

Billing Code: 4310-55-P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 22

RIN 1018-AT94

Protection of Eagles; Definition of “Disturb”

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (the Service), are codifying a definition of “disturb” under the Bald and Golden Eagle Protection Act (Eagle Act). Given that the Eagle Act’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 Eagle Act will be the primary law protecting bald as well as golden eagles. The Eagle Act prohibits unregulated take of bald and golden eagles and provides a statutory definition of “take” that includes “disturb.” Although disturbing eagles has been prohibited by the Eagle Act since the statute’s enactment in 1940, the meaning of “disturb” has not been explicitly defined by the Service or by the courts. To define “disturb,” we considered Congressional intent, the common meaning of the term as applied to the conservation intent of the Eagle Act, and the working definitions of “disturb” currently used by Federal and State agencies to manage eagles. This definition of “disturb” will apply to eagles in Alaska, where the bald eagle has never been listed under the ESA, as well as eagles throughout the 48 contiguous States. (Eagles do not occur in Hawaii.)

In addition to this final rule, the Service is publishing three related documents elsewhere in today's Federal Register: a notice of availability of the final environmental assessment for the definition of "disturb"; a notice of availability for National Bald Eagle Management Guidelines; and a proposed rule to codify additional take authorizations under the Eagle Act.

DATES: This rule goes into effect on [insert date 30 days after date of publication in the FEDERAL REGISTER].

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

SUPPLEMENTARY INFORMATION:

Background

On February 16, 2006, 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) (16 U.S.C. 1531 et seq.), we proposed a regulatory definition of "disturb" under the Bald and Golden Eagle Protection Act (Eagle Act) (16 U.S.C. 668-668d) to guide post-delisting bald eagle management (71 FR 8265). The Service concurrently proposed two other related actions: (1) a notice of availability of draft National Bald Eagle Management Guidelines (Guidelines) (71 FR 8309, February 16, 2006); and (2) a reopening of the comment period on our proposal to remove the bald eagle from the List of Endangered and Threatened Wildlife

under the ESA (71 FR 8238, February 16, 2006). On May 16, 2006, we extended the 90-day comment period on those actions by 30 days, to June 19, 2006 (71 FR 28293). Fifty-five respondents commented on both the definition of disturb and the draft Guidelines. Eighteen commented on the definition only and 31 commented on the Guidelines only.

The definition of “disturb” we proposed on February 16, 2006 read: “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.” On December 12, 2006, we made available a Draft Environmental Assessment (DEA) of our proposed definition of “disturb,” and announced its availability through a notice in the Federal Register (71 FR 74483). In the DEA, we considered a definition slightly modified from the definition proposed in February as our preferred alternative. The definition was reworded for purposes of clarity, and included a definition of “injury,” a term used in the definition of “disturb.” During this round of public comment, we received 1,977 comments, approximately 1,875 of which were very similar to one another.

The definition of disturb we are codifying through this rulemaking is a modification of the definition we identified as our preferred alternative in the DEA and reflects our consideration of the various concepts raised to us in the comment processes. The following definition of “disturb” will be codified in regulations at 50 CFR 22.3: “Disturb means to agitate or bother a bald or golden eagle to a degree that causes, or is likely to cause, based on the best scientific information available, 1) injury to an eagle, 2) a decrease in its productivity, by substantially interfering with normal breeding, feeding, or sheltering behavior, or 3) nest abandonment, by substantially interfering with normal breeding, feeding, or sheltering behavior.” The final

definition thus reduces uncertainty, adds clarity, and appropriately implements the Eagle Act.

The definition was reworded from the preferred alternative in the DEA to address concerns expressed about enforceability and predictability. The earlier definitions we had proposed required injury, death, or nest abandonment to have occurred, whereas the final definition includes the phrase “or is likely to cause,” with the result that all actions that are likely to cause the biologically significant event (injury, loss of productivity, or nest abandonment) by agitating and interfering with eagles will constitute disturbance, whether or not the harm is documented. Requiring actual injury, death, or nest abandonment was viewed as creating uncertainty as to whether a disturbance has taken place or whether it will, since death or injury will almost always occur at a later date and sometimes a different location. It also implies that actual harm will have to be proven to have taken place, which would make the prohibition difficult to enforce without evidence of a dead or injured eagle. The final definition is more consistent with the separate elements used in the Eagle Act to define “take” as well as how the term “disturb” has been applied in the past for managing eagles. We are not aware of any local, State, Federal, or tribal guidance or regulation that interprets the term “disturb” to require a threshold as severe as wounding or death.

We believe the addition of the phrase “likely to cause, based on the best scientific information available” in the final rule increases predictability and is the logical outgrowth of the comment process. Many commenters, including numerous state wildlife agencies and our own Office of Law Enforcement, encouraged us to incorporate a “likelihood” clause for purposes of predictability and enforceability. Without such a clause, similar actions may be treated differently, depending on their outcome. Additionally, the phrase is consistent with the goal of

the Eagle Act of protecting eagles by preventing injury. The Service will use the best available information to predict the likely outcomes of an action or activity. If it is clear an action is likely to cause one of the negative results, there is a high degree of predictability that the disturbance will occur in violation of the Eagle Act. It is at this time, when the actor is contemplating the action, that predictability is important, because that is when alternatives are available.

In addition to immediate impacts, this definition also covers impacts that result from human-caused 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 injures an eagle or substantially interferes with normal breeding, feeding, or sheltering habits and causes, or is likely to cause, a loss of productivity or nest abandonment.

Because one of the criteria for disturbance in the proposed definition of "disturb" was "injury," we proposed in the DEA to define "injury" to clarify our intent. We included the following definition of "injury" as part of our preferred alternative in the DEA: "Injury means 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." We intended this definition to clarify that "injury" is not restricted to a wound in which skin is torn or bruised, or bones are broken. Defining "injury" to include a decrease in biological fitness of the eagle significant enough to affect productivity would clarify that interference with feeding and sheltering habits can cause disturbance short of the eagle being wounded or killed. The inclusion of decreased productivity in the definition of "injury" underscored the biological premise that preservation of eagles depends on protection from disturbance when feeding and sheltering as well as when nesting. In this final rule, we do not define "injury" separately because the final definition of "disturb"

directly incorporates the phrase “decrease in its productivity,” removing the need for a separate definition of “injury.”

A decrease in productivity refers to the reproductive capacity of the eagle(s). A decrease in productivity can be caused by events that occur at various stages of an eagle’s life cycle. For example, a decrease in productivity can occur because eagles are not fit enough after the wintering season to breed (e.g., if they have not adequately fed or sheltered). A decrease in productivity can also occur after eagles have initiated breeding behaviors; for example, if they do not lay eggs or lay fewer eggs than would be expected based on the best scientific information available, due to interruptions in their normal behavior. It may also occur if eggs do not hatch after being exposed to extreme heat or cold in the absence of the adults, or when nestlings do not survive long enough to fledge because they are not adequately fed by adults due to interference at an important foraging area. All of these outcomes can be caused by factors unrelated to human activity. A decrease in productivity is only a prohibited disturbance if it is the result, or likely to be the result, of activities by humans that agitates and bothers the birds and substantially interferes with breeding, feeding, or sheltering behavior.

The final definition removes the reference to death, since “injury” is a broader term than “death” and encompasses injury that results in death. Also, as several commenters noted, killing eagles is already prohibited under the Eagle Act, so it is not necessary to repeat that prohibition within the definition of “disturb.” We also note that a definition of “disturb” that required death or injury might be vulnerable to a claim that the definition renders the word “disturb” as surplusage, given that the Eagle Act’s definition of “take” separately lists the terms “kill” and “wound.”

We also note that the only court to have addressed the relationship between the prohibitions of the ESA and the Eagle Act stated:

Both the ESA and the Eagle Protection Act prohibit the take of bald eagles, and the respective definitions of “take” do not suggest that the ESA provides more protection for bald eagles than the Eagle Protection Act.... The plain meaning of the term “disturb” is at least as broad as the term “harm,” and both terms are broad enough to include adverse habitat modification. (*Contoski v. Scarlett*, Civ No. 05-2528 (JRT/RLE), slip op. at 5-6 (D. Minn. Aug 10, 2006).)

In any event, the final definition cannot—and does not—broaden the protections provided by the Eagle Act, but merely clarifies the meaning of the protection that exists.

Response to Comments on the definitions identified in the February 16, 2006, Proposed Definition and the Draft Environmental Assessment

Comment 1: The Service needs to formally grandfather existing ESA take authorizations under section 10 permits and section 7 biological opinions.

Service response: If the bald eagle is delisted, the Service will honor existing ESA incidental take authorizations. At least until we complete a rulemaking for permits under the Bald and Golden Eagle Protection Act, we do not intend to refer for prosecution the take of any bald eagle under the Migratory Bird Treaty Act of 1918, as amended (16 U.S.C. 703-712), or the Bald and Golden Eagle Protection Act of 1940, as amended (16 U.S.C. 668-668d), 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)(A) or 10(a)(1)(B) of the ESA. Consistent with its authority under the Eagle Act, the Service has proposed in today's Federal Register, a separate rulemaking to establish criteria for issuance of permits to authorize the "take" of bald and golden eagles. We address previous ESA authorizations for incidental take of bald eagles in that rulemaking, which, if finalized, would extend comparable authorizations under the Eagle Act.

Comment 2: The Service should provide assurances to persons who received "authorizations" granted through letters of technical assistance while the bald eagle was listed under the ESA.

Service response: The nature and degree of assurances that were provided by letters of technical assistance will not be altered by removal of the bald eagle from the list of threatened wildlife under the ESA.

Comment 3: A new incidental take permitting system needs to be developed under the Eagle Act. A mechanism is needed to address situations where incidental take will be unavoidable (e.g., highway maintenance, bald eagles nesting at the end of an airport runway). An incidental take permit would provide conservation benefits because it would allow the Service to work with applicants to establish mitigation measures that can provide a net benefit to eagles and other wildlife. Moreover, a permit mechanism with associated monitoring and reporting requirements would provide the Service with valuable data and information about the real effects of activities on eagles, allowing the Service to modify management practices accordingly. The Eagle Act provides for this type of incidental take authorization by inclusion of the following language: "Whenever, after investigation, the Secretary of the Interior shall determine that it is compatible

with the preservation of the bald eagle or the golden eagle to permit the taking, possession, and transportation of specimens thereof ... or that it is necessary to permit the taking of such eagles for the protection of wildlife or of agricultural or other interests in any particular locality, he may authorize the taking of such eagles pursuant to regulations which he is hereby authorized to prescribe” (16 U.S.C. 668a).

Service response: We agree with this comment and have proposed a take permit regulation, published in today’s Federal Register, that would authorize the take of bald and golden eagles under certain conditions, including requirements for conservation measures and monitoring. The regulations we have proposed would (1) establish a take permit under the Eagle Act, (2) extend Eagle Act authorizations comparable to the authorizations granted under the ESA to entities who continue to operate in full compliance with the terms and conditions of permits issued under ESA section 10 and incidental take statements issued under ESA section 7, and (3) authorize take of eagle nests that pose a risk to human safety or to the eagles themselves.

Take permits would be issued under 50 CFR 22, Eagle Permits. The permits would also provide any necessary authorization under the Migratory Bird Treaty Act, as implemented through 50 CFR 22.11(a), which states, “You do not need a permit under parts 17 and 21 ... for any activity permitted under this part 22 with respect to bald and golden eagles.” The take permit provisions would primarily authorize disturbance of eagles. However, the regulations could also authorize other take of eagles where such take cannot be avoided. For example, take could be authorized for a utility that follows best management practices for minimizing eagle mortalities. Even the use of best management practices cannot ensure that eagles will not be killed by a collision with power lines, and the regulation could cover such take.

Comment 4: As currently written, harm to eagles would have to be proven after the fact, despite the widespread knowledge that many effects on eagles have predictable results. The definition restricts enforcement to incidents where death, injury, or nest abandonment has already occurred. In addition, the injury or death will almost always occur at a later date and sometimes a different location. This type of after-the-fact cause and effect relationship would make violations too difficult to legally establish, and would seriously compromise law enforcement and fail to protect eagles. Another unfortunate result will be that equally culpable acts will be treated differently depending on whether a dead or wounded eagle is recovered. Neither the actor nor the government can know whether the action is lawful or unlawful.

Service response: We agree with these concerns. To address them, we modified the definition to make clear that it encompasses impacts to eagles that cause “or are likely to cause” injury, decreased productivity or nest abandonment. This definition no longer restricts enforcement to situations where death, injury, or nest abandonment has already occurred. The definition codified by this rule therefore facilitates law enforcement, avoids the use of the term “kill,” which is also defined in the Eagle Act as a take, adds predictability for the regulated public by treating similar actions the same way, and ensures better protection for eagles.

Comment 5: The threshold impacts of death, injury, and nest abandonment are too extreme. The regulatory definition of “disturb” should be closer to the plain meaning of the term in common usage, which does not imply any such severe results. Furthermore, the Eagle Act already makes it illegal to “wound” and “kill” eagles, so the proposed definition is largely redundant.

Service response: The modifications we describe in our preceding response address these

concerns in part. In addition, see the discussion in the Final Environmental Assessment explaining why defining “disturb” as simply causing a physiological response in an eagle is inconsistent with the intent of the BGEPA.

Comment 6: The Eagle Act only prohibits intentional and non-incidental take. “Disturb” can only apply where the act is intentionally directed at eagles.

Service response: We do not agree that the Eagle Act protects eagles only from actions intentionally directed at them, and that “disturb” was not meant to apply to other indirect or incidental impacts to eagles. Such an interpretation is too large a deviation from the common usage of the word “disturb,” which more often than not refers to incidental impacts (e.g., *her tranquility was disturbed by the neighbor’s leaf blower*). Also, Congress reaffirmed the Eagle Act’s prohibition of incidental take in 1978, when it amended the Eagle Act to authorize the issuance of permits to take golden eagle nests. Without the amendment, mining companies faced violating the Eagle Act by incidentally taking golden eagles during mining operations.

Comment 7: The Eagle Act only applies where an act was committed “knowingly or with wanton disregard.” The definition should incorporate that requirement.

Service response: This comment fails to discern between the criminal provisions of the Act, which require those elements, and the civil provisions, which do not. Congress specifically left that phrase out of the Eagle Act section addressing civil penalties (16 U.S.C. 668(b)), signaling that civil violations are subject to strict liability standards. For criminal violations, since the statute already limits those to acts that are conducted “knowingly or with wanton disregard” (16 U.S.C. 668(a)), there is no reason to repeat the phrase within the definition of “disturb.”

Comment 8: The definition should require a negligent standard of conduct in order to add

fairness, objectivity, and a predictable standard to the proposed regulation. We see nothing in the overall definition of take to imply that Congress wanted the Eagle Act to punish good faith or innocent conduct.

Service response: Criminal penalties under the Eagle Act already require a negligent standard conduct. Therefore, innocent conduct committed in good faith is not subject to criminal prosecution. As noted in our preceding response, Congress deliberately enacted a strict liability standard for civil penalties, a standard that uniformly applies to each prohibition of the act. Even so, the Service has rarely, if ever, brought any kind of enforcement action under the Eagle Act against a person acting in good faith, even where eagles have been killed. Also, to reduce the possibility that people will innocently violate the Eagle Act by disturbing eagles, we have developed Guidelines for how to conduct activities to minimize the potential for inadvertent disturbance. As stated in the Guidelines, we will prioritize enforcement efforts to focus on violations committed without regard to the consequences of the actions and the availability of conservation measures such as those recommended in the Guidelines. We also have proposed permit regulations to establish a means by which a person can gain authorization to take eagles, and thereby avoid criminal or civil liability.

Comment 9: The definition inappropriately incorporates habitat protection, which is not authorized by the Eagle Act.

Service response: The Service agrees that the Eagle Act is not a habitat management law, however, there is a difference between protecting habitat per se, and protecting eagles in their habitat. The proposed and final definitions protect eagles from certain effects to the eagles themselves that are likely to occur as the result of various activities, including some habitat

manipulation.

Comment 10: The proposed definition will not satisfy the Eagle Act's conservation goals; it should be revised to explicitly include habitat modification or degradation.

Service response: The Eagle Act contains no provisions that directly protect habitat except for nests. Individual members of the species are protected from certain effects to themselves that are likely to occur as the result of various human activities, including some habitat manipulation. Activities that disrupt eagles at nests, foraging areas, and important roosts can wound, kill, or disturb eagles, each of which is specifically prohibited by the Eagle Act. Therefore, eagle nests, important foraging areas, and communal roost sites are accorded protection under the Eagle Act to the degree that their loss would disturb or kill eagles.

Comment 11: The definition of disturb should not apply to feeding or sheltering eagles or to the impacts of activities that take place outside the nesting season.

Service response: The Eagle Act's stated goal is the preservation of the bald eagle and the golden eagle. We are aware of no provision of the Eagle Act or its legislative history to suggest that, in enacting the law, Congress intended to protect only breeding eagles from disturbance, and only during the nesting season. Activities that disrupt eagles at foraging areas and important roosts can lead to decreased productivity, injury, or death.

Comment 12: Under the proposed definition, "injury" is not defined and could be interpreted narrowly to equate with "wound." If so, the prohibition against disturbing eagles will have no meaning independent of the Eagle Act's other prohibitions against wounding and killing eagles, unless a nest is abandoned. The proposed definition would provide little protection for eagles at communal wintering sites and foraging areas, since neither wounding nor death is likely to be

directly connected to the disruption of feeding or sheltering behavior, even though such disruption can affect survival and productivity.

Service response: We agree that the definition proposed on February 16, 2006 (71 FR 8265), did not adequately protect nonbreeding eagles. Because the threshold requirement was injury, death, or nest abandonment, the definition could have been interpreted to mean that, aside from the scenario of nest abandonment, an eagle would have to be wounded (e.g., cut or bruised) or killed to have been disturbed. We believe that threshold was too high and did not adequately protect eagles other than when they are nesting (when nest abandonment is an issue) and was inconsistent with the statutory definition of “take” because “wound” and “kill” were separate specified elements of “take.” To address this weakness, the preferred alternative of our DEA included a definition of “injury” to clarify that it includes a “loss of biological fitness significant enough to pose a discernible risk to an eagle’s survival or productivity.” That definition better protects non-breeding eagles from disturbance at foraging areas and winter roost sites, where human activity is unlikely to actually wound or kill an eagle, but may have serious effects on long-term viability. Although the final rule does not contain a separate definition of “injury,” it instead incorporates such elements into its definition of “disturb.”

Comment 13: Including nest abandonment in the definition raises the possibility that a one-time departure from the nest could constitute nest abandonment. “Nest abandonment” needs to be defined in the regulation to exclude mere flushing from the nest.

Service response: The Service defined “nest abandonment” in the glossary to the draft Guidelines (see 71 FR 8309, February 16, 2006), which have now been finalized after considering comments received from the public (see our notice of availability in today’s Federal

Register and our website at <http://www.fws.gov/migratorybirds/baldeagle.htm>). We do not believe it is necessary to also include this definition in the final rule.

Comment 14: Nest abandonment should not be included in the definition of disturb. If no injury or death has occurred, then nest abandonment should not be of concern. The proposed definition would apply to situations in which adult eagles do not return to a particular tree to nest, on either a temporary or permanent basis, without adverse biological effect and for a variety of reasons not related to human activity. This leaves far too much discretion to the individual enforcement authorities at FWS, and creates an impossible burden of proof for those trying to implement projects or engage in needed maintenance activities. Also, there is no clear standard as to the contribution of human activity to nest abandonment. This will result in strict liability regardless of whether their activity can be shown to have caused the abandonment.

Service response: First, nest abandonment is not always due to interference from humans. Nest abandonment caused by non-human factors is not a violation of the Eagle Act. The fact that similar outcomes can be brought about by other factors is no reason not to regulate human-caused outcomes. This is similar to other actions and results prohibited by the Eagle Act and many other statutes. For example, all eagles die eventually, whether or not someone kills them. This does not prevent the Service from enforcing the Eagle Act's prohibition against killing eagles. Only "nest abandonment caused by intentional human activity that disturbs eagles would be subject to criminal prosecution. We view the standard set in this definition as sufficiently high to avoid capturing activities conducted according to a reasonable standard of care based on readily available guidance, and therefore we disagree that it creates an impossible burden of

proof for those attempting to comply. Enforcement authorities will continue to exercise the discretion they have (which arguably will be reduced substantially merely by the promulgation of this clarifying regulation) in a reasonable manner. As far as the concern regarding strict liability, the inclusion of “nest abandonment” would not result in strict liability any more than many legal prohibitions, including the Eagle Act’s prohibition against killing eagles. In any case, even strict liability requires a showing of causation. In fact, the burden of proof would be greater for nest abandonment. First, the Service would have to demonstrate that an eagle was agitated or bothered, then that there was substantial interference with normal breeding, feeding, or sheltering behaviors, then that the activity, based on the best scientific information available, either caused or was likely to cause the abandonment.

Second, nest abandonment may have an adverse biological impact even without an eagle being killed or injured. Nest abandonment prior to egg-laying will generally have a negative effect on eagle productivity unless the eagles use an alternate nest without significant delay. Therefore, eagle populations can be affected by nest abandonment without the occurrence of actual injury or death of nestlings or eggs.

Third, even where eagles re-nest elsewhere and successfully breed, the disturbance will have a long-term effect on eagles if the interference continues until the nest is no longer viable. The Guidelines suggest that, after five years of disuse, nests may no longer merit protection from disturbance. When human activities completely surround the nest at close proximity, eagles will usually not re-use the nest. After five years, the nest site would be lost for all intents and purposes, and may result in a significant biological impact on eagles. In Florida, for example, many biologists believe that bald eagles have been nesting in closer proximity to humans and to

one another because available nest sites are limited, leading to speculation that eagle populations in Florida will not significantly increase from current size, due to a lack of available nest sites. If so, the loss of a nest site will result in a decrease in the eagle population. The Eagle Act specifically protects nests. That statutory protection recognizes that nests are biologically significant structures constructed in specific locations selected by eagles because of the presence of various ecological factors necessary for survival and productivity.

Comment 15: The Service should add the word “premature” before nest abandonment to clarify that it does not include the scenario where eagles do not occupy a nest in a given year, switching to another nest nearby, or building a new nest and not using the old one.

Service response: The guidelines provide for consideration of impacts to nests and alternate nests. Alternate nests are important to eagle productivity, and are protected by the Eagle Act.

Comment 16: Including nest abandonment in the definition extends liability beyond proximate cause and results in too much uncertainty for the public. Landowners need to know in advance whether their actions might disturb eagles. The proposed definition does not provide enough certainty.

Service response: With regard to its prohibition of disturbance, the Eagle Act is concerned with a result of an action (with respect to the eagle), rather than the action itself. This is a common feature of wildlife laws. (Such laws, including the Eagle Act, also directly prohibit actions, such as importing or shooting at the protected species.) A level of uncertainty is inherent in any statute that prohibits results, rather than actions, as one can never be sure what the results of a particular action might be. However, to minimize this uncertainty as much as possible while maintaining consistency with the statutory language, in response to the comments

received we have revised the definition to include the phrase “or is likely to cause.” Inclusion of this phrase will enable people to better predict when their actions may violate the Eagle Act by disturbing eagles, particularly in conjunction with the guidance provided by the Guidelines, which publicize our recommendations for avoiding disturbance. To further reduce uncertainty, we have proposed regulations, published separately in today’s Federal Register, that would provide for issuance of permits for take of eagles; obtaining such a permit would essentially eliminate any remaining uncertainty.

Comment 17: If an eagle returns from its wintering grounds to the vicinity of its nest at a heavily altered site but never returns to the actual nest because the landscape has changed very drastically, the habitat modification might not be a disturbance under the proposed definition, but it should be.

Service response: We do not believe that the Eagle Act was meant to prohibit habitat modification that is undetected by eagles, so if the eagle(s) never return to the site at all, the habitat alterations should not be per se attributed as the cause. However, we do intend that the definition still applies to a situation where eagles, as part of their normal nesting behavior, return to the vicinity of the nest, but the habitat alterations are so vast in scale that the eagles become agitated as a result, alter their behavior, and never return to the nest itself.

Comment 18: The extension of the proposed definition to “impacts that result from human-induced alterations initiated around a previously used nest site during a time when eagles are not present” is unreasonable and places an impossible burden on landowners. If “nest abandonment” remains in the definition of disturb, it should be defined narrowly to mean “premature abandonment of an active nest during the nesting season.”

Service response: We disagree that the prohibition against disturbance should exclude impacts to eagles that occur *after* the activity takes place. Such an exclusion would mean that an activity that causes eagles to abandon a nest could qualify as a disturbance if the eagles were present, but not if the activity was conducted when eagles were away from the nest, whether for a season or a few hours – even if the reaction of (and effect on) the eagles is identical in both cases.

Comment 19: Disturbance should not require injury, death, or nest abandonment. Too many problems are occurring in Alaska because of people feeding eagles, and the definition of disturb should make the practice illegal without requiring such a high threshold.

Service response: Although the Eagle Act does not directly prohibit feeding eagles, the final definition protects eagles from situations where eagle feeding is likely to injure eagles.

Comment 20: Although stated in the preamble, the definition needs to be clearer that the death or injury can occur to eagles other than those that are disturbed (e.g., young or eggs).

Service response: The wording of the final definition more clearly conveys that “disturb” incorporates the injury of an eagle other than the one that was agitated or bothered.

Comment 21: The definition should specifically exclude impacts to nests that have not been used for 5 years, to mirror the draft Guidelines, which state “The likelihood that an alternate nest will again become active decreases the longer it goes unused. If you plan activities in the vicinity of an alternate bald eagle nest and have information to show that the nest has not been active during the preceding 5 nesting seasons, the recommendations provided in these guidelines for avoiding disturbance around the nest site may no longer be warranted.”

Service response: We do not agree that the regulatory definition of “disturb” is the appropriate vehicle to transmit Service recommendations regarding the likelihood of eagle nest

re-use. Such recommendations are more appropriately housed under the Guidelines, as written.

The Service will prioritize enforcement efforts under the Eagle Act to focus on violations committed without adhering to the Guidelines.

Comment 22: Disturb should be defined to explicitly exclude any impacts resulting from activities conducted in accordance with a State-approved Bald Eagle Management Plan.

Service response: We do not believe it is appropriate or that the Eagle Act affords us the discretion to establish a definition that would differ in application from State to State. The Eagle Act is a Federal statute, and the prohibitions it contains have general applicability throughout the United States.

Comment 23: A permit for intentional take of nests needs to be available. Situations arise where the location of eagle nests jeopardizes human safety, or the eagles themselves.

Service response: We agree that a permit regulation may be warranted to authorize removal or relocation of eagle nests under limited circumstances. We have proposed a regulation, published separately in today's Federal Register, to establish a permit process in the near future that would include such a provision.

Comment 24: More discussion needs to be included as to how the definition will affect golden eagle management.

Service response: Due to different geographic preferences, human activities are less likely to conflict with golden eagles than bald eagles. Because fewer activities have the potential to disturb golden eagles, the effect of defining "disturb" will be relatively small in relation to golden eagles in comparison to bald eagles. However, we recognize that disturbance caused by human activities can still be an issue with respect to golden eagles. We intend to more fully

address golden eagle disturbance as part of the National Environmental Policy Act assessment of the Eagle Act take permit regulations we are proposing.

Comment 25: The Eagle Act was meant to protect eagles from significant stress that affects their ability to forage, nest, roost, breed, or raise young. Any activity that causes such stress should be considered a violation of the Act.

Service response: The final definition of “disturb” encompasses impacts that, based on the best scientific information available, are likely to cause injury to an eagle, or a decrease in its capacity to reproduce. In contrast to the approach suggested by the commenter, however, the definition provides a measure of predictability to the regulated community by indicating thresholds that can be detected or anticipated by the actor or someone trying to enforce the law.

Comment 26: The definition should prohibit “repeated displacement” of eagles from their nests and roosts.

Service response: To the degree that repeated displacement of eagles from their nest is associated with injury or nest abandonment, it can be a useful indicator of disturbance. However, temporary impacts such as “repeated displacement” are not relevant unto themselves to the preservation of eagles; they are relevant only if they produce the likelihood of meaningful biological effects.

Comment 27: In the definition of “injury” the phrase “pose a discernible risk” (to an eagle’s survival or productivity) should be removed because it’s speculative and hypothetical. Instead, the definition should require that the eagle actually dies or doesn’t breed, rather than capturing effects that only “risk” such an outcome. The ESA definition of “harm” requires actual injury or death.

Service response: The ESA definition of “harm” does require injury or death, but “harass” requires only the “likelihood of injury.” We see no reason to assume that “disturb” would resemble “harm” rather than “harass,” and we find limited utility in comparing either ESA term to the Eagle Act’s prohibition of “disturb.” All three are distinct definitions, and “disturb” is from a separate statute enacted 33 years before the ESA. It is useful to compare the ESA terms with “disturb” in order to determine certain types of sentence construction that may hinder or facilitate compliance with and enforcement of the statute. Having done this comparison, we initially thought that the phrase “pose a discernible risk” was helpful in those regards. To require that the death or loss of productivity be documented could make it difficult to enforce the prohibition. The final definition of disturb no longer incorporates the phrase “pose a discernible risk,” but it does include “or is likely to cause,” which we believe is both readily understandable and will help prevent adverse effects to eagles.

Comment 28: (From numerous airport authorities) We are concerned about maintaining airport safety in light of the risk of air strikes with eagles and the prohibition against disturbing them.

Service response: We appreciate the gravity of these concerns. However, we see no reasonable definition of disturb that would exclude the intentional harassment and displacement of eagles necessary to remove eagles from the vicinity of airports, while adequately protecting eagles from many other potentially disturbing activities that would adversely affect them. Permits are already available and routinely issued under 50 CFR 22.23 (Depredation) to intentionally haze eagles at airports for purposes of human safety. We agree that a permit regulation may be warranted to authorize removal or relocation of eagle nests under

circumstances of human health and safety such as at airports. We have proposed a regulation to establish a permit process that includes such a provision (published separately in today's Federal Register).

Comment 29: In light of the Service's April 15, 2003, Migratory Bird Permit Memorandum, it would be helpful if the Service would clarify whether removal of an unoccupied eagle nest would constitute a violation of the Migratory Bird Treaty Act (MBTA) (16 U.S.C. 703-712) or the Eagle Act.

Service response: As explained in the memorandum referenced by the commenter, it is illegal to collect, possess, and by any means transfer possession of any nest of a species protected by the MBTA, but the MBTA does not contain any prohibition that applies to the destruction of a bird nest alone (without birds or eggs), provided that no possession occurs during the destruction. Thus, destruction of unoccupied nests with no prohibited impacts to a migratory bird (or egg) does not require a MBTA permit. However, the public should be made aware that, while destruction of a nest itself is not prohibited under the MBTA, nest removal that results in the unpermitted take of migratory birds or their eggs is illegal and fully prosecutable under the MBTA. Furthermore, some unoccupied nests are legally protected by statutes other than the MBTA, including nests of bald and golden eagles. The Eagle Act protects nests from removal by a number of means, including its inclusion of the term "molest" as part of "take" (16 U.S.C. 668c). Congress reaffirmed the Eagle Act's protection of inactive nests when it amended the Act in 1978 to direct the Secretary of the Interior to make permits available for incidental take of inactive golden eagle nests for resource development and recovery operations. A permit would not be necessary if such take were not otherwise prohibited by the Act.

Comment 30: Does the removal of large trees occasionally used by roosting and perching eagles constitute a violation of the Eagle Act?

Service response: Removal of trees is not in itself a violation of the Eagle Act. The impacts of such action can be a violation, however, if the loss of the trees kills an eagle, or agitates or bothers a bald or golden eagle to the degree that results in injury or interferes with breeding, feeding, or sheltering habits substantially enough to cause a decrease in productivity or nest abandonment, or create the likelihood of such outcomes. However, if the large trees are only occasionally used, the probability of such an outcome is lower than if the trees were within a traditional communal roost site or were the primary perch trees used by eagles in an important foraging area.

Comment 31: The definition should include protection of traditional nest and roost sites during seasons of the year when eagles are not present.

Service response: The Eagle Act does not directly protect habitat (except nests), but manipulation of important eagle use areas, including nests and communal roosts, that results in a prohibited “take” under the Eagle Act would constitute a violation of the Act. Therefore, roost sites are accorded protection under the definition to the degree that their loss would result in eagle disturbance. For example, if destruction of an important bald eagle winter roost site would agitate the eagles that roost there and interfere with feeding and/or sheltering significantly enough to decreasing productivity, then the roost destruction could constitute a violation.

Comment 32: The definition should include communal roost abandonment as explicitly as it addresses nest abandonment. The phrase “nest abandonment” should be replaced with nest abandonment or communal roost abandonment.”

Service response: While many communal roost sites are identified and well documented, some may not be. The Guidelines define “communal roost sites” as “[a]reas where bald eagles gather and perch overnight – and sometimes during the day in the event of inclement weather. Communal roost sites are usually in large trees (live or dead) that are relatively sheltered from wind and are generally in close proximity to foraging areas. These roosts may also serve a social purpose for pair bond formation and communication between eagles. Many roost sites are used year after year.” Although many communal roost sites are well known to the public, such as at Mason Neck Wildlife Refuge in Virginia, a satisfactory definition of “communal roost site” that would clearly distinguish all of the important areas upon which eagles depend from all other habitat where eagles might sometimes gather and roost has not (to our knowledge) been put forward by eagle biologists, State agencies, or other wildlife managers. Further, because of the lack of documentation of traditional use of all such areas, we believe it would be problematic to explicitly reference communal roost site abandonment in the same manner as nest abandonment.

Comment 33: Long-term habitat protection will be critical to continued recovery and management of bald eagles throughout the nation. The lack of regulatory protection for concentration areas and foraging habitats will result in the degradation of habitats necessary for both nesting and non-breeding eagles. Protection of nest sites will not be enough to sustain eagle populations, which rely on a matrix of habitats to meet their life-cycle requirements. The definition of “injury” should be broadened to specifically include disturbance to essential habitats as under the definition of “harm” in the ESA.

Service response: Habitat manipulation can amount to a violation of the ESA if it “harms” a protected species, meaning injures or kills it (by impacting essential behavior patterns).

Although there is no specific reference to habitat in the definition of “disturb,” habitat degradation can also cause a prohibited disturbance under the Eagle Act, and not just around nest sites, to the extent the activity results in injury, decreased productivity, or nest abandonment.

Comment 34: The phrase “agitate or bother” should be removed since the Eagle Act’s intent is to prevent physical harm of eagles. The terms could be interpreted to include non-physical harms.

Service response: In order for disturbance to occur, the agitation or bother must lead to injury, or substantially interfere with breeding, feeding, or sheltering to the degree that causes, or is likely to cause, decreased productivity or nest abandonment. Each of these outcomes is a physical harm. Without the phrase “agitate or bother,” the definition would no longer require a direct effect on one or more eagles. This would broaden the definition’s applicability. For example, excessive agricultural runoff might then be said to “disturb” eagles since it might interfere with breeding, feeding, or sheltering, and cause decreased productivity. We do not believe such a broad application was intended by Congress when it included the term “disturb” in the definition of take in the Eagle Act.

Comment 35: The word “directly” should be added to the definition before “causes” in order to meet the “knowingly” standard of the Eagle Act.

Service response: Adding “directly” would not affect whether the act was committed knowingly, since the potential outcome (loss of productivity, death, or nest abandonment) is still a *result* of the action, whether direct or not. Whether the actor sees the result is immaterial to whether he knew at the time he acted that his conduct would probably result in disturbance. The latter is at issue in the Eagle Act. (The Eagle Act’s standard that an act be committed

“knowingly or with wanton disregard” only applies to criminal violations. Civil violations do not require this standard.) Additionally, we specifically do not intend disturbance to be limited to situations where the outcome is immediately evident. The Eagle Act makes no distinction between immediate or direct effects to eagles and those that can reasonably be foreseen, as evidenced by its prohibition of eagle poisoning, and our enforcement of cases where the poisoning was secondary but foreseeable. The Guidelines, and our staff, are available to the public to assist in determinations of what activities are likely to result in a violation of the Eagle Act.

Comment 36: Unlike bald eagles, golden eagles are not on the Federal List of Endangered and Threatened Wildlife. Therefore, there is no need to buttress Eagle Act protections for golden eagles to compensate for bald eagle delisting pursuant to the ESA.

Service response: The Eagle Act equally protects both species of eagles from disturbance. The statute treats golden eagles somewhat differently than bald eagles in that it provides broader authority to permit certain otherwise prohibited activities in relation to golden eagles (16 U.S.C. 668a). However, the prohibition against disturbance applies in the same way to both species under the Act (16 U.S.C. 668(a) and (b)).

Comment 37: Under the ESA, permits were available for incidental take of bald eagles. Many project proponents who have relied on such authorizations will be put in an untenable position if the Service issues a final delisting decision before incidental take regulations are in place.

Service response: We recognize the difficult position in which many developers, transportation officials, and others will find themselves (without a means to authorize take of

bald eagles) if the bald eagle is delisted before the time that regulations for a take permit are finalized. The Service intends to place a high priority on completing the rulemaking that would establish a permit program authorizing “take” of eagles, as appropriate, while maintaining the statute’s requirement of protection and conservation of bald and golden eagles. In the interim, the Service will use the Guidelines and provide technical assistance to the public to minimize the “take” of eagles. As a result of the court-ordered deadline, the Service is required to issue a final decision on the delisting by June 29, 2007 (extended from February 16, 2007), which does not allow enough time to promulgate a final rule for a permit program before a decision on delisting is due. See *Contoski v. Scarlett*, Civil No. 05-2528 (JRT-RLE) (D. Minn. August 10, 2007).

Required Determinations

Energy Supply, Distribution or Use (E.O. 13211). Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. Because the definition promulgated herein is similar to the current working interpretation of “disturb,” 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.

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; farms; 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 Eagle Act. Thus, “disturbance” is already prohibited under the law. This rule promulgates a definition that is consistent with the Service’s former interpretation of “disturb” for bald eagle management under the Eagle Act, and thus does not further restrict human activity. This codification of the Service’s definition of “disturb” does not impose any new reporting, recordkeeping, or other compliance costs on any small entities. Promulgation of the rule and the accompanying Guidelines provides clear guidance to all parties that engage in activities that could potentially disturb eagles. Promulgation of the rule and Guidelines may decrease the costs of complying with the Eagle Act by reducing uncertainty and enhancing resolution of potential conflicts between human activities and eagles. The decreased costs are

expected to be minimal. Therefore, this rule will not have a significant effect 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 Eagle Act 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 Eagle Act. 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 of how to minimize disturbance to 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 States' ability to manage themselves or their funds. Defining a term within the prohibitions of the Eagle Act 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 rule does not contain information collection requirements. An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act. The Service has prepared an environmental assessment of this action, pursuant to the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 et seq.). The Notice of Availability for the final environmental assessment is published elsewhere in today's Federal Register.

List of Subjects in 50 CFR Part 22

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

For the reasons described in the preamble, we 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. Section 22.3 is amended by revising the heading and introductory paragraph and adding the 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 a degree that causes, or is likely to cause, based on the best scientific information available, 1) injury to an eagle, 2) a decrease in its productivity, by substantially interfering with normal breeding, feeding, or sheltering

behavior, or 3) nest abandonment, by substantially interfering with normal breeding, feeding, or sheltering behavior.

Dated: _____

Signed: _____

Assistant Secretary for Fish and Wildlife and Parks