



Assistant Director  
Migratory Birds  
and  
State Programs

9/26/06

Attached is a reopening  
of a comment period on  
a revised definition  
of "disturb" under  
BC-EPA and the  
Notice of Availability  
of EA. Best to keep  
these moving together.  
Briefing for AIs being  
set-up.

Pat Schmid



Barry N. Roth

Deputy Associate Solicitor - Parks & Wildlife  
U.S. Department of the Interior

9/25

The proposed rule is surnamed  
as legally sufficient. However,  
ASFWP needs to be briefed  
on the differences between this  
and the earlier proposal.

BR



**FISH AND WILDLIFE SERVICE  
DOCUMENT TRACKING CONTROL SLIP**

*Jesup*  
FWS Form 3-2180  
Attach to front of folder

Date: 09/11/2006

|             |        |
|-------------|--------|
| DCN: 027479 | ES No: |
|-------------|--------|

|                          |                           |                      |
|--------------------------|---------------------------|----------------------|
| Orig Office:<br>AMB-DMBM | Input Date:<br>09/11/2006 | Addressee:<br><br>FW |
| Due Date:                | Signature Level:<br>FW    |                      |

Subject:  
Protection of Bald Eagles; Definition

Comments:

Action Codes:

- |                         |                                |                            |
|-------------------------|--------------------------------|----------------------------|
| 0 - Prepare Draft Reply | 4 - Signature                  | 8 - Other - See Comments   |
| 1 - Prepare Reply       | 5 - Review/Comment             | 9 - Mail/Distribute        |
| 2 - Appropriate Action  | 6 - Revise                     | 10 - Finalize              |
| 3 - Surname             | 7 - Obtain Additional Surnames | 11 - Simultaneous Surnames |
|                         |                                | 12 - Email Draft Reply     |
|                         |                                | 13 - Advance Read          |

Routing:

| Routed To       | Action                 | Assigned Date        | BF DATE | Returned Date |
|-----------------|------------------------|----------------------|---------|---------------|
| AMB-DMBM        | 2 - Appropriate Action | 09/11/2006           |         | 09/11/2006    |
| AMB-DMBM        | 3 - Surname            |                      |         |               |
| ABHR-PDM        | 3 - Surname            | 9/11/2006            |         | 9/12/2006     |
| SOL             | 3 - Surname            | 9/13/06              |         | 9/25/06       |
| AMB             | 3 - Surname            | <del>9/25/2006</del> |         |               |
| <i>AES</i><br>D | 3 - Surname            |                      |         |               |
| FW              | 4 - Signature          | 10/2/06              |         |               |

*AES* Surname 9/26/06  
*CCM* 2- 9/26/06  
*AMB* 2 10/2/06  
*AMB-DMBM* 2 11/02/06



**FISH AND WILDLIFE SERVICE  
DOCUMENT TRACKING CONTROL SLIP**

*Jesup*

FWS Form 3-2180  
Attach to front of folder

Date: 09/11/2006

|   |                           |                      |
|---|---------------------------|----------------------|
| DCN: 027479                                       |                           | ES No:               |
| Orig Office:<br>AMB-DMBM                          | Input Date:<br>09/11/2006 | Addressee:<br><br>FW |
| Due Date:   | Signature Level:<br>FW    |                      |
| Subject:<br>Protection of Bald Eagles; Definition |                           |                      |

Comments:

Action Codes:

- 0 - Prepare Draft Reply
- 1 - Prepare Reply
- 2 - Appropriate Action
- 3 - Surname

See Comments  
Date

Routing:

| Routed To  | Action |
|------------|--------|
| AMB-DMBM   | 2      |
| AMB-DMBM   |        |
| ABHR-PDM   |        |
| SOL        |        |
| AMB        |        |
| <i>AES</i> |        |
| D          |        |
| FW         |        |

*KES*  
*CC*  
*AM*

*Handwritten note on a dark background:*  
Dad, this  
assigned this  
package to  
you

**NOTE to REVIEWERS**  
**Division of Migratory Bird Management**

**Proposed Rule;** This is a re-proposal of the definition of "disturb" under the Bald and Golden Eagle Protection Act in regulations at 50 CFR 22.3. It is necessary to define the term because it will have increased legal significance if the bald eagle is removed from the ESA List of Endangered and Threatened Wildlife. The Service originally proposed a definition for "disturb" on February 16, 2006 at the time it re-opened the comment period on the proposal to delist the bald eagle. It is necessary to re-propose a definition of "disturb" because the different definition is now the Service's preferred alternative in the environmental assessment (EA) we have prepared under the National Environmental Policy Act. We must publish the EA for public comment before the Service can promulgate a final definition of "disturb."



**FAST TRACK:** The Service is under a court order to make a final determination regarding whether to delist the bald eagle by February 16, 2007. This regulation needs to be finalized on or before that date, and therefore must be published in the Federal Register ASAP. Please make every possible effort to give priority to reviewing, commenting, and forwarding this package in as timely a manner as possible. Thank you.

Program Contact:

Eliza Savage  
Branch of Permits and Regulations  
(703) 358-2329

September 29, 2006

**INFORMATION MEMORANDUM FOR THE ASSISTANT  
SECRETARY**

**FROM:** Director, U.S. Fish and Wildlife Service

**TELEPHONE #:**

**SUBJECT:** Bald Eagle Delisting; Definition of Disturb under the Bald and Golden Eagle Protection Act (Federal Register Reproposal)

**1. SUMMARY**

**2. DISCUSSION:** On February 16, 2006, the Service reopened the public comment period on its July 1999 proposal to delist the bald eagle in the lower 48 states. At the same time, it proposed a regulatory definition of *disturb* under the BGEPA and National Bald Eagle Management Guidelines. The Service received 73 public comments on the proposed definition of disturb.

Based on comments received (and consistent with the DOI's approach from 2000-2004), we believe the Service needs to promulgate regulations establishing an incidental take permit under the BGEPA to authorize disturbance where it cannot feasibly be avoided. Our solicitors endorse this approach. The definition of "disturb" should be revised to provide better protection for eagles under a permit scenario. There is sufficient public comment to support a new, more protective definition of "disturb" that incorporates the elements we now wish to propose. The definition in the reproposal more closely adheres to current use of the term for bald eagle management, and better fulfills the preservation goals of the BGEPA when applied in conjunction with a permitting mechanism that will authorize some disturbance. We also propose to define "injury," which is used in the definition of "disturb." The reproposal definitions are:

*Disturb:* "As applied to live birds, *disturb* means: To agitate or bother a bald or golden eagle to the degree that causes or is likely to cause (i) injury or death of an eagle due to interference with breeding, feeding, or sheltering habits, including death or injury to chicks or eggs due to disruption of adult nesting behavior, or (ii) nest abandonment. As applied to nests, *disturb* means: To impair, dismantle, or destroy a nest, or the immediate area

surrounding a nest, to the degree that renders the nest unsuitable for nesting purposes.”

*Injury* means: a wound or other physical harm, including a loss of body mass and/or biological fitness significant enough to jeopardize an eagle’s survival or productivity.

Significant changes from earlier definition:

1. The new definition does not require actual injury, death, or nest abandonment. Instead, the threshold is the likelihood of one of those outcomes. Requiring actual “injury, death, or nest abandonment” generates uncertainty as to whether disruptive actions will disturb eagles because 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 be very difficult to enforce without evidence of a dead or injured eagle. Adding “or is likely to cause” reduces this uncertainty and is more enforceable.
2. The definition applies directly to nests in accordance with Congress’s intent to protect nests. Without this part of the definition, nests could be rendered unusable even though untouched. A nest is not really protected if the immediate area surrounding it is manipulated to the degree that renders it unsuitable for breeding purposes.
3. The term “injury” is defined. The definition of injury clarifies that interference with feeding and sheltering habits can cause disturbance short of the eagle being wounded or killed. Without this definition, the definition of disturb does not sufficiently protect eagles other than breeding eagles during the nesting season.

Timing Issues:

- We believe it is important to finalize the definition at the time the bald eagle is removed from the list of threatened species under the ESA.
- The Service must publish a final delisting determination by the court-ordered deadline of February 16, 2007.
- Therefore, to provide 60 days for the public to review and comment on the new definition and for the Service to have the opportunity to meaningfully consider public comments for the final rule, we recommend that this reproposal be published as soon as possible and no later than November 1, 2006.

FWS Region 7 Concerns: The large bald eagle population in Alaska will make a permit regulation difficult to administer there. In the past, Region 7 has indicated it would prefer to continue managing bald eagles without a permit.

Constituent Positions:

- Federal Agencies are likely to be receptive to the new definition as long as we announce and efficaciously adhere to our intent to develop a permit regulation.
- State Agencies are generally likely to embrace the new definition, regardless of whether the service creates a permit for eagle disturbance. Many states were concerned that the definition proposed in February failed to sufficiently protect eagles.
- Developers, private, industry, trade groups are likely to object to greater protection. However, we believe stated intent by the Service to develop a permit regulation will substantially ameliorate their concerns.
- Conservation organizations will likely welcome the stronger definition. However, some may object to the development of a permit regulation.

**PREPARED BY:** \_\_\_\_\_ **DATE:** \_\_\_\_\_

**APPROVED BY:** \_\_\_\_\_ **DATE:** \_\_\_\_\_

Billing Code: 4310-55-P

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. The Service previously proposed a definition of "disturb" on February 16, 2006, (71 FR 8265, February 16, 2006). This proposed rule is a re-proposal with a new definition of "disturb."

In addition to this proposed rulemaking, the Service is soliciting public comment on its draft environmental assessment of the rulemaking, prepared in accordance with the requirements of the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 et seq.), and published separately in today's Federal Register.

FILE COPY

| Surname         |         |
|-----------------|---------|
| E. Savage       | 9/11/06 |
| J. Allen        | 9/11/06 |
| Millsap         | 9/11/06 |
| PD M-SLW        | 9/12/06 |
| J. Long         | 9/18/06 |
| C. Long         | 9/29/06 |
| R. Roth         | 9/21/06 |
| Schmitt         | 9/25/06 |
| Z. P. [unclear] | 9/26/06 |
| K. [unclear]    | 9/28    |
|                 |         |
|                 |         |
|                 |         |

*Subject to change on p. 0.*  
*mmB*  
*act*

**Billing Code: 4310-55-P**

**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; reproposal.

**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. The Service previously proposed a definition of “disturb” on February 16, 2006; this proposed rule is a re-proposal with a new definition of “disturb.”

In addition to this proposed rulemaking, the Service is soliciting public comment on its draft environmental assessment of the rulemaking, published separately in today’s Federal Register.

**DATES:** We will accept written comments on this proposed rule until [insert date 60 days after date of publication in the FEDERAL REGISTER].

**ADDRESSES:** You may submit comments and other information, identified by RIN 1018-

AT94, by any of the following methods:

- Mail: 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](mailto: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 email at: [Eliza\\_Savage@fws.gov](mailto: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.), the U.S. Fish and Wildlife Service (the Service) proposed a regulatory definition of “disturb” under the Bald and Golden Eagle Protection Act (BGEPA)(16 U.S.C. 668-668d) to guide post-delisting bald eagle management (71 FR 8265, February 16, 2006). The Service concurrently proposed two other related actions: (1) a notice of availability of draft National Bald Eagle Management Guidelines (71 FR 8309, February 16, 2006); and (2) a re-opening of the comment period on our proposal to remove the bald eagle from the list of threatened and endangered species under the ESA (71 FR 8238, February 16, 2006).

Based on public comments received on these three proposals and further analysis of our legal authorities and responsibilities, and biological factors affecting eagles, the Service intends to propose a new regulation that will (1) establish an incidental take permit under the BGEPA, and (2) authorize take of eagle nests under limited circumstances and conditions. We plan to publish that proposed rule in the Federal Register within one year of today’s date. In keeping with that

intent, and in accordance with public comments received, we today propose a modified definition of “disturb” that will more closely adhere to current interpretations of the term, better protect bald and golden eagles, and provide greater certainty for the public than the definition we proposed on February 16, 2006 (71 FR 8265, February 16, 2006). We also propose regulatory definitions of “injury,” and “nest abandonment,” two terms included in the proposed definition of “disturb.”

#### Description of the Proposed Rulemaking

We propose to add the following definition of “disturb” to regulations at 50 CFR 22.3: “Disturb as applied to live birds means to agitate or bother a bald or golden eagle to the degree that causes or is likely to cause (i) injury or death due to interference with breeding, feeding, or sheltering behavior, including death or injury to chicks or eggs due to disruption of adult nesting behavior, or (ii) nest abandonment. As applied to nests, disturb means to disarrange, dismantle, or destroy a nest, or the immediate area surrounding a nest, to the degree that renders the nest unsuitable for nesting purposes.”

This definition is based largely on the rationale we laid out in the February 16, 2006, proposed rule (71 FR 8265, February 16, 2006). In this current rulemaking, we only address the reasons why we are proposing modifications to the earlier proposed definition as well as additional definitions of terms found within the proposed definition. (For additional background discussion on the proposed definition of “disturb,” please refer to the February 16, 2006, proposed rule.)

The proposed definition of “disturb” includes a component that applies directly to nests, as opposed to the definition we earlier proposed, which protected nesting eagles. The BGEPA’s prohibition of “take” by its terms applies to nests as well as individual eagles. Thus, as “take” is defined to include “disturb,” the prohibition on disturbance likewise applies to nests as well as individual eagles. This definition is consistent with the common understanding and dictionary definitions of “disturb”: Inanimate objects as well as living things can be “disturbed.” For example, the American Heritage Dictionary of the English Language (4<sup>th</sup> ed., 2000) includes the following definition of “disturb”: “to put out of order; disarrange.” We believe this concept is best applied to eagle nests as follows: “disturb means to disarrange, dismantle, or destroy a nest, or the immediate area surrounding a nest, that renders the nest unsuitable for nesting purposes.” We include “the immediate area surrounding the nest” because a nest is not truly protected if the immediate area surrounding it is manipulated to the degree that renders the nest unsuitable for breeding purposes. Modifying the proposed definition in this way is also consistent with the intent of Congress to preserve bald and golden eagles. Without directly protecting eagle nests from disturbance, the viability of many nests could be eliminated, even though the nests themselves remain untouched, particularly if no eagles are documented to have been agitated or bothered.

The proposed definition includes the phrase “that causes *or is likely to cause* injury, death, or nest abandonment” [emphasis added]. The definition we proposed on February 16, 2006, required actual injury, death, or nest abandonment, which creates 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. Requiring injury, death, or nest abandonment also implies that actual harm will have to be proven to have taken place, which would be very difficult to enforce without evidence of a dead or injured eagle. Adding "or is likely to cause"

~~reduces uncertainty regarding proximate cause and is more enforceable.~~

*adds clarity and implements*

*the statute faithfully.*

Because one of the criteria for disturbance in the proposed definition of "disturb" is "injury," we believe it is helpful to define "injury" to clarify our intent. The proposed definition of "injury" reads as follows: "Injury means a wound or other physical harm, including a loss of body mass and/or biological fitness significant enough to pose a discernible risk to an eagle's survival or productivity." Many activities that disrupt eagles can have more subtle, long-term effects on reproduction. By defining "injury" to include a decrease in biological fitness of the eagle significant enough to affect productivity, this proposed rule clarifies that interference with feeding and sheltering habits can cause disturbance short of the eagle being wounded or killed. The BGEPA's goal is "the preservation of the bald eagle or the golden eagle" (16 U.S.C. 668a). The proposed definition of "injury" reflects the reality that preservation of eagles depends on protection from disturbance when feeding and sheltering as well as when nesting.

This approach is consistent with Congress's intent when it enacted the BGEPA: it is unlikely that Congress meant only to reiterate the prohibitions against wounding and killing eagles, when it included the prohibition against disturbing eagles in the Act. It also brings the definition of "disturb" closer to how it is interpreted under current bald eagle management: We are not aware of any local, State, Federal, or tribal guidance or regulation that interprets "disturb" to require a threshold as severe as injury or death.

Furthermore, we do not agree with the argument made by some who commented on the February 16, 2006, proposed rule that Congress intended the BGEPA to protect eagles only from actions intentionally directed at eagles, and that “disturb” cannot be applied to other indirect or incidental impacts to eagles. We disagree for a number of reasons, including: (1) the deviation of the commenters’ interpretation from the common usage of the word “disturb,” which often encompasses incidental impacts (e.g., *her tranquility was disturbed by the neighbor’s leaf blower*), and (2) the fact that Congress amended the BGEPA in 1978 to authorize the issuance of permits to take golden eagle nests. Without the amendment, mining companies faced violating the BGEPA by incidentally taking (including disturbing) golden eagles during mining operations.

Comments to the effect that BGEPA applies only to intentional take and that disturbance must be conducted “knowingly or with wanton disregard” fail to discern between the criminal provisions of the Act, which require those elements, and the civil provisions, which do not.

A definition is needed for “nest abandonment.” The Service addressed the term “nest abandonment” in the glossary to the proposed Bald Eagle National Management Guidelines (see 71 FR 8309, February 16, 2006) . However, we believe the term should be defined in regulation, since it constitutes a threshold for determining when disturbance has occurred. We propose to codify the definition we included in the guidelines, with minor changes: “Nest abandonment occurs when adult eagles desert or stop attending to a nest and do not subsequently return and successfully raise young in that nest for the duration of a breeding season. A nest can be abandoned due to alterations around the site that occurred prior to the breeding season, if such alterations agitate or bother an eagle to a degree that causes it either not to (1) use the nest for

breeding purposes, or (2) occupy the nest at all that season. For eagles that migrate during the non-breeding season, nest abandonment can occur at any point between the time the eagles return to the nesting site for the breeding season and the time when all progeny from the breeding season have dispersed. If the eagles remain in the area throughout the non-breeding season, nest abandonment can occur at any point after the eagles initiate behaviors that indicate they will use the nest for breeding purposes until such time that all progeny of the breeding season have dispersed.”

Not all nest abandonment occurs as the result of human disturbance. Eagles sometimes select new sites, either alternate nests with a territory or (less often) new territories altogether. Sometimes a pair of eagles will make no nesting attempt during a breeding season. Intervening events could prevent one or both eagles from returning to the area at all. A different pair might move into the territory and use the nest site(s). In these situations, a prohibited disturbance has not occurred unless the nest abandonment resulted from a human activity that either: (1) rendered the nest site unsuitable for breeding purposes, or (2) agitated or bothered an eagle and interfered with its normal breeding, feeding, or sheltering behavior.

#### 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. The Service has prepared an environmental assessment of this proposed action, pursuant to the National Environmental Policy Act. The Notice of Availability for the environmental assessment is published in today's Federal Register. The

environmental review was 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](mailto: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.

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.

*Use new  
departmental  
language re: comments*

#### 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. Section 22.3, as proposed to be amended at 71 FR 8265 (February 16, 2006), is further proposed to be amended by revising the heading and introductory paragraph and adding

definitions for “disturb,” “injury,” and “nest abandonment” 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 as applied to live birds means to agitate or bother a bald or golden eagle to the degree that causes or is likely to cause (i) injury or death due to interference with breeding, feeding, or sheltering behavior, including death or injury to chicks or eggs due to disruption of adult nesting behavior, or (ii) nest abandonment. As applied to nests, disturb means to disarrange, dismantle, or destroy a nest, or the immediate area surrounding a nest, to the degree that renders the nest unsuitable for nesting purposes.

\* \* \* \* \*

Injury means a wound or other physical harm, including a loss of body mass and/or biological fitness significant enough to pose a discernible risk to an eagle’s survival or productivity.

Nest abandonment occurs when adult eagles desert or stop attending a nest and do not subsequently return and successfully raise young in that nest for the duration of a breeding season. A nest can be abandoned due to alterations around the site that occurred prior to the breeding season, if such alterations agitate or bother an eagle to a degree that causes it either not

to (1) use the nest for breeding purposes, or (2) occupy the nest at all that season. For eagles that migrate during the non-breeding season, nest abandonment can occur at any point between the time the eagles return to the nesting site for the breeding season and the time when all progeny from the breeding season have dispersed. If the eagles remain in the area throughout the non-breeding season, nest abandonment can occur at any point after the eagles initiate behaviors that indicate they will use the nest for breeding purposes until such time that all progeny of the breeding season have dispersed.

\* \* \* \* \*

Dated: \_\_\_\_\_

Signed: \_\_\_\_\_

Assistant Secretary for Fish and Wildlife and Parks