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U.S. Fish & Wildlife Service
Division of Migratory Bird Management
4401 North Fairfax Drive
Arlington, VA 2203

Transmitted via Federal eRulemaking Portal: <http://www.regulations.gov>

RE: Proposed permit regulations under the Bald and Golden Eagle Protection Act (72 Federal Register 31141-31155)

To Whom It May Concern:

The proposed permit regulations for the Bald and Golden Eagle Protection Act (72 Federal Register 31141-31155, June 5, 2007) have a number of deficiencies and shortcomings that will be enumerated below.

- 1) Overall, the proposed permit regime for the bald eagle represents a perpetuation of the top-down regulatory approach under the Endangered Species Act (ESA) that has put at risk the very species the Act is supposed to protect. The reason for this is the Act's penalties (\$100,000 and/or 1 year in jail for harming one eagle, chick, or egg) discourage landowners from harboring species on their property. Furthermore, the Act's penalties encourage landowners to rid their land of species and habitat in efforts to avoid the Act's penalties. Much of the rest of the world has turned away from the "command-and-control" model of wildlife conservation, of which the ESA is perhaps the foremost example, and embraced approaches to conservation based on the devolution of rights to wildlife away from national governments to more localized forms of government as well as private landowners. Unfortunately, the combination of the Service's new definition of "disturb" under the Eagle Act and the proposed permit regime represent a regressive approach to eagle conservation that is out of step with progressive trends in wildlife conservation. Sadly, the bald eagle may well suffer. "[S]uccessful conservation depends on the commitment of the people living with the wild species—not us," according to Steven Edwards, of the IUCN (World Conservation Union). "Yes, we can give financial and technical support, but in the final analysis it will be those people who will make a difference. Not laws. Not government policies. And not our wishful thinking."¹ Unfortunately for the bald eagle, the Service's proposed permit regime represents precisely such wishful thinking because the future well being of the eagle depends on the largely rural landowners who harbor eagles on their property. The perpetuation of a heavy-handed federal role, as embodied in the proposed permitting regime, will only serve to alienate the very landowners who the eagle will depend on for its continued well being.

Furthermore, rural landowners, by dint of their socio-economic status, are often least able to afford the land-use restrictions that have accompanied bald eagles under the ESA and will

¹ Stephen R. Edwards. 1992. Sustainable Conservation By and For the People, pp.vii-viii in Richard Littell, *Endangered and Other Protected Species: Federal Law and Regulation*. BNA Books: Washington, D.C.

continue to accompany eagles under the Eagle Act. “My ultimate goal for a conservation program would be to ensure long-term survival of the species, with benefits derived at the local level for local communities,” states Lisa Campbell, professor of marine policy at Duke University, who has conducted research at Ostional, a village on the Pacific coast of Costa Rica where villagers have been given property rights to harvest eggs from olive ridley turtles in exchange for protecting the nesting grounds. “The poorest of the poor should not bear the cost of international feelings about charismatic species.”² America’s private landowners are ready, willing and able to conserve endangered species so long as they are not punished for doing so. Unfortunately, the proposed permit program, coupled with the definition of “disturb”, will continue to foist the costs of conserving bald eagles on the very people who need to be made willing partners in eagle conservation through cooperation, not compulsion.

Private landowners are the linchpin of successful endangered species conservation because 78% of species listed under the ESA have all or some of their habitat on private land, the largest percentage among all land categories (federal, state, municipal, non-profit organizations, Indian tribes, and various others).³ Habitat for nesting bald eagle exists largely on private land. For instance, around 75% of the nearly 1,200 bald eagles nests in Florida occurred on private land.⁴ As of 2005, 63% of Minnesota’s bald eagles nested on private and state lands, and the remaining 37% on federal land.⁵ Oregon, a state with a higher percentage of federal land, has a somewhat different distribution, according to the 2003 census of eagle nests; 51% federal, 35% private, 8% state; 4% county and municipal, and 1% Native American.⁶ Distribution of nests in Washington is: 68% private; 24% “uncertain protection,” meaning public or tribal ownership but land not necessarily specifically designated as “protected”; and 10% “protected,” a designation that encompasses federal and states lands, such as parks and wildlife refuges, that are dedicated to wildlife and natural area conservation.⁷ As of 1990, 84.5% of eagle nests in the Chesapeake Bay region, one of the eagle’s strongholds, existed on private land.⁸ Other states with large eagle populations, such

² Tinker Ready. 2004. Factoring Humans into the Environmental Picture. *dukenvironment* (the magazine of the Nicholas School of the Environment and Earth Sciences, Duke University), Spring 2004, pp.24-26. Downloaded from the web <<http://www.nicholas.duke.edu/dukenvironment/sp04/sp04.pdf>> April 30, 2007.

³ United States General Accounting Office. 1994. *Endangered Species Act: Information on Species Protection on Nonfederal Lands*. Pp.4-5. GAO/RCED-95-16. General Accounting Office, Washington, D.C.

⁴ Florida Fish and Wildlife Conservation Commission. 2006. Eagle Nest Locator. Accessed on the web <<http://myfwc.com/eagle/eaglenests/Default.asp>> January 18, 2007.

⁵ Minnesota Department of Natural Resources. 2005. *2005 Minnesota Bald Eagle Surveys*. Accessed on the web <http://files.dnr.state.mn.us/ecological_services/nongame/projects/eagle_report_2005.pdf> January 18, 2007.

⁶ Frank B. Isaacs and Robert G. Anthony. 2003. *Bald Eagle Nest Locations and History of Use in Oregon and the Washington Portion of the Columbia River Recovery Zone, 1971 through 2003*. Unpublished report, Oregon Cooperative Fish and Wildlife Research Unit, Oregon State University, Corvallis, Oregon.

⁷ Derek W. Stinson, James W. Watson, and Kelly R. McAllister. 2001. *Washington State Status Report for the Bald Eagle*. Washington Department of Fish and Wildlife, Olympia, Washington. p.58. Accessed on the web <<http://wdfw.wa.gov/wlm/diversty/soc/status/baldeagle/finalbaldeaglestatus.pdf>> January 20, 2007.

⁸ U.S. Fish and Wildlife Service. 1990. *Chesapeake Bay Regions Bald Eagle Recovery Plan: First Revision*, p.40. U.S. Fish and Wildlife Service, Newton Corner, Massachusetts.

as Maine and Michigan, all consist of overwhelming percentages of private land, as do most states east of the Mississippi. Therefore, it is reasonable to conclude that the majority of eagle nests and habitat in the contiguous 48 states exist on private land.

The Act's ability to penalize landowners financially has created what are known as perverse incentives for landowners to make the habitat on their property inhospitable to endangered species or to engage in the "shoot, shovel, and shut-up" strategy. "I've seen eagle's nests where people climbed up the trees and knocked them out," stated Jodi Millar, FWS bald eagle recovery coordinator.⁹

The ESA's perverse incentives have also been observed by Michael Bean of Environmental Defense, probably the foremost expert on the Act. "There is, however, increasing evidence that at least some private landowners are actively managing their land so as to avoid potential endangered species problems," stated Bean in comments on the red-cockaded woodpecker that are also applicable to many species, including the bald eagle.¹⁰ "The problems they're trying to avoid are the problems stemming from the Act's prohibition against people taking endangered species by adverse modification of habitat. And they're trying to avoid those problems by avoiding having endangered species on their property." He then continued; "In short, they're really nothing more than a predictable response to the familiar perverse incentives that sometimes accompany regulatory programs, not just the endangered species program but others." Habitat destruction due to the ESA's perverse incentives has been observed and documented by peer-reviewed literature.¹¹

Given these dynamics—that most species, including the bald eagle, have the vast majority of their habitat on private land, and that the Endangered Species Act's penalties have caused landowners to destroy unwittingly habitat for these species, and that this problem seems to have occurred in the case of the bald eagle—the proposed permit program will very likely perpetuate the problem of landowners unwittingly destroying eagle habitat. While the Service claims the proposed permit program is less onerous than what existed under the ESA, it appears that it is only marginally so for two reasons. First, the definition of "disturb" under the Eagle Act is remarkably similar to the definition of "harm" under the ESA. "Harm," is after all, primary means by which the ESA regulates habitat and use of land and water. So the ESA's land-use controls have been transferred to the Eagle Act virtually intact. Second,

⁹ Rod Thomson. 1998. Law to Save Species Count Successes, Failures in 25 Years. *Sarasota Herald-Tribune*. December 28, 1998, p.1A.

¹⁰ Michael Bean. 1994. Speech at the U.S. Fish and Wildlife Service's Office of Training and Education Seminar Series, "Ecosystem Approaches to Fish and Wildlife Conservation: 'Rediscovering the Land Ethic'." November 3, 1994, Marymount University, Arlington, VA.

¹¹ Dean Lueck and Jeffrey A. Michael. 2000. Preemptive Habitat Destruction Under the Endangered Species Act. *Journal of Law and Economics* 46: 27-60.

Amanda Brook, Michaela Zint, and Raymond DeYoung. 2003. Landowners' Responses to and Endangered Species Act Listing and Implications for Encouraging Conservation. *Conservation Biology* 17(6): 1638–1649.

Daowei Zhang. 2004. Endangered Species and Timber Harvesting: The Case of Red-Cockaded Woodpeckers. *Economic Inquiry* 42(1):150-165.

and stemming from this first reason, the proposed permit program will very likely end up being very much like the current Habitat Conservation Program (HCP) under the ESA. HCPs are often onerous because they require landowners to spend considerable sums of money to formulate the plans, and because they require landowners to sacrifice money and/or land in order for the right to use their land.

As the U.S. population continues to grow, and particularly as people increasingly move into rural areas that are eagle habitat—especially because eagles nest near water, the very same place where people like to live and build vacation homes—the bald eagle, at least in some areas, may well come under increasing pressure. As a result, the bald eagle is very much going to rely on the goodwill and willing cooperation of America’s landowners to insure its ongoing survival and health. Unfortunately, and sadly, the proposed permit program under the Bald & Golden Eagle Protection Act perpetuates much of the adversarial and heavy-handed approach to eagle conservation that occurred under the Endangered Species Act and which very well may have been harmful to the eagle.

- 2) The proposed permit program for the Eagle Act is very similar to incidental take permits for private landowners under the ESA, otherwise known as Habitat Conservation Plans (HCPs). HCPs were added to the ESA in 1982 as a way for private landowners to have a way out of the Act’s absolute prohibition on taking listed species by offsetting such take, or potential take, with mitigation, usually in the form of land set aside for the species in question.

The proposed Eagle Act permit program is essentially an HCP program, as the Service admits:

Many actions that are considered likely to incidentally take (harm or harass) eagles under the ESA will also disturb or otherwise take eagles under the Eagle Act. The regulatory definitions of “harm,” “harass,” and “disturb,” differ from each other; but overlap in many ways...Currently, there is no regulatory mechanism in place under the Eagle Act that permits take of bald or golden eagles comparable to under the ESA. We propose to add a new section at 50 CFR 22.26 to authorize issuance of permits to take of [*sic*] bald and golden eagles on a limited basis.¹²

We intend to develop implementation guidance to addresses procedural details of the permitting process, similar in role and format to the Service’s Section 7 and HCP Handbooks.¹³

A further indication of the similarities between the Eagle Act proposed permit program and HCPs is that, under the proposed permit program, the Service wants to transfer incidental take authorization for bald and golden eagles already covered under existing HCPs (golden eagles are covered under HCPs as a species that may be listed in the future) to the Eagle Act.¹⁴ By proposing to do this, the Service is acknowledging that HCPs and the proposed permitting program under the Eagle Act are functionally equivalent.

¹² 72 Federal Register 31141, June 5, 2007.

¹³ *Ibid*, 31145.

¹⁴ *Ibid*, 31141-31155.

On the surface, the Service’s proposed permit program seems like a reasonable idea that provides landowners with flexibility. But if the history of ESA implementation is any lesson, the reality may be far different. Take the case of Murray Pacific Lumber, a family owned company in the state of Washington. In the mid-1990s Murray Pacific was looking at potential closure because protections for endangered species put some 40 percent of the company’s saleable timber on 55,000 acres off limits. Faced with this, the company negotiated an HCP whereby they would set aside 5,500 acres for endangered species in order to release the rest of their land from the ESA. “Even though they call these habitat conservation plans voluntary, I didn’t feel it was that voluntary,” the company’s president, Toby Murray remarked. In part, he felt this because his family had to sacrifice millions of dollars of timber for the provision of the public good of conserving rare species. The company also had to spend more than \$1,000,000 to hire biologists and lawyers to write and implement the HCP.¹⁵ As the case of Murray Pacific clearly demonstrates, HCPs are voluntary in name only, forcing individuals to make major sacrifices for the public good without requiring the public shoulder the costs. It is entirely likely that FWS permit program for the Eagle Act will end up looking like a mini-version of the ESA’s HCP program.

- 3) The Service’s claims the proposed permit program application process will be “significantly less burdensome for the applicant than the current permit process under the ESA” because “the information required to apply for an Eagle Act permit does not require the habitat analysis and is less extensive and easier to compile” than what is required under the Habitat Conservation Plan application process under the Endangered Species Act.¹⁶ However, this is not the case because the application process specified in the proposed permit program is actually quite complicated, onerous, and, in all likelihood, expensive.

To apply for a permit under the proposed program under the Eagle Act, a permit application must contain:

- A) “A detailed description of the activity that the permittee believes will cause the disturbance or take of eagles;
- B) The species and number of eagles that are likely to be taken and the likely for of that take;
- C) Maps and digital photographs that depict the locations of the proposed activity and the eagle nests, foraging areas, and the concentration sites where eagle are likely to be affected by the proposed activity (including the GPS coordinates of the activity area and eagle-use area(s) and the distance(s) between these areas;
- D) For activities that are likely to disturb eagles, whether or not the important eagle-use areas(s) is visible from the activity area, or if screening vegetation or topography blocks the view;
- E) The nature and extent of existing activities in the vicinity similar to that being proposed, and the distance between those activities and the important eagle use area(s);
- F) The date the activity will start and is projected to end;
- G) An explanation of what interests(s) [*sic*] in a particular locality will be protected by the take (including any anticipated benefits to the applicant);
- H) A description of measures proposed to minimize and mitigate the impacts; and

¹⁵ Leslie Brown. 1997. Cutting a Clear New Path; Timber Companies Developing Habitat Conservation Plans Earn Government Approval to Harvest More Timber, but Critics Claim it’s a Danger to the Endangered Species Act. *The News Tribune* (Tacoma, WA), November 2, 1997, p.G2.

¹⁶ 72 Federal Register 31148.

- I) Other information the Service may request specific to that particular proposal and consistent with the information collection requirements of the Paperwork Reduction Act of 1995.”¹⁷

Furthermore, permit applicants are “responsible for conducting field surveys that we [the Service] need for your application to be complete, including compiling data on the location and status of eagle nests and important use areas within the affected area.”¹⁸

A number of these requirements, especially C, D, and E, are likely to be quite time consuming, expensive, and therefore onerous for landowners to fulfill and compile. This is especially so given the proposed definition of “important eagle-use area”:

an eagle nest, foraging area, or communal roost site that eagles rely on for sheltering and feeding, and the landscape features surrounding such nest, foraging area, or roost site that are essential for the continued viability of the site for breeding, feeding, or sheltering eagles.¹⁹

It is very unlikely that many applicants will be able to fulfill these requirements, especially C, D, and E as they relate to “important eagle-use areas.” While most applicants will likely be able to identify the location of an eagle nest, they will likely not be able to determine the important eagle-use areas because such areas often extend over many acres and are far from the nest tree(s). As with the ESA, medium-to-large corporate applicants will likely be able to afford the cost of hiring the necessary biologists to do the surveys to determine the important eagle-use areas (and how these areas fulfill requirements C, D and E), Geographic Information System technicians to put these data into a digital format and produce the requisite maps, and, perhaps, lawyers to compile the application and the make sure the application is complete. Small businesses and most individual landowners, however, will likely find these requirements extremely burdensome and expensive to the extent that planned activities may have to be substantially altered or even abandoned.

Even though it is clear that fulfilling the requirements for a permit application will be quite difficult and expensive, the Service maintains otherwise in the proposal.

[T]he permit application process would be significantly less burdensome than the current permit process under the ESA, since an HCP is not required. Preparing an HCP can be time consuming and is usually delegated to a professional consultant. Plans often cover large geographic areas—some larger than a million acres—and set forth terms and mitigation measures designed to protect species for up to 100 years. In contrast, the information required to apply to an Eagle Act permit does not require the habitat analysis and is less expensive and easier to compile.²⁰

¹⁷ Ibid, 31154.

¹⁸ Ibid.

¹⁹ Ibid, 31147.

²⁰ Ibid, 31149.

Yet, as explained above, the proposed permit requirements, especially C, D, and E as they relate to important eagle-use areas, are quite complex and difficult to determine. It is highly doubtful that many landowners will be able to fulfill these requirements without hiring professional consultants.

To gain a sense of the enormous amount of land and water that will potentially be encompassed within important eagle-use areas, and how determining these eagle-use areas will be beyond the technical and financial means of most landowners, it is useful to apply eagle habitat requirements to the estimated number of eagles in the contiguous 48 states as well as Alaska.

By applying FWS nest protection guidelines under the Eagle Act and other habitat parameters, it is possible to understand the dimensions of this issue. Under the Eagle Act guidelines issued by the FWS, “buffers,” or circles, are established around nest trees, and within these buffers various types of human activity are restricted. Multiplying the acreage within these buffers by 11,137, the current estimated number of bald eagles in the contiguous U.S., results in the total acreage for all bald eagles pairs.²¹ The most restrictive buffers, where the Eagle Act’s land-use controls will be most stringent, extend up to 660 feet from a nest for a total of 524,834 acres (because some eagles maintain alternate nests, in case one is damaged, the average number of nests per pair, 1.5, has been taken into account because the Guidelines apply both to active and alternate nests).²² The second buffer in the Guidelines, which will be subject to less stringent land-use controls, extends from 660 feet to ½ mile, and this area covers 5,073,233 acres.

This total of 5,598,067 acres, however, constitutes only a small portion of habitat used by nesting eagles. First is what is known as a bald eagle’s “home range,” the entire area a pair of eagles will utilize, including the buffers around nests, for activities such hunting, feeding, and resting. Home ranges vary in size, but using peer reviewed data (as contained in David Buehler’s comprehensive account of the bald eagle in the Birds of North America series), 11,137 eagle pairs use between 19,264,088 and 60,544,278 acres.²³ It is important to keep in mind that while there can be considerable overlap of home ranges and that these acre totals do not reflect this, however, these acre total still provide a rough estimate of the home range acreage.

There is potentially yet more land that will be impacted by the Eagle Act because roughly two-thirds of the bald eagle’s population consists of pairs, the rest is unpaired juveniles and adults.²⁴ These non-breeding eagles range very widely, each typically over 10,000 or more

²¹ Brian Seasholes. 2007. *The Bald Eagle’s Worst Enemy: How Federal Law Pits Landowners against Eagles*. Policy Brief No. 64. The Reason Foundation: Los Angeles.

²² U.S. Fish and Wildlife Service. 2007. *National Bald Eagle Management Guidelines*. May, 2007. pp.10-14.

²³ David A. Buehler. 2000. Bald Eagle (*Haliaeetus leucocephalus*). In *The Birds of North America*, No. 506. (A. Poole and F. Gill, eds.). The Birds of North America, Inc., Philadelphia.

²⁴ D.A. Blood and G.G. Anweiler. 1994. *Status of the Bald Eagle in British Columbia*. Wildlife Working Report No. WR-62, p.50. Wildlife Branch, Ministry of Environment, Lands & Parks, Victoria, British Columbia. Downloaded from the web <<http://wlapwww.gov.bc.ca/wld/documents/statusrpts/wr62.pdf>> June 25, 2007.

square miles. Wintering bald eagles must also be considered because of the influx of eagles from Canada, which brings the winter population in the 48 states to roughly 40,000 eagles. As with breeding eagles, wintering bald eagles have home ranges, albeit much larger (10 to 100 square miles per eagle) than nesting pairs.²⁵ It is, however, important to keep in mind that unpaired and wintering eagles are less sensitive to disturbance than nesting eagles, and that while nesting eagles maintain exclusive territories, unpaired and wintering eagles do not, which means that their habitat overlaps considerably. In addition, wintering eagles are not spread evenly across the landscape because they tend to congregate in areas with good food sources, and, as with unpaired eagles, there is considerable habitat overlap. Even so, these numbers, especially those for nesting eagles, provide an idea of the enormous amount of habitat used by eagles, habitat that will be covered to varying degrees by the new Eagle Act. Habitat most likely to be regulated is that around nests, followed in likelihood by nesting home ranges and areas of winter concentrations. Least likely to be regulated is habitat for unpaired eagles and wide-ranging wintering eagles.

In addition, there are the 50,000-70,000 bald eagles, which include some 15,000 pairs, in Alaska.²⁶ Simply multiplying the habitat estimates for the 48 contiguous states by the larger size of the number of Alaskan pairs (35%) yields considerably more acreage in Alaska that will potentially be subject to ESA-like regulations and permitting requirements.

As the eagle's population continues to grow, especially in the contiguous 48 states (in recent years it has grown about 8.0% annually, according the Service), the amount of acreage subject to the eagle act, and the proposed permitting program, will only increase.²⁷ This will mean more, not less conflict between the Service and landowners.

- 4) The Service claims the proposed permit program will be less onerous than HCPs under the ESA because:

The Service may provide technical assistance in development of permit applications. In many cases, the Service may be able to recommend measures to reduce the likelihood of take, obviating the need for a permit. The technical assistance we provide in the field will reduce the number of applications to our permit office²⁸

This is, to say the least, pollyannish because, as the bald eagle's population, especially in the 48 contiguous states continues to grow, there will be more, not fewer, conflicts over land-use and eagle protection. Furthermore, given the highly technical and complex data needed to fulfill the requirements for a permit application, especially C, D, and E as they relate to "important eagle-use areas", it is highly unlikely that Service field personnel will have the time or resources to provide meaningful help in determining and compiling such data. These

²⁵ Buehler.

²⁶ 72 Federal Register 31142.

²⁷ 72 Federal Register 37347, July 9, 2007.

²⁸ 72 Federal Register 31145-31146.

two factors mean that in all likelihood the Service will be increasingly unable to offer any meaningful technical assistance to landowners as the bald eagle's population in the 48 contiguous states continues to grow.

- 5) ESA-like land-use regulations, including permits like HCPs, have never applied to bald eagles in Alaska or golden eagles in the 48 contiguous states and Alaska. Yet, due to the definition of "disturb" under the Eagle Act coupled with the proposed permit program, ESA-like land-use regulations will now apply to these bald and golden eagles. This will likely come as a surprise to residents of Alaska and states with golden eagle populations. States with large populations of golden eagles may be impacted by the new Eagle Act for golden eagles in ways never contemplated, especially because in some states golden eagle populations appear to be declining, which may well subject them to increasing scrutiny by FWS.²⁹ Third, the large numbers of bald and golden eagles that nest in Canada but migrate south to the U.S. to spend the winter are also covered by the new Eagle Act.

Sincerely,

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²⁹ M.N. Kochert and K. Steenhof. 2002. Golden Eagles in the U.S. and Canada: status, trends, and conservation challenges. *Journal of Raptor Research* 36(1 Supplement):32-40; Stephen W. Hoffman and Jeff P. Smith. 2003. Population Trends of Migratory Raptors in Western North America, 1977-2001. *The Condor* 105(3):397-419.