



June 29, 2007

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*Via email to robin.boughton@myfwc.com, cc: bill.pranty@myfwc.com*

**RE: Comments on the Draft Bald Eagle Species Management Plan**

Dear Robin:

Thank you for the opportunity to comment on the species management plan FWC is developing in anticipation of the state delisting of the Bald Eagle. We were pleased to see that some of our comments on previous chapter drafts were incorporated into this version. Now that all the chapters have been combined into a single document, we were able to consider the plan comprehensively, as summarized in our comments below. For ease of use, we have logged each comment with page and line numbers from the draft document you provided to us.

**Page 2, Line 317:** We are glad to see that you have included our comment regarding the value of live, mature pines to eagles as nesting substrate. However, we feel the statement would be more accurate if the preference were for "...living *native* pines..." to differentiate them from Australian pines which eagles also use to a lesser degree. This should also be changed in the grayscale call-out box that follows this reference in the text.

**Page 9, Lines 580-583; Page 532, Lines 2304-2305:** The federal definition of "to disturb" referenced here is old, dating back to February. The new version, released in May and codified in June is as follows (with reference):

*Disturb* means 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.

--31132 Federal Register / Vol. 72, No. 107 / Tuesday, June 5, 2007 / Rules and Regulations/  
<http://www.fws.gov/policy/library/07-2694.pdf>

The differences in these two versions of the definition are relevant to the protections this plan will ultimately confer upon eagles under state law. We support the state's choice to employ the federal definition of "to disturb" in the application of its rules.

**Page 10, Lines 610-611:** Please use the name: Audubon Center for Birds of Prey

**Page 13, Line 676:** After "carrying capacity," insert "or if its carrying capacity is reduced due to habitat conversion". This will better reflect our previously expressed concern that we cannot assume that Florida's carrying capacity for eagles will remain constant, especially with the continuing conversion of habitat for human use.

**Page 13, Lines 690-691:** This final statement should be made stronger to better represent the true magnitude of the threat of climate change and increased storm activity to eagles. We propose: “increased storm activity will bring increased threats to nest trees, underscoring the urgency of protecting mature, native pines across wider areas than previously anticipated to ensure that preferred nesting substrates do not become a limiting resource for eagles.”

**Page 15, Lines 759-765:** It is unclear what the 1.5 fledging success benchmark really is for this standard: less than 1.5 in any given year, an average of less than 1.5 over three generations, a less than 1.5 average over the ten years before the plan is revisited, or a less than 1.5 average over the course of a five-year period (similar to the running averages cited in setting this standard).

**Page 15, Lines 767-768:** In order to maintain extent of occurrence in the state, the plan should recognize that the core population areas will likely have differing carrying capacities and the core populations may also vary in how close they are to their area’s carrying capacity. Whether it is at this point in the document, or later on, the plan should address this issue and include it in the monitoring analysis, if we are serious about maintaining eagle populations at current levels or better in all these areas.

**Page 16, Line 784:** While we understand the practicality of adaptive management, we are curious about how these changes will be vetted with concerned stakeholders?

**Page 18, Lines 882-892:** Delete the references to “incentive-based.” FWC’s role should be to encourage local governments to include eagle nesting substrate provisions in tree ordinances, not to advocate for non-regulatory or regulatory mechanisms. Unless FWC is willing to promulgate a statewide rule, then it needs to leave these kinds of local decisions to the local governments who are willing to implement these protections for eagles—whether they are ultimately regulatory or incentive-based.

**Page 20, Lines 896-923:** This Law Enforcement section does not address the most pertinent enforcement questions: what will the penalties be for violation of the new proposed eagle rules, how will FWC coordinate with USFWS law enforcement, and what criteria will FWC use to decide with USFWS which avenue—federal or state—to pursue for prosecution? It would be helpful if this section detailed FWC law enforcement’s view of what actions will constitute violations of which federal and state laws and what they see state law enforcement’s role being in bringing these violators to prosecution. A chart could easily compare types of violation, which state and federal rules would be violated, and the potential state and federal penalties for each. This treatment would be comparable to the level of detail provided in the landowner incentives section preceding this one, and could prove helpful in the need expressed in the education section for ensuring the public that significant protections for eagles remain, despite their removal from federal and state imperiled species programs.

**Page 22, Lines 991-995:** You changed the language of this rule from “harm or harass” to “disturb” since the last version of this chapter. Will you be using the federal definition of “to disturb” in conjunction with this rule? If so, the plan should clearly state this. Similarly, we have concerns about FWC deferring its permitting responsibilities to USFWS, but will address that further in a later comment.

**Page 23, Lines 1056-1057:** “Should the final federal rules and guidelines provide adequate protection for Florida’s bald eagle population, then the need for state oversight may be reevaluated.” We disagree with this statement and feel it should be removed, or at the very least qualified to demonstrate what stakeholder process would be utilized in the review and modification or elimination of state rules and guidelines for eagle protections. If this is a legitimate possibility, perhaps it is more

appropriate to delay state delisting of the eagle until all the federal rules relating to eagle protection are completed, rather than codifying an incomplete state species management plan now.

**Page 25, chart:** This figure is difficult to read—the decision thresholds on the second tier from the bottom are somewhat confusing, and the process could be improved by clearly stating at which point in the process the landowner must consult with an FWC regional biologist.

**Page 26:** At several points on this page, the text and call-out boxes indicate that no permit is necessary if the landowner abides by the FWC Habitat Guidelines. However, the plan does not clearly state (1) how/when landowners should notify FWC that they are opting to follow the Habitat Guidelines (which ensures FWC has knowledge of the work and the potential exists for spot checks of the landowner’s compliance with the guidelines), or (2) what the consequences are of being found in violation for not complying with the guidelines. With a complicated process like this, there will be too much leeway for a landowner to plead confusion after a violation has occurred if they are not required to at least register their intent to comply with the Habitat Guidelines in advance of beginning work. Similarly, the tone of the Guidelines, which includes language such as “should be avoided,” “recommends,” and “discourages,” rather than “must be avoided,” “requires” and “forbids,” makes the Recommendations seem more flexible than they are. If a landowner does not comply with the guidelines, they will be found in violation. Giving them the impression of flexibility is misleading. We would be interested in the opinions of FWC’s Law Enforcement and Legal departments on how this language could affect their ability to successfully prosecute a violation resulting from a landowner’s failure to abide by the Habitat Guidelines.

**Page 27, Table 3; Page 28, Table 4; Page 55, Lines 2374-2381:** We challenge the underlying assumption in the given definition of “similar size and scope” and the way that it is employed in the habitat guidelines, that four single-family houses at a distance of 200’ from an eagle nest have no greater effect on that nest than a single pre-existing house at that same distance. The way the guidelines employ this concept denies the potentially additive nature of these successive structures without citing research demonstrating this to be true. Successive structures of similar size and scope should be required to follow the same setback guidelines as new structures near previously unimpacted nests.

**Page 29, Line 1225:** What constitutes a violation? What if adults are present but do not successfully fledge young? This should be explicitly stated, to protect the interests of the birds and the landowner.

**Page 29, Line 1251:** “Appropriate precautions” is similarly vague and should be explained more thoroughly.

**Page 30, 1285-1286, 1300-1301:** Who will determine whether the eagles have demonstrated a tolerance for such disturbances?

**Page 31, 1317-1322:** We object to the FWC divesting themselves of responsibility for permitting any kind of take of eagle nests and deferring such decisions solely to the federal government. Especially in the case of airports, this type of take application can be emotionally charged with claims of risks to human safety, and benefits from review by multiple levels of government. We feel that while eagles can sometimes pose a strike hazard to aircraft, this can largely be alleviated with proactive Bird Air Strike Hazard and Hazard Mitigation plans, which all airports are required to file with the FAA. However, we feel that eagles have become unduly singled out by some airports because of the ease of locating their nests through state databases originally designed for permitting. The nests of other large birds—osprey, sandhill cranes, vultures and more—are not as frequently sought out and destroyed in the name of air safety, in our opinion because information about their nest locations are not as readily available. In reality, eagles cause a minor percentage of bird strikes in Florida. For example, at

Orlando International Airport in 2006, there were no known Bald Eagle strikes and the most common species struck were American Tree Swallow and Cattle Egret. Of surveys of animal remains found near the runways (presumably some of which were from strikes that went unnoticed), the leading species' remains were Mourning Doves, followed by Killdeer, Cattle Egret and Ring-billed Gull. Remains from a single eagle were found during that year. While eagle strikes do occur, their nests have the potential to be disproportionately targeted for removal due to the convenient, public availability of eagle nest location information. As a result, we think the agency that makes these data available to the public—the FWC—should continue to share responsibility for permitting take actions informed by that data.

**Page 31, 1324-1327:** The USFWS does not currently have a provision for take when nests may threaten human safety, or a permit to authorize it. Accordingly, it is presumptuous of FWC to attempt to divest itself of this responsibility at this time, and to do so without defining what kinds of situations FWC would consider as meeting this condition.

**Page 32, Lines 1397-1398:** A provision for blanket permission to be granted for rehabilitators specializing in eagle rescues would be appropriate.

**Page 33, Lines 1429-1430:** Just because an eagle nest is on an artificial structure doesn't mean its removal doesn't warrant mitigation. This no-mitigation requirement is inappropriate.

**Page 34, Line 1458:** This language is not clear. Perhaps: "Exterior lighting should be shielded so the light source is not visible from the nest."

**Page 34, Lines 1459-1463:** We recommend these lines read as follow: "The largest possible vegetative buffer between construction activities and the nest must be maintained. If insufficient buffer exists, it will be necessary to create, enhance or expand the visual buffer by planting appropriate native pines or hardwoods." Again, the language of all the minimization efforts (numbers 1 through 9) should use active language—"must, will, required, necessary"--rather than "should, may, recommended."

**Page 35, Lines 1518-1519:** It is unclear here why we would want to offset nest take in one area with mitigation in another core area. If this provision is included to allow for nests taken outside of any core area to be mitigated for within a core area, then this should be clarified.

**Page 26, Lines 1541-1542:** The USFWS has not yet set its mitigation fee for incidental take permits under BGEPA, so attributing the \$35,000 amount to their process is inaccurate. Similarly, it is not a number derived without input from FWC; in fact, it is based on a number originally established by Steve Nesbitt of the FWC. We question whether it is sufficient to counterbalance the ecological loss of the permitted take. The plan does not clearly establish to what purposes the mitigation fees will be applied. In literal terms, the destruction of a nest should be used to acquire or protect a nest elsewhere. It is unlikely that a mitigation payment of \$35,000 would be sufficient to do this: if the protection of a nest with a 300-foot buffer requires the acquisition of a circle with area of 7.8 acres, this \$35,000 mitigation payment would only allow the purchase of these near-waterfront upland sites at \$4,487/acre.

**Page 37, Line 1607:** It is essential that FWC monitors habitat changes, as stated in this line, however previous overviews of the eagle survey program did not include habitat condition or extent as trends that the current program monitors. This should be added to the list of priority ongoing research needs to ensure it isn't overlooked.

**Page 38, Line 1652-1653:** These messages—“highlighting that the bald eagle is an Endangered Species Act success story, that the current statewide population is thriving, and that the bald eagle will remain legally protected upon delisting”—may be priorities for the FWC, but are not necessarily for the Bald Eagle. The first two do not benefit the Bald Eagle’s population, only the agency’s image. The emphasis of the eagle education in this plan should be on educating the public that eagles remain protected, that while their population is strong they still face challenges, and how various sectors (local government, developers, individual citizens, veterinarians, etc.) can contribute to the population’s stability. The education section and economic impacts (budget) also do not make it clear who will conduct these activities.

**Page 40, Line 1752:** The research needs and the plan in general do not address one of the most significant questions regarding the eagle’s future in Florida: will small circular easements around eagle nests provide lasting, undisturbed habitat of the quality necessary for eagles to persist in Florida? This plan paints a picture of eagles (in Central Florida in particular) where urban/suburban landforms are punctuated by 7.8-acre isolated easement circles, at the center of which lie an eagle’s nest. It is a glaring omission that this plan provides no treatment of how these easements will be

- (1) catalogued,
- (2) monitored over time for compliance with the easements’ terms,
- (3) posted and protected from disturbance, and
- (4) managed for the health of not only the existing nest tree but the next generation of nest trees that will hopefully replace it when the original nest tree dies.

Relying on these habitat islands to support a stable population of eagles is already tenuous. Without some monitoring and management of these easements, it is likely their ability to provide functional habitat for eagles will be diminished and/or shortened. This plan could be setting up a future land-use pattern that will be hard to reverse if we find in fifty years that we have not adequately provided for eagles’ needs now.

**Page 41, Line 1791-1793:** If the plan is going to go so far as to suggest potential hypotheses for the research into increasing eagle use of artificial nesting substrates, then the hypothesis “this occurrence is a result of the increased availability of artificial substrates” must be accompanied by the alternative, “this occurrence is a result of declining availability and distribution of preferred, natural substrates.”

**Page 42, Lines 1821-1829:** These activities need to precede the formal downlisting in the implementation schedule so that these safeguards are in place in anticipation of the downlisting.

**Page 43, Line 1885:** This amount would be covered by only six mitigation payments. Can all of these activities be funded through that revenue stream? If not, how will that funding be used? This plan does not adequately address how mitigation payments and the Bald Eagle management fund will be used.

**Page 44, Line 1889:** Where do you anticipate distributing these brochures? Without a distribution strategy, the 10,000 brochure quantity seems arbitrary... and quite possibly meager.

**Page 44, Line 1931:** It doesn’t seem like “reevaluating the distance at which nesting eagles are disturbed” is the most urgent of priorities, but if it is, this should include an evaluation not just of presence/absence of nesting, but also of the success of that nesting (eg: fledging rates). This could also begin to resolve the “similar size and scope” assumption we raised concerns about earlier in this document.

**Page 54, Lines 2332-2333:** An inactive nest is not always an alternate nest. Sometimes it is just simply inactive.

**Page 54, Lines 2351-2352:** This should reflect that in the italicized case, “*Note that some late-nesting eagles in Florida occasionally extend the nesting season into June or July,*” compliance with the habitat guidelines is required until the young have fledged. This should be similarly referenced in the main treatment of the habitat guidelines earlier in the document as well.

In summary, we are concerned that finalizing this plan should be delayed if such a high percentage of the plan is contingent on the USFWS’ delisting of the eagle and that agency’s as-yet unfinalized incidental take process under BGEPA. Publicizing a clear timeline for completion of FWC’s eagle delisting process would help to alleviate some of this concern (if it is likely FWC will not take action until the federal IT provision is finalized, and those terms can then be incorporated into the state plan). Similarly, we are concerned by the appearance of flexibility given to the habitat management guidelines by both the permissive language (may, should, recommend) as well as the lack of clear notification of FWC biologists of when landowners are choosing the habitat guidelines option for their developments. This may make it too difficult for the agency to find true violators “in violation.” The plan does not provide adequate explanation of the fiscal accountability for mitigation funds and how they will be expended to offset the permitted eagle nest take. Lastly, the lack of consideration in this document of the long-term fate of mitigation areas and circular nest site easements may leave us with few options in future generations for habitat expansion if eagle populations decline due to nest site/substrate loss.

Thank you for your consideration. We look forward to continuing to work with you and other stakeholders in the development of this plan.

Sincerely,

A handwritten signature in black ink, appearing to read 'D Anderson', with a long horizontal flourish extending to the right.

David Anderson  
Executive Director  
Audubon of Florida