to excess take in some years, especially at the local scale. The Service needs to explain how the credit system will avoid excess take.

Service response: Under the approach we envision, permittees would be required to provide compensatory mitigation at the outset to offset predicted take over 5 years. For permits longer than 5 years, if no observed take has occurred in the first 5 years, or if observed take is lower than the take already mitigated, the permittee's future mitigation requirements would be adjusted downward to allow credit for mitigation already accomplished, and to account for the lower-than-initially predicted observed fatality rate. It would be the same at each 5-year interval. If take exceeds the predicted take rate during any 5-year period, the permittee would need to provide additional compensatory mitigation (and may be subject to additional permit conditions). As explained earlier, by "observed take," we are referring to take that is estimated using statistically rigorous, unbiased, estimators and search protocols.

Comment: Additional compensatory mitigation should be required only in response to changed circumstances previously provided for in the permit and applied at the project level consistent with the "no surprises assurances" provided by ESA incidental take permits. In providing this type of assurance, cost uncertainty would be reduced, thereby creating a situation where developers/owner operators would be more likely to seek full-term permits and to comply with the related conservation measures.

Service response: Additional compensatory mitigation for eagle permits would be required if take exceeds the predicted and authorized take level or if the best available scientific evidence demonstrates that the additional mitigation measures are necessary for the preservation

of eagles. Also, the Service may require long-term permittees to undertake additional conservation measures other than those originally contemplated, if they are both practicable and reasonably likely to reduce risk to eagles based on the best scientific information available.

Comment: The length of time that the measurable benefits of compensatory mitigation persist should meet or exceed the length of time of the projected impacts.

Service response: We agree with this comment, particularly with regard to offsetting mitigation, but also in the context of compensatory mitigation in general. Compensatory mitigation under these permits will be designed to be durable for at least as long as the detrimental impacts to eagles from the permitted activity.

Comment: The Service should set a greater than 1:1 ratio of benefit to take. The benefits provided by compensatory mitigation are inherently more uncertain than those provided by avoidance of high-risk sites and by operational mitigation (also known as Advanced Conservation Practices). Until such time as actual field performance data is compiled, equivalency standards for compensatory mitigation must be more stringent than the computed levels of take. Compensatory mitigation should be substantial in order to provide a strong incentive for developers to properly site facilities away from eagle use areas.

Service response: We are proposing to require offsetting mitigation for golden eagles at a greater than one-to-one ratio. In addition to the reasons provided by the commenter, a greater than one-to-one ratio is warranted because our data indicate golden eagles may be already experiencing higher take rates than can be sustained and the greater than one-to-one ratio is therefore necessary to ensure the permitted take is compatible with the preservation of golden eagles.

Comment: Compensatory mitigation actions should be proven to be reasonably likely to

deliver expected conservation benefits.

Comment: The regulations should allow hypothesis-driven, scientifically based research to count as part of a mitigation strategy.

Service response: Under this proposed rule, the Service would allow compensatory mitigation measures and programs that face more risk and uncertainty provided mitigation accounting systems factor in risk and adjust metrics, mitigation ratios, and the amount of required mitigation to account for uncertainty.

Comment: A project proponent should not be able to avoid compensatory mitigation if the entity proposes a project that fails to reasonably consider avoidance or minimization measures. The regulations should emphasize and incentivize avoidance in conservation plans and institute the full mitigation hierarchy prior to requiring compensatory mitigation.

Service response: Under these proposed regulations, implementation of all practicable avoidance and minimization is required in order to qualify for an eagle permit.

Comment: The Service should establish a standardized process for reporting and monitoring of compensatory mitigation actions to ensure compliance and the delivery of eagle conservation benefits.

Service response: This comment highlights one of the advantages of using mitigation banks, in-lieu fee programs, and other third-party arrangements. The third party is responsible for determining what level of monitoring is needed and carrying it out. Funds collected will cover that monitoring.

Comment: By calculating the risk of eagle take through a formula that does not account for eagle avoidance behaviors (especially with the bald eagle), and then requiring compensatory mitigation to completely offset the level of assumed take (and, pursuant to the ECPG, requiring

significant mitigation upfront), the Service sets the compensatory mitigation level too high and requires compensation for in effect "phantom" takes that may never occur. The Service should create separate risk models for bald and golden eagles based on their biology and behavior, as take estimates are the basis for determining the mitigation amounts.

Service response: As noted in our response to an earlier comment, we believe it is reasonable and prudent to consider bald eagles to be equally vulnerable to blade-strike mortality as golden eagles unless and until verifiable data become available that demonstrate a different collision probability for bald eagles. It is also important to recognize that the initial model prediction would only be used to estimate take for the first five years, after which time the observed take rate would be used to update the model prediction for the next five years (a process repeated for the life of the project). Any mitigation that has been undertaken based on the initial model predations that exceed the observed take can be carried forward and applied against the updated predicted future take.

Comment: The Service needs to collaborate with utilities on how to select which poles to retrofit and how to identify the highest priority areas for mitigation.

Comment: The Service needs to recognize the cost differences in retrofitting different companies' distribution systems. The types of equipment and size, height, and location of the power pole being retrofitted will affect the cost to complete. Utilities must calculate specific cost or value according to pole type and the scope modification to determine a cost to retrofit.

Comment: The ECPG calculates the average cost of retrofitting per pole to be $7,500, which underestimates the cost of retrofitting the average pole. In addition, the Service has also underestimated the life of a pole at 10 years. The age and cost to replace poles vary greatly. Costs to modify poles (particularly for transmission voltage) cost more than $7,500 per pole

depending on the type of work done, voltage, location, climate, etc. The Service should work with electric utilities to ensure appropriate costs are considered and that pole modification programs are effective and durable.

Service response: Working with APLIC, the Service has updated the resource equivalency analysis in the ECPG and re-run the model to come up with a "generic" replacement cost for determining what the per-eagle contribution to a mitigation fund should be with respect to power pole offsets. We expect details on costs per pole to retrofit, life of retrofits, evidence retrofits are of risky poles, etc., will be handled by the mitigation fund administrator (and selection panel), likely involving submission of proposals from potential recipients of the retrofits before funds were allocated. Such a process could account for actual costs on a case-by-case basis.

Permits for Taking Eagle Nests

Comment: The definitions found in the current regulations make sense, but they conflict with how similar terms are used in scientific literature.

Service response: We are proposing in 50 CFR 22.3 revised definitions applicable to eagle nests that are more consistent with terminology used in scientific literature.

Comment: Additional definitions should be added to the regulations, including the following:

- Active Nest—this definition would serve to clarify the types of breeding behavior or evidence needed to prevent the take of a nest during a particular breeding season.
- Active Territory—this definition would supplement the existing definition for area nesting population and relate to one breeding pair making a nesting attempt within an established breeding territory.

- Inactive Territory or Historical Territory—this definition would aid in dealing with a scenario where nest structures are observed but no evidence of use has been documented for a specific period of time.
- Alternate Nest—this definition would apply to a documented nest used by a breeding pair within the same territory in which an applicant has applied for a nest removal permit.
- Nest condition—this definition would describe the qualitative evaluation of nest conditions used to determine the likelihood of repeat nesting at this site.
- Nonviable Nesting Structure or Historical Nest Site—this definition would define a structure that has not been used for a period of time or has been damaged from environmental conditions.
- Existing Disturbance Regime—this definition is to provide a qualitative evaluation of the baseline conditions for which a new disturbance is proposed. For example, if an existing operation is ongoing and eagles chose to nest nearby, this circumstance needs to be considered when evaluating "take" or the risk for potential "take."

Service response: Most of these terms are not used in the regulations and neither are the concepts embodied in them, so for those, no definitions are needed. We are proposing a definition of "nesting territory," but nothing in these proposed regulations hinges on whether the territory (rather than the nest) is currently occupied by breeding eagles. We also are proposing a definition for "alternate nest," but the proposed definition is more aligned with how the term is used in scientific literature than what is being suggested by the commenter. In our proposed definition, a nest is "alternate" in relation to a nest that is used, rather than in relation to the nest being considered for removal. Under our proposed definition, an alternate nest may be the one

for which a nest take permit is sought.

Comment: The high standard in the current regulations that limits nest removal to limited situations should be retained. It has contributed to the preservation of bald eagle nesting habitat and the persistence of historic nest territories in Florida.

Comment: In addition to situations that present human health hazards, the Service should retain the authority to issue nest removal permits in instances of extreme hardship, such as a new nest constructed following acquisition of a small housing lot.

Comment: The regulations should be revised to allow nests to be removed to alleviate a threat of significant property damage.

Comment: Permits for removal of bald eagle nests should be less stringent and easier to acquire, without requiring applicants to provide "net benefits" to eagles or mitigation.

Comment: Additional circumstances that indicate a nesting pair may continue to be viable, such as the identification of an alternative nest within the territory, should allow for removal of one nest without requiring "net benefit" measures.

Comment: The regulations should maintain the current standards with respect to the "net benefit" requirement for removal of inactive nests, including further clarifications and a clear definition of what constitutes a "net benefit."

Service response: We are proposing to retain the standard that, in cases other than health and safety or obstruction of human-built structures, a successful applicant for an eagle nest removal permit must provide a net benefit to eagles. The standard helps to protect historic nest sites. In other cases, such as a new nest constructed on a residential lot, the requirement to provide a net benefit should not be unacceptably onerous. Generally speaking, when new eagle nests are being established in areas with high human density, this activity indicates the eagle

population is expanding, and removal of a new nest in a thriving population will have little or no long-term impact to that population. A relatively small contribution to the national mitigation fund would allow monies to be leveraged for maximum benefit for eagles. Funding could be applied to improve conditions for eagles by improving habitat somewhere where there is likely to be less conflict from human activity or other eagles. Under the existing permit system, an example of a net benefit we required in a nest removal permit we have issued is a requirement to provide two alternative nest platforms for eagles that once used a nest tree whose destruction was permitted for a railway spur line. We are not proposing a standard definition of what constitutes a net benefit, and will continue to assess net benefit on a case-by-case basis. There is too much variability in nest sites and the circumstances surrounding them that determine the value of the nest to eagles to allow for a one-size-fits-all definition. However, we will continue to require mitigation in proportion to the impacts and we anticipate that the examples provided here are the types and magnitude of net benefit compensatory mitigation we would require for permits for removal of eagle nests for other than health and safety reasons.

Comment: Nest removal should occur outside of the breeding period and should occur only when there is an extreme safety situation.

Comment: Permits should not be made available for removal or relocation of active nests with eggs or young for purposes other than safety emergencies.

Service response: We agree with the second comment and are not proposing any changes to the current provisions that restrict removal of nests with eggs or young to safety emergencies. In response to the first comment, we must be able and willing to issue nest take permits for active nests to prevent injury or loss of life to humans or the eagles associated with the nest.

Comment: The definition of "eagle nest" should have a temporal aspect such that a nest that remains unused for 5 consecutive years and has deteriorated to an unusable condition is no longer included.

Comment: Permitting exclusions or streamlined permitting should be an option for inactive nest sites, which the applicant can demonstrate are degraded and for which removal will not have a detrimental impact on preservation of the species.

Service response: We considered defining eagle nests in a manner that would exclude nests that have substantially deteriorated and which have been unused for many years, but decided against it. It is rare to have verifiable documentation that a nest has consistently not been used for many years. Nests could be lost on the incorrect pretext or assumption that they have been unused. It is quite unusual for applicants to have 5 years of documentation of past eagle use (or disuse) of nests. Sometimes nests are substantially destroyed by storms, and in most cases, the Service would have no way of determining whether eagles are likely to return to that site for breeding purposes. If applicants are able to demonstrate the low biological value of the site, that is, that eagles are unlikely to rely on it for breeding purposes in the foreseeable future, then it would not be difficult to provide the net benefit that is required to qualify for a nest removal permit.

Comment: The definition of "inactive eagle nest" should be revised to extend the time period when a nest is considered not currently being used beyond 10 consecutive days.

Comment: The 10-day period used to define an "inactive" nest should be reduced to 5 days, particularly for nests where young have fledged. The shorter period is sufficient to identify eagle breeding activity.

Service response: We are not proposing to revise the 10-day period upward or

downward; we have no data indicating either that 10 days is insufficient to protect eagles or is overly protective.

Comment: For cases where an inactive nest take permit is sought, a standard monitoring methodology should be required for determining the status of the nest so that such a determination can be reviewed and approved similarly by multiple permitting agencies.

Service response: We agree that a standard monitoring protocol for determining whether a nest is unused for 10 days would be useful, and we will consider developing such guidance in the future. Due to the size of eagles and the fact that they are easily recognized, we believe it is not onerous for even untrained persons to determine whether a nest is in use, but it might be advisable to contact the local Service field office for guidance to ensure the monitoring activity will not disturb eagles.

Comment: In order to prevent an anticipated (but not yet present) emergency situation, permits should not be available to remove nests with no eggs or young, but which adults attend for purposes of breeding.

Comment: If the regulations will allow nests that are attended by adults but contain no eggs yet to be removed for anticipated safety emergencies, the regulations should include a clear decision process for what constitutes an anticipated emergency.

Service response: We have tried without success to develop a standard decision process for what constitutes a safety emergency beyond the plain meaning of the definition in § 22.3: "a situation that necessitates immediate action to alleviate a threat of bodily harm to humans or eagles." Emergency situations and potential consequences are simply too variable. We do not want to inadvertently create a process that could prevent us from issuing a nest removal permit for a situation we failed to anticipate or describe.

Comment: The regulations should allow more flexibility for removal of active and inactive nests in urban areas and other areas of potential risk to successful nests.

Service response: Generally speaking, eagle nests in urban areas indicate a thriving local population of eagles. In robust populations, the relative value to eagle populations of each individual nest is lower than in lower density populations. Eagle nests that are of lower biological value (including relative to other eagle nests) require less mitigation as a "net benefit" with the result that there is more flexibility to issue permits for their removal.

Comment: Due to the current population status of golden eagles, golden eagle nest removal criteria are more restrictive in nature. Mitigation, whether compensatory or replacement, should be implemented, by the permit holder, for golden eagles. The destruction of golden eagle nests should be avoided, if at all possible, unless the nest is posing a safety emergency.

Service response: We largely agree with the commenter. Golden eagle nest take permits will be more restrictive in nature, but without including different criteria for the two species in the regulations. All golden eagle take permits, except for those authorizing ongoing take occurring prior to 2009 will require offsetting mitigation. Our view is that regulations should not be species specific; rather, they should address specific conditions that could apply to any of the species they are designed to protect. The avoidance and minimization requirements in the current and proposed regulations are designed to ensure that removal of a nest of either species is the last option.

Comment: If a pair of eagles known to use one nest creates another resulting in the abandonment of the original nest, the old nest should be considered immediately abandoned.

Comment: A nest should not be considered abandoned unless it has not been used for 5 years, as golden eagles sometimes return to a nest after 2 or 3 years.

Comment: The term "abandoned nest" should be clarified so it is clear in the literature that both species may have several nests that they use on a rotational basis and will pick the current year's nest based on things like disturbance.

Service response: Neither the current regulations, nor the proposed revisions, include the term "abandoned nest" because that term is misleading in this context. In these proposed regulations, a nest that eagles are not currently using is referred to as an "alternate nest" and is still protected because eagles typically use nests on a rotational basis and will sometimes return to a previously used nest after several years. A 41-year study of golden eagle nests in Idaho found that golden eagles used a nest site that had been unused for 39 years (Kochert and Steenhof, 2012). That study also found that 86% of alternate golden eagle nests were used at least one breeding season.

Nest abandonment is a term used in our definition of what constitutes disturbance under the Eagle Act at 50 CFR 22.3. It is not relevant to determining the status of nests in a nesting territory and is a different concept entirely. In the definition of "disturb," a nest is considered abandoned if eagles had been using it, or would have used it, during the current breeding season, but did not raise young there due to interference or perceived interference. If a proponent's action causes nest abandonment, then the proponent has disturbed an eagle under the definition and is liable for take. In the definition of "disturb," nest abandonment does not refer to the long-term status of the nest.

Comment: The Service should evaluate the establishment of nest removal permits that would cover the removal of an active nest (without eggs or dependent young) or an inactive nest

multiple times for the same location.

Service response: The current and proposed regulations allow the Service to issue permits to remove nests being built in the same place multiple times. We agree that there are circumstances that warrant this type of authorization (e.g., when eagles persist in trying to build a nest in a location where it would create a fire hazard).

Comment: The definition of "area nesting population" should be modified to remove the 10-mile radius because it may not have any bearing on the actual home-range of a nesting pair or on the project impact area.

Service response: We agree and are proposing to remove the term "area nesting population" from the two permit regulations where it occurs.

Comment: Establish and clearly define in the management objectives acceptable distances from eagle nests necessary to avoid disturbance of eagles in a given management area.

Service response: The Service's recommendations for buffer distances and additional guidance for avoiding disturbance of bald eagles are contained in the 2007 National Bald Eagle Management Guidelines (USFWS, 2007). Ideally, if resources allow, we will revisit that document to update our recommendations based on newer data and observations of bald eagle behaviors. At this time we do not have comparable official guidance for golden eagles, but may issue such guidance in the future.

Comment: Any nest, abandoned or active, that is removed for any reason, needs to be accounted for in the 5-year review.

Service response: We are tracking all authorized take of nests in a database to ensure they are accounted for. In most cases where a permit authorizes disturbance to breeding eagles, we require monitoring and reporting, and we enter the reported status into the database.

However, it is not always feasible to track whether authorized disturbance actually occurred, so our database will not perfectly capture all outcomes.

Comment: When an active nest must be removed, the regulations should not always require nestlings or eggs to be placed with a rehabilitator. Instead, the language should be: "In most instances, nestlings and viable eggs must be immediately transported to foster/recipient nests or a rehabilitation facility permitted to care for eagles, as directed by the Service. The Service will make the determination as to the fate of all nestlings and viable eggs."

Service response: We agree that it is not always possible to transport eggs or young to a rehabilitator in a safety emergency (the only circumstances when removal of a nest with eggs or young can be permitted), and we are proposing revisions that would allow us to waive the requirement when it is not feasible or humane to carry out.

Comment: The Service should clarify the type of permit (disturbance or nest take) that is needed for temporarily obstructing eagle access to nests (prior to nesting season) to prevent disturbance during nesting-season construction or maintenance activities.

Service response: The appropriate authorization for temporarily obstructing eagle access to a nest is a permit for disturbance. Although some eagle nest take involves disturbance, nest removal permits authorize destruction, removal, relocation of, or persisting damage to, a nest.

Low-Risk Category

Comment: The Service should revise the definition of "low-risk" to include projects with slightly higher probability of taking eagles, provided the cumulative impacts would be compatible with eagle management objectives. The current definition represents such a low level

of risk that the burdens of issuing take permits for both developers and the Service outweigh the benefits of the permitting.

Comment: The Service should exempt issuance of permits for projects with low effects or "low risk" by establishing a new categorical exclusion for them in its NEPA regulations. Given the Service's conservative take estimates and limited resources in its permitting program, a categorical exclusion for low-risk projects would be reasonable from the Service's and project proponents' standpoint.

Comment: The Service should establish criteria to identify low-risk activities and set up a more streamlined permit process to address these circumstances. For example, there could be a one-page permit criteria checklist submitted with the "take" permit application that qualifies a project for an exemption from NEPA or advanced conservation practices.

Comment: The Service should redefine the probability of take percentage for "low-risk" projects such that projects with the probability of take of 0.03 or lower should be able to address their potential impacts through the development of non-permit-based conservation strategies.

Comment: The Service should modify the low-risk threshold from 0.03 eagles per year to 0.17 eagles per year. Annual take probabilities of 0.17 eagles per year are the lowest that produce 30-year take probabilities rounding to 1.0 at two significant digits.

Comment: The Service should consider developing a "Nationwide" permit program, similar to the Section 404 Clean Water Act permits that allow for projects to qualify under specific categories (low-risk). These instances would permit take within an established threshold per category.

Comment: The Service should broaden the category of "low-risk" projects established in the "Duration Rule" to include any projects that are likely to take more than 0.03 eagles per

year. The definition of low-risk should be clearly defined and based not only on anticipated project take (mortality and disturbance), but also on habitat modification. "Low-risk" should also be defined in the context of cumulative risk to regional and local eagle populations.

Service response: We agree that the former definition of "low-risk" projects is counter-productive and needed to be revised or eliminated. "Low-risk" was defined in a footnote to 50 CFR 13.11(d)(4) as a project or activity that is "unlikely to take an eagle over a 30-year period and the applicant for a permit for the project or activity has provided the Service with sufficient data obtained through Service-approved models and/or predictive tools to verify that the take is likely to be less than 0.03 eagles per year." This definition covered only those projects where take is essentially negligible, and, therefore, the project does not require a permit. The definition has been removed from the regulations in complying with a district court decision that vacated parts of the 2013 regulations that established the definition.

We still see utility in redefining "low-risk" to include projects with a slightly higher probability of taking eagles, but which cumulatively will still be compatible with eagle management objectives. However, we were not able to develop a definition of "low-risk" that could be applied throughout the United States while achieving the desired goals for such a category. The Service considered a variety of criteria and/or metrics for the low-risk category, but each approach resulted in significant discrepancies because of on-the-ground differences in eagle population densities and resilience, habitat variability, and project scales. Therefore, we are not including a revised definition of low-risk projects into these proposed regulations.

Although the proposed regulations changes do not include a category for low-risk, we agree that streamlining the process for projects that clearly demonstrate a likelihood of take being relatively low based on siting and/or project design is a worthwhile goal. We plan to

continue our efforts to identify and establish a category of low-risk projects that, without having to conduct required pre-application surveys, could qualify for eagle take permits. We welcome comments on defining low-risk activities and potential criteria for developing an authorization process that minimizes costs of compliance and the demand for agency resources for projects that will result in no more than minimal adverse effects on eagles for our consideration in the future. Comments should focus on (1) metrics that would be necessary to establish a category of low-risk projects, (2) informational requirements, if any, for the application and (3) appropriate terms and conditions to qualify for a nationwide eagle take permit.

Comment: The Service should consider some types of projects as low-risk to nesting and roosting bald eagles, specifically those that are:

- Similar to existing activities that eagles in the area are accustomed to;
- Of limited duration, occurring no more than several days at a time;
- Implementing various minimization measures to reduce impacts to eagles; and
- Not going to have a project noise level above 92 decibels.

Comment: Criteria to evaluate whether a project is considered low risk should include:

- Proximity and view shed of proposed disturbance in relation to nesting habitat;
- Landscape-level migration patterns;
- Quality of potential foraging habitat;
- Project activities that have a potential interaction with eagles or eagle habitats;
- Timing of projects (short-term/long-term, within or outside of breeding season); and
- Specific operational practices (applicant-committed protection measures).

Comment: If a project is beyond the Service-recommended buffer distance from an eagle nest, the project should be considered "low risk" and the permit issued under a simplified and shortened application/approval permit process.

Service response: These comments incorporate good guidance for how to evaluate whether disturbance is likely to occur. We consider these types of elements when potential applicants contact us with questions about whether their activities are likely to disturb eagles. If we determine the risk of disturbance is low, we advise people that a permit is not needed.

Research

Comment: The Service should establish regular, consistent surveys to assess changes in population.

Service response: Our plan is to conduct surveys on a 6-year rotation: one set of paired summer–winter golden eagle surveys in the first and second and fourth and fifth years of each assessment period, and to conduct bald eagle surveys in years three and six.

Comment: The Service should undertake a well-defined research program that explores potential innovations in ACPs to supplement a menu of validated, effective measures.

Service response: Private industry has the responsibility to avoid and minimize take of eagles from their activities. Accordingly, industry should fund research needed to identify measures to reduce the risk to eagles posed by their activities. The Service will contribute expertise regarding eagle biology and behaviors to the degree our resources allow.

Comment: The Service would have an opportunity to use utility data if the Service facilitates use of the reporting system and provides a guarantee of security of the data.

Service response: Data on avian mortalities is needed to help us understand risks to eagles and other birds and prioritize management decisions. We have developed a new data

system that will allow companies to input, view, and manage such data. For more information on the Service's Injury and Mortality Reporting System, go to: http://www.fws.gov/birds/management/project-assessment-tools-and-guidance/imr.php. The data is accessible by select FWS staff, but not viewable by any other system users. In the event of a request for information from the public, we will provide summarized data but would withhold any information exempted from release under FOIA, including confidential business information and personal information protected by the Privacy Act. This may include information that would identify the submitter, or any other details that would point to a particular company, unless the company approves release of this information.

Comment: The Service should actively pursue research on many factors that affect long-term population status of eagles in a changing landscape, including climate, prey populations, wind-farm losses, electrocutions, and lead poisoning.

Service response: We agree with this comment, and are engaged in various research projects to assess how various factors affect eagle populations.

Comment: The Service should use modeling to simulate populations of known structure that are then impacted at known (simulated) levels as a means to inform decisions. The substantial body of knowledge on bald eagles could serve as an initial benchmark for developing simulation models for golden eagles.

Service response: The Service has developed and is using these types of population models for both bald and golden eagles.

Other

Comment: Penalties need to be increased, so violations are not just a minor cost of doing business.

Service response: Penalties applicable to eagle take are established by Congress in the statute itself. The Service does not have the ability to modify those penalties.

Comment: Any dollars that come from enforcement and fines should be applied to fund eagle research.

Service response: Congress has enacted a number of laws that limit the use of fines and penalties assessed as part of the criminal or civil enforcement of wildlife laws. In general, these statutory limits are directed at protecting the Federal appropriations process through, for example, prohibiting the augmentation of a Federal agency's budget or funding a Federal program and by requiring that any money received "for the Government" from any source be deposited into the United States Treasury as miscellaneous receipts unless a law provides otherwise for retention and use of the funds. While there are opportunities within these congressionally mandated constraints for enforcement actions to recognize funding of eagle research, application of Federal fiscal law mandates and how they apply to enforcement actions can be complex and are addressed on a case-by-case basis, taking into account the Federal laws applicable to the facts of a particular situation.

Comment: The Service should revise the definition of "programmatic take" to allow a programmatic take permit even if only indirect effects would cause a "take" or a "disturbance."

Service response: We reviewed internal staff discussions that occurred during development of the 2009 regulations about how the Service should define "programmatic take," and we believe the phrase "and not caused solely by indirect effects" was included because of concern that people would request permits to cover effects to eagles that were too attenuated to constitute take under the Eagle Act (e.g., actions that gradually affect climate and lead to decreases in the prey base). Now, however, the scope of prohibited take under the Eagle Act is

better understood both within and outside of the Service, and we are less concerned that people will seek permits for attenuated effects that do not actually constitute take. Under this proposed rule, the category and definition for programmatic take would be eliminated. However, because we believe that it is appropriate for permits to cover take that is caused by indirect effects, particularly in light of our proposal to extend maximum permit duration to 30 years, nothing in these proposed regulations would prevent us from issuing such permits.

Comment: The Service should consider shifting the focus of the programmatic permit program from a lethal take focus to the conservation of eagles and their habitat.

Service response: The Eagle Act, unlike how the ESA protects ESA-listed species, does not give the Service authority to protect or otherwise regulate eagle habitat (other than eagle nests and habitat destruction that directly causes lethal take or disturbance), but we can and do protect habitat as mitigation for permitted take. At present, habitat loss is not the limiting factor for growth of either species.

Comment: The Service should conduct a national programmatic wind EIS and use it to identify areas where wind energy cannot be developed due to unacceptable risk to public trust resources, including eagles and other federally protected birds and bats.

Service response: The Service does not have the authority to regulate where wind energy facilities can be sited. We have developed a variety of tools for assessing whether a given area is likely to pose a high risk to eagles or other birds if developed for wind power (see the ECPG), and we encourage developers to avail themselves of those tools prior to siting wind energy projects.

Comment: The preamble to the 2009 permit regulations, Final Environmental Assessment conducted for those regulations, and the ECPG all identify projects in operation

prior to 2009 as being part of baseline conditions on which take thresholds were established. In practice, however, the Service has been inconsistent about how to treat such projects. The Service should clarify the extent to which mitigation is required for pre-2009 projects.

Comment: The Service should treat known permitted take that occurred prior to 2009 as measureable when considering additional take, and not consider it "baseline."

Service response: Take occurring prior to 2009 will still be considered part of the baseline with regard to compensatory mitigation requirements (i.e., none will be required). For developments already in operation that have taken eagles prior to the permittee applying for a take permit (available since 2009), the Service will work with the applicant to resolve any unpermitted take when applying for a eagle incidental take permit. The Service has developed a template eagle take settlement agreement to provide consistency and transparency in our enforcement actions.

Comment: Section 22.11(c) should be revised to state: "You must obtain a permit under part 21 of this subchapter for any activity that also involves migratory birds other than bald and golden eagles, and a permit under part 17 of this subchapter or a statement under Part 402 for any activity that also involves threatened or endangered species other than the bald eagle."

Service response: We are proposing revisions to accomplish what this commenter proposed, i.e., allowing the use of section 7 where appropriate to cover effects to ESA-listed species. We believe the current wording, which requires the use of an ESA permit even for Federal applicants, is the result of an oversight by the original crafters.

Comment: A panel of eagle experts and eagle biologists should begin a review of the Eagle Act. The Eagle Act is old, very expansive, less complete, and harder to enforce than the

more current Migratory Bird Treaty Act (MBTA) and ESA, and it does not work well with current regulations.

Service response: We, too, have identified areas where we believe the Eagle Act could be improved, but as a Federal Executive Branch agency, the Service cannot write or enact legislation. Statutory amendments must be made by Congress.

Comment: The Service should move forward with the development of a permitting process under the MBTA to augment those now available under BGEPA and ESA.

Service response: We are in the process of developing regulations to authorize incidental take under the MBTA. We published a notice of intent to prepare an EIS on May 26, 2015 (80 FR 30032), and held four scoping meetings in different U.S. cities. For more information, go to: http://birdregs.org/.

Comment: The Service needs to enforce the ESA, BGEPA, and MBTA when it comes to all energy development, whether traditional or alternative. Shut down or relocate wind energy sites that greatly exceed their take limits for federally protected species, especially if mitigation proves ineffective in reducing bird (and bat) mortality. This means more prosecutions for violation of the laws and predictable consequences for noncompliance.

Comment: Wind turbines with predictable eagle mortality should not be permitted, and those already permitted with future predictable mortality should be taken offline.

Service response: The Service does not have the authority to shut down, relocate, or take offline energy facilities. We have the authority to bring enforcement actions against facilities that take eagles without permits or that violate the conditions of their permits, and we do. We also can and do issue permits that require conservation measures and compensatory mitigation. We disagree that wind turbines with predicted mortality should not be permitted; if

mortality is not predicted to occur, wind companies do not need permits. Through Service guidance and in these proposed regulations, we discourage the siting of facilities in areas of high risk to eagles, but our authority does not extend to actually being able to prevent developers building there despite our recommendations.

Comment: The 2013 revisions to the permit regulations provide that the Service will make reported injury and mortality data available to the public. The regulation should clarify whether the Service will publish/post this data, or whether it will be available only upon filing a request under the Freedom of Information Act.

Service response: We intend to post cumulative reported mortality data summarized to a State and flyway level on a website that can be viewed by the general public.

Comment: The scoping process documents mention timber harvesting as an activity for which a programmatic permit may be appropriate. However, timber harvesting should not qualify for programmatic permits because the current eagle management guidelines for timber harvesting are quite easy to follow.

Service response: We appreciate this comment. It is true that no timber companies have approached us for a programmatic permit. That said, if a timber company approaches the Service for a long-term permit, we would consider the merits of its application. Also, the National Bald Eagle Management Guidelines were developed specifically for bald eagles and are not necessarily the best guidance for avoiding golden eagle disturbance.

Comment: Bald eagle populations continue to grow exponentially in much of the country, and as these populations grow, so does the amount of incidental take. Therefore, a set amount of authorized take over a period of time (i.e., 30 years) can be unpredictable and impractical. As long as the population growth exceeds the take and the overall goal of stable or

increasing bald eagle populations is being met, no individual permits would be necessary.

Service response: First, the Eagle Act requires a permit for bald eagle take: "Provided further, That bald eagles may not be taken for any purpose unless, prior to such taking, a permit to do so is procured from the Secretary of the Interior." (16 U.S.C. 668a) Second, without individual permits, we could not require avoidance, minimization of impacts, and compensatory mitigation, much less track how much take is occurring in order to ensure that take is not exceeding the level at which populations would start to decline.

Comment: The Service could implement a programmatic industry permit with NEPA tiering as the Service uses for permits issued under the ESA.

Comment: The Service should consider issuing programmatic take permits to cover a company's entire service territory.

Comment: As neither the Eagle Act nor the actual regulations require that eagle take permits be available solely for individual projects, the Service should allow for multi-project/facility permits for bald eagles or regional permits that can serve as umbrella permits for individual projects.

Service response: All of the scenarios mentioned by these commenters are available under the current and proposed regulations. The Service does have some constraints based on our administrative structure. For example, although not precluded by our regulations, it would be an administrative challenge for us to issue permits to multiple companies for multiple types of activities that cross Service regional boundaries (administrative jurisdictions). It might be more efficient to pursue multiple, less complicated permitting options in such cases.

Comment: The regulations and guidance documents should address the roles and responsibilities of other permitting agencies. For example, if a project involving the removal of

an inactive nest is being evaluated in a Bureau of Land Management (BLM) document and with appropriate consultation, the Service would allow the BLM to become the lead agency and establish appropriate mitigation, which would then be written into the "take" permit. This provision would allow for a streamlined approach for permitting and NEPA.

Service response: We agree that approaches such as that described by this comment make sense. We also think it would be beneficial to develop guidance for how to work with other agencies when issuing eagle permits, and plan to do so as resources allow.

Comment: No industry should be given priority over another. For example, a permit to support a wind energy project should not be given precedence over a permit to support a mining operation.

Service response: We do not give priority to any type of industry. If for some reason, we could permit only one of several interested industries, we would issue the permit on a first-come, first-served basis.

Comment: The regulations should require permittees to allow access to State wildlife agency staff to monitor permit compliance. Currently, the regulations require permittees to allow Service personnel and other qualified persons designated by the Service such access.

Service response: We cannot unilaterally create requirements for permittees that pertain to governmental agencies other than ourselves. We would have to coordinate with each State agency on a case-by-case basis. Many States do not want the extra burden of sharing management of a Federal permit program. We are pleased to work with any particular State that has the desire and resources to train and allocate staff to monitor eagle permits.

Comment: A portion of the permit fees should fund a permit writer in each regional office dedicated to eagle permits. This arrangement will allow for consistency and efficiency in

processing applications and meeting permit timelines.

Service response: Permit application processing fees are returned to the Regional Permit Office that issued the permit and are invested into administration of the permit program.

Comment: The fees for these programmatic permits increased substantially. The money from these fees should be used for wildlife conservation, mitigation, and monitoring in the region affected.

Service response: The programmatic permit application processing fees increased in 2013 because we learned from experience that they require much more staff time than we had originally anticipated. At this time, we estimate the fees are still not enough to recoup the costs of the technical assistance we provide during the permit application development phase for complex, long-term permits, so there is no "extra" money to be used for conservation work.

Comment: The rule should incorporate provisions to allow land managers to engage in habitat management activities that are beneficial to wildlife or plants, such as prescribed burns, natural community restoration, and nuisance species abatement, without liability for temporary disturbance to eagle.

Service response: If "temporary disturbance" is used in this comment to refer to mere annoyance and disruption, then a permit is not necessary because no take is occurring. For "temporary disturbance" to meet the regulatory definition of disturb, there has to be a biological effect to eagles in the form of injury or loss of productivity. For golden eagles, because their populations are not growing, any substantial injury or loss of productivity is likely to have population effects. For that reason, we think a permit is the appropriate tool to authorize those effects because of the conservation measures and compensatory mitigation required under permits. For bald eagles, the Eagle Act does not allow the Service to authorize take unless it is

done under a permit (16 U.S.C. 668a). We recognize the importance of prescribed burns, habitat restoration, and nuisance species abatement, and have issued a number of permits that cover disturbance to bald eagles from prescribed burns. These permits generally contain only reasonable—"no fuss"—conditions. We will continue to issue eagle permits to our partners for activities that benefit wildlife in an expeditious manner that best serves our common goals.

Comment: The slow pace of the eagle permitting process often leaves projects at risk of unauthorized take between the time the project is constructed and when the permit is issued. The Service should provide a mechanism such as a Technical Assistance Letter that includes a set of criteria under which a project receives some level of protection from prosecution during the interim period.

Service response: If project proponents are engaged in the permitting process in good faith, that is, with an actual interest in obtaining a permit, they should have a reasonable expectation that any take that occurs during the technical assistance phase will have a low priority for enforcement by the Service. Issuance of a letter "with a set of criteria" could generate substantial staff time equivalent to a mini permit process while not affording the project proponent legally sufficient relief from liability. We believe our resources are better served by focusing on the process of issuing the actual permit.

Comment: When a permit is transferred to another entity, the original permit holder should be responsible for all mitigation requirements that were required during the period of their ownership. Allowing the new permittee to take responsibility for the outstanding mitigation requirements may provide a disincentive for the original permit holder to carry out the mitigation.

Service response: The original permit holder is responsible for any mitigation that is required while the permit is in his or her name. If some conservation measures are not finished or have not yet been undertaken but were not anticipated to have been completed at the time of permit transfer, it is logical that whoever takes over the permit will be responsible for those measures. If the original permittee has neglected to implement conservation measures that were required to be done while the permit was in his or her name, the permittee could face an enforcement action. However, if the subsequent permittee agrees to carry out the outstanding mitigation and the resulting implemented mitigation will be the same as if the original permittee did it, we have no objection to two parties entering into such a contract.

Comment: Implementation of Avian Protection Plans allows for a cooperative model to address concerns, rather than through a more rigid permitting scheme that adds cost to avian protection activities. To maintain this flexibility, development and implementation of APPs should remain a viable option to address the same concerns that a 30-year programmatic permit would address.

Service response: We support development and implementation of APPs and Eagle Conservation Plans, but such plans are not permitting instruments and cannot remove liability for eagle take. It is the project proponent's choice as to whether to apply for a permit, but we wonder why, after going to the effort to develop a sound APP or ECP that would provide comparable conservation measures for eagles as would a permit, a project proponent would not want to secure the protection from liability that a permit confers.

Comment: A programmatic permit to take golden eagle nests under § 22.25 (removal of nests for resource development and recovery operations) should be the same length of time as

other programmatic permits and should not contain more stringent requirements to obtain a permit than what would be authorized under §§ 22.26 and 22.27.

Service response: We may consider extending the permit duration of § 22.25 permits if we open those regulations up for more substantial revisions in the future. Doing so would essentially allow for recurrent take of eagle nests for resource development and recovery. However, we question how often there would be a need for recurrent take authorization for resource development and recovery operations. Also, we do not perceive any other provisions in those regulations that are more stringent than what is required under § 22.27 permits. In any case, a project proponent engaged in resource development and recovery can apply for take authorization under § 22.27 if he or she prefers the terms and conditions of that permit to those of § 22.25.

Comment: Similar to the ESA and its implementing regulations at 50 CFR 17.31, the eagle permit regulations should include provisions for State wildlife agencies to take eagles as part of the agencies' management activities, for example, aiding injured or sick individuals, disturbing eagles while undergoing habitat management, salvaging carcasses, euthanizing mortally wounded eagles, and removing nests for specific management purposes.

Service response: Because of the requirement that a permit be issued to authorize bald eagle take, we cannot authorize this take through regulations that exempt a party from the permit requirement, as is done under 50 CFR 17.21 and 17.31 for ESA-listed species, and 50 CFR 21.12 for migratory birds other than eagles. To achieve the same ends, however, we issue a "master" permit to the directors of each State wildlife agency that allows for the range of activities listed by the commenter.

Comment: The regulations should clarify "disturbance" as it relates to eagle take and how the Service may use disturbance to infer a permit requirement.

Comment: The Service should establish and clearly define in the management objectives acceptable distances from eagle nests that are necessary to avoid disturbance of eagles in a given management area.

Service response: The Service defined "disturb" under the Eagle Act in a 2007 rulemaking (72 FR 31132, June 5, 2007) (codified at 50 CFR 22.3). The preamble to that rulemaking clarifies how the term is to be understood and applied. Our recommendations for buffer sizes and timing restrictions for activities around bald eagle nests are set forth in our 2007 National Bald Eagle Management Guidelines. We do not at this time have a similar guidance document for how to avoid golden eagle disturbance, but hope to develop one in the future. For more background on other eagle-related rulemakings and guidance documents, visit our eagle management web page at: http://www.fws.gov/birds/management/managed-species/eagle-management.php.

Comment: The revised regulations should clarify if the provisions of the Eagle Act usurp the authority of the ESA. The Service has made it difficult or impossible to obtain a permit to remove a golden eagle nest to protect California condors at their release site.

Service response: The ESA and the Eagle Act should be read together to avoid conflicts. Neither law usurps or trumps the other. The Service's preferred approach is to balance the interests of the various species it is mandated to protect. That approach has entailed consideration of other feasible alternatives before authorizing removal of a golden eagle nest, but eventual removal for such purposes remains a potential solution if other alternatives do not work.

Comment: New regulations should provide more information as to what other entities are expected to apply for programmatic permits. Will the regulations affect the aviation industry if there are more eagle strikes? Will they apply to State natural resource agencies if there is an increase in nontarget eagle catch associated with recreational trapping?

Service response: Permits would remain available under these proposed regulations to any person, organization, agency, or business that wishes to receive authorization for recurrent take of eagles. Experience so far is that airports have been more interested in permits to remove nests in the vicinity of airfields rather than permits to cover eagle strikes. Persons wishing to apply for eagle take permits for incidental take of eagles associated with trapping would apply to the Service, not to State natural resource agencies. If there have been increases in nontarget eagle catch by recreational trappers, the Service will consider bolstering educational efforts to reach trappers to ensure they understand such take is illegal and they must make every effort to avoid incidentally taking eagles.

Comment: The Service should establish an interagency consultation process for authorizing eagle take similar to that provided by ESA section 7(a)(2).

Service response: The ESA section 7 process is an exemption from the prohibitions of take, not an authorization for take. The Eagle Act does not provide for such exemptions and does not contain provisions mandating a consultation process for federal agency actions that may result in eagle take.

Comment: A condition of permits to wind companies should be to pick up all dead birds as often as possible to minimize the risk to scavenging eagles.

Service response: The Service supports and often requires removal of animal carcasses to reduce eagle mortalities, but it is unclear whether bird carcasses have the same attractant

qualities for eagles as dead livestock and other mammals. There may be circumstances where we would condition wind companies to remove dead birds from the site, but we do not agree that requirement should be a provision of every incidental take permit we issue to a wind energy facility. We explicitly do not want facilities to pick up dead eagles, and we have required protocols for contacting our Office of Law Enforcement when that happens. Sometimes, other birds protected under the MBTA must be left where they are killed for enforcement reasons. Some companies are conducting research to determine the effectiveness of different fatality monitoring protocols, and picking up carcasses could interfere with those studies. Additionally, some wind companies have also received migratory bird Special Purpose Utility Permits to monitor for purposes of methodically tracking where take occurs and collect the carcasses for identification and/or to prevent counting the same fatality twice.

Comment: The USFWS should reconsider the concept of "depredation" as applied to golden eagle take for the purpose of falconry. As with wildlife, golden eagles that fly into windmill power generators, with lethal results, become depredation involving wildlife. Therefore, incidental take of golden eagles by wind farms is "depredation" within the meaning of the Eagle Act, which allows golden eagle take at wind facilities for falconry purposes. Falconers permitted to trap golden eagles prior to entering a "wind farm" are undertaking the first mitigation priority—"avoiding" the potential of lethal take by the windmills. Golden eagles taken in this manner could be relocated to another safer area, with a small percentage of these "mitigated" eagles available for falconry purposes.

Service response: Depredation does not mean accidental killing. A review of several American English dictionaries consistently brings up the following definition for "depredate": "plunder and pillage." The eagle itself must be doing the depredating, not the wind turbines, and

an eagle that is killed by colliding with a turbine blade is not plundering itself. Under the Eagle Act, falconers cannot take any eagles except depredating eagles, so even if we supported the proposal to relocate eagles from wind energy facility sites, falconers could not legally retain them. With regard to whether a falconer—or anyone else—is undertaking avoidance by removing golden eagles from the area of a wind turbine, we do not agree: Routine eagle presence in the area of a wind facility indicates the area is good eagle habitat. Removing eagles out of a territory with good foraging opportunities and nest sites will result in new or the same eagles returning as long as the prey and site characteristics remain. Rather than creating a population sink by continually removing eagles and relocating them to areas where they may not be able to establish successful territories, the best way to avoid eagle take at wind energy facilities is to site those facilities outside of good eagle habitat and migration corridors.

Public Comments

We request comments or information from other concerned governmental agencies, Native American tribes, the scientific community, industry, and other interested parties concerning this proposed rule. We also welcome comments on defining low-risk activities and potential criteria for developing a general permit to minimize the costs of compliance for the public and the demand for agency resources for projects that will result in no more than minimal individual and cumulative adverse effects on eagles for our consideration in the future. While comments related to low-risk or general permits would be outside the scope of this rulemaking action, we would keep them for consideration if we decide to pursue further rulemaking in the future. You may submit your comments and supporting materials by one of the methods listed in **ADDRESSES**. We request that you submit comments by only one method. We will not consider comments sent by e-mail or fax, or written comments sent to an address other than the one listed

in **ADDRESSES**. If you submit a comment via *http://www.regulations.gov*, your entire comment—including any personal identifying information—will be posted on the Web site. If you submit a hardcopy comment that includes personal identifying information, you may request that we withhold this information from public review, but we cannot guarantee that we will be able to do so. We will post all hardcopy comments on *http://www.regulations.gov*.

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection at *http://www.regulations.gov*, or by appointment, during normal business hours, by contacting the person listed above under **FOR FURTHER INFORMATION CONTACT**.

Required Determinations

Regulatory Planning and Review (Executive Orders 12866 and 13563)

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will review all significant rules. OIRA has determined that this proposed rule is significant.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must

allow for public participation and an open exchange of ideas. We have developed this proposed rule in a manner consistent with these requirements.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (5 U.S.C. 601 et seq., as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 (Pub. L. 104-121)), whenever an agency is required to publish 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 businesses, small organizations, and small government jurisdictions. However, no regulatory flexibility analysis is required if the head of an agency certifies the rule would not have a significant economic impact on a substantial number of small entities.

SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide the statement of the factual basis for certifying that a rule would not have a significant economic impact on a substantial number of small entities. We have examined this proposed rule's potential effects on small entities as required by the Regulatory Flexibility Act and determined that this action would not have a significant economic impact on a substantial number of small entities.

In the first 6 years (FY 2010 through FY 2015) since the eagle permit regulations at 50 CFR 22.26 and 50 CFR 22.27 were published, the Service has received 626 permit applications for the two permit types and issued approximately 490 permits, including renewals. Of those, we estimate 410 permits were issued to small businesses. Over those 6 years, the annual number of applications received (including for renewals) increased from 50 per year in FY 2010 to 140 per year in FY 2015.

We received a total of 34 programmatic permit applications and have issued one programmatic permit thus far. We anticipate a greater volume of applications for permits for long-term activities in the future, although we expect the number to increase gradually for a period of years and perhaps eventually reach an average of 30 or fewer per year. Utility-scale wind energy facilities and electric transmission companies are likely to be the most frequent long-term permit applicants, because of the known risk to eagles from collisions with wind turbines and electric power lines. Although smaller wind energy facilities could seek permits, we anticipate that most of the applications for wind energy facilities will be for those that are commercial or utility scale. Although businesses in other business sectors, such as railroads, timber companies, and pipeline companies could also apply for permits, we anticipate the number of permit applicants in such sectors to be very small, on the order of one or two per year for each such sector. Thus, we anticipate that the proposed rule would not have a significant economic impact on a substantial number of small entities.

Under these proposed regulations, an applicant for a long-term permit would pay a $15,000 Administration Fee (an increase from the current fee of $2,600) every 5 years to cover the cost of the 5-year permit evaluations. The initial permit application fee of $36,000 for a long-term permit will remain the same. We do not believe the increased Administration Fee would impose a significant economic impact on these small entities.

A commercial applicant for an incidental take permit of a duration less than 5 years would pay a $2,500 permit application processing fee, an increase from the current fee of $1,000 for programmatic permits and $500 for standard permits. The amendment fee for those permits would increase from $150 to $500. A commercial applicant for a nest take permit for a single nest would pay a $2,500 permit application processing fee, an increase from the current fee of

$500 for standard permits. The amendment fee for those permits would also increase from $150 to $500. An applicant for a nest take permit for multiple nests would pay a $5,000 permit application processing fee, an increase from the current fee of $1,000 for programmatic permits. None of these fee increases are significant for commercial entities and all are necessary to recoup as much of the Service's costs in providing these services to these entities. The amendment fee for those permits would remain the same as the current programmatic nest take amendment fee ($500).

Based on trends in the numbers of permit applications under the current regulations, we project there would be fewer than 100 small entities subject to the proposed fee increases annually, including renewal and amendments, which will not result in a significant impact on a substantial number of small entities. We request comments and information from industry and any other interested parties regarding probable economic impacts of this proposal.

Additional practicable mitigation measures that may be required under the terms and conditions of permits issued with a term of longer than 5 years could result in some additional costs to the permittee, but those costs should be offset by the reduction in uncertainty for the permittee achieved by securing a 30-year permit rather than a 5-year permit. Consequently, we certify that because this proposed rule would not have a significant economic effect on a substantial number of small entities, an initial regulatory flexibility analysis is not required.

We are also proposing minor revisions to the eagle nest take permit regulations at 50 CFR 22.27, but none of the proposed changes are expected to have a significant economic effect on a substantial number of small entities.

This proposed rule is not a major rule under SBREFA (5 U.S.C. 804(2)) because:

a. This proposed rule would not have an annual effect on the economy of $100 million or more.

b. This proposed rule would not cause a major increase in costs or prices for consumers; individual industries; Federal, State, or local government agencies; or geographic regions.

c. This proposed rule would not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

Unfunded Mandates Reform Act

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.), we have determined the following:

a. This proposed rule would not "significantly or uniquely" affect small governments. A small government agency plan is not required. The proposed regulations changes would not affect small government activities in any significant way.

b. This proposed rule would not produce a Federal mandate of $100 million or greater in any year. It is not a "significant regulatory action" under the Unfunded Mandates Reform Act.

Takings

In accordance with E.O. 12630, the rule would not have significant takings implications. This proposed rule does not contain any provisions that could constitute taking of private property. Therefore, a takings implication assessment is not required.

Federalism

This proposed rule would not have sufficient Federalism effects to warrant preparation of a Federalism assessment under E.O. 13132. It would not interfere with the States' abilities to

manage themselves or their funds. No significant economic impacts are expected to result from the proposed regulations change.

Civil Justice Reform

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

Paperwork Reduction Act of 1995 (PRA)

This proposed rule contains a collection of information that we have submitted to the Office of Management and Budget (OMB) for review and approval under the PRA (44 U.S.C. 3501 et seq.). After publication of the "Duration Rule" in 2013, we included the burden associated with eagle permits in our renewal of OMB Control No. 1018-0022. OMB has reviewed and approved the information collection requirements for applications, annual reports, and nonhour cost burden associated with eagle permits and assigned OMB Control Number 1018–0022, which expires May 31, 2017. The approval includes long-term (more than 5 years) eagle take permits.

This proposed rule does not revise the number of responses or total annual burden hours associated with eagle permits. However, we believe the approved estimates for the number of annual responses are high. We will adjust our estimates when we renew OMB Control No. 1018-0022.

This proposed rule would:

(1) Establish an administration fee of $15,000 that each permittee will pay every 5 years to cover the cost of the 5-year permit evaluations. We will not collect this fee until the permittee has had a permit for at least 5 years. We expect that we will not impose this fee until at least 2022.

(2) Change the application fees associated with some permits.

(3) Require annual reports. This requirement is approved under OMB Control Number 1018-0022. There are no fees associated with annual reports.

(4) Establish a new reporting requirement and a new administration fee for permits of over 5 years.

We are seeking OMB approval for changes in burden and nonhour cost burden associated with the proposed rule. We are requesting that OMB assign a new control number for the revised burden. When we publish the final rule, we will incorporate the new nonhour cost burden into OMB Control Number 1018–0022 and discontinue the new number. An agency may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid OMB control number.

Title: Eagle Take Permits and Fees, 50 CFR 22.

OMB Control Number: 1018-XXXX. This is a new collection.

Service Form Number(s): 3–200–71, 3-200-72

Type of Request: New collection.

Description of Respondents: Individuals and businesses. We expect that the majority of applicants seeking long-term permits will be in the energy production and electrical distribution business.

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

Frequency of Collection: On occasion.

Table 1 – Proposed Information Collection Requirements

Activity/Requirement	Existing Approval (1018-0022)	Current Fee	Proposed Fee	Total Approved Nonhour Burden Cost	Total Proposed Nonhour Burden Cost	Difference between 1018-0022 and proposed

CHANGE IN NONHOUR COST BURDEN						
3-200-71 - application, Eagle Incidental Take – (not programmatic or long-term)[1]	No. of responses and annual burden hours approved under OMB Control No. 1018-0022. This proposed rule revises fees and nonhour costs.	$500 $500	$500 – Homeowner $2,500 – Commercial	$72,500	$ 12,500 $300,000	+$240,000
3–200-72 - application, **Eagle Nest Take** – single nest (formerly "standard")[2]	No. of responses and annual burden hours approved under OMB Control No. 1018-0022. This proposed rule revises fees and nonhour costs.	$500	$500 – Homeowner $2,500 – Commercial	$15,000	$55,000	+$40,000
3–200-72—application, Eagle Nest Take – multiple nests (formerly "programmatic")[3]	No. of responses and annual burden hours approved under OMB Control No. 1018-0022. This proposed rule revises fees and nonhour costs.	$0	$500 – Homeowner $2,500 – Commercial	$ 0	$20,500	+$20,500
3-200-71 Eagle Incidental Take Amendment -less than 5 years (formerly "standard"[4]	No. of responses and annual burden hours approved under OMB Control No. 1018-0022. This proposed rule revises fees and nonhour costs.	$150	$150 – Homeowner $500 - Commercial	$3,000[5]	$9,300	$6,300
3-200-72 Eagle Nest Take Amendment- "Single nest" (formerly "standard")[4]	No. of responses and annual burden hours approved under OMB Control No. 1018-0022. This proposed rule revises fees and nonhour costs.	$150	$150 – Homeowner $500 – Commercial	$750[6]	$2,150	+$1,400
3-200-71 Amendment - Eagle Incidental Take Programmatic	No. of responses and annual burden hours approved under OMB Control No. 1018-0022. This proposed rule revises fees and nonhour costs.	$1,000	No Fee[7]	$2,000		- $2,000
NO CHANGE OR FEES – BURDEN INCLUDED IN EXISTING APPROVAL OF 1018-0022						
§ 22.26(c)(3) – Annual Report[8]	No. of responses and annual burden hours approved under OMB Control No. 1018-0022. This proposed rule revises fees and nonhour costs.					

NEW REPORTING REQUIREMENT AND NEW ADMINISTRATION FEE							
Activity/Requirement	**Estimated Number of Annual Responses**	**Estimated Number of Annual Burden Hours**	**Current Fee**	**Proposed Fee**	**Total Approved Nonhour Burden Cost**	**Total Proposed Nonhour Burden Cost**	**Difference between 1018-0022 and proposed**
§ 22.26(c)(7)(ii) - ***Permit reviews***. At no more than 5 years from the date a permit that exceeds 5 years is issued, and every 5 years thereafter, the permittee compiles and submits to the Service, eagle fatality data or other pertinent information that is site-specific for the project.[9]	4	32	0	$15,000	0	$60,000	+$60,000
TOTAL	4	32			93,250	459,450	366,200

[1] Approved under1018-0022 – 145 annual responses (25 from individuals/households (homeowners) and 120 from the private sector (commercial) totaling 2,320 annual burden hours) (400 burden hours for individuals and 1,920 annual burden hours for private sector); $500 permit fee for both individuals and private sector for a total nonhour burden cost of $72,500. This proposed rule changes the application fees: Homeowner fee would remain $500; private sector fee (commercial) would increase to $2,500. Total for 25 homeowners - $12,500; Total for 125 commercial applicants - $300,000).

[2] Approved under 1018-0022 – 30 responses (10 from Individuals/homeowners and 20 from private sector (commercial) totaling 480 burden hours (160 hours (individuals) and 320 hours (private sector). Homeowner fee would remain $500; private sector fee (commercial) would increase to $2,500. Total for 10 homeowners - $5,000.; Total for 20 commercial applicants - $50.000).

[3] Approved under 1018-0022 – 9 responses (1 from Individuals/homeowners and 8 from private sector (commercial) totaling 360 burden hours (40 hrs (individuals) and 320 hrs (private sector). The approved non-hour burden cost is $0; however, that is an error. The permit application processing fee for programmatic nest take permits under the current regulations is $1,000, so the total current burden cost should be $9,000 (9 responses). Under the proposed rule, the homeowner fee would increase to $500; private sector fee (commercial) would increase to $2,500. Total for 1 homeowner - $500; total for 8 commercial - $20,000.

[4] The amendments for standard non-purposeful eagle take permits and standard eagle nest take permits are combined in the approved collection for a total of 25. Here they are split into 20 eagle incidental take permit amendments and 5 eagle nest take permit amendments.

[5] Two Homeowner, Eighteen Commercial.

[6] One Homeowner; Four Commercial

[7] The amendment fee for long-term programmatic permits is approved under 1018-0022. Under this proposed rule, it is being removed because the costs associated with it would be included under the proposed Administration Fee.

[8] Approved under 1018-0022 (3-202-15) – 540 responses (20 from individuals/households and 520 from private sector) totaling 16,200 annual burden hours; nonhour cost burden $ 0. There are no fees for annual reports.

[9] This is a new reporting requirement as well as a new Administration Fee. We will not receive any reports or assess the Administration Fee until after a permittee has had a permit for 5 years (earliest probably 2022). We estimate that we will receive 19 responses every 5 years, annualized over the 3-year period of OMB approval results in 4 responses annually. We estimate that each response will take 8 hours, for a total of 32 annual burden hours. We will assess a $15,000 administration fee for each permittee for a total of $60,000. Note: this burden reflects what will be imposed in 5 years. Each 5 years thereafter, the burden and nonhour costs will increase because of the number of permittees holding 5-year or longer term permits.

Estimated Total Nonhour Burden Cost: $459,450 for administration fees and application fees associated with changes in this proposed rule. This does not include the nonhour cost burden for eagle/eagle nest take permits approved under OMB Control No. 1018-0022. States, local governments, and tribal governments are exempt from paying these fees.

As part of our continuing effort to reduce paperwork and respondent burdens, we invite the public and other Federal agencies to comment on any aspect of this information collection, including:

(1) Whether or not the collection of information is necessary, including whether or not the information will have practical utility;

(2) The accuracy of our estimate of the burden for this collection of information;

(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 respondents.

If you wish to comment on the information collection requirements of this proposed rule, send your comments directly to OMB (see detailed instructions under the heading Comments on the Information Collection Aspects of this Proposal in the **ADDRESSES** section). Please identify your comments with 1018–AY30. Provide a copy of your comments to the Service Information Collection Clearance Officer (see detailed instructions under the heading Comments on the Information Collection Aspects of this Proposal in the **ADDRESSES** section).

National Environmental Policy Act

We have prepared a draft programmatic environmental impact statement (DPEIS) under the requirements of the NEPA of 1969 (42 U.S.C. 4321 et seq.). The DPEIS analyzes the effects of this proposed rule and our proposed associated management objectives, as well as alternatives to these proposed rule revisions and proposed management objectives. The DPEIS is available online at www.regulations.gov by clicking on the link entitled "Non-Eagle Management and Regulations DPEIS" and is also available on the Service's website at: http://www.fws.gov/birds/management/managed-species/eagle-management.php. .

In addition, the Environmental Protection Agency (EPA) is publishing a notice of availability in the **Federal Register** announcing the DPEIS, as required under section 309 of the Clean Air Act (42 U.S.C. 7401 et seq.). All EISs are filed with EPA, which publishes a notice of availability on Fridays in the **Federal Register**. For more information, see http://www.epa.gov/compliance/nepa/eisdata.html. The publication date of EPA's notice of availability is the official start of the public comment period for the draft EIS. Under the Clean Air Act, EPA also must subsequently announce the final PEIS via the **Federal Register**.

The EPA is charged under section 309 of the Clean Air Act to review all Federal agencies' environmental impact statements (EISs) and to comment on the adequacy and the acceptability of the environmental impacts of proposed actions in the EISs. EPA also serves as the repository (EIS database) for EISs prepared by Federal agencies. The Environmental Impact Statement (EIS) Database provides information about EISs prepared by Federal agencies, as well as EPA's comments concerning the EISs. You may search for EPA comments on EISs, along with EISs themselves, at https://cdxnodengn.epa.gov/cdx-enepa-public/action/eis/search.

Endangered and Threatened Species

Section 7 of the Endangered Species Act (ESA) of 1973, as amended (16 U.S.C. 1531 et seq.), requires 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" (16 U.S.C. 1536(a)(2)). Service policies require assessment of impacts to certain rare, candidate, declining, and sensitive species. Before issuance of the final regulations and final DPEIS, the Service will comply with provisions of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531–1543; hereinafter the Act), to ensure that the rulemaking is not likely to jeopardize the continued existence of any species designated as endangered or threatened or modify or destroy its critical habitat and is consistent with conservation programs for those species. Consultations under section 7 of the Act may cause us to change proposals in this and future supplemental proposed rulemaking documents.

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), E.O. 13175, and 512 DM 2, we have evaluated potential effects on federally recognized Indian tribes and have determined that this proposed rule would not interfere with tribes' abilities to manage themselves, their funds, or tribal lands. In September of 2013, we sent a letter to all federally recognized tribes inviting them to consult about possible changes to the eagle take permit regulations. The letter notified Tribes of the Service's intent to amend the regulations and sought feedback about their interest in consultation on the amendment. After sending these letters and receiving responses from several Tribes, FWS conducted webinars, group meetings, and

meetings with individual Tribes. The FWS will continue to respond to all Tribal requests for consultation on this effort.

Several tribes that value eagles as part of their cultural heritage objected to the 2013 rule that extended maximum permit duration for programmatic permits based on a concern that the regulations would not adequately protect eagles. Those tribes may perceive further negative effects from similar provisions proposed in this rulemaking. However, eagles would be sufficiently protected under this proposal because only those applicants who commit to adaptive management measures to ensure the preservation of eagles will receive permits with terms longer than 5 years and those permits will be reviewed at 5-year intervals and amended if necessary.

Energy Supply, Distribution, or Use (Executive Order 13211)

E.O. 13211 addresses regulations that significantly affect energy supply, distribution, and use. E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This rule, if finalized as proposed, would likely be used by numerous energy generation projects seeking compliance with the Eagle Act. However, the rule is not a significant regulatory action under E.O. 13211, and no Statement of Energy Effects is required.

Material Incorporated by Reference

These proposed regulations incorporate by reference two appendices of the Service's Eagle Conservation Plan Guidance, Module 1—Land-based Wind Energy (ECPG) (USFWS, 2013). The guidance went through two periods of public notice and comment during its development and, separately, was twice peer-reviewed by independent third-parties. The ECPG is available in the Service's website at: http://www.fws.gov/migratorybirds/pdf/management/eagleconservationplanguidance.pdf.

Proposed provisions at § 22.26(d)(3)(i) would incorporate by reference are ECPG Appendix C: Stage 2 – Site-Specific Surveys and Assessment and ECPG Appendix D: Stage 3 – Predicting Eagle Fatalities.

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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.

Proposed Regulation Promulgation

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—GENERAL PERMIT PROCEDURES

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

AUTHORITY: 16 U.S.C. 668a, 704, 712, 742j–l, 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. In § 13.11, revise the entries for "Bald and Golden Eagle Protection Act" in the table in paragraph (d)(4) to read as follows:

§ 13.11 Application procedures.

* * * * *

(d) * * *

(4) * * *

Type of Permit	CFR Citation	Permit Application Fee	Amendment Fee
* * * * * * *			
Bald and Golden Eagle Protection Act			
Eagle Scientific Collecting	50 CFR part 22	100	50
Eagle Exhibition	50 CFR part 22	75	
Eagle Falconry	50 CFR part 22	100	
Eagle—Native American Religion	50 CFR part 22	No fee	
Eagle Take permits—Depredation and Protection of Health and Safety	50 CFR part 22	100	
Golden Eagle Nest Take	50 CFR part 22	100	50
Eagle Transport—Scientific or Exhibition	50 CFR part 22	75	
Eagle Transport—Native American Religious Purposes	50 CFR part 22	No fee	
Eagle Incidental Take—Up to 5 years	50 CFR part 22	2,500	500
Eagle Incidental Take—Homeowner	50 CFR part 22	500	150
Eagle Incidental Take—5–30 years	50 CFR part 22	36,000	
Eagle Incidental Take—Transfer of a permit	50 CFR part 22	1,000	
Eagle Nest Take—Single nest	50 CFR part 22	2,500	500
Eagle Nest Take—Multiple nests	50 CFR part 22	5,000	500
Eagle Nest Take—Homeowner	50 CFR part 22	500	150
Eagle Take—Exempted under ESA	50 CFR part 22	No fee	

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PART 22—EAGLE PERMITS

3. The authority citation for part 22 is revised to read as follows:

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

4. Amend § 22.3 by:

a. Removing the definition of "Advanced conservation practices";

b. Adding a definition for "Alternate nest";

c. Removing the definition of "Area nesting population";

d. Adding definitions for "Compatible with the preservation of the bald eagle or the golden eagle" and "Eagle management unit";

d. Revising the definition of "Eagle nest";

e. Removing the definition of "Inactive nest";

f. Adding definitions for "In-use nest" and "Local area population";

g. Removing the definition of "Maximum degree achievable";

h. Adding a definition for "Nesting territory";

i. Revising the definition of "Practicable"; and

j. Removing the definitions of "Programmatic permit", "Programmatic take", and "Territory".

The additions and revisions read as follows:

§ 22.3 What definitions do you need to know?

* * * * *

Alternate nest means one of potentially several nests within a nesting territory that is not a used nest at the current time. When there is no used nest, all nests in the territory are alternate nests.

* * * * *

Compatible with the preservation of the bald eagle or the golden eagle means consistent with the goals of maintaining stable or increasing breeding populations in all eagle management units and persistence of local populations throughout the geographic range of both species.

* * * * *

Eagle management unit (EMU) means the geographic scale over which permitted take is regulated to meet the management objective.

Eagle nest means any assemblage of materials built, maintained, or used by bald eagles or golden eagles for the purpose of reproduction.

* * * * *

In-use nest means a bald or golden eagle nest characterized by the presence of one or more eggs, dependent young, or adult eagles on the nest in the past 10 days during the breeding season.

* * * * *

Local area population (LAP) means the bald or golden eagle population within the area of a human activity or project bounded by the natal dispersal distance for the respective species. The LAP is estimated using the average eagle density of the EMU or EMUs where the activity or project is located.

* * * * *

Nesting territory means the area that contains one or more eagle nests within the home range of a mated pair of eagles, regardless of whether such nests were built by the current resident pair.

* * * * *

Practicable means available and capable of being done after taking into consideration existing technology, logistics, and cost in light of a mitigation measure's beneficial value to eagles and the activity's overall purpose, scope, and scale.

* * * * *

§ 22.4 [Amended]

5. Amend § 22.4(a) by removing "and 1018–0136" in the first sentence.

6. Amend § 22.11 by revising paragraph (c) to read as follows:

§ 22.11 What is the relationship to other permit requirements?

* * * * *

(c) A permit under this part only authorizes take, possession, and/or transport under the Bald and Golden Eagle Protection Act and does not provide authorization under the Migratory Bird Treaty Act or the Endangered Species Act for the take, possession, and/or transport of migratory birds or endangered or threatened species other than bald or golden eagles.

* * * * *

7. Amend **§** 22.25 by:

a. Revising the first sentence of the introductory text;

b. Removing the semicolons at the ends of paragraphs (a)(1) and (2) and adding periods in their place;

c. Revising paragraph (a)(4);

d. Removing the semicolon at the end of paragraph (a)(5) and adding a period in its place;

e. Removing paragraph (a)(6) and redesignating paragraphs (a)(7) through (9) as paragraphs (a)(6) through (8);

f. Removing the semicolon at the end of newly redesignated paragraph (a)(6) and adding a period in its place and removing "; and" at the end of newly redesignated paragraph (a)(7) and adding a period in its place;

g. Revising paragraphs (b)(1) and (4);

h. Removing paragraphs (c)(3) and (6) and redesignating paragraphs (c)(4) and (5) as paragraphs (c)(3) and (4); and

i. Revising newly designated paragraphs (c)(3) and (4).

The revisions read as follows:

§ 22.25 What are the requirements concerning permits to take golden eagle nests?

The Director may, upon receipt of an application and in accordance with the issuance criteria of this section, issue a permit authorizing any person to take alternate golden eagle nests during a resource development or recovery operation if the taking is compatible with the preservation of golden eagles. * * *

(a) * * *

(4) *Nest and territory occupancy data.* (i) For each golden eagle nest proposed to be taken, the applicant must identify on an appropriately scaled map or plat the exact location of each golden eagle nest in the nesting territory. The map or plat must contain enough details so that each golden eagle nest can be readily located by the Service.

(ii) A description of the monitoring that was done to verify that eagles are not attending the nest for breeding purposes, and any additional available documentation used in identifying which nests within the territory were in-use nests in current and past breeding seasons.

* * * * *

(b) * * *

(1) Only alternate golden eagle nests may be taken;

* * * * *

(4) The permittee must comply with any mitigation and monitoring measures determined by the Director to be practicable and compatible with the resource development or recovery operation; and

* * * * *

(c) * * *

(3) Whether suitable golden eagle nesting and foraging habitat unaffected by the resource development or recovery operation is available to accommodate any golden eagles displaced by the resource development or recovery operation; and

(4) Whether practicable mitigation measures compatible with the resource development or recovery operation are available to encourage golden eagles to reoccupy the resource development or recovery site. Mitigation measures may include, but are not limited to, reclaiming disturbed land to enhance golden eagle nesting and foraging habitat, relocating in suitable habitat any golden eagle nest taken, or establishing one or more nest sites.

* * * * *

8. Amend § 22.26 by:

a. Revising paragraphs (a) and (c)(1) through (3);

b. Redesignating paragraphs (c)(7) through (10) as (c)(8) through (11) and adding new paragraph (c)(7);

c. Revising paragraph (d)(2) and adding paragraph (d)(3);

d. Revising paragraph (e)(1);

e. Redesignating paragraphs (e)(3), (4), and (5) as paragraphs (e)(5), (7), and (9), adding new paragraphs (e)(3), (4), (6), and (8);

f. Revising newly redesignated paragraphs (e)(5) and (e)(7)(i) through (iv);

g. Removing newly redesignated paragraph (e)(7)(v);

h. Revising paragraphs (f)(2) through (6);

i. Adding paragraphs (f)(7) and (8); and

j. Revising paragraph (h).

The revisions and additions read as follows:

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

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

* * * * *

(c) * * *

(1) You must comply with all avoidance, minimization, or other mitigation measures specified in the terms of your permit to mitigate for the detrimental effects on eagles, including indirect effects, of the permitted take.

(i) Compensatory mitigation scaled to project impacts will be required for any permit authorizing take that would exceed the authorized take limits. Compensatory mitigation for this purpose must ensure the preservation of the affected eagle species by reducing another ongoing form of mortality by an amount equal to or greater than the unavoidable mortality, or increasing carrying capacity to allow the eagle population to grow by an equal or greater amount.

(ii) Compensatory mitigation may also be required in the following circumstances:

(A) When cumulative authorized take, including the proposed take, would exceed 5 percent of the local area population; or

(B) When available data indicate that cumulative unauthorized mortality would exceed 10 percent of the local area population.

(iii) All required compensatory mitigation must:

(A) Be determined based on application of all practicable avoidance and minimization measures;

(B) Be sited within the same eagle management unit where the permitted take will occur unless the Service has reliable data showing that the population affected by the take includes individuals that are reasonably likely to use another EMU during part of their seasonal migration;

(C) Use the best available science in formulating and monitoring the long-term effectiveness of mitigation measures;

(D) Be additional to any existing or foreseeably expected conservation and mitigation efforts planned for the future;

(E) Be durable and, at a minimum, maintain its intended purpose for as long as impacts of the authorized take persist; and

(F) Account for uncertainty and risk of failure with regard to the amount of compensatory mitigation required.

(iv) Compensatory mitigation may include conservation banking, in-lieu fee programs, and other third-party mitigation projects or arrangements. Permittee-responsible mitigation may be approved provided the permittee submits verifiable documentation sufficient to demonstrate that the standards set forth in paragraph (c)(1)(iii) of this section have been met and the alternative means of compensatory mitigation will offset the permitted take to the degree that is compatible with the preservation of eagles.

(2) *Monitoring.* (i) You may be required to monitor eagle use of important eagle-use areas where eagles are likely to be affected by your activities for up to 3 years after completion of the activity or as set forth in a separate management plan, as specified on your permit. For ongoing activities and enduring site features that will likely continue to result in take, periodic monitoring may be required for as long as the data are needed to assess impacts to eagles.

(ii) The frequency and duration of required monitoring will depend on the form and magnitude of the anticipated take and the objectives of associated avoidance, minimization, or other mitigation measures, not to exceed what is reasonable to meet the primary purpose of the monitoring, which is to provide data needed by the Service regarding the impacts of the activity on eagles for purposes of adaptive management. You must coordinate with the Service to develop project-specific monitoring protocols. If the Service has officially issued or endorsed, through rulemaking procedures, monitoring protocols for the activity that will take eagles, you must follow them, unless the Service waives this requirement.

(3) You must submit an annual report summarizing the information you obtained through monitoring to the Service every year that your permit is valid and for up to 3 years after

completion of the activity or termination of the permit, as specified in your permit. The Service will make eagle mortality information from annual reports available to the public.

* * * * *

(7) *Additional conditions for permits with durations longer than 5 years*—(i) *Adaptive management*. The permit may specify conditions under which modifications to avoidance, minimization, or compensatory mitigation measures or monitoring protocols may be required.

(ii) *Permit reviews*. At no more than 5 years from the date a permit that exceeds 5 years is issued, and every 5 years thereafter, the permittee will compile, and submit to the Service, eagle fatality data or other pertinent information that is site-specific for the project, as required by the permit. The Service will review the information to determine:

(A) Whether adaptive management conditions specified in the permit pursuant to paragraph (c)(7)(i) of this section have been reached that would indicate that modifications to avoidance, minimization, or other mitigation measures or monitoring protocols as described in the permit should be implemented; and

(B) Whether, after negotiation with the permittee, to make additional changes to a permit, including any of the following:

(*1*) Update fatality predictions and authorized take levels for the facility.

(*2*) Add, remove, or adjust avoidance and minimization measures. Such measures may be required if:

(*i*) Authorized take levels are, or likely will be, exceeded;

(*ii*) Additional or modified, appropriate and practicable avoidance and/or minimization measures shown to be effective in reducing risk to eagles become available and are feasible to implement at reasonable cost to the permittee; or

(*iii*) Avoidance and/or minimization measures in place are shown to be ineffective or unnecessary.

(*3*) Update monitoring requirements.

(*4*) Suspend or revoke the permit in accordance with part 13 of this subchapter B.

(C) In consultation with the permittee, compensatory mitigation for future years for the project, taking into account the observed levels of take based on approved protocols for monitoring, searching, and estimating total take, and also accounting for changes in operations or permit conditions pursuant to paragraphs (c)(7)(ii)(A) and (B) of this section.

(iii) *Fees.* For permits with terms longer than 5 years, an Administration Fee of $15,000 will be assessed every 5 years for permit review.

* * * * *

(d) * * *

(2) Your application must consist of a completed application Form 3–200–71 and all required attachments. Send applications to the Regional Director of the Region in which the take 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.

(3) Applicants must coordinate with the Service to develop project-specific monitoring and survey protocols, take probability models, and any other applicable data quality standards, and include in your application all the data thereby obtained.

(i) If the Service has officially issued or endorsed, through rulemaking procedures, survey, modeling, or other data quality standards for the activity that will take eagles, you must follow them and include in your application all the data thereby obtained, unless the Service waives this requirement for your application. Applicants seeking an eagle take permit for a

wind-energy generation facility must follow the data quality standards in Appendices C, and D of the Eagle Conservation Plan Guidance, Module 1–Land-based Wind Energy, available at https://www.fws.gov/migratorybirds/pdf/management/eagleconservationplanguidance.pdf, which are incorporated by reference into this paragraph, and include in your application all the data thereby obtained, unless the Service waives this requirement for your application.

(ii) Application of the Service-endorsed data quality standards of paragraph (d)(3)(i) of this section may not be needed if:

(A) The Service has data of sufficient quality to predict the likely risk to eagles;

(B) Expediting the permit process will benefit eagles; or

(C) The Service determines the risk to eagles from the activity is low enough relative to the status of the eagle population based on:

(1) Physiographic and biological factors of the project site; or

(2) The project design (i.e., use of proven technology, micrositing, etc.).

(e) * * *

(1) Whether take is likely to occur based on the magnitude and nature of the impacts of the activity.

* * * * *

(3) Whether the cumulative authorized take, including the proposed take, would exceed 5 percent of the local area population.

(4) Any available data indicating that unauthorized take may exceed 10 percent of the local area population.

(5) Whether the applicant has proposed all avoidance and minimization measures to reduce the take to the maximum degree practicable relative to the magnitude of the impacts to eagles.

(6) Whether the applicant has proposed all appropriate and practicable compensatory mitigation measures to compensate for remaining unavoidable impacts after all appropriate and practicable avoidance and minimization measures have been applied.

(7) * * *

(i) Safety emergencies;

(ii) Increased need for traditionally practiced Native American tribal religious use that requires eagles be taken from the wild;

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

(iv) Other interests.

(8) For projects that are already operational and have taken eagles without a permit, whether such past unpermitted eagle take has been resolved or is in the process of resolution with the Office of Law Enforcement through settlement or other appropriate means.

(f) * * *

(2) The take will not result in cumulative authorized take that exceeds 5 percent of the local area population, or the Service can determine that permitting take over 5 percent of that local area population is compatible with the preservation of the bald eagle or the golden eagle.

(3) The taking is necessary to protect a legitimate interest in a particular locality.

(4) The taking is associated with, but not the purpose of, the activity.

(5) The applicant has applied all appropriate and practicable avoidance and minimization measures to reduce impacts to eagles.

(6) The applicant has applied all appropriate and practicable compensatory mitigation measures, when required, pursuant to paragraph (c) of this section, to compensate for remaining unavoidable impacts after all appropriate and practicable avoidance and minimization measures have been applied.

(7) Issuance of the permit will not preclude issuance of another permit necessary to protect an interest of higher priority as set forth in paragraph (e)(7) of this section.

(8) Issuance of the permit will not interfere with an ongoing civil or criminal action concerning unpermitted past eagle take at the project.

* * * * *

(h) *Permit duration.* The duration of each permit issued under this section will be designated on its face and will be based on the duration of the proposed activities, the period of time for which take will occur, the level of impacts to eagles, and the nature and extent of mitigation measures incorporated into the terms and conditions of the permit. A permit for incidental take will not exceed 30 years.

* * * * *

9. Amend § 22.27 by:

a. Revising paragraphs (a)(1)(i) through (iv), (a)(3), and (b)(1), (2), and (7);

b. Redesignating paragraphs (b)(8) through (10) as paragraphs (b)(9) through (11) and adding a new paragraph (b)(8); and

c. Revising paragraphs (e)(1), (e)(2) introductory text, (e)(2)(ii) and (iii), and (e)(4) through (6)..

The revisions and addition read as follows:

§ 22.27 Removal of eagle nests.

(a) * * *

(1) * * *

(i) An in-use or alternate nest where necessary to alleviate an existing safety emergency, or to prevent a rapidly developing safety emergency that is otherwise likely to result in bodily harm to humans or eagles while the nest is still in use by eagles for breeding purposes;

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

(iii) An alternate nest, or an in-use nest prior to egg-laying, that is built on a human-engineered structure and creates, or is likely to create, a functional hazard that renders the structure inoperable for its intended use; or

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

* * * * *

(3) A permit may be issued under this section to cover multiple nest takes over a period of up to 5 years, provided the permittee complies with comprehensive measures developed in coordination with the Service to minimize the need to remove nests and specified as conditions of the permit.

* * * * *

(b) * * *

(1) The permit does not authorize take of in-use nests except:

(i) For safety emergencies as provided under paragraph (a)(1)(i) of this section; or

(ii) Prior to egg-laying if the in-use nest is built on a human-engineered structure and meets the provisions set forth in paragraph (a)(1)(iii) of this section.

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

* * * * *

(7) You must comply with all avoidance, minimization, or other mitigation measures specified in the terms of your permit to mitigate for the detrimental effects on eagles, including indirect effects, of the permitted take.

(8) Compensatory mitigation scaled to project impacts will be required for any permit authorizing take that would exceed the authorized take limits. Compensatory mitigation may also be required in the following circumstances:

(i) When cumulative authorized take, including the proposed take, would exceed 5 percent of the local area population;

(ii) When available data indicates that cumulative unauthorized mortality would exceed 10 percent of the local area population;

(iii) If otherwise necessary to maintain the persistence of local eagle populations throughout their geographic range; or

(iv) If the permitted activity does not provide a net benefit to eagles, you must apply appropriate and practicable compensatory mitigation measures as specified in your permit to provide a net benefit to eagles scaled to the effects of the nest removal.

* * * * *

(e) * * *

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

(2) For alternate nests:

* * * * *

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

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

(3) For in-use nests prior to egg-laying, the nest is built on a human-engineered structure and creates, or is likely to create, a functional hazard that renders the structure inoperable for its intended use.

(4) For in-use nests, the take is necessary to alleviate an existing safety emergency, or to prevent a rapidly developing safety emergency that is otherwise likely to result in bodily harm to humans or eagles while the nest is still in use by eagles for breeding purposes.

(5) There is no practicable alternative to nest removal that would protect the interest to be served.

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

(i) Safety emergencies;

(ii) Increased need for traditionally practiced Native American tribal religious use that requires eagles be taken from the wild;

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

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

(v) Other interests.

* * * * *

Dated: May 2, 2016

Michael Bean

Deputy Assistant Secretary for Fish and Wildlife and Parks.

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