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## **Fish and Wildlife Service Proposes a Change in Bald Eagle Status**

by Sean Skaggs, Robert Steele, Chris Reed

On February 7, 1990 the U.S. Fish and Wildlife Service (FWS) solicited public comment on a proposal to change the protected status of the bald eagle. The bald eagle could either be removed from the list of species protected by the Endangered Species Act of 1973, or it could be reclassified from endangered to threatened. The FWS action came in response to the recovery of bald eagle populations in the United States in the last ten years. In most regions of the country, the population goals established by FWS recovery teams have been met and the prospects of continued survival have increased greatly for the bald eagle. As in other parts of the country, bald eagle populations in Virginia have grown; however, the habitat upon which Virginia's bald eagles depend is poorly protected. Because habitat loss in Virginia poses a significant threat to bald eagles, the Environmental Law Society at Marshall-Wythe School of Law submitted comments to the FWS addressing the potential effects of reclassification or delisting.

### **Background**

#### **The Recovery of the Bald Eagle**

The bald eagle (Haliaeetus leucocephalus) was first placed on the endangered species list in 1967 under the authority of the Endangered Species Preservation Act of 1966.<sup>1</sup> The bald eagle was experiencing a number of physiological problems directly related to exposure to the pesticide DDT. Primarily, the presence of DDT led to the production of weak egg shells which resulted in low reproductive success.<sup>2</sup> The widespread use of DDT and its

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<sup>1</sup> Pub. L. No. 89-669, 80 Stat. 926 (1966).

<sup>2</sup> 55 Fed. Reg. 4209, 4210 (1990).

persistence in the environment had a drastic impact on bald eagle populations, necessitating its listing as endangered.<sup>3</sup>

The ban on the use of DDT has enabled bald eagle populations to recover. As the FWS noted in its Advance Notice of a Proposal to Reclassify or Delist the Bald Eagle, the population goals set by regional recovery teams have been achieved in four out of five regions, and bald eagle populations are close to the goal established in the fifth region.<sup>4</sup> In all the regions, however, the bald eagle will require adequate habitat if the population recovery is to be sustained. Habitat loss poses a significant threat to the continued survival of bald eagles and should therefore be the focus of any proposed change in the protected status of the species.

#### Threats to Bald Eagle Habitat in Virginia

The riparian habitat along the James, Rappahannock, and Potomac Rivers supports the bulk of bald eagle populations in Virginia.<sup>5</sup> The Virginia Department of Game and Inland Fisheries has identified important summer and winter concentration areas on the James, between Hopewell Bridge and Curles Neck Farm;<sup>6</sup> additional winter concentration areas exist at Mason Neck on the Potomac, and at Fones Cliff on the Rappahannock.<sup>7</sup> All of this habitat is under pressure from private development. In its 1987 annual report on endangered wildlife, the Department of Game and

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<sup>3</sup> Initially, only the southern populations of bald eagles were listed. In 1978, the FWS listed all populations in the coterminous States; as threatened in Washington, Oregon, Minnesota, Wisconsin, and Michigan, and as endangered in the remaining regions. Id. at 4210.

<sup>4</sup> Id. at 4211.

<sup>5</sup> Bald Eagle Investigations, in Virginia Non Game and Endangered Wildlife Investigations, Annual Report, 1-10 (1989).

<sup>6</sup> Id. at 3.

<sup>7</sup> Id.

Inland Fisheries stated that "the increasing number of cases of habitat loss in concentration areas emphasizes the need to acquire these areas."<sup>8</sup> In 1989, the Department of Game and Inland Fisheries reported more specifically: "[T]hese latter two areas [Mason Neck on the Potomac, and Fones Cliffs on the Rappahannock] continue to be under pressure from development,"<sup>9</sup> and that, "data for 1985-1988 indicate that the shoreline at Maycocks Point and Wilcox Wharf are the most heavily used sections of the [James] river for perching and foraging. . . [and] [b]oth of these areas are sites of proposed development."<sup>10</sup>

## **I. Bald Eagle Protection Under the ESA**

### **A. Section 7**

Section 7 of the ESA places two affirmative duties on federal agencies. Section 7(a)(1) requires federal agencies to use their authority to further the purposes of the ESA.<sup>11</sup> The purposes of the ESA, as provided by section 2 are, "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved," and "to provide a program for the conservation of such endangered species and threatened species. . ."<sup>12</sup> The ESA defines "conserve" as "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary."<sup>13</sup> Interpreting the ESA's definition of

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<sup>8</sup> Endangered Wildlife Investigations 1987 at 2.

<sup>9</sup> Endangered Wildlife Investigations 1989 at 3.

<sup>10</sup> Id.

<sup>11</sup> ESA § 7(a)(1), 16 U.S.C. § 1536(a)(1).

<sup>12</sup> ESA § 2(b), 16 U.S.C. § 1531(b).

<sup>13</sup> ESA § 3(3), 16 U.S.C. § 1532(3).

"conserve" while considering the stated purposes of the ESA, courts have held that federal agencies must use their authority not only to protect, but also to increase the population of an endangered species.<sup>14</sup> Indeed, the court in Defenders of Wildlife v. Hodel,<sup>15</sup> found that the FWS, by continuing to approve lead gunshot for hunting when eagles were being poisoned, had not met its duty under section 7(a)(1) to adopt conservation measures to increase the population of an endangered species. Section 7(a)(1) has also been construed to prevent the implementation of a sport hunting season on the threatened eastern timber wolf.<sup>16</sup>

Section 7(a)(2) requires federal agencies to insure that their actions are not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of habitat that has been designated critical pursuant to section 4(a)(3)(A).<sup>17</sup> Section 7 expressly includes threatened species and would continue to provide protection to the bald eagle if the species were reclassified; but it would not serve to protect habitat because no bald eagle habitat has been designated critical.<sup>18</sup>

#### B. Section 9

Section 9 of the ESA prohibits numerous activities which adversely effect an endangered species. Section 9(a)(1)(B)

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<sup>14</sup> See Defenders of Wildlife v. Andrus, 428 F. Supp. 167 (D.D.C. 1977), Connor v. Andrus, 453 F. Supp. 1037 (W.D. Texas 1978), Carson-Truckee Water Conservancy District v. Clark, 741 F.2d 257 (9th Cir. 1984), Sierra Club v. Clark, 755 F.2d 608 (8th Cir. 1985), Friends of Endangered Species Inc. v. Jantzen, 760 F.2d 976 (9th Cir. 1985).

<sup>15</sup> National Wildlife Federation v. Hodel, 23 Env't Rep. Cas. (BNA) 1089 (E.D. Cal. 1985).

<sup>16</sup> Sierra Club v. Clark, 755 F.2d 608 (8th Cir. 1985).

<sup>17</sup> ESA § 7(a)(2), 16 U.S.C. § 1536(a)(2).

<sup>18</sup> 50 C.F.R. § 17.95 (1989).

prohibits the taking of any endangered species of fish and wildlife;<sup>19</sup> section 3(19) defines "take" to include "harm".<sup>20</sup> The FWS regulations defining "harm" as it is used in section 9 provide an expansive meaning, including, "any act causing significant habitat modification or degradation having the effect of injuring, killing, or significantly altering essential behavioral patterns, including breeding, feeding or sheltering."<sup>21</sup> Thus defined, the section 9 takings prohibition protects endangered species from the indirect harm caused by habitat destruction. This is the case whether the habitat has been designated critical or not.<sup>22</sup>

In addition to protecting habitat, section 9 protects species from other indirect harms. Section 9 has protected bald eagles from inadvertent poisoning. In National Wildlife Federation v. Hodel,<sup>23</sup> the court held that the FWS had violated section 9, as well as section 7(a)(1), by continuing to permit the use of lead gunshot for waterfowl hunting when data indicated bald eagles

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<sup>19</sup> ESA § 9(a)(1)(B), 16 U.S.C. § 1538(a)(1)(B).

<sup>20</sup> ESA § 3(19), 16 U.S.C. § 1532(19).

<sup>21</sup> 50 C.F.R. § 17.3 (1989).

<sup>22</sup> In Palila v. Hawaii Dept. of Land and Natural Resources, 639 F.2d 495 (9th Cir. 1981), the Ninth Circuit held that destruction of a species' habitat can constitute a taking under section 9. In the case of the Palila, the habitat had been designated critical. Subsequently, in Sierra Club v. Lyng, 694 F. Supp. 1260 (E.D. Tex. 1988), the court held that degradation of a species' habitat can harm the species, and thus constitute a taking by altering essential behavior patterns, including breeding, feeding, or sheltering. In Lyng, the habitat of the red-cockaded woodpecker had not been designated critical. For a discussion of the development of section 9, see Field, The Evolution of the Wildlife Taking Concept From its Beginning to its Culmination in the Endangered Species Act, 21 Hous. L. Rev. 457 (1984).

<sup>23</sup> National Wildlife Federation v. Hodel, 23 Env't Rep. Cas. (BNA) 1089 (E.D. Cal. 1985).

were ingesting the lead.<sup>24</sup> In Hodel, the court found that from 1976 to 1985, ninety-six bald eagles had died as a result of lead poisoning.<sup>25</sup> The above-ground use of strychnine has also been implicated in bald eagle deaths. In Defenders of Wildlife v. Administrator, E.P.A.,<sup>26</sup> the Eighth Circuit stated that the EPA had violated section 9 by continuing to register strychnine for above-ground use when the substance had been found to cause eagle mortality.<sup>27</sup>

To date, section 9 has provided an effective means of ameliorating the threat to bald eagles from secondary lead and strychnine poisoning before the threat could have a detrimental impact on eagle populations the way DDT did. Although DDT has been banned, and the problems of lead and strychnine have been addressed, the bald eagle may continue to require protection from indirect harms such as pesticides. The Virginia Department of Game and Inland Fisheries recently expressed concern over the effect on eagles and other raptors of currently used agricultural pesticides, stating, "[w]e recommend that the effect of pesticides, particularly granular pesticides, on raptors be closely studied."<sup>28</sup>

Section 9 also provides the sole means of protecting bald eagle habitat that is privately owned in Virginia. Unlike section 7, the language of section 9 specifically protects only endangered species of fish and wildlife; threatened species do not receive the protection of the takings prohibition. The importance of section 9 to the continued successful protection of

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<sup>24</sup> Id. at 1093.

<sup>25</sup> Id. at 1090.

<sup>26</sup> Defenders of Wildlife v. Administrator, E.P.A., 882 F.2d 1294 (8th Cir. 1989).

<sup>27</sup> Id. at 1301.

<sup>28</sup> Endangered Wildlife Investigations 1988 at 26-27.

the takings prohibition. The importance of section 9 to the continued successful protection of the bald eagle, through protection of habitat in Virginia, is the primary reason the Environmental Law Society at Marshall-Wythe opposed any change in the status of the bald eagle.

#### C. Section 4 and the Decision to Delist or Reclassify

Section 4 of the ESA provides five factors to be considered in determining the endangered or threatened status of a species. A finding of any of the following factors is sufficient reason to list a species as threatened or endangered: 1) the present of threatened destruction, modification or curtailment of habitat or range; 2) overutilization for commercial, recreational, scientific, or educational purposes; 3) disease or predation; 4) the inadequacy of existing regulatory mechanisms; or 5) other natural or man-made factors affecting [the species'] continued existence.<sup>29</sup>

The present or threatened destruction of habitat and the inadequacy of existing regulatory mechanisms are the two factors to consider when deciding whether to delist or reclassify the bald eagle.<sup>30</sup> In Virginia, development threatens the habitat of bald eagles with destruction; and regulatory mechanisms, other than the ESA, are grossly inadequate to assure the protection of eagle habitat. In light of these factors -- normally sufficient in themselves to initiate protection for the species -- downlisting or delisting the bald eagle appears inconsistent with the terms of the ESA.

The FWS acknowledges the potential need to re-establish protection for the bald eagle should a change in the protected status lead to serious harm. In its Advance Notice of a Proposal

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<sup>29</sup> ESA §§ 4(a)(1)(A)-(E), 16 U.S.C. §§ 1533(a)(1)(A)-(E).

<sup>30</sup> ESA §§ 4(a)(1)(A), 4(a)(1)(D), 16 U.S.C. §§ 1533(a)(1)(A), 1533(a)(1)(D)



to Reclassify or Delist the Bald Eagle, the FWS expressed its willingness to implement a five-year plan to monitor the status of the bald eagle as provided by section 4(g) of the ESA.<sup>31</sup> The FWS is also committed to the utilization of the emergency listing provisions of the ESA in order to expedite relisting should that become necessary.<sup>32</sup>

The five-year monitoring plan and the emergency listing possibility provide a certain amount of security to a species which is delisted. The security provided is not completely reassuring, however, because monitoring population size over a five year period may not indicate a long term problem associated with habitat loss. Given the present threat to bald eagle habitat and the inability of other statutes to protect habitat, the potential for habitat loss following a change in status is a sufficient concern to warrant opposition to the proposed reclassification or delisting of the bald eagle.

## **II. Bald Eagle Protection Under Other Statutes**

### **A. The Bald and Golden Eagle Protection Act and the Migratory Bird Treaty Act**

While the FWS proposal suggests that downlisting would not be detrimental to bald eagle populations because protection would still be available under the Bald and Golden Eagle Protection Act (BGEPA)<sup>33</sup> and the Migratory Bird Treaty Act (MBTA)<sup>34</sup>, these two acts (collectively the "Bird Acts") alone do not provide sufficient protection to the bald eagle. The Bird Acts are inadequate because, unlike the ESA, they contain neither citizen

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<sup>31</sup> 55 Fed. Reg. 4209, 4210 (1990); ESA § 4(g), 16 U.S.C. § 1533(g).

<sup>32</sup> 55 Fed. Reg. 4209, 4211 (1990).

<sup>33</sup> 16 U.S.C. §§ 668-668d (1982).

<sup>34</sup> 16 USC §§ 703-713 (1982 & Supp. V 1987).

suit nor habitat protection provisions.

Although the existence of an implied private right of action under the BGEPA has been hinted at by one court,<sup>35</sup> the Eighth Circuit has specifically held that neither Bird Act authorizes citizen suits.<sup>36</sup> The only avenue available to private citizens who wish to make use of the Bird Acts is a suit under the Administrative Procedure Act (APA) alleging illegal federal action.<sup>37</sup> To succeed, such a suit would have to show that the alleged Bird Act violation is due to agency action "taken under" either of these acts.<sup>38</sup> Consequently, judicial review under the Bird Acts is precluded for any activity that threatens bald eagles but is not made pursuant to either of these acts.<sup>39</sup>

Because the development activities that are the primary threat to the bald eagle in Virginia are not federal actions "taken under" the Bird Acts, private citizens have no standing to sue under the Bird Acts to halt such development. Even if federal action could be construed to be pursuant to a Bird Act, habitat destruction is not interpreted to be a "taking" under the BGEPA.<sup>40</sup> Hence a federal action that involved eagle habitat destruction would not be illegal and standing under the APA would thus be unavailable. The only circumstance under which a citizen

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<sup>35</sup> Citizens Against Toxic Sprays v. Bergland, 428 F.Supp. 908 (D.Or. 1977).

<sup>36</sup> Defenders of Wildlife v. EPA, 882 F.2d 1294 (8th Cir. 1989).

<sup>37</sup> See 5 U.S.C. § 706(2)(A) (1982).

<sup>38</sup> 882 F.2d at 1302.

<sup>39</sup> In Defenders of Wildlife, because EPA regulations pertaining to strychnine were "taken under" the Federal Insecticide, Fungicide, and Rodenticide Act rather than the BGEPA or MBTA, an APA suit under the Bird Acts was held unavailable.

<sup>40</sup> Field, The Evolution of the Wildlife Taking Concept From its Beginning to its Culmination in the Endangered Species Act, 21 Hous. L. Rev. 457, 472 (1984).

has standing under the Bird Acts and the APA is a suit alleging a specific federal violation of a provision of one of the Acts, such as destruction of an eagle, a nest, or an egg.

The failure of the Bird Acts to provide protection from habitat destruction, in addition to limiting the availability of citizen standing, has a second, more serious consequence: It offers the federal government no mechanism by which it may limit eagle habitat loss on private land. Currently, section 9 of the ESA provides such protection.<sup>41</sup> Delisting would thus eliminate the single most powerful legal tool now available to protect bald eagle habitat. The Bird Acts provide nothing in its place.

#### B. The Virginia Endangered Species Act

If the status of bald eagle populations changes under the Endangered Species Act, the eagle will not receive adequate protection under the Virginia Endangered Species Act (VESA). The VESA does not govern as many actions or entities, and provides comparatively light penalties for violations.

The definition of taking under the VESA is much narrower than the definition under the federal Endangered Species Act.<sup>42</sup> The VESA definition provides for protection from the "taking, transportation, processing, sale, or offer for sale within the Commonwealth" of an endangered or threatened species appearing on a list published by the Secretary of the Interior pursuant to the provisions of the federal ESA. The federal ESA definition of "take" means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."<sup>43</sup> Moreover, no court on record has interpreted the Virginia Act's takings prohibition to include habitat

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<sup>41</sup> See Section I.B. supra.

<sup>42</sup> Va. Code Ann. § 29.1-564 (1989).

<sup>43</sup> ESA § 3(19), 16 U.S.C. § 1532(19) (Environmental Law Statutes West 1989).

destruction.

#### The VESA Defines Person Narrowly

The VESA definition of person as "any individual, firm, corporation, association or partnership,"<sup>44</sup> is narrower than the federal ESA definition. The ESA definition includes any individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State, or of any foreign government; any State, municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States.<sup>45</sup>

The narrower definition of person in the VESA effectively limits the scope of the takings prohibition and consequently provides the bald eagle with less protection than the ESA.

#### The VESA Provides Lighter Sanctions For Violations Than The ESA

Once the VESA has been violated, sanctions are generally lighter than those imposed by the ESA. Violation of the Virginia Act constitutes a Class 1 misdemeanor which carries a maximum fine of \$1,000 and/or twelve months in jail;<sup>46</sup> the ESA provides up to one year in jail and a \$50,000 fine for a knowing violation of the ESA.<sup>47</sup> Thus the Virginia Act provides significantly less deterrence than the ESA.

#### **Conclusion**

The Environmental Law Society at Marshall-Wythe strongly opposes both delisting and reclassification, but advocates the following actions in the event the bald eagle is reclassified as

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<sup>44</sup> Va. Code Ann. § 29.1-563 (1989).

<sup>45</sup> ESA § 3(13), 16 U.S.C. 1532(13).

<sup>46</sup> Va. Code Ann. § 29.1567 (1989).

<sup>47</sup> ESA § 11(a)(b), 16 U.S.C. § 1540(a)(b).

threatened.

If the bald eagle is to be downlisted to threatened status, the risk should be mitigated by designating important concentration areas<sup>48</sup> as critical habitat. Section 3(5)(B) of the ESA provides, "critical habitat may be established for those species now listed as threatened or endangered for which no critical habitat has heretofore been established."<sup>49</sup>

Special rules must be designed to protect bald eagles and their habitat in Virginia. Section 4(d) of the ESA provides, "whenever any species is listed as a threatened species . . . the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species."<sup>50</sup> The issuance of special regulations would compensate any disadvantages of downlisting the species on a national basis despite continued problems in Virginia. The prohibitions of section 9 should be included in the drafting of special regulations for the bald eagle.<sup>51</sup>

Acquisition of crucial habitat now in private hands should be the primary goal of a bald eagle conservation strategy. Section 5 of the ESA provides for the acquisition of land.<sup>52</sup> Habitat acquisition is the surest means of protecting the bald eagles from the threat of private development of habitat, and of assuring long term survival of the species.

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<sup>48</sup> Specifically, these critical areas would include the summering and wintering concentration areas on the James River, and the wintering concentration areas at Mason Neck on the Potomac River, and at Fones Cliffs on the Rappahannock River.

<sup>49</sup> ESA § 3(5)(B), 16 U.S.C. 1532(5)(B).

<sup>50</sup> ESA § 4(d), 16 U.S.C. § 1533 (d).

<sup>51</sup> Section 4(d) specifically provides, "the Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 1538(a)(1) [§ 9]." ESA § 4(d), 16 U.S.C. § 1533(d).

<sup>52</sup> ESA § 5, 16 U.S.C. § 1534.

To bring the "nation's symbol"<sup>53</sup> -- the "flagship species of the endangered species program"<sup>54</sup> -- back from the brink of extinction would be a great achievement for the FWS. It would surely provide a lift for the endangered species program, which is beginning to show strains in the face of an overwhelming task.<sup>55</sup> Though removing the bald eagle from the endangered list may appear to be a victory for the previously endangered species, that victory will be hollow unless the eagle's habitat can be preserved.

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<sup>53</sup> 55 Fed. Reg. 4209 (1990).

<sup>54</sup> Id.

<sup>55</sup> There are currently 1,566 species of animals and 1,595 species of plants that await evaluation for listing on the endangered and threatened species list; the FWS is able to make approximately fifty evaluations per year. Gavin, "What's Wrong with the Questions We Ask in Wildlife Research?," 17(3) Wildlife Society Bulletin 345, 348 (1989).