

June 19, 2006

Michelle Morgan
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Endangered Species Program
U.S. Fish and Wildlife Service
4401 N. Fairfax Drive, Room 420
Arlington, Virginia 22203

RE: RIN 1018 – AF21 U.S. Fish and Wildlife Service Proposed Rule to Remove the Bald Eagle in North America from the List of Endangered and Threatened Wildlife

Dear Ms. Morgan,

Defenders of Wildlife (“Defenders”) respectfully submits the following comments on the U.S. Fish and Wildlife Service’s (“Service”) proposed rule to remove the bald eagle (*Haliaeetus leucocephalus*) from the list of threatened and endangered species under the Endangered Species Act (“ESA”). 71 Fed. Reg. 8238 (Feb. 16, 2006) (Removing the Bald Eagle in the Lower 48 States from the List of Endangered and Threatened Wildlife) (“Proposal”). Evidence shows nationwide that the bald eagle population has recovered and Defenders applauds the part the Service played in making that possible. However, we have remaining concerns about the existing regulatory measures that the Service cites in the Proposal for habitat protection and also that the Service does not yet have a well-designed monitoring plan in place as required by the ESA. Before the eagle is taken off the endangered species list, the Service must ensure strong habitat protection and must create a workable monitoring plan.

THE BALD EAGLE’S REMARKABLE RECOVERY

As a symbol of American strength and freedom, the recovery of the bald eagle is a source of national pride and an example of success under the ESA. The bald eagle has made a remarkable recovery from its widespread extirpation and near extinction more than 35 years ago. It is encouraging that, according to available data, the number of known bald eagles has risen to over 7,066 nesting pairs in the continental U.S. See 71 Fed. Reg. at 8238. If the eagle’s habitat is adequately protected, these numbers will likely continue to increase over time. We are also encouraged by trends in bald eagle distribution. In 1984, thirteen states had no nesting pairs of bald eagles and 73 percent of the eagles outside of Alaska were harbored within just six states. *Id.* at 8241-42. Today, all but one state, Vermont, have established breeding territories for the bald eagle and the six-state concentration has reduced its share to 59 percent of all nesting pairs due to increased nesting in other states. *Id.* The population

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increase has been remarkable and it is a testament to the hard work by the Service and its partners in each state.

More specifically, many of the Service's stated recovery goals for the bald eagle have been exceeded. Pursuant to the ESA, once a species is listed, the Service is required to develop a recovery plan, which must establish "objective, measurable criteria which, when met, would result in a determination...that the species be removed from the list." 16 U.S.C. § 1533(f).

Here, the Service has established recovery objectives and criteria in five geographical regions. These criteria include meeting numerical nesting population goals, land acquisition for the protection of bald eagle habitat, reintroduction and habitat management programs, and public outreach. *See* 71 Fed. Reg. at 8241. For example, in the Northern States Recovery Region, the delisting goal was to establish 1,200 occupied breeding areas distributed over a minimum of 16 states with an average productivity of 1.0 young per nest. *Id.* at 8242. These delisting goals were met in 1991 with 1,349 occupied breeding areas distributed over 20 states and a productivity estimated to greater than 1.0. In 2000, the year of the most recent survey, the Northern States had an estimated 2,559 occupied breeding areas, and therefore exceeded the stated recovery criteria. *Id.* Similarly, the Pacific Recovery Region met its numeric recovery objectives in 1995, and present data shows that the goal of achieving stable to increasing trends in wintering eagle populations has been attained on the average for the entire recovery region. *Id.* Additionally, the Southeastern Recovery Region, the individual population goals for all 11 states were attained in 2000. *Id.* at 8242. The Southwestern State's 1982 Recovery Plan did not have delisting goals, but rather goals for reclassifying the bald eagle from endangered to threatened. However, the number of occupied breeding areas in the Southwest has more than doubled in the past 15 years. *Id.* at 8242-43. Finally, while it can be said that the Chesapeake Region has not protected enough habitat to meet its delisting goals, the numeric recovery goals for the region have been met since 1992. *Id.* at 8242. This data overwhelmingly suggests that the bald eagle is indeed recovered in the lower 48 states.

THE BALD EAGLE MAY BE DELISTED BUT MUST NOT BE UNPROTECTED

While Defenders joins the Service in celebrating the recovery of the bald eagle, it is imperative to recognize that the species still faces significant threats, not the least of which is the threat of continued habitat loss. A decision to remove a species from the list of endangered or threatened species must be firmly based on a consideration of the five listing factors found in section 4 of the ESA. 16 U.S.C. §1533(a)(1). These factors include: any present or threatened destruction, modification, or curtailment of the species' habitat; the over-utilization of the species for commercial, recreational, scientific, or educational purposes; disease or predation; the adequacy of existing regulatory mechanisms to protect the species; and other natural or manmade factors affecting the species continued existence. *Id.* Thus, the Service must do more than demonstrate that the eagle is recovered as of this moment, it must be sure that the species is adequately protected from the threats that imperiled the species previously.

Without meaningful analysis, the Service lays out the various measures that it claims will provide

protections for the species. While optimism for the species' future prospects may be warranted given the current population numbers and trends, the stakes for the eagle remain too high to gloss over the potential conflicts the species must contend with in the future. Thus, before the species can be delisted, the Service must fully describe and analyze the regulatory measures that will protect the species going forward, and must establish a monitoring plan to track the species' progress.

1. THE SERVICE DOES NOT ESTABLISH HOW THE EXISTING REGULATORY MEASURES WILL ADEQUATELY PROTECT THE EAGLE

The Service fails to demonstrate how the existing regulatory measures will serve to adequately protect the bald eagle, and its habitat, in the absence of the ESA's protections. The loss of habitat from forest clearing and development undoubtedly contributed to the historic reduction in the number of eagles, and these threats persist today. *Id.* at 8240. Indeed, bald eagles prefer to nest in waterside habitats, and unfortunately, these areas are also popular for human activity and development. For over 30 years, the ESA has been the sole source of habitat protection for nesting sites throughout the United States. Therefore, the Service must ensure that there are adequate regulatory measures in place so that there is sufficient habitat protection to support a recovered eagle population, rather than leaving the eagle to forage in "public landfills" and nest on "cell phone towers." *Id.* at 8246.

Once the eagle comes off the federal ESA list, the states will assume primary responsibility for species' protection and for ensuring that the population does not decline again on account of habitat loss. Yet, here the Service provides no analysis of how the various states will protect the recovering eagle populations and the necessary habitat to maintain those populations. Indeed, the Service notes that many states will remove any special protections afforded the eagle under state endangered species acts – which the Service acknowledges are generally "not as comprehensive as the ESA; [as] they provide little habitat protection," *see* Fed. Reg. at 8248 – and thus the eagle will be managed by the States as they "do their other wildlife resources." *Id.* This lack of scrutiny of the relative merit and adequacy of the various states' management plans exemplifies the cursory analysis forwarded by the Service in this delisting.

Moreover, by its own admission the existing federal laws and regulations will provide the eagle with only "limited protections," and wholly fails to articulate how these measures will provide adequate protections for the species' habitat. First, for example, the Service points to the Bald and Golden Eagle Protection Act ("BGEPA") as a continuing source of legal protection for the bald eagle. The BGEPA prohibits anyone, without a permit, from "taking" bald eagles, including their parts, nests, or eggs. 16 U.S.C. § 668. The Act defines "take" as "to pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, molest or disturb." *Id.* The Service has proposed to bolster the protections for the eagle by redefining "disturb" within the BGEPA to mean to agitate or bother a bald or golden eagle to the degree that it interferes with or interrupts normal activities. *See* 71 Fed. Reg. at 8240. However, despite this change, and notwithstanding the other beneficial protections embodied in the statute, the BGEPA clearly fails to provide meaningful protections for the habitat on which the

species depends.¹

Similarly, the Migratory Bird Treaty Act (“MBTA”) prohibits the “taking of any migratory bird or any part, nest, or egg, except as permitted by regulation.” 16 U.S.C. § 703. Under the MBTA, “take” is defined as “pursue, hunt, shoot, wound, kill, trap, capture, possess, or collect.” *Id.* Like the BGEPA, this Act does nothing to ensure the protection of eagle habitat which is essential to their long term survival.

The Service also cites Executive Order 13186, “Responsibility of Federal Agencies to Protect Migratory Birds,” which requires federal agencies to incorporate conservation measures into agency activities. 71 Fed. Reg. at 8247. The required Memorandum of Understanding that federal agencies must enter into with the FWS if their activities may adversely affect migratory birds are, however, “still under development.” *Id.* Given that these measures are not now in effect, nearly six years after the order was signed, the Service’s assertion that E.O. 13186 will result in meaningful conservation measures for the species that will protect both the eagles and their habitat is untenable.

Next, despite the Service’s faith that the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”), 7 U.S.C. 136 *et seq.*, will act as a “safeguard to avoid the type of environmental catastrophe that occurred from organochlorine pesticides, such as DDT,” the statute provides little actual protections for the species, especially given the short comings of the EPA’s current environmental review process. *Id.* at 8248. The Service correctly notes that FIFRA “requires testing the effects of pesticides on representative wildlife species before a pesticide is registered.” *Id.* This review, however, is wholly inadequate to ensure the protection of the species or its habitat. Indeed, this testing, for example, does not take into account indirect, synergistic, and cumulative effects these chemicals may have on the eagle or its habitat, nor does it consider that, if chemicals are used inappropriately or in excess, they may, in fact, lead to harm to the species and to its habitat.

Finally, the Service contends that the Clean Water Act (“CWA”), through its various mechanisms, “continues to contribute in a significant way to the protection of the species and its food supply.” 71 Fed. Reg. at 8248. Indeed, the CWA is designed “to restore and maintain the chemical, physical and biological integrity of the Nation’s water,” and has the stated goal of providing sufficient water quality “for the protection and propagation of fish, shellfish, and wildlife.” 33 U.S.C. §1251(a). However, given that, in general, each state may apply the standards and restrictions of the Act differently, contrary to the Services broad assertions, there is no guarantee that the eagle will be

¹ The Service also points to the Draft National Bald Eagle Management Guidelines (“Guidelines”), which purportedly “will provide the public with a guide for complying with the requirements of the BGEPA by avoiding activities that disturb the bald eagle.” 71 Fed. Reg. at 8248. Yet, the Guidelines, which are only suggestions and recommendations, are not directed at land developers who are the ones who will most seriously alter eagle habitat and the Service offers no strategy for ensuring that even concerned persons, not to mention the general population, will be made aware of the Guidelines. A significant amount of eagle habitat is on private land and if the public is not aware of remaining legal restrictions, including the BGEPA and the MBTA, eagle protection will never be as strong as it should be.

protected by the CWA. The Service must demonstrate how the CWA, as implemented within eagle habitat, will work to specifically protect the bald eagle after the species is de-listed.

In sum, the Service falls well short of its burden of establishing that adequate regulatory mechanisms exist to ensure the eagle and its habitat will be secure after the protections of the ESA are removed.

2. THE IMPORTANCE OF CONTINUED MONITORING

Long-term, rigorous monitoring of the species and its habitat is required by the ESA in order to determine the effects of delisting and ensure that the species does not again require the protections of the Act. 16 U.S.C. §1533(g). Here, the Service has, as of yet, failed to produce the required, comprehensive post-delisting monitoring plan.

In anticipation of this plan, which must be crafted and implemented before delisting may occur, Defenders offers the following suggestions. First, monitoring must cover several generations to ensure that an adequate understanding of the population trend is developed. A central purpose of post-delisting monitoring must be to measure the impact of delisting on the eagle population and its habitat and ensure that the population trends which lead to the delisting continue. Therefore, given that eagles do not reach sexual maturity until they are 5 to 6 years old, these goals cannot be reached if data from only a single generation is considered. Therefore, we recommend that the Service survey every 5 years for no less than 20 years in order to observe the effects of de-listing over the course of three generations.

Second, the monitoring plan must include assessments of habitat quality and distribution. As noted above, habitat loss is one of the biggest threats to bald eagles after delisting, and the monitoring scheme must be able to detect habitat changes and evaluate how these changes are affecting population trends. Therefore, the final monitoring plan must consider winter habitat and night roosting habitat, and must assess the amount, and impact of, local contaminants that may affect eagles.

Third, a specific, uniform methodology for conducting the monitoring must be established and applied by the various states. In the Proposal, the Service noted that “[d]ata collection methods vary somewhat from State to State,” 71 Fed. Reg. at 8241, and thus the Service must ensure that it will receive the required information from each source so an accurate picture of the eagle’s population trends and habitat availability can be created.

Lastly, appropriate levels of state and federal agency resources, including adequate funding sources, must be identified and secured to ensure that the required monitoring will occur on schedule. It is notable that the latest nationwide survey of the eagle population was completed in 2000. The most recent surveys by 30 states took place in 2003. Data from the other eighteen states was collected before that time. 71 Fed. Reg. at 8240. The Service provides no explanation for the six year gap in comprehensive survey efforts. A similar lapse in post-delisting monitoring would be unacceptable.

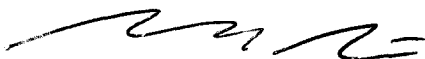
Without question, the monitoring plan and sources of funding must be established prior to delisting

the eagle. Defenders looks forward to commenting further on the proposed monitoring plan in the upcoming months.

CONCLUSION

In the last 30 years, the bald eagle story has been an inspiring one, and intensive efforts have resulted in a rare and remarkable recovery. The ESA has played a significant role in protecting the bald eagle and its habitat nationwide. It has required federal agencies to manage their land for bald eagle recovery and resulted in funding to states for recovery programs. Through continued effort and attention to habitat protection, the Service can work with its partners to maintain populations of this emblematic and much-loved species. By ensuring that states and agencies have appropriate management plans and sufficient funding before the eagle is taken off the endangered species list, the Service can help assure that our nation's symbol of strength and freedom will never again be threatened or endangered.

Sincerely,



Michael Senatore
Vice President Conservation Litigation



Carrie Boyd
Legal Clerk