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Eagle Permits; Incidental Take

Comment On: FWS-HQ-MB-2020-0023-1937
Permits for Incidental Take of Eagles and Eagle Nests

Document: FWS-HQ-MB-2020-0023-9300
Comment from Public Utility District No. 1 of Chelan County, Washington

Submitter Information

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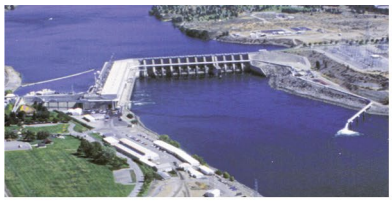
Government Agency Type: Local
Government Agency: Public Utility District No. 1 of Chelan County, Washington

General Comment

Please find attached comments from Public Utility District No. 1 of Chelan County, WA regarding FWS-HQ-MB - 2020-0023.

Attachments

Chelan PUD comments on Incidental Take of Eagles and Eagle Nests 12-23-22



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December 23, 2022

Jerome Ford, Assistant Director
Migratory Birds Program
U.S. Fish and Wildlife Service
MS: PRB/3W
5275 Leesburg Pike
Falls Church, VA 22041-3803

Submitted via www.regulations.gov. Attn: FWS-HQ- MB-2020-0023

Re: Proposed Rulemaking for Permits for Incidental Take of Eagles and Eagle Nests, Docket No. FWS-HQ-MB-2020-0023

Dear Mr. Ford:

Public Utility District No. 1 of Chelan County (Chelan PUD) appreciates the opportunity to comment on the U.S. Fish and Wildlife Service's (Service) proposed rulemaking for incidental take permits for eagles under the Bald and Golden Eagle Protection Act (Eagle Act). On September 30, 2022, the Service published notice in the Federal Register of a Proposed Rule amending its regulations authorizing permits for eagle incidental take and eagle nest take under the Eagle Act. Chelan PUD urges the Service to defer this rulemaking until a draft rule for incidental take under the Migratory Bird Treaty Act has been issued. By evaluating the two draft rules concurrently, the Service could avoid unintended inconsistencies or duplication and allow the regulated community to better predict their potential permit needs and operational implications.

Background

Chelan PUD was formed in 1936 by local voters who wanted affordable power for rural as well as urban residents. Today, we operate three hydroelectric projects that deliver clean, renewable, low-cost energy to 48,000 local customers and to other utilities that serve businesses and residents through the Pacific Northwest. We also own and operate about 335 miles of transmission lines and 900 miles of distribution lines.

In 2005, we voluntarily developed an Avian Protection Plan (APP) consistent with the Service's guidance (2005). In 2020, we updated our APP to include new, best management practices regarding the increasing numbers of osprey and bald eagle now common in our service territory and conducted avian risk assessments designed to target problem areas for wildlife protection.

The APP is a utility-specific program designed to protect and conserve migratory birds by reducing incidental take at our facilities, particularly our electric distribution lines. APP implementation is voluntary and supports our core values as a customer-owned utility. Specifically, it provides that, where feasible, Chelan PUD will install protective measures on existing lines where there is a high risk of avian mortalities or where avian mortalities have occurred. Chelan PUD is also a member of the Avian Power Line Interaction Committee (APLIC). APLIC is a coalition of over 75 electric utilities in the United States and Canada and includes the Service, Edison Electric Institute, National Rural Electric Cooperative Association, and Rural Utility Services. APLIC and its members worked with the Service and developed guidance on how to minimize the risks associated with avian interactions with electric utility facilities. In addition, APLIC participants share knowledge and stay current on best management practices related to avian power line interactions.

Chelan PUD's APP is intended to reduce avian mortality while improving electric reliability and public safety. Where feasible and appropriate, we implement avian safe (APLIC 2006)[1] design standards on new lines and lines that are planned for re-building. Our distribution personnel are trained on the avian program and APP components. Chelan PUD also reports incidental take of birds covered under the Migratory Bird Treaty Act (MBTA) in accordance with our voluntary Migratory Bird Special Purpose Utility (SPUT) Permit issued by the Service. Our utility wildlife personnel coordinate with the Service on APP implementation and annual reporting requirements. It is clear this proposed rule would create a new layer of permitting for eagles specifically, but it is not clear how the current proposed rule would affect the current status of Chelan PUD's APP and/or our current SPUT Permit. For these reasons and others offered below, Chelan PUD is providing comments to the proposed Rule.

Comments on the Proposed Rule

Relationship to MBTA

In October 2021, the Service issued an advance notice of proposed rulemaking (ANOPR) to better protect migratory bird populations under the MBTA. In the ANOPR, the Service indicated in that it may consider permitting for electric transmission and distribution infrastructure activities.[2] Because bald and golden eagles are protected species under both the Eagle Act and the MBTA, the Service should coordinate public review of both draft rules. In the absence of coordinated review, the public and regulated entities will not have a full picture of how the two rules could complement or conflict with each other, or whether certain activities may require permits under one, both or neither rule.

[1] Avian Power Line Interaction Committee (APLIC) 2006. Suggested Practices for Avian Protection on Power Lines, State of the Art in 2006,

2 86 Fed. Reg. at 54,669

Chelan PUD recommends that another public comment period occur, before either rule is finalized, to facilitate comprehensive review of the requirements for eagles under both statutes.

Eagle Incidental Take Permits for Power Lines

Notwithstanding Chelan PUD's primary concern that this Proposed Rule should be evaluated in concert with the draft MBTA rule, we offer the following comments on the substance of the Rule.

The Service proposes a general-permit option for eagle incidental take for power lines, with six conditions relating to 1) electrocution-safe new construction; 2) new construction/reconstruction design and siting ranges from nesting areas; 3) reactive retrofit strategies; 4) proactive retrofitting collision reduction strategies; 5) collision response strategy; and 6) shooting-response strategies. The APLIC comments submitted in response to the Proposed Rule provide useful and thoughtful input to the Service on these proposed conditions, and we urge the Service to consider them.

In support of the APLIC comments, Chelan PUD would like to emphasize that some accommodations should be made to reflect that not all utility poles face the same eagle risk due to location, habitat and other factors. For example, most poles "unsafe" for eagles likely occur in urban environments, with no suitable eagle habitat. Therefore, while a utility may have a high proportion of "unsafe" poles, it can still have relatively low risk to eagles. Requiring new construction or retrofitting to anticipate a very small or non-existent risk may hinder this Administration's concurrent goals of further developing the nation's transmission system. Some accommodations to aim mitigation in areas at risk is a more sustainable strategy.

The requirement to site infrastructure at least two miles from golden eagle nests and 660 feet from bald eagle nests may have unintended consequences if a nest is near an existing transmission or distribution right-of-way. Rerouting may not be possible from a land use perspective and could create significant complications for utility investments in wildfire mitigation strategies, grid resiliency and redundancy efforts. The Service should consider how its permit conditions could conflict with other management efforts, like land use planning, for the public good. Regarding nest disturbance, the Proposed Rule seems to suggest that a multitude of permits may be needed to cover the same hazard whenever there is a potential disturbance of a bald eagle nest. Instead, the Service should consider a single general permit for a given activity (regardless of whether the disturbance or take is within half a mile). APLIC's recommendation for a non-nesting season, five-year umbrella permit for work conducted, with allowances for emergency work during nesting seasons seems a reasonable place to start.

Regarding the proposed collision response strategy, Chelan PUD agrees with APLIC that bald eagle collision with power lines is mostly random, and multiple eagle collisions in any one location are rare. Similarly, to our knowledge, golden eagle collisions with power lines are very rare. The cost to retrofit, relocate, or bury lines for a single event is extremely costly with potentially limited benefit to eagle populations. Requiring a collision strategy may also create a disincentive for entities to apply for a general permit. Therefore, from a conservation perspective, over-focusing on collision response may yield less benefit than other mitigation approaches being used by utilities under their existing APPs.

The Proposed Rule requires utilities to develop an eagle shooting strategy. Aside from reporting suspected illegal activities to the proper authorities (Office of Law Enforcement for MBTA species and/or eagles), Chelan PUD has no authority to manage or affect this problem, on our structures or elsewhere. The majority of our electric lines (as with many utilities) are on private or public lands where we have no rights to manage access or activities. Furthermore, Chelan PUD service territory and infrastructure is primarily located in developed areas where eagle shooting is unlikely. Requiring a shooting strategy for a utility of our size and location seems unnecessary. Perhaps this could be an option for an eagle take permit where there is an established history of eagles being shot.

Unresolved Questions

Chelan PUD has a history of good relationships and coordination with the Service. For example, Chelan PUD identified a need for a new substation near the south shore of Lake Chelan. In conjunction with this substation project, Chelan PUD proposes to construct a 115 kV transmission line to energize the substation. Chelan PUD considered several alternatives, conducted stakeholder engagement, and consulted with the Service. Chelan PUD worked in direct consultation with the Service and at the direction of the Service utilized the Service's online Eagle Permit Recommendation Tool (EPRT). The EPRT provided Chelan PUD with assurances that if the design and schedule parameters did not change, that it could proceed with the Project and be assured that its approach was protective of eagles. Chelan PUD commends the Service for an interactive and efficient tool to help ensure protection of eagles while proceeding on projects. Chelan PUD is relying on the Service's 2021 letter confirming the design criteria and schedule for the Chelan Project will still be valid for the 5-year term. However, given the Service's current Proposed Rule and the apparent conflicts with direction we have already received from the EPRT, which we have used for future planning, Chelan PUD requests confirmation that it can continue to rely upon the Service's letter resulting from the EPRT process.

Secondly, as an eligibility requirement for the general eagle take permit, the Service is requesting a list of all unsafe poles in the utilities service territory. Chelan PUD does not have this data for our system, and it would take years to compile. Does this make Chelan PUD ineligible for the application process? As explained above, if this request were restricted to eagle use areas, specifically nesting or roosting areas, versus system wide, the timeframe for collecting the data would be shorter and much more relevant to eagle conservation.

Finally, the proposed rule does not contemplate existing Special Purpose Utility permits (SPUT), which have eagle nest take and mortality reporting requirements. If the Proposed Rule is finalized, will SPUT permits no longer be issued or will they no longer contain an eagle component? Alternatively, if a utility has an incidental take permit under the Proposed Rule, would it still be required to have an SPUT permit for species protected under the MBTA? The proposed rule should clarify how valid SPUT permits would be managed under the new rule. It appears that there is a risk of unnecessary duplicity, increasing compliance activity for utilities and oversight responsibilities for the Service. Likely the Service plans to integrate these processes, but clarification for the regulated community upfront can be helpful for operating personnel.

Conclusion

Stewardship is a core value for Chelan PUD. We are committed to responsible stewardship of our utility assets and the environment around those assets, including bird conservation through our APP. We appreciate the opportunity to comment on the Proposed Rule and look forward to an opportunity to concurrently evaluate draft rules for incident take under the MBTA and the Bald and Golden Eagle Protection Act. We encourage the Service to consider outreach with the APLIC to help ensure its avian permitting programs reflect and respond to the changing operational realities faced by utilities. We also plan to reach out to our local office to seek direction on our planned transmission project and how potential conflicts can be overcome to ensure uninterrupted implementation of that project.

Sincerely,

Alene Underwood
Director – Natural Resources

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Permits for Incidental Take of Eagles and Eagle Nests

Document: FWS-HQ-MB-2020-0023-9301
Comment from Eastern Golden Eagle Working Group

Submitter Information

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Email: trish.miller@consciglobal.org
Organization: Eastern Golden Eagle Working Group

General Comment

See attached file(s)

Attachments

EGEWG Comments FWS HQ MB 2020 0023

Eastern Golden Eagle Working Group

Dedicated to Research and Conservation

December 21, 2022

Public Comments Processing
Attention: FWS–HQ–MB–2020–0023
U.S. Fish and Wildlife Service; MS: PRB/3W
5275 Leesburg Pike
Falls Church, VA 22041–3803

Submitted via regulations.gov

Regarding: Permits for Incidental Take of Eagles and Eagle Nests
Docket No.: FWS–HQ–MB–2020–0023

The Eastern Golden Eagle Working Group is a collaboration of biologists and wildlife managers from the US and Canada dedicated to developing a more complete understanding of Golden Eagle life history and ecology throughout eastern North America. Our goals include raising conservation awareness, encouraging population management, coordinating collaboration, and supporting research activities. This set of comments on the proposed Eagle Rule (FWS-HQ-MB-2020-0023-1908) is submitted by a subset of members of the Eastern Golden Eagle Working Group. It does not represent the views of everyone in the group; to avoid conflicts of interest, several members recused themselves from comment, notably staff from certain federal and state agencies and from consulting firms.

The majority of our comments address concerns regarding golden eagles, and the eastern population in particular, but some comments are relevant to both Golden and Bald Eagles. We have several broad-scale comments, and then a number of detailed comments.

Our broad-scale comments are as follows:

First and foremost, we agree that, given the alternatives in the proposed Rule, Alternative 4 is the most acceptable option, with modifications and additions as described in this letter. Compared to Alternatives 1, 2, or 3, this alternative will likely provide the greatest conservation benefit to eagles and encourage participation by developers of wind energy facilities.

Second, we note that as with the previous version of the Eagle Rule, the eastern population of golden eagles is treated as an extension of the western population. In fact, the two populations are not one and the same – they do not occupy the same habitat components, they are not equally visible to observers, their causes of mortality differ, and their behaviors appear different. Much of the science referenced in the proposed Rule is based on western populations, and thus the science is best used for inference only for western populations. In fact, there is a substantial recent literature on eagles in the East, and we note that that literature is poorly referenced in the proposed Rule. For example, the Rule applies a one-size-fits all methodology to estimate relative abundance, to monitor for fatalities, and to track mortalities of these populations. Although we recognize that this approach may be convenient for regulators and industry, it means that the proposed Rule is biologically relevant primarily to the eagles in the western half of the continent where these approaches were developed and tested. While the populations that occupy the West may be much larger, it is our perspective that both populations

deserve equal protection. We would therefore like to suggest that if the goal of this proposed Rule is to protect all US golden eagle populations, the Rule should better take into account differences between regions and populations. Furthermore, if data or the science for inference are deficient for a population, then steps should be taken to support research to fill those knowledge gaps, including improved population estimates for the East.

Third, an important assumption of the proposed Rule is that eagle abundance translates into collision risk. This seems reasonable for golden eagles in some places, e.g., central Wyoming and the Altamont region have some of the highest abundances of golden eagles and they have high collision rates. Likewise, Florida and Texas have almost no golden eagles and very low collision rates. But this knowledge is almost useless in predicting collision risk in finer detail. In fact, there have been published studies showing that, in general, pre-construction density estimates do not correlate to post-construction fatality estimates (see Ferrer et al. 2012). Furthermore, this approach breaks down even more for bald eagles – abundance of this species correlates poorly with collision rates in Iowa, where during winter there are high numbers of eagles on the Mississippi River, but fatalities occur in upland environments. Consequently, it is our belief that this fundamental assumption of the proposed Rule is flawed. While the proposed Rule may attempt to use the best available science, it is important to acknowledge the flaws in a transparent manner to increase trust and confidence in the Rule.

Some comments about specific components of the proposed Rule:

Application of the mitigation hierarchy

The proposed Rule does not apply the mitigation hierarchy (i.e., avoid, then minimize, then compensate for impacts). Rather, there are no substantial mechanisms included to avoid or minimize impacts, instead jumping to "compensate." We suggest that the Service require measures to first avoid impacts, then minimize them, before imposing compensatory mitigation. For example, automated curtailment has been shown to decrease eagle mortalities at one wind facility (McClure et al. 2021, 2022) and other curtailment strategies are broadly effective for bats (Arnett et al. 2011). Thus, we believe that curtailment of some sort should be a part of the regulatory process for eagles. We prefer that the Service require "smart" curtailment at high-risk sites, which ideally would be identified prior to build-out. This requirement should be coupled with Service-issued guidance and recommendations for appropriate application of curtailment to allow for greater predictability for the regulated community, and broader uptake and application of this effective practice.

Mapping relative abundance

The proposed Rule uses eBird relative abundance values (page 36) that represent the average number of eagles of each species expected to be seen by an expert eBirder who observes for 1 hour at the optimal time of day for detecting the species, and who travels no more than 1 kilometer during the observation session (see eBird FAQs at https://ebird.org/spain/science/status-and-trends/faq#mean-relative-abundance).

The proposed Rule thus assumes that detectability is equal to relative abundance. For some species and some populations, this may be a reasonable approach. However, for the eastern population of golden

eagles, and potentially other populations, they are not equivalent because detection rates in some areas of the east, especially forested mountainous regions, are well below what is expected based on the number of birds that are actually present. An expert birder in the Ozarks, rugged areas of Alabama, Tennessee, North Carolina, Georgia, Virginia, West Virginia, or anywhere else across the eastern US would be hard pressed to see any golden eagles in an entire day or week, let alone a 1 hr period. This is not because golden eagles are not present, but because of their "secretive" habits (e.g., perching in dense forest away from people) and because observers generally are unable to view large areas in forested or rugged areas. For example, golden eagles have been recorded on camera traps in large numbers (>9 individuals recorded on 3 cameras placed within a 10 km of one another in a two-week period) in Arkansas, yet over a 4-day period, one of our EGEWG members, an expert eBirder who was in the same area at the same time, did not see a single bird away from the camera trap. Similar observations have occurred in other areas of the eastern US, including Alabama, North Carolina, Virginia, West Virginia, and Pennsylvania.

Based on the above and our collective expertise, it is abundantly clear that the model used to determine relative abundance using eBird data does not in any way accurately depict areas used by eastern golden eagles, or delineate risk relative to threats addressed in the EA.

Further, other key science was ignored in creating the Service's model. This includes eastern golden eagle GPS telemetry studies, hawk watch count data, and a recent modeling study conducted to predict eastern golden eagle relative probability of occurrence (McCabe et al. 2021), at minimum.

We suggest that the Service not apply a blanket model to estimate relative abundance across the entire country. Rather, we encourage the Service to utilize all of the best-available data (not solely eBird data), incorporate detection probability, ruggedness of terrain, density of birders, land cover type, and other factors that allow for a more realistic map of relative abundance. Further, the Service should enlist the help of experts with a deep understanding of the behavior and distribution of golden eagles in the east to assist with the modeling effort. The map should be reviewed by a panel of experts with knowledge of the eastern golden eagle population and if appropriate, a designation should be added for areas that are data deficient.

In developing the next iteration of the model, a designation should be added for areas that are data deficient if the model cannot otherwise adequately address such areas. This would identify areas where more substantial survey efforts are needed for development planning, as well as general targets for research and monitoring. Similarly, we recommend that the Service add a designation identifying the highest-use/-risk areas for eagles. This designation would likely have the effect of directing development to more appropriate areas (i.e., a measure of impact avoidance), as well as identifying areas that may be more difficult or expensive for developers to pursue.

Application of relative abundance maps

Importantly, while the relative abundance map could be useful for delineating general and specific permits, the way the map was created results in isolated pixels predicting high or low presence of eagles. These variations have no biological relevance to a flying bird. Thus, we suggest that the Service incorporate a smoothing algorithm to reduce the prevalence of these isolated pixels.

Finally, we recognize that the map is likely a preliminary effort. We therefore suggest specifying and implementing a process and timeline for updating and improving the modeling effort used. For example, the Service could propose to utilize suggestions such as those we provide here, together with those from other parties, to update models at 5-year intervals. This recommendation is particularly important given the expectation for a dramatic increase in wind energy development.

Fatality monitoring

We are concerned about several aspects of the proposed fatality monitoring protocol, including frequency of surveys, use of facility staff, and search radii.

We recommend that frequency of surveys should be based on regional-carcass persistence rates for eagles, not an arbitrary 3-month interval. We note that at the Manzana Wind facility in the Tehachapi Mountains in California, the Service required fatality monitoring for California Condors at monthly intervals. Condors are a substantially larger bird, and the landscape is considerably more open there than in many high-use areas for eastern golden eagles, so it is hard to imagine that monitoring at any interval less frequent than monthly would be needed for eagles.

Further, if the Service is considering allowing wind energy facility staff to monitor for eagle fatalities, then the Service should provide training sessions and materials for staff conducting the monitoring, including ongoing education, and ideally coupled with a certification process. This recommendation is important for a number of reasons including providing consistency among facilities and instilling trust and confidence in the process.

Importantly, to further instill public confidence in these regulations and processes, data transparency is key. Keeping eagle fatality data under lock and key has the opposite effect. Therefore, we strongly suggest that the Service make fatality data available to the public upon request. The data should be usable for research and minimally include the date found, location in latitude and longitude, and the cause of death. If these data were public, it would vastly improve the ability of researchers to study the effects of wind energy development on eagles and improve facility- and turbine-level risk assessment.

We further suggest that when the Service conducts fatality surveys at wind facilities, they should be conducted more extensively at facilities that are in high-risk areas and do not participate in the permit program. If possible, the approach would create an incentive for participating in the permit program and reduce uncertainty about the overall level of take. In addition, we recommend collecting at least two years of fatality data at sites with a General Permit in the eastern EMU to gain a better understanding of fatality rates in this region, where such monitoring can be challenging due to topography and forest cover.

The proposed Rule intends to use search radii taken from Hull and Muir (2010) (NOTE: the citation is missing from the EA). Hull and Muir (2010) recommend search radii that range from 102 m for small (65 m hub height) turbines to 122 m for large (94 m hub height) turbines to capture 95% of fatalities (Table 9). Applying results from this study to the forested settings of golden eagle habitat in the East, where turbine pads rarely exceed 50 m radius (Diffendorfer et al. 2014), is inappropriate because the majority of search area is obstructed by vegetation. For clear areas with a 50-m radius, <50th percentile of large bird fatalities, would be found (see Table 5, Hull and Muir (2010)) and there is no available estimate of

the number of large birds found within forested areas. Additionally, the percentage of large birds expected to fall within the cleared pad decreases with increasing size of turbines; thus, as turbine sizes continue to increase fewer and fewer fatalities will be captured by surveys in these areas. One method to correct for lack of information on quantifying large birds falling in forested areas is to include cleared surveyable area and fall distance probabilities as predictors in estimating take. However, it is important to describe how that calculation would be made. Further, the sample of turbine sizes in Hull and Muir (2010) was limited and new turbines have hub heights exceeding 100 m. Thus, an updated analysis to understand fall distance probabilities is needed to accurately calculate fatality estimates for modern turbines.

Satellite transmitter (PTT) monitoring

The geographic extent of tracking golden eagle mortality using satellite transmitters (PTT) is not stated. However, based on information for tagging of nestlings, it seems that this tracking would only occur in the West. Because causes of death vary among EMUs (e.g., high rates of lead poisoning in Mississippi Flyway, very low rates of electrocution in the Atlantic Flyway) (Russell & Franson 2014, Slabe et al. 2022), monitoring using PTTs for one region or population may produce biased estimates of causes and rates of mortalities for other regions or populations. Furthermore, this issue once again highlights the problems of using a one-size-fits-all solution by applying data from one population to another population.

To address this issue, we recommend that the Service work with biologists in Canada or the eastern US to use telemetry to monitor golden eagles. Working with Canadian biologists would have an added benefit in that demographic rates could be separately estimated for the eastern population. In lieu of that, working with biologists in the eastern US for concentrated trapping of juveniles during fall migration could also help inform demographic rates for eagle ages from the first fall migration to adult.

Protection of historic eyries

There are no provisions in the proposed Rule to protect nesting areas for golden eagles in the eastern USA. Many eyries used historically by golden eagles in the eastern US exist, but little to no monitoring has occurred in the recent past. However, at least one telemetered female visited several historic eyries in Maine within the last 10 years and another telemetered female spent some time in Maine during summer (L. Mojica personal communication, T. Miller personal observation). These records suggest there is some potential for renewed use of historic nesting locations. If golden eagles renew nesting in historic eyries at some point in the future, it will be essential that the eyries remain protected despite long-term absence of eagles. Thus, we recommend that historic golden eagle eyries in the East are afforded the same protection as those in the West.

Protection of nests, roosts, & foraging areas

Under proposed general permitting for both energy and disturbance/take activities, nests, roosts, and foraging areas are all habitat elements that must be considered, but there is no mention of detectability or data sources for any of these elements. Nests are often (but not always) obvious structures that can

be detected during site surveys and thus mapped as part of a permit application. In contrast, communal roosts and foraging areas are more difficult to identify. Communal roosts may not be obvious or detectable without greater survey effort, although certain states may have some roosts mapped in databases they maintain, which might be made available to applicants. "Foraging area" is defined in regulation (50CFR 22.6) simply as "an area where eagles regularly feed during one or more seasons." Applicants would need to conduct surveys, or assume present foraging habitat based on suitable habitat within range of their project.

Communal roosts are important for winter survival and social interactions. It is unfortunate that, while the Service suggests roost habitats must be considered, it proposes minimal protections. Specifically, for disturbance permits, the Service says is has “received little to no documentation that confirms take from activities near roosts", so it proposes to "clarify that activities adjacent to communal roosts do not constitute disturbance." It is unlikely, in our view, that there is no activity that can cause take by disturbing a roost, even though activities may be conducted for months or years. The Service’s position seems to negate the value of communal roosts in general and is illogical given the published documentation that eagles are vulnerable to disturbance. Watts and Turrin (2017) studied bald eagle roosts and suggested that smaller, satellite roosts may not be essential, but certainly communal roosts have great value to bald eagle populations, especially in winter. Take could occur as a result of decreased survival of bald eagles disturbed from communal roosts, which might disproportionately affect subadult birds. Thus, we recommend that roosts, especially large communal roosts be protected.

Expanded in-lieu fee programs to offset take

We strongly encourage the Service to develop and apply compensatory mitigation options that are relevant to the eastern population of golden eagles. As mentioned above, causes of mortality differ among populations and EMUs. Importantly, the local area population of the Atlantic Flyway has had very few, if any fatalities as a result of electrocution, which is the only currently approved compensatory mitigation option. In the eastern EMU and across the country, lead toxicity is an important cause of mortality of both species, and lead toxicity has important demographic effects (Slabe et al. 2022). Importantly, golden eagles in the Atlantic Flyway have higher rates of lead poisoning than do eagles from other Flyways (Slabe 2019). Additionally, incidental capture in mammal traps is also a recognized problem for the eastern population (Fitzgerald et al. 2015). Therefore, we encourage the Service to continue its efforts to expand in-lieu fee programs to include additional options such as non-lead ammunition distribution programs* and incidental trapping abatement in the US and in collaboration with Canadian wildlife management agencies.

**For transparency, V. Slabe and T. Miller are currently studying and using non-lead ammunition distribution programs to offset eagle take.*

Additional comments:

Definition of in-use nests

The proposed Rule changes the definition of an in-use nest to exclude protection of bald eagle nests that do not have viable eggs or young, but may have been occupied by adults during the breeding season. The new proposed definition is:

*In-use nest means a bald or golden eagle nest characterized by the presence of one or more **viable** eggs or dependent young in the nest, **or, for golden eagles only**, adult eagles on the nest in the past 10 days during the breeding season.*

We find this definition inappropriate because the time prior to egg laying is critical to breeding. Eagles invest considerable time and energy into breeding activities prior to egg laying, e.g., nest-building, mating, prepping, establishing and defending territory boundaries. Further, nests and alternate nests have had legal protection because they are defining elements of a territory, persist from year to year, and could be used in future years. We recommend that the definition of an in-use continues to include protection of nests of both species during the critical time period leading up to egg laying.

Additionally, both logically and biologically, it does not make sense to define a nest for one eagle species differently from another. With the proposed definition change, we are concerned that this would set a precedent that could ultimately affect golden eagles. For instance, someone could argue that golden eagle in-use nests should be defined the same way as bald eagle in-use nests. If argued successfully, nest protection for both species would be in jeopardy during a critical time period.

Penalties for unpermitted take

A clear and robust explanation of how unpermitted eagle take will be addressed must be established. This communication would provide certainty for wind facility operators, and assurance to the public that violations will be effectively addressed. Penalties must be of sufficient magnitude to: (1) compensate broadly for eagle conservation goals and Rule non-compliance, (2) offset enforcement cost undertaken by the Service, and (3) encourage participation in the permitting program.

Repowering

We strongly recommend that it be specified that the proposed Rule applies at repowering of wind facilities. This is particularly important because replacing turbines and modifying turbine layout at repowering has been shown to be ineffective at reducing eagle fatalities (Huso et al. 2021). Many existing wind facilities are placed in locations that are high-risk for eagles, having been approved and constructed prior to our current understanding of and available best practices for appropriate facility siting. Thus, it is imperative that the proposed Rule apply to wind project repowering, as well as new facilities.

Replacing 5-year permit review with as-needed

It is important that the articulated circumstances under which the Service would initiate a review are appropriate. We recommend that review should be initiated “if eagle take exceeds or is on track to exceed authorized take,” to ensure that unnecessary fatalities are prevented at any facility where take is occurring at higher rates than anticipated.

Pre-construction eagle surveys

This proposed permitting framework makes accurate pre-construction eagle surveys at sites intended for wind facilities all the more important. Adherence to Service-issued survey guidelines should be specified as a condition of participation in the permitting process. This would not only ensure reliable and comparable data to underpin take estimates and quantification of compensatory mitigation, but would also inform future updates to the model and delineation of general vs specific permit areas.

Further, we suggest that because of their unique ecology and frequent use of rugged, forested, and often difficult-to-access landscapes, an effort should be made to develop pre-construction survey guidelines specific to eastern golden eagles at sites intended for wind energy facilities particularly in higher use areas like the Appalachian Mountains. Moreover, the EGEWG would be happy to assist with the development of guidelines for both pre- and post-construction surveys.

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Dominguez-Villegas, D. Driscoll, B. W. Smith, M. J. Lockhart, D. McRuer, T. A. Miller, P. A. Ortiz, K. Rogers, M. Schwarz, N. Turley, B. Woodbridge, M. E. Finkelstein, C. A. Triana, C. R. DeSorbo, and T. E. Katzner. 2022. Demographic implications of lead poisoning for eagles across North America. Science 375:779–782.

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We appreciate the opportunity to provide these comments. Please reach out to us should you have any questions or need additional information.

Sincerely,

Tricia A. Miller, Ph.D.
Executive Director & Senior Research Wildlife Biologist
Conservation Science Global

On behalf of the following members of the Eastern Golden Eagle Working Group:

Richard Bailey, State Ornithologist, Wildlife Resources Section, West Virginia Department of Natural Resources

David Brandes, Professor, Lafayette College

David Brinker, Regional Ecologist, Natural Heritage Program, Maryland Department of Natural Resources

Bracken Brown, Biologist Naturalist, Hawk Mountain Sanctuary Association

Erynn Call, State Raptor Specialist, Wildlife Research & Assessment Section, Maine Department of Inland Fisheries & Wildlife

Kathleen Clark, Supervising Biologist, NJ Fish and Wildlife

Jeff Cooper, Non-game Bird Project Coordinator/Wildlife Biologist, Virginia Department of Wildlife Resources

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Brett Mandernack, Manager, Eagle Valley Nature Preserve

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Vince Slabe, Research Wildlife Biologist, Conservation Science Global

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Jeff Worrell, Avian Ecologist, Raptor Resource Project

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Comment On: FWS-HQ-MB-2020-0023-1937
Permits for Incidental Take of Eagles and Eagle Nests

Document: FWS-HQ-MB-2020-0023-9302
Comment from Delaware-Otsego Audubon Society, Inc.

Submitter Information

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Organization: Delaware-Otsego Audubon Society, Inc.

General Comment

Attached file contains comments from the Delaware-Otsego Audubon Society, Inc in Oneonta, New York.

Attachments

FWS Eagle Take Comments DOAS_26Dec2022

DELAWARE-OTSEGO AUDUBON SOCIETY, INC.
PO Box 544, ONEONTA, NY 13820

December 26, 2022

Public Comments Processing
Attn: FWS-HQ-MB-2020-0023
U.S. Fish and Wildlife Service
MS: PRB/3W
5275 Leesburg Pike
Falls Church, VA 22041-3803

Re: Proposed Rule for Permits for Incidental Take of Eagles and Eagle Nests

To Whom it May Concern:

Delaware-Otsego Audubon Society (DOAS) thanks the Fish and Wildlife Service (USFWS) for the opportunity to comment on the new proposed Rule on the issuing of Permits for Incidental Take of Eagles and Eagle Nests.

While we believe a permit system is in the best interest of eagle conservation, we have multiple concerns about the implementation of the proposed Rule. Our comments are largely focused on the Eastern Golden Eagle population with additional points made about the Rule in general.

Core Range

Critical areas of the core range of Golden Eagles in the eastern United States are not included in the maps used to determine what type of permits are necessary. The map that is currently being used as guidance for the permitting process does not consider the differences in the range, habitats and risk of each species, which are significant. The current map titled USFWS HQ MB Eagle Incidental Take Permit Eligibility Zones categorizes most of West Virginia, eastern Virginia, eastern Kentucky, eastern Tennessee and western North Carolina as being areas of lower Golden Eagle density - the green "self certifying" permitting areas. We know from peer reviewed research[1] [2] that these same areas contain high densities of Golden Eagle in the winter.

Reliance upon eBird Data

We strongly urge the Service to treat Golden Eagles in the east as a separate population from the larger population in the west, with different habits and habitats. This population is not easily detected by eBirders. The data used to map the species and establish risk need to be improved.

[1] Resource selection functions based on hierarchical generalized additive models provide new insights into individual animal variation and species distributions. McCabe et al 2021
[2] Status, Biology, and Conservation Priorities For North America's Eastern Golden Eagle (aquila chrysaetos) Population. Katzner et al 2021

eBird is a powerful tool. It has great potential, but also significant limitations in capturing data for uncommon and rare species. For Golden Eagles in the east, eBird does not fully or accurately define their distribution. During the winter season, these birds inhabit heavily forested areas with high topographic relief. Even when skilled birders are in these areas, Golden Eagles are extremely hard to locate when present. These areas lack roads, visibility and any density of birders using eBird. Golden Eagles in the east are also wary of humans.

Accurate data as to the number and distribution of eagles are a fundamental requirement for the claimed effectiveness of the proposed Rule. Lacking this, the entire regulatory plan fails to meet the statutory requirements of the Endangered Species Act and the Bald and Golden Eagle Protection Act.

Camera trapping and telemetry studies could fill in some of these eBird gaps. DOAS has specific experience with camera trapping, detailed below. Other data sources and models (such as McCabe et al 2021) could further improve the USFWS maps and more adequately protect Golden Eagles. There is a wealth of tracking and camera trap data that could inform the USFWS where Golden Eagles are wintering in the east. These data are owned by members of Eastern Golden Eagle Working Group (EGEWG) and others. They have been used in various peer reviewed publications. The members of the EGEWG should be consulted. USFWS should request their assistance and data to improve the maps and permitting requirements. These and additional data sources should be consulted to see if migratory and wintering concentration areas that are currently "green" might have been missed in the eBird data. Where data are lacking, we urge the USFWS to fund research to fill in the gaps.

In addition, there is no substitute for pre-construction on-site monitoring of proposed wind power projects. Although a primary intent of the proposed Rule is to ease the regulatory burden on wind developers, this crucial step should be a part of any general or specific permit. The data provided by such monitoring would significantly reduce the shortcomings of eBird data and increase confidence in assessments of eagle presence. Such monitoring would add to the knowledge base of eagle distribution that can improve future modeling and regulation.

From 2010 to 2020 (similar years to the eBird data considered by USFWS in the proposed Rule), DOAS operated camera traps at 9 sites in Delaware County, NY. Every one of those sites had at least one wintering Golden Eagle visit and feed. Of six sites with multiple individuals, three averaged four individual Golden Eagles per season, and one site averaged 8 different wintering Golden Eagles each year. During that same 10 year period, DOAS conducted winter surveys to determine how many Golden Eagles could be found by skilled observers. During the first weekend in February in 2015 and 2016, several teams drove hundreds of miles and searched approximately 50 hours each winter, and detected only two Golden Eagles each year. In the territory that included the camera trap with the highest number of individuals, no Golden Eagles were observed either year by participants on the ground while conducting the count. This is an area of intense use (3 or 4 different birds were known to be feeding daily, sometimes up to 3 at one time), yet the observers could not see Golden Eagles. The Golden

Eagle detection rate during 2015 was .035/hour. The detection rate in 2016 was .041/hour. By contrast the number of Bald Eagles found was more than an order of magnitude higher - .485/hour in 2015, .515/hour in 2016. A summary of the data from this work is appended.

If our teams of skilled observers searching an area of known high Golden Eagle density can only find birds at a rate of one every 26.6 hours when actively searching for that species, what can we expect eBirders to find in similar forested habitat elsewhere?

Random Pixels on Map of Eagle Incidental Take Permit Eligibility

The mapping of green areas "eligible for proposed self-certified general permit" and yellow areas "eligible to apply for proposed simplified specific permit" shows random pixels among areas of the opposite color. These suggest a lower level of density in the midst of high populations or higher density in the middle of low eagle density. We question whether these have any biological significance. These areas raise a concern particularly when a green area shows up in an area known to have high density. This may be an effect of limiting the data set to eBird.

For example, the Franklin Mountain Hawk Watch in central New York State is in a yellow area on the map. It is known for significant flights of Golden Eagles in the fall. It is an area with a healthy and growing Bald Eagle population. To the northeast of the Franklin Mountain Hawk Watch, and less than 8 miles away, is a green area on the map. This is the direction from which most eagles migrating past Franklin Mountain approach.[3] It also has excellent topography for providing lift for foraging or migrating raptors. In addition, the Delaware-Otsego Audubon Society operated a camera trap on Crumhorn Mountain, within this pixel, during the winter of 2017. Both Bald and Golden Eagles visited this camera trap.[4]

With high quality optics, birds can be seen and sometimes identified at long distances by skilled observers. Using life-size silhouettes, Franklin Mountain Hawk Watch counters determined that it is possible to identify eagles at >5 miles through high quality spotting scopes. It is likely that some eagles approaching Franklin Mountain are first observed within this green area, but since eBird records the data at the user location (on the ground), those more distant zones are not picked up as being part of a more critical region.

Visibility sometimes limits the hawk counters' ability to see birds at great distances. Even if that is the case, certainly some are acquiring lift and coming from the west facing slope of Crumhorn Mountain. They are coming directly from that area.

We are concerned that these green areas, seemingly randomly located in an area of high eagle density, will allow developers to choose a location within that area solely based on the category of a "self certified" permit. We recommend that these isolated areas that would be eligible for general permits, but surrounded by areas clearly not eligible for such permits, sensibly be coded as high eagle density.

[3] Thomas Salo personal communication
[4] Kyle Dudgeon personal communication

Identifying Areas of Highest Risk

Wind projects are often sited in New York State based on local land use rules, or lack thereof. The same is probably true elsewhere. We have found that eagle density and risk are not considered until after leases have already been contracted and signed. Siting of a wind project in an area of very high Bald and Golden Eagle density became a major problem in our region. The developers had approached landowners and town governments and chose to site there before addressing eagle risk. If USFWS included in its mapping some designation of risk, developers could choose to avoid these areas. At the very least, developers would need to consider additional costs involved in mitigation. These areas of risk could be identified using the data sources and models mentioned earlier.

Fatality Monitoring

The fatality monitoring regime in the proposed Rule appears inadequate. Considering the significant consequences for wind power developers who report eagle deaths, it is questionable whether this is a dependable method of quantifying eagle mortality from turbines. We recommend the USFWS strengthen that process and include independent third-party monitoring during the first two years of operation, with the cost of this monitoring included in permit fees. DOAS has for many years been concerned with how post-construction studies are conducted, and the lack of transparency. The introduction of much larger turbines in heavily forested areas makes it increasingly difficult to conduct accurate surveys. Methods, search intervals and search radii need to be revised to fully understand the impacts. If energy facility staff are to conduct these surveys, USFWS should require standardized training of energy facility staff. All eagle fatality data should be available to researchers and the public. Allowing these data to remain secret and proprietary will damage public trust. When USFWS conducts surveys, the service should focus on high-risk areas and projects that are not in the permitting program.

Compensatory Mitigation

DOAS objects to the use of power pole retrofitting in open habitats of the far western parts of the eastern flyway as mitigation for Golden Eagle take that occurs in the heavily forested habitat of the east. Electrocution is a problem in the western U.S. where perches are few, and retrofitting of power poles may be effective mitigation there. However, in the forested east, electrocution is rare and use of retrofitting is unlikely to provide significant benefit to the eagles that inhabit these forests. Mortality in the east is much more likely to be from lead poisoning or by trapping.

We urge USFWS to support the development and approval of new mitigation measures that will benefit the bulk of the eastern population of Golden Eagles. Since there are currently no known Golden Eagle nests in the eastern U.S., it is becoming increasingly important to have a form of mitigation that is effective in the areas and habitats where eastern projects are located. DOAS strongly supports progress on a defensible lead abatement model for mitigation for both species of eagle.

Unpermitted Take
The public needs to be confident that USFWS provides strong disincentives for project developers to avoid the permitting process. Penalties for unpermitted take should be significant. Those fines should support additional enforcement and eagle conservation goals.

In closing, this is an important national issue. We are urging USFWS to use the best available data and science for mapping, risk assessment, post-construction monitoring and mitigation. Incentives and disincentives should encourage developers to participate in a permitting project that adequately protects eagles.

Thank you for this opportunity to comment.

Sincerely,

Delaware-Otsego Audubon Society, Inc
info@doas.us

Appendix--Winter Raptor Survey Data, DOAS

	2/7/2015	Raptor per team hour	2/6/2016	Raptor per team hour
Golden Eagle	2	0.035	2	0.041
Bald Eagle	28	0.485	25	0.515
Red-tailed Hawk	99	1.715	106	2.184
Rough-legged Hawk	7	0.121	4	0.082
Red-shouldered Hawk	1	0.017	1	0.021
Northern Goshawk	1	0.017	1	0.021
Cooper's Hawk	5	0.0866	2	0.041
Sharp-shinned Hawk	4	0.0693	0	0
Northern Harrier	0	0	1	0.021
American Kestrel	1	0.017	4	0.082
Total Raptors	149	2.581	147	3.029
Northern Shrike	1	0.017	0	0
Wild Turkey	341	5.906	63	1.298
Teams	12		10	
Team Hours	57.74		48.53	
Team Miles	995		753	

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Eagle Permits; Incidental Take

Comment On: FWS-HQ-MB-2020-0023-1937
Permits for Incidental Take of Eagles and Eagle Nests

Document: FWS-HQ-MB-2020-0023-9303
Comment from Steenhof, Karen

Submitter Information

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Phone: 2083372355

General Comment

Thank you for the opportunity to comment on the 2022 Draft Environmental Assessment on Eagle Take Permit Rulemaking. I served as leader of the Pacific Bald Eagle Recovery Team from 1981 to 1990. I coordinated the national Midwinter Bald Eagle Survey from 1992 to 2008, and I have been involved in Golden Eagle Research for the last 45 years. I currently serve on the American Eagle Foundation's Bald Eagle Grant Advisory Team. I am aware that wind energy development presents a serious risk for both Bald and Golden Eagle populations

I support a stipulation that general permits be issued only for projects where all existing or proposed turbines are or will be located > 1 mile from Bald Eagle nests and > 2 miles from Golden Eagle nests. I also suggest that general permits be issued only for projects that are or will be > 1 mile from known Bald Eagle communal night roosts identified by the national roost registry (https://ccbbirds.org/what-we-do/research/species-of-concern/species-of-concern-projects/national-eagle-roost-registry/). Eagles are more likely to fly at low light levels near night roosts, and the potential for collision with turbines could be even higher near roosts than near nests. I would like to see stipulations about communal night roosts added to both Alternatives 2 and 3 in the final EA.

I wholeheartedly support the concept of stricter regulations in areas of relatively high eagle abundance.
I commend the Fish and Wildlife Service for developing a protocol that encourages siting of wind projects in locations where eagle abundance is relatively low. I am concerned, however, about the plan to classify areas of abundance based on eBird data alone. I am concerned that eBird data may underestimate eagle abundance in areas inaccessible to birders. The fact that nearly all of Texas (which has a high percentage of private land) is classified as low abundance may reflect this problem. I think it makes sense to use information from other datasets (migration counts, telemetry, roost registries, BBS, CBC, and the Midwinter Bald Eagle Survey) to supplement and improve maps either in addition to or as part of the eBird models.

The paragraph in Appendix A on page 120 that cites disadvantages of databases other than eBird clearly demonstrates that none of the other data sources should serve as the principal source of information on relative abundance. Nevertheless, each of them could identify important high use areas missed by eBird data. The possibility of eBird data failing to identify some eagle high-use areas is acknowledged in the next paragraph of Appendix A. I suggest that high use areas identified by other sources be added to the map that eBird models produce. This approach would be a simple step towards implementing the future plans identified in the Appendix "to integrate both targeted survey and tagged eagle data with eBird to generate improved maps of relative abundance" and would help to minimize incidental take in a timelier manner.

I was unable to find 2 of the references in the Draft EA about the eBird evaluations in the EA's reference section (U.S. Fish and Wildlife Service 2018 and 2021). Both references appear in the separate literature cited section of Appendix A, but their links are either broken or incorrect. I have reviewed the paper by Ruiz-Gutierrez et al. on Bald Eagles. I am concerned that their paper did not include the most complete and recent information about eagle abundance from other sources and may not have described non eBird data used in the analysis accurately. More importantly, I am concerned and curious to know about the 10% of high Bald Eagle use areas identified by other sources that was not identified by eBird models. It is critical that the final EA include results of any evaluations of the ability of eBird data to classify Golden Eagle relative abundance.

Other minor problems with the EA include:

Page 3- It would be helpful if the Table of Contents included the attachments.
Page 36- In the sentence that begins "Given this; and accounting for the comprehensive spatio-temporal coverage of eBird, it's availability to the public…" it's should be its
Page 110 -there is a confusing, possibly misplaced reference to the Horse Butte Wind Project Eagle Permit
Page 132- references are out of order

Thank you again for the opportunity to comment and for your commitment to protecting eagles.

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Permits for Incidental Take of Eagles and Eagle Nests

Document: FWS-HQ-MB-2020-0023-9304
Comment from Nebraska Game and Parks Commission

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Government Agency Type: State
Government Agency: Nebraska Game and Parks Commission

General Comment

Please see attached comment letter.

Attachments

2022.1221.FWS-HQ-MB-2020-0023_BGEPA_PermitNGPC

NEBRASKA
GAME PARKS

December 21, 2022

ELECTRONIC SUBMISSION: www.regulations.gov
Attention Docket ID No. FWS-HQ-MB-2020-0023

U.S. Fish & Wildlife Service
MS: PRB/3W
5275 Leesburg Pike
Falls Church, VA 22041-3803

RE: Comments on Incidental Take of Eagles and Eagle Nests: Proposed Rulemaking and Preparation of NEPA Document

To Whom It May Concern:

The Nebraska Game and Parks Commission (Commission) appreciates the opportunity to comment on the proposed rule and draft environmental assessment regarding the Bald and Golden Eagle Protection Act (BGEPA) incidental take permitting of eagles and eagle nests, and the development of general permits for specific project types and activities. The Commission promotes conservation and stewardship of our state's fish and wildlife resources, including bald and golden eagles, for the benefit of Nebraska citizens. This mission aligns with the intentions of the BGEPA and is achieved in partnership with the U.S. Fish and Wildlife Service (Service).

Bald eagle populations in Nebraska have steadily increased over the past three decades resulting in the Bald Eagle's removal from list of species protected by the Endangered Species Act and the Nebraska Nongame and Endangered Species Conservation Act. Due to the increasing population, human and bald eagle conflicts have become a larger challenge to meeting development and infrastructure improvement timelines. While sources of incidental take can be reduced or prevented with the implementation of proactive conservation measures, Commission staff recognizes that all incidental take is not avoidable. Therefore, we are in favor of improvements to the existing eagle incidental take permitting system, as well as development of coverage under general permits.

Upon reviewing the draft environmental assessment, the Commission supports adoption of Alternative 4 over the other alternatives; however, we have additional concerns, as follows:

1. **Permit Auditing:** Commission staff are concerned about the Service's proposed auditing plan to protect against false certification of general permits. Page 38 of the Draft Environmental Assessment states that "...the Service expects to randomly audit up to 1% of general permits on an annual basis to ensure compliance with conditions of the general permit." We do not believe that this audit target is sufficient to determine if the program is effective and compliance is being achieved. Committing to audit "up to 1%" is particularly concerning because it is a vague target that could include the number 0, resulting in no audit for compliance and no measure of success. We strongly recommend that the Service make a firm commitment to audit a sufficient number of general permits to ensure compliance. This becomes vital with the proposed removal of third party monitoring. Commission staff also recommends that the Service develop predefined triggers for increasing the percentage of audits or reviewing general permit applications (e.g., adaptive management) if the compliance rate during any one year is unsatisfactory.

2. **Relative Abundance:** Commission staff supports the concept of using bald and golden eagle relative abundance to determine where entities would be eligible for general permits. To ensure this metric is current, Commission staff recommend the Service provide clarification and firm commitments on how frequently relative abundance thresholds will be updated. We recommend relative abundance thresholds be updated at least every 5 years.

3. **Data Sources:** While Commission staff recognize that eBird data and modeling are valuable resources, eBird remains dependent on observational data from the public and this coverage and data submission is sparse and inconsistent throughout areas of Nebraska. Additionally, while modeling assumptions may be able to compensate for limited data, it is important to recognize that modeling has limitations and imperfections. We recommend the Service incorporate other data sources, when available, to determine eagle abundance. We also recommend the Service continue to require project proponents to complete pre-construction surveys when appropriate.

4. **Mortality Monitoring:** The proposed rules states that "[a]ny dead or injured eagle discovered within the project, regardless of cause, must be promptly reported to the Service (i.e., within 2 weeks)." Commission staff do not find this approach to be acceptable. The expectation for reporting lacks clarity and "up to two weeks" is an unacceptable timeframe to be considered "prompt." Commission staff recommends any eagle mortality be reported within 48 hours of discovery. This will provide law enforcement a greater probability of determining the correct cause of death before the carcass deteriorates.

5. **State Agency Partnership:** The Commission is particularly concerned with the lack of clarity on how the Service will interface with the state fish and wildlife agencies. While Nebraska does not have their own permitting requirements for

the take of bald and golden eagles, we do have a responsibility regarding the protection and management of eagles as nongame birds (Neb. Rev. Stat. 37-801 to 811). In addition, eagle permits are only one aspect of wisely siting wind energy facilities to avoid and minimize impacts to wildlife and ecosystems, and Commission staff provide guidance for project siting, which includes consideration for Species of Greatest Conservation Need and at-risk habitats. We strongly recommend that states are notified when general permits are approved within four (4) weeks of issuance, and it must be clear to applicants that additional consultation with Commission staff may be required to take eagles, as we do not currently have a mechanism in our state statutes that allows for incidental take of eagles. We also request the Service provide copies of facilities' annual reports to the Commission. We request that the Service proactively and consistently communicate and share information with the Commission regarding the issuance of eagle permits within the State of Nebraska. We recommend that the Service prioritize communication about permit issuance internally with state Ecological Services (ES) personnel to help further our request for timely and consistent communication. It is necessary for ES staff to be knowledgeable about permits issued by Regional Service staff to ensure continued partnership efforts and transparent communication efforts.

Again, thank you for allowing us to comment and if you have any questions regarding our comments, please contact Melissa Marinovich, Assistant Division Administrator of Planning and Programming, at melissa.marinovich@nebraska.gov or by telephone at (402) 471-5422.

Sincerely,

Timothy McCoy, Director

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Comment from Colorado River Indian Tribes

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Government Agency Type: Tribal
Government Agency: Colorado River Indian Tribes

General Comment

See attached file(s)

Attachments

L_EagleTakePermits_12272022

COLORADO RIVER INDIAN TRIBES

Colorado River Indian Reservation

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TELEPHONE (928) 669-9211
FAX (928) 669-1216

Via Electronic Submission

December 21, 2022

Jerome Ford
Assistant Director – Migratory Birds
U.S. Fish and Wildlife Service
MS: PRB/3W
5275 Leesburg Pike
Falls Church, VA 22041-3803

RE: **Comments of the Colorado River Indian Tribes on U.S. Fish and Wildlife Service's Advanced Notice of Proposed Rulemaking for Incidental Take: Eagle Permits (FWS-HG-MB-2020-0032)**

Dear Mr. Ford:

On behalf of the Colorado River Indian Tribes (CRIT or the Tribes), I write to respond to the U.S. Fish and Wildlife Service's (USFWS) Advanced Notice of Proposed Rulemaking for Incidental Take: Eagle Permits (FWS-HG-MB-2020-0032).

As a preliminary matter, the Colorado River Indian Tribes are a federally recognized Indian tribe comprised of over 4,440 members belonging to the Mohave, Chemehuevi, Hopi and Navajo Tribes. The almost 300,000-acre Colorado River Indian Reservation sits astride the Colorado River between Blythe, California and Parker, Arizona. The ancestral homelands of the Tribes' members, however, extend far beyond the Reservation boundaries. Significant portions of public and private lands in California, Arizona, and Nevada were occupied by the ancestors of the Tribes' Mohave and Chemehuevi members since time immemorial. These landscapes remain imbued with substantial cultural, spiritual, and religious significance for the Tribes' current members and future generations. For this reason, we have a strong interest in ensuring that potential cultural resource and other environmental impacts associated with utility and energy infrastructure and other development activities are adequately considered and mitigated.

In particular, the Tribes are concerned about the ongoing threats that this type of infrastructure poses for bald and golden eagles, as well as numerous other sensitive and endangered species. For over two decades, the federal government has permitted large-scale utility and energy development that has irreparably harmed fragile habitat and resulted in the deaths of countless birds and animals. The Tribes fear that this proposed rulemaking could result in further prioritization of infrastructure development over bald and golden eagle protection. This is

especially troubling, given the special role that the eagle plays in many Native American cultures and belief systems.

With respect the proposed rulemaking, CRIT has concerns first and foremost with the framing of the rule. The U.S. Fish and Wildlife Service asks respondents a series of questions focused entirely on reducing the time and costs of applying for and processing long-term incidental take permits for eagles. While the Tribes understand the government's desire for efficiency, the primary focus of any rulemaking regarding The Bald and Golden Eagle Protection Act should be whether the existing rules are adequately protecting eagles and allowing these endangered populations to grow again. USFWS must not water down the permit process at the expense of the eagles they are supposed to protect.

On this vein, CRIT is opposed to any changes to the regulations that would lessen the protection of bald and golden eagles. The advanced notice suggests two possible rule changes that would do just that. The notice first discusses the possibility of moving away from long-term monitoring at each project and instead having companies pay a fee that would fund USFWS's monitoring of a randomly selected subset of projects. The Tribes are skeptical that this approach would provide a full and accurate picture of long-term impacts to bald and golden eagles. A randomized monitoring program would potentially allow devastating and unanticipated levels of take at these unmonitored projects. With no mechanism for tracking impacts over the long run, it might be years before those impacts are fully appreciated. The Tribes strongly oppose any permitting process that would allow an individual project to ignore the long-term eagle take impacts of its operations.

Next, the advanced notice entertains the idea of simply tracking eagle take numbers based on the dead eagles found at a project. As the notice ultimately concludes, this method is statistically unlikely to provide an accurate representation of a given project's actual impact on eagle populations. This idea would be especially ineffective for the types of utility-scale energy projects that have been developed throughout CRIT's ancestral territory; a dead eagle is unlikely to be found quickly in these vast solar and wind farms.

Finally, the Tribes appreciate the USFWS's language expressing a commitment to tribal consultation, but have grave concerns that this proposed rulemaking process will not allow adequate opportunity for this government-to-government consultation and incorporation of tribal input. USFWS leaders must listen to tribes early and often, especially those that express a special cultural or religious affiliation with the eagle. Encouraging tribal governments to participate in open public comment periods is *not* adequate consultation. For a better understanding of what adequate consultation might look like, please visit https://www.crit-nsn.gov/crit_contents/ordinances/Government%20to%20Government%20Consultation%20Policy%20(1).pdf to review CRIT's Government-to-Government Consultation Policy. Moreover, to allow time for this vital process to take place, the Tribes strongly urge USFWS to undergo a full environmental impact statement review to fully analyze and consider the impacts of any proposed rule change.

Thank you for your consideration. To understand how these comments were taken into account in your decision-making, we ask for a written response prior to a final decision. Please copy the

Tribes' Attorney General Rebecca A. Loudbear, at rloudbear@critdoj.com, and THPO Director Bryan Etsitty, at betsitty@crit-nsn.gov, on all correspondence to the Tribes.

Respectfully,

COLORADO RIVER INDIAN TRIBES

Amelia Flores
Chairwoman

Cc: Tribal Council of the Colorado River Indian Tribes
Bryan Etsitty, THPO Director
Rebecca A. Loudbear, Attorney General, Colorado River Indian Tribes

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Comment On: FWS-HQ-MB-2020-0023-1937
Permits for Incidental Take of Eagles and Eagle Nests

Document: FWS-HQ-MB-2020-0023-9306
Comment from Otter Tail Power Company

Submitter Information

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Organization: Otter Tail Power Company

General Comment

See attached file(s)

Attachments

Otter Tail Power Company Comments on Proposed Incidental Eagle Take Permit

215 South Cascade Street
PO Box 496
Fergus Falls, MN 56538-0496
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December 28, 2022

Sent electronically via https://www.regulations.gov to:

Service Information Collection Clearance Officer
United States Fish and Wildlife Service
Docket ID No. FWS-HQ-MB-2020-0023

RE: Otter Tail Power Company Comments on Permits for Incidental Take of Eagles and Eagle Nests.

Otter Tail Power Company (Otter Tail) welcomes this opportunity to comment on the U.S. Fish and Wildlife Service's (USFWS or Service) proposed rule "Permits for Incidental Take of Eagles and Eagle Nests". Otter Tail owns four wind energy facilities and over 9,000 miles of transmission and distribution lines across the three states of Minnesota, North Dakota, and South Dakota. As such, Otter Tail welcomes the efforts by the USFWS to increase participation in the permitting of incidental eagle take.

In its proposed rule, USFWS seeks comments related to electrocution-safe retrofitting costs for power-line entities and comments on the eligibility criteria for general wind-energy permits. As a member of the Edison Electric Institute (EEI), Otter Tail supports the comments submitted on behalf of EEI and its members. Otter Tail would also like to offer the following specific comments, and requests USFWS revisit these areas prior to finalization of the rule.

Comment 1: Under the power-line entity general permit, the requirement to proactively retrofit one-tenth of the poles would be prohibitively expensive, especially for rural utilities such as Otter Tail that maintain thousands of poles over sparsely populated areas.

The USFWS proposes to require all power-line entities in the general permittee category to proactively retrofit one-tenth of their poles to be electrocution-safe over the 5-year life of the permit, regardless of pole proximity to eagle nests or history of avian interactions. For entities that maintain thousands of miles of transmission lines and hundreds of thousands of poles, this requirement would dramatically increase the costs of permit compliance, to the point of reducing participation in the program.

In the Draft Environmental Assessment for the proposed rule, the USFWS estimates that an eligible power-line entity would "need to retrofit approximately 733 poles each year".[1] Otter Tail estimates we would need to retrofit 5,580 poles per year to comply with the one-tenth requirement, or about 7.6 times the number estimated by the USFWS. At a retrofit cost of $3,500 per pole[2], Otter Tail's total retrofit cost would be $19.5 million per year, or approximately $98 million over the course of the 5-year permit period. This amounts to a permit cost that is 1) prohibitively expensive, and 2) significantly higher than the projected cost in the proposed rule.

Additionally, Otter Tail hopes to impress upon USFWS the extent of the difficulties caused by supply chain disruptions and labor force shortages on transmission infrastructure upgrades. As an example, the price of standard power line poles has increased 233% over the past two years and it has been increasingly challenging to contract the skilled labor that is required for these upgrades.

Due to these exorbitant costs and supply chain shortages, Otter Tail recommends the Service eliminate the proactive retrofit strategy. Although Otter Tail believes the proposed reactive retrofit strategy of retrofitting 11 poles in the event of an eagle collision is sufficient. If the USFWS disagrees, a more robust reactive retrofit strategy should be considered in lieu of the proactive retrofit strategy. By making this change, not only would the Service focus mitigation activities in areas where they are most needed, it would dramatically increase the feasibility of permit participation for entities with a lower risk of eagle take.

Comment 2: USFWS should offer guidance on permitting to power-line entities who share transmission infrastructure.

Many power-line entities co-own transmission infrastructure across their service area. The proposed rule is unclear on how general permitting would apply to shared infrastructure. As an example, there exists a transmission line where Otter Tail owns one phase and another entity owns the other two phases on that line. This could create permitting complexities for existing co-ownership agreements. Otter Tail also has shared maintenance agreements for co-owned transmission, which could introduce obstacles to retrofit timelines. The USFWS should address these types of situations and clarify if co-owned transmission lines require all owners to be permitted or if power lines can be permitted for incidental eagle take by a single co-owner.

Additionally, due to the exceedingly high cost of the proactive retrofit strategy outlined in the power-line entity general permit conditions, Otter Tail requests the USFWS clarify how to account for shared power line infrastructure when establishing annual targets for pole retrofits and the costs associated with those retrofits.

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[1] USFWS (U.S. Fish and Wildlife Service). 2022. Draft Environmental Assessment. Migratory Birds and Habitat Program. September 2022. Page 104, paragraph 4. <https://www.regulations.gov/document/FWS-HQ-MB-2020-0023-1908>. Accessed 15 November 2022.

[2] Otter Tail Power estimates its retrofitting costs to be $3,500 per pole.

Comment 3: USFWS should increase the options for siting new transmission lines.

When considering the siting of new construction or reconstruction in relation to eagle foraging areas, it would be impractical to reroute lines in the vastly rural areas of our service territory amongst the expansive eagle foraging boundaries. Installation of electrocution-safe lines would be a more feasible alternative to rerouting projects.

Comment 4: Due to the prohibitively high cost of specific permits, the USFWS should increase the eligibility for wind farm general permits.

Otter Tail agrees with the USFWS that the best way to avoid eagle take is through the appropriate siting of wind energy projects. However, many wind energy projects, including one of Otter Tail's facilities, are already in existence within the proposed specific permit eligibility zone. As the USFWS notes, the current permitting program, upon which the proposed specific permitting program is modeled, has seen very low (<10%) application rates. As proposed, Otter Tail would expect those low application rates to persist due to the prohibitively high administrative and mitigation costs of the specific permit program. Therefore, in order to increase participation in the wind energy permitting program, Otter Tail supports allowing existing facilities within the specific permit zone to be eligible for general wind permits, until eagle monitoring should prove otherwise.

Offering general permit eligibility to existing facilities would still serve to encourage development of new wind energy facilities in areas with lower eagle abundance, increase eagle monitoring at existing facilities within the specific permit zone, and increase compensatory mitigation for significantly higher benefits to eagles.

Summary:

Otter Tail welcomes the USFWS efforts to protect eagles and increase regulatory certainty through increased participation in the Incidental Eagle Take Permitting program. We hope the USFWS will consider the burden that the proposed proactive power-line retrofit strategy will have on small, rural electric utilities, offer more guidance on the permitting of shared infrastructure and construction siting, and increase eligibility for general wind energy permits.

If you have any questions about these comments, please contact me at mthoma@otpco.com or 218.739.8526.

Sincerely,

Mark Thoma
Manager, Environmental Services
Otter Tail Power Company

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Eagle Permits; Incidental Take

Comment On: FWS-HQ-MB-2020-0023-1937
Permits for Incidental Take of Eagles and Eagle Nests

Document: FWS-HQ-MB-2020-0023-9307
Comment from Xcel Energy, Inc.

Submitter Information

Name: Jeff West
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Email: patrick.flowers@xcelenergy.com
Organization: Xcel Energy, Inc.

General Comment

See attached file(s)

Attachments

20221228 Final Xcel Comments on Eagle Rule_

December 29, 2022

Comments regarding the September 30, 2022, Proposed Rule: Permits for Incidental Take of Eagles and Eagle Nests

Submitted by:

Xcel Energy, Inc.

Filed electronically to the attention of:
Public Comments Processing
Attn: Docket No. FWS-HQ-MB-2020-0023
U.S Fish and Wildlife Service
MS: PRB/3W
5275 Leesburg Pike
Falls Church, VA 22041-3803

Docket No. FWS-HQ-MB-2020-0023

Xcel Energy submits these comments in response to the U.S. Fish and Wildlife Service's (Service) September 30, 2022, Proposed Rule: Permits for Incidental Take of Eagles and Eagle Nests (Proposed Rule). We thank the Service and their staff for developing and proposing this rulemaking which is an important and much needed development that has the potential to create significant value for eagle conservation.

Xcel Energy serves approximately 3.7 million electricity customers and 2.1 million natural gas customers in eight midwestern and western states. Xcel Energy's generating units are capable of producing over 20,000 megawatts (MWs) of electricity, using a variety of fuel sources including wind, solar, hydroelectric, coal, natural gas, oil and nuclear. We also operate and maintain an extensive transmission and distribution network across seven states and the upper peninsula of Michigan.

Xcel Energy is a national leader in clean power according to industry rankings, and for more than 15 years, Xcel Energy has held a top spot as a leader in providing wind power to our customers. We were also the first major U.S. utility to establish a carbon-free vision, targeting 100% carbon-free electricity by 2050 and an 80% carbon reduction by 2030 (from 2005 levels). To date, we have reduced carbon emissions by 51% and are on track to achieve our 80% goal and reach 60% renewable generation by 2030. As we grow our renewable energy portfolio and the transmission assets to support it, we are mindful of the need to do so responsibly while keeping costs affordable for our customers, which is critical given that electricity is an essential service for everyone regardless of socioeconomic status. Responsible renewable energy development includes taking steps to safeguard birds and other wildlife around our operations and in the field.

We have a long history of working with wildlife agencies and conservationists on initiatives that preserve wildlife and their habitats. We were one of the first utilities in the country to voluntarily work with the U.S. Fish and Wildlife Service to develop risk-based Avian Protection Plans (APPs) that proactively address potential issues involving migratory birds and our transmission and distribution infrastructure. Xcel Energy also has a robust avian protection program that includes employee training and avian friendly standards for new construction and retrofits.

As we continue to invest in wind power, and the needed transmission infrastructure, to provide customers with clean, renewable energy and reduce our carbon footprint, we are careful in selecting wind farm locations, and we use nationally recognized best practices to protect and monitor wildlife. We follow the Service's Land-Based Wind Energy Guidelines (WEGs) and carefully select wind farm sites and individual turbine locations to avoid or minimize impacts to birds and other wildlife. Xcel Energy has also been one of the few companies to obtain an eagle incidental take permit (EITP) under the Service's existing permit program.

Summary

Xcel Energy appreciates the opportunity to provide comments on the Proposed Rule. We deeply appreciate the Service's attempt to create an eagle take permitting mechanism through the proposal of a new general permit. This is an important step that aligns eagle permitting and conservation with the needs of our society to address climate change, while providing reliable electric power to the communities we serve. Xcel Energy also supports comments filed in this docket by the American Clean Power Association (ACP), the Energy and Wildlife Action Coalition (EWAC) and the Avian Power Line Interaction Committee (APLIC).

Our comments focus primarily on the proposed General Permit programs to cover wind energy incidental take, and powerline incidental take of eagles and eagle nests, as these programs are most impactful to our operational activities. We are grateful that the Service has undertaken the effort to create a General Permit program for eagle take that would cover both eagle species; however, Xcel Energy's participation in the General Permit (GP) program as currently proposed will be restricted by the eligibility requirements of the proposed program, as well as limitations of the proposed general permit conditions. As such, our comments are focused on recommendations to increase our own participation in the program and by extension what we believe will also increase participation by our industry as a whole.

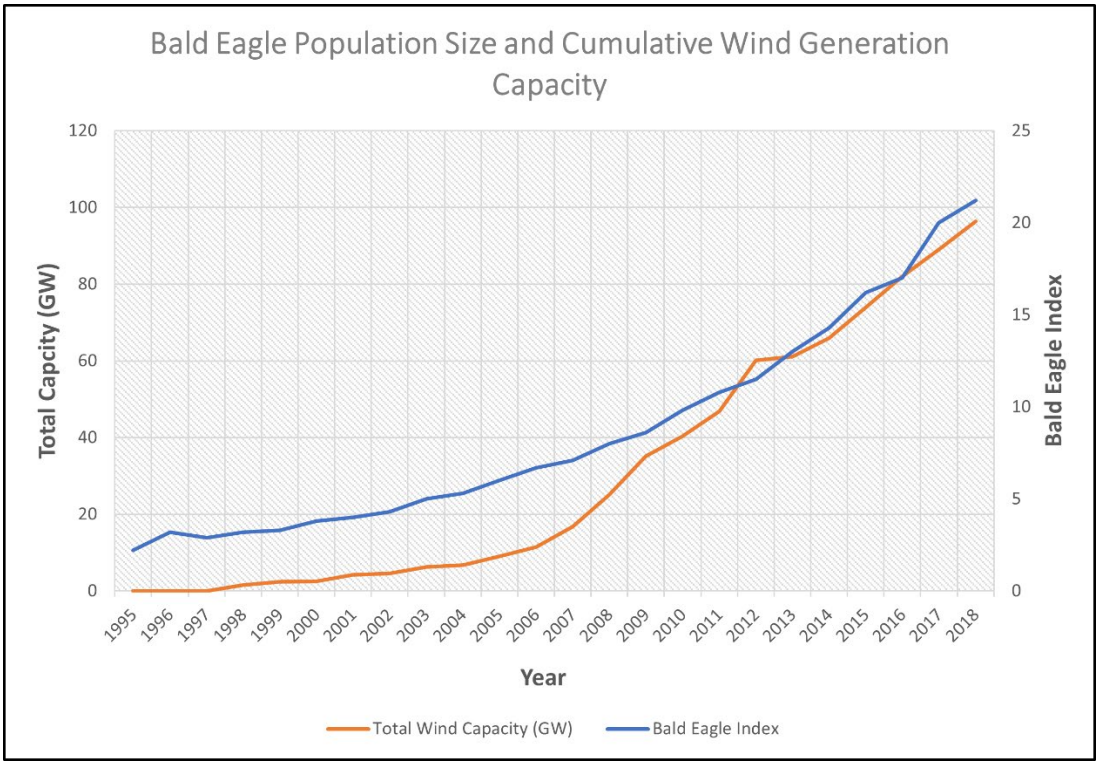
Xcel Energy's comments are focused on:

1. Recommendations for General Wind Energy Incidental Take Permits
    a. Our preference for implementation of the Alternative 2 option analyzed in the Environmental Assessment with separate GPs for golden and bald eagles,
    b. Needed changes to the preferred approach if the Service is unwilling to adopt the Alternative 2 option,
2. High-level recommendations for the Specific Permits,
3. Recommendations for General Permits for Power Line Incidental Take of Eagles and Eagle Nests

The following essential facts inform our recommendations:

- In our Northern States Power Company service territory, Xcel Energy has two operating wind facilities that were issued bald-eagle-only EITPs under the 2009 rule. We have been conducting eagle fatality monitoring in compliance with those permits and providing the data to the Service, as required. Neither site has experienced an eagle fatality during the term of the permits to date. One site is within the low abundance area proposed by the Service, the other is partly in and partly out of the area.
- According to the Service's estimates, bald eagles have more than quadrupled since 2009 to an estimated population of 316,700 birds in 2020 (U.S Fish and Wildlife, Final Report: Bald Eagle Population Size: 2020 Update 22). During the same time period, wind energy had increased significantly as well suggesting that wind energy is having no appreciable impact on bald eagle populations as a whole (Figure 1 below).

Figure 1. Bald Eagle Population Size Versus Cumulative Wind Generation Capacity



- The analysis in the EA and a recent study of GPS tagged golden eagles both show that wind energy impact on overall eagle mortality is small when compared to other natural and anthropogenic causes. According to the January 22, 2022, article in Ecological Applications, which was authored by Service eagle biologists, two out of 175 golden eagle deaths were attributable to wind energy. (Millsap, et.al., "Age Specific Survival Rates, Causes of Death, and Allowable take of Golden Eagles in the Western United States," Ecological Applications, April 2022) While this is a single study, the results

seem to correlate well with other facts showing the growth of wind energy having had little to no appreciable impact on eagle populations and bald eagles in particular.

- Our own experience at our wind energy facilities where we have conducted either structured post-construction mortality monitoring following the guidance in the WEGs or specific eagle fatality monitoring in compliance with an eagle take permit supports the premise that wind energy is not significantly impacting eagle populations.

1. Recommendations for General Wind Energy Incidental Take Permits

a. Xcel Energy strongly supports adoption of Alternative 2 as proposed by the Environmental Non-Governmental Organizations (eNGOs) and American Clean Power (ACP).

The Service's proposal for a General Permitting program for wind facilities is a much-needed complement to the Specific Take Permit program. Since eagle take permitting is voluntary, the Service should recognize the value in maximizing participation and the concomitant benefits that such participation would have for eagle conservation and preservation. The ACP/eNGO proposal, which the Service analyzed in the EA as Alternative 2 with some slight changes, is a practical, common-sense approach that was developed as the result of a historic cooperation between industry and leading conservation groups. The ACP/eNGO proposal blends the best science with good policy to craft a permit program that clearly articulates reasoned eligibility requirements and practicable permit compliance obligations while ensuring via appropriate safeguards the preservation of eagles. The Service's preferred alternative deviated in some significant ways that would reduce the overall benefit of the General Permit program for Wind and eagles.

Xcel Energy contends that ACP/eNGO proposal, which Alternative 2 is largely patterned after, is just as compatible with the preservation of eagle populations as the Service's preferred alternative. We believe this for two reasons:

1. Despite the widespread existence and growth of wind turbines across the continental U.S. landscape over the last decade, bald eagles have continued to increase in numbers and expand their areal coverage. If wind turbines were negatively impacting bald eagles, the population estimates should have revealed it by now and they do not.

2. Despite the widespread existence and growth of wind turbines across the continental U.S. landscape, golden eagles have, as the Service pointed out in their recent eagle population estimates, largely remained stable. Given the widespread proliferation of wind energy development, if wind turbines were negatively impacting golden eagles, the population estimates should have revealed a connection between increasing wind generation and golden eagle deaths. That said, the fact that golden eagles have not flourished warrants continued study and monitoring.

The proposal by ACP and the eNGOs would provide the greatest possible participation in the program. Alternative 2, like the preferred alternative, would also have the needed safeguards to protect and preserve the populations of both species.

One possible improvement to Alternative 2 would be to allow for applicants to select between a general permit that would permit take of both species of eagles, or either bald or golden eagles. Since bald eagles continue to be as successful as the Service has indicated in the 2020 population status update, providing the option of a species-specific general permit for wind would allow facilities to manage their risks appropriately. A species-specific general permit would still collect a conservation fee in addition to the needed permit processing fee so that regardless of the species permitted, there would be a conservation benefit for eagles. Xcel Energy suggests that a bald eagle only permit could have a slightly higher take limit than the golden eagle specific permit or a general, both species, take permit since bald eagles are clearly not suffering from the proliferation of wind energy.

In the Draft EA for the proposal, the Service articulated five concerns as justification for the preferred alternative over Alternative 2. We provide the following responses to each of those concerns to justify why the Alternative 2 should be the preferred alternative and we offer an enhancement to Alternative 2 that would improve its appeal to industry while still achieving required legal objectives.

i. *Smaller projects may be disincentivized from participating given the flat fee structure.*
To address this issue, base the fee structure on the generating capacity of the wind-energy facility using the proposed fees in Alternative 2 as the highest fee to be paid. Using generating capacity will ensure that smaller facilities pay a proportionally smaller fee. Using hazard area rather than generating capacity is an unnecessary complication since hazard area and generating capacity are directly proportional (facilities with larger generating capacity have larger hazard areas). Since the goal of the General Permit program is to encourage participation and simplify the permit requirements to be proportional to the risks to eagles, the use of generating capacity also achieves that objective.

ii. *Lower risk projects may decide the flat fee exceeds the cost of enforcement based on perceived liability risk.*
This concern is true regardless of which alternative is selected; the preferred alternative does not avoid this problem or even minimize it. One reason for this is that not all owners/operators of wind energy facilities have a mechanism to include this new cost in their existing power purchase agreements. Those agreements were negotiated prior to this rule and frequently don't have a mechanism for including these types of costs into them so that any unanticipated expense excessively burdens an already tight budget.

Xcel Energy used the proposed fee calculation process to evaluate the possible costs for our wind fleet in the upper Midwest. The average 30-year cost per site to obtain a

wind general permit for our 15 wind energy facilities regardless of whether they met all eligibility requirements is $1.8 million (per site). Our smallest site of 12 turbines would pay significantly less but our typical wind facility of 100 turbines would pay just under $3 million (which approximates, based on our experience, the 30-year average cost for obtaining and complying with a Specific Take Permit).

The Service should focus on designing a program to encourage the greatest possible participation.

iii. *Greater amount of eagle take and less mitigation would occur than under Alternatives 3 & 4.*
The difference in take between the two alternatives is essentially the same. There may be some slight statistical variation between the two alternatives but this difference is not significant and given other safeguards that the Service has designed in the overall general permitting process, the difference does not create unacceptable risk to eagles. The Service's proposal to review the General Permit program every 5 years is the needed check and balance to ensure the program has the intended effects for eagle preservation. Additionally, because the General Permit fee includes mitigation/conservation for both eagle species the Service will have more than the needed offset to ensure eagle preservation. These factors provide adequate conservatism that the Alternative 2 approach is essentially equal, if not better, than the preferred alternative.

iv. *High levels of eagle take at some high-risk facilities would go undetected given the lack of project-specific fatality monitoring.*
There would be an equivalent, if not increased, benefit to the species if many, or all, of those sites obtained a general permit and began complying with the permit requirements for monitoring and reporting. It would be a better outcome to have these sites participate in a permit program rather than not participate at all (lack of participation in eagle permitting is the current and historical context for this rule). Alternative 2 is providing conservation funding for the bald eagle take as well as mitigation for golden eagle so there will be more overall funding that can be directed to golden eagle conservation than when mitigation was required for only golden eagle.

If the Service believes that the monitoring proposed by Alternative 2 is inadequate, then this concern can be addressed within the Alternative 2 framework. Keep in mind, however, that the current level of take that exists in reality has clearly not impacted the bald eagle's ability to thrive and it hasn't so negatively impacted golden eagles that their population is declining. As a result the need for monitoring to achieve high levels of certainty may create an overemphasis on a detail that is not as significant as it once was when the species was listed under the Endangered Species Act.

v. *The possibility of violating the Preservation Standard would be greater under Alternative 2.*

The difference between Alternative 2 and the preferred alternative is within the range of error for the statistical analyses such that both alternatives are essentially equivalent. And, given the other safeguards in the General Permit program, the likelihood of violating the Preservation Standard is unlikely.

b. Needed changes to the preferred approach if the Service is unwilling to adopt the Alternative 2 option.

If the Service is unwilling to adopt Alternative 2, then changes should be made to the proposed rule so that participation is encouraged, there is minimal need for discretionary permit-eligibility decisions by the Service, and the process is as efficient and straightforward as possible.

i. The General Wind Energy Facility Permit should allow for both a non-species specific and species-specific option.

The continuing wide-spread success of bald eagles suggests that in the future the abundance criteria in this proposal will either have to be modified or eliminated as criteria for determining eligibility for sites that impact only bald eagles. The success of bald eagles despite the growth of wind energy across their range also suggests that a higher take limit might be sustainable for bald eagles versus golden eagles. Because of these two factors, the General Permit for Wind should allow for two different types of General Permits: non-species specific and bald-eagle specific permits. Provided an applicant meets the criteria to be eligible, which is further discussed below, the applicant should choose what permit is appropriate for their specific site(s). Since bald eagles are continuing to increase in their abundance across most of their range, the take limit for a bald-eagle-only general permit could be increased by perhaps 1 or 2 additional birds taken over the 5-year permit term. The adaptive management criteria would also be adjusted for this increase in allowable take.

ii. There should be an eligibility pathway that allows the use of site-specific data and self-certification by the applicant.

Xcel Energy disagrees with the concept of using eagle abundance based on eBird data and individual turbine location within a project site as the sole means for determining whether a wind energy facility is eligible for a general permit. The overall risk of the wind energy facility, and not individual turbines, should be the criteria for determining a site's eligibility for the General Permit for Wind Facilities.

The preferred alternative should also allow two potential eligibility pathways so that if either applies, then a site is eligible for the General Permit:

a. 50% of the turbines at a wind energy facility are within the Service's lower abundance area, or
b. The wind facility has reviewed and assessed site-specific data (e.g. eagle use surveys, post-construction mortality monitoring data, or fatality monitoring data, prey base, nest distances, etc.) and can certify that the wind facility is expected to meet the take limit authorized by the General Permit.

Using these two criteria better aligns overall facility risk with the General Permit Program objectives. The permit is issued to a facility not to individual turbines and the fact that some turbines may be outside the Service's generalized areas does not necessarily mean that there will be more eagle fatalities. We propose that up to 50% of a facility could be in the higher abundance area and the facility would still be eligible.

We also propose that the Service should allow a facility to consider site-specific data to substitute for the eBird abundance map provided by the Service as a second path for eligibility under the General Permit. Many facilities collect data during the development process and after the site becomes operational that is more indicative of possible eagle risk than the generalized eBird data proposed by the Service. Eagle use surveys from the area, post-construction mortality monitoring, eagle fatality monitoring, and the like all provide a better indication of a wind energy facility's risk of an eagle take and should be allowed. Since the General Permit program seeks to minimize the need for discretionary decisions by the Service, this second means to determine eligibility should require the applicant to certify that they have analyzed site-specific data and determined that the facility is expected to comply with the take limits set forth in the General Permit program. The data and assessment should be kept on file and available for Service to review during an audit or enforcement action should permit terms be violated.

The following example is offered to provide clarity to our response:

Xcel Energy's Courtenay Wind Facility near Jamestown, ND, is a 200 MW, 100 turbine facility. The site currently has an EITP (MB93966B-0) which permits the take of up to 5 bald eagles in 5 years. The site is currently in year three of a five-year permit term.

According to our evaluation, 11 of the 100 turbines at the facility fall outside the lower eagle abundance area and as such the facility would not qualify for a General Permit without Service-provided discretion. Because the site has an existing five-year EITP, 100% of the turbines are searched monthly and have been since the permit's issuance in 2019. To date, we have found no (0) eagle fatalities during EITP monitoring at the facility and according to assessments conducted by the Service's NEST team, the site is not believed to have caused more than the one eagle mortality since permit issuance in 2019. The data collected from the site combined with the Service NEST team evaluation of the monitoring data clearly suggests that the site, despite not having all turbines in the lower eagle abundance area, should be eligible for the General Permit. The turbine-by-turbine eligibility criteria is too restrictive and, in our view, improperly characterizes the site's overall risk. The Service should allow a percentage (we suggest 50% is reasonable) of a project's turbines to be outside the lower abundance area and still qualify for the General Permit.

In addition to allowing for up to 50% of the turbines at a facility to be outside the lower eagle abundance area, the Service should also allow for company evaluation of site-specific data and a corresponding certification by the company that they have evaluated eagle risk using their site-specific data and found that they expect to comply with the General Permit take limit as acceptable for qualification to receive a General Permit.

The proposed General Permit program has other safeguards that help assure that eagle preservation will be maintained such as adaptive management features that would be triggered as actual take is identified as well as enforcement options if more than the permitted mortalities are found at a facility. These permit safeguards plus the periodic review of the program by the Service along with offsetting all take regardless of species through mitigation ensures the Preservation Standard requirements are addressed.

iii. Approve other mechanisms for providing required compensatory mitigation

Currently, the only accepted eagle mitigation methodology is power pole retrofits; no other Service-approved methodology exists. This is a significant limitation on the future effectiveness of the funds that will be generated by the program. The Service needs to formally publish criteria by which mitigation alternatives will be accepted as an approved mitigation alternative. For a number of years now, the Service has indicated there are other alternatives under consideration but to date, none have been approved and no set of acceptance criteria has been articulated to the research or regulated communities.

There are a great number of power poles on the landscape and their individual eagle mitigation value is not the same. Additionally, many utility companies have had their transmission and distribution systems included in an APP for a number of years. Xcel Energy's APP dates back to the early 2000s and was one of the first APPs approved by the Service. Over the years, the number of non-retrofitted power poles has decreased due to company and industry implementation of APPs so the universe of remaining high-risk poles to be retrofitted has decreased. There are many other complicating factors that reduce the likelihood that a regulated utility, like Xcel Energy, would be willing or able to accept compensation in exchange for retrofitting electrical infrastructure. This situation is not unique to Xcel Energy and further argues for more mitigation options so that eagle conservation and preservation can succeed.

iv. Eliminate the need for programmatic monitoring by the Service

The Service has other methods to ensure the preservation of eagles is met. The Service's own research points to the fact that collision with wind turbines is likely only about 1% of the total anthropogenic and natural fatalities. Expending significant resources to precisely enumerate the 1% would needlessly sacrifice precious, and talented, Service resources that could be better utilized on higher value activities that would provide an actual benefit to eagles. The conservation funds planned for programmatic monitoring could be used to develop new mitigation options, better

study population dynamics of golden eagles to focus and improve conservation outcomes. It seems to us that counting the 1% of fatalities just to confirm it is 1% is probably not the best use of limited resources. Permittees are required to monitor and report eagle fatalities; the Service has the right to conduct inspections to validate compliance with the permit conditions both of which provide assurance that observation and reporting of injured/dead eagles will be better on a more widespread basis than it is currently.

If some sort of monitoring is needed, the Service can require permittees to provide one year of standardized post-construction monitoring data for a permitted site. The data could be collected either before the application is made for the General Permit or subsequent to the permit issuance. Provided the data is collected pursuant to a Service or State-approved protocol with appropriate bias trials and within the last 10 years, the Service should accept it as complying with this permit requirement. This would enhance funds available for eagle conservation by eliminating the need for programmatic monitoring by the Service.

v. *Provide Clarity on the Audit Process*

In our comments below on the Specific Permit program, we illustrate how the existing take permitting program does not provide the level of certainty needed for permittees to self-determine permit compliance. We have similar concerns for the General Permit program related to the proposed auditing process. Xcel Energy urges the Service to develop a standardized audit process in collaboration with industry stakeholders to ensure the auditing program provides the predictability and certainty that is essential for a successful permit program.

2. **Recommendations for Specific Permit Program**

Xcel Energy obtained two EITPs pursuant to the 2009 permit rule: One permit was obtained from the Mountain-Prairie Region and authorized take of five bald eagles in five years, and the second was obtained from the Midwest Region and authorized take of six bald eagles in five years. The level of take authorized by these two permits was determined based on use of the Service's Collision Risk Model (CRM). In the case of the permit obtained from the Midwest Region, the take estimate was generated using solely the Service's bald eagle priors.

Xcel Energy is currently in the second and third year of the permit terms for the Midwest and Mountain-Prairie Region permits, respectively. Looking back at the first several years of permit coverage, the biggest challenges for Xcel Energy as a permittee have been costs associated with monitoring and lack of our own ability to determine, without Service intervention, our compliance status.

The Service's specific and deliberate use of Evidence of Absence (EoA) as a compliance obliation in our permits has been the sole reason for both the cost and compliance determination issue. While we appreciate the changes the Service has proposed for the Specific Permit Program in the Proposed Rule (e.g., elimination of Third-Party Monitoring),

we are disappointed that the inappropriate application of EoA was not addressed in the Proposed Rule.

Issues with EoA are evident in the example of our Courtenay Wind Farm EITP, the permit obtained from the Mountain-Prairie Region. This EITP requires eagle mortality monitoring during all years of the five-year permit term due to the permit requiring that monitoring across all five years of the permit achieve an average probability of detection (G value) of at least 0.25. To achieve the required G value, we need to survey all 100 turbines once per month during the entire permit term. The total estimated cost of this effort, based on costs incurred to date, is over $500,000. No bald eagle fatalities have been found during EITP fatality monitoring to-date at the facility, so the cost of the monitoring does not seem commensurate with the risk to bald eagles. Based on our experience conducting monthly monitoring of all turbines at the site does not guarantee that at the end of the permit term we will meet the minimum G-value.

This lack of compliance certainty is due to two issues:

1. There are environmental conditions that significantly impact the calculation of the G-value that are outside our control, such as vegetative cover, harsh weather conditions, and scavenger activity. Unexpected changes in any one of these factors results in the need for increased survey efforts and a subsequent increase in costs to achieve the required G-value.

2. The second, and more important, issue is that we cannot calculate the G-value with any certainty that our calculation will match the only accepted "official" calculation which can only be completed by the Service. The use of the G-value, which is a function of EoA, has proven problematic for us in that it has made it impossible for us to determine compliance with our EITP on a real-time basis. Even though we know that dead eagle carcasses persist on the landscape long enough for us to find them and that no eagle fatalities have been found at our facility during EITP monitoring, we cannot know how that will translate into the Service-generated EoA estimate that is required to demonstrate compliance with our permit. To put it another way, it's if we bought car insurance but have no way to know how much it will pay if we have a crash.

   In the case of our Courtenay EITP, the Service's annual EoA results have been provided long after the completion of each year of compliance monitoring. The inability for us as a permittee to determine compliance with our own permit is a major, fatal flaw in the current permitting program. We urge the Service to eliminate the use of EoA as a compliance measure and instead assess compliance based on the actual number of eagles found during fatality monitoring. EoA should be used to help design the monitoring campaign appropriate for a site that receives a Specific Permit. The final decision as to whether a permittee exceeds their take limit must be based on the actual number of fatalities found and not speculation about whether there could have been a missed carcass. Speculating about compliance, which is what EoA does, is illogical and potentially arbitrary as a permit requirement and undermines the legitimacy of the Specific Permit program.

3. **Recommendations for General Permit for Power Line Incidental Take of Eagles and Eagle Nests**

Xcel Energy focuses its recommendations primarily on the six conditions of the general permit for power line incidental take of eagles and offers a few additional recommendations regarding line burial challenges and proposed audit program concerns.

a. Permit Conditions Regarding Electrocution-Safe New Construction and Reconstruction:

Xcel Energy is concerned that the Proposed Rule could result in other state and federal agencies requiring the acquisition of a general permit, as a condition of approval for other permits. Xcel Energy recommends that the Service provide guidance to other agencies that the general permit is voluntary and should only be considered under the Service's purview.

The Service proposes that *"all new construction and reconstruction of pole infrastructure must be electrocution-safe for bald eagles and golden eagles, except as limited by human health and safety".* Xcel Energy recommends that the definition of "electrocution-safe" be consistent with APLIC Suggested Practices for Avian Protection On Power Lines, as amended, and apply to new construction and reconstruction located within defined eagle risk/eagle exposure areas.

b. Permit Conditions Regarding Siting and Design of New Construction and Reconstruction:

The Service proposes that *"all construction and reconstruction of transmission lines must consider eagle nesting, foraging, and roosting areas in siting and design, as limited by human health and safety".* The fact that the Service has issued the Proposed Rule due to the increase of bald eagle populations and stability of golden eagle populations reflects that infrastructure can coexist in all eagle settings. New construction typically goes through a thorough review by permitting jurisdictions and typically includes consultation with state wildlife agencies. This consultation takes into consideration well established buffers for eagle nests. Forage areas can cover large expanses of land and their consideration adds a layer of potential restrictions to power line siting with little gain for the protection of eagles. Furthermore, reconstruction of existing power line routes occurs within existing easements, which could be in close proximity to existing nests, foraging and roosting areas. Relocation of the existing line to avoid these areas would cause substantial challenges associated with established land rights and approvals. Xcel Energy recommends that the Service remove "foraging" from this condition and add "when practicable" to provide flexibility in working with agencies and jurisdictions on new construction and reconstruction projects.

c. Permit Conditions Regarding the Proposed Reactive Retrofit Strategy:

Under this proposed condition, utility companies would be required to retrofit 11 poles for each eagle incident, which includes the pole involved in the incident. These retrofits are to be completed immediately following the incident. Xcel Energy supports this approach as long it provides flexibility in which poles are retrofitted. This approach could be memorialized in APPs. To assure realistic responses, Xcel Energy recommends that a minimum of 90 days be provided in order to allow for material procurement and scheduling of crews. Locations with difficult access may require additional time.

d. Permit Conditions Regarding the Proposed Proactive Retrofit Strategy:

This condition requires that utility companies retrofit 1/10 of at-risk poles during each five-year permit term. Xcel Energy does not support this expectation, as it does not consider the sheer volume of poles this might affect, in addition to challenges associated with accessibility, funding, resource allocation and planning. Furthermore, Xcel Energy has APPs that are risk-based and include proactive installation of retrofits based on electrocution and collision risk to raptors, including eagles. These APPs were reviewed and approved by the Service. Avian friendly standards for new construction and retrofits were also developed to support the implementation of the APPs. These standards require avian friendly construction for all new lines located in rural settings. Xcel Energy recommends the following:

1. Allow utility companies to develop a reasonable proactive retrofit strategy, which may be included in new or updated APPs. This strategy would not require the minimum required metric of 1/10 replacement every five years. This allows utility companies to build upon existing effective avian protection programs, while meeting the intent of the Proposed Rule.

2. Provide a three-year planning period for the development of a reasonable proactive strategy that would be approved by the Service.

e. Permit Conditions Regarding the Collision Response Strategy:

Collision responses are difficult for utility companies to address on existing power lines. These incidents tend to be random, and retrofits can be quite costly. Access can be difficult, lines may need to be temporarily de-energized, and many times line markers need to be installed via helicopter. New construction projects typically receive review by state wildlife agencies and reasonable line markings are installed during construction, where necessary. Effective proactive and reactive strategies can easily be included in one plan. Xcel Energy recommends that utility companies be provided an opportunity to develop unique collision response strategies that can be stand alone or incorporated into new or updated APPs.

f. Permit Conditions Regarding the Shooting Response Strategy:

This condition requires steps be outlined *to determine whether discovered eagles have been shot or electrocuted… and outline options for response.* Xcel Energy agrees that illegal shooting of eagles is a concern; however, activities beyond simply informing the Service's Office of Law Enforcement (OLE) of potential shooting incidents are not the responsibility of utility companies. Xcel Energy recommends that the Service clarify that the expectations of utility companies for a shooting response strategy does not go beyond incident reporting and limited assistance with investigations.

g. Recommendations for Burying Lines:

Under the condition for avian friendly new construction, the Service states that they *"recommend buried lines when feasible"*. Burying lines; however, is not generally feasible for distribution voltage power lines and even less so for transmission voltage power lines. Burying power lines is expensive, requires substantial ground disturbing activities and limits certain vegetative cover within the rights-of-way. Xcel Energy recommends that the Service stress that burying power lines can be a discussion point with utility companies; however, failure to avoid siting power lines below ground or near nests or roosting areas should not affect compliance with a general permit.

h. Proposed Audits of General Permit Compliance:

Although Xcel Energy does not oppose an auditing program by the Service, this program should be developed collaboratively with utility companies to develop an efficient, simple and standardized approach. Xcel Energy recommends that audit compliance expectations should be clear and, ideally, based on reasonably achievable goals and baselines. These goals and baselines could be a stand-alone program or incorporated into APPs.

Response periods to provide requested information to the Service must be reasonable to assure compliance success, while recognizing complexities with compiling information from crews, accounting departments and operations departments. Xcel Energy recommends a minimum response time of 90 days.

Conclusion

Xcel Energy expresses our thanks to the Service for issuing the Proposed Rule at this important juncture for our nation and the wind and power line industries. Ensuring eagles continue to survive and thrive while reaching the Administration's goal of carbon-free electricity by 2035 will require adaptation of our industry and the regulatory processes designed to conserve the species. The growing population of bald eagles and stable golden eagle population offer an opportunity to create new permitting alternatives that could encourage participation in the voluntary program and expand the potential to conserve eagles. We believe the Service's proposed changes to the Specific Permit Program align with these goals; however, there are some aspects of both the Specific and General Permit programs that should be revised to increase

participation and clarity. We appreciate the Service's thoughtful review of our comments and look forward to the next steps in the rulemaking process.

Respectfully,

Jeff West
Senior Director, Environmental Services
Xcel Energy

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Comment On: FWS-HQ-MB-2020-0023-1937
Permits for Incidental Take of Eagles and Eagle Nests

Document: FWS-HQ-MB-2020-0023-9308
Comment from Northern catskills Audubon Society, Inc.

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General Comment

See attached file(s)

Attachments

Eagle Take USFWS Comments 12-28-2022

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Public Comments Processing
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Re: Proposed Rule for Incidental Take of Eagles and Eagle Nests

To Whom it May Concern:

On behalf of the approx. 400-member Northern Catskills Audubon Society I thank the Fish and Wildlife Service (USFWS) for the opportunity to comment on the new proposed rule on the issuing of Permits for Incidental Take of Eagles and Eagle Nests. After initial reviews of the document, we have several concerns about this proposal that concur with comments submitted by Delaware-Otsego Audubon Society (DOAS). Biologists and other birders affiliated with DOAS have documented winter, breeding, and and migratory occurrences of Golden and Bald Eagles over many years and as such have direct knowledge of local and other impacts that negatively affect eagles.

1. Critical areas of the core range of Golden Eagles in the eastern United States are not included in the maps used to determine what type of permits are necessary. The map that is currently being used as guidance for the permitting process does not consider the differences in the range, habitats and risk of each species, which are significant.

2. It appears that USFWS is relying solely upon data from eBird for determining eagle density. Since eBird data relies upon people reporting their sightings, there is likely a good deal of data missing from more rural and hard to reach regions of the U.S.

3. Random pixels on the map within large areas of different colors. These areas suggest a lower level of density in the midst of high populations or higher density in the middle of low eagle density. We question whether these have any biological significance.

4. Additional sources including tracking data should be consulted to see if migratory concentration areas that are currently "green" might have been missed in the eBird data.

The current map titled USFWS HQ MB Eagle Incidental Take Permit Eligibility Zones categorizes most of West Virginia, eastern Virginia, eastern Kentucky, eastern Tennessee and western North Carolina as being areas of lower Golden Eagle density - the green "self certifying" permitting areas. We know from peer reviewed research[1] [2] that these same areas contain high densities of Golden Eagle in the winter.

[1] Resource selection functions based on hierarchical generalized additive models provide new insights into individual animal variation and species distributions. McCabe et al 2021
[2] Status, Biology, and Conservation Priorities For North America's Eastern Golden Eagle (aquila chrysaetos) Population. Katzner et al 2021

eBird is a powerful tool. It has great potential. However, for Golden Eagles in the east, eBird cannot fully capture their distribution. During the winter season, these birds inhabit heavily forested areas with high topographic relief. Even when skilled birders are in these areas, Golden Eagles are extremely hard to survey. These areas lack roads, visibility and any density of birders using eBird. Golden Eagles are also wary of humans.

Camera trapping and telemetry studies fill in these eBird gaps. These data sources should be used to improve the USFWS maps and more adequately protect Golden Eagles. There is a wealth of tracking and camera trap data that could inform the USFWS where Golden Eagles are wintering in the east. These data are owned by members of Eastern Golden Eagle Working Group (EGEWG). They have been used in various peer reviewed publications. The members of the EGEWG are likely willing to share data with USFWS to improve the maps and permitting requirements.

The mapping of yellow areas "eligible for proposed self-certified general permit" and green areas "eligible to apply for proposed simplified specific permit" shows random pixels among areas of the opposite color. These areas raise a concern particularly when a green area shows up in an area known to have high density. This may be an effect of limiting the data set to eBird.

For example, the Franklin Mountain Hawk Watch is in a yellow area. It is known for significant flights of Golden Eagles. It is an area with a healthy and growing Bald Eagle population. To the northeast of the Franklin Mountain Hawk Watch, and less than 8 miles away, is a green area. This is the direction from which most eagles migrating past Franklin Mountain approach.[3] It also has the excellent topography for providing lift for foraging or migrating raptors. In addition, the Delaware-Otsego Audubon Society operated a camera trap on Crumhorn Mountain, within this pixel, during the winter of 2017. Both Bald and Golden Eagles visited this camera trap.[4]

With high quality optics, birds can be seen and sometimes identified at long distances by skilled observers. Using life-size silhouettes, Franklin Mountain Hawk Watch counters determined that it is possible to identify eagles at >5 miles through high quality spotting scopes. It is likely that some eagles approaching Franklin Mountain are first observed within this green area, but since eBird records the data at the user location, those more distant zones are not picked up as being part of a more critical region.

Visibility sometimes limits the hawk counters' ability to see birds at great distances. Even if that is the case, certainly some are acquiring lift and coming from the west facing slope of Crumhorn Mountain. They are coming directly from that area.

We are concerned that these green areas, seemingly randomly located in an area of high eagle density, will allow developers to choose a location within that area solely based on the category of a "self certified" permit.

Given the differences in Golden Eagle concentrations on the USFWS maps and the maps in papers we cite in our comments, it is clear that eBird data cannot fully capture this species' density in the eastern U.S. We urge USFWS to include readily available additional data sources in their analysis, and adjust their maps so additional areas that are known to harbor Golden Eagles will also require a "simplified specific permit."

We also request that the random green pixels that may not have adequate eBird data be assumed to be at the same risk as the yellow pixels that border them on either 3 or 4 sides. We do not believe that these small areas have significantly different eagle density unless there are significant changes in habitat and terrain.

It is important that the map used for permitting accurately reflects the distribution of Golden Eagles in the east. This is an important national issue. We are urging USFWS to base the new permitting rules on more accurate maps to protect a rare and charismatic species (endangered in NY State).

Thank you for this opportunity to comment.

Sincerely,

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[3] Thomas Salo personal communication
[4] Kyle Dudgeon personal communication

Larry Federman
President, Northern Catskills Audubon Society, Inc.

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Comment On: FWS-HQ-MB-2020-0023-1937
Permits for Incidental Take of Eagles and Eagle Nests

Document: FWS-HQ-MB-2020-0023-9309
Comment from Wiegand, Jim

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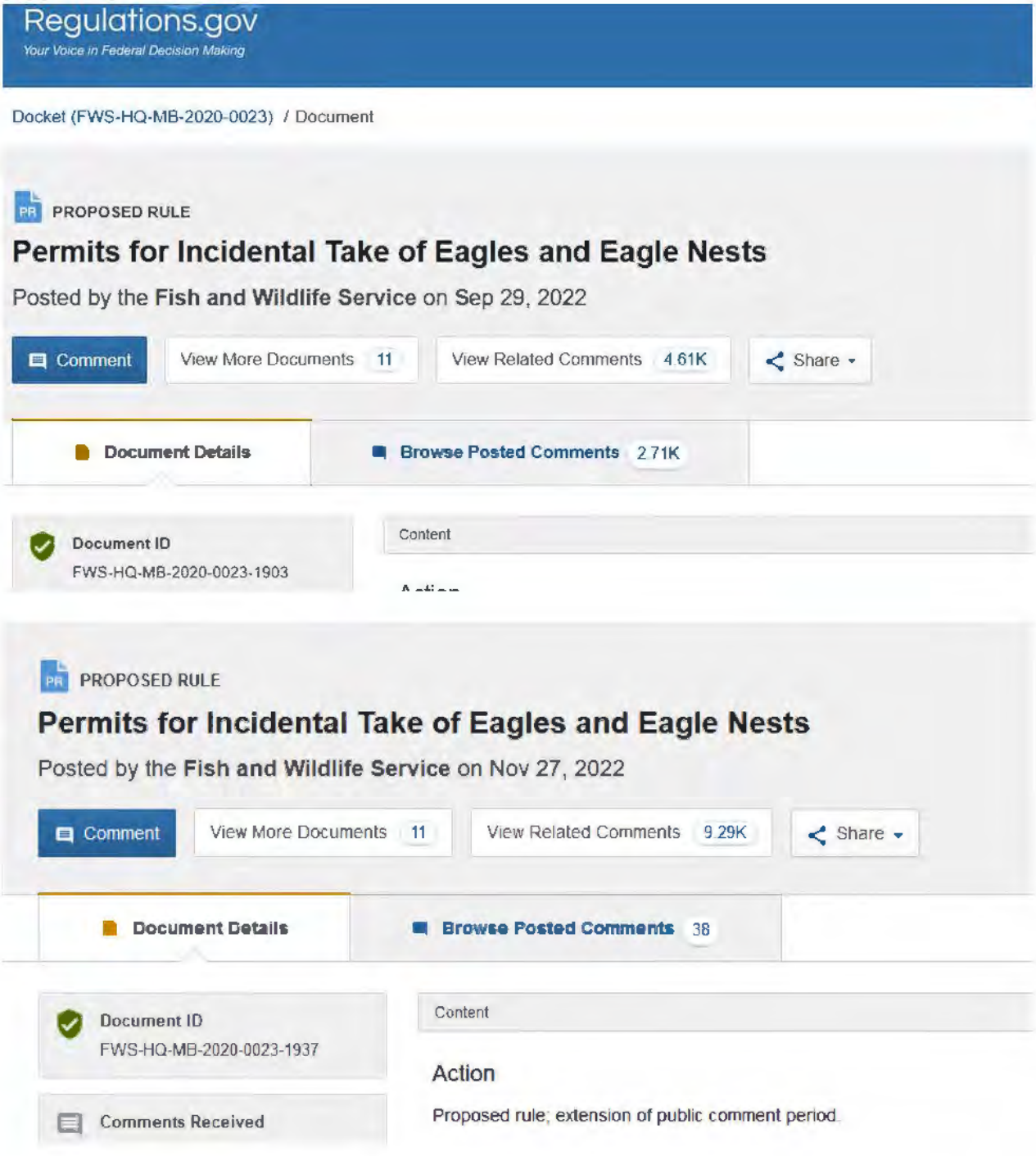
General Comment

See attached file(s) Comments against proposed rules and permits with a scientific discussion regarding golden eagle and bald eagle research fraud.

Attachments

12.28. 2022 USFWS eagle comments

comments USFWS Nov 2022



A call for science and accountability- submitted Dec 28, 2022

With America's eagle killing rules, the Fish and Wildlife Service has been put in the same position as a crooked judge. People from all sides submit their opinions, and then corrupt entities find a reason to side with the criminals. I've watched this take place for years and it's very obvious science means nothing with the USFWS.

With my new set of comments, I'm posting an article written almost 13 years ago. The information is important because it is scientific, is still completely credible and the message of scientific corruption, still applies today.

Recently I have become aware of more contrived and fraudulent green research that's been created. This bogus research will be used to rig upcoming Interior Department decisions regarding wind energy developments that slaughter eagles.

New research estimates suggest that for the Western US, there is a golden eagle population of approximately 31,900 golden eagles, there are 8602 active nesting territories in any given year and there is a potential golden eagle carrying capacity of 51,000.

None of this is remotely true or credible. If there were 8602 active and occupied golden eagle nesting territories it would mean that this large western region would have an active golden eagle territory for every 88 square miles. This is a nest per sq mile figure not even possible for an area near the Altamont pass turbines, said to have "the highest density of golden eagles in the world." In a 2000 sq mile area of this high-density population, fraudulent USGS 2014 research claimed an estimated 280 nesting golden eagles, when they could really only verify 11 active nest sites.

I find it astounding that all these so called experts, have put their name on garbage research that estimates a population of 31,900 golden eagles, with approximately 8602 active nesting territories in any given year. These are impossible numbers for any honest expert that understood ecology and habitat quality. Especially when eagle carrying capacities are greatly diminished during drought periods and in all areas around wind farms.

This newer study has published great numbers, if the Interior Department wants to allow more turbines to be placed in eagle habitat. But these numbers are fraudulent number and do not come close to reflecting real world conditions. Otherwise, they would predict a Western States golden eagle population close to 5000 with a carrying capacity no higher than 15,000 (with no drought and no wind energy) and that the golden eagle is currently an endangered species in California.

In fact, I would bet the Interior Department along with every state game agency in the west, can't even document 1000 currently active, occupied and successful golden eagle nesting territories in the Western United States.

Since 2010, due to a rapid expansion of wind turbines in golden eagle habitat, the golden eagle population in the West has declined for one primary reason, wind turbines. Nesting Eagles can't possibly coexist in the same habitat. Of course, the Interior Department knows about this because this corrupt agency has been picking up thousands of eagle carcasses from in and around wind farms for decades, without ever disclosing this covert activity with the public.

This is the purest possible example anyone could ever give for corporate/government collusion and corruption.

Besides using false data and ridiculous calculations, that suggest that hundreds of golden eagles starve and are getting hit by cars each year, new golden eagle research, signed off by 26 so called experts, doesn't say a word about the thousands of eagles pouring into the repository each year or that habitat abandonment has occurred, in and around the regions of every American wind farm located in eagle habitat. These sellout eagle experts also say nothing about the ongoing drought conditions impacting eagle populations that live away from wind farms.

In order to understand what liars we have with the wind industry consider this, in the decades leading up to the Dec 2016 law allowing 4200 (12 / day) bald eagles to be killed each year, this industry probably did not even report 12 total.

New Biden laws now allow 15,832 to be killed each year which comes out to 43 per day.

EDITORIAL: GOLDEN EAGLES FALL PREY TO WIND INDUSTRY

By Jim Wiegand, Wildlife Biologist

April 17, 2010 (San Diego's East County) -- The controversy surrounding wind farms in America has been brewing for over 25 years. The debate centers around the use of the deadly propeller style wind turbines and the large death toll to what are supposedly protected species. One of these species, the federally protected golden eagle, has been at the forefront of this debate from the beginning.

This is for good reason, because at Altamont Pass California, 50-75 golden eagles have been killed each year in the blades of the prop wind turbine. This killing has been taking place for over 25 years. Dr. Shawn Smallwood the foremost expert of bird mortality at the Altamont Pass wind farm estimates that 2300 golden eagles have been killed by the spinning turbine blades.

Along with the golden eagle, many thousands of other birds of prey have been slaughtered there as well from this source of green energy.

As far as wind farms go, the history of Altamont pass is not an exception, it just happens to be the most scrutinized wind farm in the world. A cloak of secrecy now envelopes most other American wind farms.

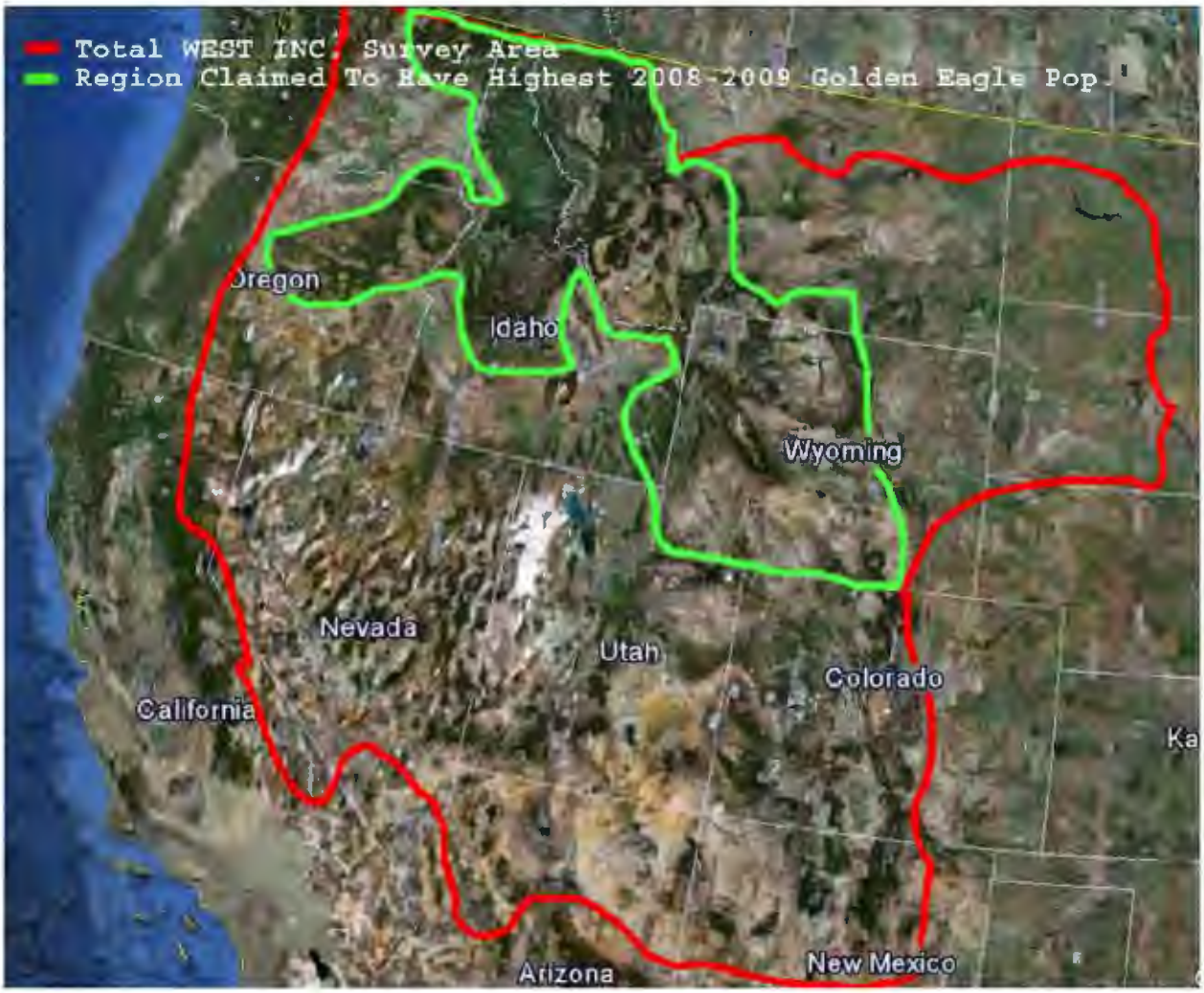
Despite this slaughter of raptors, corporate heads have been steamrolling ahead with wind farm expansion. Hundreds of thousands of prop wind turbines are now planned for America. One of the biggest regions for the harvest of wind energy is planned for the Western United States. Today Planning Departments all over the west are being faced with the choice of having wind power in their communities. In order to obtain the proper permits, Federal and State laws require an analysis of the environmental impacts so communities can make the right choice.

My research into the wind industry has uncovered a very disturbing trend in their method of disclosing environmental impacts. What I have found is that the wind Industry in American

routinely uses false or incomplete Environmental Impact Reports (EIR's) to white-wash the detrimental impacts of the "green" wind turbine. For the wind industry, environmental analysis basically comes down to disclosing as few impacts as possible to an ignorant audience. The biological assessments are either paid by the industry for or created from wind industry influence in political arena. These grossly incompetent documents are produced solely to manipulate and expedite the permitting process for wind farm approval.

In effort to keep ahead of the critics and to help persuade planning departments, many worthless studies have been launched on behalf of the wind industry. Currently there is an ongoing group of these studies under the direction of the U.S. Fish and Wildlife Service that needs to be exposed. These studies, if not stopped will be used to influence the public and planning departments for many years to come.

Since 2003 a golden eagle survey has been taking place in the Western U.S. Each year at a cost of hundreds of thousands of dollars to American taxpayers, Western EcoSystems Technology, Inc (West, Inc) has been paid to conduct a yearly population survey from an airplane. Each year a plane filled with observers crisscrosses a 757,883 sq mile region of the West in search of Golden Eagles. The surveys are called Population Level Survey of Golden Eagles in the Western United States or Survey of Golden Eagles in the Western United States.



I first became familiar with the work of West, Inc when this Wyoming based company conducted the biological studies for the Hatchet Ridge Wind project in Shasta County, CA. These studies for this project were conducted by West Inc. over a 1-year period.

In their substandard environmental impact analysis presented to Shasta County, 11 species of birds of prey that face death from this prop wind turbine project were left out of their documents. One is the endangered great grey owl and the other is the most common raptor in the region during the fall and winter months, the rough-legged hawk.

I know this because I studied the wildlife in this region 18 years.

The public and planning departments in need to take note because the golden eagle survey conducted by West Inc is also a mockery.

Since these surveys began in 2003 the West Inc survey teams have only documented 155-222 golden eagles in any given year from their airplane seats. **From these numbers they have then extrapolated their meager sightings into yearly population estimates ranging from of** 27,392 in 2003 to 20722 golden eagles in 2009. As a result, the true population estimates have been exaggerated many times over and this false information is now being disseminated.

As I will point out, there are some very good reasons to discard these surveys.

It does not matter how skilled the observer; the fact is that identification of the golden eagle and determining age class is not easy. It is a well documented fact that the golden eagle is very often confused with immature bald eagles. With the West Inc observers flying around in an airplane I can imagine there being a lot of confusion between the two
because it appears that results of these yearly surveys have to be contaminated with immature bald eagle sightings counted as golden eagles.

Mistakenly identifying golden eagles is common. I even witnessed this with UC Berkeley staff on college on field trips.
These surveys have been broken up into four geographic regions. One is called the Northern Mountain region of the Western U.S. This is the area of the survey overlaps that overlaps primary bald eagle Western habitat (see image). Over the last two years the West inc. survey reports the most golden eagles in this area even though this region represents only secondary golden eagle habitat. Much of the habitat in this region of the survey cannot even support a population of golden eagles because of the abundance of cover and lack of prey species.

This area has also been under drought conditions for years (see image). This further affects the available food supply for the golden eagle.

Yet if we are to believe the estimates put out by West Inc for entire 193,000 square mile region of what they classify as Northern Mountain habitat, there is a golden eagle every 25 square miles. In actuality there is not even one golden eagle every 200 square miles for this region.

In the past I conducted my own golden eagle research. This intermountain habitat had an elevation ranging between 3000-5000 feet. The habitat included juniper woodland, forest, semi desert, and grasslands. I found that this habitat will support a nesting pair of nesting golden eagles in about a 100 square mile territory under the best of conditions. I observed one pair that actually hunted over a 200 square mile territory during the spring and summer months exploiting pockets in the habitat where their preferred prey lived.

Over the last 40 years there have been intense ground and air surveys of some of the very best golden eagle habitat that exists in the Western US. These are habitats in Northern Nevada, Northwestern Utah, the Snake River drainage of Idaho, and the Thunder Basin area of Wyoming. These are areas that support large populations of either rabbits, ground squirrels or prairie dogs. These are the pockets of habitat that can

actually support an eagle every 25 square miles.

When considering just these prime pockets of golden eagle habitat and include all the surrounding lesser habitat in their respective counties, the golden eagle populations still only come out to about one pair of nesting golden eagles every 80-100 square miles in less than 10% of the counties of the 13 western states surveyed. None of these counties exist in the Northern Mountain Habitat region of the survey.

The Thunder Basin National Grassland was surveyed in 2006 by the USDA and they only reported 18 golden eagle nests for the entire 893 square mile National Park. This works out to one eagle nest for every 49.6 sq. miles in this prime habitat. In 2003 the West Inc survey of the 757,883 sq miles region of the Western U.S. reported a total golden eagle population of an astounding 27392 eagles. This figure represents one eagle existing for every 27 square miles of every bit of the western habitat. These reported figures are ridiculous.

In Southern Nevada, Arizona, New Mexico, the Rocky Mountains there are vast areas of poor habitat included in the survey where there is not even one pair of eagles every 400-500 square miles. There are also 1000's of square miles of cities, towns, farms and industrial areas no eagle habitat exists. This too must be factored in to any population estimates.

I have provided a map to show where the highest year-round populations and densities golden eagles actually exist in the Western U.S.

The proportion and number of juvenile golden eagles in the reported in surveys are also erroneous. I say this because when identifying young juvenile golden eagles, one must keep in mind that they look nearly identical to those birds that have not completed their first molt. This would make the juvenile eagles counted in the survey are actually a mix of two different years of golden eagle offspring. Thus, the actual fledged or juvenile golden eagles reported by the West Inc are actually lower than those stated in the surveys. Photographs are the best way to tell them apart and to document what is really an eagle recently fledged from the nest vs. an eagle from the previous year.

When considering the number of juvenile eagles accounted for in this series of surveys, I will now point out the most damming or contradictory fact of the West Inc golden eagle surveys. The age classes of the given eagle population in the surveys contradict their own total population conclusions. This further invalidates the survey results. The West Inc surveys state a population that is made up of approximately 12,000 adult golden eagles. These adults are reported to be producing fewer than 2000 young each of the last 4 years.

In reality a population of 12,000 adult eagles would easily produce 5000-6000 offspring for each of these years. It is well documented from decades of research that nesting Golden Eagles on average produce between .75 and 1.25 fledged young per year. Even if we were to accept the inflated 2000 number of juveniles given in the survey, it would indicate a population of half the size given.

As I have pointed out in this report, there are not nearly as many golden eagles as reported in the West Inc surveys. The population of golden eagles in the 13 western states has been exaggerated 3-4 times.

SUMMARY

I find it ironic that these extensive surveys were contracted out to private industry even though under the employment of the USFWS there are many qualified people that could conduct a much more accurate analysis of the golden eagle. Many biologists who are currently under the employment of the USFWS, USDA, and State wildlife departments that will agree with this report. Unfortunately, they must answer to the policies dictated by industry and remain silent.

I believe there is a clear wind industry motive and political influence behind the production of these surveys. After all the more eagles reported means that there will appear to be a less detrimental impact to the population from the introduction of wind turbines into their habitats. Also, the fewer the reported environmental impacts, the less there is to mitigate for the wind industry.
It is also my understanding that these surveys are planned for 20 years. That's just about long enough to get to get the planned 150,000- 200,000 turbines and the needed transmission lines installed into this region of the Western U.S.

So, if this gauntlet of turbines is installed and the golden eagle population is found to be in a nose dive.... Then what? Who will be responsible? Not the wind industry because they will be protected by the "no surprises clause" conveniently written into the Federal law pertaining to incidental take permits.

The golden eagle population in the West will decline rapidly because number of the propeller style wind turbines being introduced into their Western habitat. Accurate numbers are critical in order for every Planning Department to understand the cumulative impacts. The eagles destined to be killed in the future will number in the thousands. These numbers will not only include victims from the nesting population in the Western U.S. but also those migrating from Canada and Alaska.

Inflating the Golden Eagle population with imaginary statistics typifies many of the problems that plague our society. Today virtually any expert can be bought or silenced out of fear of retribution. We all see it, and many of us have been touched by this corruption. A common example is the use of false documentation by insurance companies. Today falsified reports are routine and bogus testimony from insurance friendly Doctors can be expected in nearly every legal case.

This situation is nearly the same with the wind industry with one notable exception, where are the official opposing views to offset the wind industry's bias to planning departments. It is a major flaw in our system and until it is fixed none of the major environmental problems of this era will be fixed.

This report represents the true state of the golden eagle population and it should be circulated to every planning department in the Western U.S. I have been paid nothing to write this and have been influenced by no one.

List of Federal Golden Eagle Survey Contracts given to West Inc
http://www.fedspending.org/fpds/devel/fpds.php?parent_id=372197&sortp=u&detail=3&datype=T&reptype=r&database=fpds&fiscal_year=2003&submit=GO
http://www.fedspending.org/fpds/devel/fpds.php?parent_id=372197&sortp=u&detail=3&datype=T&reptype=r&database=fpds&fiscal_year=2006&submit=GO

http://www.fedspending.org/fpds/devel/fpds.php?parent_id=372197&sortp=u&detail=3&datype=T&reptype=r&database=fpds&fiscal_year=2007&submit=GO
http://www.fedspending.org/fpds/devel/fpds.php?parent_id=372197&sortp=u&detail=3&datype=T&reptype=r&database=fpds&fiscal_year=2008&submit=GO

The links above no longer exist

Jim Wiegand is an independent wildlife biologist with a degree from the University of California, Berkeley. The views expressed in this editorial reflect the views of its author and do not necessarily reflect the views of East County Magazine. To submit an editorial for consideration, contact editor@eastcountymagazine.org.

Jim Wiegand – Wildlife Biologist & Corruption Expert

Lakehead CA

A call for science and accountability submitted November 29, 2022

America's green energy fraud has been going on for decades and as I have discovered, when tax dollars can be stolen, the DC corruption never sleeps.

New DC laws are being proposed that will give one of this world's most destructive industries, even less oversight and accountability than they already have. An industry that will continue to slaughter off millions, upon millions of protected birds, bats and raptors annually.

The last thing America needs is less oversight of the USFWS and the wind industry. Yet here we are, with new regulations being proposed by our corrupt USFWS. They now even want to destroy active and alternate nests, in eagle nesting territories near wind farms before turbines slaughter off the parents and sub-adults.

Without non-biased third-party monitoring, it's just the USFWS and the wind industry working behind our backs. This secret partnership has already hidden (1980-2022) approximately 2 billion bird and bat fatalities, which includes over a million raptors.

How do I know? I know what Science is and I've read over the contrived research put out by this industry and the Interior Department. Then I made credible adjustments for their many fatal flaws.

It's obvious both entities are working together because they've both produced incredibly fraudulent research. In addition, the USFWS has given the wind industry voluntary regulations

that require no science and the USFWS has been producing highly embellished eagle population statistics. Working together, both are hiding the wind industry's ongoing species annihilation.

With contrived modeling and a complete abandonment of reality, the USFWS claims there is a population of 316,708 bald eagles in the lower 48 states. A claim with an average of 6600 bald eagles are living in every state, when not one of our lower 48 states has 6600 eagles. California has one of America’s the largest bald eagle populations, with a population of less than 2000 bald eagles.

The USFWS has helped to hide the origin of over 66,000 eagle carcasses shipped to the Denver Repository and has also avoided any credible research that would shed light on this industry's horrific impact to species.

Since 1995 over 66,000 eagle carcasses have been secretly shipped off to the Denver Eagle Repository. About 3000 are shipped each year and their origin remains a green secret. Most collected come from wind farms.

I wonder if Maureen D. Foster, Chief of Staff, Office of the Assistant Secretary for Fish and Wildlife and Parks or Jerome Ford, Assistant Director—Migratory Birds Program, U.S. Fish and Wildlife Service are even aware of the network of dirtbags secretly shipping eagle carcasses to the Denver eagle repository from wind farms. If not, I will expect to hear back from them.

Here in Shasta County, CA, we easily have the highest density of bald eagles in the state and the total population including juveniles and sub-adults is about 150. Except for occasional migrants, many of California's 58 counties don't even have Bald eagles.

Below are CA Fish and Game numbers 2016. They report about 300 hundred bald eagles living in CA. Add the sub-adults and you might get another 150-200. Yet the Interior Department's numbers suggest that the Bald Eagle Population has grown by 10-20 times in size since 2016. But as I know, claiming a population of nearly 317,000 bald eagles is a calculated fraud.

Bald Eagle Breeding Territory Data for California, 1990-2016

Year	No. of Known Territories	No. of Territories Surveyed	No. of Territories Occupied	No. of Young Produced
1990	107	102	94	95
1991	111	105	90	92
1992	120	110	99	82
1993	127	116	102	103
1994	142	129	116	120
1995	146	129	105	89
1996	160	144	124	128
1997	171	160	142	140
1998	180	168	148	125
1999	188	180	151	138
2000	202	159	128	120
2001	211	147	128	116
2002	230	174	149	135
2003	252	199	175	150
2004	260	150	136	141
2005	265	117	111	96
2006	280	146	134	105
2007	296	164	147	69
2008	304	116	111	52
2009	310	121	105	48
2010	323	116	105	58
2011	337	121	112	103
2012	352	164	137	124
2013	355	97	89	85
2014	357	87	77	75
2015	366	99	90	87
2016	375	113	106	80

The Interior Department loves to use statistics and contrived modeling in their nonscientific research, so here is another statistic I have for them. There is a 100% probability that their latest bald eagle population numbers are fraudulent. There is also a 100% probability that the golden

eagle in California due to wind turbine fatalities, is an endangered species. A fact also being hidden with collusion and corruption.

Of course, we would actually have more many bald eagles in CA if the wind industry wasn't killing them off in the delta region near the Altamont and Solano County wind farms. The habitat is there and they've tried to establish nesting territories, but eagles trying to establish nesting territories are always killed off by turbines.

This history of nesting failures located near wind turbines is never clearly stated, but the evidence is there for anyone that wishes to read about it. But industry documents do their best to omit, hide or to not document these kinds of facts. Bald eagles are scavengers and once they discover that carcasses of other birds are falling to the ground around these turbines, they will be attracted by these carcasses and will also be killed. This is most likely to have happened to a pair of bald eagles that set up a home on Grizzly Island near the Shiloh wind turbines in 2011. This was sort of mentioned in Wind industry documents but reality was avoided.

Near the Hatchet Ridge wind Project in Shasta County are at least two abandoned Bald Eagle territories, with their nests falling apart. They were falsely claimed to have been occupied in the Fountain Wind EIR. None of the government wildlife agencies said a word, even though they were occupied before the wind farm became operational.

Nest 299, located approximately 2.9 miles east of the Fountain Wind Project.

"During eagle nest surveys conducted within a 10-mi radius of the Project area, 11 occupied bald eagle nests were documented, with the closest nests to the Project area located at Lake Margaret, approximately 4.7 km (2.9 mi) east of the Project, and along the Pit River approximately 6.8 km (4.2 mi) north of the Project."

This abandoned nest is located about 1 1/2 miles from the Hatchet Ridge turbines.

At Altamont recently……"No active golden eagle nests were documented during the 2020 raptor nest surveys conducted by ICF within the project site. **However, U.S. Geological Survey (USGS) found an active golden eagle nest on the project site in 2020, which subsequently was determined to have failed during a follow-up survey in June 2020."**

All this illustrates the hidden legacy of wind farms. Empty regional skies around wind farms and empty habitat that keeps on attracting migrants that also get killed.

Complicating this hidden carnage to eagles and other species from wind energy, wind farm leaseholders are required to immediately pick up wind turbine carcasses off their properties.

Then they are required to dispose of them by burning, burying them deeply, cooking them, and adequately composting them. If leaseholders disclose any of this to the public, they will be crucified from the nondisclosure conditions in their green energy contracts.

An honest and non-colluding USFWS could stop this fraud in a heartbeat

> 6.2.5 Disposal of Animal Carcasses. Owner agrees to take all reasonable measures to avoid attracting scavenging birds and other animals by ensuring all animal carcasses on the Property are immediately (to the extent permitted by applicable law) burned, buried, adequately and completely composted by covering with an adequate amount of earth or mulch, cooked or placed in enclosed containers with lids if such carcasses will be removed at a later time from the Property. Animal carcasses shall not be left in open fields or adjacent to buildings and shall not be left uncovered or exposed.

The wind industry in collusion with the Interior Department secretly ships thousands of eagles every year to the Denver Eagle Repository. The origin of these eagles is never disclosed but I know most of these eagles are coming in from wind farms where employees regularly search around the turbines for carcasses that are then put in freezers. America's Federal Take permit system is a complete fraud on the public because the USFWS secretly ships eagle carcasses from wind farms and nobody is required to disclose any of these clandestine activities to the public.

How did eagle carcass numbers jump from 800-900 in 1997 to over 3000 per year? Windmills being placed in eagle habitat all over America.

U.S. Fish & Wildlife Service

Fish & Wildlife News

November 1997

About 95 percent of orders received at the repository are for whole eagles, with an average of about 1,000 people applying for the 800 to 900 available birds each year. Requests are filled on a first-come, first-serve basis by date of application.

Eagles turned in to the repository typically have died of natural causes or fatal encounters with power lines, windmills, vehicles, or illegal shooters or trappers. The repository does not accept poisoned birds because of the hazard they pose to human health.

The typical dead eagle stays only three to five days at the repository before it is shipped out to the next applicant on the list.

1997 vs. 2021

80 times more in 2021

In 1997, wind power generation capacity of 1,579 MW produced 3,254,117 megawatthours (MWh) of electricity.[3] More than 99 percent of generation was by independent power producers, and nearly all of it was located in California. During 1998 and 1999, wind farm activity expanded into other States, motivated in part by financial and regulatory incentives and, in the case of Iowa and Minnesota, State mandates. Iowa, Minnesota, and Texas each had capacity additions exceeding 100 MW that came on line in 1999 (Table 1). During 1999, wind farm capacity that came on line consisted of state-of-the-art wind turbines manufactured primarily by

All so corrupt and so disgusting

The current population numbers are fake and were set up with back-room negotiations. Then using contrived methodologies, new Interior Department studies were rigged to produce data that would fit into this industry's green web of lies. In the lower 48 states there are not even 25% of the 316,708 bald eagles being reported by the USFS and yet the USFWS has currently allocated an annual take of 19,623 bald eagles.

Then there is the silence or lying by omission from Conservation groups and others, accepting blood money from this industry and all being handcuffed with nondisclosure agreements.

With honest research and accountability, many fake experts would be in prison and developers/leaseholders would be fined billions for their hidden ongoing slaughter to species.

Universities would be teaching students the truth about wind turbine impacts and the public would know how little net energy wind turbines are producing for America.

With accountability the annual harvest limit of bald eagles would be reduced to zero until credible population research was produced. With honest research and accountability, the Wind industry would not be able to hide their annual slaughter of America's eagles as they have for decades.

But sadly, staggering layers of fraud, collusion and rigging are protecting green profits and keeping all this hidden. This is a DC problem with both Republicans and Democrats in on this fraud.

I would love to be part of a Congressional wind industry hearing, that allows me to ask our sellout experts, scientific questions.

Jim Wiegand
Lakehead, CA

PUBLIC SUBMISSION

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Comment On: FWS-HQ-MB-2020-0023-1937
Permits for Incidental Take of Eagles and Eagle Nests

Document: FWS-HQ-MB-2020-0023-9310
Comment from FirstEnergy

Submitter Information

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Organization: FirstEnergy

General Comment

Please see attached document below.

Attachments

BGEPA_Genral_Take_Permit_Comments_12_28_2022_efile

Submitted via *Federal eRulemaking Portal*

December 28, 2022

U.S. Fish and Wildlife Service
MS: PRB/3W
5275 Leesburg Pike
Falls Church, VA 22041–3803

Re: Comments on the Department of the Interior Fish and Wildlife Service Proposed Rule for Permits for Incidental Take of Eagles and Eagle Nests Docket ID No. FWS-HQ-MB-2020-0023

FirstEnergy Corp. ("FirstEnergy") appreciates the opportunity to submit comments to the U.S. Fish and Wildlife Service ("USFWS" or "Service") on the proposed rule, *Permits for the Incidental Take of Eagles and Eagle Nests* (Proposed Rule or Proposal) 87 *Fed. Reg.* 59,598 (Sept. 30, 2022). The Service seeks comment on proposed revisions to the regulations authorizing the issuance of specific permits (§ 22.200) and general permits (§ 22.210) for eagle incidental take and nest take under the Bald and Golden Eagle Protection Act ("BGEPA"). *See* 16 U.S.C. §§ 668–668d. These proposed revisions include a general permit option for qualifying wind facilities (§ 22.250), power line infrastructure (§22.260), activities that may disturb breeding bald eagles (§ 22.280), and bald eagle nest take (§22.300). These proposed general permits are designed to simplify and expedite the permitting process for activities that have relatively consistent and low effects on eagles.

FirstEnergy Overview

FirstEnergy is a diversified energy company headquartered in Akron, Ohio. FirstEnergy's ten distribution companies form one of the nation's largest investor-owned electric systems, servicing customers in six states, including Maryland, New Jersey, Ohio, Pennsylvania, Virginia and West Virginia. The operating and transmission companies are the Potomac Edison Company, Ohio Edison Company, The Illuminating Company, Toledo Edison Company, Pennsylvania Electric Company, Metropolitan Edison Company, Pennsylvania Power Company, West Penn Power Company, Monongahela Power Company, Jersey Central Power and Light, American Transmission Systems, Inc., Mid-Atlantic Interstate Transmission, LLC, and Trans-Allegheny Interstate Line Company. Together, these companies provide the transmission and distribution of electricity serving approximately 6.1 million customers over a 65,000 square mile area. This electric service is provided through 269,000 miles of distribution lines and over 24,500 miles of transmission circuits. FirstEnergy is committed to providing its customers with safe, reliable, and cost-effective electricity. FirstEnergy's Environmental Policy provides for comprehensive environmental protection through compliance, environmental justice, stewardship, sustainability, and community engagement. As such, the Environmental Policy takes into the consideration of the protection of our ecological resources which includes the protection of the Bald and Golden Eagle populations within our footprint.

FirstEnergy is an active participant in helping the clean energy transition while maintaining a safe, resilient, and affordable electric system. Since 2014, FirstEnergy has invested billions into our electric system and has plans to invest $17 billion to strengthen the grid and enable the clean energy transition from 2021 to 2025. FirstEnergy has a long history of implementing strategies to minimize and mitigate the impact that this critical infrastructure has on eagles, migratory birds, and other wildlife. This can be read about in local publications around our territory. We've partnered with non-profits, education, research institutions, and government in our avian protection efforts. Over the last five years, we've completed more than 100 projects to protect eagles and other avian species. In Summer 2022, our New Jersey operations added protective equipment for bald eagles in Northern New Jersey.[1] We've also used innovative technologies, such as FirstEnergy's unmanned aerial vehicle (drone) group to aid in our avian protection efforts and have deployed a mobile application to report avian issues in real time.[2] Our efforts have also collaborated with the Electric Power Research Institute to develop break through research on the protection of avian and other species. Despite best efforts to reduce avian impacts, FirstEnergy's critical infrastructure can become the source of collisions and electrocutions resulting in the unintended incidental take of bald and golden eagles.

FirstEnergy General Comments

As a starting point, FirstEnergy supports and fully incorporates the comments submitted by both the Edison Electric Institute ("EEI") and the Avian Power Line Interaction Committee ("APLIC") on this proposed rule. In addition, FirstEnergy commends the Service for creating a streamlined and clear process provided in the proposed rule, and FirstEnergy supports the intent of the USFWS' proposal to make the permitting process more efficient and effective including the expedited permitting process for power lines. FirstEnergy also supports enhanced avian protections established in some of the general permit conditions; many of these protections are already in place at FirstEnergy. However, as we will discuss in detail below, some of the provisions are not possible for the company to achieve and, as such, make the proposed general permit unworkable.

FirstEnergy Specific Comments

We would like to emphasize two concerns that may or may not be explicitly expressed in the EEI and APLIC comments.

1. Explanation of Pre 2009 Baseline Conditions – Preamble, p. 59606

The statement in the preamble of the proposed rule stating, "pre-2009 infrastructure is considered baseline," needs further definition or clarification. The full language in the preamble is:

[1] https://www.feretirees.com/news/safe-in-the-sky/
[2] https://www.feretirees.com/news/penelec-project-protects-eagles/

> "Under the current PEIS, off-setting compensatory mitigation is required only for golden eagle mortality caused by infrastructure installed on or after the 2009 baseline conditions. Mortality on **pre-2009 infrastructure is considered part of the baseline** and is not applied to EMU take limits. With the wide availability of the guidelines developed by the Avian Power Line Interaction Committee (*Suggested Practices for Avian Protection on Power Lines* (2006) and *Reducing Avian Collisions with Power Lines* (2012)), the Service estimates that power-line infrastructure installed after 2009 takes relatively few eagles."

Based on our review of the proposed rule, the Service is stating that any infrastructure installed after 2009 is counted in the total permittee's avian safe infrastructure, but only if, the utility has an Avian Protection Plan ("APP") that includes avian safe pole designs in its engineering. However, APLIC guidelines are not mandatory. Therefore, there are likely utilities that do not have avian protection in their post-2009 pole design standards, hence we interpret this to mean that infrastructure installed after 2009 would need to be counted as non-avian safe infrastructure. FirstEnergy requests further clarification on the proposed rule's accounting of non-avian safe infrastructure.

2. Proactive Retrofit of One-tenth of Infrastructure During Duration of General Permit – Subpart E §22.260(d)(3)

The estimates by the Service, as illustrated in Table 2 (p. 59611) indicates that *if no retrofit strategy exists, then $1,100,000 should be the cost to make 1/10 of the infrastructure electrocution-safe over the duration of a general permit.* This estimate does not coincide with the reality of FirstEnergy's operations. As noted above in the FirstEnergy Overview, we have ten operating companies that own a combined distribution infrastructure of 3.9 million poles. To retrofit one-tenth of this inventory with electrocution safeguards means addressing 390,000 poles in a five-year period, or 78,000 per year. Without even discussing the exorbitant cost associated with addressing this many poles, the sheer volume of retrofitting 300 poles a day in a 260-day work year cannot be accomplished.

Many utilities across the nation are already spending billions of dollars on upgrades to the transmission and distribution infrastructures to add resiliency to withstand extreme weather events, add adaptability, increase reliability, and to effortlessly connect new, or switch between, renewable generation sources. Because of this modernization effort of the existing grid infrastructure, the addition of tens of millions of dollars per year and large amounts of human resources make the retrofits unattainable. FirstEnergy employs approximately 2,500 line workers across our territory. Even if each project took one person and one day, it would devote approximately 12% of our line workers team to avian retrofits effort which puts grid reliability and safety significantly at risk. In reality, many projects would be more complicated and require multiple personnel per job thereby further exasperating our resources.

While FirstEnergy understands the Services' intent – to make the infrastructure eagle safe over a 50-year period (1/10 of infrastructure for each 5-year permit for ten consecutive permits), the proposed "once size fits all" standard of 1/10th of the infrastructure does not work since the infrastructure inventory of any given utility in the country varies so dramatically. As expressed in APLIC's comments, and described below, there are clear alternatives to the proposed 1/10th rule that are workable and that would allow for greater participation in a voluntary permit program.

Some alternatives that the Service could consider which would continue the positive trends relating to the protection of eagles while also allowing for continued grid modernization efforts are as follows:

- $1,100,000 dollars of proactive measures as retrofits or new builds per permit (or $220,000 per year) or 1/10 of inventory, whichever, is less; or
- Adherence to a company designed avian protection plan that is reviewed by USFWS as part of the general permit process; or
- Identify specific areas within a utility's footprint that are more prone to eagle activity and focus agreed upon eagle protections there; or
- Submittal of an avian protection response plan when a take does occur.

As discussed in APLIC's comments, there are many other alternatives that would continue the eagle protections that are in place and not create unworkable requirements that may cause many, if not most, utilities to forego the permitting program. On this point FirstEnergy and USFWS have shared goals; a general permit that further protects Golden and Bald Eagles by requiring attainable measures.

Conclusion

FirstEnergy appreciates the opportunity to provide comments on this proposal and requests that you carefully consider these comments, as well as those from EEI and APLIC. If you have any questions, please contact Amy Ruszala at (330) 714-8155, or Randy Cain at (724) 838-6066 of my staff.

Sincerely,

Dave Frederick
Director, Environmental

PUBLIC SUBMISSION

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Eagle Permits; Incidental Take

Comment On: FWS-HQ-MB-2020-0023-1937
Permits for Incidental Take of Eagles and Eagle Nests

Document: FWS-HQ-MB-2020-0023-9311
Comment from Roisum, Nancy

Submitter Information

Name: Nancy Roisum
Address:
Salisbury, MD,
Email: nroisum@gmail.com

General Comment

See attached file(s)

Attachments

ltr 122422 USFWS

December 28, 2022

Re: Comment on Proposed Rule 87FR59598
Docket # FWS-HQ-MB-2020-0023

Dear Sir/Madam:

I am a 69-year-old US Citizen residing in the State of Maryland and retired from Arlington County, VA government where I served as a Construction Project Manager for 18 years and before that, a Park Naturalist for 12 years. Thank you for the opportunity to provide this letter of comment on the above-referenced revisions to regulations concerning permits for incidental eagle take and eagle nest take under the Bald Eagle and Golden Eagle Protection Act.

These comments will be limited to my area of knowledge and experience in natural history and serving local government. A list of references used is at the end of this letter.

I am grateful for the United States Fish and Wildlife Service's decades-long efforts to protect Bald and Golden Eagles, and hope the safeguards established in the Bald and Golden Protection Act and the Migratory Bird Treaty are preserved. The rebound of the eagle and other raptor populations was through the combined efforts of the EPA (Toxic Substances Control and Clean Water Acts.), the USFWS and other US government and State agencies, as well as thousands of US citizens. It is extremely important to continue and strengthen, not weaken these efforts. We should not, for the sake of the energy industry, risk reversing the recent expansion of the Bald Eagle population, and not further the dangerous decline of Golden Eagle populations. Our National Symbol is strong but like our democracy, vulnerable.

Eagles and other raptors, are highly specialized creatures who have taken about 40 million years to evolve. It took only about 40 years for human interference to drive their population to near extinction. During that population reduction, the gene pool of eagles was severely reduced. So now, the "robust" population we have is only in numbers and its inherited ability to withstand new and repeated threats is not so robust. So, I question the basis for proposing to ease the permit process allowing kills incidental to energy production. Such action does not reflect the Service's mission of conservation of wild creatures such as these highly vulnerable apex avian predators.

The methodologies used for USFWS population and habitat monitoring of eagles appear inconsistent and unreliable, and reflect, most likely, inadequate Agency funding. Surveys monitoring bald eagles are conducted only once every 6-years and are sadly due to end in 2027. The proposed 30-year take/kill permit period is therefore inappropriate and should be greatly shortened. The official population and nest counts are extrapolated from partial aerial surveys and volunteer (E-bird) surveys. Additionally, the Service does not conduct a survey of nationwide roosting sites of immature eagles. Such roosting sites are critical for eagles, who take 4-5 years to reach reproductive maturity. These roosting sites should be located and protected. Furthermore, mortality data from both contacting wind turbine blades and power line electrocution are voluntary and unreliable. Alas, there is no mandatory requirement nor standards to report take, by permittees. These inadequacies should be addressed before any decisions are made to make it easier for industries to get permits to kill eagles.

It appears inevitable that substantial off-shore and land-based wind farms are in the offing. Their effects on many migratory species could be significant. Accurate documentation of takes (kills) is crucial and will be helpful in managing production of energy without destruction of too many birds. Off shore Wind Turbines and/or their associated substation platforms could be fitted with accessories to count fallen bird carcasses and/or photo-document impacts with wildlife. This should be mandatory and kill counts monitored and reported promptly. Studies suggest painting one turbine blade black (the other white) may help reduce collisions. During migratory season, turbines could be stopped from moving during the day when most eagles are migrating. Oversight of such responses and monitoring should be managed by the USFWS and paid for out of the permit fees.

Besides just benefitting eagles, appropriate response and mitigation efforts may be helpful to other species affected by energy production industries.

Additionally, all entities generating incidental take of birds should be responsible for prompt veterinary care and rehabilitation of injured eagles, and proper handling of the carcasses of mortally wounded eagles.

I believe permit costs should be commensurate with the costs of eagle conservation. Due to the current inadequacies in population and take data, reduction in permit costs at this time seems unwise. Eagle conservation responsibilities of the USFWS are too important and current Eagle population, genetic, and habitat dynamics are too unknown to allow justification to implement changes to ease and lessen the take permit requirements and fees.

In order to alleviate these concerns and develop a knowledge base that would give decision makers the necessary information to allow effective wildlife management for eagles, I believe the Service should halt this current permit-easing effort and instead, be focusing on efforts to improve permittees' data and mitigation actions. Agency budget and permit fees must be sufficient to develop better eagle research to best monitor the status of eagles in the future decades well beyond the lifespan of current energy technology.

I am skeptical at this time, of efforts to minimize regulatory intervention and permit costs for entities claiming to *not* have "significant take incidence". The optimum (most cost-effective) siting of wind farms and electricity transmission/distribution structures typically interferes with the foraging and migration activities and roosting and nesting habitat of eagles. Eagles cannot adjust their instinctual natural behavior to avoid this conflict and thereby are injured, killed, or reproduction and viability of chicks is reduced. However, I feel that if there is solid evidence that local Eagle population numbers would not be affected, then permitting should be adjusted accordingly. For instance, transmission and distribution lines proven to be safely outside the habitat of any eagles might be exempted, with periodic review.

Furthermore, in areas where eagles are currently absent, no easing of the regulatory environment should be allowed and such areas should be targeted to allow eagle range expansion. In other words, because the eagle may be locally extinct, does not mean it does not have the right to repopulate its ancestral or potential habitat. As an example, in 1982 there was only one remaining bald eagle nest in the entire State of New Jersey. Now after substantial conservation efforts, the population has increased but New Jersey still has the Bald Eagle's official status listed as Endangered during the breeding season and Threatened for the non-breeding season. USFWS and energy industry should

respect the local protection status of eagles in New Jersey and other states where the birds remain on protective lists. Permits should reflect this and be reviewed when the local status changes.

I believe the Bald Eagle's recent removal from the national endangered species list and the Golden Eagle's current population decline warrant stringent permit regulations, and increased enforcement. In addition, there should be more coordinated and thorough monitoring of all phases and aspects of the Bald and Golden Eagle's biology. We have a lot to learn and they need us to make informed decisions about their lives.

There is a saying, "One man's trash is another man's treasure." Each eagle is a treasure-from its value to the already-reduced eagle gene pool, to its role in the ecosystem, its spiritual meaning to Native Peoples, and as our national symbol of freedom. I urge the USFWS' actions not to lessen the long-term value of eagles, by lessening short-term costs for the energy industry. The Bald Eagle, our national treasure, must never be considered "another man's trash."

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Sincerely,

Nancy Roisum

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Eagle Permits; Incidental Take

Comment On: FWS-HQ-MB-2020-0023-1937
Permits for Incidental Take of Eagles and Eagle Nests

Document: FWS-HQ-MB-2020-0023-9312
Comment from EagleWatch, Inc. dba National Eagle Center

Submitter Information

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Organization: EagleWatch, Inc. dba National Eagle Center

General Comment

Submitted by:
National Eagle Center
50 Pembroke Avenue South
Wabasha, MN 55981

Attachments

National Eagle Center Rule Change_Comment Letter_28 Dec 22

—NATIONAL—
EAGLE
— CENTER —

28 December 2022

The Honorable Shannon Estenoz
Assistant Secretary for Fish and Wildlife and Parks
1849 C Street NW
Washington D.C. 20240

Dear Assistant Secretary Estenoz,

The National Eagle Center (the Center), a nonprofit organization that is dedicated to building and sustaining *a world where the iconic power and presence of eagles is known, respected, protected, and advocated for* shares the following comments in response to the United States Fish and Wildlife Service's (the Service) request for comments on proposed rule changes for Docket No. FWS-HQ-MB-2020-0023, Permits for Incidental Take of Eagles and Eagle Nests dated 30 September 2022.

It is the understanding of our organization that the proposed rule changes are intended to 1.) standardize an approach to permitting through general permits - devised to "authorize incidental take by activities, consistent with the preservation standard, that occur frequently enough for the Service to have developed a standardized approach to permitting"; and 2.) "Includes revised provisions for processing specific permits." And, while the Center appreciates the need to simplify provisions for what are often considered expensive and extensive processes, we also seek assurance that the great strides that have been achieved in the conservation success story that is the eagle on the North American continent are not undermined.

The National Eagle Center maintains the responsibility for the care and protection of live eagles that cannot be returned to the wild and must live their lives in human care. Our raptors have been irrevocably harmed by interactions with humans, thus we are obligated to share their stories and remind our audiences eagles are a conservation success story but that many threats remain. Those include, but are

we are obligated to share their stories and remind our audiences eagles are a conservation success story but that many threats remain. Those include, but are not limited to, collision with wind turbines and solar panels, lead poisoning, electrocution, climate change, habitat destruction, nest disruption, and other human-based interventions. Concurrently, the Center shares the stories and inspiration of our national symbol and its impacts on the lives of thousands of veterans who have served this symbol of freedom and democracy; Indigenous Peoples who view the eagle as a sacred brother to their communities; and support individuals that depend on the inspiration of survival and strength that eagles provide.

Our overall perspective on the proposed changes to Docket No. FWS-Q-MB-2020-0023 is that the "simplified" regulatory process offers much less attention to the cultural/spiritual significance and environmental protection of eagles. And that greater flexibility is being afforded to energy-based (especially wind turbine) and developmental interests. On the former issue, we are aware that specific conversations have been held with Native groups but that – in the updated regulations - review and potential influence have been downgraded within the "special permitting" process. We strongly believe that the connectivity of Native interests in any take of their "eagle brothers" should be considered in any and all individual permitting activities.

Regarding leaning into energy-based and developmental interests, the Center is most certainly not opposed to the creation of alternative sources of energy. And we clearly understand the protections that certain alternative forms provide for climate protection. However, we also cannot discount the impacts of habitat destruction and removal of nests to accommodate those developments. A "take of three to four birds" equating to 35 or more is a high price to pay. We do, on the other hand, applaud the efforts of the Service requiring ongoing improvements to electrical poles to reduce electrocution occurrences.

About "Finding No Practicable Alternative," the Center is concerned that the Service is moving away from non-disturbance and solely toward "acceptable" EMU take numbers. We ask that the Service seek every means possible to avoid nest disturbance as it is at the core of eagle population sustainability and survival.

As the Service is aware, eagles are an apex species and a key indicator of the health and sustainability of our environment. On the issue of "Net Benefit to Eagles" and "Compensatory Mitigation", the language now requires explanation of "net benefit" from the applicant. This is a significant change from the current

of permits that could be issued without clear benefit to both native North American eagle populations as well as the ability of an applicant's organization to analyze and self-report. We must ask clarification on the details of what the "overall net benefit" entails as well as additional assurance that self-reporting will be effectively managed.

As an organization that believes that all eagle species (67 across the globe) are important, we request that the Service be extremely careful and thoughtful about treating the Bald Eagle like it is more "expendable" than the Golden Eagle. While we are aware that the Bald Eagle's success is based on its habits and adaptability as a species, that success should not be simply discounted. We adamantly favor protection of Golden Eagles as their adaptability is more challenged, however, what appears to be "acceptable number" of takes for one species over another requires clear and ongoing attention and consideration. It is the primary symbol of our country's conservation endeavors and illustrates our capacity to be successful. Its success makes it more essential as a species to guide our efforts, not less.

You will find in our response as many culturally responsive comments as scientific ones. We are an educational institution sharing the importance of the symbolic, scientific, cultural, historic, and artistic importance of eagles to visitors and audiences from more than 120 countries and all 50 states and hundreds of thousands of online partners every year. Eagles are a symbol of strength, perseverance, freedom, and environmental stewardship for our country and the spiritual brothers of our country's Indigenous Peoples – please take into consideration the importance of this iconic species as a higher priority than simplification of the permitting processes – their ongoing survival depends on the Service's leadership and commitment.

Thank you for your consideration of our concerns and comments in this process. We appreciate the opportunity to respond.

Most sincerely,

Meg Gammage-Tucker, PhD, CFRE
Chief Executive Officer

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Comment On: FWS-HQ-MB-2020-0023-1937
Permits for Incidental Take of Eagles and Eagle Nests

Document: FWS-HQ-MB-2020-0023-9313
Comment from Shakopee Mdewakanton Sioux Community

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Government Agency Type: Tribal
Government Agency: Shakopee Mdewakanton Sioux Community

General Comment

Attached are written comments submitted on behalf of the Shakopee Mdewakanton Sioux Community.

Attachments

SMSC Comments On Eagle Take Proposed Rule

Shakopee Mdewakanton Sioux Community

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December 28, 2022

Public Comments Processing
Attn: FWS-HQ-MB-2020-0023
U.S. Fish and Wildlife Service
MS: PRB/3W
5275 Leesburg Pike
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VIA ELECTRONIC SUBMISSION

Re: Shakopee Mdewakanton Sioux Community: Written Comments on Proposed Rule Regarding Permits for the Incidental Take of Eagles and Eagle Nests

On behalf of the Shakopee Mdewakanton Sioux Community (the "SMSC"), I submit the following written comments on the Proposed Rule regarding Permits for the Incidental Take of Eagles and Eagle Nests, FWS-HW-MB-2020-0023. The SMSC is a federally-recognized Indian tribe located in Prior Lake, Minnesota. These comments describe our concerns with the process utilized by the U.S. Fish and Wildlife Service ("USFWS") to formulate the Proposed Rule and our concerns with the loosening of regulatory requirements for the taking of eagles and eagle nests.

The SMSC is concerned with the manner in which the USFWS developed the Proposed Rule. Providing Indian tribes with an opportunity to participate in regular and meaningful consultation is an essential component of a productive Federal-Tribal relationship. To be meaningful, tribal consultation must be timely and rigorous. Tribal consultation requires more than an invitation to participate in notice and comment rulemaking through a form letter to tribal leaders. Tribal consultation must provide tribes with an opportunity to shape the agenda of rulemaking.

In this instance, the USFWS unilaterally set the agenda and drafted proposed regulations without asking Indian tribes if they have existing concerns related to the incidental take of eagles and eagle nests. The USFWS is forging ahead with self-serving regulatory changes that lessen permitting requirements and broaden the instances in which the taking of eagles and eagle nests will be allowed. The USFWS thinks that these regulatory changes will result in regulatory efficiencies. However, the SMSC believes that any purported efficiencies will be far outweighed by the detrimental impacts these changes will have on eagles and eagle nests.

The SMSC has concerns with the substantive elements of the Proposed Rule. The USFWS proposes two significant changes to the specific permit process. First, the USFWS removes third party monitoring and instead proposes to rely on permittees self-reporting eagle takings. Specifically, USFWS "propose[s] that project proponents must train relevant employees to recognize and report eagle take as part of their regular duties. This monitoring requirement includes visually scanning for injured eagles and eagle remains during inspections, maintenance, repair, and vegetation management at and around project infrastructure." The SMSC opposes this self-reporting requirement and believes that it will lead to the taking of eagles and eagle nests to go unreported or underreported. Secondly, the USFWS eliminates the requirement for five-year reviews of specific permits. The Proposed Rule instead requires the USFWS to recalculate authorized take limitations only if the permittee requests an amendment to the permit. Again, this regulatory structure disincentivizes the accurate reporting of eagle and eagle nest takings. Simply put, the proposed regulatory structure places an inordinate amount of faith in permittees to monitor permit compliance. We believe that the USFWS must be directly involved in monitoring permit compliance.

The Proposed Rule also creates general permits for four types of activities including wind energy projects, power line infrastructure, activities that disturb bald eagles, and the taking of bald eagle nests. The SMSC opposes the general permit system in its current form. The USFWS once again shifts key regulatory duties away from itself and onto prospective permittees. The general permit system proposed by USFWS replaces agency review and oversight with reliance on self-certification and self-reporting by prospective permittees. As discussed above, the SMSC believes the USFWS must take an active role in permit review and monitoring.

The SMSC is not opposed to the development of renewable energy resources provided that such development is done in a responsible manner that adequately protects eagles and eagle nests. However, we feel that the continual and rapid liberalization of eagle and eagle nest take regulations by USFWS is not being done in a responsible manner. This is particularly true when such regulatory changes are made without undergoing rigorous tribal consultation.

Sincerely,

Keith B. Anderson
Chairman

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Eagle Permits; Incidental Take

Comment On: FWS-HQ-MB-2020-0023-1937
Permits for Incidental Take of Eagles and Eagle Nests

Document: FWS-HQ-MB-2020-0023-9314
Comment from Edison Electric Institute

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Organization: Edison Electric Institute

General Comment

See attached file(s)

Attachments

BGEPA_Comments_122922_FINAL

Edison Electric INSTITUTE

Power by Association℠

December 29, 2022

Mr. Jerome Ford
Assistant Director, Migratory Birds
U.S. Fish and Wildlife Service
275 Leesburg Pike
Falls Church, VA 22041

RE: Proposed Rule; Permits for Incidental Take of Eagles and Eagle Nests
Docket No. FWS-HQ-MB-2020-0023-1937

[Submitted Electronically]

Dear Assistant Director Ford:

The Edison Electric Institute (EEI) appreciates the opportunity to submit comments to the U.S. Fish and Wildlife Service (FWS or Service) on the proposed rule, *Permits for the Incidental Take of Eagles and Eagle Nests* (Proposed Rule or Proposal) 87 *Fed. Reg.* 59,598 (Sept. 30, 2022).[1] The Service seeks comment on proposed revisions to the regulations authorizing the issuance of permits[2] for eagle incidental take and nest take under the Bald and Golden Eagle Protection Act (BGEPA). *See* 16 U.S.C. §§ 668–668d. These proposed revisions include a general permit option for qualifying wind facilities, power line infrastructure, activities that may disturb breeding bald eagles, and bald eagle nest take.

EEI is the association that represents all U.S. investor-owned electric companies. EEI members provide electricity for more than 235 million Americans and operate in all 50 states and the District of Columbia. The electric power industry supports more than seven million jobs in communities across the United States. EEI members invest more than $120 billion annually to make the energy grid smarter, cleaner, more dynamic, more flexible, and more secure; to diversify the nation's energy mix; and to integrate new technologies that benefit both customers and the environment. EEI members are united in their commitment to get the energy they provide as clean as they can, as fast as they can, while keeping reliability and affordability front and center, as always, for the customers and communities they serve. Across the nation, EEI members are leading a clean energy transformation, making significant progress to reduce greenhouse gas (GHG) emissions in our sector, while also creating good-paying jobs and an equitable clean energy future.

EEI members operate, build, and deploy critical infrastructure—such as transmission and distribution power lines and power generation facilities, including wind energy facilities. Also,

[1] The Service extended the deadline for comments by a month to December 29, 2022. 87 *Fed. Reg.* 72,957 (Nov. 28, 2022).

[2] 40 C.F.R. Part 22.

EEI members have a long history of implementing strategies to minimize and mitigate the impact that this critical infrastructure has on bald and golden eagles, migratory birds, and other wildlife.

EEI members have experienced difficulties obtaining eagle incidental take permits and have identified implementation issues with the 2016 rule that have contributed to hesitancy in applying for permits and participating in the program. However, EEI members recognize that an efficient, effective, and balanced permitting program (i.e., a general permit program) would provide certainty while furthering the conservation goals of BGEPA.

EEI's comments describe electric companies' clean energy transformation, explain EEI members' efforts to reduce and mitigate take of bald and golden eagles, request finalization of the removal of the third-party monitoring requirement, and advocate for clarifications to the Service's proposed general permits for power line infrastructure and wind facilities. Specifically, for the proposed general permits for powerline infrastructure, the Service should clarify and modify the requirements for reactive and proactive retrofitting; clarify how permittees must incorporate information on eagles into siting and design considerations for new construction and reconstruction; expand the universe of mitigation options beyond power pole retrofitting; and clarify the requirements of the eagle-shooting response strategy. For the proposed general permits for wind facilities, the Service should clarify which permit covers generation ties; provide a process for general permittees required to change to specific permits to re-enter the general permit program; and establish take limits for bald eagles that are proportionate to the bald eagle population.

EEI members look forward to working with the Service as it makes regulatory improvements to the voluntary eagle permitting program that will facilitate the application and timely issuance of incidental take permits under BGEPA.

Questions on these comments may be directed to Sarah Ball (202-508-5208); Riaz Mohammed (202-508-5036); or Patrick McGuire (202-508-5167).

Sincerely,

M. Patrick McGuire
Counsel, Clean Energy & Infrastructure Deployment

Cc: Martha Willams, Director, U.S. Fish and Wildlife Service
Shannon Estenoz, Assistant Secretary for Fish and Wildlife and Parks, U.S. Fish and Wildlife Service

COMMENTS FROM THE EDISON ELECTRIC INSTITUTE ON THE FISH AND WILDLIFE SERVICE'S PROPOSED RULE, PERMITS FOR INCIDENTAL TAKE OF EAGLES AND EAGLE NESTS

FWS-HQ-MB-2020-0023

Comments due: December 29, 2022

The Edison Electric Institute (EEI) appreciates the opportunity to submit comments to the U.S. Fish and Wildlife Service (FWS or Service) on the proposed rule, *Permits for the Incidental Take of Eagles and Eagle Nests* (Proposed Rule or Proposal) 87 *Fed. Reg.* 59,598 (Sept. 30, 2022).[1] The Service seeks comment on proposed revisions to the regulations authorizing the issuance of permits[2] for eagle incidental take and nest take under the Bald and Golden Eagle Protection Act (BGEPA). *See* 16 U.S.C. §§ 668–668d. These proposed revisions include a general permit option for qualifying wind facilities, power line infrastructure, activities that may disturb breeding bald eagles, and bald eagle nest take. These proposed general permits are designed to simplify and expedite the permitting process for activities that have relatively consistent and minimal effects on eagles. The Service also proposed to remove the third-party monitoring requirement from eagle incidental take permits.

BGEPA prohibits take of bald and golden eagles except pursuant to Federal regulations. The Service defines "take" as "pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, destroy, molest, or disturb." 50 C.F.R. § 22.3. BGEPA authorizes the Secretary of the Interior to issue regulations to permit the taking of eagles for various purposes, provided the taking is

[1] The Service extended the deadline for comments by a month to December 29, 2022. 87 *Fed. Reg.* 72,957 (Nov. 28, 2022).

[2] 40 C.F.R. Part 22.

compatible with the preservation of the bald eagle or the golden eagle. *See* 16 U.S.C § 668a. The Service first established regulations authorizing incidental take of bald and golden eagles in 2009 and revised these regulations in 2016.

Recognizing certain deficiencies in the eagle incidental take permitting program under the 2016 regulations, last year, the Service sought input through an advance notice of proposed rulemaking (ANPR) on what further changes could be made to the program to make the permitting process more efficient and effective. 86 *Fed. Reg.* 51,094 (Sept. 14, 2021). As stated above, the Service now proposes a new rule that includes general permits for power lines and wind energy facilities designed to simplify and expedite the permitting process, as well as incentivize more entities obtaining BGEPA permits with the commensurate conservation benefit.

EEI members operate, build, and deploy critical infrastructure—such as transmission and distribution power lines and power generation facilities, including wind energy facilities. Further, the capacity of the existing grid must increase by as much as 60 percent by 2030, and it may need to triple in size by 2050 to meet the growing demand for clean electricity to support a carbon-free economy.[3] EEI members have a long history of implementing strategies to minimize and mitigate the impact that this critical infrastructure has on bald and golden eagles, migratory birds, and other wildlife. For more than 30 years, EEI members have collaborated with both environmental non-profit organizations and the Service to develop and implement avian

[3] *See* Eric Larson et al., Net-Zero America by 2050: Potential Pathways, Infrastructure, and Impacts, Final Report Summary, at 76 (Princeton University, December 15Oct. 29, 20210), https://netzeroamerica.princeton.edu/img/Princeton%20NZA%20FINAL%20REPORT%20SUMMARY%20(29Oct2021).pdf.

protection practices to reduce the impact of electric transmission and distribution wires on avian species and other wildlife, fund innovative avian protection research, and partner with nonprofit and governmental organizations to support conservation efforts through publications and workshops outlining the aforementioned practices. Similarly, the wind energy industry voluntarily implements the Land Based Wind Energy Guidelines (WEGs), which were developed in 2012 based on the consensus recommendations of a multi-stakeholder Federal Advisory Committee, for the express purpose of reducing impacts to avian species and other wildlife associated with the siting and operation of wind turbines.[4] The 2012 WEGs replaced interim voluntary guidance published by the Service in 2003.[5] Despite best efforts to reduce avian impacts, EEI members' critical infrastructure can become the source of collisions and electrocutions resulting in incidental take of bald and golden eagles.

Accordingly, EEI members have a compelling interest in the Proposed Rule and in the codification of a balanced, efficient, and effective permitting program authorizing the incidental take of bald and golden eagles that provides certainty for EEI members and meets the conservation goals of BGEPA.

I. Introduction And Executive Summary.

EEI is the association that represents all U.S. investor-owned electric companies. EEI members provide electricity for more than 235 million Americans and operate in all 50 states and the District of Columbia. The electric power industry supports more than seven million jobs in

[4] *See* U.S. Fish and Wildlife Serv., Land Based Wind Energy Guidelines (Mar. 23, 2012), https://www.fws.gov/ecological-services/es-library/pdfs/WEG_final.pdf.

[5] *See id.* at iv.

communities across the United States. EEI members invest more than $120 billion annually to make the energy grid smarter, cleaner, more dynamic, more flexible, and more secure; to diversify the nation's energy mix; and to integrate new technologies that benefit both customers and the environment. EEI members are united in their commitment to get the energy they provide as clean as they can, as fast as they can, while keeping reliability and affordability front and center, as always, for the customers and communities they serve. Across the nation, EEI members are leading a clean energy transformation, making significant progress to reduce greenhouse gas (GHG) emissions in our sector, while also creating good-paying jobs and an equitable clean energy future.

EEI members have experienced difficulties obtaining eagle incidental take permits under the 2016 rule and have identified implementation issues that have contributed to hesitancy in applying for permits and participating in the program. However, EEI members recognize that an efficient, effective, and balanced permitting program (i.e., a general permit program) would provide certainty while furthering the conservation goals of BGEPA.

EEI's comments describe electric companies' clean energy transformation, explain EEI members' efforts to reduce and mitigate take of bald and golden eagles, request finalization of the removal of the third-party monitoring requirement, and advocate for clarifications to the Service's proposed general permits for power line infrastructure and wind facilities. Specifically, for the proposed general permits for powerline infrastructure, the Service should clarify and modify the requirements for reactive and proactive retrofitting, clarify how permittees must incorporate information on eagles into siting and design considerations for new construction and

reconstruction, expand the universe of mitigation options beyond power pole retrofitting, and clarify the requirements of the eagle-shooting response strategy. For the proposed general permits for wind facilities, the Service should clarify which permit covers generation ties, provide a process for general permittees required to change to specific permits to re-enter the general permit program, and establish take limits for bald eagles that are proportionate to the bald eagle population. With these targeted changes, the Services can finalize an effective and efficient permitting program.

EEI members look forward to working with the Service as it makes regulatory improvements to the voluntary eagle permitting program that will facilitate the application and timely issuance of incidental take permits under BGEPA.

II. Electric Companies Continue To Lead The Clean Energy Transformation.

EEI members are in the middle of a profound, long-term transformation in how electricity is generated, transmitted, and used. This transformation is being driven by a wide range of factors, including relatively lower prices for natural gas, particularly as compared to historic high prices; renewable energy resources; energy efficiency and demand-side management; technological improvements; changing customer, investor, and owner expectations; federal and state regulations and policies; and the increasing use of distributed energy resources. EEI members are well-positioned to continue to lead the nation's clean energy transformation. With the right policies and technologies, a 100 percent clean energy future can be more than a goal, it can be a reality. Across the industry, companies are investing in a broad range of affordable, carbon-free technologies and approaches with the goal of finding the most cost-effective ways to deliver resilient clean energy.

The mix of resources used to generate electricity in the United States has changed dramatically over the last decade and is increasingly cleaner. 2016 marked the first year that natural gas exceeded coal as the main source of electricity generation in the United States. In 2021, natural gas powered about 38 percent of the country's electricity, compared to coal-fired generation at about 22 percent.[6] Renewables[7] generated approximately 21 percent of total generation.[8] In total, approximately 40 percent of America's electricity came from clean carbon-free resources in 2021, including nuclear energy, hydropower, solar, and wind.[9]

Energy storage is a key asset in helping the grid integrate increasing amounts of renewables and offering resilience and reliability. Electric companies are the largest users and operators of the approximately 25 gigawatts (GW) of operational storage in the country—representing 96 percent of active energy storage projects.[10]

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[6] *See* Energy Information Administration (EIA), *Electric Power Monthly: with Data for December 2021* 12 (Feb. 2022), https://www.eia.gov/electricity/monthly/current_month/february2022.pdf.

[7] Renewables here are defined as wind, hydroelectric, solar, biomass, and geothermal energy.

[8] *See* n.6, *supra*.

[9] *See id.*

[10] *See* EEI, Harnessing the Potential of Energy Storage (June 2021), https://www.eei.org/-/media/Project/EEI/Documents/Issues-and-Policy/Energy-Storage/Harnessing_Energy_Storage_Factsheet.pdf?la=en&hash=F1AB8CC768C880975C5AD28DA798B2AAF01DA2FF.

Renewable energy deployments will continue. By 2025, EIA projects approximately 125 GW of renewables capacity will be online.[11] Further, EIA projects that in the United States the share of renewables in the electricity generation mix will more than double by 2050.[12] EIA projects that wind will continue to be responsible for most of the growth in renewables generation through 2024, accounting for more than two-thirds of those increases in electricity generation during that period, and that solar will dominate deployments thereinafter until 2050.[13]

These changes have profoundly decreased the sector's carbon dioxide (CO_2) emissions, the primary greenhouse gas emissions associated with electricity production. Preliminary full-year estimates are that electric power sector emissions were 36 percent below 2005 levels as of the end of 2021, as low as they were in 1984.[14] These reductions will continue. Fifty EEI members

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[11] *See* EIA, Annual Energy Outlook 2022: Reference Case Projections Tables – Table 16. Renewable Energy Generating Capacity and Generation (Mar. 3, 2022), https://www.eia.gov/outlooks/aeo/data/browser/#/?id=16-AEO2022&cases=ref2022&sourcekey=0.

[12] *See* EIA, Annual Energy Outlook 2022: With Projections To 2050 – Narrative 17 (Mar. 3, 2022), https://www.eia.gov/outlooks/aeo/pdf/AEO2022_Narrative.pdf. EIA estimates are intentionally conservative, focusing on policies currently on the books and not other potential drivers of increased renewable energy deployment, including a suite of clean energy tax credits currently being considered by Congress. These credits will drive reductions in the costs of a range of clean energy sources, increasing both deployment and emissions reductions relative to the EIA base case. *See, e.g.*, Michael Greenstone, et al., Assessing the Costs and Benefits of Clean Electricity Tax Credits, Build Back Better Act Policy Memo, Energy Policy Institute, University of Chicago, and Rhodium Group (Feb. 9, 2022), https://rhg.com/research/assessing-the-costs-and-benefits-of-clean-electricity-tax-credits/#:~:text=Building%20on%20previous%20modeling%20conducted,a%20scenario%20without%20these%20policies.

[13] *See id*.

[14] *See* EIA, Monthly Energy Review, Table 11.6—Electric Power Sector (Mar. 29, 2022), https://www.eia.gov/totalenergy/data/monthly/.

have announced forward-looking carbon reduction goals, two-thirds of which include a net-zero by 2050 or earlier equivalent goal, and members are routinely increasing the ambition or speed of their goals or altogether transforming them into net-zero goals.

In addition, the electric industry has significantly reduced air pollutants such as mercury, hazardous air pollutants (HAPs), sulfur dioxide (SO_2), and nitrogen oxides (NOx). As of 2021, SO_2 and NOx emissions have declined 94 and 88 percent, respectively, since 1990.[15] In addition, mercury emissions have declined by 90 percent since 2010,[16] and total HAPs—including all acid gas emissions—declined by 96 percent between 2010 to 2017.[17]

EEI's member companies see a clear path to continued emissions reductions over the next decade using current technologies, including nuclear power, natural gas-based generation, energy demand efficiency, energy storage, and deployment of new renewable energy—especially wind and solar—as older coal-based and less-efficient natural gas-based generating units retire. These technologies will continue to enable significant, cost-effective carbon reductions. In addition, EIA notes that coal use will continue to decline with the retirement of most of the relatively old and inefficient coal-fired electricity generating units in the United States.[18]

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[15] *See* EPA, EPA Issues Power Plant Emissions Data for 2021 (Feb. 22, 2022), https://www.epa.gov/newsreleases/epa-issues-power-plant-emissions-data-2021.

[16] *See id.*; EPA, Regulatory Impact Analysis for the Final Mercury and Air Toxics Standards 2-7 (Dec. 2011), https://www.epa.gov/sites/default/files/2015-11/documents/matsriafinal.pdf

[17] *See* 84 *Fed. Reg.* 2,670, 2,689 (Feb. 7, 2019).

[18] *See* n.12, *supra* at 18.

In the long term, reaching net-zero carbon emissions also will require the deployment of next-generation, carbon-free, 24/7, dispatchable technologies not currently available commercially. Developing a broad range of advanced clean energy technologies can help further expedite the transition of the electric power sector to one that is low- or non-emitting while keeping electricity affordable and reliable for customers.

According to the Service, the purpose of general permits is to simplify and expedite the permitting process for activities that have relatively consistent and low effects on eagles and well-established avoidance, minimization, compensatory mitigation, monitoring, and other permit conditions where take may be authorized without site-specific analysis. *See* 87 *Fed. Reg.* at 59,600. Ensuring that the general permits for power lines and wind facilities are straightforward, well understood, and easy to utilize is essential for the industry's ongoing clean energy transformation. An efficient, effective, and balanced eagle incidental take permitting program can provide regulatory certainty for EEI members as they continue this transformation while meeting the Service's conservation goals.

III. EEI Members Have Taken Extensive Actions To Address Incidental Take Of Bald And Golden Eagles.

EEI members have a long history of implementing avian protection measures and have made extensive efforts to mitigate incidental take of bald and golden eagles. EEI members remain committed to employing a suite of avoidance, minimization, and mitigation measures to address incidental take of eagles, regardless of the regulatory or policy approach taken by the Service. Existing programs are robust and EEI members will continue them, even where they are voluntary, both to benefit raptors and help maintain reliability of the electrical system.

While a variety of factors—including geography, engineering, and system reliability requirements—means there is no "one size fits all" avian protection strategy available to every electric company. The industry has been engaged since 1989 in partnership with both the Service and non-governmental organizations to develop and implement avian protection practices, fund innovative avian protection research, and educate through publications and workshops.[19] This collaboration is facilitated through the Avian Power Line Interaction Committee (APLIC), of which EEI is a founding member.[20] APLIC—in partnership with the Service—developed Avian Protection Plan (APP) Guidelines in 2005 (Guidelines) to assist companies in creating voluntary programs tailored to their unique needs and risks to reduce incidental takes resulting from avian interactions with electric facilities.[21] Electric companies invest significant time and financial resources to develop, implement, and adaptively manage their APPs.

An APP is a company-specific program designed to reduce the operational and avian risks that result from avian interactions with electric facilities, such as transmission and distribution lines and electrical substations.[22] Many electric companies rely on these voluntary Guidelines to develop company- and territory-specific APPs, which can include construction design standards to reduce avian interactions, nest management procedures, monitoring and reporting systems to track avian mortalities, mortality reduction measures such as retrofitting or reframing power

[19] *See* APLIC, APLIC History & Background, https://www.aplic.org/resources.php.

[20] *See id.*

[21] APLIC, U.S. Fish and Wildlife Serv., Avian Protection Plan Guidelines (Apr. 2005), http://www.aplic.org/uploads/files/2634/APPguidelines_final-draft_Aprl2005.pdf.

[22] *See* APLIC, What is an Avian Protection Plan?, https://www.aplic.org/APPs.php.

poles, employee training, and avian enhancement programs.[23] Given that electrocution has been documented as the cause of death for several raptor species in the United States, many electric companies have developed raptor focused provisions as part of their company-wide APP. These often include language requiring companies to identify existing power poles that may pose risks to eagles and other raptors and proactively implement power pole retrofits or reframes to mitigate these risks.

Companies also continually reassess any risk to eagles and raptors as new poles are installed and proactively implement measures to avoid take—actions that also benefit other migratory bird populations. In addition to a company-specific APP, many EEI members also rely on the WEGs to site wind projects. As stated above, the WEGs were developed in 2012 based on the consensus recommendations of a multi-stakeholder Federal Advisory Committee, for the express purpose of reducing impacts to avian species and other wildlife associated with the siting and operation of wind turbines.[24] The 2012 WEGs replaced interim voluntary guidance published by the Service in 2003. EEI members also develop and implement Bird and Bat Conservation Strategies (BBCS) and rely on Special Purpose Utility (SPUT) permits to remove migratory bird—including raptor—nests in emergency situations and to remove carcasses from electric infrastructure during routine operations.

All told, EEI members have made extensive efforts to mitigate incidental take of bald and golden eagles and will continue to do so. For example, EEI member Southern California Edison (SCE)

[23] *See id.*

[24] *See* n.4, *supra.*

performed an analysis of their service territory examining where eagle interactions are mostly likely to occur with their infrastructure. They then created a GIS layer called Eagle Zone that dictates locations requiring new and existing structures to be built or replaced using eagle-safe construction standards based on APLIC guidance. Like other EEI member companies, SCE also retrofits existing and nearby structures where eagle incidents occur. In addition, SCE's recent efforts to harden their grid include installing avian protection devices and insulated or "covered" conductor, further reducing the chances of eagle interactions.

EEI member Southern Company (Southern) and its subsidiaries perform nest surveys prior to construction and maintenance activities in areas where bald eagles are known to occur/nest and, when necessary, schedule operations and maintenance work outside of nesting season to avoid disturbing active nests. When nests are found and work must commence due to critical outage scenarios, Southern's subsidiaries follow FWS buffer and disturbance guidelines and/or consult with the Service when necessary. Southern also establishes artificial nesting platforms to promote raptor nesting on non-electric company infrastructure and participates in mid-winter bald eagle surveys, telemetry and banding projects, and nest monitoring on hydroelectric projects and other managed lands. Southern's Federal Energy Regulatory Commission-licensed hydroelectric project reservoirs have enhanced bald eagle nesting and foraging habitat and eagle nest protection is incorporated into forest management practices and the shoreline construction permit process on managed reservoirs. Southern also employs cooperative conservation, including monitoring and reporting—which can include working with stakeholders and regulators on banding eaglets. Lastly, when siting wind generation projects, Southern follows the

WEGs, and when operating wind generation projects, Southern requires personnel training and active curtailment procedures as part of site-specific BBCS.

EEI member San Diego Gas & Electric (SDG&E) has been implementing a proactive program to reduce the potential for direct mortality of birds by electrocution on or collision with electric distribution and transmission poles in its service area since 2005. Under this program, SDG&E has retrofitted thousands of poles, including retrofitting facilities with avian protection equipment, reconfiguring the structure of the pole to increase conductor spacing or other adjustments to reduce potential eagle mortality, and/or replacing/rebuilding the existing pole according to APLIC guidelines to minimize potential impacts to avian species. From 2016 through 2019 alone, SDG&E proactively retrofitted approximately 4,100 poles within its service area to reduce or eliminate electrocution risk to birds. Additionally, in 2020, SDG&E began a pilot program to replace traditional wire conductors with covered conductor to mitigate the risk of wildfires. Although the use of covered conductor was developed for wildfire mitigation, it has the added benefit of eliminating the potential for electrocutions of large birds such as eagles and other raptors. In 2020, SDG&E replaced two miles (approximately 36 poles) of conductor with insulated conductor and plans to install 20 more miles of insulated conductor in high fire threat areas in 2021. The use of covered conductor in its service area is expected to continue to expand in future years, benefiting eagles and other raptor species.

Similarly, EEI member Entergy Corporation (Entergy) and its subsidiaries have an APP that includes proactive and reactive components, including avian-friendly construction practices and a retrofitting program for existing infrastructure. Entergy builds new distribution and transmission lines to company-specific avian standards derived from the APLIC guidelines.

Entergy also ensures that older distribution lines that have documented avian impacts are retrofitted to the company-specific avian standards. Older transmission and distribution lines undergoing reliability work are often retrofitted as well while new transmission projects are scoped to determine if avian flight diverters should be placed to reduce and mitigate collisions. Entergy plans to continue these practices and has spent over 7 million dollars on these efforts in the past decade.

As these examples demonstrate, EEI members have a clear and strong commitment to eagle protection and will continue to implement a variety of strategies to avoid, minimize, and reduce incidental take of bald and golden eagles in accordance with company practices and state and federal laws, both to benefit birds and help maintain reliability of the electrical system. Tailored efforts, such as APPs and BBCSs, help to further conservation goals, reduce service outages, minimize equipment damage, decrease outage restoration costs, and increase system reliability.

IV. The Service Should Finalize The Removal Of The Third-Party Monitoring for Both Power Lines and Wind Energy.

The Service's proposed removal of the third-party monitoring requirement for specific and general eagle incidental take permits and replacement with a certification that information submitted to the Service is complete and accurate is well-founded and should be finalized. *See* 87 *Fed. Reg.* at 59,601. Currently, the Service requires that for any permit with a duration longer than five years, "monitoring to assess project impacts to eagles and the effectiveness of avoidance and minimization measures…be conducted by qualified, independent third parties, approved by the Service." 50 C.F.R. § 22.26(c)(7)(i). Even for shorter permit durations, independent third-party monitoring may be required. *See* 50 C.F.R. § 22.26(c)(2)(ii). These requirements have hindered participation in the current program.

Third-party monitoring creates numerous challenges, in addition to not being cost effective. For example, lease agreements and rights-of-way agreements may not allow third-parties access to conduct appropriate and complete monitoring. Additionally, should third parties be permitted to conduct monitoring, there are serious security concerns with allowing outside parties access to, and knowledge of, the most critical components of the electric grid. Ensuring the security of critical infrastructure is a significant priority for EEI members and our government partners. Lastly, allowing non-company employees on these properties creates additional safety and liability concerns for companies to manage.

The removal of the existing third-party monitoring requirement in the Proposed Rule will not compromise the conservation goals of BGEPA, as robust monitoring and reporting will still occur. Permittees under the proposed programs will be required to monitor for eagle take and submit that information to the Service, certifying that the information submitted is complete and accurate to the best of the permittee's knowledge and belief subject to criminal penalty. And, as stated above, many EEI members already have robust mitigation and monitoring requirements through their APPs, and therefore, have significant experience monitoring for eagle take and submitting that information to the Service. Further, the proposed general permit programs will provide funding for the Service to perform programmatic monitoring. *See* 87 *Fed. Reg.* at 59,604. These monitoring and reporting requirements will provide sufficient eagle data for the Service outside of third-party monitoring.

For the reasons explained above, FWS should finalize the removal of third-party monitoring in the eagle incidental take permit program.

V. The Service Should Finalize The Proposed General Permit Program for Power Lines, With Specific Clarifications.

Ensuring that the general permits for power lines are straightforward, well understood, and easy to utilize is essential for the industry's ongoing clean energy transformation. The capacity of the existing grid must increase by as much as 60 percent by 2030, and it may need to triple in size by 2050 to meet the growing demand for clean electricity to support a carbon-free economy. This necessarily includes buildout of power line infrastructure.[25] The Service's proposed approach for general permits for power lines would provide EEI members certainty under BGEPA for their current and future facilities. However, in order to finalize a workable and efficient program, the Service should provide both additional clarification and targeted modifications of the requirements for proactive retrofitting, how permittees must incorporate information on eagles into siting and design considerations for new construction and reconstruction, the universe of mitigation options beyond pole retrofitting, and the requirements of the eagle-shooting response strategy. Specific clarifications on these issues will ensure the successful implementation of the program by EEI's member companies and the Service should undertake them.

a. The general permit approach is well-founded and appropriate.

As discussed above, EEI members have a long history of implementing avian protection measures and have made extensive efforts to mitigate incidental take of bald and golden eagles. Many electric companies rely on the voluntary APLIC Guidelines to develop company- and territory-specific APPs for power line infrastructure, which can include construction design

[25] *See* n.3, *supra*.

standards to reduce avian interactions, nest management procedures, monitoring and reporting systems to track avian mortalities, mortality reduction measures such as retrofitting or reframing power poles, employee training, and avian enhancement programs.

The Service proposed a five-year general-permit for each state for which the power-line entity is seeking authorization. *See* 87 *Fed. Reg.* at 59,606. This approach provides a recognized permit length that has been utilized in various other federal permitting programs.[26] A five-year permit period would provide EEI members with certainty for a well-founded period time. Further, the state-by-state permitting approach provides simple line-drawing for EEI members that have facilities in multiple states.

A general permit for this infrastructure should be finalized as it will provide EEI members protection against potential liability under BGEPA and increase conservation of bald and golden eagles consistent with the preservation standard.

b. The administration fee for the general permit should incentivize participation in the program.

The Service proposed an administration fee of $5,000, per state, for each general permit for the power line seeking authorization. *See 87 Fed. Reg.* at 59,606. In addition to the administration fee, permittees will devote resources to comply with the proposed requirements of the general permit program. Therefore, the Service should consider the total expense of participating in the general permit program to ensure it is not disincentivizing participation in finalizing any additional fees.

[26] *See, e.g.,* Clean Water Act Sec. 404 General Permit Program, 33 U.S.C. § 1344(e).

c. The Service should allow for an adaptive approach to reactive retrofitting.

The Service proposed to require permittees to develop and implement a reactive retrofitting strategy. As proposed, in response to an eagle electrocution, permittees would be required to retrofit eleven total poles (usually, the pole that caused the electrocution and five poles in each direction) or a half-mile segment of poles, whichever length is less.[27] This proposed requirement would allow the permittee to look within the same circuit for needed retrofits if the eleven most proximal poles are already electrocution safe.

As previously noted *supra*, electric companies seek to prevent additional electrocution incidents to protect species and ensure reliability. However, landscape features, accessibility, and level of retrofit currently in place can affect the efficacy of the proposed reactive retrofit requirements intended to protect eagles. In cases where a company has a long-standing retrofit program, the nearby poles may already be electrocution safe. If the utility must find poles that are not retrofitted on the same circuit, this may entail significant resources and these resources may be better spent on retrofitting poles in priority areas (e.g., area near major rivers or lakes). Therefore, the Service should revise this condition to allow for reactive retrofit strategies that require the permittee to assess the poles and the surrounding landscape along one-half mile of the affected line and to prioritize pole retrofits as necessary to prevent further electrocution mortality.

[27] 87 *Fed. Reg.* at 59,605, 59,629 (to be codified at 50 C.F.R. § 22.260(d)(3)).

d. The Service should clarify and modify the requirements for proactive retrofitting under proposed 50 C.F.R 22.260(d)(3).

The Service proposed requiring permittees under the general permit for power lines to develop and implement a proactive retrofit strategy to convert all existing infrastructure to be electrocution/eagle-safe, prioritizing poles that the permittee identifies as the highest risk to eagles. *See* 87 *Fed. Reg.* at 59,605. The Service further proposed that permittees proactively convert one-tenth of infrastructure that is not electrocution/eagle-safe during the duration of the five-year permit. *See* 87 *Fed. Reg.* at 59,629 (to be codified at 50 C.F.R. § 22.260(d)(3)). As written, the proposed requirements to proactively retrofit poles are unclear and—particularly the requirement to retrofit one-tenth of all non-electrocution-/eagle-safe poles every five years—raise significant feasibility concerns for many EEI members. The Service should therefore clarify and modify the requirements of proactive retrofitting and provide a more feasible standard in the final rule.

As discussed above, many EEI members employ company-specific APPs designed to reduce the operational and avian risks that may result in avian mortalities from interactions with electric company infrastructure. Notably, many APPs contain a reactive retrofit strategy when eagle mortalities occur due to electrocutions caused by poles.[28] And, many APPs also include a proactive retrofit strategy driven by a risk assessment methodology specific to the company and its service territory.[29] These risk assessments are used to identify and prioritize those elements of

[28] Proposed 50 C.F.R. § 22.260(d)(2) requires implementation of reactive retrofit strategies following all electrocutions of eagles. 87 *Fed. Reg.* at 59,629.

[29] APLIC, Avian Protection Plan (APP) Guidelines at 54-58 (Apr. 2005), https://www.aplic.org/uploads/files/2634/APPguidelines_final-draft_Aprl2005.pdf.

electric infrastructure that represent the greatest risk of electrocution to eagles. This existing, data-driven approach enables utilities to prioritize resources to retrofit infrastructure that provide the most conservation benefit to eagles. For example, one EEI member has developed reporting forms within web-based applications to report avian interactions. This data is then used in future planning. Another EEI member uses known bald eagle nest locations along the Kansas River to identify eagle risk areas and has proactively assessed and retrofitted all non-avian-safe poles within one-quarter mile of the nests. Finally, another EEI member utilizes data on habitat, foraging areas, percent land coverage, and land usage (i.e., eagles tend not to live in urban environments) when assessing risk.

However, the Proposal contains no discussion of permittees' baseline of electrocution/avian-safe poles. As a result, it is unclear what poles must be retrofitted in order to meet the proposed requirements. The sheer number of distribution poles across all EEI member services territories can number in the millions.[30] The size of an electric company's service territory can vary greatly; thus, the number of distribution power poles for an individual member company can number from the tens of thousands to millions of poles. For example, one EEI member has approximately four million distribution poles across its service territory. As proposed, this member would be required to proactively retrofit 400,000 poles per permit cycle, an average of 80,000 poles per year. Other EEI members estimate that they have over three million distribution poles, over two million distribution poles, and around 1.2 distribution million poles.

[30] A majority of transmission lines are built electrocution-safe due to the spacing design for energized elements and thus are not included in retrofit calculations. However, a small number of low voltage lines do not meet suggested phase separation guidance. Proactive retrofitting this infrastructure would cost excess of $1 million per mile, and thus is cost prohibitive. As electric companies replace this legacy infrastructure, they will account for electrocution-safe design.

As these examples illustrate, a requirement to proactively retrofit one-tenth of the total number of distribution poles in an electric company's system in any five-year span is infeasible. Depending on a variety of factors, electric companies are required to inspect their entire systems over the course of decades. However, these inspections are very simple and do not necessarily include repairs or even touching the pole. For example, Pennsylvania requires distribution poles to be inspected at least as often as every 10-12 years[31], whereas in Southern California, electric companies must patrol (walk, drive, or fly by for a visual inspection) their systems once a year in urban areas and high fire threat areas or once every two years in rural areas.[32] Requiring electric companies to retrofit one-tenth of the total number of distribution poles per five-year cycle is incompatible with current electric companies requirements and practices, and applies a one-size-fits-all approach that is incongruous with both utility planning processes and the flexible APP approach. Moreover, the Service has not provided sufficient justification for this broad requirement.

Also, as a regulated industry, the cost—potentially prohibitive—incurred for such a large retrofit requirement would need to be approved by the relevant public utility commission. Public utility commissions review electric company rate increase requests from a prudency perspective. If ultimately approved, these costs would then be passed through to customers and could result in potentially significant rate increases for those customers. For example, one EEI member

[31] 52 Pa. Code § 57.198.

[32] *See* Public Utilities Commission of the State of California, General Order Number 165, Inspection Requirements for Electric Distribution and Transmission Facilities (June 2013), https://docs.cpuc.ca.gov/word_pdf/GENERAL_ORDER/159182.pdf.

estimates that, to meet the condition of the proposed general permit, they would annually spend $96 million to install insulator covers/caps or approximately $600 million to replace cross arms to increase average phase spacing a limited amount. Over the life of one five-year permit, they would commit to spend $480 million to install covers/caps or $3 billion to proactively reframe 10% of the system.[33] The Service has not addressed whether costs of this magnitude are necessary for the appropriate functioning of the proposed general permit program.

Further, some distribution poles are located in dangerous or inaccessible areas, where retrofits would be infeasible due to safety concerns—which is not contemplated for the proposed proactive retrofitting requirements and could impact the ability of members to comply with the proposed requirements.[34] Finally, EEI members are currently experiencing labor and supply chain challenges. This is coupled with the emergency response efforts related to responding to events that disrupt electric systems and cause outages, such as wildfires, hurricanes, and other natural disturbance events. These delays could hamper the ability of EEI members to comply with the proposed requirement due to a lack of materials.

To remedy the issues explained above—while still providing conservation benefits to eagles—the Service should provide the following clarifications and modifications to the Proposed Rule. As stated above, electric companies have been implementing their APPs and some have been employing retroactive and proactive retrofit strategies for many years, therefore, many high-risk

[33] This calculation uses $1,200 per pole for installing covers and caps and the Service's $7,500 amount for replacing cross arms.

[34] The Service does state that human health and safety may be considered regarding new construction and reconstruction of pole infrastructure and transmission lines. *See* 87 *Fed. Reg* at 59,605.

poles have already been retrofitted. In addition, some poles retrofits are infeasible due to safety concerns. The Service should allow permittees to first establish a baseline of poles that are either already electrocution/eagle-safe, in an area with a low likelihood of eagle occurrence, or infeasible to retrofit, and therefore, need not be retrofitted under any proactive strategy. These poles should be removed from any compliance calculation in a final rule.

Further, electric companies may not have the technical information readily available to establish this baseline or determine which poles are at high-risk for eagle electrocution when first permitted. Therefore, the Service should allow permittees the first five-year general permit term to establish baseline and craft a process to determine which poles to proactively retrofit, based on the risk to eagles.

Lastly, rather than mandate a percentage of poles to be retrofitted each five-year general permit period, the Service should instead adopt a voluntary, data-driven approach for permittees to identify targeted proactive retrofits for high-risk poles, as defined by the permittee. Such an approach is consistent with existing proactive retrofit strategies in APPs and enables electric companies to more accurately identify those poles presenting the highest risk of eagle electrocution. This also allows companies to target company resources and personnel in the most efficient and cost-effective manner when they perform those retrofits.

c. The Service should clarify the requirements of proposed 50 C.F.R 22.260(d)(5) for new construction and reconstruction.

The Service proposed that, for new construction and reconstruction, electric companies should "incorporate information on eagles (population status and species) into siting and design conditions as practicable, such as siting powerlines a safe distance from nests, foraging areas,

and roosts…" *See* 87 *Fed. Reg.* at 59,629 (to be codified at 50 C.F.R § 22.260(d)(5)). However, the phrase "[i]nformation on eagles" is too broad in scope and lacks the specificity necessary to be successfully implemented for new construction and reconstruction of electric company infrastructure. The Service should provide clarity as to what information should be considered and what is practicable for companies to consider.

The Service also should provide additional clarity surrounding the term "roost and foraging areas." For example, "foraging areas" for bald eagles can encompass entire watersheds or riverine habitats, while other raptors could have smaller or more specific habitats. Electric company infrastructure is ubiquitous across the landscape. Therefore, it is impractical to exclude potentially all foraging and roost areas from new construction and/or reconstruction in their entirety. The Service should provide, either in the final rule or in guidance, further clarity for the terms used and general purpose of proposed § 22.260(d)(5). In general, these areas should be defined as the smallest areas necessary to provide species support, to minimize the amount of land that is deemed off limits for development of critical clean energy infrastructure.

In the Proposal, the Service also recommends that electric company infrastructure use buffers and be sited "at least 2 miles from golden eagle nests, 660 feet from a bald eagle nest, 660 feet from a bald eagle roost, and 1 mile from a bald eagle or golden eagle foraging area." *See* 87 *Fed. Reg*. at 59,605. Such buffers are suggested to account for the increased risk of eagle interactions with power line infrastructure. However, and as the Service notes, most new construction and reconstruction is designed and built according to electrocution-safe or eagle-safe specifications. The Service also estimates in the Proposal, "…power-line infrastructure installed after 2009

takes relatively few eagles." *See* 87 *Fed. Reg.* at 59,606. Therefore, new construction and reconstruction of electric infrastructure do not present an electrocution risk in those areas where eagle interactions are more likely to occur. Accordingly, any buffers established for eagle nests, roosts, and foraging areas should be limited and tailored to nesting season.

Lastly, the Service should explicitly exempt in the final rule all new construction or reconstruction that is a result of an extreme weather event. In these instances, the priority is to restore power as quickly and safely as possible, and often materials that are provided by mutual aid responding companies may not meet suggest spacing guidance.

d. The Service should expand the universe of acceptable mitigation options beyond reactive and proactive power pole retrofitting.

The Service does not propose requiring additional off-setting mitigation beyond reactive and proactive power pole retrofits for the general permit for power lines. While EEI members have a long history of performing power pole retrofits as part of their APPs, the Service should recognize that using power-pole retrofits as offsetting mitigation is not always feasible or practical. The Service should therefore expand the universe of acceptable mitigation options that provide tangible conservation benefits to eagles, to ensure that the conditions of the general permit program are achievable.

Other mitigation options such as removing or relocating road killed animals to prevent vehicle-eagle collisions, reconfiguring stock tanks to prevent drowning, voluntarily replacing lead ammunition for big game hunting, removing big game offal to reduce lead exposure, providing eagle habitat protection and enhancement, and other mitigation methods should be quantified and approved by the Service as soon as possible. Other mitigation opportunities exist in the

implementation of toxic substances abatement programs and education programs (providing non-toxic ammunition, pesticide education, source control).[35] Efforts to reduce vehicle collisions and to implement animal husbandry best practices for livestock carcass disposal are promising mitigation measures that can help reduce eagle mortalities from other sources. Finally, the Service could consider the implementation of an eagle-shooting response strategy (discussed *infra*) as acceptable mitigation, rather than a permit requirement.

e. The Service should limit the requirement of an eagle-shooting response strategy to notifying the Service's Office of Law Enforcement under proposed under 50 C.F.R 22.260(d)(6).

The Service proposed that electric companies develop an eagle-shooting response strategy as a proactive element of the general permit conditions. Such a plan would "respond to eagle-shooting events where one or more eagles are discovered near power-line infrastructure and the cause of death is shooting. The plan must outline steps to identify when eagle shooting occurs, options for response, and implementation of the response." 87 *Fed. Reg.* 59,629 (to be codified at 50 C.F.R 22.260(b)). While EEI members recognize there is increasing evidence that eagles are being shot while perching on power poles and that utility assistance in reducing illegal shooting could advance eagle preservation (particularly for golden eagles), the proposed requirement is beyond the purview of EEI members' operations.

EEI members already report all eagle mortalities found near power lines and electric infrastructure to the Service's Office of Law Enforcement (OLE). Further, APLIC is currently funding research through Boise State University to evaluate the frequency with which avian

[35] *See, e.g.*, FWS, Ill. and Iowa Ecological Serv. Field Office, MidAmerican Energy Company's Final Habitat Conservation Plan for Wind Energy Facilities IX in Iowa (Jan. 30, 2020), https://www.fws.gov/midwest/rockisland/te/MidAmericanHCP.html.

mortalities along power lines result from illegal shooting and identify hotspots of illegal shooting.

However, electric companies should not be required to take the additional actions the Service is proposing, such as conducting or funding eagle necropsies to determine, where possible, the actual cause of an eagle mortality or offering incentives for information regarding eagle-shooting occurrences. *See* 87 *Fed. Reg.* at 59,606. Eagle necropsies can take many months, are expensive, and in some instances may not determine the ultimate cause of an eagle death. Offering incentives for information on eagle-shooting would place an undue burden on electric companies and is beyond the scope of electric company operations. EEI members understand the need to work collectively to mitigate the problem of eagle-shooting on electric infrastructure; however, an eagle-shooting response strategy should not be a permit condition entirely or should be limited to the current requirement of notifying OLE when a dead eagle is found. EEI members look forward to working proactively with the Service to address and resolve this issue.

IV. The Service Should Move Forward With The Proposed General Permit Program for Wind Energy, With Specific Clarifications.

Ensuring that the general permits for wind energy facilities are straightforward, well understood, and easy to utilize is essential for the electric industry's ongoing clean energy transformation. The Service's proposed approach for general permits for wind generating facilities would provide EEI members increased certainty under BGEPA for their current and future facilities. However, the Service should tailor in any final rule the take limits of each eagle species relative to population, and provide a pathway to re-enter the general permit program should an electric company be required to obtain an individual permit.

a. The general permit approach and fee structure are well-founded and appropriate.

As stated above, many EEI members also rely on the WEGs to site wind projects. The WEGs were developed in 2012 based on the consensus recommendations of a multi-stakeholder Federal Advisory Committee, for the express purpose of reducing impacts to avian species and other wildlife associated with the siting and operation of wind turbines.[36] The 2012 WEGs replaced interim voluntary guidance published by the Service in 2003. Given the well-established eagle avoidance and minimization strategies EEI members employ, a general permit for the majority of wind energy facilities is appropriate and should be finalized. The wind general permit will also allow the Service to devote resources to processing the limited number of wind energy facilities that require a specific permit in a timely manner.

The Service proposed a five-year general permit with an administration fee of $2,625 for each turbine, which accounts for the cost of the Services systematic monitoring. *See* 87 *Fed. Reg.* at 59,604. This approach provides a recognized permit length that has been utilized in various other federal permitting programs.[37] A five-year permit period would provide EEI members with certainty for a well-founded period time.

b. The Service should clarify the lines between transmission and generation for permitting purposes.

Wind energy facilities are often connected to transmission lines and substations through a dedicated line known as a generation tie (gen-tie). The Proposed Rule does not discuss whether

[36] *See* n.4, *supra.*

[37] *See* n.26, *supra*.

gen-ties are to be covered under permits for power lines or for wind energy projects. In the final rule, the Service should clarify which permit covers gen-ties.

c. The Service should provide a process for general permittees required to change to specific permits to re-enter the general permit program.

As currently proposed, once a permittee identifies an injury or mortality of a fourth eagle that can be attributable to the wind energy facility, that facility would be covered under the general permit for the remainder of the permit term, however, the facility would no longer be able to obtain future coverage under a general permit. *See* 87 *Fed. Reg.* at 59,604. The Service proposed to allow the applicant to request a reconsideration, outlining extenuating circumstance, but, after conclusion of that reconsideration, the permittee may be required to obtain a specific permit for eagle take. *See id.*

EEI members are continuingly employing minimization and avoidance efforts on their facilities to reduce the impact these facilities have on eagles through adaptive management plans. As EEI members employ these measures, they may once again meet the eligibility requirements for a wind energy general permit after they were required to file for a specific eagle permit.

As proposed, there is no pathway for a permittee that meets the eligibility requirement for a wind general permit to obtain one following their application for a specific permit. As mentioned above, the efforts of EEI members in implementing their adaptive management plans should be accounted for by allowing reentrance to the general permit program once they can meet the eligibility requirements. The Service should develop a process to account for this in the final rule since member company facilities might need to move between the two approaches during implementation of any final rule.

d. The Service should establish take limits for bald eagles that are proportionate to bald eagle population.

The Service notes in the Proposal that the bald eagle and the golden eagle populations are on different trajectories. Notably, bald eagle populations are vastly increasing, and the Service estimated in 2019 that the population of bald eagles in the coterminous United States to be 316,708—a four-fold increase above the previously published estimate in 2016. *See* 87 *Fed. Reg.* at 59,599. In contrast, the golden eagle population has remained relatively stable through the same time period. *See id.*

Despite this difference between species, the Service nevertheless proposed identical take limits of four eagles for both bald and golden eagles. Part of the rational for proposing the same take limit for both bald and golden eagles is the relatively robust nationwide populations of bald eagles. However, given the thriving bald eagle population, the Service should consider increasing the take limit for bald eagles to be proportionate to existing population levels, as the Service itself has noted. This approach would still be consistent with the preservation standard for bald eagles and would encourage more participation in the wind general permit program.

V. Conclusion.

As discussed above, EEI members have a long history of implementing avian protection measures and have made extensive efforts to mitigate incidental take of bald and golden eagles and will continue to do so. An efficient, effective, and balanced eagle general permit program with the clarifications included in these comments would provide certainty to EEI members and further the conservation goals of BGEPA. Questions on these comments may be directed to Sarah Ball (202-508-5208); Riaz Mohammed (202-508-5036); or Patrick McGuire (202-508-5167).

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Permits for Incidental Take of Eagles and Eagle Nests

Document: FWS-HQ-MB-2020-0023-9315
Comment from Janke, Ronald

Submitter Information

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General Comment

A wind generator or power line transmission tower and line to be located in a flowing body of water should not be eligible to obtain a general permit/permit by rule. Facilities sited in flowing body of waters cannot adequately monitor incidental takes of eagles or other birds, which will float away or perhaps sink before their demise can be monitored. Many bald eagles reside along the lake's southern shore and fly over the lake when hunting. The southern shore of Lake Erie is one of the most abundant populations of bald eagles in the United States, which increases the risk of incidental take from tall structures in Lake Erie. Of course, many other shore birds fly over Lake Erie, which is a major flyway for migrating birds of many species.

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Comment from Baker Botts LLP on behalf of the Cross-Cutting Issues Group

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Organization: Baker Botts LLP on behalf of the Cross-Cutting Issues Group

General Comment

Attached please find the Cross-Cutting Issues Group's comments.

Attachments

CCIG BGEPA Comments

COMMENTS OF THE CROSS-CUTTING ISSUES GROUP ON THE U.S. FISH AND WILDLIFE SERVICE'S PROPOSED RULE ON PERMITS FOR INCIDENTAL TAKE OF EAGLES AND EAGLE NESTS

Docket No. FWS-HQ-MB-2020-0023

I. INTRODUCTION

On September 30, 2022, the U.S. Fish and Wildlife Service ("FWS" or "Service") published a proposed rule revising the regulations authorizing the issuance of permits for eagle incidental take and eagle nest take under the Bald and Golden Eagle Protection Act ("BGEPA," 16 U.S.C. § 668-668d) ("Proposed Rule").[1] The Proposed Rule would amend the eagle permit regulations at 50 C.F.R. Part 22 by adding a new subpart E, which would revise the provisions for processing specific permits and add a general permit alternative for four categories of qualifying activities — (i) wind energy generation projects, (ii) power line infrastructure, (iii) activities that may disturb breeding bald eagles, and (iv) bald eagle nest take — consistent with the current preservation standard established by FWS in 2016.[2]

According to FWS, the purpose of these proposed revisions is to increase the efficiency and effectiveness of permitting, facilitate and improve compliance with BGEPA requirements, and increase the conservation benefit for eagles by increasing the participation of regulated entities in the permitting program.[3] The Service's intent is to restructure the permitting program in a way that allows FWS to focus its resources on projects that pose the greatest risk to eagles.[4] FWS is seeking public input on all aspects of the Proposed Rule, along with information on issues specific to electric utilities and wind energy projects.[5]

The Cross-Cutting Issues Group[6] ("CCIG" or "Group") respectfully submits these comments to assist FWS with developing an updated permitting program for incidental take of bald and golden eagles, including an efficient and effective general permit program.[7, 8] CCIG is a group of electric generating companies with a diverse portfolio of generating assets located throughout the United States, including wind energy and other generating facilities and power lines. Group members have a substantial interest in the Service's administration of BGEPA and

[1] 87 Fed. Reg. 59,598 (Sept. 30, 2022) ("Proposed Rule").
[2] *Id.* at 59,598-99. *See also* 81 Fed. Reg. 91,494 (Dec. 16, 2016).
[3] *See* Proposed Rule at 59,598.
[4] *See id.* at 59,599-600.
[5] *Id.* at 59,610.
[6] AES Corporation; Arizona Public Service; Alliant Energy Corporation; Basin Electric Power Cooperative; Dominion Energy; Duke Energy; Entergy Services, LLC; Louisville Gas & Electric / Kentucky Utilities; Minnesota Power; OGE Energy Corp.; Public Service Company of New Mexico; PowerSouth Energy Cooperative; Talen Energy; Tucson Electric Power Company; Salt River Project; SIGECO; and Southern Company.
[7] CCIG submitted comments on the advanced notice of proposed rulemaking ("ANPR") preceding this Proposed Rule, 86 Fed. Reg. 51,094 (Sept. 14, 2021). Docket ID. FWS-HQ-MB-2020-0023-1881.
[8] CCIG reserves the right to provide further comments on the BGEPA permitting program once the Migratory Bird Treaty Act ("MBTA") permitting program is proposed. Group members and other utilities are facing the prospect of having to comply with two permitting programs that may have substantial overlap, and thus it is difficult to evaluate the full picture of avian compliance with only one permit program available given that both eagle species are also protected by the MBTA. CCIG submitted comments on the ANPR for the MBTA proposal, 86 Fed. Reg. 54,667 (Oct. 4, 2021). Docket ID. FWS-HQ-MB-2021-0105-12810.

its implementing regulations because they own and operate transmission and distribution lines, substations, wind turbines, and other infrastructure with which eagles interact.

CCIG appreciates the Service's efforts to reform the BGEPA permitting program and fully supports the development of the general permit program, especially for power line infrastructure and wind energy generation projects. To ensure that the general permit program achieves the purpose of the rulemaking and does not create disincentives to participation, CCIG recommends that FWS amend aspects of the proposed general permit for power line infrastructure. Among other amendments discussed below, the Service should: (i) eliminate or substantially revise the 10% minimum proactive retrofitting requirement, which would lead many utilities to decline to participate in the general permit program; (ii) provide clarity on the scope of permit coverage; (iii) build in additional eligibility and compliance flexibility; and (iv) consider alternative compliance approaches to ensure broader participation across utilities of different sizes and organizational structure and with a range of experience with programs to protect eagles. With respect to the proposed general permit for wind energy generation projects, CCIG recommends that FWS provide sufficient justification regarding the use of eBird data and, similarly, build in additional eligibility and compliance flexibility. Group members also seek clearer language in the general permits for eagle disturbance and bald eagle nest take regarding routine maintenance or emergency response activities, as such activities are essential to maintaining grid reliability and often time-sensitive. Finally, the Group encourages FWS to consider providing clearer distinctions in how the general permit programs address the different eagle species in light of their population and geographical distinctions, and making the proposed auditing program, as well as any future guidance and policy documents, available for public comments when drafted.

II. COMMENTS

CCIG strongly supports the creation of general permits as a way of streamlining permitting for a wide range of projects. CCIG believes that a general permit program, if properly structured, will minimize permitting burdens on utilities and contribute to eagle conservation while allowing FWS to better focus its limited resources.[9] CCIG also supports steps that FWS is proposing to modify the specific permit process, including removing the current third-party monitoring requirement.[10]

At the same time, CCIG has a number of recommendations that it believes would further the Service's goal of making the permitting program more efficient and effective while minimizing disincentives to participation. The Group's recommendations are discussed below.[11]

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[9] *See* Proposed Rule at 59,599.

[10] *Id.* at 59,598.

[11] As a threshold matter, CCIG seeks clarification regarding the terminology used in the Proposed Rule. The proposed general permit program is structured around entities "applying" for a general permit, which is then "issued" by the Service. *See* § 22.210(c)-(d) (proposed). This terminology and its conceptual underpinnings are at odds with the structure of general permits issued by other agencies, such as the U.S. Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers ("Corps"). For example, under the Corps' Clean Water Act ("CWA") Section 404 nationwide permit program, the general permits are considered issued when the Corps publishes them, and entities then determine whether their proposed activity qualifies for coverage under an already-issued general permit. General permits issued by EPA or states delegated with such authority under the National Pollutant Discharge Elimination System ("NPDES") program (such as stormwater permits) operate the same way. The structure of a general permit

a. General Permit for Power Line Infrastructure

CCIG supports the Service's proposed development of a general permit for power line infrastructure. As stated in the Proposed Rule, general permitting of incidental take by power line infrastructure would be allowed if six conditions are met, including requirements that permittees: (1) use electrocution-safe[12] configurations for all new construction and reconstruction of pole infrastructure; (2) consider eagle nesting, foraging, and roosting areas in siting and design in new construction and reconstruction of transmission lines; (3) develop a reactive retrofit strategy (for 11 poles or a half-mile segment of poles, whichever is less) upon discovery of eagle electrocution; (4) develop and implement a proactive retrofit strategy to convert all existing infrastructure to be electrocution-safe; (5) implement a collision-response strategy for all eagle collisions with power lines; and (6) develop and implement an eagle-shooting-response strategy when an eagle shooting is discovered near power line infrastructure.[13]

For the reasons discussed below, the Group requests that FWS consider amending its approach to this general permit in order to minimize disincentives for utilities to make use of the general permit and thereby further the goal of increasing the conservation benefit for eagles by increasing the participation of regulated entities in the permitting program.

i. Scope of Permit Coverage

A threshold question concerns the scope of permit coverage. As proposed, it is unclear whether a general permit for power line infrastructure would necessarily apply to all of the permittee's power lines. While many utilities would seek a permit that covers all of their power lines as a matter of administrative convenience, some utilities might choose to have the permit and its associated conditions cover only selected power lines (and poles). For example, a utility may determine that it does not need permit coverage for some of its power lines because no eagles are found in the areas where those lines are located, and it is unlikely that eagles would come to occupy those areas. CCIG presumes that a permittee would have the discretion to determine which of its power lines are covered by the general permit.

ii. Newly Constructed and Reconstructed Poles

The proposed first condition would require that utilities "[e]nsure all new construction and reconstruction of poles is electrocution-safe, as limited by the need to ensure human health and safety."[14] The Group believes that this requirement should be limited to areas where eagles are known to be present. Requiring construction of electrocution-safe poles in areas where eagles are not known to occur would misallocate resources, resulting in a lack of benefit to eagles. Even in areas where eagles are known to occur, not all poles present the same level of risk. Permittees

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program has important implications because a federal action such as issuance of a permit triggers obligations on the part of the issuing agency to comply with other federal statutes such as the National Environmental Policy Act, the Endangered Species Act, and the National Historic Preservation Act, among others. As structured, the permits proposed by the Service are in some respects more akin to streamlined individual (specific) permits with standardized conditions than they are to general permits. The Service should clarify its intent.

[12] The term "electrocution-safe" should be interpreted in a manner consistent with standard industry practices as reflected in guidance documents produced by the Avian Power Line Interaction Committee ("APLIC").

[13] Proposed Rule at 59,605-06.

[14] *Id.*at 59,629 (proposed § 22.260(d)(1)).

should be given the option of evaluating risk to eagles from poles in different areas and focusing efforts on constructing (and, where appropriate, reconstructing) electrocution-safe poles in areas presenting significant risk to eagles.

Moreover, FWS should differentiate between newly constructed poles and newly re-constructed poles, particularly where reconstruction takes place as part of a response to an emergency situation such as a hurricane, tornado or other storm condition. In these situations, CCIG members prioritize restoration of power to customers in a timely manner while also seeking to maintain and enhance the reliability of their systems. The Group presumes that the Service intends for the qualifier "as limited by the need to ensure human health and safety" to cover these situations but seeks clarification that this is in fact the case. CCIG believes that a more explicit exemption for emergency response situations would be appropriate. For example, the qualifier could be revised to state "except for situations involving emergency power restoration or as otherwise limited by the need to ensure human health and safety." Consideration of these factors will ensure that this condition is not overly costly and burdensome on utilities and is consistent with the Service's intent to address projects that pose the highest risk to eagles.

iii. Siting and Design

The second condition would require that utilities "incorporate information on eagles (population status of the species) into siting and design considerations as practicable, such as siting power lines a safe distance from nests, foraging areas, and roosts, subject to human health and safety, and/or significant adverse effects to biological, cultural, or historical resources."[15] CCIG recommends that FWS revise the proposed language in the condition by: (1) removing "foraging areas," as such areas are subjectively defined and could include any habitat;[16] and (2) adding "appropriate" after "practicable" so that permittees "incorporate information on eagles . . . into siting and design considerations as practical *and appropriate*," so as to account for project-specific factors and local and environmental conditions (emphasis added for recommended language). FWS should also add language clarifying that failing to bury lines will not affect compliance with or eligibility for the general permit program, given that it is not practicable to bury lines in a variety of circumstances.

iv. Reactive Retrofit Strategy

The third condition would require utilities to develop a reactive retrofit strategy in response to discovery of an eagle electrocution. The strategy must include the following specifications:

> Determining which poles to retrofit must be based on the risk to eagles and not on other factors, such as convenience or cost. The pole that caused the electrocution must be retrofitted, unless the pole is already electrocution-safe. A total of 11 poles or a half-mile segment must be retrofitted, whichever is less. The typical pole selection will be the pole that caused the electrocution and five poles in each direction. However, if retrofitting other poles in the circuit provides more benefit to eagles, those poles may be retrofitted by prioritizing the least-safe poles closest to the electrocution event. Poles outside of the

[15] *Id.* at 59,605, 629 (proposed § 22.260(d)(5)).

[16] "Foraging area" is defined under 50 C.F.R. § 22.6 as "an area where eagles regularly feed during one or more seasons." However, without further and more specific parameters, those areas could include any habitat.

circuit that caused the electrocution may be counted towards this retrofit requirement only if all poles in the circuit are already electrocution-safe.[17]

The Group recommends that FWS amend the proposed retrofit strategy such that it is more consistent with current industry practices, like those undertaken by utilities operating under an Avian Protection Plan ("APP"). Specifically, FWS should clarify that utilities are required to prioritize *assessing* the 11 poles or half-mile segment that needs to be retrofitted so that it is clear that the poles only need to be retrofitted if, after assessment, the cause of eagle take is in fact electrocution and not due to other causes unrelated to power line infrastructure.[18]

Furthermore, the Group recommends that FWS require a total of 11 poles or a half-mile segment be retrofitted *only if* it is part of the circuit that caused the electrocution, presents a risk to eagles, and is not already electrocution-safe. Retrofitting other poles that do not meet these factors would be a waste of resources as they likely do not present a high risk of eagle electrocution.

v. Proactive Retrofit Strategy

CCIG has a number of serious concerns regarding the proposed fourth condition, which would require utilities to "[i]mplement a proactive retrofit strategy to convert all existing infrastructure to electrocution-safe" using the following approach: (i) "convert one-tenth of infrastructure that is not electrocution-safe as of the effective date of the general permit to electrocution-safe during the duration of the permit"; and, (ii) if renewing the general permit, retrofit the same number of poles, "such that all poles are retrofitted within 50 years or by the expiration of the tenth, 5-year general permit."[19]

As proposed, this condition would be impractical for many utilities and would create a major disincentive for many utilities to participate in the general permit program. Most notably, the requirement that a permittee retrofit 10% of all poles during the course of a five-year permit term would impose substantial financial and logistical burdens on utilities and may be unachievable in light of supply chain issues.[20] The Group requests that FWS consider limiting a proactive retrofit strategy to power line infrastructure located in areas where eagle use occurs because not all such infrastructure is located in eagle use areas. This is the approach generally taken by industry members. For example, utilities operating under an APP typically identify areas for avian-safe new construction within their APPs based on avian species presence/abundance and habitat use.

There are a number of questions about how the baseline for the 10% calculation would be measured. CCIG presumes that the starting point would be the number of poles owned by the permittee, *i.e.*, the corporate entity that "applies for" and receives permit coverage. However, it is not clear whether the baseline would include poles that are already electrocution-safe. The Group requests that FWS provide clarification on which poles should be included in the baseline.

[17] Proposed Rule at 59,605, 629 (proposed § 22.260(b)).
[18] As the Service is aware, eagle deaths in the vicinity of power lines can be due to a variety of causes, including natural causes that are entirely unrelated to the presence of power lines.
[19] Proposed Rule at 59,605, 629 (proposed § 22.260(d)(3)).
[20] In fact, a number of CCIG members consider this proposed requirement to be a "non-starter" and would simply not use the general permit if the 10% proactive retrofit requirement is a condition of general permit coverage.

Moreover, the Proposed Rule does not provide any justification or support for the use of the 10% figure.[21] The Service should explain how it determined that 10% is the appropriate level of retrofit (and provide a supporting rationale should FWS ultimately select a different level).

Regardless of how the baseline is determined, ***the 10% retrofit requirement would be a substantial hurdle — in some cases an insurmountable barrier — for Group members' participation in the power line general permit given the cost and resources required to achieve this level of retrofitting.*** For a large utility, for every million power poles in its baseline the utility would need to commit to retrofitting 100,000 power poles within five years (an average of 20,000 poles per year), while also committing to ultimately retrofit all million poles. The cost of retrofitting 100,000 poles — using the Service's $7,500 estimate[22] — would mean that a utility commits to spending $150 million per year on its proactive retrofit program; for utilities with more than a million poles in the baseline, the commitment would be even larger. Many if not most utilities would loathe to make such a commitment, particularly when a substantial part of the eventual investment would yield little or no return in terms of eagle protection because there are no eagles in the area. In fact, utilities might be hard-pressed to justify such an expenditure to their regulators and customers.[23] Even for smaller utilities, the commitment would exceed the Service's estimate of $220,000 per year, which using the Service's own figures would cover the cost of retrofitting only 29 poles. As a result, this requirement would create a substantial disincentive for many utilities to make use of the power line general permit, thereby undercutting the Service's goals.

Moreover, the cost required to satisfy this requirement is clearly not consistent with the intent of the general permit program, which FWS states is meant to "require relatively minor additions and modifications" for entities currently operating under an APP.[24] Utilities currently operating under an APP typically have retrofitted only about 1-2% of their poles at most, and thus requiring 10% proactive retrofitting would impose significant additional burdens on such utilities.

In assessing the extent of these burdens, the Service needs to account for a variety of factors that influence the cost and logistics of retrofitting power poles:

- Size of the utility (and number of poles), as discussed above;
- Cost of materials, including supply chain concerns as, for instance, longer cross arms would need to be manufactured and enter the supply chain as a typical item supplied;
- Labor costs, including the availability and cost of obtaining either internal or contracted personnel;

[21] *See* Proposed Rule at 59,606.
[22] *Id.* at 59,610; Draft Economic Analysis, Docket ID. FWS-HQ-MB-2020-0023-1908, at 61.
[23] Even if a utility wanted to strive to satisfy a 10% retrofitting requirement, its oversight body would first need to approve that expenditure. Utilities are highly regulated entities, tasked with seeking to avoid imposing undue costs on their customers. Without significantly narrowing the retrofitting program, such as limiting retrofitting to high-risk poles, utilities would not be acting in good faith with respect to their customers.
[24] Proposed Rule at 59,606, 612.

- Maintenance costs, which depend on the type of pole materials, timing of maintenance, and when poles can be retrofitted;

- Safety concerns associated with working on energized lines in various environments, including lines on poles that difficult to access and having to climb certain poles to retrofit them;

- The need to avoid or compensate for disturbances, which may be required to access and retrofit poles, such as in wetlands;

- Additional permitting requirements, including applying for and obtaining permits or consultation to reach poles located in refuges and national forests; and

- Reliability and resiliency issues, which arise as more poles are retrofitted. These issues include increased fire and equipment degradation risks with the installation of insulator covers, as well as decreased visibility when conducting inspections of important connections.

FWS should also consider factors that are beyond a utility's control like weather events, which impact pole replacement schedules, affect reliability, and impose additional costs on utilities.

In light of the above concerns, CCIG strongly encourages FWS to carefully evaluate less onerous options, such as those listed below, which members believe are more line with the anticipated costs and intent of the proposed general permit program and would create fewer disincentives to program participation:

- ***No proactive refitting; stronger retroactive retrofitting strategy only.*** FWS could instead adopt a stronger retroactive retrofitting strategy (third condition) in lieu of a proactive retrofitting program. This could involve retrofitting a greater number of poles in response to an eagle death attributable to contact with power lines and/or recognition of other types of response measures. For example, as part of their retrofitting strategy, some Group members partner with other state entities to support eagle conservation through a memorandum of understanding ("MOU"), supply helicopter time for annual bald and golden eagle nest surveys, and donate GPS tracking devices for state eagle programs.

- ***Proactive retrofitting plan without a minimum baseline.*** Another option would be for FWS to require utilities to demonstrate that they have a proactive retrofit plan but not require a minimum number or percentage of retrofits. Rather, FWS could audit the utility against its own commitment, where each utility would document the reasoning for its proactive retrofitting strategy that incorporates local system information, risk information, its size, and budget constraints.

- ***Proactive retrofitting plan for only the highest risk poles.*** FWS could require utilities to only retrofit the highest risk poles. By not requiring all poles to be proactively retrofitted, including those that present minimal or no risk of electrocution, this approach would strike the appropriate balance between preventing eagle electrocution and the costs associated with proactive retrofitting.

Should FWS maintain a proactive retrofitting requirement in the final rule, CCIG recommends that FWS incorporate a "phased-in" compliance approach which accounts for the different sizes and organizational structures of utilities, as well as the degrees of maturation of the avian protection programs of utilities — some of which may have APPs already, while others do not have any existing retrofitting program in place — so as not to discourage participation. Under this approach, during the first permit term a utility would: (i) develop an accurate accounting system for quantifying electrocution-safe poles; and (ii) retrofit a lower percentage of poles. Upon permit renewal, utilities would then be required to retrofit a higher percentage of poles (which would still be significantly less than 10%).[25] A grace period to allow for the development of an accurate accounting system is needed as some Group members currently do not have every pole GIS-mapped due to the pole's age or remote location. Other Group members do not currently keep track of their annual upgrade and replacement of poles — specifically, which poles are newly retrofitted and which poles are an upgrade or replacement of existing electrocution-safe poles. As a result, to the extent they choose to pursue coverage under a power line general permit, some utilities would need time to put a compliant program in place.

vi. Eagle Shooting Response Strategy

CCIG recommends that FWS reconsider the proposed sixth condition, which would require entities to provide a plan for responding to eagle shooting events where one or more eagles are discovered near power line infrastructure and the cause of death is shooting and where such plan must outline the steps to identify eagle shootings, response options, and response implementation.[26] CCIG supports a commitment to notify FWS and other relevant agencies in response to a discovery of an eagle shooting, which many members already do via the Special Purpose Utility ("SPUT") or other permit programs. However, CCIG believes that additional obligations, such as possibly "necropsying eagles at a qualified laboratory to determine the cause of death," fall within the purview of the Service's enforcement responsibilities.[27] CCIG thus recommends that FWS clarify that notification of authorities is a sufficient response by a utility to a shooting death for which the utility is not responsible.

vii. Alternative Approach

In light of the substantial concerns with numerous aspects of the power line general permit as proposed, CCIG believes that many utilities, including many large utilities, would choose not to take advantage of the general permit, leaving a substantial portion of poles across the country outside the permit program. CCIG believes that an alternative approach would better achieve the

[25] A "phased-in" approach would be consistent with compliance schedules that are added to CWA permits when, for instance, new water quality standards are adopted and facility upgrades are required.
[26] Proposed Rule at 59,606.
[27] *Id.* While CCIG understands that this requirement may be a response to a series of eagle shooting incidents in a specific geographic area — the Morley Nelson Snake River Birds of Prey National Conservation Area in Idaho — that in itself should not trigger a nation- and industry-wide requirement to develop and implement an eagle shooting response strategy. *See* Department of Justice, U.S. Attorney's Office, District of Idaho, "Two Men Sentenced for the Unlawful Taking of a Golden Eagle," June 15, 2022, https://www.justice.gov/usao-id/pr/two-men-sentenced-unlawful-taking-golden-eagle. By way of analogy, one accident on a highway does not justify decreasing the speed limit over the entire highway.

Service's goal of increasing the efficiency and effectiveness of the permitting program while also increasing the conservation benefit for eagles by increasing participation in the program.

Under this approach, FWS would offer utilities considering the power line general permit two options for compliance. One option would be to comply with the standardized conditions set forth in the Proposed Rule (although the Service should still consider the modifications to those conditions discussed above, particularly the 10% retrofit requirement under the proactive retrofit condition and the "phased-in" compliance approach to make this option more attractive). This option may be preferred by smaller utilities that do not have well-developed APPs currently in place or the resources to devote to developing such a program.

The second option would be to allow a permittee to use its own company-specific program (such as an APP or similar program developed in a manner consistent with Avian Power Line Interaction Committee ("APLIC") guidelines). While the Service could require that a company-specific program address all six conditions currently identified in the Proposed Rule, the permittee would be allowed to employ a program that is risk-based. For example, the permittee would focus its efforts to ensure that poles are electrocution-safe in areas where eagles (particularly golden eagles) are known to occur or are considered likely to occur in the near future and would prioritize expenditure of resources on poles presenting the highest risk to eagles. The company-specific program would be made available to the Service upon request,[28] and the permittee would need to be able to demonstrate compliance with the plan. This type of option would be much more attractive to larger utilities that already devote significant resources to avian protection and would be more consistent with the Service's stated intent that the general permit program would only involve at most minor modifications for utilities already operating under an APP.[29]

b. General Permit for Wind Energy Generation Projects

CCIG supports the adoption of a general permit for wind energy generation projects. Per the Proposed Rule, incidental take associated with such projects would be eligible for general permit coverage if the eligibility criteria are met — specifically, that seasonal eagle abundance at all existing or proposed turbine locations must be below all five seasonal abundance "thresholds," which are derived using available data from eBird, an online database of bird distribution and abundance maintained by the Cornell Lab of Ornithology.[30]

The Group urges FWS to reconsider aspects of the eligibility criteria, as well as certain permit conditions as discussed below, to allow for more flexibility such that entities are not deterred from participating in the general permit program.

i. Use of eBird Data

CCIG members have significant concerns regarding the Service's reliance on eBird data in determining eligibility for the wind energy general permit. One concern is that the eBird database

[28] Company-specific documents provided to FWS, particularly if they contain the exact locations and configurations of substations and power lines, should not be made available to the public as such information presents national security concerns. Should FWS require the documents be made available or obtainable by the public, permittees should be allowed to provide only "sanitized" versions that do not contain such sensitive information.
[29] *See* Proposed Rule at 59,606, 612.
[30] *Id*. at 59,606.

is based on 2018 data, and FWS should use more current data if available (at least 2021 data). A more fundamental concern is that the eBird database consists of data collected by citizens, not scientists. FWS and state agencies have and currently use decades of accurate, reliable, and local data on eagle nests and eagle populations compiled by trained biologists, and it is unclear why FWS has chosen to rely exclusively on observations by non-scientists which — while they may be geographically more comprehensive than other existing data — are undoubtedly not as accurate. For example, adult bald eagles are relatively easy to identify, but golden eagles and juvenile bald eagles are more difficult to accurately identify. Moreover, eBird data may be skewed toward more populated areas where there may be more eagle hotspots and more citizen reports (*i.e.*, data) compared to less populated areas. As a result, the Service should allow for the use of other data, including project-specific data, where available and where such alternative datasets are likely to be more accurate than eBird data.

ii. Relative Abundance

CCIG understands that the eligibility criteria have been crafted such that the general permit program is structured as a "plug and play" program with minimal administrative burdens on both FWS and permittees. However, CCIG urges FWS to carve out some flexibility with respect to how an operator demonstrates its eligibility for the wind energy general permit to minimize disincentives to participation. As discussed above, FWS should allow an operator to use project-specific data in circumstances where such data are more appropriate.

CCIG understands that FWS intends to review eagle thresholds as new eBird data become available and to update thresholds when appropriate via rulemaking.[31] However, FWS should clarify whether seasonal eagle abundance at the turbine location must be below all five thresholds for the entire duration of the permit or only at the time of self-certification, and whether subsequent updates to the eagle thresholds would have any impact on the status of existing permits, particularly if the thresholds are lowered.

Additionally, CCIG recommends that FWS reevaluate its estimate that "nearly 80 percent of all existing wind energy *turbines* in the coterminous United States are located in areas under the proposed relative abundance thresholds for both species and thus eligible for a general permit under this proposal."[32] Given that some projects may have some turbines located in areas under the thresholds and other turbines located in areas above the thresholds, the percentage of wind energy *projects* that are actually below the proposed relative abundance thresholds and thus eligible for a general permit is likely lower. Thus, CCIG recommends that FWS reassess that estimate based on project location rather than turbine location and reconsider the use of the proposed relative abundance thresholds if FWS finds that a significantly lower percentage of existing wind energy projects actually qualify for the wind energy general permit.[33]

[31] *Id.*

[32] *Id.* at 59,602 (emphasis added).

[33] Based on experience with existing projects, if FWS is anticipating that 80% of wind projects will be eligible for coverage under the proposed general permit, the Service will either need to readjust its current "one turbine outside the range, the whole project is disqualified" approach or base eligibility on just golden eagle risk related to nest proximity.

iii. Nest Buffer Zone Requirement

FWS is proposing to pair the eagle abundance thresholds with a requirement that projects be sited more than 660 feet from bald eagle nests and more than two miles from golden eagle nests to be eligible for a general permit. CCIG is concerned that members will be precluded from future general permit coverage if a new golden eagle nest is constructed within two miles (or a new bald eagle nest is constructed within 600 feet)[34] of the project after issuance of the general permit, even if all appropriate steps were taken in complying with the terms and conditions of the general permit.[35] CCIG believes that in this situation a project should remain eligible for the general permit as long as the take threshold is not exceeded, particularly if the newly constructed nest is a bald eagle nest. To the extent eligibility for the general permit is lost due to new construction of an eagle nest, Group members recommend that FWS provide an "on-ramp" that allows for renewed eligibility such that entities that are otherwise in compliance are not barred forever from qualifying for the general permit. "On-ramp" options could include first allowing an entity to provide FWS justification when seeking to renew its general permit, providing renewed eligibility for a general permit at some point after the current permit expires (*e.g.*, ineligible for five years after the expiration of the current permit provided that the golden eagle nest is no longer occupied or displays signs of recent use), or imposing more stringent take limits for an interim period.

Moreover, while CCIG understands that FWS adopts a "once a nest, always a nest" approach, especially as it pertains to the golden eagle, CCIG urges FWS to reconsider that approach or, at a minimum, provide data showing the frequency at which golden eagles "reoccupy nests after decades of vacancy."[36]

iv. Systematic Fatality Monitoring

CCIG requests that FWS make available for public comment its proposed approach to conducting systematic fatality monitoring — "on a program-wide basis . . . instead of individual applicants being required to fund and conduct more rigorous fatality monitoring in each project" — when the contours of this approach have been more fully developed.[37] It is difficult for CCIG to assess its viability without any information on when such monitoring would be conducted, how FWS will select project sites to undergo systematic monitoring, how the results of the monitoring would impact the status of the remaining non-FWS monitored general permits, and any other impacts the results of the monitoring may have on the wind energy general permit program as a whole.[38]

v. Adaptive Management Plan

Group members have two concerns about the proposed adaptive management plan. First, the Service needs to provide more robust reasoning justifying how and why FWS selected the three and four-eagle limits triggering the need to develop and implement an adaptive management plan.

[34] Proposed Rule at 59,602.
[35] *Id.* at 59,602-603. The Proposed Rule is unclear as to whether this bar on future eligibility only applies to golden eagle nests. If this bar also applies to bald eagle nests, CCIG incorporates the same concerns and comments as for the golden eagle.
[36] *Id.* at 59,602.
[37] *Id.* at 59,604.
[38] *See id.*

Per the Proposed Rule, a permittee must provide an adaptative management plan to FWS within two weeks of discovering three eagle injuries or mortalities attributable to the project during the permit duration and confirm its implementation if a fourth eagle injury or mortality is discovered.[39] The Proposed Rule does not explain how the Service selected the three and four-eagle limits and only provides rough estimates of take detection rates without further detail or support.[40]

Second, CCIG is concerned that members will be precluded from eligibility for future general permits if the four-eagle limit is met, even if an adaptive management plan is appropriately implemented and the permittee complies with all other terms and conditions of the permit.[41] The Group thus urges FWS to provide an "on-ramp" that allows for renewed eligibility for the wind energy general permit such that permittees that are otherwise in compliance are not barred forever from qualifying for a general permit. Specifically, FWS should provide for additional "on-ramp" options — aside from requesting reconsideration under 50 C.F.R. § 13.29 based on extenuating circumstances[42] — such as first allowing an entity to provide FWS justification when seeking to renew its general permit,[43] providing renewed eligibility for a general permit at some point after the current permit expires (*e.g.*, ineligible for five years after the expiration of the current permit), or imposing more stringent take limits for an interim period (*e.g.*, no more than two eagle takes for each of the next two years).

vi. Compensatory Mitigation

CCIG recommends that FWS include language allowing for more compensatory mitigation options and flexibility in selecting such options in order to avoid any disincentives to participation in the general permit program and to minimize administrative burdens on both the applicant and FWS. Currently, the Proposed Rule only allows for two compensatory mitigation options: conservation banking and in-lieu fee programs.[44] Other options could include active participation in a MOU with statewide eagle conservation stakeholders.

c. General Permit for Activities that May Disturb Eagles

CCIG supports the Service's development of a general permit for certain activities that may disturb bald eagles. At the same time, the Group recommends that FWS clarify the definition of

[39] *Id.*
[40] *See id.*
[41] *See id.* Fatalities caused by unusual weather events, natural disasters, or other clear anomalies that is not attributable to an entity's activities or conduct should not be counted against the entity's eagle limit. For instance, if an entity has been operating for 10 years, has never recorded an eagle fatality, and then discovers several fatalities in a short period of time — thus causing the entity to exceed the limit — despite the lack of an increase in eagle activity in the area or other factors to explain the fatalities, then the fatalities should be characterized as an anomaly and should not be counted against the entity; and in that instance, the entity should be allowed to renew the general permit. However, if such fatalities continue, then the entity should first be afforded the opportunity to consult with FWS to determine whether a specific permit or general permit renewal is warranted.
[42] *See id.*
[43] If the entity is then denied a general permit after providing justification, there should be a fast-track or alternative process for the entity to submit a specific application process to minimize unnecessary time and resources of both the entity and FWS.
[44] *See id.*at 59,605.

"foraging area" as it applies to determining whether an activity would result in a "disturbance" that would potentially trigger the need for permit coverage.[45]

Current regulations define a "foraging area" as "an area where eagles regularly feed during one or more seasons,"[46] which could be broadly interpreted to encompass extensive areas used by eagles. For example, the National Bald Eagle Management Guidelines state that bald eagles are opportunistic feeders and that while wintering bald eagles often congregate near streams, eagles also feed on carcasses along roads and in landfills and feedlots.[47] Moreover, while the proposed regulations refer to eligibility for permits for "disturbance to a foraging area,"[48] disturbing a foraging area in and of itself is not something that constitutes a violation of the BGEPA. Rather, the need for permit coverage is triggered by activities in or modifications to foraging areas which result in the disturbance of eagles, *i.e.*, agitating or bothering a bald or golden eagle to a degree that causes, or is likely to cause: (i) injury to an eagle; (ii) a decrease in its productivity, by substantially interfering with normal breeding, feeding, or sheltering behavior; or (iii) nest abandonment, by substantially interfering with normal breeding, feeding, or sheltering behavior. Thus, the Group also recommends that FWS clarify that a determination to obtain a disturbance permit associated with foraging should be based on an evaluation of whether a disturbance *of eagles* is likely to occur.

Additionally, the Group recommends that FWS consider providing an exemption from permitting for emergency or routine maintenance activities associated with power reliability or safety.[49] To that end, the Group likewise recommends that FWS revise the proposed language in § 22.280(d) by clarifying that disturbance minimization measures are only required to the "maximum degree practicable." In some cases, either due to safety or otherwise lawful operating requirements, utilities may not be able to fully avoid or minimize disturbance activities or impacts or implement minimization measures. Thus, the Group recommends that the provision reads as (proposed language in italics):

> (1) Implement measures to avoid and minimize nest disturbance *to the maximum degree practicable*, including disturbance due to noise from human activities, visibility of human activities, proximity to nest, habitat alteration, and indirect stressors.
>
> (2) Avoid activities that may negatively affect the nesting substrate *to the maximum degree practicable*, such as the survivability of the nest tree.[50]

Addition of such language would be consistent with the proposed language in § 22.200(d)(4) on issuance criteria for specific permits.

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[45] *Id.* at 59,630 (proposed § 22.280(c)).
[46] 50 C.F.R. § 22.6.
[47] FWS, National Bald Eagle Management Guidelines at 7 (May 2007), https://www.fws.gov/sites/default/files/documents/national-bald-eagle-management-guidelines_0.pdf.
[48] Proposed Rule at 59,630 (proposed § 22.280(c)).
[49] *See id.*at 59,630 (proposed § 22.280(b)(2) (requiring a general permit for incidental take of bald eagles by "[l]inear infrastructure construction and maintenance (*e.g.*, roads, rail, trails, power lines and other utilities) within 660 feet of an in-use bald eagle nest or within 330 feet of any bald eagle nest").
[50] *Id.* at 59,630 (clarifying language in emphases).

d. General Permit for Bald Eagle Nest Take

CCIG supports the Service's development of a general permit for "bald eagle nest take for emergency, health and safety, or a human-engineered structure."[51] At the same time, the Group asks that FWS consider extending the permit tenure to longer than one year to minimize administrative burdens on both regulated entities and FWS. The Service should also consider developing a general permit for golden eagle nest removal, as it may be difficult to timely apply for and obtain a specific permit where, for instance, there is an emergency or health and safety concern that needs to be urgently addressed. A general permit for limited instances of golden eagle nest removal ensures that emergency response, health and safety concerns, and power reliability (particularly following extreme weather events) are appropriately prioritized.

Moreover, FWS should clarify whether nest disturbance that is or anticipated to be minimal requires a general permit. The season and time of year or nest status may allow for minimal or no disturbance to nests for new projects, particularly projects that update existing facilities or those that are within existing rights-of-way ("ROWs").

e. Other Aspects of Proposed Rule

CCIG provides the following recommendations on other aspects of the Proposed Rule for the Service's consideration.

i. Clearer Distinctions in How the General Permit Program Addresses Different Eagle Species

FWS should make a greater distinction between how bald and golden eagles are addressed in the general permit program given the significant difference in population status[52] and geographic distribution[53] between the two species. One option could be increasing take limits for bald eagles or allowing permittees to make distinctions between species in their individualized plans for the wind general permits.

ii. Auditing

FWS should make the proposed auditing program available for public comment when it has been developed. Per the Proposed Rule, FWS "intends to conduct annual audits for a small percentage of all general permits to ensure applicants are appropriately interpreting and applying eligibility criteria."[54] While FWS is soliciting feedback on how it should implement the proposed audit program, it is difficult for CCIG to provide meaningful comments. The Group cannot adequately assess the viability of the Service's proposed auditing approach without any information on when the audit would be conducted, how FWS would select the "small percentage

[51] *Id.* (proposed § 22.300(c)).
[52] *See id.*at 59,599 ("estimated U.S. population size for golden eagles remains approximately 38,000 which is less than the bald eagle population of 336,000 by an order of magnitude").
[53] *Cf.* FWS, Bald Eagle, https://www.fws.gov/species/bald-eagle-haliaeetus-leucocephalus (bald eagle ranging from Alaska and Canada, across the contiguous U.S., and down to northern Mexico) *with* FWS, Golden Eagle, https://www.fws.gov/species/golden-eagle-aquila-chrysaetos (golden eagles "most commonly found in the western half of the country").
[54] Proposed Rule at 59,600.

of all general permits" to be audited, the timeline by which information requested in an audit must be provided, and how the results of the audit would impact the status of the remaining non-audited permittees.

In developing the auditing program, CCIG recommends that FWS make clear the selection process, criteria, and expectations for documentation and provide audited entities the opportunity to respond to the Service's findings. The Group would appreciate the opportunity to assist FWS with developing a workable audit program that ensures conservation benefits for eagles while reducing administrative burdens.

iii. Revisions to Specific Permit Program

CCIG recommends that FWS allow applicants to submit site-specific alternatives to FWS-issued or endorsed surveys, modeling, take estimates, or other data based on local conditions or in cooperation with state agencies unless there is a compelling reason to reject such alternatives based on the best available (local, state, or regional) scientific information.[55] CCIG also recommends that FWS allow for permit transfers, particularly in instances where a utility has acquired an already-built project that has an eagle permit. CCIG notes that many environmental permits that relate to facility operations are transferable, including NPDES permits, Clean Air Act ("CAA") Title V permits, and permits for transportation, storage and disposal facilities under the Resource Conservation and Recovery Act ("RCRA").[56] BGEPA take permits that relate to ongoing operations, such as permits for wind energy facilities and power lines, should likewise be transferable where notice of the change in ownership is provided to the Service and the new owner certifies that it is taking over permittee responsibilities and will comply with the terms and conditions of the permit.

iv. Scope of Self-Certification

The Proposed Rule includes a requirement that as a prerequisite of obtaining incidental take coverage under a general permit, the applicant must self-certify that the activity is "otherwise lawful." Under the BGEPA, the Service is authorizing incidental take of eagles, not the underlying activity. The Service should avoid appearing to authorize (or tread into federalizing) the *underlying* activity.

v. Future Guidance and Policy Documents

Should FWS issue national recommendations or guidance in the future regarding the BGEPA permitting program,[57] CCIG asks that they be made available for public review and input as Group members are concerned that such policies will ultimately become *de facto* rules.[58] For

[55] *See id.* at 59,625 (proposed § 22.200(c)(2)(C)(iii) states, "If the Service has officially issued or endorsed, through rulemaking procedures, survey, modeling, take estimation, or other standards for the activity that will take eagles, you must follow them and include in your application all the information thereby obtained, unless the Service waives this requirement for your application.").

[56] *See e.g.*, 40 C.F.R. §§ 70.7(d)(iv) (transfer of CAA Title V permits); § 122.61 (NPDES permits); § 270.40 (RCRA Treatment, Storage, and Disposal Facilities ("TSDF") permits).

[57] This includes, for example, upcoming guidance on in lieu fee programs including a regulatory economic analysis ("REA") for the lead abatement program.

[58] *See* Proposed Rule at 59,603.

example, Group members expect that FWS will provide recommendations for compliance with Clean Water Act ("CWA") Section 404 nationwide permit ("NWP") requirements based on guidance such as the 2007 National Bald Eagle Management Guidelines.[59] Activities covered by the Proposed Rule, as well as associated avoidance, minimization, and mitigation measures, are discussed in the 2007 National Bald Eagle Management Guidelines.[60] To the extent that the Service relies on those guidelines or similar documents in implementing the BGEPA permitting program, those documents should be made available for public review and input. Undertaking rulemaking and codifying future guidance and policy documents would eliminate uncertainty and provide consistency.

Similarly, CCIG asks that FWS Regions make their individual recommendations or guidance available for public review and input should they be issued in the future, as Group members are concerned that such policies will likewise become *de facto* rules where regional staff use recommendations in regional guidance documents as conditions of permit compliance. There are currently a number of BGEPA guidance documents issued individually by FWS Regions, and there is often cross-reliance on guidance documents by FWS Regions that did not issue them, which contribute significantly to the confusion surrounding the current BGEPA permit process, as well as to the lack of consistency and transparency regarding how FWS carries out the permit program.

III. CONCLUSION

The Cross-Cutting Issues Group appreciates the opportunity to submit comments on the Proposed Rule. CCIG respectfully asks FWS to consider the Group's recommendations discussed above to ensure that the general permits are realistic, clear, and do not create significant barriers to participation by the majority of stakeholders so as to achieve the Service's goals of creating an efficient and effective permitting system while maximizing conservation benefits to eagles.

Dated: December 28, 2022

[59] *See* NWP 1 Aids to Navigation, General Condition 19 (expires Mar. 14, 2026), https://saw-reg.usace.army.mil/NWP2021/NWP-1.pdf. ("The permittee is responsible for ensuring that an action authorized by NWP complies with the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act. The permittee is responsible for contacting the appropriate local office of the U.S. Fish and Wildlife Service to determine what measure, if any, are necessary or appropriate to reduce adverse effects to migratory birds or eagles, including whether 'incidental take' permits are necessary and available under the Migratory Bird Treaty Act or Bald and Golden Eagle Protection Act for a particular activity.").

[60] National Bald Eagle Management Guidelines at 9-15, https://www.fws.gov/sites/default/files/documents/national-bald-eagle-management-guidelines_0.pdf.

PUBLIC SUBMISSION

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Docket: FWS-HQ-MB-2020-0023
Eagle Permits; Incidental Take

Comment On: FWS-HQ-MB-2020-0023-1937
Permits for Incidental Take of Eagles and Eagle Nests

Document: FWS-HQ-MB-2020-0023-9317
Comment from IdentiFlight

Submitter Information

Address: United States,
Email: shelley.vierra@identiflight.com
Organization: IdentiFlight

General Comment

See attached file(s)

Attachments

Public comment submission Docket No. FWS HQ MB 2020 0023 IDENTIFLIGHT

IdentiFlight

Public Comment Submission

U.S. Fish and Wildlife Service
MS: PRB/3W
5275 Leesburg Pike
Falls Church, VA 22041-3803
Re: Docket No. FWS-HQ-MB-2020-0023

December 28, 2022

Dear U.S. Fish and Wildlife Service:

Thank you for the opportunity to comment on the pending Eagle Rule. IdentiFlight has a proven advanced technology that dramatically avoids and minimizes eagle collisions with wind turbines. This breakthrough in avoiding and minimizing incidental eagle takes will revolutionize the success of wind farms in the future by providing maximum protection to golden and bald eagles. The technology is cost effective and proven through independent, third-party studies, and reviewers, and is being implemented within the United States and worldwide[i]. It is essential that the forthcoming eagle regulations of the Service incentivize and embrace these new technologies.

At the outset, IdentiFlight supports the efforts of the Service to strengthen and improve the Eagle regulatory program. We believe the Service is on a strong path to protecting eagles while enhancing renewable wind energy throughout the country. There is no reason why major growth of wind energy cannot occur while the Service ensures comprehensive protection of eagles.

Therefore, we applaud the Service's move to establish a general permit program to complement the more comprehensive specific permit requirements. The more wind farms come under a regulatory structure, the better protections there will be for golden and bald eagles. That said, we believe the regulations must be more precise in recognizing the benefits and role of advanced technology, and where appropriate, include the use of advanced technology systems at all phases of the regulatory program including avoidance, minimization, and compensatory mitigation. Such advanced and approved technologies can also be helpful as part of adaptive management and enforcement alternatives.

GENERAL PERMITS

Wind farms proceeding under general permits utilizing advanced technology will have greater confidence that they will not exceed allowable takes limits and will be able to renew general permits at the expiration of the five-year period. To this end, several important changes in the proposed regulations should be made:

1. Analogous to power pole retrofits, approved advanced technologies that minimize collision risks can and should be a recognized minimization/mitigation measure to which credits can be received when applying for general permits. The regulations should clearly state this, as we identify in our suggested edits to the draft regulations.

2. Where existing wind operations fall within EMUs of abundance requiring specific permits, utilization of approved advanced technologies may significantly reduce or prevent eagle fatalities and may allow such operations to qualify for general permits. The regulations should specify that the Service has the flexibility to direct the operator to apply for a general permit when it utilizes an approved advanced technology. This approach will result in far greater participation in the regulatory program and protection of the species.
3. Similarly, for new wind farms that are subject to specific permit conditions, utilization of approved advanced technologies should be a factor in the Service's consideration of a general permit (in lieu of proceeding under a specific permit). As stated above, we believe this will result in far greater acceptance of, and participation in, the overall regulatory program.

SPECIFIC PERMITS

Where a wind farm falls within the requirements of a specific permit, here too the Service should encourage the use of approved advanced technologies that can aid in minimizing incidental takes, providing compensatory mitigation, structuring adaptive management, or dealing with enforcement and curtailment issues. Approved advanced technologies provide effective mitigation across the board and should be incentivized by the Service. Approved advanced technologies will also aid operators in fulfilling the full term for specific permits.

We ask that you give consideration to the above comments and to the specific edits we provide in the attached.

Sincerely,

Carlos Jorquera, Chief Executive Officer and Chief Technology Officer
IdentiFlight

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[i] ***IdentiFlight's system is being utilized in multiple USFWS regions, as well as in multiple countries around the world***. *We welcome the opportunity to further review this technology with the Service outside of this regulatory comment period. For the purposes of our comments, we wish to briefly explain our technology.*

IdentiFlight is an advanced technology that brings high-precision optical cameras to wind farms for the purpose of instantly identifying and tracking eagles. Utilizing high-speed image processing, artificial intelligence, and software, eagles can be evaluated and tracked with a determination of risk assessment for collisions with the blades of wind turbines. Where necessary, time-sensitive curtailment signals are automatically sent to turbines that shut off or reduce operations. After an eagle flies outside of the danger zone, turbines are reengaged to minimize downtime. IdentiFlight customers report one percent or less annual power loses due to the informed curtailments, even at sites with high abundance.

IdentiFlight is a mature technology that warrants recognition of and utilization by the Service in all phases of its regulatory system from avoidance to compensatory mitigation to adaptive management.

Utilization of IdentiFlight is cost effective, on average adding less than one percent to overall project costs.

As our technology enters its eighth year of adoption in diverse global environments, multiple independent studies have confirmed that IdentiFlight is effective in minimizing avian fatalities. Key aspects of IdentiFlight's technology story:

- A recent study update: "Confirmation that eagle fatalities can be reduced by automated curtailment of wind turbines" (published in the British Ecology Society's Ecological Solutions and Evidence Journal) confirms that eagle fatalities can be reduced by 85 percent with the implementation of IdentiFlight's targeted, informed curtailment based on multi-year data collected from 2018 to 2021.
- The update is based on additional data collected since "Automated curtailment of wind turbines reduces eagle fatalities," was published in the *Journal of Applied Ecology.* The 2021 study and the updated report were both conducted by The Peregrine Fund, in cooperation with Western EcoSystems Technology, Inc. and the US Geological Survey, at a wind farm site in Wyoming. The original publication indicated an 82 percent reduction in eagle fatalities as compared to biomonitors.
- IdentiFlight is currently installed and actively minimizing collisions with turbines at eight different wind farms throughout the western U.S., including California, Oregon, Washington, Utah, Wyoming, and Oklahoma – in addition to installations around the world. To cite one example, seven IdentiFlight units have been installed at a wind farm in USFWS Region 6 since January 2019. In the four years since installation, none of the 52 fully covered turbines have had an eagle take. In comparison, other turbines in the wind farm that are not covered by IdentiFlight have experienced take incidents. IdentiFlight is happy to share the project specific information with USFWS to demonstrate IdentiFlight's effectiveness at precluding take of eagles at this site.

IdentiFlight suggested edits to Federal Register / Vol. 87, No. 189 / Friday, September 30, 2022 / Proposed Rules

Page 59625, Subpart E- Take of Eagles for Other Interests.
§ 22.200 Specific permits. (2.C.iv) Implemented and proposed steps to avoid, minimize, compensate for, and monitor impacts on eagles~~.~~ *including any approved in-lieu fee programs, approved advanced technologies, and other mitigation measures.*

Page 59625, Subpart E- Take of Eagles for Other Interests.
§ 22.200 Specific permits. (3.d.1.ii) The Service may grant a letter of authorization to apply for a general permit if the Service determines the project is consistent with fatality estimates for general permits even though it does not otherwise meet general-permit eligibility criteria. *Utilization of approved advanced technologies may also be the basis for proceeding under the general permit program.* This paragraph…

Page 59626, Subpart E- Take of Eagles for Other Interests.
§ 22.200 Specific permits. (4.d.4)
The applicant has proposed avoidance and minimization measures to reduce the take to the maximum degree practicable relative to the magnitude of the activity's impacts to eagles~~.~~ *, which may include utilization of approved advanced technologies.* These measures must meet…

Page 59626, Subpart E- Take of Eagles for Other Interests.
§ 22.200 Specific permits. (4.d.5)
The applicant has proposed to either: implement compensatory mitigation measures that comply with the standards in § 22.220; or secure required eagle credits from a Service approved conservation bank or in-lieu fee program~~.~~ *or include approved advanced technology measures.*

Page 59626, Subpart E- Take of Eagles for Other Interests.
§ 22.210 General permits. (2.c.C.vi)
A certification that the applicant agrees to acquire eagle credits, if required, from a Service-approved in-lieu fee program *or from an approved advanced technology*, within 90 days of the effective date of the permit.

Page 59626, Subpart E- Take of Eagles for Other Interests.
§ 22.210 General permits. (2.d.5)
You will implement the required eagle credits from a Service-approved conservation bank or in-lieu fee program *or from an approved advanced technology*, within 90 days of the effective date of your permit.

Page 59627, Subpart E- Take of Eagles for Other Interests.
§ 22.215 Conditions of permits. (a.2)
Your permit will require implementation of avoidance, minimization, monitoring, and adaptive management measures, *which may include approved in-lieu fee or advanced technology measures,* consistent with the relevant regulations in this subpart.

Page 59627, Subpart E- Take of Eagles for Other Interests.
§ 22.220 Compensatory mitigation. (b.1)
Be contingent upon application of avoidance and minimization measures to reduce the take to the maximum degree practicable relative to the magnitude of the project's impacts on eagles. *Approved advanced technologies should be considered by the applicant.*

Page 59628, Subpart E- Take of Eagles for Other Interests.
§ 22.220 Compensatory mitigation. (b.7.c)
Compensatory mitigation must be approved by the Service and may include conservation banks, in-lieu fee programs, *approved advanced technologies,* or permittee-responsible mitigation as mitigation providers.

Page 59628, Subpart E- Take of Eagles for Other Interests.
§ 22.220 Compensatory mitigation. (b.7.c.1)
General permittees meet this requirement by obtaining required credits from a Service-approved third-party mitigation provider. Specific permittees can meet this requirement by obtaining required credits from a Service-approved third-party mitigation provider or meeting the requirements to be a permittee-responsible mitigation provider as described in paragraph (c)(2) of this section. Third-party mitigation providers, such as in-lieu fee programs, *approved advanced technologies,* and conservation banks, obtain Service approval by meeting the requirements to be a mitigation provider as described in paragraph (c)(2) of this section.

Page 59628, Subpart E- Take of Eagles for Other Interests.
§ 22.220 Compensatory mitigation. (c.2)
To obtain approval as a permittee responsible mitigation provider, providers must submit a mitigation plan to the Service sufficient to demonstrate that the standards set forth in paragraph (b) of this section can be met. At a minimum, this must include a description of the mitigation, the benefit to eagles, the location(s) where projects will be implemented, the EMU and local area population served, the number of credits provided, and an explanation of the rationale for this determination. The Service must approve the mitigation plan prior to implementation. *The Service may determine approved advanced technologies that minimize collision risks to be equivalent or preferable to compensatory mitigation.*

Page 59628, Subpart E- Take of Eagles for Other Interests.
§ 22.250 Permits for incidental take of eagles by wind energy projects. (c.1)
To be eligible, all turbines associated with a project must be located in areas characterized by seasonal relative abundance values that are less than the relative abundance values for the date range for each species listed in paragraphs (c)(1)(i) and (ii) of this section. Additionally, golden eagle nests must be at least 2 miles and bald eagle nests must be at least 660 feet from any turbines. *When approved advanced technologies are implemented to minimize collision risks, an approved reduction factor may be applied to the relative abundance values for turbines that are covered by such advanced technologies, and additionally, the minimum distance to golden eagle nests may be reduced below two (2) miles.*

Page 59628, Subpart E- Take of Eagles for Other Interests.
§ 22.250 Permits for incidental take of eagles by wind energy projects. (d.2)
If you discover the take of three eagles of any one species during the tenure of the general permit, you must notify the Service in writing within 2 weeks of discovering the take of a third eagle and implement

an adaptive management measure(s). Your notification must include the reporting data required in your permit conditions, your adaptive management plan, and a description and justification of which adaptive management approaches you will be implementing. *Adaptive management may include utilization of approved advanced technologies.*

Page 59628, Subpart E- Take of Eagles for Other Interests.
§ 22.250 Permits for incidental take of eagles by wind energy projects. (e)
Eligibility for a wind energy specific permit. To qualify for a specific permit, you must meet the requirements of § 22.200. In determining whether to issue a permit, the Service will review the application materials provided, including the eagle impacts assessment. The Service will use the best available data to estimate the take of eagles that will result from the proposed activity. *Application and implementation of advanced technology measures will be considered by the Service.*

Page 59628, Subpart E- Take of Eagles for Other Interests.
§ 22.250 Permits for incidental take of eagles by wind energy projects. (f.1)
Develop an adaptive management plan, including circumstances that trigger implementation and management measures to be considered. *These may include implementation of approved advanced technologies.*

Page 59629, Subpart E- Take of Eagles for Other Interests.
§ 22.250 Permits for incidental take of eagles by wind energy projects. (f.3)
Minimize collision and electrocution risks in the project, including collisions with turbines, vehicles, towers, and power lines. *In-lieu fee proposals and advanced technological treatments may be considered.*

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Permits for Incidental Take of Eagles and Eagle Nests

Document: FWS-HQ-MB-2020-0023-9318
Comment from EDP Renewables North America

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General Comment

See attached file(s)

Attachments

Public Comments of EDPR NA on Proposed Eagle Permit Rule Revisions_Final.docx

December 28, 2022

Comments Regarding the September 30, 2022 Proposed Rule: Permits for Incidental Take of Eagles and Eagle Nests

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Fish and Wildlife Service

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Docket No. FWS-HQ-MB-2020-0023

EDP Renewables North America LLC ("EDPR NA") is filing these comments on the U.S. Fish and Wildlife Service's ("Service") September 30, 2022 Proposed Rule: Permits for Incidental Take of Eagles and Eagle Nests ("Proposed Rule").[1] EDPR NA, its affiliates and its subsidiaries develop, construct, own, and operate wind farms and solar parks throughout North America. Headquartered in Houston, Texas, with 58 wind farms, nine solar parks, and eight regional offices across North America, EDPR NA has developed more than 8,800 megawatts (MW) and operates more than 8,200 MW of onshore utility-scale renewable energy projects. With more than 1,000 employees, EDPR NA's highly qualified team has a proven capacity to execute projects across the continent.

As the owner of the fourth largest fleet of wind farms in the U.S., EDPR NA has dealt extensively with the issue of bald and golden eagle impacts from wind development and is working on eagle take permit applications for several of its projects across the country. In fact, for some projects our efforts to obtain an eagle permit have been ongoing for five years or more, resulting in substantial costs and administrative expenses for both EDPR NA and the Service. This excessively long time frame is emblematic of some of the problems that have plagued the Service's existing eagle permit rule in 50 C.F.R. Part 22.

EDPR NA has been engaged in numerous discussions and forums with the Service, stakeholders, and other members of the renewable energy industry over the past 13 years since the first eagle permit rule was adopted in an ongoing effort to identify and seek solutions to some of the most problematic aspects of the regulation. Most recently, EDPR NA worked with several of its fellow members of the renewable energy industry association, American Clean Power ("ACP"), and environmental non-governmental organizations (eNGOs) including Audubon Society, Defenders of Wildlife and Natural Resources Defense Council to develop a proposed framework for a Wind General Permit for eagles. That framework was largely incorporated into the Service's draft Environmental Assessment ("Draft EA") for the Proposed Rule as Alternative 2. Thus, EDPR NA is deeply invested in ensuring that there is a workable, efficient permitting framework that will

[1] *Federal Register*, Vol. 87 No. 189, Friday, September 30, 2022, pages 59598-59631.

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allow the industry to achieve the level of renewable energy buildout and generation that is necessary to meet the nation's necessarily ambitious climate goals, while also ensuring the conservation and preservation of bald and golden eagles.

We are encouraged that the Service is proposing to significantly revise its Part 22 regulations to address many of the problems that have impeded permitting and discouraged participation of many project owners. In particular, the proposal to establish a General Permit ("GP") framework is an important and needed step in the right direction. However, there are numerous aspects of the current proposal, including the proposed GP framework, that would undermine implementation of the Proposed Rule just as implementation of the existing eagle permit rules have been undermined. Fortunately, there are practical solutions available for these issues that can be incorporated into a final rule to provide a practicable and predictable permitting framework while still meeting the preservation standard of the Bald and Golden Eagle Protection Act ("BGEPA").

EDPR NA participated in the development of and fully supports the comments filed by each of ACP and the Energy and Wildlife Action Coalition ("EWAC"). Those comments provide many practical, productive suggestions for addressing the shortcomings in the Proposed Rule. We urge the Service to consider those comments carefully and in detail. Doing so will enable the Service to avoid a repeat of the problems that have plagued the current Part 22 rules and led to lower than expected participation in the permit program.[2] In the comments that follow, EDPR NA highlights some of the most significant concerns that our company has with the Proposed Rule and our recommendations for how the Service can best address those concerns.

I. Application of the Preservation Standard

Before addressing the Proposed Rule itself, it is important to highlight an issue in the Service's existing regulations that is the source of many of the overly conservative and problematic provisions in both its existing rules and the Proposed Rule. BGEPA authorizes the Service to permit the taking of bald eagles and golden eagles provided that the taking is "compatible with the preservation of the bald eagle or the golden eagle."[3] The Service has interpreted this phrase, referred to as the "Preservation Standard," to mean that the issuance of a permit must be "consistent with the goals of maintaining stable or increasing breeding populations in all eagle management units and the persistence of local populations throughout the geographic range of each species."[4]

The Service's interpretation of the Preservation Standard is overly broad and not supported by the language of the statute itself. The statutory language requires only that permits be "compatible" with preservation of the species. To interpret this standard as applying on an eagle management unit level, let alone a local population level, is a significant overreach that exceeds the Service's regulatory authority. The Service has never provided a biological justification for the proposition that the persistence of every local population of eagles is essential to the preservation of the species as a whole. Indeed, the very way in which the Service defines local populations belies any biological justification for this position. The Service defines a local area population ("LAP") as the "population within the area of a human activity or project bounded by the natal dispersal distance for the respective species."[5] Because the LAP is different for every

[2] *Id.* at p. 59600.
[3] 16 U.S.C. § 668a (2018).
[4] 50 C.F.R § 22.6 (2016).
[5] 50 C.F.R § 22.6 (2016).

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project, it cannot be the case that the persistence of that arbitrarily defined "population" is necessary for the preservation of the species.

The overreach embodied in this definition manifests itself in the requirements of the Proposed Rule. By applying the Preservation Standard at what is essentially the project level (due to the way the Service defines a LAP), the Proposed Rule imposes a financially burdensome mitigation requirement in the wind energy GP even for projects that would take only bald eagles, despite the fact that as noted throughout the Proposed Rule, bald eagle populations have quadrupled in just the past six years.[6] Further, the caveat that the Service can suspend or revoke a permittee's permit coverage if necessary to "safeguard local or regional eagle populations" introduces an unacceptable level of uncertainty into the permit program that is unwarranted from either a biological or regulatory perspective.

We urge the Service to take the opportunity afforded by the Proposed Rule to reconsider its interpretation of the Preservation Standard and revise its regulatory definition to be consistent with the species population-level standard set forth in the BGEPA statute itself.

II. Inference of an "Otherwise Lawful" Standard that is not included in BGEPA

Although the Service has previously acknowledged that BGEPA, unlike the ESA, does not contain an "otherwise lawful" provision,[7] the Proposed Rule requires that applications for coverage under the wind energy GP include a "[c]ertification that the activity complies with all other applicable Federal, State Tribal and local laws."[8] A similar provision was included in the Service's Proposed Rule when it revised Part 22 in 2016, and was removed in response to public comment which pointed out that BGEPA does not contain the same "otherwise lawful" condition for take permits as the ESA. However, even the revised formulation that was included in the final 2016 rule, which states that "You are responsible for ensuring that the permitted activity is in compliance with all Federal, tribal, State, and local laws and regulations applicable to eagles," is inappropriate. This same language is included in the proposed § 22.215(a)(8) as well as Condition J.4 of the proposed Wind GP Conditions.

This language should be removed from § 22.210(c)(2)(iv), § 22.215(a)(8), the Wind GP Conditions, and anywhere else it appears when the Proposed Rule is finalized. It is unnecessary to inform permit applicants of their obligation to comply with other applicable legal requirements, and there is no statutory justification for requiring them to provide a certification to that effect in their application for a GP. Even where intended merely as informational, the inclusion of such language in the regulation and in permit conditions implies that it is creating an independent legal requirement, and one that would allow states, local governments and other federal agencies to interfere with the issuance of a federal permit. We also point out that by requiring a certification, or simply instructing the applicant/permittee to ensure that the "activity" complies with all other applicable laws implies that the Service is permitting the activity of operating a wind farm, which is definitively not the case. The Service's statutory authority under BGEPA is limited to permitting take of eagles, not operating a wind farm or any other activity. The Service's rules must reflect that limitation and not seek to expand the Service's jurisdiction through the inclusion of an "otherwise lawful" condition that is not included in BGEPA.

[6] *Federal Register*, Vol. 87 No. 189, Friday, September 30, 2022, at p. 59599.
[7] 81 Fed. Reg. 91535 (Dec. 16, 2016).
[8] Proposed Rule § 22.210(c)(2)(iv).

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III. Bifurcation of the Wind General Permit

The creation of a GP option for wind energy is a welcome and sorely needed addition to the Service's eagle permitting framework. Indeed, as noted above EDPR NA worked closely with a group of renewable energy companies and eNGOs to develop a proposal for a wind energy GP that was included in the Service's Draft EA as Alternative 2. EDPR NA appreciates the Service including it in the Proposed Rule. However, we urge the Service to bifurcate the wind energy GP and allow applicants to obtain permit coverage separately for bald eagles and golden eagles. This is both important and appropriate for a number of reasons.

First and foremost, there are significant differences between the biology and the conservation status of the two species, as the Proposed Rule acknowledges. While golden eagle populations appear to be holding relatively steady, bald eagle populations increasing more than four-fold since the Service's previous population estimated in 2016, and increasing at a rate of 10% per year in most EMUs.[9] While this remarkable recovery is a welcome success story, the recent, rapid expansion of bald eagle populations is resulting in more frequent interaction between bald eagles and wind turbines, and the conditions and limitations of the proposed wind energy GP are likely to quickly become inadequate for a large number of projects.

Additionally, there are significant differences in range and distribution of the two species, such that many projects may have risk for one species but the other, or risk that is greatly disproportionate between the two species. Forcing every eligible project to obtain coverage, and pay for mitigation, for both species is a grossly inefficient approach. This is especially true considering that compensatory mitigation for bald eagles would not otherwise be (and under the current rule is not) necessary in many if not most cases under a specific permit. Projects should have the ability to seek coverage under the wind energy GP for either or both species but should not be required to seek coverage for both species if they have determined that there is negligible risk for one of them. In that event, they should have the ability to obtain coverage under a GP that is specifically tailored to the risks to and needs of the species on which the project may have an impact and does not impose additional financial or compliance obligations that are not warranted for that species.

IV. Conditions of the Wind General Permit

As mentioned above, EDPR NA supports the Service's effort to establish an eagle GP for wind energy. However, in addition to the importance of making separate GPs available for bald eagles and golden eagles, we also have a number of concerns with the proposed conditions of the wind energy GP. In Section III.C. of its comment letter filed separately on this docket (the "EWAC Comments") EWAC provides a detailed description of the shortcomings and problems with the GP framework in the Proposed Rule and the specific GP conditions set forth in the Service's separate "Wind General Permit Conditions" document, version 9.15.2022, included in the Proposed Rule docket. As described in further detail in the EWAC Comments, EDPR NA's most significant concerns with the Wind General Permit Conditions are:

> (1) The use of e-Bird survey data as the sole basis for determining GP eligibility – This approach to GP eligibility ignores existing data about eagle behavior, topography and other natural features and conditions that drive eagle risk, resulting in large areas of the

[9] *Federal Register*, Vol. 87 No. 189, Friday, September 30, 2022, at p. 59599.

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country being excluded from eligibility and projects with only a small subset of turbines located in areas exceeding the relative abundance thresholds being denied GP eligibility;

(2) The use of nest buffers as an eligibility criteria for bald eagles, and the lack of clarity regarding how the Service will audit for compliance with the nest eligibility criteria – EDPR NA acknowledges the importance of nest buffers for golden eagles, but specifics are needed regarding the data and surveys that can be used to demonstrate compliance with this criteria;

(3) The lack of predictability and certainty resulting from the prospect of disqualification from the GP – The Proposed Rule provides that projects operating under a wind energy GP may not be able to renew their GP coverage if an eagle nest is subsequently built within the relevant buffer distance from a project turbine, or if otherwise warranted based on "new information." This lack of certainty regarding long-term eligibility for the GP and the prospect of having to obtain specific permit coverage at some point during the project life creates an unacceptable level of uncertainty that will discourage use of the wind energy GP option.

(4) The lack of approved mitigation options – EDPR NA and other wind energy companies have been urging the Service to approve additional mitigation options for eagle take beyond power pole retrofits. Power pole retrofits alone are an inadequate solution, and the lack of approved alternatives has already proved a hindrance to many permit applicants. If the Service is successful in implementing a GP that actually attracts participation by industry, this lack of approved alternatives will become a crippling bottleneck that undermines the success of the program.

(5) The imposition of a compensatory mitigation requirement for bald eagles – Despite the Service's established policy that compensatory mitigation is not necessary for bald eagle take in the vast majority of situations, it is requiring compensatory mitigation for bald eagles as a condition of the GP. This is irrational and not required to satisfy the Preservation Standard and will only serve to discourage participation in the GP program.

(6) Service-conducted, program-wide fatality monitoring – Fatality monitoring at wind energy facilities is not necessary to meet the Preservation Standard and provides no benefit to eagles. Further, it imposes an unfair burden and cost on wind energy facilities compared with power lines, for which the relevant GP includes no monitoring component beyond incidental monitoring by operations and maintenance personnel. It also raises serious legal, liability, and landowner relations concerns for project owners under their lease agreements. The monitoring requirement should be removed from the wind energy GP consistent with the power lines GP.

In section III.A. of the EWAC Comments, EWAC discusses Alternative 2 from the Draft EA, which was based upon the GP framework that EDPR NA helped to develop and explains how that framework would address the problems with the GP framework advanced by the Service in the Proposed Rule. We disagree with the concerns cited by the Service in the Proposed Rule as justification for rejecting Alternative 2 for the reasons set forth in section III.A. of the EWAC Comments and urge the Service to reconsider. We further urge the Service to reconsider the adoption of Alternative 2 for a golden eagle GP and give strong consideration to the separate GP framework for bald eagles based on upon Alternative 2 and set forth in section III.B. of the EWAC Comments.

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V. Implementation of Specific Permits

As the Service acknowledges in the Proposed Rule, the existing eagle permit rule, which provides for issuance of individual permits only, is seriously flawed. The flaws are so significant that even for an industry that places a priority on conservation and routinely goes above and beyond applicable legal requirements relating environmental and natural resource preservation, fewer than 100 eagle permit applications have been received for more than 1,000 projects on the landscape, and only 26 of those applications have successfully resulted in the issuance of a permit.[10] The addition of separate wind energy GP options for bald eagles and golden eagles consistent with the recommendations above and those set forth in the EWAC comments would be a significant improvement that would greatly increase participation. However, specific permits will continue to be an important part of the Service's eagle permit program. The Proposed Rule makes a number of positive changes to the requirements for specific permits, most notably the removal of the requirements for third-party monitoring and for 5-year reviews of long-term permits. EDPR NA appreciates the Service's efforts in this regard. However, additional changes are needed to avoid repeating the failures of the Service's 2016 rulemaking and create a specific permit framework that provides a practicable route to eagle take authorization for project developers, owners, and operators.

Here again we refer you to the EWAC Comments, section VI, for a more fulsome discussion of the remaining issues with specific permits in the Proposed Rule. EDPR NA agrees with and endorses those comments. However, we wish to highlight our concerns with the Service's requirement for the use of the Evidence of Absence ("EoA") model for estimating take and the manner in which the Service is applying that model in individual/specific permits. EoA was designed as a tool for estimating bat and bird fatalities in circumstances where the number of fatalities is expected to be low, and detection is imperfect. The tool was developed by U.S. Geological Survey ("USGS") statisticians specifically for the purpose of estimating take of endangered bats at wind farms.[11] While EoA can certainly be used for estimating eagle fatalities, eagles' much larger size and the much longer persistence of eagle carcasses on the landscape present a very different set of circumstance than searching for carcasses of bats that weigh only a few grams and are typically scavenged or decompose in a matter of days. The Service began insisting on the use of EoA in eagle permits over the last several years, without notice to the industry, a formal rulemaking, or any opportunity for industry to comment. Yet the Service refuses to approve eagle permit applications that do not incorporate EoA in violation of federal law (as addressed more fully in section VI of these comments, below).

Of even greater concern is the way in which the Service has insisted on applying EoA. Whereas initially the Service merely required applicants to utilize EoA for estimating take, in recent years it has begun requiring permit applicants to achieve a detection probability (*g*) of 0.35 (*i.e.* 35%) for the full year in post-construction mortality monitoring. This greatly exceeds the target *g*-value that the Service regularly accepts in incidental take permits for endangered bats under the Endangered Species Act. The Service's insistence on achieving a *g*-value of 0.35 is arbitrary and capricious, and also represents a fundamental misapplication of the EoA model. EoA was specifically designed to provide *flexibility* in designing a post-construction mortality monitoring regime. The estimate of take provided by the EoA model is predominately influenced by the *g*-value achieved in monitoring. The more robust the monitoring effort, the higher the *g*-value that is achieved, and the lower the resulting take estimate will be. By contrast, a permittee could

[10] *Federal Register*, Vol. 87 No. 189, Friday, September 30, 2022, at p. 59602.
[11] EDPR NA was heavily involved in the development of the Midwest Wind Energy Multi-Species Habitat Conservation Plan ("MWE MSHCP") for which EoA was originally developed.

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perform less intensive monitoring and achieve a lower *g*-value, leading to a higher estimate of take. As long as the take estimate is below the applicable permit limit, the permittee has demonstrated compliance with the permitted level of take. By imposing a minimum *g* requirement in a permit, the Service makes monitoring effort, rather than eagle take, the objective of the permit and forces a permittee to spend millions of dollars for post-construction monitoring over the course of the permit term. It is monitoring for the sake of monitoring, with no conservation benefit and no rational justification.

Section VI.B. of the EWAC comments provides a more detailed analysis of the many problems with the way in which the Service is requiring the use of EoA in specific eagle permits. EDPR NA echoes those comments and urges the Service to adopt the recommendations provided therein.

VI. Opportunity for Public Comment on Future Guidance

One of the most significant obstacles to greater participation by the wind industry in the existing eagle permit program has been the practice of the Service regions and the Migratory Birds division generally to develop and implement policy and guidance without prior notice and without any opportunity for the regulated community to provide comment on the proposed policy or guidance. Applicants frequently learn about such policies out of the blue, and after significant resources have been expended in pursuing permit coverage or an implementation strategy based on the policies currently known to be in effect.

This approach to regulation is a clear violation of the Administrative Procedure Act (APA)[12] yet one the Service employs all too frequently, and often for the purpose of imposing requirements that make it more difficult to obtain or meet the proposed conditions for permits. The Service's recently imposed policy of requiring permittees to commit to achieve a detection probability (*g*) in their monitoring under individual eagle permits of at least 0.35 is a prime example of this. Several Regions of the Service are treating this policy as a rule, in that they have been unwilling to process permit applications that do not propose to meet that standard notwithstanding the fact that imposition of a minimum *g* requirement is fundamentally inconsistent with the basic design of the Evidence of Absence model. EDPR NA is aware of numerous projects owned by multiple developers for which the eagle permitting process has been stalled indefinitely over this issue. There are other examples of the Service's practice of imposing rules in the guise of "guidance" as well, such as the requirement imposed in the Mountain-Prairie Region for seasonal curtailment of all turbines within proximity to golden eagle nests, whether active or not.

The Service indicates in the Proposed Rule that it intends to develop guidance addressing a number of aspects of the revised eagle permit program. While such guidance will likely be needed on a number of topics in the eventual final rule, the Service must publish any proposed guidance in the Federal Register to allow for public notice and comment in accordance with the APA and the Service's existing Part 22 regulations.[13] This will provide the regulated community as well as other stakeholders with an opportunity to raise issues and concerns and provide alternative suggestions, which is the very purpose of the APA, and help ensure that the policies implemented by the Service are not arbitrary, capricious and abuse of its discretion.

[12] See, e.g., CropLife Am. v. EPA, 329 F.3d 876 (D.C. Cir. 2003); Gen. Elec. Co. v. EPA, 290 F.3d 377(D.C. Cir. 2002); Appalachian Power Co. v. EPA, 208 F.3d 1015 (D.C. Cir. 2000); Iowa League of Cities v. EPA, 711 F.3d 844, 863-65 (8th Cir. 2013); Texas v. United States, 809 F.3d 134 (5th Cir. 2015), aff'd, 136 S. Ct. 2271 (2016).
[13] See 50 C.F.R. § 22.80(c)(2)(ii), (d)(2)(ii) (2022).

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VII. Consolidation of All Regulatory Requirements

The regulatory docket associated with the Proposed Rule contains several distinct documents, including the Proposed Rule itself, the Draft EA, and the permit conditions for each of the proposed GPs. Many of these ancillary documents contain apparent regulatory language, which may vary slightly from, be inconsistent with, or be in addition to, the requirements set forth in the proposed regulatory language. Cataloging and reconciling these discrepancies would be a significant undertaking and in many cases would require further guidance or clarification from the Service. To avoid the potential for inconsistent requirements or procedures under a revised rule, the Service must consolidate all relevant and enforceable requirements and conditions of the eagle permit program into the regulatory language of Part 22 and eliminate the use of separate documents and guidelines that may contain inconsistent requirements or recommendations. Doing so is not only required by law but will help the regulated community clearly identify and understand the legal obligations and requirements to which it is subject, and avoid confusion and inconsistent interpretation or application of the rules, all of which would stymie the purpose of the Proposed Rule and the Service's goal of increased participation and compliance with its eagle permit program.

VIII. Conclusion

EDPR NA commends the Service for recognizing that the flaws in its current eagle permit program have significantly impeded participation on the program by the wind energy industry and is taking steps to address the problems and create a workable permitting regime. The Proposed Rule represents a significant improvement over the current Part 22 regulations, particularly in the creation of general permits. However, as explained above and in the EWAC Comments, significant additional changes must be made to the Proposed Rule to ensure that the eventual revised eagle permit program is successful in attracting participation and meeting the preservation standard without imposing unwarranted and unnecessary financial burdens and uncertainty on the industry. EDPR NA is ready and willing to work with the Service to ensure those goals are met. For any questions regarding these comments or to discuss these issues further, please feel free to contact Christi Calabrese, Director, Permitting and Environmental Affairs, at christina.calabrese@edp.com or 713-231-8724 or our outside counsel, Ben Cowan of Locke Lord LLP at bcowan@lockelord.com or 713-226-1339.

Sincerely,

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Comment from Center for Biological Diversity

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General Comment

See attached file(s)

Attachments

BGEPACenterCommentsFinal

December 28, 2022

Comments on Proposed Rule for Incidental Take of Eagles and Eagles Nests, FWS-HQ-MB-2020-0023

The Center for Biological Diversity ("Center") submits these comments on the Fish and Wildlife Service's ("FWS" or "Service") proposed revisions to the rules governing the incidental take of eagles. *See* 87 Fed. Reg. 59598 (Sept. 30, 2022). The Center strongly supports the responsible expansion of renewable energy and believes that this expansion can and must take place in as wildlife-friendly a manner as feasible. The Center also supports reasonable efforts to make the BGEPA permitting process operate efficiently and effectively. However, in a number of respects, the rule proposed by the Service does not strike an appropriate balance because it does not adequately protect eagles. Rather, without justification, the Service is proposing to reverse important safeguards for bald and golden eagles.

Before turning to our specific concerns, it is important to address the central premise of the proposal: that facilitating the obtaining of permits to kill or otherwise take eagles will significantly increase participation in the permitting program *and* that such facilitation is the only (or at least the best) way to increase such participation. *See, e.g.*, 87 Fed. Reg. 59,600 ("Low application rates and permit-processing requirements that some have perceived as burdensome have resulted in few permits being issued for wind projects as compared to the number of operational wind projects in areas where golden eagles. As a result, golden eagles continue to be taken without implementation of conservation actions to offset that take.") (emphasis added).

There are several flaws in the premise that facilitating permitting is the key to increasing participation in the permitting system. First, the proposed rule and accompanying Environmental Assessment ("EA") present no actual documentation that a significant number of wind power (or other) companies are, at present, interested in obtaining eagle take permits (and implementing the mitigation measures necessary to obtain them) but have been deterred from doing so by virtue of existing regulatory obstacles. Instead, the proposal refers obliquely to "complaints" the Service has "heard" from the "regulated community," 87 Fed. Reg. 59601, without providing any actual evidence (let alone identify the sources of the "complaints") that companies that are now willing to risk killing eagles *illegally* will be enticed into a permitting scheme through the changes proposed by the Service.

Second, and relatedly, the proposed rule and EA set forth no analysis as to whether increased (and timely) *enforcement* of BGEPA's take prohibition would motivate more companies to participate in the permitting process and, indeed, would do so in a more effective manner than adoption of all of the sweeping regulatory changes the FWS is proposing. Enforcement of BGEPA (and the MBTA) against industrial activities that routinely take eagles has been sporadic and anemic at best. If companies know that the chance of their being prosecuted for the unauthorized take of eagles is minimal and that, even if a prosecution is brought, the penalty will likely be a slap on the wrist that the company can chalk up to little more than a modest business expense, then companies that have been willing to violate BGEPA and

MBTA have little practical incentive to apply for a permit – regardless of any regulatory changes made by the Service.

Most important, a regulatory "obstacle" from the standpoint of industry may be a vital safeguard from the vantage point of eagle protection. Thus, the mere fact that some members of an industry may desire to dispense with a particular protective measure does not mean that it should be jettisoned. Nonetheless, in a number of respects, it appears that the Service has prioritized the desires of industry over fundamental safeguards for eagles without a compelling (or even plausible) rationale for doing so.

1. The FWS Should Not Dispense with the Requirement for Permit Reviews of Long-Term Permits At Least Every 5 Years.

Prior to 2013, the FWS limited the duration of BGEPA incidental take permits to five years. In doing so, the agency explained that "factors may change over a longer period of time such that a take authorized much earlier would later be incompatible with the preservation of the bald eagle or the golden eagle." 74 Fed. Reg. 46,856. The FWS further explained that periodic renewal decisions were important because "[w]e expect that circumstances will often change such that the original [measures] for minimizing take may no longer be considered the most effective measures that could be adopted." *Id*. at 46,861. The Service said this was the case because "[t]here are likely to be technological advances in some industries that would warrant adoption of new, more effective conservation measures" and because "new information regarding eagle biology, behavior, and responses to the permitted activity may warrant re-examination of the effects of the permitted activity and re-evaluation of the permit conditions." *Id*.

In 2013, the Service extended the maximum duration of permits to incidentally kill or otherwise take eagles from five to thirty years. *See* 78 Fed. Reg. 73704 (Dec. 9, 2013). A federal court vacated that rule on the grounds that the Service failed to analyze under NEPA the impacts on eagles of such a six-fold increase in permit duration. *See Shearwater v. Ashe*, 2015 U.S. Dist. LEXIS 106277 (N.D. Cal. Aug. 11, 2015). In its ruling, the court pointed out that many of the Service's own personnel believed that such a major increase in permit duration posed serious threats to eagle populations and that, "[a]t the very least substantial questions are raised as to whether the Final 30-Year Rule may have a significant adverse effect on bald and golden eagles." *Id*. at * 68; *see also id*. at ** 74-75 (noting that "FWS's decision to increase the maximum duration for programmatic eagle take permits from five to thirty years was the subject of considerable opposition outside of the agency," including from many conservation organizations as well as Indian tribes).

Following the court's ruling, the FWS prepared an Environmental Impact Statement in connection with issuance of a new rule in 2016. Although the 2016 rule again increased the maximum duration of permits to thirty years, it conditioned the issuance of such long-term permits on a requirement for Service reviews at least every five years. The rule at present provides that "[a]t no more than 5 years from the date a permit that exceeds 5 years is issued, and

at least every 5 years thereafter, the permittee will compile, and submit to the Service, eagle fatality data or other pertinent information that is site-specific for the project, as required by the permit." 81 Fed. Reg. 91,552. The rule provides that the "Service will review this information, as well as information provided by independent monitors," to determine whether the permittee is in compliance with the terms and conditions of the permit; whether eagle "take exceed[s] the amount authorized to occur within the period of review"; and whether additional measures are necessary, including "[a]dding, removing, or adjusting avoidance, minimization, or compensatory mitigation measures." *Id*.

In supporting the need for this provision in 2016, the FWS stated that the "5-year review is a *reasonable and justified provision that appropriately balances the Service's responsibility to ensure the preservation of bald and golden eagles, while also creating benefits to industries seeking long-term permits*." 81 Fed. Reg. 91,516 (emphasis added). The agency further explained that "[e]ven for permits with low fatality predictions, we believe it would be remiss not to review whether eagle take is within the authorized level, and whether there are elements of the adaptive management strategy that should be implemented." *Id*.; *see also id*. ("we anticipate that long-term permits with adaptive management strategies and 5-year reviews will be beneficial to eagle populations").

The Service, however, now proposes to eliminate the 5-year review process entirely – meaning that the agency can issue decades-long eagle take permits with no obligation to ever reassess the ongoing impact of the permitted activity on eagles and whether any modifications are necessary in view of such impacts. In proposing this reversal of course, the Service has not suggested that the conservation rationale for it no longer applies. To the contrary, the agency acknowledges that the "Service introduced these mandatory reviews to ensure that the Service had an opportunity to receive and review all existing data related to a long-term activity's impact on eagles. It was intended that the Service would use this information to, if necessary, recalculate fatality estimates and authorization levels, and amend permit conditions such as mitigation requirements." 87 Fed. Reg. 59,601.

Rather, the sole justification proffered by the Service for dispensing with the five-year reviews is that "[o]ver the last several years, the Service has heard complaints from the regulated community that these scheduled reviews introduced uncertainty into project planning and funding and have discouraged potential applicants from participating or have influenced the permit tenure requested by the applicant . . . Removal of these administrative check-ins would increase certainty for applicants that are concerned about the potential for unknown amendments to permit conditions every 5 years and is intended to increase participation in eagle take permitting." 87 Fed. Reg. 59,601.

This justification for eliminating a safeguard the Service has previously found to be necessary to protect eagles is woefully inadequate. First, neither the proposed rule nor the EA provide any supporting information concerning the industry "complaints" the agency now says are a sufficient basis to reverse an important eagle protection – such as how many "complaints" the Service has received and from whom; whether the complaining parties even sought a permit;

and what documentation has been made available to the agency to support the proposition that the 5-year review requirement has in fact created sufficient uncertainty to deter their participation in the permitting program.

Second, neither the proposed rule nor the EA even begin to analyze the adverse impact on eagles from elimination of the 5-year review requirement. Even if it is true that some members of the regulated committee are in fact refraining from obtaining permits due to the five-year review provision—which is unsupported by the proposal—this cannot, consistent with the overriding eagle protection purposes of BGEPA, justify elimination of what the Service itself has deemed an important measure for conserving eagle populations. At the very least, the Service must fully assess the adverse impact of eliminating the 5-year reviews and explain how, and on what factual basis, it has determined that the benefits (to eagles) of removing the reviews exceeds the benefits (to eagles) of maintaining them.

Third, the elimination of the 5-year review requirement seems especially arbitrary given that the Service is (properly) proposing to limit the maximum duration of general permits to five years. *See* 87 Fed. 59,627. Since, as envisioned by the Service, activities authorized by specific (individual) permits may have significantly greater impacts on eagles than projects that qualify for general permits, it makes little sense to allow projects with specific permits to not only obtain decades-long authorization to take eagles, but to do so without even having to go through reviews at least every five years.

Fourth, if, as the Service states in the proposed rule, the purpose of eliminating the five-year reviews is to increase participation in the permitting program, the Service, once again, does not explain why better enforcement of BGEPA is not a more effective approach than jettisoning safeguards that the agency itself has declared to be a "reasonable and justified provision that appropriately balances the Service's responsibility to ensure the preservation of bald and golden eagles, while also creating benefits to industries seeking long-term permits." 81 Fed. Reg. 91,516. Tellingly, the Service's proposal makes clear that many entities *have* sought and obtained permits in connection with their eagle-taking activities notwithstanding the 5-year review requirement. *See* 87 Fed. Reg. 59,613 (explaining that in the last five years, "the Service has issued 26 permits to wind-generation facilities and 677 specific permits to other entities, which averages about 141 permits annually"). Since the 5-year review requirement has evidently not been a factor in deterring hundreds of entities from participating in the permitting program, this counsels strongly in favor of considering an alternative approach to increase participation by those who have instead opted to take eagles illegally, i.e., enforce the law against those violators rather than dispense with a protective measure that other entities have found to be acceptable.

Finally, the fact that "[t]hird parties . . . may contact the Service if they have concerns about compliance with permit terms at a particular project or new information that may bear on the conditions of the permit," 87 Fed. Reg. 59,601, is surely no substitute for routine reviews conducted by the Service—as the agency itself recognized when it adopted the 5-year review requirement. Third parties do not have timely (or, often, any) access to data on eagle impacts at particular facilities. Nor do they have any available mechanism by which they can trigger review

by the Service. Further, given that the Service is eliminating the 5-year review requirement for the express purpose of affording permittees increased "certainty" that their permit terms will never be altered, the likelihood that the Service will respond to any inquiry by third parties by engaging in a serious review that is no longer required by the agency's rules is fanciful. Hence, the Service's assertion that it "*may* initiate a permit review based on information received from third parties," *id*. (emphasis added), is, for all practical purposes, meaningless.

For all of these reasons, the Service should abandon its ill-advised and unsupported proposal to eliminate the 5-year review requirement.

2. **The Service Should Not Eliminate the Requirement for Third Party Monitoring.**

Equally untenable—and for similar reasons—is the Service's proposal to eliminate the requirement for third party monitoring. When the Service adopted this requirement in 2016, it emphasized that "monitoring is among the most important and essential elements of the Service's eagle permitting program," especially because "considerable uncertainty exists in all aspects of the eagle permitting program, particularly with respect to the accuracy of models used to predict the effects of actions like the operation of wind turbines on eagles; therefore, "[w]e will continue to require monitoring as a condition of all incidental take permits for which uncertainty exists to fulfill the Service's adaptive management objectives and to ensure take of eagles is within the terms and conditions of the permit." 81 Fed. Reg. at 91,522. At the same time, the Service determined that independent, third-party monitoring is crucial to an effective, accurate monitoring program. *See id*. at 91,523 (agreeing with the "large number of entities that urged the Service to require third-party monitoring" for long-term permits because the Service "must not rely on any for-profit industry to monitor itself"); *id*. at 91,532 ("We agree that independent third parties reporting directly to the Service should monitor take under long-term permits, and we have incorporated this requirement into the final regulations.").

As with the 5-year reviews, the Service has proffered no valid justification for removing the third-party monitoring requirement. The proposed rule states simply that, "[i]n implementing the 2016 Eagle Rule, this requirement has proven impracticable to implement at *some projects* for a variety of factors, including health, safety, liability, and access issues for project sites that are leased from multiple landowners." 87 Fed. Reg. at 59,601 (emphasis added). This rationale cannot support the proposed action for several reasons.

First, as with the 5-year review requirement, the Service has provided no evidence or documentation to support the vague assertion that the third-party monitoring requirement has in fact "proven impracticable to implement." Nor has the agency proffered any explanation of what it means by "health, safety, liability, and access issues for project sites that are leased from multiple landowners." For example, why would a requirement for third-party monitoring raise more "health" or "safety" issues than company employees engaging in the same monitoring? And insofar as "access issues" are concerned, why would it not be a simple matter for any company to include in lease terms that third-party monitoring may be conducted? Merely ticking off "issues" without in any way explaining or expanding on them—let alone documenting the

extent to which they have actually impeded companies from participating in the permitting process—does not comport with even the most basic requisites of reasoned agency decisionmaking.

Second, even taking the Service's stated rationale at face value, the fact that "some projects" have purportedly had difficulties with third-party monitoring cannot support total elimination of the requirement for third-party monitoring. Rather, the most it could reasonably support would be a provision whereby a particular permit applicant could request an exemption from the requirement based on specific extenuating circumstances. Indeed, the fact that various permittees *have* been able to comply with the third-party monitoring requirement reinforces that eliminating an important eagle-protection measure in its entirety because some projects have allegedly had difficulties with compliance cannot be reconciled with the conservation purposes of BGEPA. At the least, the approach of allowing companies to request an exemption based on specific factual circumstances in lieu of eliminating wholesale an important protective measure is a reasonable alternative that the Service is obligated to seriously consider.

Third, as with the 5-year reviews, neither the Service's proposal nor the EA even acknowledges, much less analyzes, the adverse impacts associated with eliminating the requirement for third-party monitoring. Because the Service agreed in 2016 with the common-sense proposition that independent, third-party monitoring is far more likely to be objective and accurate than reliance on a self-interested "for-profit industry to monitor" and report on itself, 81 Fed. Reg. 91,523, it necessarily follows that eliminating the requirement reduces the accuracy and completeness of eagle fatality and injury monitoring. This flouts the protective purpose of BGEPA and must at least be afforded a hard look under NEPA.

That no such look has been undertaken is underscored by the offhand suggestion in the proposed rule that dispensing with the third-party monitoring requirement is permissible because the potential for "referral to the Service's Office of Law Enforcement" when there is a "demonstration or finding of falsified reports" from a permittee "will ensure that permittees provide the Service with accurate monitoring information without the need to require third-party monitoring." 87 Fed. Reg. 59,601. Of course, the potential for such referrals also existed in 2016 but that did not prevent the FWS from agreeing with myriad commenters that a system of third-party monitoring was essential to protect eagle populations. And for good reason. Because the Service rarely even enforces BGEPA (or MBTA) against the blatant unauthorized incidental take of eagles by major industrial operations, the notion that there will ever be extensive enforcement based on inaccurate reports, and that this will somehow ensure accurate monitoring, strains credulity.[1] It also begs the question as to how the Service will even *know* when there is incomplete monitoring or underreporting insofar as the agency will not be overseeing the monitoring and outside parties have no effective way of double-checking the permittee's efforts.

[1] *See also* Dec. 12, 2022 Comments of the Ornithological Council (providing empirical evidence from past experience of serious underreporting of bird deaths without any action by the Service, and explaining that, given this experience and "current staffing levels" at the FWS, "it is hard to imagine that the agency will be able to effectively enforce reporting requirements").

Even further, when permittees rely on employees who are not effectively trained and thus merely engage in monitoring incompetently or incompletely, any invocation of 18 U.S.C. § 1001—which requires a specific intent to deceive the government in order for criminal prosecution to occur, *see, e.g., United States v. Sullivan*, 555 F.2d 1385 (7th Cir. 1977)—would be fruitless (even if the FWS were otherwise able and inclined to refer reporting deficiencies to the agency's Office of Law Enforcement, none of which will be the case).

The bottom-line is that, as with the 5-year reviews, the Service is proposing to jettison an important eagle conservation measure without offering any coherent, let alone legitimate, reason for doing so. In addition, if the proposal is adopted, eliminating the 5-year reviews *and* the requirement for third-party monitoring will work in tandem to seriously undermine eagle conservation. In effect, the Service is proposing to deprive itself *both* of essential information to make informed decisions on permit issuance and the review process it needs to review such information and adjust long-term permits as necessary to protect eagles. The grave risk this approach takes with eagle populations cannot be reconciled with BGEPA, and it is one that has certainly not been analyzed in the EA or any other NEPA document. The Service should abandon it.

3. Additional Concerns with the Proposed Rule.

In addition to the foregoing, the Center agrees with and incorporates by reference concerns with the proposed rule that have been raised by other conservation groups as well as State agencies, Indian Tribes, and others.[2] We highlight two such concerns.

First, the proposal places excessive reliance on eBird, which depends on observational data from the public. There are significant flaws in relying too heavily on such information. Accordingly, the Service should incorporate other data sources, including those from States that have compiled long-term datasets on eagle presence and population trends, *see, e.g.,* Dec. 14, 2022 Comments of Commonwealth of Virginia, and data compiled and analyzed by USGS scientists who have extensively studied eagles.[3]

[2] The Center also incorporates by reference comments it has previously submitted on the BGEPA rules and related agency actions. *See* August 17, 2018 Center "Comments on the Updated Collision Risk Model Priors for Estimating Eagle Fatalities at Wind Energy Facilities"; July 5, 2016 "Comments on Eagle Permits; Revisions to Regulations for Eagle Incidental Take and Take of Eagle Nests and the Programmatic Environmental Impact Statement (PEIS) for the Eagle Rule Revision—USFWS May 2016."

[3] *See, e.g.*, https://usgs.gov/publications/golden-eagle; https://www.usgs.gov/centers/forest-and-rangeland-ecosystem-science-center/science/information-golden-eagle-management.

Second, the Service's proposal to issue general permits for eagle disturbance and nest removals should be withdrawn or significantly revised. Tribes, among others, have raised serious, legitimate objections as to the extent to which the general disturbance and nest removal permit provisions, as drafted, could result in impairment of tribal interests, conflicts with more protective State laws, and unanticipated adverse impacts on local eagle populations. *See, e.g.*, Nov. 29, 2022 Comments of Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians; Comments of Grand Portage Band of Lake Superior Chippewa, Reservation Tribal Council; Dec. 8, 2022 Comments of Colorado Parks and Wildlife; Dec. 14, 2022 Comments of Central Flyway Council.

Sincerely,

/s/Eric Glitzenstein

Eric Glitzenstein
Director of Litigation
Center for Biological Diversity

PUBLIC SUBMISSION

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Eagle Permits; Incidental Take

Comment On: FWS-HQ-MB-2020-0023-1937
Permits for Incidental Take of Eagles and Eagle Nests

Document: FWS-HQ-MB-2020-0023-9320
Comment from Evergy, Inc.

Submitter Information

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Address:
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Email: eric.johnson@evergy.com
Organization: Evergy, Inc.

General Comment

Evergy Inc. comments attached.

Attachments

Evergy Inc. Eagle Take Comments

December 28, 2022 Submitted Electronically Via Regulations.gov

Public Comments Processing
Attn: FWS–HQ–MB–2020–0023
U.S. Fish and Wildlife Service
MS: PRB/3W
5275 Leesburg Pike
Falls Church, VA 22041-3803

Re: Proposed Rulemaking for Permits for Incidental Take of Eagles and Eagle Nests; 87 Fed. Reg. 59598 (Sep. 30, 2022), Docket ID No. FWS–HQ–MB–2020–0023.

Assistant Director, Migratory Birds, Mr. Jerome Ford:

Evergy, Inc submits the enclosed comments in response to the U.S. Fish and Wildlife Service's (Service) Proposed Rulemaking for Permits for Incidental Take of Eagles and Eagle Nests (Proposed Rule). Evergy appreciates the Service's effort to develop an eagle take general permit mechanism for power lines and is hopeful that a final permit rule will be efficient, effective, and will allow companies the flexibility to prioritize and continue to implement efforts that will best provide a conservation benefit to eagle populations.

Evergy, Inc. provides energy to approximately 1.6 million customers in Kansas and Missouri. Today, nearly half the power generated by Evergy comes from emission-free sources. In 2021, our emission-free generation was equivalent to 56 percent of our retail customer demand, creating reliable energy with less impact on the environment. Evergy is committed to delivering safe, reliable, affordable, and sustainable energy to customers while employing a diverse workforce, being a great place to work for employees, and supporting the communities we serve.

Evergy is an active member of the Avian Power Line Interaction Committee (APLIC) and has maintained and implemented an avian protection plan since 2011. As part of this plan, Evergy routinely tracks and reports all known bald eagle nesting territories throughout our service area, proactively identifies and remediates eagle-risk poles within those nesting territories, and quickly responds and remediates all documented bald eagle incidents that occur on our system.

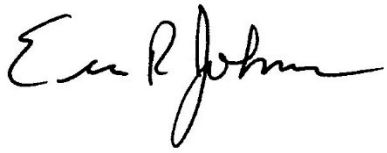
Additionally, Evergy partners with state and Federal wildlife agencies and local wildlife conservation organizations to band and install telemetry units on bald eagle nestlings, fund aerial bald eagle nest surveys, provide resources to upgrade wildlife education/rehabilitation facilities, and assist in eaglet rescue and nest reconstruction efforts following storm events.

Evergy assisted in and supports the comments and recommendations provided by APLIC, but would like to provide additional comments and recommendations regarding the proposed general

permit conditions and qualifications for incidental take of eagles by power lines (50 CFR 22.260).

Please let me know of you or your colleagues have any questions or need additional information about our comments and recommendations.

Sincerely,



Eric R. Johnson
Sr. Environmental Consultant
Wildlife Conservation and Compliance Programs

Evergy is generally supportive of the proposed conditions and qualifications of the general permit for the incidental take of eagles by power lines (50 CFR 22.260) but have significant concerns with two of the six proposed conditions.

(1) **"**Ensure that all new construction and reconstruction of poles is electrocution-safe, as limited by the need to ensure human health and safety."

Because eagle use is not uniform across our service area, eagle electrocution risk is not solely a function of power pole design, but rather a result of suitable habitat in combination with power pole design. A significant number of our power poles are in urban and suburban areas that are not suitable for eagle use and pose limited risk to eagles. If all new construction and reconstruction must be electrocution-safe for bald eagles, regardless of eagle risk, this would be impractical for a significant portion of our service area.

Rather, Evergy recommends that this condition be revised to apply only to those poles that are most likely to be used by eagles. Evergy currently has an evaluation process within our Avian Protection Plan to identify those areas of Missouri and Kansas that have increased potential for eagle use ("eagle risk area"). All new construction and reconstruction in these "eagle risk areas" are either built to electrocution-safe separation distances for eagles or are retrofitted with insulating material to prevent phase-to-phase and phase-to-ground contact. Evergy has done this for several years and has effectively reduced eagle electrocutions.

As currently proposed, this condition would not be achievable and Evergy would not be eligible for this permit.

(2) "Implement a reactive retrofit strategy following all electrocutions of eagles."

Evergy currently responds to all eagle electrocutions and mitigates accordingly.

This proposed condition is generally consistent with our existing "reactive retrofit" procedure for eagle incidents and is achievable if flexibility is allowed to address the highest eagle-risk poles.

(3) "Implement a proactive retrofit strategy to convert all existing infrastructure to electrocution-safe. You must convert one-tenth of infrastructure that is not electrocution-safe as of the effective date of the general permit to electrocution-safe during the duration of the permit. If you renew your general permit, the same number of poles must be retrofit, such that all poles are retrofit within 50 years or by the expiration of the tenth, 5-year general permit."

Again, because eagle use is not uniform across our service area, and eagle electrocution risk is not solely a function of power pole design, but rather a result of

suitable habitat in combination with power pole design, this condition is not practical, but most importantly, the metric of this condition (10%) is logistically and financially impossible for us to achieve.

Rather, we would recommend that the Service omit the 10% requirement and instead require the company to have a "proactive retrofit program" that evaluates risk to eagles and makes best use of resources that will most directly and most efficiently reduce impacts to eagle populations.

As currently proposed, this condition would not be achievable and Evergy would not be eligible for this permit.

(4) "Implement an eagle collision response strategy."

Evergy currently responds to all eagle collisions, evaluates future eagle risk, and mitigates accordingly.

This proposed condition is consistent with our existing "eagle collision response" procedure and is achievable if flexibility is allowed to address the highest eagle-collision-risk poles.

(5) "For new construction and reconstruction, incorporate information on eagles (population status of the species) into siting and design considerations as practicable, such as siting power lines a safe distance from nests, foraging areas, and roosts, subject to human health and safety, and/or significant adverse effects to biological, cultural, or historical resources."

Evergy currently evaluates impacts of new transmission and existing transmission reconstruction activities to all known bald eagle nesting areas and ensures that no construction activities occur within 660 feet of an active eagle nest (during typical reproductive activities as identified in the 2007 "National Bald Eagle Management Guidelines"). However, bald eagle roosts and bald eagle foraging areas are not easily defined, and we recommend that "as practicable" be maintained within this permit condition.

If the language "as practicable" is maintained in the final permit condition, this condition is consistent with our current siting process with regards to eagles.

(6) "Implement an eagle-shooting response strategy"

Evergy currently reports all eagle incidents to the USFWS Office of Law Enforcement's local Special Agent, regardless of cause.

This proposed condition is consistent with our existing "eagle reporting" procedure and is achievable if flexibility is allowed to address this issue.

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Comment On: FWS-HQ-MB-2020-0023-1937
Permits for Incidental Take of Eagles and Eagle Nests

Document: FWS-HQ-MB-2020-0023-9321
Comment from Avian Power Line Interaction Committee (APLIC)

Submitter Information

Email: Lesly.Swanson@srpnet.com
Organization: Avian Power Line Interaction Committee (APLIC)

General Comment

Please see the attached file for comments from the Avian Power Line Interaction Committee (APLIC).

Attachments

FINAL_APLIC_BGEPA_Gen_Permit_Proposed_Rule_2022

December 28, 2022
Submitted Electronically Via Regulations.gov

Public Comments Processing
Attn: FWS–HQ–MB–2020–0023
U.S. Fish and Wildlife Service
MS: PRB/3W
5275 Leesburg Pike
Falls Church, VA 22041-3803

Re: Proposed Rulemaking for Permits for Incidental Take of Eagles and Eagle Nests; 87 Fed. Reg. 59598 (Sep. 30, 2022), Docket ID No. FWS–HQ–MB–2020–0023.

Assistant Director, Migratory Birds, Mr. Jerome Ford:

The Avian Power Line Interaction Committee (APLIC) submits the attached comments in response to the U.S. Fish and Wildlife Service's (Service) Proposed Rulemaking for Permits for Incidental Take of Eagles and Eagle Nests (Proposed Rule). APLIC appreciates the Service's effort to develop an eagle take permit mechanism for power lines and is hopeful that a final permit rule will provide an opportunity for increased utility participation in the permit program.

APLIC leads the electric utility industry in protecting avian resources while ensuring reliable energy delivery. We work in partnership with utilities, resource agencies, and the public to develop and provide educational resources; identify and fund research; develop and provide cost-effective management options; and serve as the focal point for electric utility avian interaction issues. APLIC members include 75 U.S. and Canadian electric utilities, as well as federal and state agency partners. The comments included herein are from U.S. APLIC-member utilities only; no agencies were involved in the drafting of these comments.

Since its inception in 1989, APLIC has addressed a variety of avian power line interactions including electrocutions, collisions, and nests on electric infrastructure. APLIC has developed guidance documents identifying causes and minimization methods for avian electrocutions, collisions, perching, and nesting concerns with power lines. These publications provide resources for engineers, biologists, planners, and the public to understand and address avian interactions with electric power facilities.

When it comes to eagle interactions with electric infrastructure, APLIC is uniquely positioned to provide information and expertise to the Service. In 2005, in partnership with the Service, APLIC produced voluntary national *Avian Protection Plan (APP) Guidelines*. To help individual

electric utility companies in the development of their own best practices, APLIC has authored two documents outlining a toolbox approach for avoidance, minimization, and mitigation measures for the electrical utility industry to consider; these are the *Suggested Practices for Avian Protection on Power Lines: State of the Art in 2006* and *Reducing Avian Collisions with Power Lines: The State of the Art in 2012*. These documents provide the foundation for utility avian protection efforts, agency guidance related to avian/power line interactions, scientific research and publications, and have been cited by the Service in the Programmatic Environmental Impact Statement for the Eagle Rule Revision, December 2016 (PEIS), the 2022 Draft Environmental Assessment (DEA) and the regulations to support rulemaking efforts. APLIC has also produced two additional documents that are vital to the dialogue surrounding power pole retrofitting to offset eagle take by wind energy facilities: *Developing Power Pole Modification Agreements for Compensatory Eagle Mitigation for Wind Energy Projects* (2014) and *Eagle Risk Framework: A Practical Approach for Power Lines* (2018). Last but not least, in early 2023, APLIC plans to release a newly revised *Suggest Practices for Avian Protection on Power Lines* to supplement the 2006 document and provide new research and practical experience that will offer even greater clarity and depth of information.

The information in the APLIC documents is based on scientific research and decades of first-hand experiences of APLIC member biologists and engineers from across North America. APLIC guidance has been found to be effective at reducing bird injures and mortalities; all APLIC publications are available at www.aplic.org.

Many APLIC member utilities routinely support projects which further eagle conservation. From assisting state agencies with gathering population data, to supporting local wildlife rehabilitators, to participating in eagle surveys, banding or telemetry projects, to providing bucket trucks for wildlife officials to access eagle nests, utilities collaborate with various stakeholders to improve eagle nest success and provide conservation uplift for both species. Utilities provide benefits to the eagle population by establishing artificial nesting platforms for eagles and other raptors and enhancing nesting and foraging habitat through hydroelectric project reservoirs. Indeed, some members' hydro power reservoirs support eagle nesting that would not exist otherwise.

APLIC has encouraged our members to submit their own comment letters to outline their specific support or concerns with the proposed rule, and we encourage the Service to review these individual comment letters. The following letter summarizes areas of consensus for the larger committee.

APLIC would like to thank the Service for drafting a proposed rule that shows innovation and a willingness to collaborate with stakeholders, including the electric utility industry, in order to further the conservation of eagles. APLIC looks forward to partnering with the Service to address concerns and refine the current Proposed Rule to create a simple, workable framework, which should increase the participation in the voluntary eagle incidental take permit program.

Sincerely,

Lesly Swanson

APLIC Chair

APLIC would like to thank the Service for taking the time to learn more about the electric utility industry and how APLIC members have worked to reduce detrimental avian interactions with power lines. We appreciate the consideration of our previous input into the Proposed Rule, and we look forward to continuing our long-standing partnership.

We are pleased that the general permit program is self-certifying and simple in its currently conceived application process. APLIC supports the Service's proposal to issue different general permits for various activities because there is no one size fits all solution to the challenges of electrocution, collision, and nest management. We are encouraged that your proposed approach is flexible and can be tailored for different scales and landscapes, thereby allowing utilities to use their existing or future APPs to evaluate and reduce risk. APLIC supports the Service's recognition that existing power lines are part of the baseline, that proactive and reactive pole retrofits are considered mitigation and no additional compensatory mitigation for wires is needed, and that the electric utility industry has been working on the issue for decades. APLIC will continue to support science-based practical solutions.

APLIC supports the voluntary nature of this process, and we appreciate that many of the requirements are reasonable for most utilities; we do, however, want to emphasize that all requirements may not be practicable for all entities. APLIC would like to note some concerns, offer suggestions, and provide answers to the Service's questions to improve the implementation of a General Permit program for power lines, thereby increasing the likelihood of electric utility participation in the program.

<u>Specific Responses to Service Requested Information</u>

The Proposed Rulemaking (Proposed Rule) outlined the information the Service is seeking in the form of a list of questions. APLIC is providing responses to questions 1, 3, and 11 in particular, as they are most pertinent to the power line industry. The language pulled directly from the Federal Register is presented in italics for clarification.

1. *Are the anticipated number of annual permits to be issued for each permit type a reasonable estimate?*

   The Service has estimated that four utility companies would obtain a general permit each year. APLIC believes this to be an easily achievable number should the Service revise the proposed permit to take into consideration the concerns we raise in this letter. Should the Service not revise the proposed permit, APLIC believes this is an overestimate. Based on a survey of our membership, not a single U.S. member would consider applying for a General Permit as it is currently proposed. The concerns outlined in this letter represent steep barriers to likely participation.

3. *For electric utilities, at what rate are power poles and other infrastructure planned for regular maintenance, rehabilitation, or reconstruction? What is the assumed life cycle of a typical power pole? How many utilities have an avian protection plan in place? At what*

rate do utilities schedule retrofits specifically of non-electrocution-safe equipment? Are the estimated costs associated with power-pole-retrofit strategies reasonable?

Electric utilities have different rates for inspecting, replacing, and maintaining poles based on a variety of factors, including location, climate, pole type and material, geology/hydrology, salt water, fire and other natural disasters, and other environmental factors that affect the performance of the pole.

State and/or federal regulatory entities such as the North American Electric Reliability Corporation (specific to transmission) or State Public Utilities Commissions (PUCs), may have requirements for pole inspection frequency that can vary from state to state or line by line and between provider types within a single state.

APLIC has summarized a range of responses from various member utilities regarding the Service's questions.

Company Identifier	**Inspection Cycle (frequency of review for an individual pole)**	**Maintenance Review for Pole Performance and Human Health and Safety**	**General Life Span of Wood Pole**	**Description**
A	12 years	Approx. 130,000 poles/year	50-60 years	Company A inspects 10% of their poles per year (poles older than 7 years).
B	10 years	Approx. 1,000 poles/year	50-60 years	Company B inspects 10% of their poles/year; but only maintains/replaces about 3% of the poles inspected (3% of 10%).
C	10 years	130,000 inspections/year	60 years	Company C inspects 10% of their poles per year.
D	10 years	Approx. 67,000 poles/year	50-65 years	Company D inspects 10% of their poles per year and restores/replaces 3%.
E	3 years	Approx. 350 poles/year	65-75 years	Perform a quick inspection of distribution poles every 3 years, with detailed inspection on about 0.5% of wood poles. Inspections result in maintenance/ replacement of approximately 350 poles/year or about 1% of the poles inspected (1% of 33%).
F	20 years for distribution, 15 years for transmission	11,400 distribution poles/year, 2,200 transmission poles/year	60-70 years	Company F replaces approximately 15% of the poles inspected on an annual basis.
G	10 years	Approx. 25,000 poles/year	60-65 years	Inspection violations required to be fixed within 2 years, timing based on priority of violation.
H	20 years for distribution, 10 years for transmission	Approx. 60,000 poles/year	40-60+ years	Inspection cycles can vary depending on state and inspection type.

It is key to note that a pole inspection can vary from utility to utility and can be as simple as a visual review of the crossarm and components from a helicopter to a full-scale ground-based review with pole taps/cores and soil sampling. Regardless of the intensity of an inspection, an inspection does not mean that the pole is touched for any repair, replacement, or work. The

inspection group is often not the maintenance group and inspection reports do not always trigger any maintenance work on the pole. It is also important to understand that, as a standard practice, many utilities do not retrofit specifically for avian-safe issues unless the review is a result of an avian-related incident, outage, or unless the pole is included in an avian protection zone within a protection plan or program.

As the examples in the table above highlight, the inspection rate can vary across utilities and inspections only result in a selective number of maintenance actions on a much smaller subset of poles. The general life span of a wood pole can vary as well. Some utilities see this as a minimum number of years a pole may be in the ground, and others view this as the date after which more intensive inspections are required. Regardless of how the utilities view the general life span, it is dependent on original species of wood, the chemical treatment the pole undergoes, and the environment in which the pole is installed. Some types of treated wood poles are expected to last at least 75 years with proper remedial treatments.

APLIC conducted a member survey in 2020, and of those members that responded, 88% have APPs. Even for those utilities that have APPs, not all have scheduled retrofits for non-avian-safe equipment (the standard industry language is avian-safe or avian-friendly not electrocution safe), but many have avian-friendly standards for new construction or upgrades (what we will term a proactive approach for the remainder of these comments). It is important to note that calling a pole electrocution safe has implications for human health and safety (and other non-avian wildlife not covered by this permit), and APLIC strongly recommends the Service use the appropriate industry language of avian-safe or avian-friendly. See APLIC's Suggested Practices document for a definition of "avian-safe".

An APP is developed based upon the avian species found in a service territory and the infrastructure the utility operates and maintains. The term "avian-safe" is used by many utilities in an APP. Some utilities use additional terms which focus on particular species. For example, a utility may identify eagle specific protection measures by using the term "eagle-safe" or "eagle-friendly".

Utilities with APPs (and some without) typically retrofit poles in response to eagle injuries, fatalities, and eagle-caused outages. Some utilities have proactive approaches for new or replacement equipment (based on internal standards) within an identified risk or priority zone (there is no industry standard term for these locations, some utilities may elect to call them eagle-risk zones while others may call them eagle exposure zones – the key is that each utility will use a set of criteria to define locations that may receive a higher priority for review). Some electric utilities have not completed (or are in the process of completing) a company-wide assessment of their poles to identify which poles pose the greatest risk to eagles. Given the range of sizes, locations, and infrastructure types of utilities (co-ops to multi-state), this rate of retrofit can vary widely.

APLIC members are concerned that the Service's cost estimates are not accurate and may underestimate the cost of retrofitting non-incident poles or replacing entire circuits that have not reached end of life. Utilities have variable costs for addressing electrocution issues. These costs depend on the nature of the fix (full pole replacement or protective cover up

material), the type of infrastructure (wood distribution pole or steel sub-transmission), the season (access; outage or no-outage), the crew type (internal staff or a contracted crew) and the number of staff required to complete the work safely, accessibility, and the availability of materials (supply chain issues and competition) - just to name a few site-specific factors. Other larger scale factors of cost can also vary based on competitive purchasing power (quantity discounts), proximity to timber resources and pole or avian protection product manufacturers (shipping and handling costs), finance structure of the company (possibility of a loan required), staffing resources (high demand for trained line crews), safety requirements (moratoriums on helicopter use), and other economic/market related variations.

Members report a range of costs from as little as $250 for the installation of cover up material (based on the principle of insulation, see APLIC 2006) to as much as $3,600 for a full pole replacement. These costs represent *only* the materials required to complete the corrective action. This cost *does not* include any lost service or outage penalties, the crew time, the equipment required for the work (bucket trucks, pole augers, etc.), road closures/traffic control, permitting/land rights acquisition, material standards (wood pole or steel pole), or other costs incurred during the course of installation. Therefore, those numbers cannot be used to estimate the cost of a program. The comprehensive cost can be difficult to tease out on a per pole basis as the timekeeping, accounting, asset management, and system operations costs are not unitized to pole. In one example provided by a member utility, a single pole replacement using heavy equipment was an $11,000 cost. In another example provided by an APLIC member, the routine cost of multiple pole replacements on a single circuit is around $5,300 per pole assuming cost efficiencies of multiple poles completed in one day by one in-house crew with no overnight travel costs. For a transmission pole, the comprehensive costs can be $50,000 per pole for a wooden pole with a possible risk to eagles at the 69-kV voltage.

APLIC members are generally supportive of the per state application fee for the proposed power lines permit. This is a simple way to administer the program, but we suggest that the Service consider scaling costs for smaller entities such as cooperatives, municipalities, and public utility districts to account for the smaller budgets and at-cost operations under which many of these entities are required to operate. Perhaps these smaller entities could qualify for the reduced fee based on a small business administration definition. APLIC recommends the Service engage with representatives of this group, perhaps through their trade organization - the National Rural Electric Cooperative Association (NRECA) to gage the feasibility of this approach.

11. How should the Service implement the proposed audit program? Are there costs we should consider that ensure accuracy of the results while reducing the burden to the public?

APLIC recommends that the Service collaborate with utilities, prior to development of the auditing program, to develop an efficient, simple, and standardized approach to an audit program that is consistent with existing industry practices. This collaborative process may ease the burden on the Service by allowing utilities to describe generally similar avian protection practices, engineering, operations, maintenance, asset management, and accounting practices that the auditors would be required to understand in order to complete

the audit process. We understand that the Service intends to hire additional staff to support the audit process. APLIC supports this approach, and recommends the Service conduct audits in-house, rather than hiring a third party or consultant firm, to avoid a potential conflict of interest. We also recommend the Service hire employees for this audit program that have electric utility industry experience (or familiarity) to ensure a complete understanding of a complex system. This is also an area APLIC would be happy to partner with the Service on – in fact it is part of our mission – to provide the needed training on electrical infrastructure, the methods electric utilities use to address poles that are not eagle-safe and the methods of scheduling, implementing, and funding such eagle-safe strategies. Due to access, liability, and safety concerns associated with field audits, APLIC recommends the Service conduct desktop audits instead of field audits.

APLIC recommends the Service provide a sufficient timeline for utilities to provide the information requested in an audit, such as a 90-day response period. Even companies with successful APPs may not have the ability to easily track all activities conducted on their system in real time, and it may take time to access and compile this information. Some utilities might be able to quickly provide cost information, while some may be limited in what they can provide based on accounting practices and how integrated the systems may or may not be. For example, some timesheet software is not able to capture a per pole cost for a crew. Utilities may calculate cost and pole retrofit numbers at the end of the calendar or fiscal year, therefore, a mid-year audit may pose challenges in obtaining these numbers. Some may easily be able to track the number of poles replaced under eagle-safe standards, the numbers of different types of covers installed, miles of tree wire, etc., while others may not have these systems in place. The implementation of these accounting systems may present a significant hurdle to early adoption of the permit program should an audit require information that is not readily available. The development of software and special accounting practices presents additional cost that the Service may not have contemplated in the permit cost estimate. APLIC also recommends the Service consider how the information collected in an audit program would differ from the annual reports. APLIC understands that APPs may need to be provided to the Service upon request, but as APPs vary depending on many company-specific factors, APLIC encourages the Service to work collaboratively with utilities to understand their APPs rather than "approving" or determining whether an APP is adequate through the audit process.

APLIC encourages the Service to work collaboratively with industry to develop a standardized list of documentation, based on each utilities' system, required for the audit. This list should be available for review before an application is submitted. There should be simple to use tools to upload the information to the auditors through a secure web-based portal. The North American Electric Reliability Corporation Critical Infrastructure Protection (NERC CIP) plan is a set of standards aimed at regulating, enforcing, monitoring, and managing the security of the Bulk Electric System (BES) in North America. These standards apply specifically to the cybersecurity aspects of BES and the Service should be aware of the limitations on data and information that can be provided so that utilities can maintain compliance. No CIP information should be required as part of this audit without the proper cybersecurity measures and accommodation from the NERC in place.

APLIC hopes the information provided above proves useful to the Service. The remainder of APLIC's comments highlight the concerns our members have with particular areas of the Proposed Rule. The intention of providing these concerns is to illuminate areas of the proposed permit program that may require additional clarity or items that impact the feasibility and practicability of participation in the permit program.

General Framework Comments

APLIC members repeatedly expressed the concern that this voluntary general permit may somehow become a requirement in other Federal or State permit processes, or that it may be misinterpreted to be project-specific rather than a company-wide, programmatic permit. This proposed General Permit should not be a requirement or condition for any other permit but should remain voluntary. Based on members' past experiences, APLIC is apprehensive about how other federal agencies may incorporate this proposed permit into other permitting process for existing operation and maintenance plans, renewal of those plans or utility rights-of-way (ROW), or new construction on federal lands. APLIC recommends that the Service educate other federal permitting partners about the purpose and role of the this proposed (voluntary) program and that permit program participation is entirely up to the applicant and the permit is entirely under the Service's purview.

APLIC members want to stress the importance of APPs and that any permit process for power lines should build on APP foundations, rather than replace them. In many cases, APPs have been accepted by Service, have been used by utilities for over a decade, and offer many of the resources that are needed for eagle conservation. It is important to keep corporate APPs in place as they provide a strategy for other avian species that may interact with utility infrastructure and can also be used as a complimentary tool in a future migratory bird permit program.

APLIC members also expressed interest in further understanding how this proposed permit process would address the two eagle species also under the protection of the Migratory Bird Treaty Act (MBTA). Can the Service offer any clarification on if a separate permit for eagles would be required to allow for take under MBTA (in the circuits in which the courts have determined that incidental take of MBTA protected species is prohibited)? How will this current proposed BGEPA program interact with any future MBTA program? Some utilities may delay the decision to apply for an eagle take permit until they understand what, if any, overlap may be associated with the future MBTA general permit program.

Permit Conditions Regarding New Construction

The Service proposes that "*all new construction and reconstruction of pole infrastructure must be electrocution-safe for bald eagles and golden eagles, except as limited by human health and safety*". APLIC recommends that this condition only apply to new construction in each utilities' defined eagle risk/eagle exposure areas. Not all poles on the landscape pose electrocution risk to eagles, and some utilities have no documented eagle electrocutions in their service area.

The Service also proposes that "*all construction and reconstruction of transmission lines must consider eagle nesting, foraging, and roosting areas in siting and design, as limited by human health and safety*." APLIC suggests the Service clarify and maintain the use of the phrase "when practicable" in the general permit language and that the Service removes "foraging" from this condition. For some utilities, compliance with this condition would not be possible, particularly without a clear definition of "forage area." Consequently, APLIC recommends removing the requirement to consider roosting or foraging areas since the Service also proposes (under nest permits) "*to clarify that activities conducted adjacent to a communal roost or foraging area do not constitute eagle disturbance and do not require a permit*." Please note that most utilities will utilize existing ROW for the reconstruction of lines and may not be able to acquire new ROWs; in addition, these existing lines may provide nesting substrate for eagles. Many APLIC members report successful nesting by both bald and golden eagles on distribution and transmission lines throughout the United States. It may be impractical and disruptive to remove these successful nests from the lines.

The Service recommends utility infrastructure siting at least two miles from golden eagle nests and 660 feet from bald eagle nests. APLIC encourages the Service to review and honor existing guidance from various Service regions that may have already established a standard buffer distance or may have other conditions for power line construction and maintenance that are different from the recommended two miles for golden eagles and 660 feet for bald eagles. Electric utility members are often bound under law to provide service to customers no matter the location. This Proposed Rule should provide exceptions with regards to activities required to meet State PUC service requirements. Many State PUCs have long standing requirements for wildlife considerations (including buffers for eagles) or other non-wildlife related resources within these state requirements. APLIC members would like to see the Service acknowledge that nesting can occur on poles or structures and make accommodations for nests on existing electrical infrastructure (recognizing that without the structure there would be no nest) throughout the Proposed Rule.

Federal land management agencies also prefer that ROW are consolidated to concentrate disturbance. This would prohibit utilities from paralleling existing ROWs if an eagle nest is found on an existing line in that corridor. Re-routing lines two miles from an existing transmission line with nests present will result in additional habitat fragmentation and may result in impacts to other resources of concern.

<u>Permit Conditions Regarding the Proposed Reactive Retrofit Strategy</u>

Under reactive retrofits, the Proposed Rule suggests "*This estimate assumes that the permittee implements mitigation immediately and retrofits remain effective for 30 years*" as it relates to retrofitting of 11 poles/eagle offset. APLIC would like clarification on the expectation of "immediately." This definition is important to understand with respect to the response expectations and what this may require for projects. Moreover, the timing for retrofit completion can vary widely even within a utility due to crew scheduling, outage availability if appropriate, permitting timeframes, process/plan development, engineering, material availability, human

health and safety risks, land access, and other conditions that may be outside of the control of the utility. APLIC suggests a minimum 90-day response time for completion of the investigation, documentation, and proper design standard selection. Given supply chain issues and system constraints, the installation of these materials may take longer than 90 days. APLIC encourages the Service to be flexible with the timing of the final step of installation. This type of open communication approach would be the most amenable to electric utilities.

Permit Conditions Regarding the Proposed Proactive Retrofit Strategy

APLIC members had the greatest level of concern surrounding the condition of a proactive program. The expectation of converting "*one-tenth of non-electrocution-safe infrastructure*" during the five-year permit term is an unrealistic goal for many utilities, and as a result APLIC does not believe the one tenth metric for the proposed proactive retrofit strategy is feasible.

Most utilities with APPs, and some without, have existing proactive programs to retrofit the portion of their systems that pose a risk to eagles. This proportion varies depending on where the utility is located, eagle density, land use, habitat, and size of the utility. APLIC would like to point out that many avian protection programs and APPs were first developed and implemented in the late 1990s and early 2000s, and the avian protection practices/equipment have improved since then. As a result of this evolution, some of the reference articles in the information provided within the DEA may not be the best available science. For example, the DEA assumption that 76% of poles are avian-safe does not accurately reflect current APLIC member company experience, and the use of this metric for the Service's baseline calculations grossly underestimates the cost of a proactive retrofitting program. Consequently, the actual cost to utilities and their customers/ratepayers has not been adequately analyzed in the DEA.

The DEA states that many utilities have APPs, and of those, many are probably already converting a significant portion of their poles to be eagle-safe through reactive, proactive, and maintenance (pole replacement) work. The Service assumes that these power line entities won't have much additional cost to supplement their current actions under their APPs. Some APLIC member utilities include special sections in their corporate APPs that address eagles explicitly, others do not have any special reference to eagles, and still others may have standalone eagle specific documents.

APLIC believes the Service has underestimated the cost to industry based on the Proposed Rule. In the Proposed Rule, the Service estimated that the annual cost to industry for the *entire* proposed rule is $30.391 million (*See* 87 Fed. Reg. at 59612). The information provided below suggests that the Service might consider re-evaluating the total cost to industry in the proposed rule.

It is important to acknowledge that the Service has stated during public scoping forums that they would like to have all the poles on the landscape eagle-safe in 50 years. Perhaps the Service can reconsider this timeline given the significant number of poles that are on the landscape and all of the poles cannot feasibly be addressed within 50 years. We provide the following conceptual

examples from nine of our members, representing various sizes and regions, to show that a proactive retrofit program of 10% of poles is an unrealistic expectation. Some members provided information based on the assumption that all of their poles would need to be addressed while other members provided information based upon individual eagle risk assessments they already have in place. The utilities with an eagle risk assessment provided costs associated with a subset of all of their poles.

Example 1: For a western utility, the anticipated cost of the 10% proactive program would be 379 times what the Service estimated for the maximum average permit cost per year. This particular utility currently spends more than the annual average cost to industry ($7.9 million for this company alone as compared to the $1.2 million Service total industry estimate) and the current program does not meet the 10% goal, despite an ongoing high level of effort. In order to meet the proposed 10% proactive retrofit threshold, this company alone would need to spend $22.8 million annually.

Example 2: An APLIC member in the southeastern U.S. has over 6 million distribution poles in a single state service territory; approximately 25% of these poles have been risk ranked as presenting an electrocution risk to bald eagles. This represents a pool of 1.5 million poles that may present a risk to bald eagles. Despite these 1.5 million "risky poles," this company only experiences an average of 4 to 6 bald eagle interactions per year with an extensive monitoring, detection, and reporting system in place. If required to proactively address 10% of the risky poles in a 5-year period, this company would be faced with proactively addressing 30,000 poles per year or 150,000 poles for the term of the permit. At the current pole replacement cost for this utility ($1,250 when done in bulk for material costs alone) the cost to comply with this single permit condition exceeds $37 million per year and is well over $187.5 million for the five-year permit term.

Example 3: A utility in the southwest recently reviewed the age of their infrastructure and found that they have 910,000 poles that are older than 2013 (the date cutoff for when the last overhaul of the company's avian standards took place). If the utility were to assume that all of those poles represented some level of eagle risk, then they would have to proactively address 18,200 poles/year to achieve the 10% requirement over the 5-year permit term. At the current estimated minimum cost for their utility to address these poles ($1,500/pole replacement), this represents a $27.3 million annual requirement ($136.5 million over 5 years).

Example 4: A utility in the Great Lakes Region has 3.9 million poles, and if they were required to address 10% of their system, it would represent 390,000 poles. Logistically, the requirement would be to address 78,000 poles a year, equaling 300 poles a day (in business days). This company's current costs, for covers or retrofit, average $4,000 a pole. This would result in a cost of $312 million per year, or $1.56 billion for the single five-year term. This company currently has no budget for their avian program that would cover this cost. All of this cost would have to be charged back to rate payers.

Example 5: A second utility located in the southeast noted known eagle incidents occur infrequently, therefore the costs of the proactive mitigation requirement is not commensurate

with the eagle incident risk. For this utility to retrofit 10% of its approximately 4 million distribution poles (400,000 poles) at a maximum of $7,500 retrofit per pole, within the five-year permit term, over $3 billion would have to be spent ($600 million per year). Any legacy low voltage transmission lines that are not deemed eagle-safe would have to be completely rebuilt at a cost exceeding $1 million per mile.

Example 6: A mid-Atlantic utility with a large distribution network, and a robust eagle population that has grown exponentially over the last two decades, provided calculations on the costs of the proactive mitigation requirement. These calculations are based on assumptions with a high degree of uncertainty but represent a good faith attempt to estimate the scale and costs of the proactive mitigation requirement under the proposed rule. This utility estimated costs assuming that the entire distribution system required retrofitting under the proposed rule. In this scenario, they estimate that 547,200 total poles would be retrofitted (10,944 poles/year at a cost of $1500/pole for material costs) with an annual cost of $16.4 million and over $82 million for five years ($821 million over 50 years). If this same utility only focused on poles they designated as high hazard poles in eagle exposure areas, they would still be looking at 85,500 structures (1,710 poles/year) at a cost of $2.6 million annually and about $13 million for five years ($128 million over 50 years). The cost of $2.6 million a year still remains prohibitive within scheduling and operating constraints.

Example 7: Another utility in the Great Lakes Region constructs about 300 miles of new line per year and most of that is replacing existing infrastructure. Approximately 95% of the new distribution line is installed underground. They have about 15,582 miles of overhead line remaining within their urban distribution system, so it is possible that they may be one of the few utilities that might be able to meet the $1/10^{th}$ per five-year permit term.

Example 8: A small utility in the northwest U.S. has approximately 244,000 distribution poles in a single state service territory; the majority of which could present an electrocution risk to bald eagles due to their increased populations and their use of urban areas in this region. There would be significant costs associated with determining which poles are or are not currently constructed to reduce eagle electrocutions. Given the time and expense associated with completing the risk assessment of their infrastructure, they would assume all poles would need to be addressed. They estimate a cost of $12.2 million per year (assuming an average $2,500 per pole, not a loaded cost) to meet the condition (retrofitting 4,880 poles per year, costing $61 million over 5 years). This is a significant hurdle for this utility.

Example 9: Another northwestern utility estimated that they may have approximately 37,000 “high-risk” poles out of a total of 400,000 distribution poles within their Service territory. If they apply their internal averaged retrofit cost of $2,000 per pole, the cost would be approximately $7.4 million over five years or $1.48 million per year (740 poles per year). It would cost $74 million to correct all of their high-risk poles. If the company were to retrofit ten percent of their 400,000 distribution poles it would cost them $80 million over five years or $16 million per year (8,000 poles per year). It would cost $800 million to update all of their poles. These costs represent a substantial increase in the avian program budget.

These examples show that only one of nine members may be able to participate in the proposed program as it is currently envisioned. Based upon information from the nine APLIC members, the estimated $30.391 million (*See* 87 Fed. Reg. at 59612) annual cost to industry for the *entire* proposed rule is substantially underestimated. The individual estimated cost provided by the majority of the example utilities would exceed the total industry cost estimate in the DEA.

APLIC also polled our U.S. members with power lines in order to understand how many would participate in the General Permit as currently proposed. APLIC received 48 responses to the poll, and not a single responding company would apply for an eagle take permit as currently written in the proposed rule. There are many challenges showcased in these examples, including the sheer number of poles on the landscape, the logistical effort to track retrofits and rebuilds completed under maintenance that meet the general permit requirements within a five-year time frame, the pace of routine maintenance versus the expectation of system upgrades assumed in the proposed rule, and the difficulties in the financial restrictions/limitations to the funding of the program. Perhaps 1% may be a more realistic expectation. Even the ongoing implementation of a proactive program would still improve the baseline.

As written, the Proposed Rule does not acknowledge the challenges utilities face in funding a large scale, accelerated eagle mitigation program. Power distribution providers use multiple financial models, but rural areas are disproportionately served by Rural Electric Associations (REAs) and Investor-Owned Utilities (IOUs). Perhaps it would be valuable for APLIC to provide information on how utilities are funded and how avian programs are funded within the financial framework in order to better understand the cost estimates.

REAs rose out of a federal effort to support rural electrification in the 1930's, which posed a challenge because, by definition, rural areas have proportionately few customers per line mile. As a result, the capital investment per customer/member are disproportionately high: generally, REAs have many poles and many line miles but a very small revenue base and very limited staff. REAs receive technical support from the USDA Rural Utility Service (RUS) and can pursue low- or no-interest federal loans, but capital costs are ultimately borne by a small pool of customers. A requirement to mitigate the entire system (or even eagle risk areas, which could comprise all or nearly all of some systems) would not be financially practicable for many REAs within the timeframe outlined in the Proposed Rule.

IOUs are larger than REAs and are publicly traded corporations. Because they are regulated utilities, rate adjustments are controlled by State PUCs. IOUs annually present detailed rate cases to these organizations using detailed performance, reliability, and financial metrics. Rules for discerning between capital expenditures and operational and maintenance (O&M) costs vary by state and are highly detailed, and the distinction between the two may have implications for funding any proactive program. Some PUCs make funding allowances within the different types of cost recovery to comply with new regulatory requirements, particularly programmatic efforts; however, as incidental take has been prohibited for many years under the BGEPA, it is unclear whether the availability of a general permit would facilitate compliance-driven cost recovery in any state.

The Proposed Rule would accelerate eagle mitigation dramatically, and in many cases the proposed rate of retrofitting would cost millions of dollars that may or may not be eligible for cost recovery. IOUs anticipate balancing the need to comply with BGEPA and rate-setting requirements imposed by state-level public utilities commissions.

Utilities may have to reduce certain routine maintenance or other activities in their service territories to comply with this proposed 10% requirement, leaving them at risk of non-compliance with other reliability requirements and obligations. For example, wildfire mitigation and vegetation management are taking a significant portion of western utilities' annual operating budgets, making it impractical to also comply with this proposed eagle requirement. Storm remediation results in a similar budget and timing challenges, as may the shortage of crews to complete all the required work under all the different compliance obligations.

APLIC would also like for the Service to understand that adding ROW is difficult, if not near impossible for existing lines, so the expectation that utilities will opt for reframing lines over using protective materials is unrealistic in most cases. APLIC acknowledges that there are concerns with using protective cover-up materials. These concerns center around reliability, resiliency, labor, and supply chain challenges. Many manufacturers of the protective materials are actively conducting research to improve materials and longevity, and APLIC routinely educates on proper installation and maintenance of the devices.

In order to begin to address all of these concerns, APLIC recommends that the Service alter this proactive retrofit condition to provide two different options for applicants:

1. The Service maintains a condition that requires a utility to demonstrate that they have a proactive retrofit strategy but omits a minimum required metric. Instead, the Service would audit the utility against their own commitment. This would allow the utility to document the reasoning for their strategy and incorporate local system information, risk information, and operational constraints. This condition would still progressively reduce the number of risk poles on the landscape yet provide a realistic condition for utility compliance.

   OR

2. Remove the proactive requirement all together and instead increase the reactive response to eagle take to include a larger number of non-eagle-safe poles or a greater distance for the reactive response. This would target the risk reduction in areas of actual risk and create a measurable, universally documentable definition of risk. This still achieves the goal of reducing the number of risky poles on the landscape and scales this proposed General Permit to the level of take on the landscape.

Whatever the outcome of the final Proposed Rule, APLIC would like to reassure the Service that many members would opt to continue their own APP driven reactive and proactive programs.

Permit Conditions Regarding the Collision Response Strategy

APLIC appreciates the flexibility in addressing eagle collisions with power lines. Unlike electrocution, collision is a difficult problem to proactively address. Collision incidents seem to be somewhat random, and sometimes utilities mark lines if there is risk of reoccurrence (closely spaced wires in open/waterfront habitat, river crossings, close proximity to nests, etc.); rarely are utilities in a position to modify habitat or reroute the line for a single collision. Most APLIC members have not had multiple eagle collisions in any one location, and often the context and conditions surrounding collisions are unique to each situation.

Utilities will have various levels of risk throughout their own service territories, different methods for assessing risk, and a suite of methods for remediation if determined to be appropriate given the site-specific conditions. APLIC would like clarification on the expectation of the collision response strategy as it applies to either the span in which the collision occurs, or to some other quantifiable distance of line. It is unclear in the current proposed language whether the collision requirement applies to a limited area related to an incident, or if this is a programmatic requirement to be applied across an entire system. APLIC wonders if this condition is duplicative of other efforts. APLIC recommends that the Service maintain utility flexibility in collision response and allow for a "no line modification" action in cases where collisions are unlikely to occur again or where access, line design, or other considerations would hinder line marking ability.

APLIC would like to better understand how the Service estimated the number of eagles killed by collisions with power lines, when the reference in the Proposed Rule says, "*Approximately 600 [more] die from collisions, a **portion** of which are **probably** collisions with power lines*"? APLIC members have non-estimated, actual data on the number of eagle collisions on their systems that APLIC may be able to share with the Service for the purpose of this discussion and to further the understanding of the scope of the collision issue. Based on APLIC's data, the number inferred in the proposed rule appears to overestimate power line collision risk.

Permit Conditions Regarding the Shooting Response Strategy

APLIC agrees the illegal shooting of raptors is an issue and a concern, and APLIC members routinely report suspected shooting instances to Office of Law Enforcement (OLE). Adding a condition to the proposed permit program that requires utilities to create an eagle-shooting-response strategy seems to place an unfair burden on utilities in enforcing a responsibility that has clearly been delegated to the Service OLE.

As stated in the Proposed Rule, it is unclear whether a shooting response strategy would be required for each eagle suspected of being shot, or whether the shooting response strategy would describe a systematic approach. The Proposed Rule states that the strategy should include determining where eagles have been shot or electrocuted, neither of which may always be evident. APLIC has concerns about necropsies being required due to the need to have necropsies completed in a timely manner, costs, issues with collecting potentially shot eagles (not all

utilities retrieve dead birds), employee safety when accessing these areas, and implications for time and resources.

The Proposed Rule further states that if it is an identified shooting, that the strategy should include response options. APLIC recommends that the Service clarify that a sufficient response strategy would be reporting eagles suspected to have been shot to OLE. Further measures would be determined in coordination with OLE, if appropriate. We do caution the Service on the expectation that utilities will be able to do more to address the issue. This problem has been around for decades, and utilities have worked to resolve the issues where we can; unfortunately, we are not the underlying landowner on our ROWs, cannot limit or control access to private or public lands, and have no law enforcement authority. APLIC members that have encountered illegal shooting in the past have been advised to report the incident to OLE and take no further action so as not to interfere in a criminal investigation. Further involvement or actions should be at the sole discretion of the investigating OLE. APLIC recommends that the Service coordinate with OLE, reach out to the Federal Land management agencies, and work collaboratively to address the concerns of illegal shooting on public lands.

Recommendations for Burying Lines

It is important to recognize that it is generally not feasible to bury many miles of lines in response to shooting, collision, or electrocution incidents. Shooting most likely occurs in remote areas, often on public lands, and on circuits that cover long distances which has ground disturbance, environmental, and cultural implications for permitting on public lands. Collisions can be habitat dependent, for example near lake shores or rivers, but these same conditions that make collision a higher risk can also create operational, technological, or permitting challenges to undergrounding the lines. In many instances, the installation of lines underground far exceeds the cost of installing overhead lines. APLIC has previously described the difficulties with wide-spread undergrounding of power line in our Sage Grouse BMP document as well as in previous rule making comments on sage grouse, APLIC provides this information below:

> Installing new power lines underground or converting existing lines from overhead to underground are often raised as RDFs, permit stipulations or mitigation options. However, underground power lines result in increased cost, reduced reliability, greater ground disturbance during construction and repairs, longer outage periods for customers, shorter life span of the line, and may not always be feasible from engineering and operations perspectives. Underground power lines require a continuous excavation through all habitat types resulting in ground disturbance for the entire line route. This is in contrast to overhead lines, which result in a disturbance only at the structure locations. Underground lines would also require excavation for repairs or maintenance, which would result in ground disturbance occurring temporally over the life of the line, not just during initial construction. Ground disturbance during construction, repairs, and maintenance can result in large, permanent displacement of excavated soil and subsequent issues with re-establishing native vegetation and preventing the overgrowth of invasive species. Undergrounding lines can result in adverse impacts to other resources, such as cultural, historic, or paleontological areas, and wetlands. A University of California study (Bumby et al. 2009) found that underground power lines have more environmental impacts than overhead power lines for all categories and most scenarios in southern California. For more detailed discussion of environmental and engineering constraints associated with underground power lines, see *Reducing Avian Collisions with Power Lines: The State of the Art in 2012* (APLIC 2012), pages 62-63 and *Best Management Practices for Electric Utilities in Sage-Grouse Habitat* (APLIC 2015).

Two utilities have provided side by side costs for both distribution and transmission lines, and one utility provided cost comparisons between burying lines and retrofitting above ground to help illustrate the current costs associated with both options.

One utility in the Great Lakes Region supplied a side-by-side cost comparison for undergrounding distribution lines compared to overhead pole replacement and cover up strategies. The costs vary depending on the configuration of the lines (single vs three phase). The underground costs can range from $290,000 to $520,000 per mile; compare these costs to the overhead pole costs of $2,300 to $5,500 per pole replacement and cover up $900 to $1,600 per pole.

One utility in the southwest recently completed a project and provided the side-by-side cost estimates for overhead vs underground lines at the 138-kV transmission voltage. The cost comparison estimated underground lines at approximately $19 million per mile, whereas the same 138-kV line constructed overhead was estimated at approximately $2.3 million per mile.

The third utility in the western states provided the cost estimate for undergrounding distribution in rural areas. This cost averages $528,000 per underground mile; for this same type of line, the corrective action for above ground pole retrofits with covers or reframing averages $1000-$1800 per pole to address electrocution risk. With an average of 14 poles per mile, this cost is roughly $14,000-$25,200 per mile. To address collision, the installation of line markers averages $500-600 per span; with an average of 13 spans per mile, this is an estimated cost of $6,500-$7,800 per mile.

Eagle Disturbance and Nest Take Permits

The current proposed regulatory language fails to include golden eagles in the nest permits and seems to set forth buffer distances only for bald eagle nests. Perhaps this is simply an oversight in the wording in the proposed regulatory language or perhaps golden eagles were never intended for inclusion with in 22.280. APLIC requests that the Service clarify their intentions. Does the omission of golden eagles from the 22.280 mean that an individual permit will be required to conduct work near a golden eagle nest, regardless of the season or other current regional guidance?

APLIC members have expressed concern with the proposed process of applying for a disturbance permit each and every time a utility may need to conduct work near a nest. Instead of the current proposed approach to nest disturbance permits, APLIC suggests that the Service consider a nest disturbance general permit, applicable to both species. Ideally, this could be offered as a standalone permit or included as an “add-on option” in a General Permit power line permit, streamlining the process for both the Service and utilities. These permits would be applied for as a single umbrella permit that would have the same five-year permit term as the General Permit take permit with conditions that would apply to utilities such that necessary de

minimis[1] work could be conducted within buffer distances of an active nest for both bald and golden eagles. This permit would also allow for emergency work to address human health and safety and electric reliability (wildfire, vegetation management requirements, nest trimming, etc.) with no buffer, year-round (regardless of nesting season), so long as the integrity of the nest or nest substrate are not impacted.

If the nest is located on the utility infrastructure, the permit would allow for work to address human health and safety and electric reliability with no buffer, year-round (regardless of nesting season), so long as nest, eggs, chicks, and adults are not taken, and the activity is actively monitored. Inactive nests (having not been actively occupied by eagle species for the past season or a nest that is no longer viable) would not require permit coverage. Under the proposed rule, there is not a mechanism for golden eagle nest removal from utility infrastructure in the event of immediate human health and safety incidents. Utilities may require an emergency and expedited permit option to remove golden eagle nests that pose a threat to human health and safety. An approved mitigation option for this permit could include the removal and transfer of chicks to a state approved rehabilitation center.

The Service currently allows for the removal of inactive golden eagle nests for resource development or recovery operation when a nest in inactive under the current permit ID 3-200-18. For purposes of this permit, an inactive nest is one that is not currently used by eagles as determined by the absence of any adult, egg, or dependent young at the nest during the ten days before the nest is taken. APLIC encourages the Service to include this as an option in the final rule and consistently apply this definition of an inactive nest to other nest permits, regardless of the industry category of the permittee.

APLIC recommends that this general permit program for both nest disturbance and nest take (associated with human health and safety and system reliability) not include a compensatory mitigation requirement unless it can be documented by a qualified biologist that the eagles were disturbed in a manner that appreciably decreases their breeding, feeding, or sheltering behavior during the course of the utility maintenance work. If the disturbance or take does appreciably decrease the breeding, feeding, or sheltering behavior of the eagles, then APLIC requests that the Service consider making the entire suite of compensatory mitigation options available (internal or third-party power pole retrofits, lead abatement, carcass removal from roads, habitat enhancement, installation of adjacent nest platforms, or other non-power line options) to the electric utility industry. For example, the installation of nesting platforms has been authorized by the Service as a successful mitigation approach for the take of eagle nests, when land rights and authorizations can be granted to install them on the right-of-way.

APLIC members would like to better understand the process that applicants/permittees can utilize to obtain up-to-date information about eagle nest locations, forage areas, roosts, etc. It seems as though the Service and State Wildlife agencies are no longer tracking bald eagles on

[1] De minimis activities are recognized by other state wildlife and federal land management agencies as activities that are necessary for the safe operation of utilities, and do not pose a significant impact to wildlife due to their limited footprint or duration. Utility O&M actions, line inspections, and vegetation management are typically included as de minimis activities.

any reliable scale or frequency, and golden eagle nest information is considered sensitive and is not shared. How do we obtain current data to evaluate risk and develop/implement avoidance or minimization measures, BMPs, and observe the appropriate spatial buffers when conducting activities in proximity to these areas? Many utilities often don't have the resources to collect and maintain this data internally at the scale that may be needed to meet these criteria.

APLIC recommends the Service consider providing a national eagle nest database, perhaps only available to those who apply for access, so there is current data available for permittees regarding the locations of eagle nests for the purposes of planning, siting, construction, and maintenance activities. Permittees could report new nests to the Service using this database. This database would also be available for State Wildlife agencies to update or utilize for State needs. This would provide a single, uniform, up-to-date, database that may advance population estimations, trends in nesting density, and other important gaps in the demographics of eagles.

In Summary

APLIC appreciates the flexibility in the rule that recognizes the differences in size, location, and infrastructure type for electric utilities in the U.S. We appreciate that the Service recognizes the key role APPs have played for more than a decade in managing avian interactions with power lines. The primary challenge to seeing greater participation in the program is associated with the required metric in the proposed proactive program. APLIC appreciates the opportunity to provide comments on this Proposed Rule, and our members are available to answer any questions or provide any additional information on our comments. APLIC members are committed to eagle conservation, and we look forward to working with the Service to make the permitting program accessible and feasible for all that would like to participate.

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Comment from CTIA - The Wireless Association

Submitter Information

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Organization: CTIA - The Wireless Association

General Comment

See attached file(s)

Attachments

FWS-HQ-MB-2020-0023 Eagle Take NPRM - CTIA Comments

Before The
DEPARTMENT OF THE INTERIOR FISH AND WILDLIFE SERVICE
Falls Church, VA 22041

Permits for Incidental Take of Eagles and Eagle Nests	))	Docket No. FWS-HQ-MB-2020-0023

COMMENTS OF CTIA – THE WIRELESS ASSOCIATION

CTIA – The Wireless Association[1] submits these comments in response to the Fish and Wildlife Service's ("FWS") Proposed Rule to revise its regulations governing the issuance of permits for bald and golden eagle incidental take and eagle nest take.[2]

CTIA appreciates the opportunity to contribute the perspective of its members on the Proposed Rule. We support FWS's proposal to adopt general permitting as a more effective and efficient way to meet FWS's statutory responsibilities, while also reducing burdens on the agency and on entities that build structures in areas where eagles are present. Streamlining the permit process for communications towers will also advance the bipartisan national priority to expand broadband communications infrastructure to enable all Americans to access broadband services. We thus urge FWS to adopt its proposals for general permits for eagle disturbance take

[1] CTIA – The Wireless Association ("CTIA") (www.ctia.org) represents the U.S. wireless communications industry and the companies throughout the mobile ecosystem that enable Americans to lead a 21st century connected life. The association's members include wireless carriers, device manufacturers and suppliers, as well as apps and content companies. CTIA vigorously advocates at all levels of government for policies that foster continued wireless innovation and investment. The association also coordinates the industry's voluntary best practices, hosts educational events that promote the wireless industry and co-produces the industry's leading wireless tradeshow. CTIA was founded in 1984 and is based in Washington, D.C.

[2] Department of the Interior, Fish and Wildlife Service, *Permits for Incidental Take of Eagles and Eagle Nests,* Docket No. FWS-HQ-MB-2020-2023, Proposed Rule, 87 Fed. Reg. 59598 (Sept. 30, 2022). FWS subsequently extended the comment period until December 29, 2022. 87 Fed. Reg. 72957 (November 28, 2022).

and nest take, and to streamline both its general and specific permit procedures. We also recommend several revisions to the rules that will further advance FWS's objectives in this rulemaking.

I. ADOPTING STREAMLINED PERMIT RULES FOR COMMUNICATIONS TOWERS WILL SERVE IMPORTANT NATIONAL POLICY OBJECTIVES.

CTIA members continually seek to improve the nation's communications services by installing and upgrading the radio tower structures that are needed to support those services. Particularly in rural areas, those towers are often the only cost-effective solution to providing broadband services to nearby communities and residents. Public safety and other government officials also rely on the services that towers enable. For example, in the vast areas managed by agencies such as the Bureau of Land Management and the National Park Service, a network of towers is often essential for agency staff to communicate.

This tower infrastructure will be expanding nationwide because in 2021, Congress enacted landmark bipartisan legislation that appropriates over $45 billion to build new broadband infrastructure.[3] The law recognizes the enormous national economic and social benefits of ensuring all Americans can access high-speed broadband services and thus helps to fund construction of the networks needed for those services. CTIA's members are committed to investing in communications networks to advance this national objective.

To accomplish the national priority of vastly expanded broadband availability, more communications towers will need to be constructed, and existing facilities will need to be upgraded. Some of this work will need to occur in areas where bald and golden eagles or eagle nests are present. However, communications towers are not associated with eagle mortality.

[3] Infrastructure Investment and Jobs Act, Pub. Law No. 117-58 (2021).

Incidental takes that do occur are related to removals of vacant nests, not those in use, and disturbances that are related to necessary tower construction and upgrades.

CTIA agrees with FWS's stated objective in this rulemaking: "to increase the efficiency and effectiveness of permitting, facilitate and improve compliance, and increase the conservation benefit for eagles."[4] FWS's proposals to adopt general permitting procedures for nest takes and disturbances will advance those objectives. With several modifications CTIA proposes in these comments, the revised eagle take rules will at the same time help speed deployment of needed communications infrastructure and thus advance the nation's broadband goals.

II. FWS SHOULD ADOPT A GENERAL PERMIT PROCESS FOR EAGLE DISTURBANCE TAKES AND EAGLE NEST TAKES.

CTIA supports FWS's proposal to adopt new general permit application procedures for disturbance and nest takes.[5] The proposed general permit approach will enable FWS to meet its statutory obligations under the Bald and Golden Eagle Protection Act,[6] and at the same time allow simpler and more efficient permitting, reduce costs and burdens on the FWS and industry, and reduce uncertainty.

In the proposed rule, FWS explains that a general permit "requires the same compliance with the Eagle Act's preservation standard as specific permits but reduces the administrative burden in obtaining a permit."[7] FWS has thus determined that it can fully achieve the Eagle Act's protection objectives while streamlining the permit process. CTIA agrees with FWS's determination, as does the Wireless Infrastructure Association, which states in its comments,

[4] Proposed Rule, 87 Fed. Reg. 59598.

[5] These general permit procedures would be codified at 50 C.F.R. § 22.210. Procedures for disturbance takes would be set forth in Section 22.280, while those for nest takes would be set forth in Section 22.300.

[6] Bald and Golden Eagle Protection Act, 16 U.S.C. §§ 668-668(d) ("Eagle Act").

[7] 87 Fed. Reg. 59600.

"WIA believes the Proposed Rule will create a more efficient and effective conservation program that appropriately balances protecting species with burdens on industry."[8]

CTIA supports FWS's proposal to allow general permits based on the eligibility factors set forth in the proposed rules. For example, general permits for bald eagle nest takes would be available in emergency situations, which would allow permit holders to respond immediately to alleviate or prevent emergencies that may otherwise result in harm to humans or eagles.[9] CTIA also supports removing compensatory mitigation requirements, because this will also reduce uncertainty and costs on permittees that would otherwise hinder needed communications facility investment.

FWS should also adopt its proposal to allow general permits for activities on structures in the vicinity of an eagle nest. Under current rules, activities on a structure that may cause incidental take within a certain distance of an active eagle nest may require a specific permit, even if the nest is not located on the structure. The proposed rule would allow incidental takes within 660 feet of an in-use bald eagle nest or 330 feet of any bald eagle nest to be covered under a general permit, enabling them to proceed more quickly inside of the nesting season.[10]

Adopting the general permit approach for disturbance and nest takes would also free up FWS resources to allow for faster processing of specific permits that may be needed where an activity would not qualify for a general permit, thus streamlining the overall permit process. During the November 3, 2022 public information session, agency staff indicated that a general

[8] *Permits for Incidental Take of Eagles and Eagle Nests,* Docket No. FWS-HQ-MB-2020-0023, Comments of the Wireless Infrastructure Association (filed November 29, 2022) ("WIA Comments"), at 3.

[9] *See* proposed rule, 50 C.F.R. § 22.300(c).

[10] *See* proposed rules, 50 C.F.R. §§ 22.210(b), 22.280(b).

permit could be issued the same day an application is submitted. FWS should adopt this "same-day" process into its rules to provide certainty for applicants that the general permit process will generally result in automatic same-day grants as long as the application is complete and meets all permit conditions.

FWS should not, however, adopt the proposed requirements for monitoring of in-use nests that would apply to disturbance takes and eagle nest takes related to communications towers.[11] There should be no need to search for eagle remains because communications towers do not contribute to eagle mortality, and access to nearby areas to conduct monitoring may not be available due to the limits of access easements. Moreover, there is no difficulty in determining whether or not a tower hosts an eagle nest. Monitoring requirements also impose substantial costs that can make needed infrastructure work infeasible. Put simply, there is no tangible benefit to maintaining eagle populations that would justify the costs of continuous monitoring related to communications towers – costs that would impede expanding the nation's communications infrastructure.

FWS should also not adopt the condition in the proposed rules for general permits for takes of eagle nests that could require permittees to install deterrents or take other actions to obstruct renesting.[12] Deleting this condition would not cause increased takes, because other rule provisions will sufficiently protect eagles and eagle nests. FWS explains that it is not revising the current eagle preservation standard, which provides for "maintaining stable or increasing

[11] *See* proposed rules, 50 C.F.R. § 22.280(d)(3) (monitoring for disturbance permits); 50 C.F.R. §§ 22.300(f)(6), (7) (monitoring for nest take permits).

[12] *See* proposed rule, 50 C.F.R. § 22.300(f)(3).

breeding populations in all eagle management units and the persistence of local populations throughout the geographic range of each species."[13]

As WIA notes, "There are currently no deterrents that effectively discourage eagles from nesting/re-nesting on communications structures. Additionally, the use of these deterrents on a site could pose safety risks to the eagles (i.e., risk of entanglement) and to tower climbers who must be able to easily access equipment without obstruction."[14] CTIA agrees. The tower industry is continually examining the viability of potential options for deterring eagles from re-nesting. FWS should adopt a rule that encourages trials of these options, but should not mandate such measures.

III. FWS SHOULD MAKE ADDITIONAL REVISIONS TO THE PROPOSED RULES FOR SPECIFIC PERMITS TO MAKE THE PERMITTING PROCESS MORE EFFECTIVE AND EFFICIENT.

CTIA agrees that FWS should maintain its existing program for issuing specific permits, because there are some entities that may prefer individual permits based on fact-specific circumstances, or some situations where specific permits are appropriate. CTIA also supports FWS's objective to make the specific permitting process as efficient as possible.

The proposed changes to the existing specific permitting process are generally reasonable and will help streamline that process, to the benefit of both the agency and applicants. CTIA does, however, recommend that FWS make the following revisions to the proposed specific permit rules.

First, FWS should set a deadline for acting on specific permits. All too often the permit application process takes weeks or months, impeding industry's ability to construct or upgrade

[13] 50 C.F.R. § 22.6.

[14] WIA Comments at 3-4.

needed communications facilities, even when industry is ready and able to implement protective measures. Industry has experienced permit review backlogs where site work has been delayed for multiple breeding seasons. Given that the new general permit processes will free up agency staff time, faster action on specific permits is feasible. FWS should thus set a reasonable time period for it to act on a specific permit. If during its review FWS determines that the application is incomplete, it can toll that period until the missing information is submitted.

Second, the proposed monitoring requirements for specific permits granted to communications towers[15] should not be adopted, for the same reasons discussed in Section II of these comments as to why monitoring should not be a condition imposed on general permits for eagle take and nest takes.

[15] *See* proposed rules, 50 C.F.R. § 22.280(d)(3) (monitoring for disturbance permits); 50 C.F.R. §§ 22.300(f)(6), (7) (monitoring for nest take permits).

IV. CONCLUSION

CTIA looks forward to continuing to work with FWS and interested stakeholders to advance the dual federal policy objectives of protecting eagles and enabling accelerated broadband deployment. Through the adoption of streamlined permitting rules as discussed in these comments, FWS can promote both objectives.

Respectfully submitted,

/s/ Amy E. Bender

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Comment from National Audubon Society, Defenders of Wildlife, NRDC

Submitter Information

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General Comment

See attached file(s)

Attachments

Audubon Defenders NRDC Comments on 2021 Proposed Eagle Rule

National Audubon Society
Defenders of Wildlife
Natural Resources Defense Council

Joint comments on Proposed Rule for Permits for Incidental Take of Eagles and Eagle Nests
Docket ID: FWS-HQ-MB-2020-0023, 87 Fed Reg 59598 (Sept 30, 2022)
Submitted Electronically at http://www.regulations.gov

Mr. Jerome Ford
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Dear Assistant Director Ford:

Thank you for the opportunity to comment on the Department of the Interior (Interior), U.S. Fish & Wildlife Service (Service or USFWS) Proposed Rule for Permits for Incidental Take of Eagles and Eagle Nests (Proposed Rule) and the accompanying Draft Environmental Assessment (DEA) for the 2022 Eagle Take Permit Rulemaking, 87 Fed Reg 59598 (Sept 29, 2022). We believe that a General Permit for wind energy facilities with a low risk of eagle interactions, as well as other appropriately defined activities, is long overdue and we strongly support the Service's proposed framework with the alterations described below.

The National Audubon Society (Audubon), Natural Resources Defense Council (NRDC) and Defenders of Wildlife (Defenders) and the Service have a long history of collaboration on conservation of endangered and threatened species under the Endangered Species Act (ESA) and their critical habitat designation, protection of species of birds under the Migratory Bird Treaty Act (MBTA), and conservation of eagles under the Bald & Golden Eagle Protection Act (Eagle Act). We highly value that collaboration and the Service's trust responsibilities to preserve and protect our birds, wildlife and habitat.

Our organizations also have a long history of collaboration on Interior's lands and resources, as well as with the clean energy industry, and we are fully committed to helping establish an effective and efficient eagle permitting program. We have provided comments on every Eagle Act proposal to authorize permits for incidental (non-purposeful) "take" of eagles since the initial 2009 rulemaking. This regulation cuts to the heart of two key issues that drive our advocacy: species conservation and climate change. Through this rulemaking the Service has the opportunity to provide more effective conservation for our nation's iconic eagle species while at the same time creating a framework that will help accelerate our clean energy transition and mitigate climate change. Thank you for creating this most recent opportunity to address these two urgent priorities.

History of the Eagle Act

The recovery of the Bald Eagle under the ESA is one of the finest achievements in conservation by the Service. The Service led the public, stakeholders and conservation partners in that recovery program and we are pleased to have been a part of that success. We also underscore the success of the Service's Migratory Bird Division in managing our waterfowl and recreational hunting. While revealing a devastating population decline of 30% in all birds since 1970, the recently published Decline of the North American Fauna[1] published in Science Magazine also noted "Population declines can be reversed, as evidenced by the remarkable recovery of 40 waterfowl populations under adaptive harvest management and the associated allocation of billions of dollars devoted to wetland protection and restoration..." The USFWS Migratory Bird Division's leadership and close work with state wildlife agency members of AFWA, Congress and conservation partners on waterfowl management is a model for cooperative regulatory engagement that should be considered for regulating eagle take.

Since 2009 the Service has promulgated rules to authorize the issuance of Incidental Eagle Take Permits (IETP) to "take" eagles under the Eagle Act. Eagle permits and the resultant take must be offset in order to meet the preservation standard of both species of eagles, defined in 81 FR 91494 as "consistent with the goals of maintaining stable or increasing breeding populations in all eagle management units (EMUs) and the persistence of local populations throughout the geographic range of each species." The EMUs are delineated by the four Flyways of the U.S. – Pacific, Central, Mississippi and Atlantic.

The Service may issue IETPs for eagle take that is associated with, but not the purpose of, an activity. Such permits can be issued by the USFWS when the take that is authorized is not the purpose of the activity and it cannot be practicably avoided (50 CFR § 22). We appreciate and strongly support the Service's efforts to improve eagle permitting, while also keeping intact and unchanged critical underpinnings of the Eagle Act incidental take authorization program. The aforementioned components are cornerstone to meeting the Eagle Act's preservation standard, and too many changes at this early stage of implementation would be quite confusing and destabilizing to the permit program.

Proposed Revisions to Eagle Permitting

On September 29, 2022 the Service issued a Proposed Rule and accompanying DEA proposing revisions to the existing Individual eagle permit, renamed Specific permit, and a new proposal for a General permit option for qualifying wind-energy generation projects, power line infrastructure, activities that may disturb breeding bald eagles, and bald eagle nest take. We focus the majority of our comments below on the proposed take permits for wind projects and transmission.

[1] Rosenberg et al, Decline of American Fauna, https://www.birds.cornell.edu/home/wp-content/uploads/2019/09/DECLINE-OF-NORTH-AMERICAN-AVIFAUNA-SCIENCE-2019.pdf

Our organizations believe that a General Permit for these activities is long overdue and we strongly support the Service's efforts and proposed framework for a General Permit for wind energy facilities with a low risk of eagle interactions, as well as other appropriately defined activities.

However, considering populations of eagles in the context of climate change and the build out of wind energy and transmission, we suggest that the following actions are needed to achieve a successful eagle permitting program: considering more sources of data to determine qualification for the General Permit, adding a Conservation Fee, improving the formulation of the alternatives in the DEA, and accommodating the other comments below. With respect to Specific permits in particular, we also note that the Service should allow for more opportunity and experience and flexibility in issuing these permits before making wholesale revisions to the third party monitoring requirements and 5-year reviews to justify their removal.

1. **We strongly support the Service's effort to "increase the efficiency and effectiveness of permitting, facilitate and improve compliance, and increase the conservation benefit for eagles" via the Proposed Rule.**[2]

Despite over a decade of implementation, the existing eagle permitting program has yet to live up to its full potential in terms of delivering eagle conservation benefits. One challenge is its limited scope. Although there are an estimated 1000 plus wind projects on the U.S. landscape today - accounting for around 72,357 turbines covering 43 states (plus Guam and Puerto Rico)[3] - the Draft EA reveals the following eagle permit issuance rates:

> To date, the Service has issued 29 long-term permits for incidental take (killing/injury) of eagles, including two permits issued under Section 10 of the [ESA]. Nine of these permits were issued under the initial 2009 Eagle Rule – eight to wind facilities and one to a military installation. Twenty of these permits were issued under the 2016 Eagle Rule to 18 wind energy facilities, one solar energy facility, and one mine. Our processing of applications for these permits has accelerated in recent years, with 24 of the 29 permits being issued since the beginning of 2019.[4]

We have little doubt that the current permit program provides conservation of eagles through required avoidance, minimization and compensatory mitigation measures for the wind energy projects that have applied and received an eagle permit. However, the tiny fraction of projects with eagle permits means that almost 1,000 wind projects encompassing tens of thousands of turbines are not providing such eagle conservation benefits and are not reporting important data on eagle mortality while operating their project for up to 30 years. This has made it

[2] Rule, Summary
[3] Hoen, B.D., Diffendorfer, J.E., Rand, J.T., Kramer, L.A., Garrity, C.P., and Hunt, H.E., 2018, United States Wind Turbine Database v5.2 (October 12, 2022): U.S. Geological Survey, American Clean Power Association, and Lawrence Berkeley National Laboratory data release, https://doi.org/10.5066/F7TX3DN0.
[4] DEA, p. 9

impossible for the Service to accurately estimate the impact of wind energy on eagles and effectively manage their populations, and is a missed opportunity that the Service is now seeking to address.

We are pleased to provide both general and specific comments below on the Proposed Rule and DEA in hopes that our comments will help clarify and strengthen the final Rule and final EA, and to ultimately boost eagle conservation efforts. We also urge the Service to not lose sight of the primary aim of the Eagle Act: to first and foremost protect and preserve Bald Eagle and Golden Eagle populations.

2. **The final rule and FEA should incorporate climate change and the urgency to rapidly deploy wind energy and transmission at an unprecedented scale and pace in the next decade as well as the benefits of decarbonizing the energy sector.**

According to some estimates, getting to net zero emissions would require a rapid deployment of three to five times the current installed capacity of wind energy.[5] By 2035 – a mere 12 years – we may see up to 6000 additional wind projects and up to 350,000 more turbines. Additionally, transmission infrastructure is predicted to have a similar 4 times build out with increased collision risk for eagles. With so many additional facilities in place, eagles will be increasingly impacted unless the Service has effective tools and pathways in place to proactively manage and protect eagle populations while also supporting needed clean energy infrastructure.

Audubon's science at https://climate.audubon.org reveals that we may lose up to 389 species of North American birds if we can't keep warming below 3℃ above pre-industrial levels, and the closer we can keep warming to 1.5℃ the better for our birds.[6] Golden eagle is predicted to lose 44% of its range in the West if warming climbs to 3℃ above pre-industrial levels.[7]

Transforming the energy sector with a rapid deployment of responsible clean energy including utility-scale wind energy is critical to mitigating climate change, decarbonizing the economy, reducing the price of energy to ratepayers, and, most importantly, keeping warming below 3 degrees Celsius above pre-industrial levels. The benefits of wind energy as well as the impacts and its overall benefits to birds, other wildlife, habitat and humans should be acknowledged in the Rule and FEA. As noted by Katzner et al. (2022), a more comprehensive framing would "evaluate, for each species or system, the incremental effects of renewables over their full life

[5] E. Larson, C. Greig, J. Jenkins, E. Mayfield, A. Pascale, C. Zhang, J. Drossman, R. Williams, S. Pacala, R. Socolow, EJ Baik, R. Birdsey, R. Duke, R. Jones, B. Haley, E. Leslie, K. Paustian, and A. Swan, Net-Zero America: Potential Pathways, Infrastructure, and Impacts, Final Report Summary, Princeton University, Princeton, NJ, 29 October 2021.
[6] Wilsey, C, B Bateman, L Taylor, JX Wu, G LeBaron, R Shepherd, C Koseff, S Friedman, R Stone. Survival by Degrees: 389 Bird Species on the Brink. National Audubon Society: New York. https://www.audubon.org/climate/survivalbydegrees
[7] https://www.audubon.org/field-guide/bird/golden-eagle, accessed Dec 2022

cycle against the incremental effects they provide by mitigating climate change."[8] This level of analysis is the only way to properly evaluate this scale of permitting.

While it may not be possible to discern the climate implications of issuing an individual permit, the permit program as a whole could facilitate the expansion of clean energy, which has clear climate implications and should be acknowledged.

3. **To effectively manage populations and insure that the preservation standard is met, the Permitting Program must attract more wind and transmission companies to conserve eagles and provide data on eagle use and wind turbine and electrical distribution line interactions.**

Eagle permits are voluntary, and the Service does not have the authority to require wind or transmission projects to apply for or obtain these permits prior to construction. However, the incidental (non-purposeful) mortality of an eagle through collision or electrocution at a wind project or transmission line without a permit is illegal under both the Eagle Act and the Migratory Bird Treaty Act. This means that the Service must incentivize industry participation and work proactively to ensure effective use of the eagle permitting program. The Service has acknowledged this in the Proposed Rule and DEA, and we agree with this goal.

By its own admission, USFWS has had little success in attracting wind projects to apply for the current individual permits and our advocacy with the wind industry has produced only a handful of permits. Thus, "while there are more than 1,000 wind-energy projects on the landscape, the Service has received fewer than 100 applications from those projects and has currently issued only 26 permits since the promulgation of the 2016 Eagle rule."[9]

The low participation rates signal a strong need for a more workable permitting framework, which the General Permit has great potential to provide. While the Service justifies much of the eagle permitting proposal as an effort to remedy low participation, it should also not lose sight that the overarching goal and Eagle Act mandate is preservation of eagles. We understand the careful balancing of these two aims and have worked collaboratively with the clean energy industry to provide detailed joint comments at each stage; see additional comments submitted by ACP, Audubon, Defenders and NRDC. Our comments throughout are with this frame in mind.

As a top-line matter, our organizations consistently and strongly urge wind and transmission developers that we work with to apply for an Eagle permit if there is risk to eagles from their project, and we consider such a permit an essential factor in evaluating whether a project is environmentally responsible.

4. **The Permitting Program could provide additional benefits beyond compensatory mitigation with a Conservation Fee.**

[8]Katzner, T.E., Allison, T.D., Diffendorfer, J. E. , Hale, A. E. , Lantz, E. J., and Veers, P. S. 2022. Counterfactuals to Assess Effects to Species and Systems from Renewable Energy Development. Frontiers in Conservation Science, Volume 3 https://doi.org/10.3389/fcosc.2022.844286

[9] 87 Fed. Reg. at 59602

The General Permit proposal[10] that we collaboratively developed with wind industry representatives incorporated a critical concept: the use of an up-front Conservation Fee in addition to the Application and Mitigation Fees. This Conservation Fee, proposed as three times the amount of the Application/Administration fee, could be paid to a third party such as National Fish & Wildlife Foundation. The fee could fund continued research and activities to benefit eagles including but not limited to lead abatement programs, habitat conservation by land trusts and non-profits, programs to reduce threats to eagles other than wind energy, and additional research on eagle interactions with turbines through telemetry or other tracking technology.

The Conservation Fee was not envisioned to replace Compensatory Mitigation fees, which are required by the proposed General Permit framework to offset eagle take and would be a separate type of fees related directly to the amount of estimated take intended to offset it with power pole retrofits or other mitigation measures approved by the Service. While the Compensatory Mitigation fee would be paid up front and used to offset eagle take whether eagles are actually taken or not, a Conservation Fee could provide additional direct conservation to the highest priority needs for research and programs by third parties to conserve eagles. The Service has approved such arrangements in a variety of situations[11] and given the wind industry's interest in such an option, the Service should seriously reconsider the use of an up-front Conservation Fee to lock in a significant conservation benefit for eagles.

5. **Take a more measured approach with respect to Specific permit modifications surrounding third party monitoring and 5-year check-ins, given the relatively short implementation record.**

We appreciate the Service's keeping intact and tiering to the 2016 final rule and PEIS, given the relatively short implementation time that has elapsed and associated confusion that additional modifications would cause at this stage. We further urge the Service to stay focused on a General permit proposal that dovetails with and supports the use of Specific permits in appropriate situations. If an effective and workable General permit is set up, then Specific permits will be reserved for situations where heightened measures such as third-party monitoring and five-year check-ins could be entirely appropriate.

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[10] ACP, 2021. Bean, 2021.

[11] Similar efforts have included, for example, habitat conservation plans for wind energy and other facilities under section 10 of the Endangered Species Act, the Range-wide Indiana Bat In-lieu Fee Program, memoranda of understanding under the Fish and Wildlife Act, and the Bald and Golden Eagle Electrocution Prevention In-Lieu Fee Program. The latter program authorizes payment of mitigation funds required in permits issued under BGEPA to NFWF which, in turn, contracts with utilities and construction firms to undertake power pole retrofits.

There currently is at least one fund (the Wyoming Golden Eagle Fund) administered by NFWF and benefitting golden eagles. The Fund was established and funded pursuant to the judgment of U.S. v. Duke Energy Renewables. Monies in the Fund may be spent on projects to protect or restore golden eagle habitat, reduce the risks of golden eagle death, injury, and disturbance, rehabilitate injured golden eagles, provide education and outreach about golden eagles in the State of Wyoming, and facilitate collection and analysis of golden eagle monitoring data. There are also public/private partnerships with land trusts that are permanently conserving high quality habitat for golden eagles in Wyoming that could possibly match funding for a greater conservation benefit.

Therefore we suggest that instead of making a wholesale deletion of the use of third-party monitoring and five-year check-ins, the Service should simply allow for such measures when appropriate for individual Specific permits. This approach would enable additional flexibility for the Service to incorporate such tools if warranted, but would also allow the Service to forgo the requirement in other circumstances. This more measured approach is consistent with the relatively short implementation period of the 2016 rules and is a more prudent and protective alternative for eagles.

6. **The Final Rule and the FEA should provide more clarity and context regarding the population level impacts of eagle mortality at wind projects, transmission projects, nest take and eagle disturbance in both documents.**

The estimated population level impact of collision with wind turbines on eagles should be clearly stated and consistent throughout the Proposed Rule and the DEA. The DEA relies in part on data from Millsap et al. (2022) from telemetry attached to 512 eagles and estimates that anthropogenic factors (collision, electrocution, shooting, poisoning, and trapping) cause nearly 60% of all golden eagle mortality in the coterminous western United States. The data also provides mortality from presumed natural causes such as starvation and disease and "accidents" (not defined) for the other 40%.[12]

Since the DEA is analyzing only permits for wind energy, electric line distribution, nest take and eagle disturbance, it's necessary to understand how each of these factors contribute to overall mortality of eagles and to differentiate between collision with turbines, electrical lines, and any other infrastructure. The FEA should analyze these threats clearly and individually while estimating the anthropomorphic impacts on eagle populations rather than lumping them together. The public may lack a clear indication of the mortality of eagles at wind projects or transmission lines in their relationship to all mortality of eagles. A clear and understandable analysis of the estimated population level impacts on eagles from collision with turbines and power lines is central to an effective NEPA analysis and may help dislodge the public misperception that collision with wind turbine collision is the biggest threat to eagles.

Regarding eagle populations, the DEA states that since the 2009 "baseline" population estimates by the Service, bald eagle populations have increased approximately 10% per year[13] and golden eagle populations "appeared stable through 2016, but there is increasingly strong evidence that anthropogenic mortality exceeds the allowable take rate (Millsap et al. 2022), potentially leading to future population declines.[14]" During this same period wind energy tripled, growing from approximately 40.3 GW of capacity to 135.9 GW of capacity.[15] We are

[12] DEA, Table 4-3, p. 56
[13] Zimmerman, et al, 2022, DEA p. 127
[14] DEA, p. 55
[15] U.S. Department of Energy, Land-based Wind Market Report, https://www.energy.gov/eere/wind/wind-market-reports-2022-edition#wind accessed 12/11/2022.

pleased to see that the Service's analysis indicates that such a significant increase in renewable electricity generation has apparently not coincided with a decline in eagle populations.

We acknowledge that a rapid deployment of transmission and wind energy in the next few years may change this equation and make it difficult to track the impacts of collision and loss of foraging habitat on eagles. And this new reality only underscores the importance of obtaining more robust participation and information from industry through an effective and readily utilized eagle permitting program, a transparent program that works for industry while meeting the preservation standard of BGEPA. Without careful and proactive stewardship, Golden eagle population declines from all sources including wind energy may lead to the species being proposed for ESA listing.

We recommend that the Service provide greater transparency for the public and more clearly describe their data processing and modeling protocols; that information is currently found in supplemental materials and is not clearly outlined in the DEA or the explanation of the Proposed Rule.

7. General Permit eligibility requirements for wind energy in Alternate 2, 3 and 4 should provide for consideration of on-site data from existing projects.

The Service has proposed to stop requiring on-site data provided by wind energy operators and developers in the proposed new General Permit. Instead, a map-based approach for determining whether a project may qualify for the proposed General Permit has been proposed.

For Alternatives 3 and 4, the Service uses models derived from occurrence data from eBird[16] data managed by Cornell University to identify areas of Relative Eagle Abundance (REA) where only Specific Permits are available due to a high abundance of eagle use. For golden eagles, these areas include most of the Intermountain West, an area where hot spots of golden eagle abundance and wind resources coincide.

Audubon is a partner with Cornell Laboratory of Ornithology and has worked with them on many projects, and our organizations champion the use of eBird data. We appreciate the geographic scope and magnitude of the eBird database and the power of the derived products to understand where high concentrations of birds may occur. Although the avian data collected through community science is skewed toward areas of frequent travel and areas where birds can be reliably seen, the level of data processing performed to correct these biases leads to a defensible product. Using additional data sources would provide a more comprehensive, accurate identification of REA areas.

The DEA states that after evaluating the North American Breeding Bird Surveys, Christmas Bird Counts, the Midwinter Bald Eagle Survey, the bald eagle communal roost database, various eagle telemetry datasets, databases of nest locations, and eBird status and trends products the

[16] Sullivan, B.L., C.L. Wood, M.J. Iliff, R.E. Bonney, D. Fink, and S. Kelling. 2009. eBird: a citizen-based bird observation network in the biological sciences. *Biological Conservation* 142: 2282-2292.

Service determined that eBird status and trend relative abundance estimates for eagles represented the best available information. The Service justifies this decision by asserting that any data used must span the entire space and time domain of concern.[17] We disagree with this rationale. Eagles deserve the highest quality data available for conservation decision making, and methods exist to reconcile and combine distinct geographic datasets. The groups of datasets considered do not appear to be inclusive and, in fact, for the area where golden eagles are most at risk there are some data products from Golden Eagle working groups and others coming out that have not yet been included in the Proposed Rule and DEA. We hope this data will be considered for the Final Rule and FEA.

Additionally, the Proposed Rule and DEA are inconsistent regarding their reliance on on-site data. The Proposed Rule proposes to remove the requirement for third-party monitoring in the Specific Permit: "Instead the Service would rely on the requirement in 50 CFR 13.12(a)(5) that the permittee must certify that the information submitted is complete and accurate to the best of their knowledge and belief subject to criminal penalty under 18 U.S.C.1001."[18]

Yet the DEA ignores the existence of such self-certification with respect to the proposed General Permit even though some projects may have on-site data to offer to the Service and could follow 50 CFR 13.12(a)(5) in certifying the data. The DEA asserts that"[b]ecause the Service is pre-authorizing take in the absence of local information on eagle abundance or use, a strong argument can be made to use broader indices of relative abundance as the basis for designating areas of the U.S. where general permits are preapproved."[19]

The Proposed Rule indicates that the Service may reconsider this inconsistency in relying only on the REA occurrence data to the exclusion of on-site data in a General Permit while allowing self-certification of on-site data in a Specific permit, which may include combining a criteria approach with a higher resolution mapping approach that includes multiple layers of data as well as eBird data in determining qualification for General Permit for wind energy projects. Audubon Christmas Bird Count data may also be useful for eagle occurrence especially for Bald Eagle roosts and occurrence.

We urge the Service to reconsider the proposed approach to analyzing the REA and the methodology explained in the DEA. We recognize that the Service is responding rapidly to a request to propose a program for General Permits for eagles. Nonetheless, and despite its scale and large volume of data, using eBird data alone to determine permit eligibility would result in a less robust analysis as a result of failure to use many valid sources of data. In addition to having accessibility biases that, although corrected for, still affect the data, eBird does not incorporate flight height or other factors that may affect risk, nor does it include predictive models of nest density or orthographic uplift that reduce or heighten risk to eagles and should also be considered in advising projects of areas where eagle permits may be more restrictive. The

[17] USFWS, pers. comment
[18] 87 Fed. Reg. at 59601
[19] DEA, p. 157

Service is obligated to use best available science for their review, and this means including any model or survey data that improves predictability. We strongly advise a more comprehensive analysis that includes the datasets described above in the FEA.

A related area for reconfiguration is the REA analysis and resulting map of areas that are excluded from General Permit application. Currently 80% of the area in the Lower 48 states is mapped for a rapid General Permit process.[20] Areas within the other 20% might be assessed as low risk given additional layers of data or additional criteria that strongly support this classification. A stronger and more fine-grained analysis would likely increase the area within which a General Permit is possible. We suggest a refined analysis in the FEA that would enable broader application of the General Permit to achieve the important goals of the General Permit program.

8. **Standardized monitoring protocols for O&M staff under the General permit should be consistent across all alternatives and should not be a rationale for Alternative 2 potentially not meeting the preservation standard.**

Additionally, there are some assumptions which could be checked for accuracy in the Analysis of Alternative 2. The DEA states that "[u]nder Alternative 2, monitoring will not occur at all wind energy facilities under general permits, so some high-risk facilities with general permits could have high levels of undetected take."

This statement is not consistent with the monitoring protocol using Operations and Management staff outlined in the Proposed Rule or with the General Permit framework we proposed. The Proposed Rule and our proposed General Permit framework require monitoring by Operations and Management personnel trained to spot eagle carcasses. Research has shown eagle carcasses to persist and be visible and have a high degree of detection probability in most habitats, and with increased monitoring during periods of high eagle use such as migration or breeding this data could be informative if not precise.[21]

For existing projects, the General Permit framework we submitted requires submission of past eagle mortality monitoring results certified by top officials of the company with the understanding that submitting false certification is illegal, just as the Service discussed with respect to the third-party monitoring requirement in the Proposed Rule.

The Service should explain why it has not included this protocol of monitoring in Alternative 2, 3 and 4 and possibly revise its conclusion that "the possibility of violating the preservation standard is greater for Alternative 2 compared to all other Alternatives."[22]

[20] DEA, Table 9, p. 40

[21] Hallingstad EC, Rabie PA, Telander AC, Roppe JA, Nagy LR. Developing an efficient protocol for monitoring eagle fatalities at wind energy facilities. PLoS One. 2018 Dec 12;13(12):e0208700. doi: 10.1371/journal.pone.0208700. PMID: 30540840; PMCID: PMC6291117. Accessed 12/2022

[22] DEA, p.79

Additionally, the Service estimates that "the operations and management staff conducting the monitoring as outlined in the proposed general permit conditions will detect approximately 15-20 percent of all eagles injured or killed at an average project."[23] The Proposed Rule points does not cite any data to support this percentage. This low estimate is likely to provoke concern among stakeholders and should be abandoned if it is not substantiated with clear analysis.

9. **The Service should include wind, wires, nest take and disturbance General permit proposals in Alternatives 2, 3 and 4 in order to ensure the consideration of a full range of alternatives that meet the Service's objectives in the Proposed Rule.**

The Proposed Rule states: "We propose a general permit option for qualifying wind-energy generation projects, power line infrastructure, activities that may disturb breeding bald eagles, and bald eagle nest take**."**[24]

The way the Service has structured the Alternatives analyzed in the DEA (which the public must separately access) suggests that only Alternative 4 can achieve what the Service asserts it is proposing. Alternative 2 apparently could not be selected as a Preferred Alternative since it applies only to wind energy and would not include General Permits for electrical lines, nest take nor disturbance. As a result, elements of Alternative 2 that may meet the Service's stated purpose – to "increase the efficiency and effectiveness of permitting, facilitate and improve compliance and increase the conservation benefit for eagles"[25] – would be lost by selecting Alternative 4 as the Preferred Alternative. Including wind, wires, nest take and disturbance General Permit proposals in Alternatives 2, 3, and 4 would help ensure the consideration of a full range of alternatives that meet the Service's objectives in the Proposed Rule.

10. **New technologies and compensatory mitigation measures should be incorporated into the Final Rule and EA.**

The Service's precautionary approach to new technologies and new compensatory mitigation measures may not be appropriate in a rapidly expanding clean energy environment. We have advocated repeatedly for paths forward in protecting eagles with these technologies and offsetting take with new mitigation. The Rule and EA is an opportunity to finally incorporate these avoidance, minimization, and mitigation measures into the Permit Program.

For example, despite research validating the detection superiority of Identiflight[26] and the effectiveness of the detect and curtailment ability of this technology and others like it for minimization and avoidance of mortality of eagles, the Service does not propose to provide credit for eagle mortality avoided. The Service should at a minimum consider approving and

[23] 87 Fed. Reg. at 59604
[24] 87 Fed. Reg. 59,598.
[25] Id.
[26] McClure et al, Peregrine Fund, Western Systems Technology, American Wind Wildlife Institute, 2018 https://tethys.pnnl.gov/sites/default/files/publications/McClure-et-al-2018.pdf; Top of the World Wind Energy LLC, Eagle Conservation Plan, Duke Renewables, January 2021; McClure et al, 2022 https://besjournals.onlinelibrary.wiley.com/doi/abs/10.1111/1365-2664.13831 accessed Dec 2022.

providing incentives for the use and development of this technology and others that would reduce eagle mortality at wind projects, a public benefit in conserving eagles and addressing climate change as we build out wind energy at scale.

The Service in the Final Rule could identify a clear pathway and incentives for certification of technologies as avoidance, minimization or compensatory mitigation measures for developers willing to implement new technologies and mitigation measures such as painted blades[27] (and we appreciate the Service's partnership with USGS, Renewable Energy Wildlife Institute, and Pacific Corp in the proposed replication of the painted blade study in process at a wind project in the West). The U.S. Department of Energy Wind Energy Technologies Office (DOE WETO), California Energy Commission, New York State Energy Development Authority and others provide grant funding to develop new technologies and the Service might consider collaborating with these agencies regularly to understand, test and implement these technologies on a defined pathway to certification.

Additionally, if there is a Conservation Fee in a General Permit program, the third-party recipient of those fees like NFWF could also fund research and development of these technologies. Currently, the financial burden for development and testing of these technologies and mitigation methods is shouldered by DOE WETO, select state agencies and wind energy developers. Proactive developers must pay both compensatory mitigation on estimated mortality as well as for the implementation of the technology and the data collection on the results of mortality of eagles. The Service could take a more collaborative approach on these efforts.

Use of Eagle Technology Team

The range of potential solutions that are here now or on the horizon justifies the creation of an Eagle Technology team composed of high level FWS/DOI staff that would meet regularly with DOE WETO and others to learn of technologies in development, propose a more rapid and efficient certification pathway, develop incentives and credits for the eagle mortality avoidance or minimization, and facilitate modernizing the wind energy fleet in areas of demonstrable high eagle use, mortality, or nest density. This type of Service technology team could include staff from both the Migratory Bird Division and Ecological Services Division and should consider expanding their scope of work to other large-bodied birds such as Condors or Whooping cranes, offshore wind, and impacts on passerines.

Expansion of Available Mitigation Measures

Alternate compensatory mitigation measures for eagles such as lead abatement and removal of roadkill have been proposed by others, including 2 fully developed models with Resource Equivalency Analysis by Renewable Energy Wildlife Institute.[28] These models have been provided to the Service beginning in 2013 and still await adoption. Additional models for

[27] Hodos, et al, 2002; May et al;

[28] Allison, https://rewi.org/wp-content/uploads/2018/12/Eagle-Vehicle-Collision-Results-Summary.pdf; Cochrane et al, 2013, https://rewi.org/wp-content/uploads/2018/05/Cochrane-et-al.-2015_GOEA-lead-mitigation.pdf

compensatory mitigation by conserving or improving habitat for golden eagles may also be in preparation. The Service should provide a clear pathway to certification of these mitigation measures and avoidance and minimization technologies in a more timely manner.

Incentivize Priority Mitigation Measures

The Service should also ensure that the use and incorporation of mitigation measures prioritize those efforts that have the greatest conservation impact. While we appreciate and agree with the Service's reliance on Avian Protection Plans (APPs) under the General permit for power lines, the Service's proposal to require proactive powerpole retrofits should ensure that poles and areas with the greatest likelihood of eagle interactions are prioritized for retrofits. The proposal to require retrofitting 10% of distribution poles could be susceptible to incentivizing quantity over quality, and particularly in the future as reactive power pole retrofits occur with additional participation in the program. We urge the Service to adopt mechanisms and approaches, consistent with the spirit and intent of APPs, to ensure that the greatest needs for eagle conservation are being met.

11. The take threshold analysis should be more clearly explained in the proposed specific permit.

The Service estimates that "the average 100-turbine project that qualifies for a specific permit will take approximately 6.9 golden eagles per year (at the 80th quantile), or approximately 35 golden eagles over a 5-year period, and approximately 1.6 bald eagles per year (at the 60th quantile), or approximately 8 bald eagles over a 5-year period."[29]

The Service uses this estimate for multiple calculations in the DEA but does not clearly explain or cite the data that lead to it. Perhaps the estimate is derived from mortality data from the 29 permits that the Service has issued. In any case,it would be helpful to understand not only the underlying data for this analysis, but also the relevance to the General Permit other than using it as a basis for determining that take limits for Golden and Bald eagles should be equal.

Additionally, if these estimates are based on mortality data from wind projects which are currently under Eagle permits, then it may be relevant to specify that this take has been offset by compensatory mitigation so that there is "no net loss" and perhaps a "net gain" to eagle populations and this mortality data will not affect the take threshold of the EMU or local population nor be a violation of the preservation standard. Without this, the public may assume that this eagle mortality analysis is unmitigated.

Conclusion

In closing, establishing a BGEPA General Permit program is one of the most important steps the Service can take to ensure that the rapid renewable energy buildout necessary to avoid the worst impacts of climate change does not harm Bald and Golden eagles. By addressing the issues identified above, in our opinion the agency can make the program more effective and workable for the environment and industry alike.

[29] 87 Fed. Reg. at 59604

Thank you for the opportunity to comment, and we would appreciate the opportunity to address any questions you may have.

Sincerely,

Garry George
Director, Clean Energy Initiative
National Audubon Society

Katie Umekubo
Director, Lands Division, Nature Program
Natural Resource Defense Council

Monica Goldberg
Vice President, Landscape Conservation
Defenders of Wildlife

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Comment from American Clean Power Association

Submitter Information

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Organization: American Clean Power Association

General Comment

Attached please find joint comments from the American Clean Power Association (ACP), Audubon, Defenders of Wildlife and Natural Resources Defense Council (NRDC) on the Service's draft eagle take permit program revisions.

Thank you for the opportunity and your consideration.

Tom Vinson
ACP

Attachments

Final industry-ngo joint letter re eagle draft rule 12-29-22

December 29, 2022

Mr. Jerome Ford
Assistant Director, Migratory Birds Program
U.S. Fish and Wildlife Service
MS: PRB/3W
5275 Leesburg Pike
Falls Church, VA 22041-3803

Re: Docket No. FWS-HQ-MB-2020-0023
Submitted via http://www.regulations.gov

Dear Assistant Director Ford:

We are writing these joint comments in response to the draft rule[1] published by the U.S. Fish and Wildlife Service (FWS or the Service) to revise the incidental take permit program under the Bald and Golden Eagle Protection Act (BGEPA or Eagle Act). During the comment period on the advanced notice of proposed rulemaking[2] (ANPR) in October 2021, we jointly filed a detailed general permit framework for wind energy, covering both existing facilities and future projects, which we developed over a year and a half of regular discussion. We represent clean energy industries[3,4] and environmental/wildlife conservation organizations[5,6,7] that have united around the need

[1] 87 Fed. Reg. 59,598, September 30, 2022, available at: https://www.govinfo.gov/content/pkg/FR-2022-09-30/pdf/2022-21025.pdf ("Draft Rule")
[2] 86 Fed. Reg. 51,094, September 14, 2021, available at https://www.govinfo.gov/content/pkg/FR-2021-09-14/pdf/2021-19717.pdf ("ANPR")
[3] ACP is the national trade association representing the renewable energy industry in the United States, bringing together hundreds of member companies and a national workforce located across all 50 states with a common interest in encouraging the deployment and expansion of renewable energy resources in the United States. By uniting the power of wind (both land-based and offshore), solar, storage, and transmission companies and their allied industries, we are enabling the transformation of the U.S. power grid to a low-cost, reliable, and renewable power system. The American Wind Energy Association (AWEA) merged into ACP on January 1, 2021. Additional information is available at http://www.cleanpower.org.
[4] In addition to the signatories on this letter, industry representatives that participated in this effort included: Avangrid Renewables (Laura Nagy), Berkshire Hathaway Energy (Jennifer McIvor), Duke Energy (Tim Hayes), EDP Renewables (Jon VanDerZee) and Pattern Energy (Rene Braud).
[5] Audubon protects birds and the places birds need, today and tomorrow. Audubon works throughout the Americas using science, advocacy, education, and on-the-ground conservation. Thirty-two state programs, 27 nature centers, over 700 chapters, and our partners in the Americas give Audubon an unparalleled wingspan that reaches millions of people each year to inform, inspire, and unite diverse communities in conservation action. A nonprofit conservation organization since 1905, Audubon believes in a world in which people and wildlife thrive.
[6] Defenders is dedicated to protecting native animals and plants in their natural communities. Founded in 1947, Defenders is a national conservation organization with nearly 2.2 million members and activists focused on wildlife and habitat conservation and protecting biodiversity.
[7] Natural Resources Defense Council (NRDC) combines the power of more than three million members and online activists with the expertise of some 700 lawyers, scientists and policy advocates to solve the most pressing environmental issues we face

to enhance permitting under the Eagle Act to improve conservation outcomes for eagles, ease the administrative burden on the Service, and provide a workable pathway for industry to secure take coverage in order to support the necessary growth in wind energy to meet the President's objectives for clean energy deployment and addressing the climate crisis.[8] We were pleased to see the enhanced eagle conservation, improved efficiency and workability of the permitting regime, and expanded industry participation goals we shared also reflected in the purpose the Service articulated for the changes proposed in the draft rule.

However, as discussed more below, we are concerned the Service will fall short of these worthy goals without changes being incorporated into the final rule.

Climate Context

Before sharing our thoughts on what works in the rule and what can be improved, we want to reiterate the climate crisis requires, among other solutions, a significant expansion of wind energy over the next decade. As a part of that expansion, we need an eagle take permit program equal to the task.

Climate change is an existential crisis facing our country and the world and is one of the greatest threats facing wildlife and biodiversity. As the Service itself has noted, "Because of climate change, some populations may decline, many will shift their ranges substantially, and still others will face increased risk of extinction."[9] Audubon's *Survival by Degrees* analysis finds a warming scenario of 3.0 degrees Celsius above pre-industrial levels would put 389 North American avian species at risk of extinction.[10] Audubon further notes by stabilizing carbon emissions and holding warming to 1.5 degrees Celsius, 76 percent of vulnerable species will be better off and nearly 150 species would no longer be vulnerable to extinction due to climate change.

With respect to eagles specifically, Audubon finds golden eagles[11] are moderately vulnerable to climate change due to spring heat waves endangering young birds in nests and an increase in the frequency and severity of wildfire, incinerating habitat. Audubon also identifies the same risks for bald eagles,[12] but due to their more robust population, the species is considered at lower risk from climate change impacts.

To address the climate crisis and its impacts to avian species, including eagles, we need to rapidly expand deployment of clean energy resources, including wind energy. In 2021, wind energy alone avoided nearly 330 million metric tons of carbon dioxide emissions,[13] equivalent to the emissions of 72 million cars.

To reduce carbon emissions to the levels scientists have found are necessary to address climate change and correspondingly benefit eagles and other avian populations, various studies[14] have found that annual deployment of wind energy (along with solar energy) will need to expand up to four times recent record levels over the next

today: curbing global warming and creating the clean energy future, reviving the world's oceans, defending endangered wildlife and wild places, protecting our health by preventing pollution, ensuring safe and sufficient water and fostering sustainable communities. We have been doing it since 1970, with a powerful track record of success. NRDC staff is committed to promoting environmentally responsible renewable energy development in this country while simultaneously ensuring the protection of unique and sensitive natural resources.

[8] Executive Order 14008, available at https://www.federalregister.gov/documents/2021/02/01/2021-02177/tackling-the-climate-crisis-at-home-and-abroad.

[9] https://www.fws.gov/home/climatechange/

[10] https://www.audubon.org/climate/survivalbydegrees

[11] https://www.audubon.org/field-guide/bird/golden-eagle#bird-climate-vulnerability

[12] https://www.audubon.org/field-guide/bird/bald-eagle#bird-climate-vulnerability

[13] https://cleanpower.org/facts/wind-power/

[14] Princeton Net Zero America Project report available at: https://netzeroamerica.princeton.edu/the-report, the University of California Berkeley analysis on achieving 90 percent carbon reduction emissions by 2035 available at: https://www.2035report.com/electricity/, Lawrence Berkeley National Lab (LBNL) Halfway to Zero report available at: https://eta-publications.lbl.gov/sites/default/files/halfway_to_zero_report.pdf, LBNL and Evolved Energy Research report on carbon neutral pathways available at: https://agupubs.onlinelibrary.wiley.com/doi/10.1029/2020AV000284

two decades and beyond. Our groups collectively recognize this needed expansion of renewable energy and strongly believe it can be done in ways compatible with the preservation of bald and golden eagles. Indeed, the quadrupling of bald eagle populations over the last decade reported last year[15] by the Service is fantastic news and has occurred while wind energy has been expanding at record levels, including within the range of the bald eagle.

Elements We Support in the Draft Rule

We recognize and appreciate several elements of our joint general permit proposal for wind energy are reflected in the draft rule, including:

- Establishment of a general permit program for wind energy, including self-certification of eligibility
- National Environmental Policy Act (NEPA) review at the programmatic level, not project-level
- Compensatory mitigation resulting in a net benefit to eagles, as mitigation is required whether eagles are taken or not
- 5-year permit duration
- An ability for the Service to revise general permit conditions periodically, with new conditions applicable upon permit renewals
- An eligibility metric based on nest distance
- Systematic, regular project-level monitoring by trained operation and maintenance staff paired with tagging eagles to support programmatic monitoring
- Fatality reporting requirements
- An adaptive management requirement
- Off-ramps including general permit program suspension if necessary given population status
- Coverage eligibility for both bald eagles and golden eagles
- In-lieu fee mitigation option for compensatory mitigation

That said, we are united in our concern about some elements of the wind energy general permit program provisions in the draft rule. We summarize those concerns below. In general, we recommend the Service incorporate a modified Alternative 2 for wind energy in the final rule, with the inclusion of the additions and clarifications requested in the following paragraphs, along with the other proposed general permits.[16] We believe that approach has the best chance of achieving the conservation outcome for eagles, ease of administration for the Service, and broad participation levels by industry we are all seeking.

Consistency with the Preservation Standard

We believe a modified Alternative 2 for wind energy is consistent with the preservation standard, including with respect to local area populations, for many of the reasons the Service identifies for Alternatives 3 and 4 given the widespread similarities between the Alternatives (in several cases, the provisions referenced below are identical among the Alternatives). For example:

- Five-year programmatic reviews and permit durations, with potential adjustments to terms and conditions upon renewal, including in response to populations changes at the local, regional, and/or national level
- Ability to suspend the permit program temporarily or permanently
- Expanded participation in the permit program beyond the status quo, which will increase monitoring, reporting and data collection, avoidance and minimization measures, and mitigation

[15] https://www.fws.gov/sites/default/files/documents/2020-bald-eagle-population-size-report.pdf

[16] In our individual organizational comments, we include recommendations related to the wires, nest removal, and nest disturbance general permits.

- Standardized, regular monitoring by trained O&M personnel corresponding to periods of highest eagle use, supplemented with incidental finds and programmatic monitoring through eagle tagging[17]
- Take limits that trigger adaptive management and that can make a facility ineligible for the general permit
- Compensatory mitigation above and beyond expected project-specific take, meaning a net benefit is provided to eagles

Further, with respect to Alternative 2, the nest distance eligibility metric for bald eagles is more conservative in Alternative 2 versus Alternatives 3/4 (1 mile v. 660 feet, respectively), which adds support to the argument for consistency with the preservation standard.

If Alternative 2 is supplemented with the take reduction activities envisioned via the Eagle Conservation Fund referenced below, it will also support consistency with the preservation standard.

With the provisions above, we are confident the Service can qualitatively and quantitatively assess consistency of the general permit program with the preservation standard.

Shared Concerns about the Draft Rule and Recommendations for the Final Rule

1. **Concern**: No Eagle Conservation Fund in the draft rule or Alternative 2.

Recommendation: Include an Eagle Conservation Fund modeled after our joint general permit proposal.

Explanation: The joint NGO-industry general permit framework included a flat fee payment per project to a newly established Eagle Conservation Fund. This would be paid up front along with the administrative fee. It is in addition to compensatory mitigation. As an illustrative example in our proposal, we included an administrative fee of $2,500 and an Eagle Conservation Fund fee of $7,500. The biological value of an Eagle Conservation Fund is to provide resources to support overall conservation efforts not addressed through permitting and compensatory mitigation. For example, leading causes of eagle mortality today (trapping, poisoning, lead ingestion, illegal shootings, etc.) represent unpermitted take and given limited agency resources remain largely unaddressed. Reducing impacts from take that will not be subject to permitting would provide significant biological value to both bald and golden eagles. Our joint proposal suggested the following scope of activities to be funded:

- Research to better understand eagle population dynamics, including wind and non-wind energy stressors.
- Reduce threats to eagles from other stressors such as lead and rodenticide poisoning, road-side collisions, illegal shooting, and disease.
- Address and improve various components of the eagle permitting program, such as:
    - Gathering and analyzing demographic data;
    - GPS tagging and tracking of eagles to support programmatic monitoring;
    - Validating avoidance, minimization, and mitigation measures; and,
    - Improving standardized monitoring requirements and risk prediction models and analysis at the flyway level.

We recognize that some investment areas we suggest above, such as GPS tagging and tracking of eagles, are included in the Service's programmatic monitoring proposal. And reducing illegal shooting is proposed to be considered under the wires general permit program.[18] However, we believe a more coordinated and holistic approach would be to incorporate programmatic monitoring, research, and targeted conservation measures via an Eagle Conservation Fund. Such an approach would clearly provide an up-front net benefit to eagles, particularly coupled with established mitigation fees, and could direct resources to the highest priority eagle conservation needs.

[17] ACP details concern about the on-site programmatic/pooled monitoring in its individual comments.
[18] We do not take a position on the proposal from the Service in this joint letter.

We believe there are ways to establish an Eagle Conservation Fund that would be consistent with and supported current law and operate with transparency and accountability. For example, applicants could provide the funds pursuant to a general permit program requirement directly to a third party like the National Fish and Wildlife Foundation (NFWF), with some requirements on transparency, planning, and peer review prior to implementing spending decisions.[19]

2. **Concern**: The ability for facilities to qualify based on project-specific fatality data is unclear, at best, or missing, at worst.

Recommendation: Clarify in the final rule that wind energy facilities can qualify for the general permit by having project-specific data demonstrating they fall at or below the five-year take eligibility threshold for the covered species.

Explanation: One of the key features of our joint general permit proposal was a pathway for existing facilities with fatality data collected through fatality monitoring and/or O&M staff self-monitoring to qualify for the general permit if their data demonstrates the facility falls below the threshold set in the rule. One of the soundest ways to determine whether a facility poses a limited risk is to look at its actual operating record. The draft rule and Alternative 2 are unclear on whether existing facilities can qualify for the general permit using fatality data. We believe they should be able to qualify and recommend clarification allowing this be included in the final rule regardless of which Alternative is chosen.

While we understand and agree with the overall intent of the general permit program to move away from project-specific analyses and review, existing project data would allow the Service to efficiently incorporate the largest number of existing projects most likely to stay well within the established take thresholds. We believe this is consistent with the Service's approach to uniform eligibility pathways under the general permit for wind and would not require Service review of individual facilities. Essentially, eligibility based on existing data would work exactly as the Service has proposed with respect to relative abundance mapping and nest distance eligibility paths: the applicant reviews their project specific information whether it is fatality data, turbine locations with respect to the abundance map, or proximity to eagle nests and self-certify if they meet eligibility thresholds subject to potential Service audit and prosecution.

3. **Concern**: The eagle relative abundance approach to eligibility in the draft rule is complex, abundance does not necessarily equate to risk, and the draft rule implies that if even a single turbine is located outside the designated general permit zone the entire facility is ineligible – all these will unnecessarily limit participation and, therefore, undermine the conservation and other benefits from an approach like a modified Alternative 2.

Recommendation: We recommend that for wind, Alternative 2 be incorporated in the final rule with a modification to be more consistent with our joint general permit proposal by including two eligibility pathways (1) proximity to eagle nests (for new facilities) and (2) fatality data (for existing facilities). Should the Service retain the relative abundance mapping concept, we recommend (1) as an eligibility screen, abundance mapping should be limited to facilities that do not have fatality data that can demonstrate eligibility and/or (2) a facility should be able to qualify using, at the applicant's election, two of the three pathways, i.e., relative abundance, nest proximity, and project-specific fatality data.

[19] The Service has approved such arrangements in a variety of situations, including habitat conservation plans (including those of wind energy facilities) under section 10 of the Endangered Species Act, the Range-wide Indiana Bat In-lieu Fee Program, memoranda of understanding under the Fish and Wildlife Act, and the Bald and Golden Eagle Electrocution Prevention In-Lieu Fee Program, which authorizes payment of mitigation funds required in permits issued under BGEPA to NFWF which, in turn, contracts with utilities and construction firms to undertake power pole retrofits.

Explanation: As the Service acknowledges in the draft rule, the science on relative abundance equating to risk is mixed, at best. For example, flight height is an important component to risk that is not accounted for in the relative abundance approach the Service proposes. Based on a preliminary industry review of fatality data, the GIS map does not necessarily equate to where take has happened. We gave serious consideration to various eligibility options when we were negotiating our joint general permit proposal, and we avoided the relative abundance approach due to questions about the data and the science. We ultimately concluded that nest proximity and fatality data are the best proxies for assessing risk, while still meeting goals related to eagle conservation, administrative feasibility, and increased industry participation.

However, as outlined in our joint proposal, examining relative abundance along with several other factors (e.g. key foraging areas, migrating eagles, water features for bald eagles, and other factors) is needed in order for an applicant to fully assess its risk, but relative abundance and these other factors should not be used as a "you're in – you're out" eligibility criteria for the reasons listed above.

4. **Concern**: The requirement to secure coverage for both golden eagles and bald eagles is not biologically necessary, and will likely limit participation, thus undermining the overall objectives.

Recommendation: Whether to seek coverage for golden eagles, bald eagles, or both should be up to the applicant, consistent with the voluntary nature of incidental take permitting under BGEPA.

Explanation: We appreciate the Service has proposed to authorize coverage for bald eagles and golden eagles. However, unlike our joint proposal, under which the applicant could choose whether to secure coverage for bald eagles, golden eagles, or both based on the risk profile of a given facility, the Service has proposed to require applicants secure coverage for both species under the same permit regardless of project location or risk level. We do not believe that mandated coverage for both species under a single general permit is biologically necessary, and it would likely limit participation as companies may elect to forgo securing coverage if the risk profile is zero for one species and limited for the other given the potentially significant mitigation expense that would be required for such a facility.

Thank you for your consideration. We believe that if the final rule incorporates the recommendations above, it will remain consistent with the preservation standard and will better meet the stated purpose of the rule to improve eagle conservation, lessen the administrative burden, and increase industry participation, all of which are important to expanding the deployment of wind energy at the levels necessary to help mitigate the risk climate change poses to eagles and other wildlife. We stand ready to answer any questions the Service may have. Please don't hesitate to let us know if we can provide additional information on any of the points above.

Sincerely,

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Comment from Mosaic Fertilizer, LLC and Mosaic Potash Carlsbad Inc.

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General Comment

Attached are comments of Mosaic Fertilizer, LLC and Mosaic Potash Carlsbad Inc. on the proposed rule on Permits for Take of Eagles and Eagle Nests, 87 Fed. Reg. 59,598 (Sept. 30, 2022).

Attachments

Mosaic Comments on ETP Proposed Rule-c_RKBsigned

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Re: Comments on Permits for Take of Eagles and Eagle Nests; Proposed Rule, 87 Fed. Reg. 59,598 (Sept. 30, 2022), Docket No. FWS-HQ-MB-2020-0023

Dear Mr. Ford:

Mosaic Fertilizer, LLC and Mosaic Potash Carlsbad Inc. (collectively, Mosaic) appreciate this opportunity to provide comments on the U.S. Fish and Wildlife Service's (FWS or Service) proposed rule revising permit regulations for incidental take of eagles and take of eagle nests (eagle take permits, ETPs).[1] Mosaic appreciates the Service's efforts to improve the efficiency and utility of the eagle take permitting framework and agrees that many of the proposed changes will accomplish that goal, especially the creation of general permits. For the reasons detailed below, the Service should clarify that certain activities not addressed in the Proposed Rule that are relatively low-risk – including certain phosphate mining activities and other low-eagle-risk mining activities – are either (1) covered by the proposed general permits or (2) not expected to result in incidental take of eagles. The Service should also eliminate statements in the Proposed Rule characterizing disturbance of eagle foraging habitat as take.

I. Introduction

Mosaic has made a long-term commitment to the effective protection and conservation of eagles and other migratory birds in relation to its mining, processing, and reclamation activities. The comments that follow draw on the experience and expertise gained through implementing that commitment.

Mosaic is the largest U.S. phosphate producer, accounting for roughly 73 percent of North American phosphoric fertilizer production and 13 percent of the world output. Mosaic owns and controls more than 350,000 acres of land in Florida to support its phosphate operations, as well as lands associated with potash production in New Mexico and two fertilizer manufacturing

[1] *See* Permits for Take of Eagles and Eagle Nests; Proposed Rule, 87 Fed. Reg. 59,598 (Sept. 30, 2022) (Proposed Rule).

plants in Louisiana. Migratory birds, including bald eagles, use these landscapes, and Mosaic is committed to their conservation and protection.

A prime example of Mosaic's commitment is found in Tampa Bay. Mosaic leases two islands at the mouth of the Alafia River to Audubon Florida (Audubon). The islands, known as the Richard T. Paul Alafia Bank Bird Sanctuary, are home to one of the largest and most diverse bird colonies in Florida, supporting more than 5,000 to 10,000 nesting pairs of shore birds each year, including bald eagles, wood storks, reddish egrets, and the largest nesting population of roseate spoonbills in Florida. Mosaic has supported Audubon's efforts to protect the sanctuary and funded Audubon's construction of more than 6,000 linear feet of living shoreline breakwater to mitigate wave erosion and provide increased foraging and nesting habitat.

Phosphate mining is a temporary land use, and Florida's Mining and Mitigation Program requires former mines to be reclaimed in a manner that at a minimum restores the ecological value that existed prior to mining. As phosphate mining typically takes place on lands that are historically disturbed by farming activities, reclaimed mine sites frequently have a higher ecological value and provide more valuable foraging habitat for bald eagles and other migratory birds than were available in the pre-mining condition, including more lakes, forests, and wetlands. Wetlands must be reclaimed at least acre for acre, and reclamation lakes provide increased foraging opportunities for bald eagles. Mosaic's reclamation of its Hookers Prairie mine, for instance, included constructing more than 3,500 acres of marshlands, now with over 60 species of bird recorded and a wading bird breeding rookery numbering in the tens of thousands of individuals. Bald eagles have been observed utilizing this marshland area as well.

Mosaic has partnered with state and federal wildlife agencies to craft Avian Protection Plans for several of its holdings in Florida and New Mexico. Additionally, for more than a decade, Mosaic has conducted aerial searches for bald eagle nests within its Florida property, as well as annual monitoring of known bald eagle nests, as part of its mine planning efforts to avoid and minimize eagle disturbance. For example, Mosaic often sequences mining so that activities near eagle nests occur in the non-breeding season or after nests are determined to be inactive. Mosaic shares its eagle nest information with the Audubon Eagle Watch program, enhancing the accuracy of the organization's assessments of the bald eagle population and reproductive success.

II. Mosaic Supports the Proposed Revisions Overall, but Additional Low-Risk Activities Should Be Allowed to Use General Permits.

A. Mosaic Supports Important Aspects of the Proposed Revisions to the Current Regulations.

Mosaic supports the Service's proposed revisions to special permit regulations, including removal of independent third-party monitoring requirements and five-year permit reviews. Mosaic further supports replacement of the monitoring requirement with the existing

certification requirement in 50 C.F.R. § 13.12(a)(5) and holding authorized take amounts consistent unless the permittee requests an amendment to its permit or the Service determines an amendment is necessary. 87 Fed. Reg. at 59,601. These proposed revisions will improve the efficiency, clarity, and usefulness of permits and encourage greater participation in the ETP program without compromising eagle conservation.

B. Mosaic Agrees that Certain Activities Do Not Constitute Take.

Mosaic also supports the Service's recognition that bald eagle populations have grown exponentially and are continuing to grow in the contiguous United States, and that the science indicates that bald eagles tolerate human activities well when avoidance and minimization measures are followed. *See id*. at 59,599 (noting an estimated four-fold increase in the bald eagle population between 2016 and 2019). In particular, Mosaic supports the Service's recognition that deterrence measures near communal roosts and foraging areas are effective in avoiding adverse impacts to eagles and other migratory birds and do not cause disturbance or require a permit in most instances. *Id*. at 59,607. This is consistent with Mosaic's experience. Implementation of proper deterrence measures should be encouraged.

C. Mosaic Supports the Establishment of General Permits.

Mosaic strongly supports the creation of general permits for incidental eagle take associated with certain activities. The availability of general permits for common, relatively low-risk, and well-understood activities that may affect eagles will increase the efficiency and effectiveness of the Service's ETP program by encouraging greater participation, reducing administrative burdens, and streamlining the specific permitting process. As explained below, the Service should clarify the scope of activities eligible to rely on the proposed general permits.

Mosaic agrees that it is most appropriate for the Service to select its preferred alternative (Alternative 4), which would create general permits for power line entities and land-based wind energy projects, activities with the potential to disturb bald eagle nests and bald eagle nest removal. *See* Draft Environmental Assessment, 2022 Eagle Take Permit Rulemaking (FWS, Sept. 2022) at 7. This alternative is superior to those focused solely on land-based wind energy projects (Alternatives 2 and 3) because it is more comprehensive, creates more administrative efficiency, and supports FWS's "strong preference … to be able to focus [its] limited time and resources on eagle take permits that are likely to have the highest risk to eagles and/or the highest uncertainty surrounding the risk." *Id*. at 50. In this way, Alternative 4 is the most beneficial to both conservation interests and stakeholders.

However, the Service has categorically excluded mining activities from those eligible to rely on the proposed general permit for disturbance of bald eagles on the mistaken premise that "requests for these activities have been received infrequently and standard avoidance and minimization measures have not yet been developed." 87 Fed. Reg. at 59,606-07. Many activities undertaken to support phosphate mining are functionally equivalent, in both form and effect, to the activities

for which proposed general permit would apply. *See id*. at 59,630 (proposed 50 C.F.R. § 22.280(b), listing activities eligible to rely on the general permit). The impacts resulting from mining activities are equivalent to activities authorized by the proposed general permit, and the standard avoidance and minimization measures associated with those authorized activities would apply equally to mining activities. As an example, to prepare land for mining, it must be cleared of vegetation. Land clearing is an activity for which a general disturbance permit is available. *See id*. (proposed 50 C.F.R. § 22.280(b)(4), alteration of vegetation). Likewise, Mosaic constructs and maintains linear infrastructure associated with its mining operations. Construction and maintenance of linear infrastructure is an activity for which a general disturbance permit is available. *Id*. (proposed 50 C.F.R. § 22.280(b)(2)). The fact that the end use is mining or mineral extraction should not foreclose use of a general permit. Thus, the Service should clarify that the proposed general permit for disturbance can be used in connection with mining activities for aspects of those activities that involve activities expressly authorized by regulation, including "[b]uilding construction and maintenance," "[l]inear infrastructure construction and maintenance," and "[a]lteration of vegetation" or wetlands. *Id*. (proposed 50 C.F.R. § 22.280(b)(1)-(4)).

Mosaic further requests that the Service specify in the final rule that phosphate mining itself qualifies for reliance on the general permit for disturbance. Unlike other types of mining, phosphate extraction does not require blasting or other sudden loud noises with the potential to disturb eagles. The noise from draglines (which are electric) and other equipment used for phosphate mining have an estimated decibel level of 49 A-weighted decibels at a distance of about 1,000 feet with the use of an industry-standard berm – a decibel level that is the functional equivalent of a refrigerator. In Mosaic's experience, bald eagles use operations areas for foraging, indicating that bald eagles are not disturbed by extraction activities. Indeed, Mosaic has mined adjacent to the buffers surrounding several active eagle nests without displacement of the birds. The general permit categories should specifically include phosphate mining (and possibly other low-eagle-risk mining activities) given their relatively low risk compared to other proposed categories.

Finally, in the final rule, FWS should clarify that the general permits for incidental take of eagles by power lines and for take of bald eagle nests should be available to mining companies for construction and maintenance of power lines to support mining activities and relocation or obstruction of nests due to emergency, for protection of public health and safety, or to alleviate hazards due to a nest constructed on a human-engineered structure.[2] The preamble language at 87 Fed. Reg. at 59,606-07 is presented in the context of the proposed take permits for bald eagle disturbance, but it could be read to suggest that none of the proposed general permits would be available if the end use is mining. This interpretation would be unduly restrictive, as the effect of an activity on eagles is the same regardless of the end use.

[2] *See* 87 Fed. Reg. at 59,608 (referencing 50 C.F.R. § 22.85(a)(1)(i)); *id*. at 59,630 (proposed 50 C.F.R. § 22.300).

III. The Service Should Eliminate or Clarify Statements from the Preamble and Proposed Regulatory Language that Characterize Disturbance of Eagle Foraging Habitat as Take.

The preamble to the proposed rule states, "*we propose to clarify that activities that fully prevent use of a foraging area may cause disturbance and the project proponent should apply for a specific permit, particularly if the activity will remove all foraging opportunities within one mile of an in-use nest.*" *Id*. at 59,608 (emphasis added). This implies authority to regulate habitat impacts as take, which is inconsistent with the text of the Bald and Golden Eagle Protection Act (BGEPA or Eagle Act), and should be eliminated or clarified.

Additionally, proposed 50 C.F.R. § 22.80(c) provides that a specific permit (and not a general permit) for eagle disturbance is available for "disturbance to a foraging area." *See id*. at 59,630 (proposed 50 C.F.R. § 22.280(c)). Current rules do not require an incidental take permit for habitat destruction in its own right, nor could they. Unlike the U.S. Endangered Species Act (ESA), the definition of "take" in the Eagle Act does not include harm.[3] "Take" is defined in the Eagle Act to mean "pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, destroy, molest, or disturb." 50 C.F.R. § 22.6. "Disturb" in turn means to "agitate or bother" an eagle to such an extent as to cause injury, a decrease in productivity, or nest abandonment. *Id*. To "agitate or bother" an eagle implies an intentional or negligent act, similar to the definition of "harass" in the ESA. *See* 50 C.F.R. § 17.3 ("harass … means an intentional or negligent act or omission …."). It is unclear how one could "agitate or bother" (i.e., "disturb") a foraging area.[4] Interpreting "disturb" to include habitat impacts would constitute an impermissible expansion of the Eagle Act by rulemaking and would render the rule vulnerable to legal challenge, potentially limiting its viability or usefulness. Accordingly, the Service should eliminate statements suggesting that impacts to eagle habitat constitute take.

To the extent that this proposed language is retained in the rule, it should be amended and clarified. The term "disturb" cannot logically be expanded to include habitat modification. The focus for purposes of eagle disturbance should be on whether an *eagle* has been agitated or bothered, not on modification of habitat. The Service must take care to avoid mixing regulatory concepts through statements or references to "take" or "disturb" as encompassing impacts to foraging areas or habitat.

The National Bald Eagle Management Guidelines (USFWS, May 2007) (Guidelines) suggest that human activities that "permanently" alter "important foraging areas" and "altogether

[3] Even if it did, the ESA term "harm" includes significant habitat modification or degradation only where it "actually kills or injures" listed species. 50 C.F.R. § 17.3. Mere disturbance to a foraging area does not meet this threshold even assuming it applied to the BGEPA, which it does not.

[4] "Foraging area" is defined as "an area where eagles regularly feed during one or more seasons," and "disturb" is defined to mean to "agitate or bother" an eagle to such an extent as to cause injury, a decrease in productivity, or nest abandonment. 50 C.F.R. § 22.6.

eliminate the elements that are essential for feeding and sheltering eagles" could constitute disturbance for which a permit is required. Guidelines at 9. However, the Guidelines are non-regulatory and voluntary. For purposes of rulemaking, the Service is constrained by the Eagle Act, which, as explained above, expressly limits the take prohibition to an "eagle, alive or dead, or any part, nest, or egg thereof." 16 U.S. Code § 668(a), (b). The Eagle Act does not provide the Service with the authority to prohibit or regulate disturbance of general categories of habitat, including foraging habitat. Thus, while these statements in the Guidelines may be accurate to the extent such activities actually disturb an eagle (or an eagle nest or egg), the focus of the rule must be on impacts to eagles (or nests or eggs) rather than impacts to habitat generally.

IV. The Definition of "Foraging Area" Should Be Revised.

Currently, the rule defines "foraging area" as "an area where eagles regularly feed during one or more seasons." *See* 87 Fed. Reg. at 59,607 (referencing 50 C.F.R. § 22.6). This definition is unnecessarily vague. As part of this rulemaking to improve the ETP program, FWS should revise the definition of "foraging area" to correlate with the Guidelines: "An area where eagles feed, typically near open water such as rivers, lakes, reservoirs, and bays where fish and waterfowl are abundant, or in areas with little or no water (*i.e.*, rangelands, barren land, tundra, suburban areas, etc.) where other prey species are abundant." *See* Guidelines at 19.

V. Use of the Guidelines to Avoid the Need for a Take Permit Should Be Reaffirmed.

The Service should clarify that activities that maintain the appropriate buffer areas (i.e., activities that follow the Guidelines) do not require a take permit, regardless of the type of activity, because they are unlikely to disturb eagles. This clarification is needed given the statement in the preamble limiting the use of the proposed general take permit for disturbance to non-mining activities. 87 Fed. Reg. at 59,606-07. Mosaic follows the Guidelines and implements buffer areas around eagle nests on many of its mining sites, and its monitoring data collected for more than ten years has documented that maintaining the buffer distances has avoided disturbing nesting eagles.

VI. A General Permit Should Be Available for Nest Take During the Non-Breeding Season, Especially in Areas Where Bald Eagles Are Migratory.

The bald eagle is migratory in Florida and is not present in the state from mid-May through September; breeding season is from October 1 through May 15. Charles L. Broley, *Migration and Nesting of Florida Bald Eagles*, 59 Wilson Bull. 3 (1947).[5] Essentially then, bald eagles are absent from the state during the non-breeding season. The continued growth of the bald eagle population, as recognized in the proposed rule, suggests new nest sites are readily available. Mosaic therefore requests that the Service revise proposed 50 C.F.R. §22.300 to establish a

[5] *See also* https://myfwc.com/wildlifehabitats/wildlife/bald-eagle/biology/ (describing bald eagle breeding behavior in Florida).

general permit for the removal of bald eagle nest trees and nests in locations during the non-breeding season, especially where the bald eagle is migratory, once it is confirmed the nest is not in use.[6] Additionally, the rules should clarify that a disturbance take permit is not required during the non-breeding season, when eagles are not present, even if buffer distances are not maintained (other than the distance necessary to avoid damage to the nest tree or its roots, for which a general permit should be available, as described above).

VII. Conclusion

Mosaic generally supports the proposed changes to the Service's ETP framework, which will improve the efficiency and utility of the eagle permits. Mosaic recommends some clarifications to ensure that phosphate mining activities are covered by the proposed general permits and requests that a general permit be issued for nest or tree removal during the non-breeding season when bald eagles are absent. Finally, the Service should eliminate or clarify statements characterizing disturbance of eagle foraging habitat as take.

If any additional clarification is needed, please contact me at the e-mail address or phone number provided above.

Sincerely,

Raoul Boughton, Ph.D.
Ecologist Lead

[6] Mosaic supports the Service's proposed changes to the definitions of "eagle nest" and in-use nest" to clarify that nest structures located on failed nesting substrate (which will no longer be available to eagles for functional use) are not included in the definition of "eagle nest", and that eggs referenced in the definition of "in-use" nest must be viable for the nest to be considered in use. 87 Fed. Reg. at 59,609. The practical implications of these clarifications will benefit both stakeholders and conservation interests.