

September 22, 2014

**Comments regarding the Notice of Intent to Prepare an
Environmental Assessment or an Environmental Impact
Statement for Eagle Permits**

Submitted by:

Energy and Wildlife Action Coalition

Filed electronically to the attention of:

Public Comments Processing
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I. Introduction

On behalf of the Energy and Wildlife Action Coalition (EWAC), we submit these comments in response to the June 23, 2014, notice of intent (NOI) to prepare an Environmental Assessment or an Environmental Impact Statement pursuant to the National Environmental Policy Act (NEPA) of 1969, as amended, in conjunction with an evaluation of eagle management objectives, published by the U.S. Fish and Wildlife Service (Service).

EWAC was formed in 2014 with 15 member companies consisting of electric utilities, electric transmission providers and renewable energy companies across the United States. The fundamental goals of EWAC are to evaluate, develop and promote sound environmental policies for federally-protected wildlife and associated natural resources while ensuring the continued generation and transmission of reliable and affordable electricity. EWAC supports public policies, based on sound science, that protect wildlife and natural resources in a reasonable, consistent and cost-effective manner. Because the focus of the eagle permitting program has been largely directed at wind energy development (e.g. the Eagle Conservation Plan Guidance for Land-Based Wind Energy (Eagle Guidance)), many of the comments below may appear to address concerns of EWAC's wind energy members more so than EWAC's utility members. However, given that the Eagle Guidance is being applied beyond the wind industry and that the fundamental aspects of the eagle permitting program affect all potential eagle take permit applicants, these comments address concerns of the EWAC membership as a whole.

Initially, it is important to recall that the Service has de-listed the bald eagle under the ESA, and the golden eagle has never been listed and is not currently being considered for listing as endangered under the ESA. Yet, in certain aspects, the Eagle Rule would impose more burdensome requirements, standards, and costs than under the ESA for threatened or endangered species. As further described below, the Service should account for these species' current status by providing additional flexibility and allowing consideration of additional factors so as to make the review process for these species less, not more, onerous than the ESA. In addition, to the extent that similarities are warranted between the ESA process and the eagle management process, the Service should use existing terms and processes rather than creating new standards and definitions that will create uncertainty and be overly burdensome. Accordingly, we offer the following comments on the NOI in anticipation of the upcoming amendments to the Eagle Rule¹:

II. Programmatic Eagle Take Permit Issuance Criteria

- a. *The standards should be the same as "Standard" Eagle Take Permits and include a practicability component.*

Under the Eagle Rule either standard permits or programmatic permits may be granted for the incidental take of bald and golden eagles. Standard permits "authorize individual instances of take that cannot practicably be avoided."² "Practicable" under the Eagle Rule means "capable of being done after taking into consideration, relative to the magnitude of the impacts to eagles: (1) the cost of remedy compared to proponent resources; (2) existing technology; and (3) logistics in light of overall project purposes."³

¹ See Eagle Permits; Take Necessary to Protect Interest in Particular Localities, 74 Fed. Reg. 46,836 (Sept. 11, 2009) (codified at 50 C.F.R. §§ 13, 22) [hereinafter Eagle Rule].

² *Id.*

³ 50 CFR 22.3.

Programmatic take is defined as “take that is recurring, is not caused solely by indirect effects, and that occurs over the long term or in a location or locations that cannot be specifically identified.”⁴ Programmatic permits “authorize recurring take that is unavoidable even after implementation of advanced conservation practices [(ACPs)].”⁵

Note that, unlike the standard take permit issuance criteria that are qualified by the phrase “cannot be practicably avoided,” programmatic take permits have no such qualification. Reasonableness, practicability, and economics are not considered when determining whether an activity meets the issuance criteria for a programmatic take permit. Moreover, no sideboards exist with regard to ACPs by which an applicant can evaluate the feasibility of its project. The Service defines its expectations for programmatic permittee as “we expect . . . that the permittee fully implement the ACPs agreed to by the Service as conditions of the permit, which are measures designed to reduce take to the maximum degree achievable . . . a programmatic take permit will be available only if the applicant can implement all available, technically-achievable measures to reduce take.”⁶ This simply is unworkable for real-world projects where budgets are not limitless. Moreover, the types of projects that are most heavily impacted by this lack of commercially-reasonable standard are projects that generate and distribute electricity across the nation.

The issuance criteria should be the same for both standard and programmatic permits. There is no statutory basis (as discussed below) for having different standards. The programmatic permit standard is complicated further by the lack of ACPs and the decision in the Eagle Guidance that experimental ACPs will not be included as a condition of initial permits and only as adaptive management.⁷ Therefore, in conformance with our suggested recommendation to make the issuance criteria the same across both types of non-purposeful take permits and to address the inconsistent treatment of ACPs (and the lack of ACPs currently), the Service also should redefine ACPs as “scientifically supportable measures or testing of experimental measures that are approved by the Service to reduce eagle disturbance and ongoing mortalities to a level where remaining take cannot practicably be avoided” (emphasis added).⁸ The proposed definition not only reflects our recommendation that standard and programmatic take permits have the same issuance criteria, but also allows for experimental ACPs.

b. *Having a practicability component better aligns with the proven approach used in ESA permitting.*

When the Service proposed the Eagle Rule to allow incidental take of eagles, it assured the public that the “permitting process we are proposing under [BGEPA] would be less burdensome for the public” than the ESA’s incidental take process, which applied to the bald eagle until it was delisted.⁹ However, the issuance criteria for programmatic permits under the Eagle Rule are more burdensome, less certain, and more costly than the criteria for issuing an incidental take permit (ITP) process for much more imperiled species under the U.S. Endangered Species Act (ESA).

⁴ 50 CFR 22.3

⁵ 50 CFR 22.26(e)

⁶ Eagle Rule, at 46,842.

⁷ Eagle Guidance, p. iv-v.

⁸ 50 CFR 22.3 defines “advanced conservation practices” as “scientifically supportable measures that are approved by the Service and represent the best available techniques to reduce eagle disturbance and ongoing mortalities to a level where remaining take is unavoidable.”

⁹ Eagle Rule at 46,847

The ESA follows a more workable issuance standard for permit applicants than the process under Eagle Rule. Under the ESA, an ITP can be granted if the “applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such [incidental] taking.”¹⁰

Again, as highlighted above, as written a programmatic eagle take permit cannot be issued unless ACPs specified by the Service are first applied. There is no comparable constraint of applying ACPs or, on reducing take to, an “unavoidable” level to obtain an ITP under the ESA and its implementing rules. Given that the species protected under the ESA are more imperiled than eagles, the permitting scheme for eagles should not impose more stringent requirements than the ESA.

c. Practicability should not take a company’s resources into account.

Not only should the practicable standard be applicable to programmatic take permits, the “practicable” standard should not take into account the project proponent’s resources. As currently defined, one of the three factors to determine whether methods of reducing or avoiding take are “practicable” is “the cost of remedy compared to proponent resources.”¹¹ Having every applicant’s resources measured against whether or not take is practicable creates disparities between projects and creates financial situations that could render projects infeasible or grossly disproportionate just because the applicant has the financial means to provide the grossly disproportionate mitigation. Realistically, project decisions are typically made within the context of project finances rather than a permit applicant’s ability to pay. An applicant is unlikely to fund mitigation measures that do not make financial sense for the project, regardless of whether the applicant has the means to do so. Practicability should be tied to the cost of the remedy as commensurate with impacts and include consideration of public interest factors.

Both the ESA and Clean Water Act rely on practicability standards during their permitting processes.¹² Even though the ESA’s treatment of “practicable” includes the capabilities of the applicant, it is weighed against similar circumstances, and benefits are weighed against costs, thereby guarding against disproportionate application of the standard.¹³ The Service’s HCP Handbook instructs that:

This finding typically requires consideration of two factors: adequacy of the minimization and mitigation program, and whether it is the maximum that can be practically implemented by the applicant. To the extent maximum that the minimization and mitigation program can be demonstrated to provide substantial benefits to the species, less emphasis can be placed on the second factor. However, particularly where the adequacy of the mitigation is a close call, the record must contain some basis to conclude that the proposed program is the maximum that can be reasonably required by that applicant. This may require weighing the costs of implementing additional mitigation, benefits and costs of implementing additional mitigation, the amount of mitigation provided by other applicants in similar situations, and the abilities of that particular applicant.¹⁴

¹⁰ 16 U.S.C. § 1539(a)(2)(B)(ii).

¹¹ 50 CFR 22.26.

¹² See Endangered Species Act of 1973 §10(a)(2)(B), 16 U.S.C. § 1539(a)(2)(B) (2013) (establishing the ESA practicability standard); see also 40 CFR § 230.10 (2013) (establishing the Clean Water Act practicability standard).

¹³ U.S. Fish & Wildlife Service, Habitat Conservation Planning and Incidental Take Permit Processing Handbook 6-13 (1996).

¹⁴ U.S. FISH & WILDLIFE SERVICE, HABITAT CONSERVATION PLANNING AND INCIDENTAL TAKE PERMIT PROCESSING HANDBOOK 6–13 (1996).

Mitigation under the ESA should also be commensurate with the impacts they address.¹⁵ Similarly, the Clean Water Act § 404 permitting program requires an applicant to demonstrate that its project is the least environmentally-damaging practicable alternative. An alternative is considered practicable under the § 404 program “if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.”¹⁶ The Environmental Protection Agency and U.S. Army Corps of Engineers (USACE) issued guidance on how the practicable standard is to be applied. Under the § 404 program, “it is important to emphasize, however, that it is not a particular applicant’s financial standing that is the primary consideration for determining practicability, but rather characteristics of the project and what constitutes a reasonable expense for these projects that are most relevant to practicability determinations.”¹⁷

III. The Application of the Preservation Standard

a. *The Preservation Standard is inappropriately applied to non-purposeful take permits.*

Contrary to the statutory language in the Bald and Golden Eagle Protection Act (BGEPA), the advanced notice of proposed rulemaking issued on April 13, 2012 (ANPR)¹⁸ places the phrase “compatible with the preservation of the bald eagle or the golden eagle” (the “Preservation Standard”) directly before the following phrase “for the protection of wildlife or of agricultural or other interests in any particular locality.”¹⁹ Confirming the Service’s belief that the Preservation Standard applies to programmatic permits, it states later in the ANPR: “Both as a matter of statutory interpretation and as a matter of policy discretion, the Secretary applies the foregoing [Preservation] standard to all types of permits issued under the [BGEPA].”²⁰ However, we take issue with the assertion that the Preservation Standard even applies to programmatic permits under a fair reading of the statute.

If one were to carefully evaluate the sentence structure of BGEPA section 668(a), it would read as follows:

Whenever, after investigation, the Secretary of the Interior shall determine [:] [(Clause 1)] that it is compatible with the preservation of the bald eagle or the golden eagle to permit the taking, possession, and transportation or specimens thereof for the scientific or exhibition purposes of public museums, scientific societies, and zoological parks, or for the religious purposes of Indian tribes, or [(Clause 2)] that it is necessary to permit the taking of such eagles for the protection [A] of wildlife or [B] of agricultural or other interests in any particular locality, [then] he may authorize the taking of such eagles pursuant to regulations which he is hereby authorized to prescribe. . . .

With the clause markers inserted in section 668a above, it is clear that the phrase “compatible with the preservation of the bald eagle or the golden eagle” (again, the “Preservation Standard”) in the first clause should apply only to BGEPA permits issued pursuant to that clause before the disjunction. That clause concerns take from certain specified, narrow activities, including those for “scientific or exhibition

¹⁵ HCP Handbook 3-19.

¹⁶ 40 C.F.R. § 230.10

¹⁷ U.S. Army Corps of Eng’r & U.S. Envtl. Prot. Agency, Regulatory Guidance Letter 93-02, Guidance on Flexibility of the 404(b)(1) Guidelines and Mitigation Banking 6 (Aug. 23, 1993).

¹⁸ 77 FR 22278

¹⁹ 77 FR 22278 at 2267 and 2279.

²⁰ Id. at 22267.

purposes” and “for the religious purposes of Indian tribes.” These activities are covered by permits under different sections of the Eagle Rule than those that would be applicable for incidental take permits for wind energy projects.²¹

The preamble to the Eagle Rule makes it clear that the authority for eagle take permits arises from the last half of the second clause of BGEPA section 668a: “protection of . . . agricultural or other purposes.” See, e.g., 74 Fed. Reg. 46837-38. Since section 22.26 of the Eagle Rule implements the second clause of BGEPA section 668a with respect to the authorization of eagle take permits, it concerns a separate class of activities than those enumerated in the first clause of section 668a. As potential impacts caused by electric transmission and wind energy projects would fall within the language contained in the second clause of section 668a and, therefore, are subject to the standards set forth in that clause, programmatic eagle take permits should not be limited to situations compatible with the preservation of the golden eagle or bald eagle (the standard from the first clause).

The application of the Preservation Standard to non-purposeful standard or programmatic take permits ultimately led to the current unworkable issuance criteria discussed in Section I above. As the “compatible with the preservation” language from BGEPA does not apply to the clause on which the eagle take permit program is based, then the Service should not require that programmatic take permit applications demonstrate that take is avoided and then minimized and mitigated so that any remaining take is unavoidable. Instead, the relevant BGEPA language in the second clause of section 668a allows, as noted, eagle takes on whatever terms the “Secretary of the Interior shall determine . . . is necessary . . . for the protection of . . . agricultural or other interests.” Thus, the word “necessary” in that clause of the section permits activities that are considered to be in the public interest (as is electric generation and distribution) and does not require the onerous process set forth by the current programmatic permit issuance criteria.

b. *The no-net loss standard should not be applied.*

As demonstrated above, the Preservation Standard has been misapplied by the Eagle Rule and its application to programmatic permits is inconsistent with BGEPA. It follows, then, that the Service’s interpretation of the Preservation Standard to require no-net loss also is not appropriate for application to either standard or programmatic eagle take permits.

IV. Compensatory Mitigation

a. *Should only be required where avoidance and minimization measures do not offset take and commensurate with actual impacts to the species.*

The Eagle Guidance makes clear that the Service expects compensatory mitigation amounts to be set by the risk of take.²² The Service should not set the level of compensatory mitigation based on the risk of an eagle take. Instead, compensatory mitigation should be tied to the actual measureable level of take of eagles or to a predicted level of take under fair assumptions. Further, the Service has stated that separate risk models need to be developed for bald eagles and golden eagles based upon their biology and behavior.

²¹ 50 C.F.R. §§ 22.21 and 22.22.

²² Compensatory Mitigation must offset the “predicted number of fatalities per year . . . estimated from the product of exposure rate and collision probability.” Eagle Guidance at 61.

BGEPA only makes it unlawful to take actual eagles, with the limited exception that during construction activities, take of nests or eggs could be authorized. Creating the risk of take of an eagle is not unlawful, and accordingly, compensatory mitigation should be tied to the actual measureable level of take of eagles or to a predicted level of take under fair assumptions. By calculating the risk of eagle take through a formula that does not account for eagle avoidance behaviors (especially with the bald eagle), and then requiring compensatory mitigation to completely offset the level of assumed take (and, pursuant to the Eagle Guidance, requiring significant mitigation upfront), the Service sets the compensatory mitigation level too high and requires compensation for in effect “phantom” takes that may never occur.

b. *There should be several mitigation options available to offset take.*

Service-accepted mitigation options continue to be scarce. Moreover, the one form of mitigation the Service relies upon, power-pole retrofits, is not always an available, appropriate, or reasonable option. Other forms of mitigation should be accepted and standards set to ensure consistent and quality mitigation. Other forms of mitigation would allow a broader set of tools for benefitting eagle. Other sources of mitigation, all of which are well documented sources of impact to eagle populations throughout the United States, could include:

- An ammunition exchange in locations where eagles are impacted by lead;
- Funding for developing mitigation strategies in preventing stock tank drowning;
- Funding for identification and carcass removal programs that would remove carcasses from areas where eagles collide with vehicles or trains;
- Habitat enhancement funding or purchasing mitigation lands through commercial habitat banks;
- Funding for appropriate research efforts;
- Reduction of unintentional poisoning;
- Implementation of a reward system to reduce poaching; and
- Conserving land and nesting areas.

V. Permitting should be less onerous than the ESA (or at most equally onerous)

It is important to recall that the Service determined that the bald eagle no longer qualified as endangered or threatened under the ESA, and the golden eagle has never been listed and is not currently being considered for listing as endangered under the ESA. Despite the two eagle species being arguably in better circumstances than species listed under the ESA in numerous ways, the Eagle Rule imposes requirements and costs that go beyond what is required by the ESA and without regulatory assurances or cost certainty.

a. *Programmatic Eagle Take Permits should have some level of “No Surprises Assurances.”*

ESA ITPs have the regulatory assurances of the “No Surprises Rule.”²³ Adopted by Interior Secretary Babbitt in the 1990s, the No Surprises Rule provides that ITP holders have regulatory assurance that, as long as they are abiding by the terms and conditions of their ITP, the Service cannot ask the permittee to commit any additional compensatory resources nor impose on the permittee any additional restrictions in the event of unforeseen circumstances short of a jeopardy determination. The Eagle Rule is lacking any comparable mechanism for less imperiled species.

²³ Habitat Conservation Plan Assurances (“No Surprises”) Rule, 63 Fed. Reg. 8859 (Feb. 23, 1998)

Many ESA ITPs have terms lasting several decades with adaptive management triggers limited by the No Surprises Rule so that a permittee can reasonably gauge what Year 20, 30, or 40 may cost to remain in compliance. In December 2013, the Service extended the BGEPA programmatic take permits term to thirty years. However, permits are subject to intensive review every five years with no assurances that allow the permittee to gauge the costs of remaining in compliance in Year 30. This five-year review “will be comparable to the initial review of the permit application,” and, “the Service will make eagle-mortality information compiled in the five-year review reports available to the public.²⁴ After conducting its assessment, the December 2013 amendments provide that the Service may change the programmatic eagle take permit to, “(i) update fatality predictions for the facility; (ii) require implementation of additional conservation measures as described in the permit; (iii) update monitoring requirements; (iv) revise compensatory mitigation requirements in accordance with the permit, or (v) suspend or revoke the permit.”²⁵ The discussion prefacing the December 2013 amendment also describes permit revocation as a “final option” and that the Service anticipates that implementation of additional mitigation will reduce the number of instances in which revocation is necessary. While the December 2013 amendments do extend programmatic take permit terms to a more workable length, large cost uncertainties remain. With each five-year review, a permittee is potentially subject to additional conservation measures and compensatory mitigation or risks losing its permit. Again, unlike the ESA, there are no regulatory assurances that allow a project proponent any sort of cost certainty.

b. *Disturb should be revised to align with the ESA.*

The BGEPA take prohibition is broader than that of the ESA. “Disturb” includes actions “likely to cause” take. The Supreme Court has held that the ESA’s “harm” definition means “actual death or injury.” Again, the Eagle Rule should be no more stringent than the ESA.

VI. Take estimation tools should take into account differences between the species

Bald eagle and golden eagle are very different species. The Eagle Rule and accompanying tools that the Service uses to evaluate take estimates, conservation, mitigation etc. should take these differences into account. The existing Service-endorsed model does not do this. The model does not account for the different behaviors between the species; including among many other differences, potential avoidance behavior in bald eagles (*see* Sharp et. al study). The Service’s application of the model derived for golden eagle to bald eagle permitting processes due to a lack of a model having been developed for the bald eagle is highly problematic. It is unreasonable to apply models developed for golden eagles when assessing risk, effective avoidance and minimization measures, and resulting compensatory mitigation for bald eagles. Such a position is in direct conflict with the Department of Interior Manual on Integrity of Scientific and Scholarly Activities (Section 305.3.7 *Code of Scientific and Scholarly Conduct*; 28 Jan 11). Finally, the use of the upper 80% credible interval is too conservative and this in turn has led to proposed projects too easily triggering the Service’s policy to recommend a permit (i.e. one eagle death over 30 years results in permit recommendation) and skews mitigation unnecessarily high.

²⁴ Eagle Permits; Changes in the Regulations Governing Eagle Permitting, 78 Fed. Reg. 73,704, 73,725 (Dec. 9, 2013).

²⁵ *Id.*

VII. The Eagle Rule should allow for a “low-effect” approach for programmatic eagle take permits

It is Service policy to recommend a project proponent seek a programmatic eagle take permit should the collision risk model indicate that just one eagle could potentially be taken over thirty years. Notably, and referring back to the issue identified in Section V above, the collision risk model is made for golden eagles and is calibrated to overestimate potential take (emphatically so with bald eagles). Given that the Service is relying on an overly conservative model and its policy is then to recommend a permit for such a low level of take over a large period of time, the Service should allow for a “low effect” programmatic take permit. Like its ESA counterpart,²⁶ a low-effect permit would require an application to, and coordination with, the Service to obtain permit issuance. However, it would allow for a streamlined process where project impacts are assessed to be minimal or negligible to eagles and the environment. These applications could be categorically excluded from NEPA. Given the Service’s policy for recommending permits for very low levels of take, the problems with the collision risk model, and the issues this creates for project planning and financing, it would seem reasonable from both the Service’s resources standpoint and the project proponent’s standpoint to have such a permitting approach available.

VIII. National Environmental Policy Act (NEPA) Scope of Analysis

The Service, in developing the scope of eagle permitting processes, should clarify the proposed federal action is strictly the issuance of an eagle permit. Some of our membership has experienced confusion around the scope of the NEPA analysis to be undertaken. Using a wind facility as an example, confusion has arisen where the characterization of the federal action has encompassed the entirety of the wind energy facility under development or operation, rather than the solely the issuance of an eagle permit. The scope of the NEPA analysis should be scoped relative to the lead agency action; in this case, whether to issue an eagle take permit. Extending the NEPA analysis beyond this specific decision to the rest of a project is inappropriate and beyond the Service’s jurisdiction. Furthermore, appropriate scoping of purpose and need (i.e., proposed issuance of an eagle take permit) would assure, under most circumstances, that an EA-level investigation is sufficient.

IX. Conclusion

The Eagle Rule needs to be commercially-reasonable and workable, and we hope the Service’s upcoming rulemaking achieves this. We look forward to reviewing a proposed, revised Eagle Rule. We greatly appreciate this opportunity to comment, and would be happy to engage in further discussions should the Service find it useful.

Please feel free to contact the following EWAC representatives:

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²⁶ Habitat Conservation Planning and Incidental Take Permit Processing Handbook 1-8.