

DEPARTMENT OF THE INTERIOR**Fish and Wildlife Service****50 CFR Part 22**

RIN 1018-AT94

Protection of Bald Eagles; Definition**AGENCY:** Fish and Wildlife Service, Interior.**ACTION:** Proposed rule.

SUMMARY: In anticipation of possible removal (delisting) of the bald eagle in the 48 contiguous States from the List of Endangered and Threatened Wildlife under the Endangered Species Act (ESA), the U.S. Fish and Wildlife Service (the Service) is proposing a definition of “disturb” under the Bald and Golden Eagle Protection Act (BGEPA) to guide post-delisting bald eagle management. Because BGEPA’s prohibition against disturbance applies to both bald and golden eagles, the definition will apply to golden eagles (*Aquila chrysaetos*) as well as bald eagles (*Haliaeetus leucocephalus*).

If the bald eagle is delisted, the BGEPA will become the primary law protecting bald eagles. BGEPA prohibits take of bald and golden eagles and provides a statutory definition of “take” that includes “disturb.” Although disturbing eagles has been prohibited by BGEPA since the statute’s enactment, the meaning of “disturb” has never been explicitly defined by the Service or by the courts. To define “disturb,” we rely on the common meaning of the term as applied to the conservation intent of BGEPA and the working definitions of “disturb” currently used by Federal and State agencies to manage bald eagles. This proposed definition of disturb will apply to Alaska, where the bald eagle has never been listed under the ESA, as well as the 48 contiguous States. (Eagles do not occur in Hawaii.)

In addition to this proposed rulemaking, the Service is soliciting public comment on two related proposals published separately in this part of today’s **Federal Register**. First, the Service is re-opening the public comment period on the proposed rule to remove the bald eagle from the list of threatened species under the ESA (16 U.S.C. 1531 *et seq.*); we originally proposed delisting the bald eagle on July 6, 1999 (64 FR 36453). Second, we are soliciting comment on draft National Bald Eagle Management Guidelines.

DATES: We will accept written comments on this proposed rule until May 17, 2006.

ADDRESSES: You may submit comments and other information, identified by RIN

1018-AT94, by any of the following methods:

- Mail: Brian Millsap, Chief, Division of Migratory Bird Management, U.S. Fish and Wildlife Service, 4401 N. Fairfax Drive, MBSP-4107, Arlington, Virginia 22203. Attn: RIN 1018-AT94.

- Hand Delivery/Courier: Same address as above.

- E-mail:

BaldEagle_ProposedRule@fws.gov.

Include “RIN 1018-AT94” in the subject line of the message.

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name and Regulatory Identification Number (RIN) for this rulemaking. For detailed instructions on submitting comments, file format and other information about electronic filing, and additional information on the rulemaking process, see the “Public Comments Invited” heading at the end of the

SUPPLEMENTARY INFORMATION section of this document. In the event that our Internet connection is not functional, please submit your comments by the alternate methods mentioned above.

The complete file for this proposed rule is available for inspection, by appointment, during normal business hours at the Division of Migratory Bird Management, 4501 North Fairfax Drive, Room 4107, Arlington, Virginia 22203-1610. Please call 703-358-1714 to make an appointment to view the files.

FOR FURTHER INFORMATION CONTACT: Eliza Savage, Division of Migratory Bird Management, (*see ADDRESSES* section); or via e-mail at: *Eliza_Savage@fws.gov*; telephone: (703) 358-2329; or facsimile: (703) 358-2217.

SUPPLEMENTARY INFORMATION:**Background**

For a discussion of the history of the bald eagle’s status in the United States, including legislative and regulatory actions taken to protect and recover bald eagle populations, see our re-opening of the comment period on the proposed rule to delist the bald eagle, published separately in this part of today’s **Federal Register**.

Bald Eagle National Management Guidelines

Since the bald eagle was listed under the ESA, the ESA has been the primary law protecting bald eagles in the 48 contiguous States. If the bald eagle is delisted under the ESA, the BGEPA (16 U.S.C. 668-668d) will become the primary law protecting bald eagles in the lower 48, as it has continued to be

in Alaska where the bald eagle was never listed under the ESA. The BGEPA protects both bald and golden eagles. It prohibits take of both species and provides a statutory definition of “take” that includes “disturb.” To provide guidance to land managers, landowners, and others who plan activities in the vicinity of bald eagles, the Service has developed draft National Bald Eagle Management Guidelines. (See our notice of availability of the draft guidelines published separately in this part of today’s **Federal Register**.) In the event the bald eagle is delisted, the guidelines will provide information to the public regarding how to avoid disturbing bald eagles. Secondly, the guidelines include additional recommended practices that can benefit bald eagles. The draft guidelines are based on the definition of “disturb” that we are proposing in this rulemaking.

Although the Guidelines are not law and strict adherence to them is not mandatory, they will benefit both eagles and people by: (1) Publicizing the provisions of the BGEPA and the Migratory Bird Treaty Act (16 U.S.C. 703-712) that continue to protect bald eagles, in order to reduce the possibility that people will violate those laws, (2) advising landowners, land managers and the general public of the potential for various human activities to disturb bald eagles, and (3) encouraging land management practices that benefit bald eagles and their habitat. We are soliciting public input on the guidelines. To obtain a copy, see the **Federal Register** notice announcing the availability of the National Bald Eagle Management Guidelines for public comment published separately in this part of today’s **Federal Register**.

Description of the Proposed Rulemaking

Through an amendment to 50 CFR 22.3, we propose to define the term “disturb” under the BGEPA. Disturbing bald and golden eagles is prohibited because BGEPA prohibits “take” of eagles, and defines “take” to include “disturb.” Until now, the meaning of “disturb” has never been explicitly defined by the Service or by the courts. To define “disturb,” we rely on the common meaning of the term as applied to the conservation intent of BGEPA and the working definitions of “disturb” currently used by Federal and State agencies to manage bald and golden eagles.

“Disturb” is defined by the *American Heritage Dictionary of the English Language* (4th ed., 2000) as:

“1. To break up or destroy the tranquillity or settled state of: “Subterranean fires and deep unrest disturb the whole area” (Rachel

Carson). 2. To trouble emotionally or mentally; upset. 3a. To interfere with; interrupt: *noise that disturbed my sleep*. b. To intrude on; inconvenience: *Constant calls disturbed her work*. 4. To put out of order; disarrange.

The *Merriam-Webster Online Dictionary* (2004) defines disturb as:

“1a: to interfere with : *INTERRUPT*. b: to alter the position or arrangement of. c: to upset the natural and especially the ecological balance or relations of <land disturbed by dumping>. 2a: to destroy the tranquillity or composure of. b: to throw into disorder. c: *ALARM*. d: to put to inconvenience.”

Thus, disturb can be applied to individuals as well as to natural forces and universal concepts (e.g., “disturbing the peace”). As applied to individuals, the concept of *disturb* implies and requires there be a psychological or physiological component—essentially an agitating effect—on the individual being disturbed.

Biological studies of eagle behavior indicate that eagles are particularly vulnerable to interference during territory establishment, courtship, egg-laying, incubation, and parenting of nestlings. A wide variety of activities, including various types of 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. Further disruption may also result from human activity that occurs after the initial habitat alterations and construction activities (e.g., residential occupancy or the use of commercial buildings, roads, piers, and boat launching ramps).

When the BGEPA was enacted, Congress intended it to be the primary vehicle by which eagles would be protected from extinction, and as such Congress provided a broad prohibition in its definition of “take,” by defining it to include: pursue, shoot, shoot at, wound, kill, capture, trap, collect, molest or disturb. (Congress added the term “poison” to the definition in 1972 (P.L. 92–535 [86 Stat. 1064]), October 23, 1972.) In keeping with the conservation intent of the BGEPA, we have determined that the following biological premises are necessary to secure long-term protections for the bald and golden eagle populations: prevention of nest abandonment and prevention of death or injury resulting from interference with normal breeding, feeding, and sheltering habits.

Accordingly, we propose to define “disturb” under the BGEPA as follows: “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.” In addition to immediate impacts, this definition encompasses impacts that result from human-induced alterations initiated around a previously used nest site during a time when eagles are not present, if, upon the eagle’s return, such alterations agitate or bother an eagle to a degree that interferes with or interrupts normal breeding, feeding, or sheltering habits and causes injury, death, or nest abandonment. This 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.

The definition is intended to cover situations where the interference or interruption of an eagle’s breeding, feeding, or sheltering habits causes injury or death not just to themselves, but more typically to other eagles: the juveniles or eggs. For example: if adult eagles are repeatedly flushed from a nest, their young may overheat and die, or their eggs may cool too much and fail to hatch.

Biological literature indicates that factors such as the proximity, frequency, magnitude, and duration of activities, along with the presence or absence of vegetative buffers and topographic changes in terrain, determine how an activity impacts eagles. Vegetation surrounding a nest tree or concentration area may serve to buffer, conceal, or muffle human activities from the eagle’s visual or auditory awareness. Therefore, site-specific factors can affect the likelihood and degree of impacts to the eagles. Individual eagles and pairs of eagles demonstrate remarkably different thresholds for disturbance. On-site evaluations of the terrain, existing vegetation, existing human activities and/or development, sight lines from the nest, and observed behaviors of the eagles in that particular locality will help to determine whether disturbance is likely to occur on a case-by-case basis. The National Bald Eagle Management Guidelines will provide assistance to people whose activities may affect bald eagles based on these varying factors (see our notice of availability of the guidelines published separately in this part of today’s **Federal Register**).

Required Determinations

Energy Supply, Distribution or Use (E.O. 13211). On May 18, 2001, the President issued an Executive Order addressing regulations that affect energy supply, distribution, and use. E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This rule is

not expected to significantly affect energy supplies, distribution, and use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

Regulatory Planning and Review (E.O. 12866). This rule is a significant regulatory action subject to review by the Office of Management and Budget (OMB). OMB makes the final determination of significance under Executive Order 12866.

a. The Service does not anticipate that this rule will have an effect of \$100 million or more on the economy. This rule defines an existing statutory term in a manner largely consistent with how it is currently interpreted by State and Federal agencies. The Service is seeking comments from the public on any potential costs and/or benefits associated with promulgating this regulatory definition of “disturb” and providing guidance for avoiding such disturbance. In particular, the Service is interested in information about the level of anticipated conflicts between eagles and various land use activities to help determine the expected impacts.

b. This rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency. This rule deals solely with governance of bald and golden eagle take in the United States. No other Federal agency has any role in regulating bald or golden eagle take. Although some other Federal agencies regulate activities that impact wildlife (including eagles) and such impacts may constitute take, the definition of “disturb” promulgated by this rule is similar to existing operative interpretations of the term.

c. This rule does not alter the budgetary effects of entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients. No entitlements, grants, user fees, or loan programs are associated with the regulation of bald or golden eagle take.

d. This rule may raise novel legal or policy issues.

Regulatory Flexibility Act. The Department of the Interior certifies that this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA), 5 U.S.C. 804(2).

Description of Small Entities Affected by the Rule. This rule applies to any individual, government entity, or business entity that undertakes or wishes to undertake any activity that may disturb bald or golden eagles. It is not possible to define precisely or

enumerate these entities because of uncertainty concerning their plans for future actions and incomplete scientific knowledge of which activities in specific cases will disturb bald or golden eagles. Small entities that are most likely to engage in activities that may disturb bald or golden eagles include: Small businesses that are engaged in construction of residential, industrial, and commercial developments, small timber companies, small mining operations, and small governments and small organizations engaged in construction of utilities, recreational areas, and other facilities. These may include tribal governments, town and community governments, water districts, irrigation districts, ports, parks and recreation districts, and others.

Expected Impact on Small Entities. The rule defines the term “disturb,” which is contained in the definition of “take” in the BGEPA. The definition is consistent with the Service’s interpretation of “disturb” and this interpretation will remain unchanged regardless of whether this rule is implemented. This codification of the Service’s definition of “disturb” does not change existing law and, therefore, does not impose any new reporting, recordkeeping, or other compliance costs on any small entities. Promulgation of the rule and the accompanying National Bald Eagle Management Guidelines provides clear guidance to all parties that engage in activities that could potentially disturb eagles. Improved compliance with existing laws may result in additional costs to regulated entities. Conversely, promulgation of the rule and guidelines may decrease the costs of complying with the BGEPA by reducing uncertainty and enhancing resolution of potential conflicts between human activities and eagles.

Description of steps the Service has taken to minimize the economic impact of the rule on small entities. The Service is seeking comments on its draft guidelines and definition, including suggestions for ways to structure the guidelines to minimize the burden on small entities while providing appropriate protection for the bald eagle under the BGEPA. The Service is also seeking comments that provide examples of effects on small entities.

Unfunded Mandates Reform Act. In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*):

a. This rule will not “significantly or uniquely” affect small governments. A Small Government Agency Plan is not required. This rulemaking will not

impose a cost of \$100 million or more in any given year on local or State government or private entities.

b. This rule will not produce a Federal mandate of \$100 million or greater in any year; *i.e.*, it is not a “significant regulatory action” under the Unfunded Mandates Reform Act. Revisions to State regulations are not required; codifying the definition of “disturb” under the BGEPA does not require any future action by State or local governments.

Takings (E.O. 12630). In accordance with Executive Order 12630, the rule does not have significant takings implications. This is an interpretive rule, defining the statutory term “disturb” under the BGEPA. The rule promulgates a definition of “disturb” that is consistent with working definitions currently applied to private property, and will be used in conjunction with guidelines that provide greater flexibility than existing guidelines used by the Service to advise landowners regarding how to avoid disturbing bald eagles. A takings implication assessment is not required.

Federalism (E.O. 13132). In accordance with Executive Order 13132, the rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. This rule will not interfere with the States’ ability to manage themselves or their funds. Defining a term within the prohibitions of BGEPA will not result in significant economic impacts because this definition is consistent with the meaning of the term as currently interpreted by the Service and the States. A Federalism Assessment is not required.

Civil Justice Reform (E.O. 12988). In accordance with Executive Order 12988, the Office of the Solicitor has determined that this rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order.

Government-to-Government Relationship with Tribes. In accordance with the President’s memorandum of April 29, 1994, “Government-to-Government Relations with Native American Tribal Governments” (59 FR 22951) and 512 DM 2, we have evaluated potential effects on federally recognized Indian tribes and have determined that there are no potential effects. This rule will not interfere with Tribes’ ability to manage themselves or their funds.

Paperwork Reduction Act. This proposed rule does not require any information collection from the public. No OMB control number is required.

National Environmental Policy Act. If warranted, the Service will prepare an environmental assessment of this proposed action, pursuant to the National Environmental Policy Act. If undertaken, the environmental review of this action will be conducted in accordance with the requirements of the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 *et seq.*), National Environmental Policy Act regulations, and policies and procedures of the Service for complying with those regulations.

Clarity of this regulation. Executive Order 12866 requires each agency to write regulations that are easy to understand. We invite your comments on how to make this rule easier to understand. Send a copy of any comments pertaining to how we could make this rule easier to understand to: Office of Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street, NW., Washington, DC 20240. You may also e-mail comments on the clarity of this rule to: Exsec@ios.doi.gov.

Public Comment Invited

Interested persons may submit written comments, suggestions, or objections regarding the proposed regulations. Correspondence should be sent to the address given at the beginning of this proposed rulemaking under the **ADDRESSES** section. Please submit Internet comments to BaldEagle_ProposedRule@fws.gov in ASCII file format and avoid the use of special characters or any form of encryption. Please also include “Attn: RIN 1018-AT94” in your e-mail subject header, and your full name and return address in the body of your message. Please note that the Internet address BaldEagle_ProposedRule@fws.gov will be closed at the termination of the public comment period.

We will take into consideration the relevant comments, suggestions, or objections that are received by the deadline indicated above in **DATES**. These comments, suggestions, or objections, and any additional information received, may lead us to adopt a final rulemaking that differs from this proposal.

Our practice is to make comments, including names and home addresses of respondents, available for public review during normal business hours. Individual respondents may request that we withhold their home addresses from the rulemaking record, which we will honor to the extent allowable by law. There also may be circumstances in which we would withhold from the rulemaking record a respondent’s identity, as allowable by law. If you

wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. However, we will not consider anonymous comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

List of Subjects in 50 CFR Part 22

Exports, Imports, Reporting and recordkeeping requirements, Transportation, Wildlife.

For the reasons described in the preamble, we propose to amend subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 22—EAGLE PERMITS

1. The authority citation for part 22 continues to read as follows:

Authority: 16 U.S.C. 668a; 16 U.S.C. 703–712; 16 U.S.C. 1531–1544.

2. In § 22.3, revise the heading and introductory paragraph and add a definition for “disturb” in alphabetical order to read as follows:

§ 22.3 Definitions.

In addition to definitions contained in part 10 of this subchapter, the following definitions apply within this part 22:

* * * * *

Disturb means 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.

* * * * *

Dated: November 1, 2005.

Craig Manson,

Assistant Secretary for Fish and Wildlife and Parks.

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