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September 4, 2007

Ms. Eliza Savage  
Division of Migratory Bird Management  
Attn: RIN 1018-AV11  
United States Fish and Wildlife Service  
MBSP-4107  
Arlington, Virginia 22203

Dear Ms. Savage:

On behalf of the National Audubon Society, including its state offices and one million members and supporters, we are pleased to submit the following comments on the Fish and Wildlife Service's proposed Bald Eagle permit rule. Our comments are intended to strengthen the final rule, so that it ensures adequate protection for Bald Eagles under the Bald and Golden Eagle Protection Act (BGEPA).

### **Audubon's Interest in Protecting Bald Eagles**

The National Audubon Society is a not-for-profit corporation organized under the laws of the State of New York, with its principal office at 700 Broadway, New York, New York 10003. Audubon has a presence in all 50 states through more than 450 certified chapters, nature centers, sanctuaries, and education and science programs. Audubon's mission is to conserve and restore natural ecosystems, focusing on birds, other wildlife, and their habitats. It carries out that mission through a variety of activities including education, habitat conservation and public policy advocacy. Audubon's members engage in a variety of activities relating to viewing and protecting Bald Eagles, including translocation and care of Bald Eagles, monitoring of nesting Bald Eagles through Audubon's Eagle Watch Program, hiking, bird watching, and other wildlife-related activities.

### **Summary**

Our overarching concern with the proposal is that it does not ensure that permits will be limited so that the current population of Bald Eagles does not decline. With great effort, the Bald Eagle population has been growing since the bird was listed under the Endangered Species Act more than 40 years ago. The number of eagles should not be allowed to decline before measures are taken to ensure the eagles' continued vitality. Toward that end, the methodology and data for measuring decline must ensure that data is evaluated on an annual basis. Furthermore, measurements need to be taken regionally, to ensure that regional populations are maintained. In each area, there must be a clearly defined threshold level from which decline will be measured.

Against that background of data, the permit program must be administered in a manner such that it maintains the current level of eagles. While the preamble includes statements of the Service's intention to limit and condition permits, the final rule must incorporate criteria to provide certainty and consistency in the implementation of the permit rule to accomplish that objective. Furthermore, the regulatory provision on the purpose and scope of the rule contains glaring inconsistencies with the provision setting the standards for issuance of permits. The two subsections need to be harmonized to make clear that incidental takes are authorized only when the take is consistent with the preservation of the Bald and Golden Eagle and cannot be practicably avoided. Among other things, the application should include a certification by the applicant that it is complying with all applicable best management practices (BMPs) and the National Bald Eagle Management Guidelines.

Another area of significant concern is mitigation. The regulations must state with specificity minimal essential elements of acceptable mitigation when the take of eagles is permitted. As written, the proposal could lead to confusion as to what mitigation will be required and inconsistency in implementation of the permit program. Furthermore, funds collected for mitigation should be used primarily for that purpose.

We also have some specific suggestions regarding permit conditions and the definition of "important eagle-use area."

Finally, Audubon is concerned about the permits for removal of eagle nests for safety emergencies. While we recognize that these permits may be necessary in rare circumstances, the proposed safeguards are highly inadequate and must be strengthened to assure that such permits are issued only when the need has been justified and alternatives have been sufficiently explored. The preamble statements that these permits will be granted only in rare circumstances must be incorporated into the final rule.

### **Measuring Eagle Populations to Prevent the Decline of Bald Eagles**

A critical goal of the proposed rule is the prevention of eagle decline after years of successful efforts at eagle preservation. However, as proposed, the methodology and data to measure decline will not accomplish its intended purpose of ensuring that the issuance of permits does not lead to population decline. The key element of the Partners- in-Flight definition of decline that should be adopted is the threshold of an **annual average decline of -0.54%**. The PIF threshold was chosen because an average annual decline of that magnitude will lead to a 15% population loss over a 30 year period. However, it would be unacceptable to allow such a level of annual decline over 30 years before deciding that the Bald Eagle is declining. Bird populations are notoriously variable, so it might not be necessary to tighten regulations after a single year's decline, but a decline that continued over five years should require tightened regulations. In addition, PIF criteria apply nationally, but the rule needs to apply regionally. The measurement of decline should be: "Any evidence that a regional Bald Eagle population has declined -2.67% or more over a 5-year period (averaging -0.54% annually over that five-year period) will be accepted as evidence that the regional Bald Eagle population has begun to decline. Such regional information may be derived from the Breeding Bird Survey, the Audubon Christmas Bird Count, the post-delisting national nest survey, state surveys, or other monitoring counts." The post-

delisting national nest survey is projected to occur every five years for the next 20 years and needs to be done at least that often. Most of the other surveys are done annually, and population trend analysis of each survey should be re-done after each repetition of the survey. Any time any of the surveys measures a five-year cumulative decline of -2.67% or greater, that is evidence the Bald Eagle is declining.

Furthermore, the final rule, not just the preamble, must make clear that population decline will be measured on a regional basis. The preamble to the proposed rule notes that, as part of an environmental assessment to be released in the future, the FWS intends to determine the most meaningful population scale for measuring population impacts and to delineate regional populations that are relatively distinct for management purposes. The proposal states that there may be utility in classifying Bald Eagle populations into nine regional populations plus some highly isolated sites for purposes of assessing impacts under the regulations. In our view, there should be many more recognized regions, which might include the nine regions proposed by the FWS for the Bald Eagle, but would definitely include states and bird conservation areas, as defined by the North American Bird Conservation Initiative (NABCI). If any state or bird conservation region experiences a decline in Bald Eagle populations, it makes sense to reduce permits in that state or region. We will reserve comment on the FWS's intentions in this regard until after the EA is available to the public, and we urge the FWS not to finalize the permit rule until after the comment period on the EA is closed, and the comments are received and taken into account.

A glaring omission from the regulations is the absence of a link between the goal of avoiding the decline of eagles and the numbers of permits issued. Specifically, §22.26(d) does not provide any limitation on permits so the number of permits issued will be limited to the anticipated 300 per year. While the preamble states in vague terms that the Service will limit permits in the event of eagle population decline, the final rule must provide a clear standard for that determination as one of grounds on which a permit will be denied.

Specifically, the final rule must provide some mechanism so that permit numbers will be limited and mitigation requirements increased whenever the data show a decline in regional eagle populations. Whenever a regional population decline exceeds -2.67% cumulative over five years (averaging more than -0.54% per year over five years), permits in that region should be restricted and mitigation increased. There should be even more restrictions on permits and more mitigation required in any region where the decline in that region exceeds -8.9% cumulative over five years (averaging more than -2.28% per year over five years). This tiered approach is consistent with PIFs two levels of concern, each with its relevant threshold.

### **Standards for Issuing Permits**

The section in the final rule setting forth standards for issuance of permits, including the purpose and scope and the required determinations, must be clarified and internally harmonized to ensure that the purpose and scope of the rule is reflected in the permit issuance requirements.

Proposed section 22.26(a), outlining the purpose and scope of the permit program, sets forth the four "take" characteristics for the new permits as follows . . .

- (1) the take must be “for the protection of other interests in a particular locality;”
- (2) It must be considered “consistent with the preservation of the Bald and Golden Eagle;”
- (3) it must be “associated with, and not the purpose of the activity” (i.e., it must be an incidental take); **and**
- (4) the take cannot practicably be avoided.

(Emphasis added.) Meanwhile, proposed §22.26(d), the “required determinations,” states that before a permit is issued under §22.26(a)(1) it must be found that . . .

- (i) The taking is necessary to protect an interest in a particular locality, and for lethal take, the activity is also necessary for the public welfare;
- (ii) The applicant has minimized impacts to the extent practicable, and for lethal take, the taking will occur despite application of BMPs;
- (iii) The taking is compatible with the preservation of Bald and Golden Eagles, including the cumulative effects of other similar existing and anticipated activities.

As can be seen from the above, there are several glaring inconsistencies between §22.26(a), which says that a take may be authorized “for the protection of other interests” but **only** when the take “cannot practicably be avoided, while §22.26(d)(i) says the take may be authorized when “necessary to protect an interest in a particular locality.” “Necessary” sets a high standard, so that a take can be authorized only when indispensable to protect an interest in a particular locality. However, the word “for” in subsection (a) suggests that a take may be authorized to contribute to the “other interests,” which would mean that the preservation of the Bald or Golden Eagles is of lesser importance. Given that the factors to consider for issuing permits focus on the eagle’s preservation, permits should **not** be authorized if they merely contribute or support “other interests” but rather only as a last resort, when necessary for the “other interests” and the take cannot practicably be avoided.

While 22.26(a) says that the take must be “incidental” and not the purpose of the activity; §22.26(d) omits the key requirement that the take cannot be practicably avoided, as stated in §22.26(a). According to §22.26(d)(ii), the FWS must determine that “the applicant has minimized impacts to Bald Eagles to the extent practicable,” to issue a permit. Minimizing impacts “to the extent practicable” is not a sufficiently specific mitigation standard for issuing permits. The applicant must demonstrate that the take is necessary for protection of other interests in the locality and cannot be practicably avoided. Furthermore, that section must clarify that all required determinations must be made for each permit application.

In this regard, we have concerns about the term “unavoidable.” The preamble states that for a take to be “unavoidable”, the activity must be necessary for the public welfare and all practicable, industry-accepted measures to minimize the take are in effect. We strenuously object to that definition of “unavoidable” for the reason that “industry-accepted measures” should not be part of the standard because those measures – in most circumstances – will not be all that could be done to avoid a take.

Finally, the last “required determination” set forth in §22.26(d)(iii) says that the take needs to be compatible with the preservation of Bald and Golden Eagles, including the cumulative effects of other similar existing and anticipated activities.” In contrast, subsection (a)(i) says the take needs to be “consistent” with the preservation of Bald and Golden Eagles. The final rule should use the formulation of subsection (d)(iii), which considers cumulative effects.

### **Requirements for Essential Mitigation**

Audubon has significant concerns about the lack of specificity in the proposal regarding mitigation. The final rule must spell out what is acceptable mitigation. The goal should be to keep the **regional** Bald Eagle population whole. Thus, if a nest is to be removed, protection should be provided to an area large enough to support that nesting pair, which should include several potential nesting sites. If land used by Bald Eagles is to be negatively impacted for the eagles, previously unprotected land nearby of similar size and utility to Bald Eagles must be put under protective measures. While the preamble acknowledges the importance of considering more than the footprint of the activity being permitted, the final rule must include that acknowledgment as a permit condition. Furthermore, the FWS must commit that any funds collected as part of mitigation will be used primarily for Bald Eagle habitat.

The importance of providing adequate mitigation on a regional basis cannot be overstated. The proposal discusses the FWS’s intention to recognize nine regions plus some highly isolated sites. It notes that an environmental assessment is being prepared, which will discuss those regions and potential population impacts. We await that publication and will reserve further comment on this subject until the EA is available for public comment.

### **Permit Conditions**

The proposal omits some safeguards and procedures that should be included in the final rule, and some of the proposed conditions should be modified. First, the permit must be conditioned on compliance with all applicable BMPs and the National Bald Eagle Management Guidelines. Second, the final rule must include standards and procedures for the Service to review, deny, modify, and revoke a permit. Third, all permits under the rule should be for a term not to exceed one year, with a procedure to renew. Fourth, the final rule should require public notice of permits, so that the affected public can provide comment on a permit application. Fifth, under the proposal, permits are valid for up to three years after they expire. The Service needs to clarify that this condition means the restrictions and conditions in the permit apply for three years, but the activity is authorized for only the one-year term of the permit. When the permit expires, the permittee should be required to apply for a new permit if it wants to continue to carry out activities requiring a permit under the BGEPA. Furthermore, the final rule must provide for inspections at any reasonable hour with no notice from the Service. This will ensure that the Service observes actual site conditions.

### **Definition of Important Eagle-Use Area**

The introduction of the new term “important eagle-use area” is a positive and important step. Nests, biologically important foraging areas, and communal roosts are equally important to both

individual eagle and eagle population survival. However, areas used for eagle feeding **or** roosting must be protected. Therefore, the word “and” should be changed to “or.” Thus, the definition would be changed from “an eagle nest, foraging area, or communal roost site that eagles rely on for sheltering and feeding . . .” to “an eagle nest, foraging area, or communal roost site that eagles rely on for sheltering or feeding . . .”

### **Permits for Removal of Eagle Nests for Safety Emergencies**

Audubon recognizes that there are rare circumstances in which eagle nests may need to be removed for safety emergencies. However, the proposal is not clear what the FWS considers a safety emergency. The final rule must clarify that a safety emergency is a threat to public safety, as in a threat to life, not a threat to property and that these permits will be issued rarely, only to address actual safety concerns.

In general, we are concerned that the emergency permit concept relies too heavily on the as-yet-unproven, experimental technique of eagle nest relocation. Eagle nests frequently weigh up to a ton and can incorporate several limbs and the trunk of the host tree into their structure. In some cases, applicants may not be able to find a qualified entity to perform such a specialized service. In our view, it is unrealistic to hinge a permit program on a new technique with no proven history of success for eagles.

In light of these uncertainties, the emergency permit provisions must include a requirement that the applicant take all reasonable steps to minimize harm to eagles, including a requirement that, unless infeasible, eggs will be allowed to hatch and chicks will be allowed to fledge before a nest is taken. From laying the first egg to hatching of the last chick can take 100-135 days; under some, limited situations, it might be permissible to remove chicks that have grown to a size at which they can be successfully fostered or rehabilitated for release before the nest is taken.

Our specific comments on emergency permits are as follows:

**Section 22.27(b):** Because of the novelty of this program and the degree of uncertainty about criteria by which a nest’s potential for harm will be measured, the FWS must make an on-site assessment before approving any application under this permit process. The proposal states merely that the Service “may” conduct a visit. That will not ensure adequate oversight of applicant’s activities and representations.

The application must require that the applicant demonstrate what previous actions have been taken to ameliorate the threat and that all appropriate alternatives to removal of the nest have been exhausted. Permission to take nests should only be given when FWS can confirm the applicant has exhausted all other options.

**Section 22.27(b)(1):** Because eagle nests are most often re-used, the FWS should substitute the word “inactive” in the proposal with the word “abandoned”, which should be defined to mean inactive for a period of more than five years. The regulation should also how an applicant will document/prove its determination that a nest is active or abandoned. Because the average

applicant would be unqualified to make this determination, the rule should require that an outside expert make that determination.

**Section 22.27(b)(6):** The FWS must give the applicant more direction on what “disposition” is appropriate for nestlings and eggs. Furthermore, applicants should be required to consult with an entity permitted to rehabilitate eagles to determine what options are available.

**Section 22.27(c):** The evaluation criteria listed must be clarified and strengthened. Without a clear understanding of what kinds of circumstances the FWS would consider a “legitimate emergency safety concern,” the emergency permit process could be abused and lead to unnecessary take of eagle nests, which could cause significant decline in eagle populations.

In Florida for example, claims of “imminent danger” have led to permission for eagle nest removals. In March 2007, FWS and the Florida Fish and Wildlife Conservation Commission (FWC) allowed the Sanford Airport to remove three eagle nests after a sub-adult eagle unaffiliated with any of those nests was struck at that airport. This action was authorized even though the airport did not address the presence of vultures, eagles and other birds scavenging on its runways. Similarly, in June 2007, the USFWS and FWC allowed a homeowner in Collier County, Florida, to remove a nest without a permit, on the ground that it was no longer a nest, even though it successfully fledged two young in 2006 and a single bird in 2007.

Both of these incidents underscore the need for clear criteria for these types of situations, before the pressure of pending applications is present. State and federal agency staff should have defined criteria to rely on when evaluating permit applications.

**Section 22.27(d)(1):** The rehabilitation of eggs or nestlings can be costly, frequently on the order of several thousand dollars, and the expenses incurred by groups who perform this work should be covered. Therefore, in addition to requiring the fostering or rehabilitation of these birds, the permit should require the applicant to compensate the “qualified, permitted, designated agent” for these services.

Finally, these permits must require mitigation payments for the removal of nests. If there is no required mitigation, it will create a financial incentive for landowners to claim a safety concern rather than apply for a standard eagle take permit. This fee could be structured based on the components of the take, such as: nest alone, nest with chicks, and nest with eggs. This is because each type of mitigation entails associated costs and risks of success.

### **Funding for Bald and Golden Eagle Monitoring**

The FWS has proposed a post-delisting Bald Eagle nest monitoring program, which Audubon is reviewing. In addition, there are many other monitoring programs that include Bald Eagles. We take this opportunity to urge the FWS to secure adequate funding for those important programs. Mitigation and other fees collected under this program should be used primarily for eagle habitat.

In conclusion, we appreciate the opportunity to submit these comments, prepared by the offices listed below and endorsed by the Audubon state offices listed on the attachment. Please contact Dr. Butcher, Mr. Daulton, or Ms. Goldman at 202-861-2242 if you have questions concerning our comments.

Respectfully submitted,

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**AUDUBON STATE OFFICES ENDORSING THE ATTACHED COMMENTS**

Audubon Alaska  
Audubon California  
Audubon Colorado  
Audubon Connecticut  
Audubon Florida  
Audubon Maryland-DC  
Audubon Minnesota  
Audubon Mississippi  
Audubon New Mexico  
Audubon New York  
Audubon Ohio  
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