

June 19, 2006

Brian Millsap
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 U.S. Fish and Wildlife Service Proposed Rule to Define “Disturb” Under the Bald and Golden Eagle Protection Act and Draft National Bald Eagle Management Guidelines, 71 Fed. Reg. 8265 (Feb. 16, 2006)

Dear Mr. Millsap,

On behalf of Defenders of Wildlife (“Defenders”), please accept the following comments in response to the U.S. Fish and Wildlife Service’s (“Service”) Proposed Rule to define “disturb” under the Bald and Golden Eagle Protection Act (“BGEPA” or “Act”). 71 Fed. Reg. 8265 (Feb. 16, 2006). As the Service moves toward removing the eagle from the list of threatened and endangered species under the Endangered Species Act (“ESA”), it is imperative that adequate regulatory mechanisms are in place to ensure the species, and its habitat, are protected. As a result, while Defenders supports the Service’s initiative in this instance, the definition of “disturb” forwarded here will not provide meaningful protections for the species and thus falls well short of furthering the comprehensive protections envisioned by Congress when passing the BGEPA.

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. at 8266, 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. With this Proposal, the Service intends to define the term “disturb” under the BGEPA’s take provision, 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 8265.

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The Existing Protections Provide an Appropriate Standard

Defenders recommends the Service – rather than pursuing the proposed definition, which fails to provide meaningful protections for the eagle, thus failing to meet the conservation goals of the BGEPA – promulgate a definition of disturb derived from a combination of the definitions of “harass” and “harm” under the term “take” as found in the ESA. *See* 50 C.F.R. § 17.3. Similar to the BGEPA, the ESA prohibits the “take” of species, 16 U.S.C. § 1538, thus making it unlawful to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” *Id.* § 1532 (19). In this context, the Service has further defined the term “harass” to mean “an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.” 50 C.F.R. § 17.3. Further, the Service has defined the term “harm” to, in part, prohibit actions that “include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

Drawing on these well-established definitions of similar terms under the ESA, Defenders recommends that the definition of “disturb” read:

an intentional or negligent act or omission, include 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.

Such a definition, which consists of long-used verbiage and terms, would be easily understood, and therefore followed, by both potentially regulated parties and enforcement authorities alike. Indeed, the definitions for harm and harass have been in place since 1981 and 1998 respectively, and have been the interpreted and enforced by the Service and vetted through judicial interpretations and thus provide a sensible model upon which the Service should base the definition of “disturb.”

Moreover, the definition Defenders is forwarding here would provide a measure of the habitat protections necessary to ensure that the species is not again driven toward the brink of extinction by the destruction or modification of essential habitat areas.¹ Loss of nesting habitat from forest clearing and development undoubtedly contributed significantly to the historic reduction in the number of eagles. *See* 71 Fed. Reg. 8238, 8240 (Feb. 16, 2006) (Removing the Bald Eagle in the Lower 48 States from the List of Endangered and Threatened Wildlife). The same pressures exist today, and yet, as the Service moves toward the delisting of the species, the eagle will once again be left without apparent habitat protection once the ESA’s protections are removed. The BGEPA’s “take” prohibition, as initially envisioned by Congress, however, is broad enough to provide the needed protections via a suitable broad definition of “disturb.”

¹ The level of habitat protection provided by the proposed definition will certainly not be sufficient to wholly protect the eagle and its habitat if the species is delisted pursuant to the ESA, but it will provide the Service with another useful tool to ensure the eagle is able to continue to prosper.

The Definition of Disturb Must Provide Meaningful Protections for the Species

More generally, regardless of the language chosen, 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, the term “take” under the BGEPA already includes terms such as wounding and killing and therefore a requirement of injury or death within the definition of disturb is redundant and inappropriate.

Moreover, the ordinary meanings of disturb, as cited by the Service, 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 the harshest of results, here the Service has significantly diverged from the ordinary meaning of disturb, despite its stated objective of providing a commonly understood meaning.²

Further, in its 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 much too high, as 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.

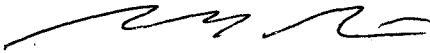
Finally, the Service’s proposed definition will also make meaningful enforcement of the prohibitions established nearly impossible. Indeed, the Service’s own example of how a repeatedly flushed eagle may not be able to adequately care for its young or eggs, *see* 71 Fed. Reg. at 8267, demonstrates the 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 action become 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, such as flying away from the disturbance, circling above it and emitting high pitched vocalizations, and occasionally swooping down upon the source of the disturbance, which clearly demonstrates that an activity is altering an eagle’s normal behavior, to be the trigger for a violation and an enforcement response.

² 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.

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 Service must ensure the species is allowed to continue to prosper. Thus, as the Service looks to remove the protections afforded the eagle under the ESA, it is imperative that the full conservation mandate embodied in the BGEPA is realized and the term "disturb" is defined in a manner that will provide meaningful, on-going protection for the bald eagle.

Sincerely,



Michael Senatore
Vice President Conservation Litigation