

# CRS Report for Congress

## What Happens to the Bald Eagle Now That It Is Not Protected Under the Endangered Species Act?

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## Summary

In 2007 the American bald eagle was removed from the list of species protected by the Endangered Species Act (ESA). However, the ESA was not the only statute protecting the eagle. Among the federal statutes protecting the bald eagle are the Bald and Golden Eagle Protection Act (BGEPA) and the Migratory Bird Treaty Act (MBTA). Additionally, state laws and federal agency policy continue to protect the bird. This report reviews the Endangered Species Act protections for the bald eagle and compares them to the protections remaining under the Bald and Golden Eagle Protection Act and the Migratory Bird Treaty Act. It also considers other legal protections that shield the bald eagle from harm, such as state laws and other federal acts and policies.

Some differences in protection under BGEPA and MBTA, compared with the ESA, are as follows:

- Habitat protection is uncertain, based on a new regulatory definition that is untested in the courts.
- Federal agencies will not have to consult with the Fish and Wildlife Service before developing a project that could harm bald eagles.
- Private citizens will not be able to initiate actions against other private citizens to claim that eagles are harmed.
- The federal government probably will be immune from most enforcement.
- The incidental take permit under BGEPA is not as involved as the permit under the ESA, and does not require any public notice or comment, even for federal projects.

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# What Happens to the Bald Eagle Now That It Is Not Protected Under the Endangered Species Act?

## Background

The American Bald Eagle (*Haliaeetus leucocephalus*) stopped being protected under the Endangered Species Act (ESA) (P.L. 93-205, 87 Stat. 886; 16 U.S.C. §§ 1531 - 1543) as of August 8, 2007. Efforts to halt the declining population of the bald eagle began as early as 1940 with the passage of the Bald Eagle Protection Act (June 8, 1940, c. 278, § 1, 54 Stat. 250). That act, aimed at stopping hunters, had little effect, and in 1963 the Audubon Society estimated there were only 487 nesting pairs left. In 1967 the bald eagle was listed as an endangered species under a predecessor of the ESA, the Endangered Species Preservation Act of 1966 (P.L. 89-699, 80 Stat. 926). Despite this legislation, the real protection to the eagle came in 1972 when the pesticide DDT was banned. The pesticide had caused the bird's eggshells to be too thin, and the species' decline is attributed primarily to the effects of this compound. In 1978 the eagle was listed as endangered under the ESA in 43 of the lower 48 states, and threatened in Michigan, Minnesota, Oregon, Washington, and Wisconsin.<sup>1</sup>

The states followed suit. Most states have their own laws protecting the bald eagle, as one of a list of species in peril, or under a rule specifically protecting it.<sup>2</sup> A list of state laws and regulations is included in the Appendix to this Report.

In 1995 the bald eagle population had increased, and the species was reclassified as threatened in all 48 states.<sup>3</sup> The delisting process began in 1999. (64 Fed. Reg. 36454 (July 6, 1999).) The final rule was issued in July 2007. (72 Fed. Reg. 37345 (July 9, 2007).) According to the FWS there are 9,789 nesting pairs at present, a number that exceeded the agency's recovery plans. Prior to the arrival of Europeans,

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<sup>1</sup> Under the ESA, *endangered* means the species is in danger of extinction throughout all or a significant portion of its range. 16 U.S.C. § 1532(6). A *threatened* species is defined as a species that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. 16 U.S.C. § 1532(20).

<sup>2</sup> These state laws are not preempted by the ESA. The act specifically allows "any State law or regulation respecting the taking of an endangered species or threatened species may be more restrictive [than this chapter]." ESA § 6; 16 U.S.C. § 1535(f).

<sup>3</sup> Alaska and Hawaii are not part of the bald eagle's listing (or delisting). Alaska has always had a healthy population of eagles (currently estimated at 15,000 breeding pairs), and the bald eagle does not occur in Hawaii.

the bald eagle population in the lower 48 states was estimated at between 250,000 and 500,000.

## The Delisting Process

Removing a species from protection under the ESA is called *delisting*. Under the ESA a species may be delisted for a number of reasons, such as extinction, or more happily in the case of the bald eagle, recovery. The Fish and Wildlife Service (FWS), the federal agency charged with most endangered species tasks (the other being the National Oceanic and Atmospheric Administration's National Marine Fisheries Service (NMFS)), found that the population of the bald eagle had rebounded to the point where protection under the ESA was no longer necessary.

The delisting process considers the same five factors that were reviewed at the time the eagle was placed on the list:

- the destruction, modification, or curtailment of its habitat or range;
  - use for commercial, recreational, scientific, or educational purposes;
  - disease or predation;
  - the inadequacy of existing regulatory mechanisms; or
  - other natural or manmade factors affecting its continued existence.
- (ESA § 4; 16 U.S.C. § 1533.)

A decision to delist a species is to be made “solely on the basis of the best scientific and commercial data available.” (16 U.S.C. § 1533(b)(1)(A).) Delisting the bald eagle was brought by FWS without being petitioned by a private party, but it was not without controversy. One lawsuit was filed to hasten the process.<sup>4</sup> More than six years after the proposed delisting notice was published, no final decision had been made. A real estate developer who had an eagle nest on his property sued to force the agency to act, arguing that the delay was harming his planned subdivision since he was unable to build within 330 feet of the nest. At the time the district court heard the case the comment period on the delisting had been reopened by FWS. The court agreed that the data received from the first comment session was old and allowed the FWS more time. However, the court set a deadline for the final notice: “defendants shall issue a final determination within a reasonable period of time, but no later than February 16, 2007, unless defendants present persuasive evidence of just cause for further limited delay.”<sup>5</sup> The final notice was published July 7, 2007.

Another lawsuit related to the delisting was based on a petition to have a distinct population segment (DPS) of bald eagles named that would still be protected under the ESA. The Center for Biological Diversity (CBD) filed the petition to have the eagles found in the Sonoran Desert of Arizona defined as a DPS. FWS rejected the petition, finding it lacked substantial scientific or commercial information. CBD

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<sup>4</sup> Contoski v. Scarlett, No. 05-2528 (JRT/RLE), 2006 WL 2331180 (D. Minn. August 10, 2006).

<sup>5</sup> Id.

filed suit in January 2007; the case is still pending.<sup>6</sup> FWS argued that the suit was mooted by the delisting, which included a finding that the Sonoran bald eagle was not a DPS, although the court has not yet decided the issue. In the same Federal Register notice with the eagle's delisting, FWS wrote that while the Sonoran bald eagle was a geographically distinct population, it did not behave differently from other eagles. Although it lives in a hot climate, it is still located near riparian areas. The fact that it nests in cliffs was unusual, but the FWS found that more and more, eagles are becoming opportunistic nesters and will nest in places other than treetops. Therefore, the FWS found the Sonoran bald eagle is not a significant discrete population segment and, therefore, was not entitled to special protection. (72 Fed. Reg. 37345, 37354 - 58 (July 9, 2007).)

**Post-Listing Monitoring by FWS.** When a species is delisted, the agency is required to monitor the well-being of the species for at least five years. (ESA § 4(g); 16 U.S.C. § 1533(g).) As part of its review, the FWS prepared a post-listing monitoring plan, which was included in the July 9, 2007, delisting notice in the Federal Register. The FWS has indicated that the bald eagle faces certain hazards, although it does not believe any of the risks threaten to reverse the overall recovery of the species. While the population has continued to increase over the past three decades, the growth will not reach pre-settler numbers, primarily due to loss of habitat.<sup>7</sup> However, the FWS has noticed that to some extent the eagle has adapted its nesting practices, in some instances nesting closer to people and other eagles, and sometimes choosing nesting locations in places other than trees. Also, the eagle is able to exist in a wide range of settings — in all states but Hawaii. Any future losses of habitat are not expected to imperil the species.

Environmental risks also threaten the eagle — for example, mercury poisoning from eating mercury-contaminated fish, and lead poisoning from eating prey that contains lead shot or lead sinkers from fishing.<sup>8</sup> Mercury emissions are being reduced, and some states have prohibited the use of lead shot or lead sinkers, so those threats may be lessening. The FWS considered the risk of high pathogenicity avian influenza (HPAI), but noted that the disease had yet not been discovered in any eagles or other migratory birds in North America. (72 Fed. Reg. at 37353.) Another disease, avian vacuolar myelinopathy, has killed 80 eagles to date. The cause of this disease, which affects muscular coordination, is unknown, but human-introduced or natural toxins are suspected, according to the U.S. Geological Survey.<sup>9</sup>

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<sup>6</sup> Center for Biological Diversity v. Kempthorne, CV 07-0038-PHX-MHM (D. Ariz.).

<sup>7</sup> According to FWS, “available habitat will almost certainly limit the population of bald eagles in the lower 48 states.” 72 Fed. Reg. at 37359.

<sup>8</sup> Under federal law, lead shot is currently illegal for waterfowl hunting. See [[http://www.fws.gov/migratorybirds/issues/nontoxic\\_shot/nontoxic.htm](http://www.fws.gov/migratorybirds/issues/nontoxic_shot/nontoxic.htm)]. However, states regulate hunting of other game species. To the extent that eagles scavenge from these carcasses, they may ingest lead.

<sup>9</sup> See National Wildlife Health Center webpage at [[http://www.nwhc.usgs.gov/disease\\_information/avian\\_vacuolar\\_myelinopathy/index.jsp](http://www.nwhc.usgs.gov/disease_information/avian_vacuolar_myelinopathy/index.jsp)].

The FWS post-listing monitoring plan includes National Bald Eagle Management Guidelines (Guidelines), which were released in June 2007.<sup>10</sup> The Guidelines do not have the effect of law, but provide information on what behavior could disturb the eagles. The Guidelines recommend different types of buffers to limit harassment of the birds, such as distance buffers and landscape buffers. For example, for construction that will be visible from a nest, the Guidelines recommend a buffer of 660 feet. If that activity is not visible from the nest, a 330-foot buffer is recommended. (Guidelines, p. 12.)

In conjunction with the delisting, the FWS prepared other regulatory documents under the Bald and Golden Eagle Protection Act (BGEPA) (June 8, 1940, c. 278, § 1, 54 Stat. 250; 16 U.S.C. §§ 668-668d) — a rule defining *disturb* (72 Fed. Reg. 31139 (June 5, 2007)); and a proposed regulation to allow permits for incidental takes of eagles (both bald and golden) (72 Fed. Reg. 31141 (June 5, 2007).) These will be discussed in detail later in this report.

## **The Endangered Species Act, the Bald and Golden Eagle Protection Act, and the Migratory Bird Treaty Act**

A key factor in the bald eagle's potential for continued success as a species is that the ESA is not the only statute protecting it. The eagle is also covered by the Bald and Golden Eagle Protection Act and the Migratory Bird Treaty Act (MBTA) (July 3, 1918, c. 128, § 2, 40 Stat. 755; 16 U.S.C. §§ 703 - 712). These acts pre-date the ESA and underscore the bird's symbolic importance to America. In fact the preface to BGEPA recognizes the bird's significance: "the bald eagle is no longer a mere bird of biological interest but a symbol of the American ideals of freedom." (54 Stat. 250 (1940).) This section will discuss the three acts generally before comparing them.

The Endangered Species Act has a broad purpose. It is intended to:

provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in ... this section. (16 U.S.C. 1531(b).)

Also provided in the ESA is a list of prohibited acts, which includes the following:

it is unlawful for any person subject to the jurisdiction of the United States to —

- (A) import any such species into, or export any such species from the United States;
- (B) take any such species within the United States or the territorial sea of the United States;
- (C) take any such species upon the high seas;
- (D) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of subparagraphs (B) and (C);

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<sup>10</sup> 72 Fed. Reg. 31156 (June 5, 2007), online at [<http://www.fws.gov/migratorybirds/issues/BaldEagle/NationalBaldEagleManagementGuidelines.pdf>].

(E) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of commercial activity, any such species;

(F) sell or offer for sale in interstate or foreign commerce any such species; or

(G) violate any regulation pertaining to such species or to any threatened species of fish or wildlife listed pursuant to section 1533 of this title.... (16 U.S.C. § 1538(a)(1).)

BGEPA and the MBTA are more narrowly drafted. BGEPA provides as follows:

Whoever, within the United States or any place subject to the jurisdiction thereof, without being permitted to do so as provided in this subchapter, shall knowingly, or with wanton disregard for the consequences of his act take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import, at any time or in any manner any bald eagle commonly known as the American eagle or any golden eagle, alive or dead, or any part, nest, or egg thereof of the foregoing eagles, or whoever violates any permit or regulation issued pursuant to this subchapter, shall be fined ... or imprisoned ... or both. (16 U.S.C. 668(a).)

The MBTA provides as follows:

it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird, any part, nest, or eggs of any such bird, or any product, whether or not manufactured, which consists, or is composed in whole or part, of any such bird or any part, nest, or egg thereof included in the terms of [certain conventions] .... (16 U.S.C. § 703(a).)

**How Habitat is Protected under the ESA, BGEPA, and MBTA.** All three statutes prohibit destroying the bird, its eggs, and its nest, but the ESA protects the eagle, its eggs, its nest, *and* its habitat. BGEPA and the MBTA appear to be drafted to prohibit only direct harms to the eagle, whereas the ESA has been structured to prevent indirect harm such as habitat destruction. The difference is significant. Based on the plain language of BGEPA and the MBTA, a developer could remove all the trees near a bald eagle nest, provided it did not touch the eagle, the eggs, or the nest.<sup>11</sup> It has been up to the courts to find whether BGEPA and the MBTA prohibit only direct harm to the bird, or also ban the indirect harm of habitat destruction.

All three statutes use the word *take*, which is clarified under the ESA and BGEPA, but is not defined in the MBTA. The ESA defines *take* as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” (ESA § 3, 16 U.S.C. § 1532(19).) BGEPA defines *take* as

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<sup>11</sup> “Removal of trees is not in itself a violation of the Eagle Act,” 72 Fed. Reg. 37363.



“pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, or molest or disturb.” (16 U.S.C. § 668(c).)

Because the MBTA is silent, the courts have had to interpret how the statute defines take. The Ninth Circuit has held that the act applies only to direct taking, such as by poisoning or hunting, and not to indirect takes made by habitat modification.<sup>12</sup> The court compared the ESA to the MBTA: “Habitat destruction causes ‘harm’ to the owls under the ESA but does not ‘take’ them within the meaning of the MBTA.”<sup>13</sup> Other courts agree that habitat destruction does not amount to a take under the MBTA. For example, a district court found that habitat destruction and logging even during the bird’s nesting season were not a take.<sup>14</sup> Based on these decisions, it appears the MBTA does not provide habitat protection for the eagle.

The next question is whether BGEPA protects habitat in the same way as the ESA. Based on the plain terms of the respective acts, there is a lesser standard toward habitat protection in BGEPA than in the ESA. One of the ESA’s purposes is ecosystem protection, after all, yet habitat is not mentioned in BGEPA. Because habitat is not specifically provided for in BGEPA, courts have reviewed the take provision to find whether habitat protection is implied. One district court found the protections under BGEPA were the same as under ESA: “the respective definitions of ‘take’ do not suggest that the ESA provides more protection for bald eagles than the Eagle Protection Act.”<sup>15</sup> The court compared the definitions of *take*, which under the ESA includes the word *harm*, to find there was no difference.

The issue can be focused on how the definition of *disturb*, which is found in BGEPA, compares to *harm* in the ESA. FWS issued a regulatory definition of *disturb* in 2007 to clarify that some habitat manipulation could be considered a take. The rule defines *disturb* as: “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.”<sup>16</sup> (50 C.F.R. § 22.3; 72 Fed. Reg. 31139 (June 5, 2007).) Under this standard, harmful behavior could be halted before the death or injury actually occurred, provided it was likely to occur. Thus, the government would not need to show an eagle died to make its case.

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<sup>12</sup> Seattle Audubon Society v. Evans, 952 F.2d 297, 303 (9<sup>th</sup> Cir. 1991) (MBTA did not prevent Forest Service from logging areas that were habitat for migratory birds).

<sup>13</sup> *Id.*

<sup>14</sup> Mahler v. U.S. Forest Service, 927 F. Supp. 1559 (S.D. Ind. 1996).

<sup>15</sup> Contoski v. Scarlett, No. 05-2528 (JRT/RLE), 2006 WL 2331180 (D. Minn. August 10, 2006).

<sup>16</sup> The draft rule’s definition was not as broad as the final rule, defining disturb as: “to agitate or bother a bald or golden eagle to the degree that interferes with or interrupts normal breeding, feeding, or sheltering habits, causing injury, death, or nest abandonment.” (71 Fed. Reg. 8265 (February 16, 2006).) Under the draft rule, an action would have to cause injury, death, or nest abandonment to be a violation.

However, the extent of habitat protection provided by this regulatory change has not been reviewed by the courts. Because the BGEPA definition of *disturb* is now similar to the ESA definition of *harm*, it is worth reviewing how courts have interpreted *harm* to see how *disturb* may be applied under BGEPA. The FWS defines *harm* as follows: “Harm in the definition of ‘take’ in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification, or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.” (50 C.F.R. § 17.3.)

After some dispute in the lower courts, the U.S. Supreme Court upheld the FWS definition of *harm*, finding it was reasonable.<sup>17</sup> Destruction of habitat could be considered an indirect taking of the eagle, and indirect, as well as deliberate, takings were contemplated by Congress when writing the ESA, according to the Court.

Despite this, the courts have not uniformly found when a habitat intrusion amounts to a taking under the ESA. The dispute centers on whether a species must be injured or killed before there is a cause of action. The Ninth Circuit has interpreted Section 9 broadly as it applied to habitat modification. So long as the injury to wildlife occurs, either in the past, present, or future, the injury requirement in the definition is satisfied.<sup>18</sup> Other courts have been more circumspect. For example, one district court said that an injury must occur before a Section 9 taking may be found:

Although some of the comments specifically argued that habitat modification alone is a prohibited taking under section 9, in the opinion of the Service, Congress expressed no such intent. The final definition adds the word “actually” before the words “kills or injures” in response to comments requesting this addition to clarify that a standard of actual, adverse effects applies to section 9 takings. In response to the broad misperception of the intent of the rule, an additional sentence has been added which is similar to the original definition’s language. This additional language makes it clear that habitat modification or degradation, standing alone, is not a taking pursuant to section 9. To be subject to section 9, the modification or degradation must be significant, must significantly impair essential behavioral patterns, and must result in actual injury to a protected wildlife species.<sup>19</sup>

It is possible that the language in BGEPA will be subject to less legal wrangling. While the ESA regulation states that there must be an actual injury for there to be harm, leading to these contradictory holdings, BGEPA clarifies that actions *likely to*

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<sup>17</sup> Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687, 115 S. Ct. 2407, 132 L. Ed. 2d 597 (1995).

<sup>18</sup> Forest Conservation Council v. Rosboro Lumber Co., 50 F.3d 781, 784 (9<sup>th</sup> Cir. 1995); see also Marbled Murrelet v. Babbitt, 83 F.3d 1060, 1064 (9<sup>th</sup> Cir. 1996) (evidence of a threat of future harm to the threatened marbled murrelet supports a permanent injunction; evidence of past harm is not required), *cert. denied*, 117 S. Ct. 942 (1997).

<sup>19</sup> Hawksbill Sea Turtle v. Federal Emergency Management Agency, 11 F. Supp. 2d 529, 553 (D.N.J. 1998).

*cause* injuries are a disturbance. That phrase moots the dispute regarding actual injury.

While the wording differs regarding whether an action actually kills a listed species, the degree of harm for injuring a species appears to be similar between the two acts. Where the ESA prohibits behavior that “significantly impair[s] essential behavioral patterns, including breeding, feeding or sheltering,” the BGEPA regulations would now prevent actions that “substantially interfere with normal breeding, feeding, or sheltering behavior.”

**Consultation with the Federal Government.** The ESA provides more than just rules against hurting the birds, however. The ESA requires affirmative steps on behalf of the federal government when its projects interact with a listed species. This is one significant way in which the ESA differs from BGEPA and the MBTA. It requires federal agencies to “insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [designated critical] habitat...” (ESA § 7; 15 U.S.C. § 1536(a)(2).) Federal agencies must undertake a Section 7 consultation, which is made with the FWS or NMFS, depending on the species. According to FWS, in 2006 it made 57 formal consultations under Section 7 regarding the bald eagle leading to incidental take permits, and 5,184 informal consultations. (72 Fed. Reg. at 37363.) As the bald eagle is no longer listed, those consultations are not required. There is no similar language or requirement in either BGEPA or the MBTA.

**No Private Right of Action.** Another meaningful difference between ESA and the other two statutes is that only the ESA provides a private right of action. This means the ESA allows citizens to sue others for failing to comply with the act. A look at the last 50 cases to have published decisions brought at least in part under the ESA shows the significance of this change. Of those 50 cases, one was brought by the federal government. The remaining 49 were by private litigants, sometimes against other private parties, but mostly against the federal government. Although the issue has not been discussed in the BGEPA context, courts that have considered whether there is a private right of action under MBTA have rejected the theory.<sup>20</sup> It appears likely that a similar conclusion would be reached for citizen suits under BGEPA, since that statute is silent on the matter.

**Application of the Laws to the Federal Government.** In addition to allowing private citizens to enforce the ESA, the ESA also allows actions to be brought against the federal government. This waiver of sovereign immunity is

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<sup>20</sup> See *Turtle Island Restoration Network v. U.S. Department of Commerce*, 438 F.3d 937 (9<sup>th</sup> Cir. 2006) (noting that MBTA does not have a private right of action but *not* considering whether it may be used in conjunction with the APA to sue the government); *Flint Hills Tallgrass Prairie Heritage Foundation v. Scottish Power, PLC*, No. 05-1025-JTM, n.1 (D. Kan. February 22, 2005) (noting that MBTA does not provide a right of action for private parties to sue another private party); *Center for Biological Diversity v. Pirie*, 201 F. Supp. 2d 113, 117 (D.D.C. 2002) (MBTA did not provide private right of action, but APA could be used as basis for injunction), *vacated on other grounds sub nom.*, *Center for Biological Diversity v. England*, Nos. 02-5163, 02-5180 (D.C. Cir. January 23, 2003).

explicit under Section 11(g), the citizen suit provision. Courts have also allowed citizen suits to be brought via the Administrative Procedure Act (APA) (5 U.S.C. § 551 et seq.) for actions that were not covered under Section 11(g).

It is not so clear whether BGEPA or the MBTA waived sovereign immunity for enforcement against the government. There is no express waiver in either act. The caselaw is more developed for claims under the MBTA. The courts are split as to whether the APA can be used as a vehicle to bring MBTA claims against the government. Generally speaking, in order to sue the federal government under the APA, a plaintiff uses the APA with a substantive statute that applies to the federal government. The relevant statute must provide the legal basis for the complaint. The APA provides some waiver of sovereign immunity, but does not confer authority to grant relief if another statute impliedly forbids the relief which is sought. (5 U.S.C. § 702(2).) In an APA suit, the court reviews whether an agency action was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” (5 U.S.C. § 706.)

Two of the three federal courts of appeals to consider the issue have held that the MBTA cannot be used to sue the federal government, even using the APA.<sup>21</sup> The Eleventh Circuit said that under the APA, an agency’s actions must first be subject to a law before they could be found not in accordance with it.<sup>22</sup> The Eleventh Circuit looked at the plain language of the MBTA and the legislative history to hold that the act did not apply to the federal government. The MBTA states that a “person, associations, partnership or corporation” could violate the act, and does not mention the government. The court compared that language to the ESA, which includes “any officer, employee, agent, department, or instrumentality of the Federal Government” in its definition of person, saying “Congress has demonstrated that it knows how to subject federal agencies to substantive requirements when it chooses to do so.”<sup>23</sup> Accordingly, the government was not subject to the MBTA.

The Eighth Circuit also rejected the idea that the MBTA could be used along with the APA to challenge a Forest Service action that would kill migratory birds. The court said that the MBTA did not appear to apply to federal agencies, but based its decision on different factors than the Eleventh Circuit. The court noted that the MBTA did not provide a private right of action, and found it could not be used as the underlying basis for an APA injunction.<sup>24</sup> The court then considered whether the government could be liable for criminal conduct. The court reviewed the definition of take under the MBTA to hold “it would stretch this 1918 statute far beyond the

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<sup>21</sup> No right to sue: *Sierra Club v. Martin*, 110 F.3d 1551 (11<sup>th</sup> Cir. 1997); *Newton County Wildlife Ass’n v. U.S. Forest Service*, 113 F.3d 110 (8<sup>th</sup> Cir. 1997). Right to sue: *Humane Society of the United States v. Glickman*, 217 F.3d 882 (D.C. Cir. 2000) (expressly rejecting the holdings of *Newton County* and *Martin* to hold that the FWS was subject to an injunction under the MBTA).

<sup>22</sup> *Sierra Club v. Martin*, 110 F.3d 1551, 1555 (11<sup>th</sup> Cir. 1997).

<sup>23</sup> *Id.* at 1555.

<sup>24</sup> *Newton County Wildlife Ass’n v. U.S. Forest Service*, 113 F.3d. 110 (8<sup>th</sup> Cir. 1997).

bounds of reason to construe it as an absolute criminal prohibition on conduct, such as timber harvesting, that indirectly results in the death of migratory birds.”<sup>25</sup>

The D.C. Circuit Court decision is the most recent of the three to consider whether the MBTA applied to the federal government. It found that the act provided only injunctive relief against the government. In contrast to the Eighth Circuit, which had expressly rejected the argument, the D.C. Circuit held that because the underlying treaties within the MBTA applied to the federal government, the act applied to the government.<sup>26</sup> The court also said that “person” under the act could apply to a person acting on behalf of the government. However, in light of the common interpretation that “person” does not mean the government, the court said that the criminal provisions of the MBTA would not apply to federal agencies.<sup>27</sup> But injunctive relief under the act was still available.

Lower courts are also divided. A general rule regarding APA complaints is that the plaintiff must identify a substantive statute that the agency has transgressed and show how that statute applies to the United States.<sup>28</sup> However, most courts considering complaints against the federal government for violating the MBTA have not considered whether the statute applies.<sup>29</sup> Some distinguish between using the MBTA to enjoin a federal action and using it for criminal enforcement.<sup>30</sup>

There is every reason to expect that a similar schism will occur when courts consider whether the BGEPA applies to takings by the federal government. Because the statute has not been exercised in this capacity due to overlapping coverage by the ESA, it is not clear how this issue will be resolved. Like the MBTA, the language of BGEPA applies to a person, which is defined as “associations, partnerships, and corporations.” (16 U.S.C. § 668(c).) No mention is made of the government, and there is no provision for a citizen suit. BGEPA differs somewhat from MBTA, however, in that it is not solely a criminal statute, but also provides for civil sanctions.

BGEPA’s history does not clarify whether claims against the government could be brought. The legislative history includes a House Report, recording a letter from

<sup>25</sup> *Newton County Wildlife Ass’n v. U.S. Forest Service*, 113 F.3d 110, 115 (8<sup>th</sup> Cir. 1997).

<sup>26</sup> *Humane Society of the United States v. Glickman*, 217 F.3d 882 (D.C. Cir. 2000).

<sup>27</sup> *Humane Society of the United States v. Glickman*, 217 F.3d 882, 886 (D.C. Cir. 2000), *referring to*, *United States v. Cooper Corp.*, 312 U.S. 600, 604 (1941).

<sup>28</sup> *See, e.g.*, *Preferred Risk Mutual Ins. Co. v. United States*, 86 F.3d 789, 792 (8<sup>th</sup> Cir. 1996).

<sup>29</sup> *See Seattle Audubon Society v. Evans*, 952 F.2d 297 (9<sup>th</sup> Cir. 1991) (MBTA did not prevent Forest Service from logging areas that were habitat for migratory birds); *Mahler v. U.S. Forest Service*, 927 F. Supp. 1559 (S.D. Ind. 1996) (logging during nesting season did not violate MBTA); *see also Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1991) (reviewing whether an appropriations bill impliedly modified the MBTA, among other acts, without considering whether the MBTA applied to federal agencies).

<sup>30</sup> *Center for Biological Diversity v. Pirie*, 201 F. Supp. 2d 113 (D.D.C. 2002), *vacated on other grounds sub nom.*, *Center for Biological Diversity v. England*, Nos. 02-5163, 02-5180 (D.C. Cir. 2003).

the Acting Secretary of Agriculture. According to the report, the letter explains the purpose of the legislation:

All too frequently occur in newspapers and other publications reproductions of pictures of gunners who have killed an eagle of so much wing spread and other dimension as are displayed in the legend accompanying the picture or news item relating to it. It is apparent to this Department from its long observations with respect to the wildlife of this country that there are those in any community in which an eagle may appear who are immediately seized with a determination to kill it for no other reason than that it is an eagle and a bird of large proportions. H.Rept. 2104 (76<sup>th</sup> Cong.)

This language addresses hunting eagles, not the harm to eagles that may result from government projects. It appears that logging and other federal projects that would take eagles were not contemplated by Congress as being covered under this statute.

If plaintiffs lack the ability to use BGEPA or the MBTA to stop government projects that may harm the eagle, they will have lost a significant litigation tool.

**Permits to Take Eagles.** Before delisting, one way in which BGEPA was more protective of the eagle than the ESA, is that it did not allow permits for taking the birds as an unintended consequence of other activities, such as the incidental take permit issued by FWS under ESA Section 10 (16 U.S.C. § 1539) or ESA Section 7, for federal actors. However, the FWS issued a proposed rule to authorize incidental takes under BGEPA, similar to a ESA Section 10 permit. FWS says it is authorized to allow these permits under 16 U.S.C. § 668a, which allows the Secretary of the Interior to issue permits where:

it is compatible with the preservation of the bald eagle or the golden eagle to permit the taking, possession, and transportation of specimens thereof for the scientific or exhibition purposes of public museums, scientific societies, and zoological parks, or for the religious purposes of Indian tribes, or that it is necessary to permit the taking of such eagles for the protection of wildlife or of agricultural or other interests....

This rule would allow FWS to issue permits for the take of eagles where “such permits are consistent with the preservation of the bald and golden eagle, and the take is associated with, and not the purpose of an otherwise lawful activity, and such take cannot be practicably avoided.” (72 Fed. Reg. 31141, 31143 (June 5, 2007).) In the draft rulemaking, FWS explained how the phrase “practicably avoided” was to be interpreted. It said that *practicable* meant capable of being done after taking into consideration cost, existing technology, and logistics in light of the overall project purpose. (72 Fed. Reg. at 31142.) Something was *unavoidable* only if the activity was “necessary for the public welfare,” and all “practicable, industry-accepted measures to minimize the take are in effect.” (72 Fed. Reg. at 31142.) For any permit, the take must be consistent with the preservation of the eagles, and FWS did not anticipate that permits will “significantly affect eagle populations.”

Permittees under the draft BGEPA regulation would include federal, state, local, and tribal governments, as well as private parties, according to FWS. (72 Fed. Reg. 31144.) However, we could not find any language in the regulations or draft

regulations pertaining to these permits that includes the federal government or tribal governments. Despite the definition in the statute, the regulations define person as “an individual, corporation, partnership, trust, association, or ... any officer, employee, agent, department or instrumentality of any State or political subdivision of a State.” (50 C.F.R. § 22.3.) The FWS estimates that two-thirds of the 300 applicants seeking the permits will be governmental. (72 Fed. Reg. 31149.) Permits issued to private entities under the more stringent ESA guidelines amounted to 1.8 per year since 2002. Permits to federal entities averaged 52 per year during that time. (72 Fed. Reg. at 31142.) Based on these numbers, the FWS anticipates receiving more than 240 additional permit applications for taking per year than before the eagle was delisted.<sup>31</sup> (72 Fed. Reg. at 31149.)

According to FWS, the proposed take permit under BGEPA will be “less burdensome” to obtain than the incidental take permits under the ESA. (72 Fed. Reg. at 31141.) One way the permit process will be less burdensome is that there is no public notice and opportunity to comment, as under the ESA. Also, the permittees do not need to prepare a Habitat Conservation Plan, as required under Section 10 of the ESA. (16 U.S.C. § 1539(a)(2).)

BGEPA continues to authorize permits for scientific and exhibition purposes (50 C.F.R. § 22.21); Indian religious purposes (50 C.F.R. § 22.22); and taking depredating eagles (50 C.F.R. § 22.23); and falconry purposes (50 C.F.R. § 22.24). FWS also allows states to petition for Depredation Control Orders, but only for golden eagles. These orders are issued for seasonal protection of domestic herds and have a limited duration. Unlike the permits, which have no public notice or publication requirements, the orders must be published in the Federal Register.

Permitting provisions under the MBTA are very limited and do not appear to apply to the federal government. The fact that the permitting regulations did not provide for federal agency permits was further justification for the 8<sup>th</sup> Circuit to find that the MBTA did not apply to federal actors.<sup>32</sup> However, that fact was not commented on by the D.C. Circuit when finding the Forest Service violated the act by not having a permit.<sup>33</sup> Some permitting is provided for under the MBTA. However, with the new permit allowed under BGEPA, it is unlikely that those needing to take a bald eagle will turn to the MBTA.<sup>34</sup>

**Knowing Violations under ESA, BGEPA and MBTA.** Prosecuting a violation under BGEPA and the MBTA frequently requires less proof than under the

<sup>31</sup> n.b. Not all incidental take permits result in an actual taking.

<sup>32</sup> *Newton County Wildlife Ass’n v. U.S. Forest Service*, 113 F.3d 110, 115 (8<sup>th</sup> Cir. 1997)

<sup>33</sup> *Humane Society of the United States v. Glickman*, 217 F.3d 882 (D.C. Cir. 2000).

<sup>34</sup> The following permits are available under the MBTA: hunting conducted under a state hunting license (50 C.F.R. § 20.20); import and export (50 C.F.R. § 21.21); banding and marking (50 C.F.R. § 21.22); taxidermist permit (50 C.F.R. § 21.24); waterfowl sale and disposal (50 C.F.R. § 21.25); special Canada goose (50 C.F.R. § 21.26); special purpose (50 C.F.R. § 21.27); falconry (50 C.F.R. § 21.28); raptor propagation (50 C.F.R. § 21.30); rehabilitation (50 C.F.R. § 21.31); and depredation (50 C.F.R. § 21.41).

ESA. Under BGEPA, a criminal violation must be the result of knowing conduct or conduct taken in wanton disregard for the consequences of the action. (16 U.S.C. § 668.) This is a lesser standard than is required under the ESA, which provides for penalties only for knowing acts.<sup>35</sup> (ESA § 11; 16 U.S.C. § 1540.) The original language of BGEPA required willful behavior for a criminal violation, but the act was amended in 1972 to remove the word *willfully* from 16 U.S.C. § 668c and to add “knowingly, or with wanton disregard for the consequences of his act” to Section 668(a).<sup>36</sup> (P.L. 92-535, 86 Stat. 1064.) A knowing violation occurs if the person knew they were taking a certain action, for example, if they knew that they were firing a gun at a bird. It does not depend on whether the person committing the violation knew the bird was an eagle,<sup>37</sup> or that the eagle was protected. In one case under BGEPA, a defendant argued that he thought he was shooting a “big, brown hawk,” and claimed he could not be convicted of knowingly killing an eagle under these circumstances. The court rejected this parsing of the statute, finding that *knowingly* modified the taking of the bird, not the species of the bird.<sup>38</sup> Under this construct, knowingly means only that the defendant knew he was taking a certain action, not that he knew the action was illegal. This is distinct from *willfully* committing a violation, which could be described as knowing the action itself was illegal. With the expanded definition of disturb proposed, this could make prosecution of violators easier than under the ESA. For example, under BGEPA, cutting down trees in wanton disregard for whether it would harm bald eagles could be prosecuted as an offense. It would not be necessary to show that the person knew cutting down the trees would hurt eagles.

Felony violations under the MBTA are based on the knowing standard, just as under ESA and BGEPA. In contrast, misdemeanor violations have a strict liability standard,<sup>39</sup> with the exception of crimes related to baiting birds.<sup>40</sup> Violators of

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<sup>35</sup> *United States v. McKittrick*, 142 F.3d 1170, 1177 (9<sup>th</sup> Cir. 1998) (ESA is a general intent statute, meaning the defendant did not have to know he was killing a wolf, only that he was shooting an animal that turned out to be a wolf); *United States v. Nguyen*, 916 F.2d 1016 (5<sup>th</sup> Cir. 1990) (defendant did not need to know that possessing the turtle was illegal to violate the ESA, only that he possessed the turtle); *United States v. St. Onge*, 676 F. Supp. 1044 (D. Mont. 1988) (government did not have to show the defendant knew the animal he was killing was a grizzly bear).

<sup>36</sup> “Take” used to be defined as “pursue, shoot, shoot at, wound, kill, capture, trap, collect, or otherwise *willfully* molest or disturb.” (Emphasis added.) For a discussion on the legislative history of this amendment to the act, see *United States v. Moon Lake Electric Ass’n Inc.*, 45 F. Supp. 2d 1070, 1085-88 (D. Colo. 1999).

<sup>37</sup> *United States v. Zak*, 486 F. Supp. 2d 208 (D. Mass. 2007).

<sup>38</sup> *United States v. Zak*, 486 F. Supp. 2d 208, 219 (D. Mass. 2007) (“knowingly” only refers to Defendant’s behavior in deliberately retrieving his rifle and intentionally aiming and shooting, not to his state of awareness as to the specific identity of the bird he shot).

<sup>39</sup> See, e.g., *United States v. Corrow*, 119 F.3d 796 (10<sup>th</sup> Cir. 1997) (possession of golden eagle feathers was enough for conviction, as government did not have to show the defendant knew he was breaking the law); *United States v. Smith*, 29 F.3d 270, 273 (7<sup>th</sup> Cir. 1994); *United States v. Engler*, 806 F.2d 425, 431 (3d Cir. 1986); *United States v. Chandler*, 753 F.2d 360, 363 (4<sup>th</sup> Cir. 1985); *United States v. Catlett*, 747 F.2d 1102, 1105 (6<sup>th</sup> Cir. 1984);

(continued...)



BGEPA are often charged with MBTA violations as well. According to one court, “MBTA constitutes a lesser included offense of the BGEPA.”<sup>41</sup> Another court noted their connection: “the BGEPA was modeled after and, in some respects, duplicates the offenses enumerated in the MBTA.” Therefore, when there is proof satisfying the requirements of the BGEPA, that will be sufficient for conviction under the MBTA.<sup>42</sup>

One common feature to all three statutes is that they all provide for forfeiture of all “guns, traps, nets, and other equipment, vessels, vehicles, aircraft and other means of transportation used [to take a bald eagle].”<sup>43</sup> In terms of punishment for crimes, the statutes are similar, except that the ESA does not provide for felonies.<sup>44</sup>

## State Laws

Most, but not all, states have their own laws protecting the eagle. (*See* Table Listing States with Eagle Protection Laws at the end of this report.) The ESA allowed states to have stricter laws without being pre-empted, and so states could continue to list the bald eagle as endangered or threatened without running afoul of the act. The MBTA also expressly allows states to make and enforce laws “not inconsistent” to give “further protection to migratory birds, their nests, and eggs.” (16 U.S.C. § 708.) No similar provision is found in BGEPA. However, under standard rules of statutory construction, state laws that are consistent with the act would not be pre-empted.

We found that two states have changed their own rules to reduce the protected status of the bird since the delisting was proposed: Florida and Maine. Virginia acknowledged that the federal law was changing, but stated the eagle continued to be protected under state law: “Notwithstanding the prospective removal of the bald eagle from the federal list of endangered or threatened species, the bald eagle continues to be threatened in the commonwealth of Virginia, and is hereby declared to be a threatened species in Virginia effective as of, and simultaneously with, the date of its removal from the federal list.” (4 Va. Admin. Code 15-20-130.) At least one state, Louisiana, links its protected species to those listed under the ESA. However, it has not changed its listing of the bald eagle, which indicates its status as endangered. (La. Admin. Code 76:1.317.)

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<sup>39</sup> (...continued)

United States v. Wood, 437 F.2d 91 (9<sup>th</sup> Cir. 1971); Rogers v. United States, 367 F.2d 998, 1001 (8<sup>th</sup> Cir. 1966).

<sup>40</sup> 16 U.S.C. § 704(b) (amended in 1998 to add knowing standard in the instance of baiting). *See also*, United States v. Delahoussaye, 573 F.2d 910 (5<sup>th</sup> Cir. 1978) (the presence of bait must reasonably have been ascertainable in order to sustain conviction).

<sup>41</sup> United States v. Zak, 486 F. Supp. 2d at 216 (D. Mass. 2007).

<sup>42</sup> United States v. Corbin Farm Serv., 444 F. Supp. 510, 535 (E.D. Cal. 1978), *aff’d*, 578 F.2d 259 (9<sup>th</sup> Cir. 1978).

<sup>43</sup> ESA - 16 U.S.C. § 1540(e)(4)(B); BGEPA - 16 U.S.C. § 668a(b); MBTA - 16 U.S.C. § 707(d).

<sup>44</sup> ESA - 16 U.S.C. § 1540(b)(1); BGEPA - 16 U.S.C. § 668; MBTA - 16 U.S.C. § 707.

Like the federal government, many states have multiple protections for the bald eagle. Those that do, for example, Georgia and Kansas, have statutes that protect endangered and threatened wildlife, which currently include the bald eagle, and also have statutes that prohibit harming eagles. Other states protect against harming migratory birds without a permit. Thus, even if the states that list the bald eagle eliminate their coverage as a threatened or endangered species, the bird could continue to be protected under separate laws.

**Lacey Act.** The existence of state laws protecting eagles is significant because it allows them to be protected under another federal law, the Lacey Act. The Lacey Act prohibits possessing and transporting plants and animals, the taking of which was illegal under a state, federal, or international law. (16 U.S.C. § 3371). Therefore, if an eagle were harmed in violation of one state's law, it would be illegal to possess that eagle in any other state. The Lacey Act includes forfeiture provisions, as well as civil and criminal penalties.

**Interstate Wildlife Violator Compact.** A multi-state agreement affords some protection to the bald eagle. The Interstate Wildlife Violator Compact is an agreement whereby states agree to share information about fish and game violators and honor other states' decisions to deny licenses and permits. Therefore, someone found to have violated one state's game rules would face being banned from being licensed in the 26 participating states.<sup>45</sup>

## Other Federal Agency Directives

The FWS states that other practices of the federal government will protect the bald eagle, in addition to the federal laws discussed above. FWS estimates that over 3,500 bald eagle nests are located on federal property. (72 Fed. Reg. at 37360 - 362.) The federal obligations are described by FWS based on the agency that manages the property.

**National Forests.** Most nests on federal property are located within the National Forest System, which is under the jurisdiction of the Department of Agriculture Forest Service. The FWS estimates there are more than 2,000 known nests. According to FWS, the National Forest Management Act of 1976 (16 U.S.C. §§ 1600 *et seq.*) requires the forests to be managed for multiple use and sustained yield, including wildlife and wilderness.

**National Wildlife Refuges.** Wildlife refuges have an additional 600 bald eagle nests. (72 Fed. Reg. at 37361.) They are managed by the Department of the Interior. Four refuges provide specifically for the management of bald eagles: Karl E. Mundt National Wildlife Refuge (South Dakota, Nebraska), Mason Neck National

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<sup>45</sup> Those states participating in the agreement, by adopting it as their own state law, are Arizona, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Mexico, New York, North Dakota, Oregon, South Dakota, Tennessee, Utah, Washington and Wyoming.

Wildlife Refuge (Virginia); James River National Wildlife Refuge (Virginia); and Bear Valley National Wildlife Refuge (Oregon).

**National Parks.** More than 300 bald eagle nests are found on National Park Service property, including national parks, wild and scenic rivers, national seashores and national monuments. The Department of the Interior National Park Service is charged with conserving the wildlife within its lands to “leave them unimpaired for the enjoyment of future generations.” (16 U.S.C. § 1.) Regulations prohibit visitors from disturbing wildlife. (36 C.F.R. § 2.1(a).)

**Bureau of Land Management.** The Department of the Interior Bureau of Land Management (BLM) manages 264 million acres of land. According to the FWS, 200 bald eagle nests are located on BLM lands, which are all subject to management to protect “the quality of the scientific, scenic, historical, ecological, environmental ... values.” (Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701 *et seq.*) BLM regulations prohibit conducting surface mining operations where a bald eagle nest is present: “A bald or golden eagle nest or site on Federal lands that is determined to be active and an appropriate buffer zone of land around the nest site shall be considered unsuitable [for mining].” (43 C.F.R. § 3461.5(k).)

**Department of Defense.** Department of Defense (DOD) facilities have at least 275 nests, according to FWS. DOD must conserve natural resources on its facilities pursuant to the Sikes Act. (16 U.S.C. § 670a). The Sikes Act requires each installation to have a plan for conserving natural resources. According to FWS, these plans typically include special management areas for eagle nests, and goals to minimize human disturbance in nesting areas. (72 Fed. Reg. at 37362.)

The Army Corps of Engineers (Corps) adds another 65 nests to the DOD’s inventory. The Corps has an obligation to consult with FWS for projects that would modify streams to conserve wildlife resources. (16 U.S.C. § 662.) In addition, many Corps projects are also managed for wildlife and recreation under the secondary jurisdiction of FWS.

**Executive Order 13186.** An executive order imposes additional obligations on federal agencies to protect migratory birds. (Responsibilities of Federal Agencies to Protect Migratory Birds, Exec. Order No. 13186, 66 Fed. Reg. 3853 (January 17, 2001).) The executive order required each federal agency to enter a memorandum of understanding (MOU) with the FWS if the agency will take actions that “have, or are likely to have, a measurable negative effect on migratory bird populations.” (Exec. Ord. No. 13186, § 3.) The order also requires the agencies to take into account numerous conservation measures, such as the following:

- (1) support the conservation intent of the migratory bird conventions by integrating bird conservation principles, measures, and practices into agency activities and by avoiding or minimizing, to the extent practicable, adverse impacts on migratory bird resources when conducting agency actions;
- (2) restore and enhance the habitat of migratory birds, as practicable;
- (3) prevent or abate the pollution or detrimental alteration of the Environment for the benefit of migratory birds, as practicable;
- (4) design migratory bird habitat and population

conservation principles, measures, and practices, into agency plans and planning processes (natural resource, land management, and environmental quality planning, including, but not limited to, forest and rangeland planning, coastal management planning, watershed planning, etc.) as practicable, and coordinate with other agencies and nonfederal partners in planning efforts. (Exec. Ord. No. 13186, § 3(e).)

Two agencies have entered an MOU as of September 2007. The DOD entered a MOU with the FWS in July 2006. The Department of Energy entered an MOU on August 3, 2006. Both MOUs expire after five years.<sup>46</sup>

## Conclusion

Although the bald eagle is no longer a listed species under the Endangered Species Act, there are a host of other laws, both federal and state, that continue to protect it, although arguably not to the same extent. The most significant are the Bald and Golden Eagle Protection Act and the Migratory Bird Treaty Act, both of which prohibit killing the bird or its eggs, or taking its nests. The enforcement provisions appear to remain the same, allowing criminal and civil fines, as well as civil forfeiture. At the initiation of the delisting process, it appeared that the eagle's habitat would lose most of its protection by the delisting. However, a new rule expanded the regulatory definition of *disturb* under BGEPA to include habitat destruction. Courts have yet to consider this definition, so its impact on protecting the bald eagle's habitat is still unknown. The significant changes after the delisting are as follows:

- Federal agencies will not have to consult with the Fish and Wildlife Service before developing a project that could harm bald eagles.
- Private citizens will not be able to initiate actions against other private citizens to claim eagles are harmed.
- The federal government probably will be immune from most enforcement.
- The incidental take permit under BGEPA is not as involved as the permit under the ESA and does not require any public notice or comment, even for federal projects.

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<sup>46</sup> See FWS website for copies of the MOUs: [<http://www.fws.gov/migratorybirds>].

## Appendix

States with Eagle Protection Laws		
State	Law/Regulation	Restrictions
Arizona	Ariz. Rev. Stat. Ann. § 17-314	Prohibits taking, wounding, killing or possessing eagles. Fine is \$2,500.
Arkansas	002-00-001 Ark. Code R. § 01.00-C 03-07 002-00-001 Ark. Code R. § 01.00 18.20	Lists bald eagle as an endangered species.  Prohibits taking bald eagles.
California	Cal. Fish & Game Code § 3511	Prohibits taking or possessing “fully protected birds,” which include the bald eagle.
Colorado	Co. Rev. Stat. § 33-6-109  2 CCR 406-8, ch. 10, Art. III, #1003(A)(2)	Prohibits taking all wildlife not privately owned. Fine of \$2,000 to \$100,000, plus incarceration for taking threatened or endangered species. Lists bald eagle as threatened.
Connecticut	Conn. Gen. Stat. § 490.26-93	Prohibits disturbing, molesting, harassing, killing or attempting to kill bald eagles. \$100 fine.
Delaware	Del. Code Ann. tit. 7, § 739	Prohibits disturbing or destroying nests, killing or attempting to kill eagles, removing eggs, selling or possessing eagles/eggs. Class A misdemeanor.
Florida	Fla. Stat. § 372.0725  Fla. Admin. Code 68A-27.004	Prohibits intentionally killing or wounding listed species. Lists eagle as threatened. Notice of rulemaking (8/3/07) plans to delist eagle.
Georgia	Ga. Code Ann. § 27-3-22  Ga. Comp. R. & Regs § 391-4-10-.06  Ga. Comp. R. & Regs § 391-4-10-.09	Prohibits hunting, trapping, taking, purchasing sell eagles or any part, nest, or egg thereof. Prohibits harassing, capturing, killing or directly causing the death of a protected species (threatened, endangered, rare or unusual). Prohibits habitat destruction on public lands. Lists bald eagle as a threatened species.
Idaho	Idaho Code Ann. § 36-1102(b)  Idaho Admin. Code r. 13.01.06.300.02 Idaho Admin. Code r. 13.01.06.150.03a	Prohibits taking hunting, taking or possessing migratory birds.  Prohibits taking threatened and endangered species. Lists bald eagle as threatened species.

<b>States with Eagle Protection Laws</b>		
<b>State</b>	<b>Law/Regulation</b>	<b>Restrictions</b>
Illinois	Ill. Stat. ch. 520, § 5/2.2	Prohibits taking, possessing, selling, offering to sell eagles, including their nests or eggs.
Indiana	Ind. Code § 14-22-34-12  312 Ind. Admin. Code 9-4-14(7)	Prohibits taking, possessing, transporting, selling endangered species. Class A misdemeanor. Lists the bald eagle as endangered.
Iowa	Iowa Code § 481B.5  571 Iowa Admin. Code r. 77.2(1)	Prohibits taking, possessing, transporting, selling animals listed as threatened or endangered by state or federal government.  Lists the bald eagle as endangered.
Kansas	Kan. Stat. Ann. § 32-1005  Kan. Stat. Ann. § 32-963 Kan. Admin. Regs. § 115-15-3(h) Kan. Admin. Regs. § 115-15-1(b)	Prohibits capturing, killing, possessing, selling, transporting, buying eagles. \$1,000 fine. Authorizes rules for enacting nongame and endangered species conservation act. Prohibits intentional taking of threatened or endangered species. Lists bald eagle as threatened.
Louisiana	La. Rev. Stat. § 56-1901.A La. Admin. Code 76:I.317	State protects those species that are federally-listed. Indicates that the bald eagle is federally-listed as endangered.
Maine	Maine Rev. Stat. § 12808  2007 Maine Laws 166 (HP 296)	Prohibits taking, hunting, trapping, or possessing an endangered or threatened species. Changes bald eagle listing to threatened.
Maryland	Md. Nat. Res. Code § 1-705	Provides for habitat protection and monitoring. No provision for taking.
Massachusetts	Mass. Gen. Laws. ch. 131, § 75A	Prohibits hunting, taking, possessing bird of prey, or taking, molesting, disturbing nests or eggs of bird of prey, which includes the eagle.
Michigan	Mich. Comp. Laws § 324.36505(1)  Mich. Admin. Code R. 299.1026(2)(h)	Prohibits taking, possessing, transporting, selling, offering for sale any listed species [on state or federal list]. Lists bald eagle as threatened.

<b>States with Eagle Protection Laws</b>		
<b>State</b>	<b>Law/Regulation</b>	<b>Restrictions</b>
Mississippi	Miss. Code. Ann. § 49-5-109  Code Miss. Rules § 19-000-044	Prohibits taking, possessing, transporting, exporting, selling or offering for sale of state-listed endangered species. Lists bald eagle as endangered (last updated 2000).
Missouri	Mo. Code Regs. Ann. tit. 3 § 10-4.111(1) Mo. Code Regs. Ann. tit. 3 § 10-4.111(3)	Prohibits importing, selling, possession, take, of endangered species.  Lists bald eagle as endangered.
Montana	Mont. Code Ann., § 87-1-111(b)	\$1,000 fine for killing a bald eagle.
New Hampshire	N.H. Rev. Stat. Ann. § 209:9	Prohibits hunting, capturing, killing, taking, or possessing bald eagles or molesting or disturbing the nest or young.
New Jersey	N.J. Rev. Stat. 23:2A-6  N.J. Admin. Code 7:25-4.13	Prohibits taking, possessing, transporting, selling, offering for sale wildlife determined to be endangered or nongame species. Lists bald eagle as endangered.
New York	N.Y. Eenvtl. Cons. Law § 11-0537 6 N.Y. Code Rules & Regs. § 182.6	Prohibits taking bald eagles, eggs and nests.  Lists bald eagle as threatened species.
Nevada	Nev. Stat. § 503.610	Prohibits killing, destroying, wounding, trapping, injuring, possessing, pursuing with such intent the bald eagle or taking, injuring, possessing or destroying the nests or eggs.
North Carolina	N.C. Stat. Ann. § 113-294	Prohibits taking, possessing, transporting, selling or buying any bald eagle or golden eagle, alive or dead, or any part, nest or egg. Class 1 misdemeanor.
North Dakota	N.D. Cent. Code § 20.1-04-05	Prohibits taking, killing, hunting, possessing, etc. bald eagle or nest or egg.
Ohio	Ohio Stat. § 1533.07	Prohibits catching, killing, injuring, or pursuing bald eagles.
Oklahoma	Okla. Stat. tit. 29 § 5-410	Prohibits knowingly and willfully molesting, injuring or killing any species of eagle, their nests, eggs or young.
Oregon	Ore. Admin. Rule 629-665-0100 <i>et seq.</i>	Requires forest projects to meet protection goals for bald eagle nesting sites, roosting sites and foraging perches.

<b>States with Eagle Protection Laws</b>		
<b>State</b>	<b>Law/Regulation</b>	<b>Restrictions</b>
Pennsylvania	25 Pa. Code § 87.138	Protects bald eagles and their nests and eggs from harm from mining projects.
South Carolina	S.C. Code 50-11-852  S.C. Code Regs 123-150.1 S.C. Code Regs. 123-150.2	Prohibits hunting or molesting eagles and other birds of prey. \$500-\$1000 fine plus up to one year. Lists bald eagle as an endangered species.  Prohibits taking, possessing, transporting, exporting, processing, selling, any endangered species.
South Dakota	S.D. Codified Laws § 34A-8-9  S.D. Admin. Rules 41:10:02:02	Prohibits taking, possessing, transporting, selling threatened or endangered species. Misdemeanor. Lists bald eagle as a threatened species.
Texas	Texas Parks & Wild. § 68.015  State list of threatened and endangered species	Prohibits trapping, taking, or killing, possessing, selling, or attempting to capture, trap, take, or kill, endangered fish or wildlife. Bald eagle is listed as threatened. ( <a href="http://www2.tpwd.state.tx.us/huntwild/wild/species/endang/animals/birds/">www2.tpwd.state.tx.us/huntwild/wild/species/endang/animals/birds/</a> )
Vermont	Vt. Stat. Ann. tit. 10A § 10-4.1  Vt. Stat. Ann. tit. 10A § 10-6.9	Prohibits taking or possessing threatened or endangered species.  Lists bald eagle as state endangered species.
Virginia	4 Va. Admin. Code 15-20-130	Prohibits taking, transporting, processing, or selling threatened and endangered species. Bald eagle is listed as threatened.
Washington	Wash. Admin. Code 232-12-011  Wash. Admin. Code § 232-12-292	Prohibits hunting protected wildlife (threatened, sensitive, other). Bald eagle is listed as threatened. Requires site management plans to protect bald eagles and their habitat.
West Virginia	W.Va. Code § 20-2-5a  W.Va. Code R. § 38-2-8	Penalty for conviction of killing bald eagle is \$5,000. Eagle is considered protected (non-game) bird. Prohibits surface mining activities from unlawful taking bald eagle, its nest or any eggs.
Wyoming	Wyo. Code R. 040-020-052(11)	Prohibits intentional taking of nongame wildlife. Bald eagle is considered nongame wildlife.