

PROPOSED BALD EAGLE "INCIDENTAL TAKE" PERMIT PROGRAM

- The development of an incidental take permitting program is essential in providing maximum assurance that land use activities can proceed ahead without fear of "take" liability under the Bald and Golden Eagle Protection Act ("BGEPA") and the Migratory Bird Treaty Act ("MBTA"), should the bald eagle be delisted under the Endangered Species Act ("ESA").
- Section 668(a) of BGEPA provides statutory authority for the FWS to develop an incidental take permit program. Section 704 of the MBTA authorizes the Secretary to allow for take when "compatible" with other terms of the MBTA.
- The U.S. Fish and Wildlife Service ("Service") has taken the position that the MBTA "special use" permit authority "is an acceptable approach" until a specific BGEPA permit program is developed.
- Any incidental take permit program must continue to honor existing "take" approvals issued pursuant to both Sections 7 and 10 of the ESA. The Service may treat "take" authorization under existing ESA approvals (which includes habitat modification that actually kills or injures a species) as encompassing "takes" under BGEPA and the MBTA (which are limited to direct impacts to eagles and their nests).
- While a BGEPA permit program provides the greatest protection from "take" liability, it should be treated as an option, not a requirement.
- The Service should adopt regulations stating that activities undertaken consistent with the National Bald Eagle Management Guidelines are immune from liability under the MBTA and BGEPA. Essentially, a party that does not wish to undergo the permit process could utilize compliance with the Guidelines as a "safe harbor" from liability. That party should also have the option of obtaining a "fast track" permit.
- The Service already has authority to issue consolidated permits covering multiple authorizations and therefore should seek to cover both BGEPA and the MBTA. The Service's general permit regulations (50 C.F.R. Pt. 13) would have to be amended to reflect the new incidental take provisions. Either a stand-alone permit regulation should be promulgated or the bald eagle regulations already in place (50 C.F.R. Pt. 22) ought to be amended to allow for incidental take.
- Any permit program must provide a flexible process that minimizes red tape and delay. In particular, the Service should implement a "fast track" general permit program covering (1) activities already authorized under existing ESA authorizations; (2) activities undertaken consistent with the Guidelines; and (3) emergencies necessary to protect life and property. A party acting in compliance with existing ESA authorizations should be able to obtain automatic coverage under such a "fast track" program by simply providing notice to the FWS that it is in compliance with the terms of prior ESA authorizations.
- Any permit program should give substantial weight to adopted State eagle management plans.
- The FWS has ample authority to ensure that the bald eagle will not "backslide" below recovery goals and be listed again.