

Bald Eagle Soars Off Endangered Species List By Jim Morriss

On July 9th, the final rule removing the bald eagle (*Haliaeetus leucocephalus*) from the list of endangered and threatened species was published in the Federal Register. This action by the U. S. Fish & Wildlife Service delisted those bald eagles residing in the lower 48 states. The delisting becomes effective August 8, 2007. The Service determined that the threat to the species had been eliminated or reduced to the point where the bald eagle had either recovered or no longer met the definition of a threatened and endangered species under the Endangered Species Act (“ESA”). The population growth in the bald eagle ranks over the past 40 years has been robust. In 1963, only 487 breeding pairs existed in the lower 48 states, and the species hung on the brink of extinction outside Canada and Alaska. Today, 9,789 breeding pairs reside in the lower 48 states.

The recovery of the bald eagle has been a tremendous success story which began when the bird’s plight was highlighted with the publication in 1962 of Rachel Carson’s book *Silent Spring*. Bald eagle populations had plummeted due to loss of habitat, shootings, and DDT poisoning. The latter caused a thinning in the eggs of the bald eagle, resulting in a loss of generations of birds in many areas.

In 1967, the bald eagle was listed as an endangered species under the Endangered Species Preservation Act, the forerunner to the ESA. This determination applied to bald eagles south of the 40th parallel. (The 40th parallel is the boundary between Kansas and Nebraska.) Following the enactment of the ESA in 1973, the bald eagle throughout the lower 48 with the exception of the states of Minnesota, Michigan, Oregon, Washington

and Wisconsin, were listed as endangered. In these five states, the bald eagle was identified as threatened. In 1995, the eagle had made a sufficient come back to warrant a change in status and the Service upgraded the status of the bald eagle in all states in which it had been classified as endangered to threatened status. The delisting of the bald eagle completes a process that began in 1999 when the Service first proposed to remove the bald eagle from the endangered species list. The delisting of the bald eagle does not leave the bird without protection. The bald eagle will remain subject to several significant federal acts.

The Bald Eagle and Golden Eagle Protection Act (“Eagle Act”) (16 U.S.C. § 668-668d) was originally passed in 1940 to protect the bald eagle and broadened in 1962 to include the golden eagle. The Eagle Act prohibits take, possession, sale, purchase, barter, or offer to sell, purchase or barter, transport, export or import, of any bald or golden eagle alive or dead, including any part, nest, or egg, unless allowed by permit. The term “take” is broadly defined to include “to pursue, shoot, shoot at, poison, wound, kill, capture, trap, molest, or disturb.” 16 U. S. C. § 668(c), 50 CFR § 22.3. A violation of the Eagle Act can result in a fine of \$100,000 or imprisonment for 1 year or both for the first offense. Penalties for subsequent offenses are significantly higher.

In addition to defining the term “take”, “disturb” has been defined to mean “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 bald eagle is also protected by the Migratory Bird Treaty Act (“MBTA”) (16 U.S.C. §§ 703-721) which makes it unlawful to pursue, hunt, take, capture, kill, attempt to kill, capture or kill, possess, offer for sell, offer to purchase, deliver for shipment, ship, purchase to be shipped, deliver for transportation, transport, cause to be transported, carry or cause to be carried, received for shipment or export, any migratory bird including its eggs, parts, and nests. The MBTA authorizes the Secretary of Interior to determine if and by what means “take” will be allowed. The penalties for violation of the MBTA include a maximum of 2 years imprisonment and a fine of \$250,000. Finally, the Lacey Act (16 U.S.C. §§ 3371-78) which was passed in 1900, makes it illegal to transport illegally taken wildlife across state lines. These prohibitions will apply to the bald eagle as well. Violations can result in a civil penalty of \$10,000 or upon a felony conviction, 5 years in prison and a \$250,000 fine.

Obviously, the authority that remains under these three federal laws is sufficiently broad to protect the bald eagle. However, while the delisting of the bald eagle is good news for the bird and is a symbolic success for the ESA, it creates uncertainty for those who have been operating in close proximity to bald eagles under the direction and authority of the ESA. Under the ESA, the Service could issue an incidental take permit pursuant to Section 10 of the Act or provide guidance or impose restrictions through the Section 7 consultation process applicable when other federal agencies were taking action that might affect the species.

Landowners and developers, land managers, and others with activities in close proximity to bald eagle habitat should consider the following:

1. The Service does not presently have regulations or a permit process in place authorizing “take” under the Eagle Act and the MBTA. While draft regulations have been developed and are available for review, they have yet to be proposed and are probably at least a year away from promulgation.

2. The Service has published guidelines entitled “The National Bald Eagle Management Guidelines”. These guidelines published in May, 2007, define practices that the Service believes will be protective of the bald eagle. The guidelines provide useful information about eagle behavior and the potential for human impact and offer recommendations for avoiding disturbance at nest sites, foraging areas and communal roost sites. Specific buffer distances and techniques are recommended based upon the nature of the activities and are intended to avoid “take” of the species. The guidelines address construction, timber operations, off-road vehicle use, motorized watercraft use, non-motorized recreation and human entry into habitat, (such as hiking, camping, fishing, kayaking, and canoeing), helicopter and fixed wing aircraft operation, and blasting and other activities causing loud noises. The Service also invites site specific inquiries and recommends that such inquiries regarding specific activities be directed to the appropriate Service field office. Reportedly, the Service is developing a web-based tool for providing guidance on specific proposed activities.

3. The Service guidelines are just “guidelines” and do not authorize “take”. However, the Service has announced that it will exercise enforcement discretion under the Eagle Act and the MBTA if a person causing incidental “take” is complying with the guidelines in good faith. The Agency will also continue to honor authorizations under §

10(a)(1)(B) and § 7(b)(4) of the ESA until a permit process under the Eagle Act has been established.

4. Developers or others with activities in close proximity to eagles must remember that states may still identify the bald eagle as threatened or endangered under state law and impose more stringent limits on activities than the restrictions recommended by the federal guidelines. Landowners should check with their state wildlife resource agencies to ensure that their activities will not be subject to inconsistent treatment under federal and state law. Most states appear to be working closely with the Service as the Service rolls out its new strategy with respect to bald eagles.

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