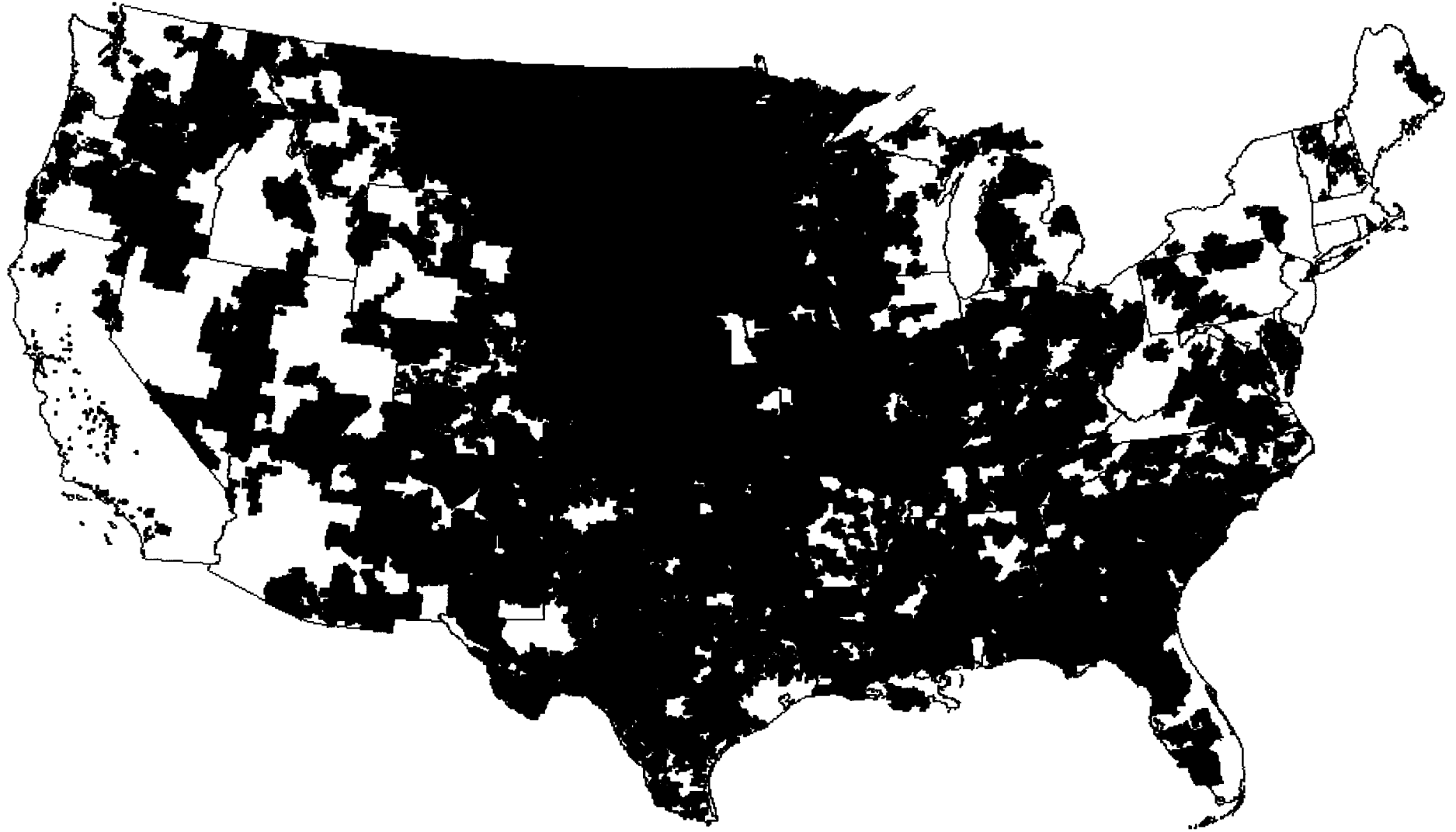


Electric Cooperative Service Areas



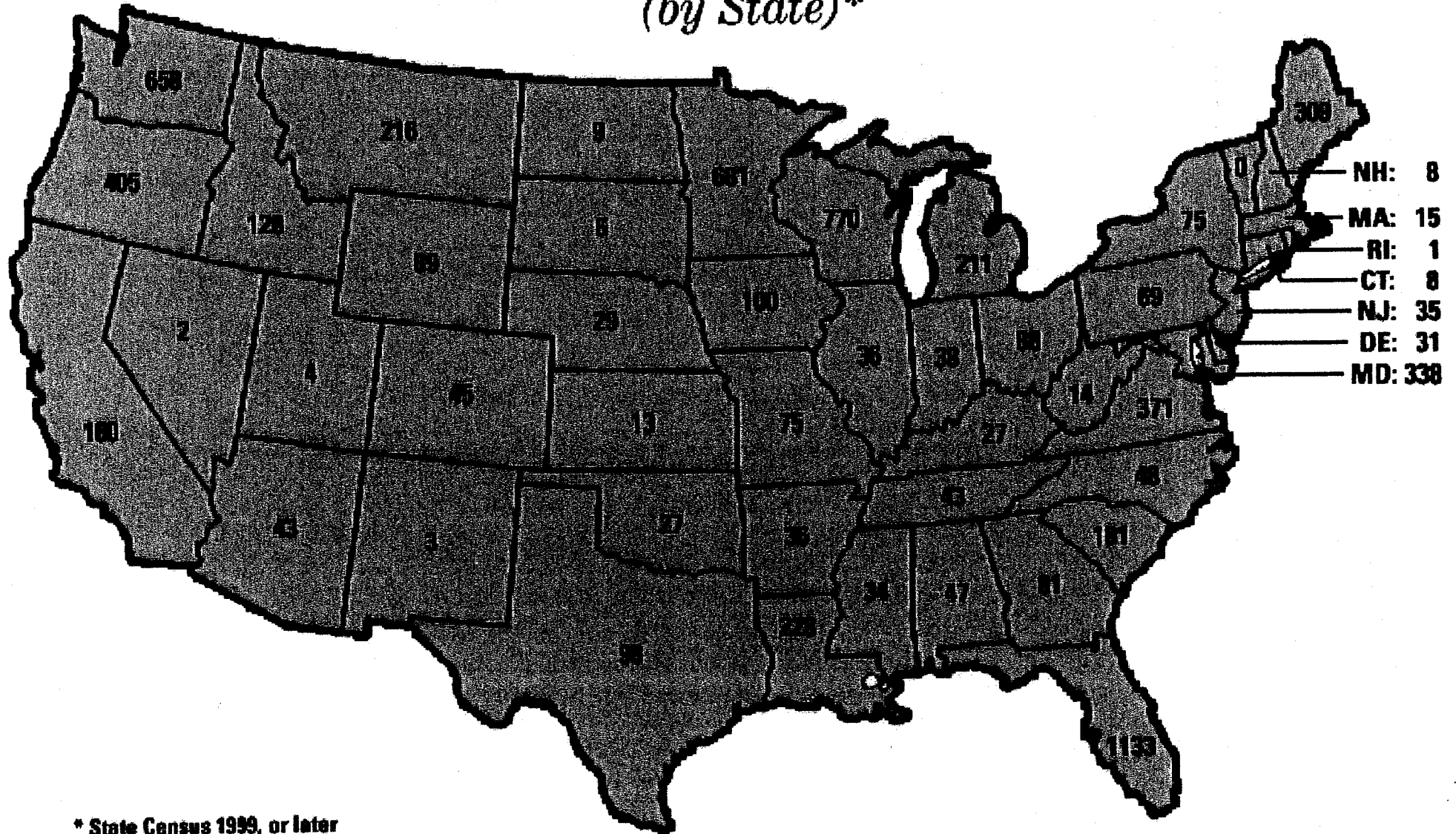
Attachment 1



U.S. Fish & Wildlife Service

Bald Eagle

*Estimated Number of Breeding Pairs
(by State)**



* State Census 1999, or later

SUMMARY OF COMMENTS PROVIDED BY THE UNITED STATES FISH & WILDLIFE SERVICE, SOUTHEAST REGION ON THE BALD EAGLE DELISTING AND PROPOSED NEW RULE AND GUIDANCE UNDER BGEPA

On June 26, 2006, the United States Fish and Wildlife Service ("FWS") Regional Director, for the Southeast Region, Atlanta, Georgia, submitted comments on the Bald Eagle Delisting, Disturbance Rule and Proposed National Management Guidelines.¹ **Although generally supporting the delisting, the Southeast Region of FWS was very critical of FWS Headquarters proposed rule and draft guidelines regarding the shift in protecting the bald eagle under the Endangered Species Act ("ESA") to the Bald and Golden Eagle Protection Act ("BGEPA") as follows:**

- The proposed definition of "disturb" coupled with site-specific recommendations in the Guidelines, will render a potentially less flexible approach (than under the ESA), thereby "creating the condition that the Guidelines may actually produce more regulatory restrictions on the affected public." *See* FWS Memo. at 1.
- The Guidelines address habitat management irrespective of a direct statement to the contrary. *Id.* at 2.
- Following the Guidelines provides no assurance to landowners that they will not face potential liability and enforcement actions. Should an eagle be disturbed (i.e. nest abandonment event equates to a BGEPA violation) according to the rule, a landowner is potentially subject to enforcement actions. *Id.*
- There is no regulatory relief for citizens who are unable to comply with the new guidance, and the new guidance does not provide the regulatory flexibility to address complex problems to the benefit of the species and the people as the FWS is currently able to do under the ESA. The Guidelines address only simple situations, and will limit the ability of the FWS to advise or provide practical solutions to landowners. Given the rapidly expanding bald eagle population in the Southeast region, and especially Florida, this is of concern. Landowners may be more likely to cut down nest trees, rather than lose the use of their land. *Id.*
- The new guidance no longer honors or "grandfathers" existing commitments made under the ESA (e.g. technical assistance letters, formal and informal consultations, section 10 permits and/or section 7 biological opinions). Grandfathering of Habitat Conservation Plans was also not addressed, despite the fact that FWS news releases stated that HCPs would be honored. *Id.*
- The disturbance rule and definition of nest abandonment is more expansive than under the ESA. *Id.* at 3. The definition of disturb includes situations where disturbance occurs during the non-nesting season and the eagles do not return the following year. This definition would be nearly impossible to enforce, because birds fail to use previously

¹ Memorandum from Regional Director, Southeast Region, USFWS to Director USFWS (June 27, 2006).

used nests for a variety of reasons. The definition of disturb should apply only during the nesting season when birds are actually using the nest. *Id.*

- It is unclear whether the public will have the option to follow a state management plan in lieu of the FWS guidelines. *Id.*
- Once the bald eagle is delisted, it no longer qualifies for ESA funding and becomes a responsibility of the Division of Migratory Birds of the FWS. Local field offices currently do not provide technical assistance to the public on migratory bird issues, and there is no dedicated funding to provide for the anticipated necessary technical assistance. *Id.* at 3-4.
- The new definition of disturb and new Guidelines will increase demand on FWS's local division of law enforcement both in the advisory capacity and conducting field investigations. *Id.* at 4.
- FWS, Southeast region does not agree that a 3-year protective waiting period after the loss of a nest. They currently protect the nest site for 2 years and recommend retain the 2 year time frame. *Id.* at 4.
- Because the Guidelines lack applying a secondary buffer zone it is unclear at what distance development can take place year round, and no ability to reasonably implement construction timing recommendations. *Id.* at 5.
- The 660 feet buffer does not make sense in light of the Guidelines assumption that nesting eagles are habituated to activities that occur within a mile of the nest. *Id.*
- The Guidelines do not address communication tower facility or electrical platforms relative to performing maintenance or construction activities during nesting season. *Id.*

**SUMMARY OF COMMENTS PROVIDED BY THE FLORIDA FISH AND
WILDLIFE CONSERVATION COMMISSION ON THE DRAFT NATIONAL
MANAGEMENT GUIDANCE**

On June 14, 2006, the Florida Fish and Wildlife Conservation Commission ("FWC"), submitted comments on the draft National Management Guidelines.¹ While generally supporting the delisting, the FWC provided the following concerns:

- *The lack of a permitting process for individual who cannot follow the Guidelines.* FWC believes that the FWS should authorize a permitting process for both incidental takes, and in emergency situations, direct takes. This is particular important in dealing with nests on human-made structures – something that is becoming increasingly common in Florida.
- *The lack of a specified distance to which the seasonal restriction are applied.* It is unclear if the seasonal prohibition in the Guidelines is suppose to apply to activities only when they occur inside the specified buffer or if there is an additional protection to be applied to projects beyond the 660 foot buffer.
- FWC recommends following monitoring guidelines to allow for projects to be conducted during the nesting season, for those cases where a project cannot proceed during the non-breeding seasons.
- For timber operations and motorized watercraft, the FWS suggest a buffer of 1000 feet rather than 660 feet during the nesting season.
- Regarding visibility of a project from the nest, the important aspect is not if the project is visible to the eagles, but rather, if there is sufficient buffer to provide the eagle a measure of comfort that would encourage continued use of the site.
- FWC does not agree that a 3-year protective waiting period after the loss of a nest. They currently protect the nest site for 2 years and recommend retain the 2 year time frame.
- FWC recommends a FWS permitting process for the removal of nests during non-nest season on human-made structures to encourage cell tower owners to install nesting platform structures.
- The definitions of "active nest" and "nest abandonment" and their implications are of concern. Under current guidance, nests that are inactive for 5 breeding seasons can be declared "abandoned" and the protection zones no long apply. The new definitions do not seem to follow this, and even inactive nests for 5 years are still protected from human destruction.
- A significant decrease in the FWS technical assistance on bald eagle/development issues may result in projects being implemented that increase nest abandonment and result in further decline of the species.

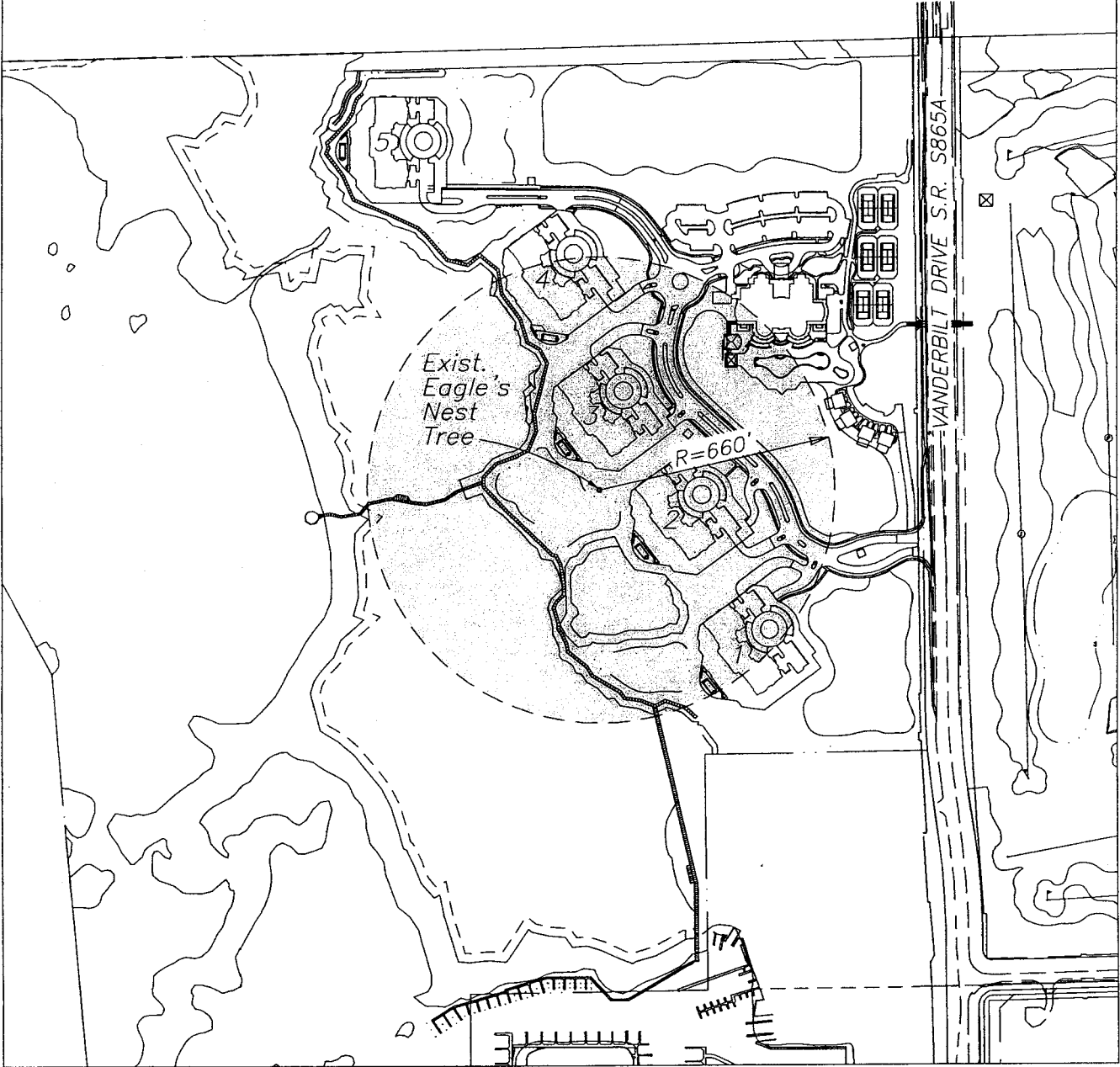
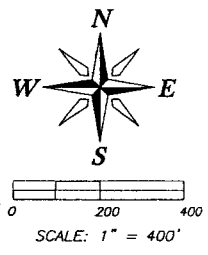
¹ Letter from Timothy Breault, FWC, to Brian Millsap, Chief, Division of Migratory Bird Management, USFWS (June 14, 2006).

Potential Economic Consequences of Draft *National Bald Eagle Management Guidelines*

- The proposed definition of "disturb" and the implementing *Guidelines* would prohibit any disturbance of a bald eagle nest that might cause nest abandonment and likewise prohibit the incidental take of any bald eagle by any means.
- The Federal Register Notice of the draft "disturb" definition stated that the Service did not anticipate this rule would have an effect of \$100 million or more on the economy (Executive Order 12866), would not have a significant economic effect on a substantial number of small businesses (Small Business Regulatory Enforcement Fairness Act), and would not have any significant regulatory takings implications (Executive Order 12630).
- Biological Research Associates (BRA) calculated for 2004 the reported tax assessed land value within 660 ft. (31.4 acres) of active bald eagle nests in Hillsborough (15 nests, \$23,415,000 total value), Pasco (19 nests, \$16,189,000) and Sarasota (27 nests, \$43,496,000) Counties, under the assumptions of even distribution of value over every parcel, no differentiation for uplands/wetlands and no new building value on the affected parcels.
- There are about 1,405 pairs in Florida with an estimated 75% on private lands, suggesting that the land value encumbered by eagle nests may total \$1,435,519,317 in 2004 dollars (about \$1,362,295 per nest).
- These estimates do not take into account the tremendous escalation in property values between 2004 and 2006 and the fact that we used tax assessors information, which grossly underestimates fair market value.
- The economic loss of the proposed *Guidelines* on the Cocohatchee Bay PUD project alone is about \$199,360,000.
- The draft "disturb" definition and *Guidelines* will have severe socioeconomic and public safety impacts that are not limited to Florida. Several examples follow.
 - In 1999 the Annapolis Field Office issued a Biological Opinion for the National Harbor project in Prince George's County, Maryland, which contained within it an active bald eagle nest. National Harbor is a 7 million square foot retail and entertainment destination resort valued at over \$1 billion dollars, which could not be constructed as designed under the proposed *Guidelines*. The project was associated with a Federal Highway Authority need to rebuild the Woodrow Wilson Bridge that also likely would have been jeopardized by the proposed *Guidelines*.
 - The Annapolis Field Office currently is finalizing a Biological Opinion for the Department of Defense Aberdeen Proving Grounds where 65 bald eagles have been electrocuted in the last decade. The proposed definition of "disturb" and the

Guidelines prohibit incidental take, which will prevent this National Defense facility from conducting its normal and necessary operations.

- Similarly, the electrical power industry inadvertently causes many electrocutions and bird strike with transmission lines across the U.S.
- The Service has authorized the removal of at least two new, active eagle nest trees at the ends of runways of major airports (Sanford, Florida and Norfolk, Virginia) over public safety concerns with bald eagle strikes, which would be prohibited under the proposed regulations.



PROJECT NO:
80447

ACAD NO:
80447-Ex02

DRAWN BY:
JN

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SCALE:
1"=400'

DATE:
03-14-06

PAGE TITLE:
**Cocohatchee P.U.D.
Bald Eagle Management**

Sheet No. **3** of **3**



SCALE 1" = 200'



NOTES:
 AERIAL PHOTOGRAPHS WERE ACQUIRED THROUGH THE LEE COUNTY PROPERTY APPRAISER'S OFFICE WITH A FLIGHT DATE OF JANUARY 2005.
 PROPERTY BOUNDARY, EAGLE NEST LOCATION AND SITE PLAN PER ABB, INC. DRAWING No. 9291-S3 DWG DATED MARCH 11, 2006.
 WETLAND LINES SHOWN PER SFWMD PERMIT NO. 36-00289-S AND USACOE PERMIT NO. 199201848.

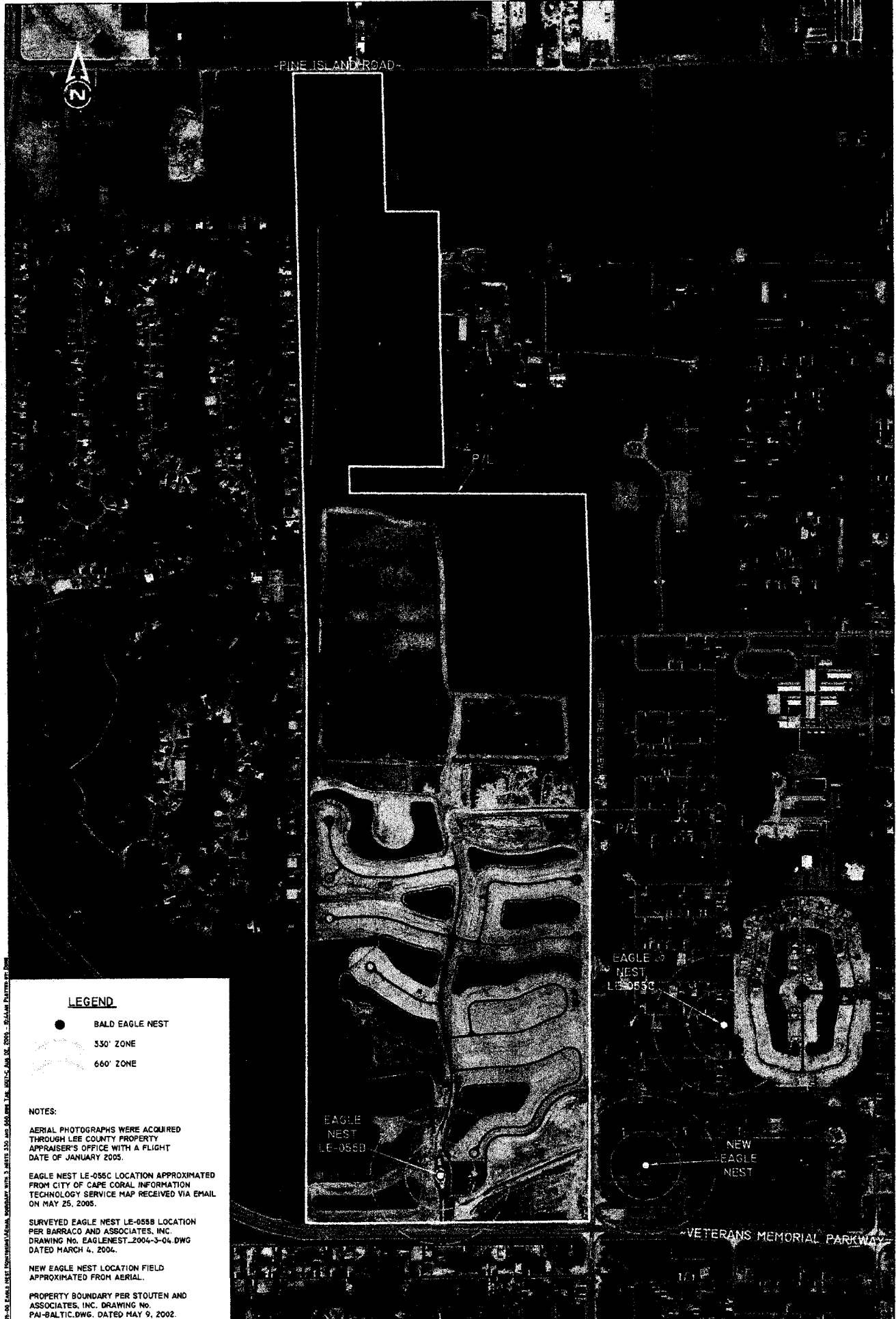
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	CHECKED BY	DATE	VERTICAL SCALE
	K.C.P.	10/2/06	N/A
	DRAWN BY	DATE	SEC./TWP./RNG.
	J.I.	10/2/06	20.29/47/25

PASSARELLA and ASSOCIATES, INC.
Consulting Ecologists
 9110 College Pointe Court, Fort Myers, Florida 33919

BAYWOODS PHASE TWO
 AERIAL WITH EAGLE NEST AND SITE PLAN

DRAWING No.:	998BP444
SHEET No.:	

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LEGEND

- BALD EAGLE NEST
- 330' ZONE
- 660' ZONE

NOTES:

AERIAL PHOTOGRAPHS WERE ACQUIRED THROUGH LEE COUNTY PROPERTY APPRAISER'S OFFICE WITH A FLIGHT DATE OF JANUARY 2005.

EAGLE NEST LE-055C LOCATION APPROXIMATED FROM CITY OF CAPE CORAL INFORMATION TECHNOLOGY SERVICE MAP RECEIVED VIA EMAIL ON MAY 25, 2005.

SURVEYED EAGLE NEST LE-0558 LOCATION PER BARRACO AND ASSOCIATES, INC. DRAWING No. EAGLENEST_2004-3-04.DWG DATED MARCH 4, 2004.

NEW EAGLE NEST LOCATION FIELD APPROXIMATED FROM AERIAL.

PROPERTY BOUNDARY PER STOUTEN AND ASSOCIATES, INC. DRAWING No. PAI-8ALTIC.DWG. DATED MAY 9, 2002.

AERIAL PHOTOGRAPH FROM: DR. EAGLE NEST, NORTHERN FLORIDA, UNIVERSITY, WITH: 3, NESTS 330' AND 660' FROM 1/16/05, AUG. 06, 2005. SCALE: 1"=1000'.

DRAWN BY A.K. 2/2/06 1"=1000' CHECKED BY A.K. 2/2/06 N/A DATE OF D.E. 2/2/06 20:28/14/23		PASSARELLA and ASSOCIATES, INC. <i>Consulting Ecologists</i> 9110 College Pointe Court, Fort Myers, Florida 33919	SANDOVAL AERIAL PHOTOGRAPH WITH PROJECT BOUNDARY AND BALD EAGLE NEST LE-0558, LE-055C, AND NEW BALD EAGLE NEST	0088P579 SHEET NO.
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	ESA	BGEPA	MBTA
Overview	Protects species from extinction	Protects individual eagles	Protects individual migratory
Prohibitions	Prohibits the taking, possession, selling, delivery, carrying, transportation, shipping, importation, or exportation of listed species	Prohibits the taking or possession of and commerce in bald and golden eagles, with limited exceptions	Prohibits the taking, killing, capturing, selling, bartering, exporting, importing, transpo possession of migratory birds
Exceptions	Permits may be issued for scientific purposes, maintenance/establishment of experimental populations, or to enhance the propagation and survival of affected species. Incidental take permits may be issued in conjunction with an HCP.	Permits may be issued for scientific or exhibition purposes, for religious purposes of Indian Tribes or for the protection of wildlife, agricultural or other interests if compatible with the preservation of bald and golden eagles.	The Secretary may issue perm temperature zones, distributio value, breeding habits and m
Permits Relevant to Private Sector	Permits are issued to qualified applicants for: <ol style="list-style-type: none"> <i>enhancement of survival associated with Safe Harbor Agreements and Candidate Conservation Agreements with assurances</i> <i>incidental take associated with HCP</i> 	BGEPA is more restrictive than MBTA or ESA, prohibiting the Service from authorizing the sale, purchase, barter, trade, importation, or exportation of eagles or their parts. Authorized permits are: <ol style="list-style-type: none"> <i>Eagle Depredation—Permits are issued to authorize the taking or disturbance of a bald or golden eagle that have become injurious to wildlife, agriculture, personal property, or human health or safety.</i> <i>Taking of Golden Eagle Nest—Permits are issued only to parties engaged in a resource development or recovery operation, and only applies to inactive golden eagle nests.</i> <i>Permits associated with scientific collecting/research, exhibition, falconry, and Indian religious purposes, and temporary transportation.</i> 	The MBTA greatly restricts v involving migratory birds; ho permits are available: <ol style="list-style-type: none"> <i>Depredation—Permits an control purposes, such as public property or for hu reasons.</i> <i>Special Purpose—Permi applicant demonstrates a otherwise provided for b</i>
Incidental Take Authorization	<ol style="list-style-type: none"> Incidental take permits (section 10) are issued with associated HCPs. Incidental take statements are issued in conjunction with §7 Biological Opinions. 	Current regulations do not provide incidental take authorization--Possible basis for authorization: Section 16 U.S.C. 668a-- "or that is necessary to permit the taking of such eagles for the protection of wildlife or of agricultural or other interests in any particular locality. "	Current regulations do not pr authorization--possible basis purpose permit" for activities standard permits.
Analysis Under Proposed Guidelines and Definitions	<p>The Service and FWC have proactively authorized incidental take associated with land use activities in proximity to active bald eagle nests in exchange for conservation measures through dynamic management strategies while the species has recovered from estimated 88 pairs in the 70s to now 1,200+ nesting pairs. These management programs and guidelines were in full compliance with and facilitated under the ESA.</p> <p>Currently, Service staff has implemented the draft Guidelines as thresholds for "take" determinations under the ESA. If an activity is consistent with the</p>	<p>The management programs and achievements observed in Florida generally could not have been achieved nor will they continue under the BGEPA and proposed national guidelines and definition of "disturb." The proposed program will effectively prohibit the conservation programs currently practiced for bald eagles in Florida and seriously compromise recovery of the species that has been achieved during the past decades under the ESA.</p> <p>The Service is relying on the National Guidelines as the litmus test for compliance with BGEPA/MBTA; however, the proposed Guidelines do not provide certainty from liability. BGEPA is very restrictive with limited take authorization; including no regulations for incidental take. Any activity that is inconsistent with the Guidelines would not be</p>	See BGEPA analysis

	<p>Guidelines, then work proceeds pursuant to Clearance. Inconsistent activities require formal consultation with associated incidental take statements, which provides flexibility in the protection of bald eagles and the regulation of the private sector.</p> <p>The ESA is concerned with the existence of the bald eagle species and not the existence of individual bald eagles. Therefore, the ESA provides more flexibility in authorizing “takes” where, overall, the species’ existence is not jeopardized.</p>	<p>permissible under BGEPA and thus would not be able to proceed legally. Simply stated, the current Guidelines and proposed rules do not provide the same management flexibility as the ESA.</p> <p>BGEPA/MBTA primarily focus on the protection of individual bald eagles. Consequently, these acts do not provide the same flexibility as the ESA. Further, the proposed definition of “disturbed” assumes a strong presumption that bald eagles are disturbed and thus would, under the proposed Guidelines and rules, significantly limit development activities.</p>	
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Nest ID	Location in Florida	Existing and Proposed Activities	Viability of Nest After ESA Authorization	Existing ESA Authorization	BGEPA/MBTA Proposed Guidelines "Disturb"
SJ-021	Located within 48 acre residential development in St. Johns County, Florida	A visible nest within 310 feet of existing residences and proposed development site <i>No similar construction activity within 310 feet of nest</i>	The pair of bald eagles using this nest continue to produce young from this nest.	A §7 BO/ITS was issued with 404 Permit authorizing new development at 310 feet from the nest with prudent measures (Monitoring and BEMP).	The activity is a Category B activity within 660 feet of the nest. Implementation measures cannot be considered (i.e., the BO/ITS and thus no rational flexibility). Further, the proposed Guidelines are grandfathered in the ESA authorization to avoid BGEPA/MBTA liability.
SE-047B	Located within a 56.93 acre residential development in Seminole County, Florida	Developer proposed to construct a residential subdivision around this nest within 100 feet of the nest <i>No similar construction activity within 100 feet of nest</i>	The bald eagle pair have fledged young for the past three nesting seasons.	A §7 BO/ITS was issued with 404 Permit authorizing development within 100 feet with prudent measures (BEMP and off-site conservation easement around another bald eagle nest).	Same as above
MN-014A	Located on a 39.19 acre parcel in Manatee County, Florida	Developer proposed residential development around the visible nest <i>No similar construction activity within 330 feet of nest</i>		A §7 BO/ITS will be issued with 404 Permit authorizing the development at 330 feet with prudent measures (BEMP and voluntary donation of \$35,000 to Wildlife Trust Fund)	Same as above
LE-056	Located within north portion of the Lehigh Acres Sewage Treatment Facility in ___ County, Florida	A visible nest that was built within 80 feet of existing sewage treatment facilities (pond, berm, etc) and 300 feet of existing equipment storage areas and other operational facilities. Plant operators need to conduct work on the berm within 80 feet of the nest. <i>No similar construction activity within 300 feet of nest</i>	Eaglets were fledged that year (2002-2003) and each of the following nesting seasons.	There was no federal action so no BO/ITS was issued. Instead the Service issued a Technical Assistance Letter that advised the proposed activity would not violate the ESA.	The activity is a Category A activity permitted within 330 feet of the nest. Letters can be issued, but they would not meet the terms of the Guidelines; i.e., no flexibility measures or other factors.
LE-065	Located on a 13 acre parcel in Lee County, Florida	Ongoing residential development. The nest tree is within 150 feet of a golf course, 320 feet of an existing road, and 400 feet of existing residences. The nest is highly visible. Developer is proposing the construction of a storm water facility and multi-family homes. <i>No similar construction activity within 330 feet of nest</i>	Young were produced in 2003-2004 and 2004-2005. The nest was active this nesting season but nesting was disturbed by horned owls.	A §7 BO/ITS was issued with 404 Permit authorizing a BEMP that will allow construction of the storm water facility within a 200 foot buffer and residential construction outside the 200 foot buffer with the condition certain conservation measures are taken.	The activity is a Category B activity within 660 feet of the nest. No allowance for the implementation of prudent measures similar to the BO/ITS and thus no rational flexibility. Further, the proposed Guidelines are grandfathered in the ESA authorization to avoid BGEPA/MBTA liability.
C0-19	Located within the Cocohatchee Bay PUD in Collier County, Florida	Proposed mixed-use development on 532.76 acres of land (multi-family residential/golf course)		The Service issued a BO/ITS with 404 Permit authorizing the proposed projects associated with the PUD.	Same as above. The lack of a grandfathered activity would result in a monetary loss of approximately 10 years of cooperation with the Service.