



January 11, 2007

Via Electronic Mail

Robert Blohm
Acting Chief, Division of Migratory Bird Management
U.S. Fish and Wildlife Service
4401 N. Fairfax Drive, MBSP-4107
Arlington, Virginia 22203

RE: RIN 1018-AT94 Comments on U.S. Fish and Wildlife Service's Proposed Rule to Define "Disturb" Under the Bald and Golden Eagle Protection Act and Draft Environmental Assessment, 71 Fed. Reg. 74482 (Dec. 12, 2006)

Dear Mr. Blohm,

Defenders of Wildlife ("Defenders") respectfully submits the following comments on the U.S. Fish and Wildlife Service's ("FWS" or "Service") Proposed Rule to define "disturb" under the Bald and Golden Eagle Protection Act ("BGEPA" or "Act") and the related Draft Environmental Assessment ("EA"). 71 Fed. Reg. 74482 (Dec. 12, 2006) (Proposed Rule; reopening of the comment period; notice of availability; draft environmental assessment). As the Service moves toward removing our national symbol from the list of threatened and endangered species under the Endangered Species Act ("ESA"), it is imperative that adequate regulatory mechanisms are established and maintained to ensure that bald eagles, and their habitat, continue to be protected. As a result, while Defenders supports the delisting of the bald eagle, the definition of "disturb" proposed by the Service may weaken protection for bald eagles and their habitat. The proposed definition undermines the comprehensive protection for bald eagles which the BGEPA is supposed to provide and calls into question whether adequate regulatory mechanisms exist to allow delisting under the ESA. Defenders urges the Service to adopt, instead, the definition proposed in Alternative 2 of the EA.

Discussion

First enacted in 1940, the BGEPA is intended to be the "primary vehicle" for the conservation and protection of our national symbol, see 71 Fed. Reg. 8265, 8266 (Feb. 16, 2006), and as such, makes it unlawful to "take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import, at any time or in any manner, any bald eagle [] alive or dead, or any part, nest, or egg thereof" 16 U.S.C. § 668(a).

Principle among the Act's protections, the prohibition against "take," by definition, makes it illegal to: "pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, molest or disturb" an eagle. *Id.* § 668c.¹ The term "disturb" was not further defined in the Act, nor has FWS to date promulgated a regulatory definition of the term.

To further the goals of the Act, the Service must promulgate a definition of "disturb" that provides meaningful protections for the species and its habitat. To this end, in our earlier comments, dated June 19, 2006, incorporated herein by reference, Defenders proposed the following definition of "disturb:"

any intentional or negligent act or omission, including actions that result in significant habitat modification or degradation, which create the likelihood of significantly disrupting normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.

Defenders proposed this definition to provide adequate protection of bald eagles and their habitat, using well-established terminology from regulatory definitions of "harass" and "harm" as types of "take" under the ESA. As discussed below, we believe that the definition set forth in Alternative 2 of the EA will achieve this purpose and, therefore, urge the adoption of the Alternative 2 definition by the Service.

The Definition of Disturb Must Provide Meaningful Protections for the Species

FWS initially proposed to define the term "disturb" to mean "to agitate or bother a bald or golden eagle to the degree that interferes with or interrupts normal breeding, feeding, or sheltering habits, causing injury, death, or nest abandonment." 71 Fed. Reg. at

¹ In a footnote, FWS notes that after the bald eagle is delisted the Service will not "refer for prosecution the incidental take of any bald eagle under the Migratory Bird Treat Act [], or the [BGEPA], if such take is in full compliance with the terms and conditions of an incidental take statement issued to the action agency or applicant under the authority of section 7(b)(4) of the ESA or a permit issued under the authority of section 10(a)(1)(B) of the ESA." EA at 2, n.1. Rather, the EA continues, "[t]he Service intends to propose a rulemaking to establish criteria for issuance of a permit to authorize activities that would "take" bald eagles under the Eagle Act." *Id.*

This raises the important question of why, to date, FWS has not established a regulatory mechanism to review and assess the impact of actions that may result in the violation of the BGEPA and whether as a result the FWS has been allowing activities to proceed unchecked that are detrimental to the species. Rather than allow the indefinite continuation of actions that may impact bald eagles under an inapplicable permitting system for some undefined "interim period," FWS must, prior to delisting, establish a permitting system under the BGEPA that will properly review projects under the standards Congress enacted therein, and establish a priority system to ensure that all existing projects that may impact bald eagles are reviewed in a timely fashion. FWS should not remove the important protections of the ESA until such a review system is in place.

8265. Subsequently, the Service announced the availability of a Draft EA that describes four alternative definitions and discusses the relative merits of each.²

Alternative 1

Under Alternative 1, FWS would not define “disturb.” EA, at 7. In this situation, the common use of the term would remain the operable standard. Presumably, this would require both the regulated community and enforcement officials to turn to the dictionary to discern the appropriate standard, which could lead to inconsistent interpretations. For example, the American Heritage Dictionary of the English Language, Fourth Edition, defines “disturb” as “To break up or destroy the tranquility or settled state of” or “To trouble emotionally or mentally; upset,” while Black’s Law Dictionary, Seventh Edition, defines “disturbance” as “An act causing annoyance or disquiet, or interfering with . . . the peace” Neither definition provides sufficient clarity about what conduct may be prohibited and, as a result, FWS is correct in dismissing this alternative. FWS should publish a definition of “disturb” which both provides the necessary protections for the species and creates clear sideboards to guide actions in and around individual birds and their habitat.

Alternative 2

Pursuant to this alternative, the definition for disturb would be: “To agitate or bother a bald or golden eagle to the degree that disrupts the normal behavior of the eagle.” EA, at 8. This is the most suitable definition considered by FWS and thus should be selected for several reasons.

First, the definition provides the appropriate level of protection for bald eagles. By establishing a threshold of immediate interference with the normal behaviors of an individual eagle, this definition will allow for the regulation of precisely the types of activities FWS noted may be detrimental to eagles, including: “development, resource extraction, and recreational activities near sensitive areas such as nesting, feeding, and roosting sites.” 71 Fed. Reg. at 8266. More specifically, clearly drawn from the common definition of the term, this definition appears to best embody the degree of harm Congress intended to prevent when it included “disturb” among other enumerated forms of “take.”

Second, this alternative meets FWS’s requirements that the definitions should be unambiguous and enforceable. As FWS notes, there are several reliable indicators,

² While these comments focus on the FWS’s choice of a definition for “disturb,” it must be noted that the EA falls well short of satisfying the Service’s National Environmental Policy Act (“NEPA”) obligations. See, e.g., Maryland-National Capital Park and Planning Commission v. U. S. Postal Service, 487 F.2d 1029, 1040 (D.C. Cir. 1973) (In an EA the agency must take a “hard look” at the project and its impacts, “as opposed to bald conclusions, unaided by preliminary investigation,” and must “identify the relevant areas of environmental concern.”). This EA, however, is replete with undocumented and unsupported statements, conflicting conclusions, and unrealistic worst-case scenario hypothetical examples. In sum, the EA wholly fails to provide the information necessary to enable the agency to make a reasoned decision, much less allow the reader to follow and critique that process.

including “flushing from the nest, perch, or foraging area; vocalizations (alarm calls); disrupted flight patterns in the vicinity of the nest, roost tree, or foraging area; or any detectable physiological reactions,” EA, at 8, which can be used to determine if the disruption of “normal behavior” trigger will be or has been reached. As a result, this definition will allow for both effective pre-action decision-making by potentially-regulated individuals and consistent enforcement by agency officials.

The Service’s arguments for rejecting this alternative are unpersuasive. First, FWS’s conclusion that “[t]he initial result of this alternative would probably be consternation on the part of the public” is an inappropriate, unsupported, and biased narrative, and is wholly inappropriate in this context. FWS assumes that the public would react negatively to the notion that a measure of restraint on the types of activities that may be carried out in eagle habitat may be required to continue to protect our nation’s symbol. To the contrary, this definition presents a clear rule that will inform interested persons as to the permissible scope of actions, thus providing a measure of security while at the same time protecting bald eagles.

FWS’s second argument is equally unpersuasive, as FWS misconstrues the scope and intent of the take provision in the BGEPA. FWS states that “[e]nforcement of this definition could be difficult, however, because it may appear unreasonable to curtail a large number of human activities that have no meaningful, long-term effect on eagles.” EA, at 10. Any requirement that the take prohibition be extended to only activities that will have an impact on eagles as a species, misses the point. To the contrary, the BGEPA specifically prohibits the take of “any bald eagle,” 16 U.S.C. § 668(a), and therefore, Congress plainly articulated that any act that disturbs an individual eagle is impermissible. As a result, FWS cannot deviate from the BGEPA’s stated management objective with this regulatory definition, and must craft its definition to prohibit impacts to individual eagles.

In sum, the definition set forth in Alternative 2 presents an easily understood, workable definition of “disturb,” best furthers the conservation goals of the BGEPA and provides an enforceable framework to judge the lawfulness of future actions impacting bald eagle habitat.

Alternative 3

The definition set forth in Alternative 3, identified by the Service as the preferred alternative, is wholly unacceptable, as it fails to provide meaningful protection for bald eagles, runs afoul of the structure and intent of the BGEPA, and presents significant enforcement difficulties. Under this alternative, FWS would define “disturb” as “to agitate or bother a bald or golden eagle to the degree that causes (i) injury or death to an eagle (including chicks or eggs) due to interference with normal breeding, feeding, or sheltering behavior, or (ii) nest abandonment.” EA, at 8.

The Service must not limit the definition of disturb to prohibit only those actions that will result in “injury, death, and nest abandonment,” for the following reasons. To begin with, as FWS points out in the EA, the term “take” under the BGEPA already includes terms such as wounding and killing. See EA, at 12 (a definition that has a

“threshold [of] actual injury, death, or nest abandonment,” “is also inconsistent with the text of the Eagle Act: Congress would not have included the term ‘disturb’ in the definition of ‘take’ if it simply meant ‘wound’ or ‘kill,’ since it already included those two terms in the take definition.”). Therefore a requirement of injury or death within the definition of “disturb” is, at best, redundant and, at worst, contrary to the broad scope of the statutory definition of “take.”

In its previous notice, the Service states that “eagles are particularly vulnerable to interference during territory establishment, courtship, egg laying, incubation, and parenting of nestlings” and notes that various activities, such as “development, resource extraction, and recreational activities near sensitive areas such as nesting, feeding, and roosting sites can interrupt or interfere with the behavioral patterns of eagles.” 71 Fed. Reg. at 8266. Yet, the inclusion of the “causing injury, death or nest abandonment” clause would effectively and unduly limit the types of activities that would be prohibited. The Service, despite its acknowledgement of the vulnerability of the species, sets the bar so high that eagles would be forced to endure being agitated or bothered to a degree just short of injury, death or nest abandonment; certainly, an eagle can be “disturbed” long before it is killed, injured or forced to abandon its home. This, however, is precisely the type of “take” Congress intended to prohibit by including the term “disturb” in the Act.

Moreover, the ordinary meanings of disturb do not include outcomes as severe as death, injury, or displacement, but rather focus on interference, inconvenience, intrusion, alarm, and disruption of ecological balance. *See* 71 Fed. Reg. at 8265-66. Thus, by limiting the term to include only actions that result in death or injury, the Service would significantly diverge from the ordinary meaning of disturb, despite its stated objective of providing a commonly understood meaning. The Service claims that its proposed definition “is consistent with how ‘disturb’ has been interpreted in the past by the Service and other Federal and State Wildlife and land management agencies,” but provides no examples or support for this claim. *See* 71 Fed. Reg. at 8266. To the contrary, FWS’s own description of the range of applicable standards for the operation of disturb in prior management contexts does not support the inclusion of death or injury as a component. *See* EA, at 1 (“In the context of eagle management, “disturb” has been applied informally to as small a reaction as temporarily flushing an eagle from a nest or perch, to causing eagles to permanently avoid a geographical area.”).

Furthermore, FWS itself argues against the practicality of this definition, concluding that such a definition would be essentially unenforceable. EA, at 12 (“because the threshold is actual injury, death, or nest abandonment, this alternative would be difficult to enforce, since those outcomes are often removed in time and/or location.”). Indeed, the Service’s own example of how a repeatedly flushed eagle may not be able to adequately care for its young or eggs, *see* 71 Fed. Reg. at 8267, demonstrates the difficult burden of proof the agency must carry to find a violation of the Act under the proposed definition. Instead of prohibiting the activity that repeatedly flushes the adult eagle, the Service’s definition requires a dead fledgling or un-hatched egg before the disturbance becomes a violation. The difficulty of proving the causal connection between the activity and the dead bird or un-hatched egg in such an instance may be monumental. The better course is to allow for natural signs of disturbance, noted above, which clearly demonstrate that an

activity is altering an eagle's normal behavior, to be the trigger for a violation and an enforcement response. As FWS correctly describes, any definition that cannot be properly and uniformly enforced will "likely increase negative impacts to eagles." EA, at 12.

Finally, this definition will add a layer of complexity that would serve only to further weaken the protections provided to eagles, by independently defining the term "injury." Here, injury would be defined as "a wound or other physical harm, including a loss of biological fitness significant enough to pose a discernible risk to an eagle's survival or productivity."³ This definition, rather than providing clarity to the overall picture, introduces, and significantly misuses, the term "biological fitness." Biological fitness is a term associated with evolutionary theory, generally defined as the long-term ability, compared to others of members of a species, of an individual to produce offspring. The misplaced use of this term here, rather than clarifying the scope of the regulation, will provide another ambiguous term which will further confuse potentially regulated parties and enforcement agents alike. Moreover, even if the use of the term were correct, it implies an effect that is even further removed from the time of the disturbance than other forms of injury and thus further reduces the certainty of what types of actions would be prohibited.

Alternative 4

The final alternative considered would define disturb as "[t]o purposefully interfere with normal breeding, feeding, or sheltering habits of a bald or golden eagle, causing injury or death to the eagle or its young or eggs." EA, at 8. This is not a viable alternative because it is limited to actions that intentionally harm eagles. Such a narrow definition is inconsistent with the BGEPA which specifically prohibits all acts that may result in the "take" of an eagle including those that are carried out "with wanton disregard for the consequences." 16 U.S.C. § 668(a). Thus, Congress acted to prohibit all acts that may harm individual eagles, even if that result is not the intent of the action. FWS cannot, through the definition of "disturb," change the scienter requirements of the BGEPA.

Conclusion

In the last 30 years, the story of the recovery of bald eagles has been inspiring, with intensive conservation efforts by federal and state agencies, landowners, conservation organizations, and individuals producing a remarkable conservation success. The Service must ensure bald eagles continue to thrive. Thus, as the Service moves to delist bald eagles

³ The Service's action announcing its intention to define the term "injury" is also a violation of the required public participation requirement of the Administrative Procedures Act. FWS's Notice of the reopening of the comment period on its Proposal to Define Disturb is inadequate because it only vaguely lays out what action the agency is proposing to take. Shortcomings in the proposal are clearly exemplified by the announcement in the draft environmental assessment of the consideration of the additional action of "adding a definition of 'injury.'" EA, at 11. The proposed definition of "injury," was not included in any Federal Register notice. The public should not be expected to search through a Federal agency's website to determine what action that agency is proposing to take in order to have an opportunity to comment on it.

under the ESA, it is imperative that these magnificent birds, which symbolize our nation, continue to receive the full protection mandated by Congress under the BGEPA.

Thank you for the opportunity to comment on this important conservation decision. If you have any questions, please contact staff attorney Andrew Hawley at (202) 772-3224 or at ahawley@defenders.org.

Sincerely,

A handwritten signature in black ink, appearing to read "Wm. Robert Irvin". The signature is stylized and cursive, with a long horizontal stroke at the end.

Wm. Robert Irvin
Senior Vice President for
Conservation Programs