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

Department of the Interior
Fish and Wildlife Service

Submitted by:

Energy and Wildlife Action Coalition

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The Energy and Wildlife Action Coalition ("EWAC")[1] submits these comments in response to the United States Fish and Wildlife Service's ("Service") September 30, 2022 Proposed Rule: Permits for Incidental Take of Eagles and Eagle Nests ("Proposed Rule").[2]

EWAC members strongly support an amended Bald and Golden Eagle Protection Act ("BGEPA") eagle take permit program ("Eagle Permit Program") that achieves greater participation, improves conservation, and is legally defensible. A successful permitting program will help further the Administration's stated clean energy and grid modernization goals and the implementation of the recently enacted Inflation Reduction Act. EWAC members, both in the wind and power line industries, have a vested interest in a successful Eagle Permit Program that provides a clear, practicable pathway to obtaining liability protection under BGEPA.

EWAC members appreciate and acknowledge the efforts made by the Service to improve the Eagle Permit Program, namely the introduction of a general permit ("GP") and inclusion of Alternative 2 in the draft environmental assessment ("DEA").[3] A GP program is an important and welcome step to a successful Eagle Permit Program. The proposed GP program is a good foundation and currently contains many necessary aspects to make a GP successful. The intent of these comments is to identify areas that would impede a successful Eagle Permit Program and suggest, where applicable, alternative approaches. Below, EWAC outlines several critical issues within the Proposed Rule and offers substantive solutions and recommendations to ensure the final rule results in a successful, legally defensible, and widely-used Eagle Permit Program. We also identify areas where clarification is required to ensure that unpredictability and uncertainty does not limit participation, suggest solutions to the GP program, and outline fundamental issues that remain within the specific permit program.

EWAC is committed to supporting the Service in its efforts to improve the Eagle Permit Program and welcomes the opportunity to collaborate on solutions that result in a successful outcome.

[1] EWAC is a national coalition formed in 2014 whose members consist of electric utilities, electric transmission providers, and renewable energy entities operating throughout the United States, and related trade associations. The fundamental goals of EWAC are to evaluate, develop, and promote sound environmental policies for federally protected wildlife and closely related 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.

[2] 87 Fed. Reg. 59598 (Sept. 30, 2022).

[3] Alternative 2 is based on a general permit framework ("Framework") developed by a group of industry and eNGO stakeholders. *See* Comments on Advance Notice of Proposed Rulemaking, filed by American Clean Power Association, Audubon Society, Defenders of Wildlife, and Natural Resources Defense Council (Oct. 29, 2021), https://downloads.regulations.gov/FWS-HQ-MB-2020-0023-1879/attachment_1.pdf.

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Attachments[4]

1. Attachment A – EWAC's Suggested Edits to the Service's Proposed Power Line General Permit Conditions (Version 9.15.2022).

2. Attachment B – EWAC's Suggested Edits to the Service's Proposed Wind General Permit Conditions (Version 9.15.2022).

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[4] Both attachments are submitted as a single document with EWAC's Comment Letter. The attachments can be found at the end of this letter.

I. Overall Considerations and Recommendations

Before commenting on specific components described in the Proposed Rule, DEA, and ancillary documentation, we address the following general, overarching considerations.

A. All language having regulatory effect should be located in and limited to the regulatory language.

All language having a substantive, regulatory effect on the regulated community should be in the regulatory language. The Federal Register docket includes the Proposed Rule, the DEA, and several ancillary documents, such as the various permit conditions documents for each of the proposed GPs. In some instances, the proposed regulatory language differs from the language included in the ancillary documentation. In other places, the cross-references across the various documentation results in significant duplication and, in some cases, contradictory elements. EWAC is concerned that the universe of elements that may have a regulatory effect on future applicants is not available in a single document, and the Service may revise these ancillary documents in the future without going through the requisite notice and comment process. EWAC is also concerned that by having regulatory elements spread across documents, contradictory elements may not be readily identifiable. This will ultimately result in a final rule with unattainable or ambiguous standards or inconsistent interpretation. It is unlawful for the DEA to include any substantive requirements that are not set forth in the regulatory language.[5] EWAC recommends the Service include all language that may have a regulatory effect on a potential applicant within the proposed regulatory language and remove regulatory requirements from the DEA and any ancillary documentation. Incorporating this recommendation will result in a more legally defensible and consistently administered Eagle Permit Program.

B. BGEPA does not require the Service to apply the Preservation Standard at the regional, local, or project-level.

The Service has taken the position that BGEPA requires it to ensure that any Eagle Permit Program is "compatible with the preservation of the bald eagle or the golden eagle."[6] The Service has expanded that statutory language with its regulatory definition of the "Preservation Standard," to mean, "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."[7]

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[5] NEPA is a purely procedural statute that "does not mandate particular results, but simply prescribes the necessary process." Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989). *Robertson* further held that NEPA does not impose a substantive requirement to mitigate the adverse effects of major federal actions. *Id.* at 353. In addition, courts have held that "Government regulations must be sufficiently clear so that ordinary people can understand what conduct is being prohibited . . . and so that the regulation 'does not encourage arbitrary and discriminatory enforcement.'" Chalmers v. City of Los Angeles, 762 F.2d 753, 757 (9th Cir. 1985) (quoting Kolender v. Lawson, 461 U.S. 352, 357 (1983)).

[6] 16 U.S.C. § 668a (2018).

[7] 50 C.F.R. § 22.6 (2016) (emphasis added).

EWAC continues to disagree with the Service's position that BGEPA requires the Service to apply the Preservation Standard to these Eagle Permits. EWAC also disagrees that the regulatory definition of Preservation Standard is a reasonable interpretation of the statutory standard. Nothing in the statutory language suggests that BGEPA authorizes the Service to regulate eagles at the eagle management unit ("EMU") level, much less the local area population ("LAP") level.[8] The current regulatory definition goes beyond the Service's regulatory authority under BGEPA. Similarly, nothing in the statutory or regulatory language requires the Service to meet the Preservation Standard at the project level. The biology of the two species does not support this interpretation. Bald eagles and golden eagles are panmictic species and therefore population-level analysis is sufficient to ensure their populations are stable or increasing. By incorporating the EMU and LAP into its Preservation Standard, the Service has created a framework that, in most cases, ignores the population size, genetics, or that eagles are a panmictic species.

While EWAC does not think the Service's regulatory definition of Preservation Standard aligns with the Service's statutory authority, we understand the Service has not proposed to revise its definition of the Preservation Standard. But, EWAC also has concerns with respect to how the Service has applied its interpretation of the Preservation Standard in the Proposed Rule. For example, the Service proposes that GPs require compensatory mitigation at the LAP level for bald eagles in all three Golden Eagle EMUs[9] despite the Service's analysis indicating only the Pacific Flyway South Bald Eagle EMU may require compensatory mitigation to meet the Preservation Standard.[10] The Service also suggests it may suspend or revoke certain GPs if the Preservation Standard has not been met, including where necessary to safeguard regional or local populations.[11] Again, the statutory language does not require this or grant the Service the authority to require it of permittees and creates unnecessary uncertainty for permittees.

EWAC recommends the Service review how it views the authority bestowed on it by BGEPA and how that authority is being applied in the Eagle Permit Program. As currently proposed and administered, EWAC believes the Service is unduly complicating and expanding its authority under BGEPA, and consequently inhibiting the success of the Eagle Permit Program. The Service should focus its interpretation and application of the Preservation Standard at the population-level and not apply the Preservation Standard at the project-level.

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[8] West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022) (stating that an agency's "enabling legislation is generally not an open book to which the agency may add pages and change the plot line" and it is "presume[d] that Congress intends to make major policy decisions itself, [and] not leave those decisions to agencies.") (internal citations omitted).

[9] U.S. Fish and Wildlife Service, Draft Environmental Assessment 2022 Eagle Take Permit Rulemaking 40-41 tbl.3-3 (Sept. 2022), https://www.regulations.gov/document?D=FWS-HQ-MB-2020-0023-1908 [hereinafter DEA]. In the PEIS, the Service stated that Bald Eagle populations "have continued to increase" and therefore decided not to require compensatory mitigation for bald eagle take unless the permitted take exceeded the cap of "5% of [the bald eagle's] annual productivity." U.S. Fish & Wildlife Service, Environmental Impact Statement for the Eagle Rule Revision 2-3, 19 (Dec. 2016), https://www.fws.gov/sites/default/files/documents/programmatic-environmental-impact-statement-permits-to-incidentally-take-eagles.pdf. Since the PEIS was published in 2016, the Service has reported that the bald eagle population has increased four-fold. 87 Fed. Reg. at 59599.

[10] DEA, *supra* note 9, at 137 tbl.7.

[11] *See* proposed § 22.210(b) ("The Service may amend, suspend, or revoke a permit issued under this subpart if new information indicates that revised permit conditions are necessary, or that suspension or revocation is necessary, to safeguard local or regional eagle populations.").

C. BGEPA does not include an "otherwise lawful" requirement and all statements requiring certifications with other laws should be removed.

In its 2016 amendments to the Eagle Permit Program, the Service removed previously proposed language that suggested BGEPA includes language requiring a demonstration that the activity for which eagle authorization is sought is "otherwise lawful."[12] At the time, EWAC noted that "otherwise lawful" is built into the Endangered Species Act ("ESA") statutory language, but is notably absent from BGEPA. The otherwise lawful concept has been misconstrued and inappropriately applied in both ESA and BGEPA permitting. This has resulted in confusion, significant delay, and occasional litigation relating to permit processing and issuance.[13] Yet despite the Service's previous recognition that BGEPA does not include an "otherwise lawful" requirement, EWAC notes that proposed sections 22.210(c)(2)(iv) and 22.215(a)(8), the Power Line General Conditions, and the Wind Energy General Permit Conditions include language that requires the permittee to ensure "that the activity for which take is authorized complies with all Federal, Tribal, State, and local laws and regulations applicable to eagles."[14] This language is unnecessary and by suggesting that a permittee must ensure its "activity for which take is authorized" is otherwise lawful, the Service misstates the federal action for which it has authority. The federal action under the Eagle Permit Program is the authorization of the eagle take, not the underlying activity. This requirement must be removed.

The Service should similarly remove specific references to compliance with the ESA, Migratory Bird Treaty Act ("MBTA"), and National Historic Preservation Act ("NHPA").

1. *ESA*

The DEA includes a statement that **"**General permits would be issued contingent on certification by the permittee that they will accept the standard permit condition that no activity shall occur that is likely to directly or indirectly adversely affect a listed species or a species proposed for such designation, or the critical habitat of such species."[15] This language does not appear in the Proposed Rule and this statement should be removed from the final environmental assessment. Not only are there the aforementioned issues with including substantive language in the DEA that do not appear in the Proposed Rule, this statement is legally unsound. The issuance of eagle incidental take authorization under the proposed GP is non-discretionary and does not trigger ESA section 7.[16] Further, the GP authorizes incidental take, not the underlying activity, and authorization of the take of eagles will not affect listed species, a species proposed for such designation, or the critical habitat of such species. This requirement must be removed.

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[12] 81 Fed. Reg. 91535 (Dec. 16, 2016).
[13] Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv., 450 F.3d 930 (9th Cir. 2006); Env't Prot. Info. Ctr. v. U.S. Fish & Wildlife Serv., No. C 04-4647 CRB, 2005 WL 3877605, at *4 (N.D. Cal. Apr. 22, 2005).
[14] 87 Fed. Reg. 59598, 59627 (Sept. 30, 2022).
[15] DEA, *supra* note 9, at 76.
[16] Nat'l Ass'n of Home Builders v. Def. of Wildlife, 551 U.S. 644, 673 (holding that "the transfer of NPDES permitting authority is not discretionary, but rather is mandated once the State has met the [statutory] criteria" and "does not trigger [ESA] § 7(a)(2)'s consultation and no-jeopardy requirements").

2. *MBTA*

In proposed sections 22.250(f)(4) and 22.260(d)(7)[17] and the Wind Energy and Power Line General Permit Conditions, the Service includes compliance with any provisions specific to authorizing incidental take of migratory birds as a condition to the GPs. In addition to the otherwise lawful and scope of federal action considerations above, it is impossible for potential permittees to know whether they can demonstrate compliance with a program that does not exist. Additionally, the uncertainty surrounding this requirement may discourage participation in the GP program. This requirement must be removed.

3. *NHPA*

Proposed paragraph 22.210(c)(2)(C)(iv) includes a specific reference to the NHPA, requiring applicants to certify that the activity for which take is to be authorized either does not affect a historic property, or that the applicant has entered into an agreement with the relevant State Historic Preservation Officer ("SHPO") or Tribal Historic Preservation Officer ("THPO") to mitigate or prevent adverse effects to a historic property.

This proposed paragraph should be removed. Including NHPA language in the Proposed Rule is unnecessary and creates the potential for misapplication of the NHPA. NHPA section 106 imposes procedural obligations on federal agencies prior to the issuance of a federal permit.[18] However, the scope of section 106 review is limited to the federally licensed activity.[19] Section 106 only requires the Service to consider the potential impact of authorizing take or disturbance on historic properties. Issuance of an Eagle Permit does not authorize the underlying activity. As worded, this provision suggests the Service has authority over the underlying activity. Further, authorizing the take or disturbance of eagles and the take of eagle nests does not have the potential to cause effects on historic properties. This language must be removed from the final rule.

The DEA wrongly suggests[20] that ground disturbing activity conducted under a power pole retrofit plan, such as replacing poles or burying lines, could trigger NHPA requirements. By issuing a permit under the proposed rule, the Service is not authorizing the applicant's underlying activity; it is only authorizing the incidental take or disturbance of eagles or the take of eagle nests. More specifically, issuance of a take or disturbance permit does not authorize power pole replacements or burying lines and Service authorization is not required for these activities. The agency may recognize and give credit for mitigation actions, but it does not authorize those actions. This statement should be removed from the final EA.

[17] 87 Fed. Reg. at 59628-29.
[18] 54 U.S.C. § 306108 (2018).
[19] *See* Nat'l Mining Ass'n v. Fowler, 324 F.3d 752, 759-60 (D.C. Cir. 2003) (Congressional addition of a broad definition of "undertaking" to the NHPA did not expand the scope of section 106).
[20] DEA, *supra* note 9, at 78.

D. The Service must approve additional options for compensatory mitigation and provide a clear pathway for how additional options can be approved.

Compensatory mitigation options for golden eagles are key to a successful Eagle Permit Program. EWAC is concerned that both the lack of available compensatory mitigation options and the absence of a clear pathway to establish potential compensatory mitigation options will frustrate the Service's objectives to establish a workable, successful Eagle Permit Program. It is not clear that the Service has considered the amount of available compensatory mitigation in its development of the Proposed Rule. Currently, the *only* compensatory mitigation method accepted by the Service for Eagle Permits is power pole modifications (i.e., retrofitting and reframing). While the Service has said it would be open to other mitigation options, in the past 12 years of the Eagle Permit Program, no other option has been accepted when proposed to the Service despite alternatives approved for bald eagles being included in a habitat conservation plan.[21] This lack of options results in power line owner/operators being the sole mitigation source for other industries and creates tension with the power line owner/operator's own retrofit programs under an Avian Protection Plan ("APP") which is designed to minimize their own avian impacts and risk exposure. This concern is compounded by the Proposed Rule, under which power line owners and operators must conduct both proactive and reactive power-pole retrofits as conditions of their own power line GP, thereby significantly reducing the pool of eligible poles available to wind companies seeking mitigation for their wind GP. Therefore, it is critical for the Service to provide a clear pathway to establish compensatory mitigation options. The Service must immediately accept other compensatory mitigation options in order to meet mitigation needs and provide other eagle conservation benefits over the duration of the Eagle Permit Program.

The Service often cites uncertainty in determining offset value (i.e., how to quantify compensatory mitigation provided to offset an eagle) when providing reasons for not approving other methods of compensatory mitigation. Uncertainty alone should not preclude a mitigation option from being available to a permittee. Uncertainty abounds in the natural resource field, and the Service has found ways of addressing other uncertainties across its programs. EWAC encourages the Service to seek solutions to compensatory mitigation that rely on the best available science and data and to allow other mitigation approaches to be adopted, utilized, and equally credited as compensatory mitigation such as roadside carcass removal/relocation, nest/habitat preservation, and lead abatement programs.[22] Adding additional compensatory mitigation options will have, independent

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[21] MidAmerican Energy's Habitat Conservation Plan ("HCP") includes bald eagles. The eagle mitigation program is comprised of (1) education efforts to reduce the use of toxic ammunition; and (2) funding of rehabilitation efforts for sick or injured eagles captured and brought to wildlife rescue centers. *See* MidAmerican Energy Company, Final Habitat Conservation: Iowa Wind Energy Project Portfolio 95 (2019), https://downloads.regulations.gov/FWS-R3-ES-2018-0037-0107/attachment_1.pdf. EWAC is aware of at least two other compensatory mitigation options that have been proposed to the Service, a roadside carcass removal option and a lead abatement option. *See* Renewable Energy Wildlife Institute, *Compensatory Mitigation for Golden Eagles: Reducing Vehicle Collisions* (Aug. 22, 2018), https://rewi.org/resources/vehicle-collision-mitigation-model/; Renewable Energy Wildlife Institute, *Eagle Mitigation Models Update: Alternative Options for Offsetting Golden Eagle Take at Wind Energy Facilities* (Sept. 14, 2022), https://rewi.org/webinars/eagle-mitigation-models-update/; Jean Fitts Cochrane et al., *Modeling with Uncertain Science: Estimating Mitigation Credits from Abating Lead Poisoning in Golden Eagles* (Sept. 2015), https://rewi.org/wp-content/uploads/2018/05/Cochrane-et-al.-2015_GOEA-lead-mitigation.pdf.

[22] *See, e.g.*, Steve Slater, Ph.D., *Quantifying eagle Vehicle Strike Risk in the Western U.S.*, Hawkwatch, https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=170426&inline; *see also supra* note 21.

of the specific biological benefits of mitigation itself, a benefit to the species by increasing the options for mitigation and decreasing supply/demand pressures being placed on power pole retrofits. Developers of alternative in lieu fee programs and conservation banks would benefit from standardized guidance from the Service on what metrics and program details are necessary for approval by the Service. Having additional options would increase the conservation value of the Eagle Permit Program by addressing more sources of eagle mortality, providing a greater pool of long-term of mitigation options, and should be made available concurrently with the amendments to the Eagle Permit Program.

E. The Service should bifurcate the wind energy GP to create two distinct authorization pathways for bald eagle and golden eagles.

Given the differences between the two species and the unique considerations for each, EWAC urges the Service to bifurcate the wind energy GP to cover bald eagles and golden eagles separately. This would allow an applicant to seek coverage for bald eagles, golden eagles, or both species. Bifurcation is appropriate because the status of bald eagle and golden eagle populations are not the same. In 2020, the Service released an updated population report for bald eagles that noted bald eagle conservation efforts have been so successful that the population has more than quadrupled since 2009 and has increased by about 10% per annum since 1994.[23] The recovery of the bald eagle has been extraordinary. At current growth rates, the proposed wind energy GP eligibility and take thresholds will quickly become outpaced and unworkable for bald eagles. In addition, not all wind projects have the potential to impact both species – some projects pose a potential risk to only bald eagles and others only golden eagles. To meet the Service's stated objective of improving the Eagle Permit Program while facilitating the advancement of renewable energy projects such as wind, the final rule should include two GP pathways for wind: one for golden eagles and one for bald eagles. Below in Section I.E, we provide specific recommendations for the bifurcated wind energy GPs, including conditions common to both wind energy GPs and recommended specifics for each species' GP. Moreover, the Service has interpreted its authority to allow for an industry-wide authorization and has proposed such a program for power lines.[24] EWAC believes the same authority exists and should be exercised for wind energy facilities.

F. The proposed Service-conducted monitoring program is a significant flaw in the proposed wind energy GP.

A common goal shared by all stakeholders is the conservation of eagles. However, as proposed, a significant amount of the funding provided by the proposed wind energy GP will be directed to Service-conducted monitoring rather than mitigation. DEA section 5.2.4 and DEA Attachment 2 show that as proposed, the monitoring costs more than double the cost of mitigation. The Service estimates the average compensatory mitigation cost per project to be $42,000 while the average monitoring cost per project will be $97,500 over the five-year GP term. Members have calculated costs for their projects to participate in the proposed wind energy GP. A few examples:

[23] U.S. Fish and Wildlife Service, Final Report: Bald Eagle Population Size: 2020 Update 22 (Dec. 2020), https://www.fws.gov/sites/default/files/documents/2020-bald-eagle-population-size-report.pdf.
[24] 87 Fed. Reg. 59598, 59605-07 (Sept. 30, 2022); DEA, *supra* note 9, at 42-43.

- A project with 176 turbines that have a 140m rotor diameter total 0.542 in hazardous volume. It is located in the Atlantic/Mississippi EMU thereby having a mitigation credit of 3.6 when calculated with the hazardous volume. The administrative (monitoring) fees here total $462,000, and the mitigation fee is $297,000, again significantly less than monitoring expenses.

- A project with 72 turbines with a 116m rotor diameter generates a hazardous volume of 0.152, it is in the central EMU so has a mitigation credit of 1.2. For this project, the administrative (monitoring) fee total is $189,000 and the mitigation fee is $99,000, almost half of the cost contributed to Service monitoring.

- An operating project has operated for several years with no eagle fatalities and robust fatality monitoring. To participate in the proposed wind energy GP, the administrative fee would be $400,000 and the mitigation fee would be $125,000.

In every example, the cost of participating in the proposed wind energy GP program will total nearly $2 million or more over the life of the project, and those costs are significantly driven by monitoring results. This is exactly the result that the Framework (Alternative 2) seeks to avoid.

There are myriad other reasons the proposed Service-conducted monitoring is a critical weakness of the proposed wind energy GP. In Section III.C.7 EWAC provides a more detailed explanation of its concerns and suggested solutions.

G. A uniform audit process developed with industry expertise is critical to a successful Eagle Permit Program.

An essential component to a successful Eagle Permit Program is predictability and certainty. One of EWAC's most significant concerns with the existing Eagle Permit Program has been the lack of certainty regarding cost estimation and compliance. Now, the proposed GP program makes compliance contingent on an audit program performed by the Service for a small percentage of all GPs. The audit process is therefore critical to understanding how to demonstrate compliance, which in turn influences the cost. Clarity in the audit process is necessary for permittees to understand the cost and requirements necessary to comply with the GP. The issuance criteria and corresponding terms and conditions of each proposed GP must be clear to ensure that (1) a permittee can confidently demonstrate compliance; and (2) auditors can consistently and predictably assess compliance. It is critical that any final rule language is revised to minimize confusion and inconsistent application.[25]

The Service must establish a training program for auditors to ensure consistent application of the final rule. EWAC recommends that those charged with auditing general permit compliance be familiar with the types of infrastructure they are tasked with auditing and understand the practical, access, and safety considerations that must be taken into account. To that end, EWAC encourages the Service to develop a uniform audit program and meet with industry stakeholders to understand

[25] In addition, the Service should make guidance available to other agencies, including state and federal wildlife and land management agencies, on any final rule to ensure any conditions of their authorizations are consistent with the Eagle Permit Program.

their operations and documentation practices and limitations, and to use existing industry resources (for example, Avian Power Line Interaction Committee ("APLIC") guidance documents related to power lines) when developing audit checklists, training manuals, and related materials. An understanding of industry typical practices can help ensure the auditing program provides the predictability and certainty that is essential for a successful Eagle Permit Program. Additionally, EWAC recommends that desktop, rather than field, audits be conducted due to concerns regarding private lands access, safety, and liability. Operators may be unable to provide property access to auditors for facilities located on private land. Audits should also be conducted only by Service employees in order to avoid any conflicts of interest. EWAC welcomes the opportunity to work with the Service to ensure the auditing program appropriately reflects the practical considerations of wind energy and power line infrastructure.

Finally, the audit process and the proposed Service-conducted post-construction monitoring for the wind energy GP are intertwined. As noted in the previous subsection, EWAC harbors serious concerns regarding the Service's proposed approach to post-construction monitoring for the wind energy GP. These specific concerns and suggested solutions are described in greater detail in Section VI.B below.

H. Guidance that has a regulatory effect must go through notice and comment.

In its comments on the Advance Notice of Proposed Rulemaking ("ANPR") preceding the Proposed Rule, EWAC raised concerns that regional offices have been inappropriately requiring that guidance be incorporated into Eagle Permit terms and conditions, even though that guidance had not gone through public notice and comment. The concern continues as the Midwest and Mountain-Prairie Regions continue to insist their guidance be incorporated into permit applications and will refuse to process permit applications that do not incorporate the same. In both instances, the requirements being asked of applicants have significant cost, compliance, and power production implications for specific permits.[26] EWAC reiterates that applying guidance as a legal requirement without an opportunity for notice and comment is unlawful.[27] If the Service continues to require the applicant to meet the standards set forth in the guidance, then the guidance must go through proper notice and comment rulemaking procedures.

Now the Service has stated, both in its public information sessions and in the Proposed Rule itself, that it will be developing guidance on several aspects of the Eagle Permit Program.[28] EWAC reminds the Service that any such guidance must be published for notice and comment to ensure

[26] For example, the Midwest Region guidance requires a 0.35 probability of detection for post-construction mortality monitoring. The Mountain-Prairie Region guidance requires seasonal curtailment for turbines within proximity of golden eagle nests (even inactive nests). *See* U.S. Fish & Wildlife Service, Region 6, Recommendations for Avoidance and Minimization of Impacts to Golden Eagles at Wind Energy Facilities 1 (Mar. 31, 2021), https://www.fws.gov/sites/default/files/documents/R6_Buffer%20Recommendations%20for%20Wind%20Facilities.pdf.

[27] *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); Nat'l Mining Ass'n v. McCarthy, 758 F.3d 243, 251-52 (D.C. Cir. 2014).

[28] *See, e.g.*, 87 Fed. Reg. 59598, 59603 (Sept. 30, 2022).

compliance with the Administrative Procedure Act ("APA") and the existing Eagle Permit Program language, which requires incorporation of guidance only after it has gone through rulemaking procedures.[29] The comment periods are not only required, but also are an important opportunity for stakeholders to provide practical considerations and clarifications that ensure the Eagle Permit Program is workable for all.

I. The final rule should provide clarity on use of multiple general permits.

It is unclear how the general permits work together. Any final rule should clarify how the GPs could work together to reduce the need for multiple general permits for the same facility. For example, wind energy projects often have generation interconnection ("Gen-Tie") transmission lines that can span any number of miles to a point of interconnect to the electric grid. The proposed wind energy general permit conditions include a requirement for minimization measures to be implemented on power lines,[30] but it is not clear that the wind energy general permit would provide authorization for the risks that may be posed by Gen-Tie lines. Similarly, it would be helpful for the Service and power line permittees alike to revise the power line GP to include coverage for any bald eagle nest disturbance risk or take of immediate hazard nests that may be associated with the power line system.[31] In that same vein, it is not clear whether the lack of a golden eagle nest GP would prevent a power line applicant from participating in the power line GP if there is a golden eagle nest that may be disturbed by power line activities. EWAC recommends that the final GP for wind should include coverage for Gen-Tie lines, that the power line GP include coverage for disturbance of bald eagle nests, and that the power line GP be available even if the power line company must pursue a specific golden eagle nest disturbance permit for a particular activity.

J. The final rule should provide more detail on the types of information that may warrant revision, revocation, or suspension of the GP program.

Proposed section 22.215(b) allows the Service to revise, suspend, or revoke, the GP program should "new information" warrant it. The Service should revisit the GP amendment and suspension criteria included in the Framework and incorporate those concepts into a final rule.

II. Comments on the Power Line GP

EWAC appreciates the Service's proposal to establish a GP for power line infrastructure. Having a permit pathway for power line companies to obtain regulatory assurances under BGEPA is important. It is also equally important that such pathways be readily attainable to ensure that the unhindered delivery of safe and reliable electricity continues. In general, EWAC supports the Service's overall approach to authorizing possible incidental take on power line infrastructure, with the caveat that several details of the proposed permit conditions would require modifications in order to facilitate utility participation (see below), and it balances the power line sector's

[29] *See* 50 C.F.R. § 22.80(c)(2)(ii), (d)(2)(ii) (2022).
[30] 87 Fed. Reg. at 59626.
[31] For example, in the power line GP, there are no requirements in the proposed regulatory language regarding distance to the nearest nest, but the Service recommends nest buffers to 660 feet for bald eagle nests. In contrast, for the proposed nest disturbance GP, activities within 660 feet of an active bald eagle nest or 330 feet of any bald eagle nest may be considered disturbance, suggesting a disturbance GP is warranted.

BGEPA liability concerns with the public's need for safe, reliable, and affordable electricity. EWAC agrees with the Service's approach to establish a GP pathway that does not rely on take limits or abundance mapping to establish eligibility and appreciates the Service's recognition that most take attributable to power line infrastructure is properly considered pre-2009 baseline and agrees that additional compensatory mitigation beyond the permit conditions is not warranted.

However, some aspects of the proposed GP for power line infrastructure would benefit from revision and clarification. EWAC explains its concerns below and provides recommended solutions. Additional suggested edits to the Power Line General Conditions are provided in **Attachment A**. Utility participation in the power line permits may be limited if EWAC's concerns are not addressed. EWAC urges the Service to meet with stakeholders to ensure any final rule reduces ambiguity and confusion in implementation of the Eagle Permit Program.

A. Condition 1 "Electrocution-safe" new construction warrants clarification.

In general, the requirement that new construction or reconstruction be electrocution-safe (except as limited by human health and safety) is reasonable, with a few clarifications. EWAC recommends the Service provide clarity on a few aspects of this condition:

- The Service should recognize in the regulatory language that "electrocution-safe" should be consistent with industry standard practices. The "Power Line General Permit Conditions" section (C)(1) includes a reference to the Suggested Practices for Avian Protection on Power Lines by the Avian Power Line Interaction Committee ("APLIC Suggested Practices").[32] EWAC recommends that any final rule include a similar reference to the APLIC guidance documents in the regulatory language itself.

- EWAC also recommends that any final rule use the same terms as contained in the APLIC Suggested Practices to reduce confusion. For example, "electrocution-safe" should be replaced with "avian-safe."[33]

- The requirement for avian-safe new construction in an eagle take permit should be limited to infrastructure in areas where eagles occur. Not all utility infrastructure is constructed in eagle use areas. Utilities typically identify areas for avian-safe new construction within their APPs based on avian species and habitat use. These areas are based on factors such as the geographic location of the infrastructure and eagle species. Due to the local nature of this condition, a utility should be able to use local data to identify areas where avian-safe new construction would be necessary to prevent eagle electrocutions. In addition, because power lines in urban areas are unlikely to have eagle use, the Service should clarify that urban power line infrastructure does not require avian-safe construction to prevent eagle electrocution.

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[32] 87 Fed. Reg. at 59606.

[33] *See* Avian Power Line Action Committee, Suggested Practices for Avian Protection on Power Lines 51-106 (2006), https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjLlPrPvK_7AhWJIUQIHbp2AyIQFnoECA0QAQ&url=https%3A%2F%2Fwww.nrc.gov%2Fdocs%2FML1224%2FML12243A391.pdf&usg=AOvVaw0FHVh0c0aPG7Hr-AyhasEu (discussing avian electrocution concerns and "describ[ing] ways of designing new facilities and retrofitting existing facilities to be 'avian-safe'").

- The Service should provide clarity on what constitutes "human health and safety." This term is undefined. During the October 20, 2022 public information session, the Service noted that practical considerations such as right-of-way constraints would be a reasonable application of human health and safety. But, this is not apparent from a read of the Proposed Rule. Similarly, supply chain issues and the ability to take outages if needed to modify structures for avian protection can influence a permittee's ability to make its system "avian-safe." The Service should make clear that the term "human health and safety" is to be interpreted broadly to include these practical considerations.

- The Service should acknowledge its understanding that in most instances, buried lines are not practicable, and that the construction or reconstruction of unburied lines will not impact compliance with this general permit condition.

B. Condition 2 "Siting" will create unintended consequences as written.

EWAC generally agrees that eagle considerations should be a factor in new construction or reconstruction of power lines, where practicable. However, EWAC is concerned that as written, the Proposed Rule's recommendations will be applied as standards that are unachievable in many parts of the country. In the event of an audit, if these recommendations were used to determine compliance, demonstrating compliance with this condition would be difficult.

Proposed Section 22.260(d)(5) and Power Line General Conditions Document Section (C)(2) includes "siting a safe distance from nests, foraging areas, and roosts" as part of this condition.[34] The preamble, when discussing this condition, includes a recommendation that power line infrastructure be sited at least two miles from golden eagle nests and 660 feet from bald eagle nests and roosts, and one mile from bald eagle or golden eagle foraging areas.[35] A "foraging area" is defined as, "an area where eagles regularly feed during one or more seasons."[36] As defined, very little power line infrastructure constructed in non-urban areas can meet the siting recommendation for foraging areas. For example, it would be unrealistic to incorporate a specific eagle foraging buffer area when constructing overhead power lines that span across reservoirs. Further, the nest recommendations are similarly unattainable particularly in the western United States. EWAC recommends that the Service remove references to foraging areas in siting considerations.

EWAC also identified concerns with "reconstruction" of lines and the ability to demonstrate compliance with this condition. The ability to incorporate siting concerns into line reconstruction is heavily constrained by the surrounding infrastructure and setting. Similarly, while the Service correctly acknowledges that engineering constraints will factor into siting and design considerations, references and recommendations to bury lines are found throughout the Proposed

[34] U.S. Fish and Wildlife Service, Power Line General Permit Conditions § (C)(2) (Sept. 15, 2022), https://downloads.regulations.gov/FWS-HQ-MB-2020-0023-1904/content.pdf; 87 Fed. Reg. at 59629.
[35] 87 Fed. Reg. at 59605.
[36] 50 C.F.R. § 22.6 (2022).

Rule and accompanying documentation.[37] In most circumstances, buried lines are not practicable, cost effective for rate payers, or at some voltages even feasible.

Through the Service's public information sessions the Service clarified that the recommendations were not meant to be bright-line compliance conditions. For example, the Service clarified that the nest buffer recommendations are intended as a seasonal and spatial construction recommendation rather than a strict compliance condition. The Service also noted that foraging area recommendations were intended to focus on foraging areas of importance, such as those around nests.[38] Similarly, the Service acknowledged in the information sessions that they understood the impracticability of burying power lines in most circumstances.

The Service's clarifications made during public information sessions are not clear in the Proposed Rule. EWAC understands the Service did not intend to apply these recommendations as a bright-line rule, but if interpreted as a condition to demonstrating compliance, many are unrealistic and unworkable, especially in light of a power line company's existing duties and obligations. When developing a project, companies consider a multitude of factors, including other federal, tribal, state, and local siting requirements, engineering considerations, and community needs. Many of these requirements must be prioritized over eagle considerations due to regulatory, reliability or safety concerns. For instance, a power line company cannot decline to construct a distribution line to a community needing power because of its proximity to a golden eagle nest or foraging area.

EWAC is also concerned that the draft permit condition as written can be open to interpretation by other agencies, including federal land use agencies, that may consequently disallow new right-of-way authorizations within eagle nest or foraging buffers.

To address these concerns, EWAC recommends that the final rule clarify the Service's intent and include language that is reasonable and commensurate with the impacts to eagles. EWAC offers the following suggested clarifications:

- References to buffers associated with eagle foraging areas should be entirely removed from the final rule and permit conditions since these areas are already encompassed by nest buffers, do not offer an additional benefit to eagles, and create confusion and uncertainty.

- Utilities should apply siting recommendations as practicable and appropriate given the project setting (e.g., topography, existing human activity, other infrastructure constraints) and the inability to incorporate the recommendations does not result in non-compliance.

- The final rule should use a 0.5-mile nest buffer, rather than a 2-mile nest buffer, for golden eagles.

[37] *See, e.g.*, 87 Fed. Reg. at 59605 ("Buried lines are considered 'electrocution-safe.' We recommend buried lines when feasible because they completely eliminate the risks of electrocution, collision, and shooting.").

[38] But, if this is the case, then a nest buffer would already include these foraging locations and a separate recommendation around 'foraging areas' is not needed.

- The final rule should make clear that the failure to bury lines will not affect compliance, eligibility, or enforcement exposure under the Eagle Permit Program.

C. Condition 3 "Reactive Retrofit Strategy" requires greater flexibility.

Conceptually, EWAC agrees with having a reactive retrofit strategy as a condition to a power line GP, but as written, the condition is too prescriptive to be broadly applicable. The Service's requirement of immediately retrofitting 11 total poles or a half-mile segment of poles needs additional clarification and should allow for flexibility given incident-specific conditions. Geographic features such as expansive waterways and steep terrain can affect the implementation of this condition due to accessibility constraints. It may be infeasible, or unnecessary to retrofit 11 poles in an urban setting. Instead, the Service should revise this condition to allow for reactive retrofit strategies that require the permittee to assess the poles and the surrounding environmental conditions along either 11 poles or ½ mile of the affected line and to prioritize pole retrofits as necessary to prevent further electrocution mortality. In cases where a utility has a long-standing retrofit program, the nearby poles may already be electrocution-safe. Likewise, some utilities may already have internal policies that dictate reactive responses to eagle mortalities and have been developed in collaboration with the Service; such existing policies should be honored. If the utility must find poles that are not retrofitted on the same circuit to meet Condition 3, this may entail significant resources and retrofitting resources may be better spent on priority areas or proactive retrofits.

D. Condition 4 "Proactive Retrofit Plan" as written is unworkable.

The proposed requirement that general permittees must convert 10% of their infrastructure to be electrocution-safe within the duration of the general permit term is unworkable. Moreover, it is not based on any data supporting the enormous expense for what the Service identifies as 500-600 annual eagle fatalities. This extent and timeframe of a proactive program is a strong deterrent to utility participation, and must be modified.

The Service should understand that the cost and personnel needs required to meet a 10% proactive condition over five years will be an enormous barrier to participation in the GP program. For example, one member company has over 6 million distribution poles in its service territory, of which 25% 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, yet this company only experiences an average of 4 to 6 bald eagle interactions per year. If required to proactively address 10% of the risk poles in a 5-year period, this company would be faced with proactively addressing 30,000 poles per year or 150,000 poles over one permit term. The cost to comply with this single permit condition exceeds the company's annual Avian Protection Budget by 1000%.

Depending on the size of the company's power line system, the numbers generated from this 10% requirement exceed, by an order of magnitude, pole replacements in response to major hurricane damage. Another member company has an extensive proactive program that averages $8-10 million annually on avian protection would require $114 million over a five-year period to meet the 10% proactive requirement. Based on this utility's experience, the volume of that level of work would be impossible due to labor, material, and access considerations, let alone the cost to customers.

The cost estimates provided in the Proposed Rule do not accurately capture these costs. The Service has failed to undertake a cost estimate on a per eagle basis to analyze the cost per eagle fatality for this proactive retrofit strategy. Additionally, power line companies of all sizes will face challenges in having enough personnel and materials to achieve this metric and document compliance with this condition.

The only justification for this proactive retrofit requirement is the stated desire to convert the nation's power lines to avian-safe in 50 years. Perhaps that is a laudable goal, but it is not rationally related to the Service's objectives. First, the Service ignores the fact that poles age, and many will have to be replaced in any event in the next 50 years. Second, retrofitting these poles eliminates the only accepted mitigation option for other permittees. Third, the Service has identified only 500 eagle electrocutions annually, and another 600 collision fatalities. Notably, this cost is not incurred to compensate for an eagle fatality; that is addressed in the reactive retrofit plan. Rather, the enormous cost of the proactive retrofit plan is a primary deterrent for most power line companies from participating.

Notably too, the data used in the DEA to extrapolate the number of poles needed for retrofitting is incorrect, and therefore likely has contributed to the subsequent errors in the Service's estimates of pole retrofit numbers, costs, and durations for retrofitting utility systems. The DEA references Harness (2000) in its assessment that 76% of utility infrastructure is already avian-safe. This number does not accurately reflect current utility data, and its validity is also questionable since retrofitting techniques used during that era (such as perch discouragers) have been subsequently proven as ineffective in electrocution prevention. EWAC recommends that the Service work with utilities to identify numbers that are more realistic in terms of retrofitting, as well as durations for completion.

EWAC shares the Service's desire to increase participation in the Eagle Permit Program, and this condition is a significant impediment to achieving that objective. EWAC recommends the Service work with the power line industry to understand the options that would better serve a proactive retrofit plan condition. EWAC suggests that the Service consider proactive retrofits that address an appropriate and practical portion of poles that are located in eagle use areas, as identified by utility APPs. As described above under the avian-safe new construction section, not all poles pose risks to eagles due to their locations. EWAC does not propose that the Service require any particular method for identifying eagle risk poles; rather, power line GP permittees should identify such locations for their service territory. For example, if a company has an existing APP that identifies poles that pose a risk to eagles and implements a proactive retrofit plan that is specific to the eagle species, system configuration, and other local conditions that should be an appropriate condition for purposes of demonstrating general permit eligibility and compliance. For other utilities, this methodology may need to be developed. The permitting mechanism should allow more than one option for a proactive retrofitting strategy in order to accommodate these differences and encourage participation. Any final condition should be commensurate with the risk posed to eagles, consider impacts on the cost of energy, and be logistically feasible and practicable.

E. Condition 5 "Collision Response Plan" requires clarity regarding its scope.

The proposed condition is generally consistent with how EWAC members manage eagle collisions through their APPs, particularly with regard to case-by-case assessments and responses to

eagle/power line collisions. However, it is important to clarify the scope of the required plan in terms of the extent of line covered. It is not clear in the Proposed Rule or the Power Line General Conditions Document that this requirement applies only to the span where the collision occurs. This requirement should not be applicable to the entire power line system and, to avoid confusion, should be clarified to apply only to the span where the collision occurs. In addition, as part of a utility's assessment in response to an eagle/power line collision, the likelihood of subsequent collisions should be considered when determining if line marking is warranted. This is especially true when allocating limited utility avian budgets towards efforts that will have greatest eagle conservation benefits. The golden eagle/power line collision data presented in the DEA appears to over-estimate collision risk compared to utility data. Utility data suggests that golden eagle collisions with power lines are infrequent, significantly less common compared to electrocutions, are unlikely to occur repeatedly in the same area, and would not necessarily reoccur in adjacent spans of the same habitat type. As a result, the permit language should afford utilities the flexibility to determine if line marking is warranted, or if those eagle program resources would be better spent elsewhere (e.g., on pole retrofits). Due to the concerns raised previously, burial, removal, or other line modifications should be removed as possible collision response strategies. Finally, this condition should include an emergency response exemption to allow unimpeded provision of electricity.

F. Condition 6 "Shooting Response Strategy" is not suitable as a mandatory condition.

EWAC understands the Service's desire to develop stronger data to support enforcement for the illegal shooting of eagles. EWAC also appreciates that the Service does not intend to penalize or hold liable permittees who report illegal shooting discoveries to the Service. However, EWAC does not believe this condition makes sense as an "Avoidance, Minimization, and Adaptive Management" measure (as set forth in the Power Line General Permit Conditions)[39] nor as a compliance condition as set forth in section 22.260(d)(6).[40] It is unrealistic for the Service to expect a power line permittee to be responsible for reporting activities by others and be responsible for developing and implementing responsive actions. Instead, permittees should undertake this conservation measure voluntarily, and should be limited to reporting only.

G. The service should clarify the monitoring and training compliance requirements.

EWAC appreciates the Service's limited monitoring requirements to reasonable efforts that can be made by onsite staff. Electric utilities often have an employee training component as part of their APPs, and a process for documenting eagle mortalities. Likewise, outages, line patrols, and customer reports are all mechanisms in which eagle mortalities may be documented. EWAC supports the Service's proposed monitoring requirements for power lines, as they are consistent with typical APP practices and appropriate for detecting eagle mortalities. In any final rule, the Service should clarify how compliance with this condition will be assessed in the event of an audit.

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[39] U.S. Fish & Wildlife Service, Power Line General Permit Conditions § (C) (Sept. 15, 2022), https://downloads.regulations.gov/FWS-HQ-MB-2020-0023-1904/content.pdf.

[40] 87 Fed. Reg. at 59629.

H. A clear auditing and compliance program is essential to a successful GP.

Many of the ambiguities and concerns noted above affect the ability to understand how to demonstrate compliance with the power line general permit. It is important to clarify the audit process and standards so the regulated community and Service staff can consistently and predictably understand how compliance with the power line general permit can be demonstrated. This will improve transparency with the intent of facilitating compliance and targeting enforcement efforts at those entities engaged in negligent or willful unlawful conduct. As recommended in Section I.G above, the Service should develop a uniform audit program that is made available for public comment before finalized.

I. Other power line general permit considerations.

In addition to the more condition-specific concerns above, EWAC also has the following comments to support the establishment of a successful power line general permit program.

- **Careful use of recommendations and avoidance of unintended consequences.** The Service should be careful when making recommendations related to engineering, siting, and other industry operations and maintenance ("O&M") practices such as vegetation management, linear infrastructure maintenance, and helicopter use. Any measures included in a final rule should be worded to not contradict industry-standard practices, other agency requirements, or the need to deliver affordable, safe, and reliable electricity. Any recommendations included in a final rule have the potential to be incorporated into other federal, state, and local conditions. The Service should keep this consequence in mind when including recommendations that are not eligibility or compliance requirements. For example, several of the activity types included under eagle disturbance permits are currently considered routine O&M and/or *de minimis* activities by other federal or state agencies, including vegetation management, linear infrastructure maintenance, and helicopter surveys of lines for safety inspections. Such actions are recognized by other agencies as minimal impact and necessary for the safe and reliable operation of the electric grid. As written in the Proposed Rule, such activities could be interpreted by these agencies as impactful and requiring nest disturbance permits, which would have significant negative impacts on utility safety, reliability, and wildfire risks.

- **Small business alternatives.** The Service should consider an alternate administration fee arrangement for small businesses to allow for smaller power line companies and cooperatives to participate at a lower fee. The Service should also consider an alternative pathway where smaller companies without APPs can develop a strategy for addressing eagle issues and implementation based on their evaluation of risk to eagles. This would help ensure smaller company resources are used efficiently and effectively.

III. Comments on the Wind Energy GP

A wind energy GP is critical to a successful Eagle Permit Program. EWAC appreciates that the Service has proposed a GP program, and EWAC is committed to work with the Service to establish a successful GP program. The proposed wind energy GP is a good foundation and currently

contains many necessary aspects to make a general permit successful: it authorizes take of both species, minimizes processing, does not require preconstruction surveys, does not require collision modeling, relies on O&M monitoring, and does not require statistical fatality estimates. However, to achieve the level of participation desired by the Service and the industry, the Service must make certain revisions and clarifications.

In order to maximize participation in the wind energy GP program and maximize conservation benefits for eagles, the wind energy GP should be designed in a manner that provides participants with high predictability and certainty regarding their ongoing obligations and compliance status. The proposed wind energy GP, while providing an increased level of certainty compared to the existing permitting program, does not provide the requisite level of certainty, ease of participation, and cost effectiveness necessary to achieve the desired participation levels.

EWAC's ultimate recommendation for a final wind energy GP is that the Service adopt a modified Alternative 2, which adjusts Alternative 2 to reflect the latest data on bald eagle populations. Below, we first identify concerns with the Service's conclusions with respect to Alternative 2. Next we suggest a GP approach based on Alternative 2 that takes a separate approach for bald eagles given their populations. We then identify concerns with the wind energy GP as proposed. While EWAC believes that the proposed wind energy GP with EWAC's suggested modifications could result in a workable wind energy GP, the Service's most straightforward path to a successful GP would be to adopt a modified version of Alternative 2.

A. The Service inappropriately rejects Alternative 2.

The DEA inadequately analyzes and inappropriately rejects Alternative 2.[41] This Alternative incorporated the Framework that resulted from a facilitated process that took over a year to develop and reach consensus. The industry and eNGO group spent considerable time contemplating eligibility criteria; this group decided using abundance as eligibility was difficult and that abundance is not likely a primary driver of risk. Eagle foraging areas, communal roosts, and other habitat features are all required to help inform the applicant of its decision to apply for coverage under a GP and the eligibility criteria of distance to nest (as presented in Alternative 2) is ecologically linked to these other factors.

The Service states it rejected Alternative 2 because: (1) smaller projects may be disincentivized from participating given the flat fee; (2) lower risk projects may decide the flat fee exceeds the cost of enforcement based on perceived liability risk; (3) greater amount of eagle take and less mitigation would occur than under Alternatives 3 & 4; (4) high levels of eagle take at some high-risk facilities would go undetected given the lack of project-specific fatality monitoring; and (5) the possibility of violating the Preservation Standard would be greater under Alternative 2.[42] EWAC explains its disagreement with the Service's conclusions immediately below.

[41] *See* Framework, *supra* note 3.
[42] *See* DEA, *supra* note 9, at 79.

1. *Service Conclusion: Smaller projects may be disincentivized from participating given the flat fee.*

This concern is not a barrier to selecting this alternative and can be readily addressed. The Service should develop a fee structure that includes a reduced fee for qualifying small projects and/or small businesses.[43]

2. *Service Conclusion: Lower risk projects may decide the flat fee exceeds the cost of enforcement based on perceived liability risk.*

This concern is not unique to Alternative 2. Alternatives 2, 3, and 4 are all structured in a manner that may lead some owners and operators of lower risk projects to elect not to participate. The reputational and non-monetary risks of civil and criminal liability are not something the wind energy industry takes lightly, regardless of the actual dollars that may result from an enforcement action. A flat fee, even if disproportionate to the level of impacts from a lower risk project, would still likely provide a cost-effective degree of certainty in terms of liability risk.

3. *Service Conclusion: A greater amount of eagle take and less mitigation would occur than under Alternatives 3 & 4.*

EWAC disagrees with this conclusion. In all four alternatives, the potential for take remains largely the same because, as the Service states, the "general permit framework . . . is not expected to affect the number of new wind energy facilities built on the landscape." Every alternative would result in mitigation fees to benefit eagles. Indeed, given that eligibility for a GP under Alternative 2 would not be affected by updates to abundance maps, there is likely to be increased enrollment under Alternative 2 compared to Alternatives 3 & 4 because of the greater certainty. Therefore, it is likely that more mitigation would occur under Alternative 2 rather than less compared to other Alternatives.

4. *Service Conclusion: High levels of eagle take at some high-risk facilities would go undetected given the lack of project-specific fatality monitoring.*

The Service's concern here is both unlikely and common to all Alternatives. All of the GP alternatives are designed for lower risk projects, not high risk projects. High levels of undetected take at projects qualifying for the GP (as set forth in Alternative 2) is as unlikely as it would be for other Alternatives. In general, eagles persist on the landscape such that they are readily discovered by operations and maintenance staff.[44] Incidental monitoring by these personnel occurs at all existing wind facilities.

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[43] *See* American Clean Power Association, Comments on the draft rule for permits for Incidental Take of Eagles and Eagle Nests.

[44] *See* Renewable Energy Wildlife Institute, *Compensatory Mitigation for Golden Eagles: Reducing Vehicle Collisions*, *supra* note 21, at 4-5; *see also* Eric C. Hallingstad et al., *Developing an Efficient Protocol for Monitoring Eagle Fatalities at Wind Energy Facilities* 11 (Dec. 12, 2018), https://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0208700&type=printable (discussing the probability that carcasses would be detected on a wind turbine site).

5. *Service Conclusion: The possibility of violating the Preservation Standard would be greater under Alternative 2.*

There is no basis for this conclusion. Given (1) the growing bald eagle population, (2) the mitigation provided for golden eagles under all of the Alternatives, and (3) low level of take from wind demonstrated by GPS data, the likelihood of violating the Preservation Standard under this Alternative is not any different than the other Alternatives. Neither BGEPA nor the current definition of the Preservation Standard require the Service to measure the health of eagle populations at the project level. The Service can adequately assess whether its permit program is "compatible with the preservation of the bald eagle or the golden eagle" through population-level and other data-collection efforts and make changes to the GP program as necessary in light of the best available data on populations. This concern is unfounded.

The Service should reevaluate the dismissal of Alternative 2 and reconsider it as the preferred alternative incorporating the modifications identified below for bald eagles.

B. The Service should adopt a *modified* Alternative 2 for a wind energy GP that reflects the different population status for bald and golden eagles.

While the American Clean Power Association and participating eNGOs developed the Framework, the Service released an updated population report for bald eagles that noted bald eagle conservation efforts have been so successful that the population more than quadrupled from 2016-2019 and increased by about 10% per annum since 1994.[45] The recovery of the bald eagle has been extraordinary. Because of the remarkable population growth of bald eagles, EWAC is concerned about the durability of a GP program that relies on relative abundance as eligibility criteria and includes take limits and compensatory mitigation requirements for bald eagles. EWAC believes a different approach to the wind energy GP should be adopted and finalized by the Service. Importantly, a bifurcated approach would decouple bald and golden eagle mitigation, which EWAC believes is critical to a durable and defensible Eagle Permit Program.

1. *Common elements of the bald and golden eagle wind energy GP.*

Consistent with the Framework while taking some of the proposed wind energy GP conditions into consideration,[46] elements that would be common to both a bald eagle wind energy GP and a golden eagle wind energy GP would be:

- Both wind GPs will have a five-year permit term, with opportunities for the Service to renew, amend, suspend, or revoke the availability of the GP for either species, based on the species' population status.
- Projects would enroll in the wind GPs via a registration process, specifying the requested species coverage (bald eagle, golden eagle, or both), and paying the requisite fees.

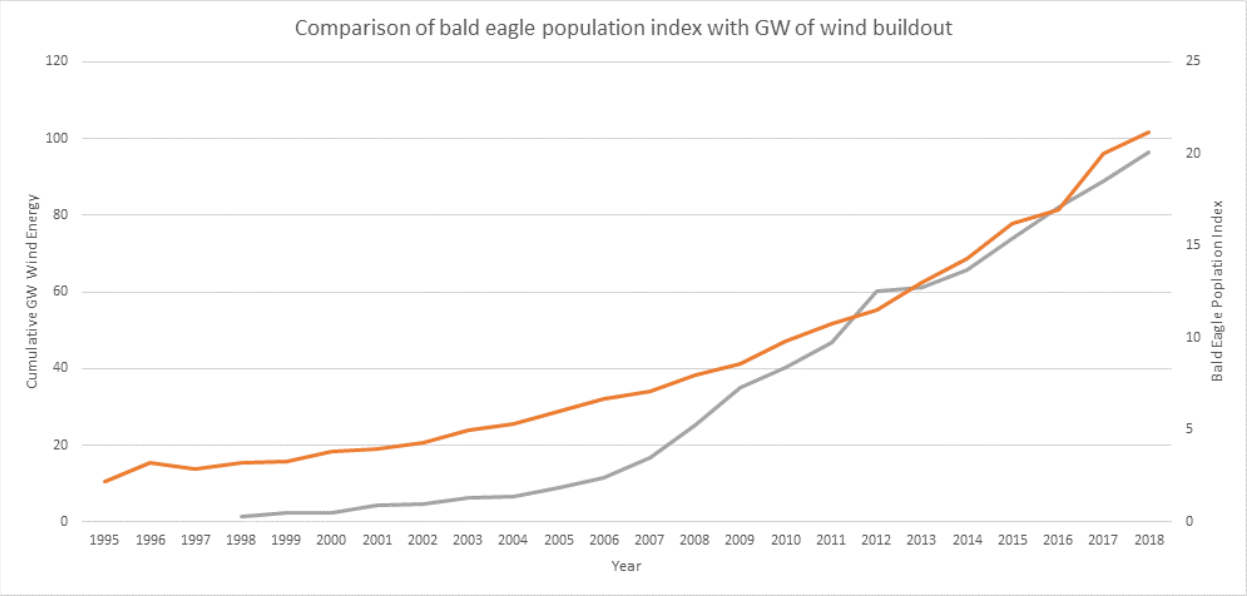
[45] U.S. Fish and Wildlife, Final Report: Bald Eagle Population Size: 2020 Update 22 (Dec. 2020), https://www.fws.gov/sites/default/files/documents/2020-bald-eagle-population-size-report.pdf.
[46] With the suggested modifications set forth in Attachment B.

- Permittees would employ avoidance and minimization measures as described in Part D of the proposed Wind General Permit Conditions (with modifications recommended in Attachment B).
- Permittees will adaptively manage enrolled project(s) consistent with Part E of the proposed Wind General Permit Conditions (with modifications recommended in Attachment B) – with separate adaptive management plans for each species, as applicable.
- Permittees will conduct monitoring as described in Part F of the proposed Wind General Permit Conditions. Specifically, monitoring will be limited to site personnel incidental monitoring only.
- Permittees will report and dispose of discovered eagles consistent with Parts G and H, respectively, of the proposed Wind General Permit Conditions (with modifications recommended in Attachment B).
- Permittees will be subject to Service-conducted review of compliance and reporting records and audits of the project's monitoring program upon written and six months advance notice. However, see Section III.C.5 of these comments concerning Service-conducted fatality monitoring.
- Permittees will implement species-appropriate best management practices ("BMPs"), such as limiting maintenance activities around active bald eagle nests in accordance with the National Bald Eagle Management Guidelines.

2. *Bald eagle wind energy GP.*

The Service recognizes that the bald eagle population continues to grow while at the same time wind projects are being constructed and operated.[47] Wind projects are not the primary – or even a significant – cause of impacts to the bald eagle population. The 2021 ANPR explained that "human development and infrastructure continue to increase in the United States, and bald eagle populations continue to grow throughout their range."[48]

[47] Framework, *supra* note 3, at 2-3.
[48] 86 Fed. Reg. 51094, 51095 (Sept. 14, 2021).



The Proposed Rule explains that the bald eagle population has increased four-fold since 2016. The DEA explains that "[b]ald eagle populations in all of the EMUs and the nation as a whole are expected to continue increasing toward their theoretical carrying capacity."[49] Currently, bald eagle populations are such that, under the current permitting program, the Service does not require compensatory mitigation in most circumstances.[50] Given the documented abundance of bald eagles and their expanding population, it is arbitrary to propose the same consequence for takes of bald and golden eagles. Taking four golden eagles under a general permit is a reasonable limit, but four bald eagles does not align with the current population status. EWAC is deeply concerned that a wind energy GP program that imposes a take limit of four bald eagles will result in the failure of the wind energy GP.

The bald eagle's current population status means that take of bald eagles (from any source, including wind) will not affect the Service's ability to demonstrate it has maintained the Preservation Standard. The Service can continue to safely meet its Preservation Standard while administering a wind energy GP program that does not require specific take limits for bald eagles or compensatory mitigation. In the event changes in bald eagle populations suggests adjustments are needed to maintain the Preservation Standard, then the Service can consider adjusting the wind energy GP to function similarly to what has been proposed below for golden eagles.

EWAC's changes to the wind energy GP for bald eagles, described below, function as a variation of Alternative 2 and the Service's proposed wind energy GP. Our modifications are responsive to the specific issues highlighted by the Service—certainty, efficiency, simplicity, eligibility, thresholds for disqualification and suspension, and compensatory mitigation options.[51] Further, it

[49] DEA, *supra* note 9, at 64.
[50] 87 Fed. Reg. 59598, 59599 (Sept. 30, 2022) (explaining that in 2022, in light of the bald eagle population's four-fold growth over the last six years, the Service "updated [the] population size estimates and allowable take limits for bald eagles").
[51] *Id.* at 59610.

builds on the stated objectives and updated data and information outlined by the Service and submitted during the public comment period for the ANPR. The Service committed to "continue to consider revisions to our proposed general-permit eligibility criteria and other possible criteria that meet the preservation standard."[52] The bald eagle wind energy GP described in this section is consistent with the Service's stated objective to implement "changes to improve clarity and reduce complexity while retaining the core requirements of implementing practicable avoidance and minimization measures to reduce impacts, implementing appropriate compensatory mitigation, and ensuring the permitted take is compatible with the preservation of bald eagles and golden eagles."[53]

a. Eligibility criteria

All wind projects that will certify to implementing the avoidance and minimization measures as described in Part D of the proposed Wind General Permit Conditions (with modifications recommended in Attachment B) are eligible for coverage, similar to the GP proposal for power lines. Given bald eagle populations are robust and wind energy projects do not have population-level effects on bald eagles, all wind energy projects should be eligible for coverage under a bald eagle wind energy GP.

b. Take limits

EWAC believes a successful GP program is of paramount importance and that the proposed take limit of four bald eagles will set the wind energy GP program up to fail from the very outset. EWAC has struggled to arrive at an alternative take limit that would be legally and biologically defensible and reasonably demonstrable through the Service's preferred take prediction and estimation tools. Ultimately, given the current status of bald eagle populations and the lack of population-level effects to bald eagles from the wind energy industry, EWAC recommends the Service shift its focus away from a project-level take limit for the bald eagle wind energy GP.

BGEPA does not require that an eagle take permit have a project-specific take limit. Accordingly, EWAC encourages the Service to manage the bald eagle wind energy GP take limits at the population level and/or through EMU take thresholds and use fatality data reported by permittees combined with other mortality data collected from other sources (poaching, poisoning, etc.) to manage the Service's LAP concerns. Where bald eagle populations are currently stable and meeting the Preservation Standard, a project is eligible for authorization and no take limit would apply. In the event population level data gathered by the Service demonstrates bald eagle populations are no longer stable at the population-level or at a particular LAP, the Service could propose adjustments to the GP program, including imposition of project-specific take limits, to retain its goal of meeting the Preservation Standard. Population-level surveys can be supported by permitting fees paid upon registration.

[52] *Id*. at 59602.
[53] *Id.*

c. Compensatory mitigation

BGEPA does not impose specific requirements for compensatory mitigation. The appropriate goal of compensatory mitigation in the Eagle Permit Program is to aid in meeting the Preservation Standard. Bald eagles continue to thrive while wind projects are constructed and operated, and bald eagle fatalities attributable to wind energy facilities are very low in proportion to the population.[54] Implementation of minimization measures such as siting away from eagle nesting areas, roadkill removal, lead ingestion abatement, and landowner education and engagement are sufficient. No additional compensatory mitigation for bald eagles should be required.[55]

EWAC proposes that registration for the wind energy GP program include a conservation fee proportional to the impacts wind energy development has on the bald eagle population (i.e., something significantly reduced from the proposed wind energy GP) on a per registration basis.[56] This fee would be used for eagle research, population counts, GPS monitoring, preservation of habitat, or other conservation measures. Research efforts could focus on efforts to support populations, nesting programs, breeding programs, and developing, procuring and deploying new collision avoidance technologies. A conservation fee would promote conservation of bald eagles without tying the fee to a specific compensatory mitigation objective (i.e., the fee would be decoupled from resource equivalency analyses or other offset calculations, unlike golden eagles). A conservation fee should not be assessed for those projects that are part of the baseline.[57]

3. *Golden eagle wind energy GP.*

Given the population status of the golden eagle, EWAC agrees that it is appropriate to include a take limit in the golden eagle wind energy GP and further agrees that four golden eagles found is an appropriate take limit. EWAC's proposed golden eagle wind energy GP closely follows the wind Alternative 2, the components of which have been analyzed throughout the DEA.

a. Eligibility criteria

As described below in Section III.C.1, the proposed abundance map should not be the sole option to determine eligibility for the general permit. Rather, as described at length in the Framework, the appropriate eligibility assessment should rest on whether a project can meet the take limit imposed. Accordingly, EWAC recommends the following eligibility criteria for the golden eagle wind GP:

- All wind projects in development should be eligible for the golden eagle wind energy GP, unless turbines are sited within 2 miles from golden eagle nests at the time of registration.
- All operating projects should be eligible for the golden eagle wind energy GP as long as they have not found more than four (4) golden eagle fatalities attributable to wind operations over the most recent five years.

[54] Kevin Kritz et al., *Bald Eagle Mortalities and Injuries at Wind Energy Facilities in the United States*, U.S. Fish & Wildlife Service (2018).
[55] For an in-depth discussion on EWAC's concerns with the proposed approach to bald eagle compensatory mitigation, see *infra*, section III.C.4.
[56] The Service could rely on existing partnerships and programs with conservation entities to receive and direct funds to eagle conservation.
[57] DEA, *supra* note 9, at 15.

All wind energy projects should remain eligible for the GP program unless a permittee finds four or more golden eagle fatalities attributable to the covered project's operations over the previous 5-year term.

b. Mitigation

Permittees pursuing coverage under the golden eagle wind energy GP will provide compensatory mitigation. Part C of the Wind General Permit Conditions should make it clear that compensatory mitigation for golden eagles is not required if the project is part of the baseline.[58]

To further streamline the golden eagle wind energy GP, the Service should consider establishing a mitigation fund with an appropriate partner where applicants who seek GPs pay a set $30,000 per eagle into the fund.[59] This could be adjusted up or down in the future as new in lieu fee/conservation banks enter the market. Once these fees are paid by the applicant, the fund pays the appropriate in lieu or conservation bank. Upon payment of this mitigation fee into the appropriate account, the applicant has met its compensatory mitigation obligations. This serves several beneficial functions: (1) it removes the burden of the applicant of seeking out and selecting an appropriate in lieu or conservation bank; (2) allows the GP program to be implemented immediately without concern for available options; (3) would allow efficiencies of scale by allowing the fund to pool these funds; (4) would allow the fund manager, with the guidance from the Service to implement the mitigation in the areas that most benefit eagles; (5) would stimulate in lieu fee/ conservation bank providers to develop additional programs beyond power pole retrofits; and (6) stimulate the Service to move rapidly to approve those new programs. This will be especially important for the Atlantic and Mississippi flyways where, to EWAC's knowledge, in lieu fees or conservation banks are scarce and power line electrocution or collision is not a significant source of eagle mortality.

C. EWAC must modify and clarify the proposed wind GP for it to be effective.

EWAC strongly supports a wind energy GP that incorporates Alternative 2 with the additional modifications suggested above. Below, EWAC provides its concerns and recommendations with the proposed wind energy GP should the Service continue with its preferred alternative in a final rule. As written, the proposed wind energy GP contains critical flaws that prevent practicable participation and administration. Additionally, EWAC provides suggested edits to the Wind Energy General Conditions in **Attachment B.**

1. *Relative abundance maps must not be the sole pathway used to determine eligibility.*

EWAC strongly disagrees with the use of relative abundance maps as the sole threshold determination of eligibility. The Service must expand its eligibility criteria to include other

[58] *Id.*

[59] EWAC believes $30,000 per eagle is supported by existing documentation. For example, settlement agreements from the last decade have applied a dollar amount of approximately $30,000 per eagle fatality that occurs during the probationary period while the companies seek permits. A report commissioned by the Service better aligns with the $30,000 per eagle range. *See* H. Hosterman & D. Lane, *Proxies for the Market Value of Bald and Golden Eagles: Final Report* (Contract Report to the U.S. Fish and Wildlife Service No. F14PA000019) (2017).

eligibility pathways. In the Proposed Rule, the Service states that higher eagle abundance data equates to a higher potential risk of take. There is insufficient evidence that relative abundance or pre-construction eagle use rates are predictive of collision risk and mortality. While some regional eagle abundance numbers may be higher than national averages, it should not be ignored that many wind energy projects within those regions are sited outside of preferred eagle nesting, foraging, and hunting areas with very low risk of eagle take.

Application of the Service's proposed abundance maps as the sole eligibility criteria results in two specific problems for EWAC members. First, there are several EWAC members whose projects are ineligible for the proposed wind energy GP; even though these same projects have operated for many years without an eagle fatality. Second, EWAC members have examined their projects and found that many of their operational projects have one or more turbines that fall outside eligible areas. As a consequence, EWAC members are finding many of their development or operating projects will not qualify for the general permit despite their otherwise low risk to eagles. Under the Proposed Rule, these projects would then be subject to the reconsideration process with Service regional staff, which would require the time and cost of pulling together application materials for a specific permit. Discretionary review by regional offices will result in a lack of predictability and lead to inconsistent implementation from project to project. Additionally, if the eligibility determination is solely reliant on abundance maps, and the Service updates the maps with new data every 5 years to incorporate the best available data, this will result in repeated uncertainty for project owners over whether their projects that have previously established eligibility using the abundance maps will be able to remain eligible over the project lifetime. These are key shortcomings to ensuring that increased participation from the significant existing buildout across the United States.

While relative abundance derived from eBird datasets can be *one* useful consideration when predicting the relative risk of eagle collision, other considerations like eagle flight height, eagle behavior, topography, prey availability, and other factors are likely higher drivers of risk. For example, many eagle observations in the eBird dataset include eagles migrating one-thousand meters or more above ground level ("AGL") in a straight, directional manner. These eagles are clearly not at risk of turbine collision. Hunting and foraging at an AGL similar to a rotor sweep area is riskier. The industry and eNGO groups spent considerable time contemplating this issue when developing the Framework and ultimately concluded that distance to nest should be the only siting criterion to determine eligibility for new wind projects.

The issues with relying on relative abundance as the threshold criterion are also illustrated by the fact that the Service's maps show a large area in the northeast United States would not be eligible for a wind energy GP; this is concerning given EWAC is unaware of significant eagle mortality attributed to wind energy in the northeast for either eagle species. If the Service insists upon using relative abundance maps as an eligibility criterion, the Service should also accept other criteria to determine eligibility in lieu of abundance maps. Other criteria could include:

- Landscape characteristics, project-specific eagle use data, inferences based on nearby projects, or other considerations.[60]

- The Service should also provide an eligibility option for those applicants who elect to manage their take through the implementation of risk reduction technology or bio-monitors. Permittees should have the option at the outset to employ minimization measures to maintain compliance with the wind energy GP. Permittees employing these measures must then demonstrate compliance through its monitoring efforts and the audit process.

- For operating projects, a project should be eligible if it can attest, based on post-construction fatality monitoring conducted by operational staff that it has found less than the number of eagles authorized under the GP over the most recent 5-year period.

Ultimately, it is essential that the Service maximize eligibility for a wind energy GP and put the burden on the permittee to manage compliance. The Service can request that permittees share their basis for determining risk at their projects during the audit process.

If the Service continues to rely on eBird for abundance mapping as an eligibility pathway, then the Service must define its method for developing abundance maps from eBird data sets and expand project eligibility margins. EWAC members are currently unable to replicate the Service's mapping approach. One of the big gaps in understanding and replicating the maps produced by both eBird and the Service is a clear understanding of the process used by eBird to generate the abundance maps. Without this core understanding, the industry cannot evaluate the science behind the decision.

Finally, the Service should avoid requiring project-specific consideration where one or more turbines fall outside the abundance mapping. The Service should instead allow new and existing projects to be eligible where a majority of project turbines fall within eligible areas or a project can otherwise qualify for eligibility (e.g., the additional recommendations above).

2. *The Service should specify how it will audit for compliance with the nest eligibility criteria.*

It is unclear how the Service will administer the nest eligibility criteria. As set forth in the next section, EWAC believes the establishment of nests within the designated nest buffers should not be a disqualifying event. And, as stated above, all projects should be eligible for a bald eagle wind energy GP. However, EWAC recognizes that, for projects in development and where practicable, siting turbines away from known golden eagle nests is a reasonable eligibility criterion. It is not clear in the Proposed Rule how compliance with this eligibility criterion can be demonstrated in the event of an audit. The Service should clarify that eagle nest surveys that are less than five-years old from the date of registration for the wind energy GP can be used to demonstrate eligibility for new projects seeking wind energy GP coverage.

[60] If the Service does not adopt a modified Alternative 2, it should work with stakeholders to develop alternative eligibility that can be applied objectively and fit within the Service's intended registration process.

3. *The Service should reduce the amount of uncertainty posed by the risk of disqualification.*

Predictability and certainty are essential to a successful wind energy general permit program. As written, the proposed wind energy GP includes several ways in which a project may become ineligible for the GP program after initially qualifying. These potential disqualifiers make it challenging for EWAC members to assess permitting costs and regulatory certainty over time. Designing a system that successively siphons permittees out of the GP program and thrusts them into the specific permit program is an ineffective permitting approach. Making a permittee ineligible for a subsequent GP also increases the burden upon the Service. As noted in the Proposed Rule, specific permits take a great deal of work by the Service; this leaves a project operator exposed if it suddenly learns it is ineligible for the GP. The Service should carefully revisit its proposed disqualifiers to ensure that disqualification is an exceptional scenario and not commonplace.

In addition to resolving the eligibility disqualifiers presented by the relative abundance mapping approach described in the subsection immediately above, the Service should carefully examine other potential disqualifiers to ensure they are not impeding the certainty and predictability of the wind energy GP. For example, eagle nests being built within 2-miles or 660 feet of project turbines by golden eagles and bald eagles, respectively, after the project has already established eligibility should not be a disqualifying event. Permittees should not be penalized for something over which they have no control. EWAC members have had several experiences where eagle nests were built near a project turbine, and it has not resulted in eagle collisions. In some cases, the nesting eagles are using areas outside the project area and do not fly through the project area. In other instances, the project proponent has employed biological monitors or technology to curtail turbines when nesting eagles are flying near project turbines. In all instances, it should be incumbent on the permittee to manage that risk to remain below its eagle take limit.

4. *The mitigation available for the wind energy GP has several flaws.*

EWAC appreciates that the Service has tried to design the mitigation component of the proposed wind energy GP to minimize project-specific processing and review. However, EWAC is concerned the mitigation component of the wind energy general permit will significantly impede its success.

- **Limited availability of conservation banks and in lieu fee programs.** As described at the outset, the Service must expand the available options for mitigation. The lack of available conservation banks, in lieu fee programs, and other mitigation options will incapacitate any final wind energy general permit program, preclude addressing key anthropogenic sources of golden eagle mortality, and hinder eagle conservation. More options are needed immediately, and the Service should also consider a per eagle mitigation structure for golden eagles as suggested in Section III.B.3.b above.

- **Lack of flexibility for wind energy project proponents with independent power line infrastructure.** Many EWAC members with wind energy projects also construct, own, and operate power line infrastructure, which may be related to or independent from specific

wind projects.[61] It is illogical to require a wind energy project proponent that has power line infrastructure in the same EMU to choose between using its own power poles to satisfy its compensatory mitigation obligation or not use the GP. Furthermore, for companies whose infrastructure is regulated by state utilities commissions, such a requirement oversteps the Service's authority and infringes on states' authorities to regulate electric rates and reasonable use of customer dollars. In that same vein, a company should not feel pressured to enroll its poles in an in lieu fee program or conservation bank to make its poles available as mitigation for general permits for its own or other wind projects. The Service must establish an option for mitigation for the wind energy general permit that allows applicants to use the general permit program and rely on compensatory mitigation options available within the applicant's company or its affiliates, or other established agreements between utilities.

- **Inability to gain efficiencies of scales with existing specific permit mitigation.** Some EWAC members have Service-approved mitigation plans for affiliated specific permits. In these instances, GP permittees should be able to "tier" off of these existing mitigation plans to fulfill their mitigation obligations.

- **Improperly requiring bald eagle mitigation.** Despite robust bald eagle populations and repeated statements by the Service that compensatory mitigation is not required for bald eagles to meet the Preservation Standard, the proposed wind energy GP includes compensatory mitigation payments for bald eagles. The Service has been forthright that the mitigation payments for bald eagles will help fund the proposed GP program. The Service has not established a rational basis for its decision to require bald eagle compensatory mitigation payments and its stated duty to meet the Preservation Standard.[62] Nor has it provided a rational basis for how it arrived at a bald eagle mitigation rate of 25%.[63] EWAC cautions that, as applied, the Service may run afoul of the constraints placed on mitigation by the U.S. Supreme Court in the Nollan,[64] Dolan,[65] and Koontz series of cases.[66] There must be an "essential nexus" between the condition and the underlying purpose of the agency's approval to which the condition is attached,[67] and the condition must also be

[61] For examples of projects that are related to wind projects, see *supra*, section I.I for EWAC's recommendations relating to Gen-Tie lines. Examples of power line infrastructure unrelated to a wind energy project would be transmission and distribution infrastructure.

[62] Michigan v. EPA, 576 U.S. 743, 750 (2015); Federal administrative agencies are required to engage in "reasoned decision making." Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359, 374 (1998) (internal quotation marks omitted). "Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational." *Id.* It follows that agency action is lawful only if it rests "on a consideration of the relevant factors." Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (internal quotation marks omitted).

[63] DEA, *supra* note 9, at 40 (discussing how the Service arrived at the current mitigation ratios and stating that "[t]o keep these mitigation calculations simple and straightforward, we will require bald eagle mitigation based on the estimated nationwide take rate for bald eagles").

[64] Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987).

[65] Dolan v. City of Tigard, 512 U.S. 374 (1994).

[66] Koontz v. St. John's River Mgmt. Dist., 570 U.S. 595 (2013).

[67] *Nollan*, 483 U.S at 837; *Dolan*, 512 U.S. at 386.

"roughly proportional" in nature and extent to the impact of the proposed land use.[68] If mitigation is paid by a permittee for the specific purpose of compensating for take of bald eagles, then any mitigation monies received by the Service or others should be used to, in fact, mitigate and/or monitor for bald eagles. Using such monies to compensate for or monitor for golden eagle take not associated with permitted activities arguably would bear no nexus at all to use of those funds to address the needs of a different species (golden eagle). It is inappropriate for the Service to require bald eagle compensatory mitigation.

- **Funneling compensatory mitigation fees to monitoring.** As discussed at the beginning of this letter, it frustrates stakeholder objectives to create a GP program where the majority of mitigation fees paid do not enhance conservation of eagles and instead are spent on unnecessary project-specific fatality monitoring. We continue our discussion of concerns with the proposed Service-conducted monitoring program in the next subsection.

- **Erroneous assumption that wind turbines operate at 100% of daylight hours.** DEA Appendix A makes clear the Service is assuming that turbines operate 100% of daylight hours.[69] This assumption in turn drives the take estimates in each EMU, which then affects the values used to ascribe mitigation rates. In other words, the assumption that turbines operate 100% of daylight hours has a direct impact on the cost of mitigation for the proposed GP program. In reality, no wind energy project operates at 100% of daylight hours and a variety of factors can result in a wind energy project operating far short of 100%. Seasonal variations in wind resource, transmission congestion, maintenance, and other factors affect turbine operations. Given the impact this assumption has on the cost of the GP program, the Service should correct this assumption and consult the wind energy industry to identify a more reasonable assumption.[70]

- **Inconsistent terminology.** The Proposed Rule is inconsistent with respect to its mitigation requirements for the wind energy general permit. In general, the Service is requiring that a wind energy general permit applicant obtain compensatory mitigation credits from a Service-approved conservation bank or in-lieu fee program.[71] However, in some instances, the Service includes a requirement to "implement required compensatory mitigation," which suggests the permittee is responsible for actual implementation of the mitigation rather than the purchase of credits.[72] A general permittee should not be responsible for the timing in which a conservation bank or in lieu fee program implements its mitigation actions and the Service should clarify this in any final rule.

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[68] *Koontz*, 570 U.S. at 619.

[69] *See* DEA, *supra* note 9, at 158 ("In our models, we treated each turbine independently and turbines were assumed to be operating during all daylight hours.").

[70] The American Clean Power Association's comment letter on the Proposed Rule provides additional information on more realistic assumptions to use. *See* American Clean Power, *supra* note 43.

[71] *See* 87 Fed. Reg. 59598, 59605 (Sept. 30, 2022) ("Wind-energy projects operating under a general permit must obtain eagle credits to the nearest tenth of an eagle."); *id.* at 59605 ("The Service will require offsetting compensatory mitigation at a fixed rate for each EMU.").

[72] *Id.* at 59629 (proposed 22.250(e)(7) requires a permittee to "implement required compensatory mitigation").

These are significant concerns affecting the viability of the wind energy GP as proposed. The Service should carefully consider EWAC's recommendations.

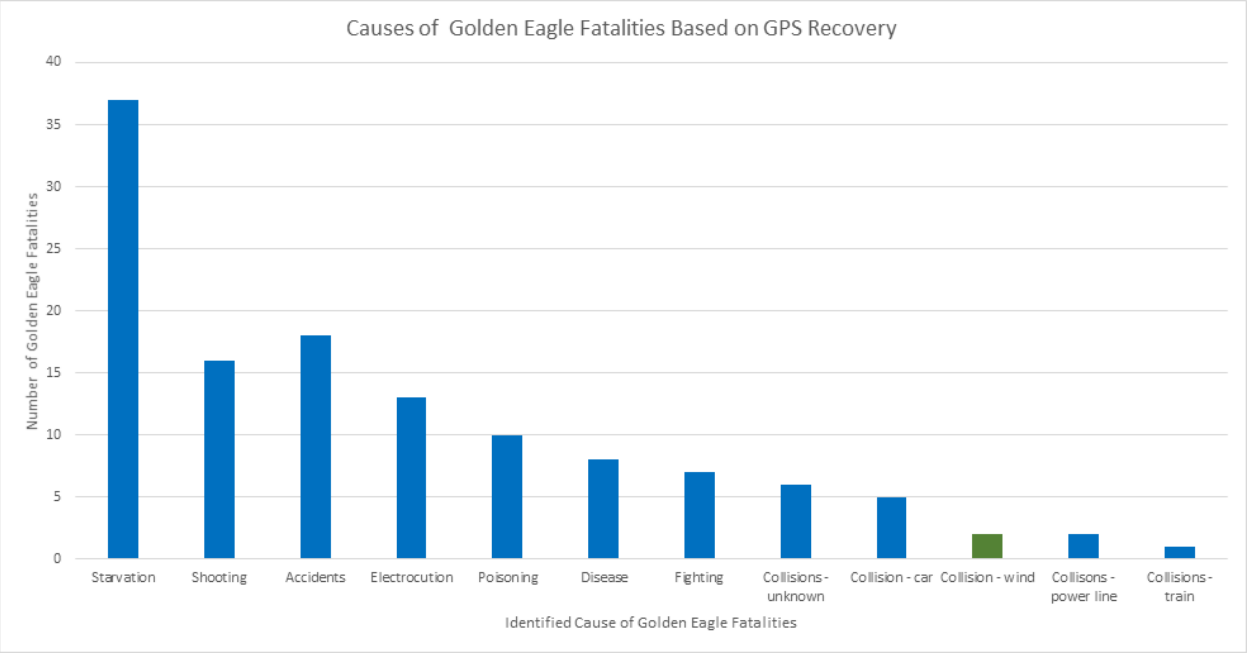
5. *The Service-conducted monitoring component of the wind energy GP must be removed.*

The removal of the Service's program-wide fatality monitoring is essential to a successful wind energy GP. This fatality monitoring requirement is unique to the wind energy GP and unnecessarily increases the cost of the GP without providing benefits to the eagles; which in turn reduces the incentive to participate.

Program-wide, Service-conducted fatality monitoring is not required to meet the Preservation Standard. The Service identified that bald eagle populations have increased by 4.4x since 2009 and are currently growing at a rate of 10% per year, which is a remarkably high growth rate that is occurring with existing wind and wires on the landscape. This growth rate demonstrates that currently, bald eagle populations are above and beyond a Preservation Standard without intervention, let alone additional monitoring or mitigation. The Service has identified that golden eagle populations are stable[73] and all golden eagle take is being fully offset at a 1.2:1 ratio; therefore, any permitted take is not impacting the population. Historically, the use of fatality monitoring in the Eagle Permit Program has been used to address the number of estimated eagle fatalities at a project. Fatality monitoring does not and cannot address or inform if the Preservation Standard is being met. Other Service efforts, such as GPS tracking of golden eagles, are a better indicator of golden eagle populations. GPS tracking provides critical information with respect to the Preservation Standard including (1) an unbiased estimate of causes of eagle fatalities, (2) adult survival rate, which is the driver of golden eagle populations, and (3) potentially even the efficacy of mitigation through the ability to detect changes in the frequency of specific causes of mortality. Data from GPS tracking, rather than fatality monitoring, is more appropriate to assess whether the Preservation Standard is being met. EWAC recommends the Service eliminate Service-conducted fatality monitoring from the final rule and instead focus permit fees on establishing a durable GPS tracking program.

It has been well documented that deaths attributable to wind energy are not a leading cause of fatalities.

[73] Brian A. Millsap et al., *Age-Specific Survival Rates, Causes of Death, and Allowable Take of Golden Eagles in the Western United States*, Ecological Applications, Apr. 2022, https://esajournals.onlinelibrary.wiley.com/doi/epdf/10.1002/eap.2544.



The proposed Service program-wide fatality monitoring for the wind energy GP represents a serious flaw to the success of the wind energy GP. If the Service maintains the Service's program-wide fatality monitoring, the items below should be addressed by the Service; however, these steps do not address the foundational deficiencies.

1. The Service must reduce monitoring intensity to below the identified value p = 0.95 probability that true take is below the permitted take.[74] Nothing in the data presented by the Service suggests that these eagle populations or in the unbiased data associated with eagle take at wind facilities requires such a high level of certainty and EWAC is concerned this probability requirement is unattainable.

2. The Service notes that eagles are only at risk for a proportion of the year for dependent on the EMU and eagle species.[75] These assumptions must be incorporated into post-construction fatality requirements. Post-construction monitoring should only be required when eagles are at risk of collision with turbines.

3. Projects must be selected by random or a stratified random design to ensure that the statistical scope of inference is correct.

4. Selected projects must be notified at least one year in advance of the study to ensure landowner notifications including, but not limited to, changes in cropping or other land uses can be given in accordance with leases. A study protocol must be provided at this time such that the selected project can provide feedback about the practicability of the design at that specific location.

[74] DEA, *supra* note 9, at 126.
[75] *Id.* at 160 (stating when bald eagles are present throughout different regions of the United States).

5. The Service must recognize that depending on the landowner and lease provisions, not all landowners may have a requirement to participate in non-operational related activities. The Service likely may need to obtain separate voluntary temporary easements directly with willing landowners to take on cleared plot work. The company should not be involved in or responsible for the Services activities and responsibilities.

6. The Service will need to take on the costs for crop clearing, crop damage/losses, and plot week/crop maintenance over the duration of the study and during the lead-up/conclusion to the study. For example, if landowners do not plant crops because of upcoming fatality monitoring or the study is done prior to the next crop planting, plots often require mowing and weed management during these times to avoid impacting the landowners in accordance with state and local noxious weed regulations. Vegetative stabilization of bare soils to minimize wind and water erosion and subsequent soil loss may also be required to maintain landowner eligibility in certain USDA crop subsidy or conservation programs and to landowner's other activities.

7. In areas of the country with significant snowfall, the Service will need to arrange and procure snow removal services to ensure turbines or access roads are open and accessible to support proposed monthly planned eagle surveys at each wind turbine. The snow removal vendors must also meet all applicable company insurance and indemnification requirements. Using snow removal equipment near turbines also carries the risk of damage to pad mounted transformers, the wind turbines, and other electrical infrastructure which could result in the release of oil to the environment and would require adherence to a company Spill Prevention, Control, and Countermeasure plan including responsible reporting and cleanup of any spills or releases.

8. The Service must follow all safety and environmental compliance requirements of a project site including, but not limited to, mandatory safety trainings, work stand downs due to weather (including icing and lightning), and all other safety directives from the company and operational teams. Also, for safety reasons, the Project may limit access to the project to days and times when project staff are onsite. The Service must allow a company representative to supervise all on-site activities, if required by the company.

In addition to the revisions noted above, the preamble and proposed language contain some contradictory statements about how Service monitoring efforts will count towards a general permittee's take estimate in the event of an audit. In the preamble, the Service notes that Service-audited monitoring will be used to "inform EMU and national estimates of take rates and ***is not intended to assess project-by-project compliance under the general-permit program***."[76] However, proposed section 22.250(d)(4) and Wind Energy General Permit Condition A(2) state the opposite:

> If the Service conducts monitoring at a wind project, eagles discovered by the Service may be attributed to the wind project. To adjust for potential differences in

[76] 87 Fed. Reg. at 59604 (emphasis added).

detection rate for Service monitoring, ***the number of eagles attributed to the project as ''discovered'' in accordance with this paragraph (d) will be adjusted based on the Service monitoring detection rate.***

This language indicates that not only will monitoring conducted by the Service during an audit count towards a facility's take limit, but any fatality discoveries will then be adjusted based on the Service's monitoring efficacy. This means that, depending on the efficacy of the Service's monitoring efforts, a Service discovery of one eagle could be adjusted to disqualify the facility from eligibility. This is an unacceptable result. A permittee's compliance should not be subject to efforts and conditions outside of the permittee's control. Any Service fatality discoveries should not be subject to any statistical estimator based on the Service's monitoring efficacy. Additionally, no project should be disqualified from the wind energy GP based on the Service's monitoring efforts.

6. *Other wind energy GP condition concerns.*

Similar to concerns noted in the Power Line General Permit Conditions document, EWAC members have determined that the Wind Energy General Permit Conditions document is written in a way that may cause confusion or unintended consequences when assessing compliance.

- Proposed section 22.250(e)(3) and Wind Energy General Permit Condition D(2)(d) require a permittee to "implement practicable measures to reduce collision with wind turbines."[77] This condition is vague and could be interpreted a number of ways. In the event of an audit, different auditors could reach different conclusions. Compliance determinations must not be based on such latitudes in interpretation. For specific permits, a permittee must implement avoidance and minimization measures that reduce take "to the maximum degree practicable relative to the magnitude of the impacts to eagles."[78] At a minimum, it should be reiterated that the use of "practicable" as used here is consistent with 50 C.F.R. 22.6, which takes into account project specifics and relative to the magnitude of impacts to eagles, which, for the GP program, would be low.

- Wind Energy General Permit Condition D(1)(a) requires project operators to monitor for and remove animal carcasses within the Project Footprint. Current regulation 50 C.F.R. § 22.80(d)(ii)(D) defines "Project Footprint" as "the minimum-convex polygon that encompasses the wind-project area inclusive of the hazardous area around all turbines and any associated utility infrastructure, roads, etc." It is unclear whether the Service means to extend that same definition to this Wind Energy General Permit Condition. EWAC cautions that any obligations with respect to carcass monitoring and removal will be influenced by landowner agreements, federal, state, and local disposal requirements and other authorities affecting the ability to fulfill this condition.

[77] Power Line General Permit Conditions, *supra* note 39, § (D)(2)(d).

[78] 50 C.F.R. 22.80(e)(5). This language appears in proposed section 22.220(b)(1) in a subsection related to compensatory mitigation, but this clarification is not included in the wind energy specific general condition language.

7. *A final rule must contain sufficient detail on the audit process.*

As noted throughout this comment letter, any final rule should provide enough detail about the audit process for stakeholders to understand how compliance will be determined. It is important that those conducting audits for the Service are evaluating projects consistently and predictably. As noted above, some of the proposed wind energy general permit conditions are written such that different auditors could come to different conclusions with respect to compliance. The Service's audit program must be developed with input from the wind energy industry.

IV. EWAC Supports a GP for Nest Disturbance Permits with Modifications.

EWAC is generally supportive of the Service's proposal to establish a GP for nest disturbance of bald eagles. EWAC calls attention to a few concerns prompted by the language in the Proposed Rule.

- **Foraging area**. The definition of "foraging area" set forth in 50 C.F.R. section 22.26 is incredibly broad. The preamble notes:

  > Removal of a foraging area has greater potential to cause disturbance; therefore, 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.[79]

  The Service's conclusion that a project proponent should apply for a specific permit is presumptuous. The Service should clarify that any decision to seek a disturbance specific permit should be contingent on the project proponent's analysis of whether nest disturbance will occur based on the particular circumstances of the project site and activity. Likewise, the definition of a foraging area is too vague to provide value to eagles or certainty to applicants. Given that nest buffers encompass the priority foraging areas that the Service is attempting to capture, EWAC recommends that "foraging areas" be removed from locations that could require a disturbance permit and only focus on nests and nest buffers for disturbance permits.

- ***De minimis* activities.** Many of the activities listed under proposed section 22.280(b) are commonly considered "*de minimis*" activities requiring no further authorization or permitting. Inclusion of these activities in section 22.280(b) suggests that permitting may be required and sets a novel precedent for requiring nest disturbance permits, which would have significant negative impacts on utility safety and reliability. For example, utilities may have mandates for vegetation management work, and these activities may need to be conducted year-round due to access or other considerations. The inability to conduct this work, or delays associated with eagle permitting, could result in significant fines and wildfire risks.

[79] 87 Fed. Reg. at 59608.

Additionally, other federal, state, and local agencies may look to the Eagle Permit Program and impose permitting conditions that have historically not been required. Additional layers of permitting will interfere with the provision of safe and reliable electricity and contradict with other agency requirements.

- **Practicability.** Proposed sections 22.280(d)(1) and (2) include conditions that a permittee: (1) "implement measures to avoid and minimize nest disturbance…" and (2) "Avoid activities that may negatively affect the nesting substrate, such as survivability of the nest tree." Both of these conditions should include the qualification that the conditions be met to the "*maximum degree practicable*." In some instances, the permittee, due to safety or other operating requirements, may not be able to fully avoid or minimize impacts/implement measures. This change would be consistent (and eliminate confusion) with section 22.200(d)(4), which states that "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 eagle."

- **Specific Permit Conditions.** The Proposed Rule indicates that permit conditions for specific disturbance permits will be informed by practicability. The Proposed Rule then provides factors such as "known efficacy of the measure," "eagle population status," and other factors.[80] The final rule should clarify that practicability for disturbance permits will be informed by the definition at 50 C.F.R. section 22.6. Additionally, proposed section 22.200(c)(2)(C)(iv) requires an applicant to include implemented and proposed steps to avoid, minimize, compensate, and monitor impacts on eagles. The Service should be careful to recognize practicability limitations in an applicant's proposed conditions and not dictate to an applicant what is practicable. The Service should also acknowledge that its practicability definition includes consideration of the impacts to eagles, which in the case of impacts to bald eagle nests, is insignificant.

V. EWAC Supports a GP for Nest Disturbance with Minor Modifications.

EWAC is supportive of the Service's proposal to establish a GP for nest disturbance of bald eagles. However, EWAC suggests that the Service reconsider its 1-year limit for the nest removal GP. Oftentimes project work prompting the nest removal will continue for more than one year. Given the potential for bald eagles to rebuild their nests, having a nest removal GP with a longer term is warranted.

EWAC also suggests that the Service include a golden eagle nest removal GP for limited circumstances in the event of imminent human health, safety, and fire risks. While such situations are rare, utilities must have the ability to obtain golden eagle nest removal permits in real time for emergency response purposes.

[80] *Id.* at 59607.

VI. The Service's Administration of the Wind Specific Permit Program Must Be Improved to Be Successful.

EWAC is pleased to see the Service has proposed removing both the third-party monitoring requirement and the 5-year review for longer term Eagle Permits. EWAC agrees these are improvements to the specific permit process and supports the Service including these revisions in any final rule. EWAC also agrees that asking permittees to certify to the accuracy of information gathered and recorded (and the penalties posed by 18 U.S.C. § 1001) is a reasonable approach to administering reporting and monitoring requirements for the specific permits.

EWAC understands the Service's primary focus in the Proposed Rule was to propose GPs for the Eagle Permit Program. However, for those potential permittees who are unable to qualify for a GP or who are later disqualified from continued use of the GP, improvements to the specific permit program are a critical piece of a successful Eagle Permit Program.[81] Below, EWAC focuses on parts of the specific permits for wind energy that are hampering administration of the Eagle Permit Program and includes recommended solutions where possible.

A. Collision Risk Model. The current approach to predicting take and setting take authorizations is problematic and needs improvement.

The Service has developed the collision risk model ("CRM") to predict take for wind energy industry applicants. The Service made clear in the 2016 Eagle Rule that it chose to apply the CRM in a way that will most often result in an overestimation of take predictions. EWAC understands this is how the Service has elected to manage its perceived duty to meet the Preservation Standard at the project-level.

However, EWAC believes applicants should be allowed to proffer their own estimates for take authorization, request the take authorization they think is commensurate with their risk evaluations, and manage their take levels through their permit's adaptive management provisions. Like the ESA incidental take permit program, these permits are voluntary and should be applicant-driven; the applicant should control its request for authorization. The Service needs to revisit the CRM approach currently required by the Eagle Permit Program and work with the regulated community to incorporate a more realistic and applicant-driven approach.

The historical use of the CRM in the Eagle Permit Program has created several issues:

- **Effect of over-estimation.** The Service continues to implement the CRM in a way designed to overestimate take predictions, and the Service then continues to rely on the CRM predictions to recommend Eagle Permits for any project estimated to take more than one eagle over 30 years.[82] Higher predictions result in higher mitigation

[81] It should be noted that uncertainties surrounding the specific permit program could dissuade participation as a general permittee, given the risk of a general wind permittee being disqualified and thrust into the specific permit program. A permittee might choose to avoid either permit program.

[82] Given the development of the general permit, this threshold ought to at least be increased to more than four eagles over five years, which is the GP limit.

requirements because the Service is requiring mitigation commitments that are proportional to modeled, rather than actual, take.[83] These higher mitigation requirements then become permit conditions, which in turn means an applicant must budget at the outset for commitments to mitigation levels that neither it, nor the Service, think are realistic. An applicant seeking an Eagle Permit should not be required to accept Eagle Permit conditions it does not believe are reasonable. These higher take predictions also draw unnecessary negative attention to both the project proponent and the Service by artificially inflating the take that is likely to occur. Overestimated take predictions can unfairly "demonize" a project. Negative public perception has implications for a project's community support, litigation risk, industry reputation, and results in unnecessary criticism of the Service.

- **The current application of the CRM inappropriately favors generic priors-only data over site-specific data.** In the 2016 Eagle Rule, the Service set a data standard threshold that an applicant must meet for site-specific, preconstruction data to be used in the CRM predictions. If data gathered at a project are insufficient to meet this threshold, then the Service will reject the site-specific data and instead will rely solely on generic inputs (i.e., priors) from the Service dataset to predict take at a project. In other words, if project data taken from the project area falls short of the Service's established threshold, then the Service will use generic data collected in other regions under markedly different conditions and ecological settings to predict a project's potential take.

- **Many project proponents who are developing, or have acquired projects that were in development for many years prior to the 2016 Eagle Rule, find themselves with site-specific data that the Service will not factor into CRM predictions.** New projects also struggle to have their site-specific data included into take predictions because of an inability to meet the 2016 Eagle Rule spatial coverage requirements for preconstruction surveys. Given that turbine layouts and project boundaries are constantly evolving through development to address the numerous required non-wildlife constraints, a project proponent may ultimately be unable to meet the spatial requirements of the 2016 Eagle Rule while developing a dataset that will work for the project's final layout. Significant time and money have then been spent on collecting site-specific data that are then summarily rejected from consideration. Discrediting site-specific data in favor of generic data contradicts the long-standing principle that site-specific data are the best available science. Peer reviewed science has shown that using site-specific data better predicts eagle fatalities than does generic priors.[84] Project-specific data remain a better indicator of eagle use at a given project site than generic data. The Eagle Permit Program should favor use of site-specific data over generic data since, as a rule, site-specific data constitutes the best available scientific information.

[83] This also contradicts 50 C.F.R. § 22.80(e)-(f), which require that mitigation be based on "remaining unavoidable impacts." See discussion *infra* Section VI.A for more detailed discussion on this point.

[84] Biological Opinion for the MidAmerican Energy Company Incidental Take Permit and Habitat Conservation Plan, 44 (Nov. 7, 2019), https://ecos.fws.gov/docs/plan_documents/bobs/bobs_2966.pdf.

- **Effect of using priors-only CRM to predict bald eagle take combined with requiring Evidence of Absence to estimate fatalities and demonstrate Eagle Permit compliance.** While the Service has directed use of the CRM in a way that will overestimate take predictions of golden eagle take 80% of the time, the 2021 update to the CRM to include bald eagle priors created another problem. For all the reasons explained above, many projects will not have site-specific data that meets the Eagle Permit Program standards. In those instances, the Service requires that generic priors-only data must be used to predict eagle fatalities to inform the take authorization that will be used in the Eagle Permit. The limited dataset used to inform the bald eagle priors is such that, when no eligible site-specific data are available for use in the CRM, the predictions generated will produce very low numbers of predicted take. While this alone is not necessarily a problem, the Service requires Evidence of Absence ("EoA") monitoring to demonstrate compliance with a permittee's take authorization. The nature of EoA is that a permittee must expend significant efforts on post-construction monitoring to demonstrate compliance with such low take numbers, in other words proving a negative.

- **The current approach to CRM lacks transparency and removes the applicant from a critical piece of the Eagle Permit process.** Currently, the Service will not use an applicant-generated take estimate to inform the ultimate Eagle Permit authorization. Instead, the Service requires that all CRM predictions be generated from the National Eagle Service Team ("NEST"), a single group of Service staff whose identities are not widely disclosed. At this time, the backlog with the NEST results is lengthy, sometimes multi-year delays in permit processing. EWAC members have also experienced significant discrepancies in predictions produced by the NEST without any explanation or opportunity to ask the NEST to "check their homework" or discuss discrepancies. Most troubling, is that despite having the assistance of qualified expert statisticians and wildlife biologists, applicants cannot replicate the NEST's CRM prediction. Typically, the inability to replicate a model's predicted outcome would be an indictment of the model itself. Applicants have no way of knowing if the model is flawed, or the process by which the applicants use it is flawed. At present, the CRM is a black box that generates a number. This number then becomes the Eagle Permit take limit. Often, prospective permittees will not see the Eagle Permit take limit until the Service publishes the Eagle Permit documents for public comment. Applicants are then forced to choose between proceeding with the permitting process even when the limits, terms, and conditions are unacceptable, or publicly air grievances with the Service, damaging reputations, and increasing litigation risk. This is unlike any other environmental permitting regime and creates an untenable situation for applicants seeking Eagle Permits.

Many wind energy facilities have diligently collected post-construction fatality monitoring data while others are located near other similarly situated facilities with overlapping ownership. Other wind energy facilities have specific characteristics that help inform the eagle risk at that project area. In all of these cases, project- or area-specific fatality data may be a better predictor of take risk than the CRM, particularly when the CRM prediction relies on generic use data and assumes

a relationship between risk and use. Again, applicants should be allowed to proffer their own estimates for take authorization, request the take authorization they believe is commensurate with their reasonable risk evaluations, and manage their take levels in coordination with the Service through their permit's adaptive management provisions.

EWAC membership has given considerable thought to how best to resolve the issues created by the current application of the CRM. EWAC has the following recommendations to resolve the issues created by the CRM:

- Take estimation and the amount of take authorization requested should be applicant driven. The Service's review should be limited to ensuring the methods are scientifically sound.

- Any approach to predicting take produced by the Service should be based on site-specific data that are transparent and replicable by the applicant.

- The Service should accept other approaches to developing take predictions. Options could include:

    - A Resource Selection Model to predict the use of eagle resources within a project's boundaries based on resource availability.[85]

    - Using the existing CRM with additional detail that would better formulate predictions.
        - Incorporate spatial data and make it spatially explicit to reflect the fact that all locations within a project are not uniformly risky.
        - Determine if there are other covariates that would make it a better predictor of eagle risk than only minutes. These data may come from where there have been eagle fatalities or from other sources.

    - Use existing intensive datasets collected from IdentiFlight® (including photos and flightpath information) and existing eagle GPS data to help inform eagle risk.

B. Evidence of Absence. The Service's insistence on using EoA for post-construction mortality monitoring at wind energy facilities and its disproportionate focus on eagle monitoring are significant impediments to the Eagle Permit Program.

The objective of compliance monitoring is to demonstrate compliance with the permitted take. The 2016 Eagle Rule acknowledges that the level of monitoring effort should be commensurate with the magnitude of impacts to the species, where it states, "The frequency and duration of required monitoring will depend on the form and magnitude of the anticipated take and the objectives of

[85] Resource Selection Models have been used successfully to map golden eagle resource selection in various regions. *See e.g.*, Kathy M. Hixson et al., *Seasonal Variation in Resource Selection by Subadult Golden Eagles in the Great Basin Desert* (2022), https://onlinelibrary.wiley.com/doi/epdf/10.1002/wlb3.01002 (mapping golden eagle resource selection in the Great Basin Desert).

associated avoidance, minimization, or other mitigation measures, not to exceed what is reasonable to meet the primary purpose of the monitoring . . ."[86] Studies have demonstrated that eagle carcasses generally persist on the landscape and can be readily found by trained searchers.[87] However, the Service has increasingly insisted on the use of EoA for post-construction fatality monitoring. The Service often cites to its own regional or in-development guidance when asserting EoA as a "requirement." As noted at the beginning of this letter, it is inappropriate under both the APA and current Eagle Rule language for the Service to be requiring EoA without further vetting by the public.

The EoA's use of the *g*-value (overall or site-wide probability of detection) creates a confounding problem: the lower the expected impacts to eagles, the higher the effort required under EoA to "prove" that the permittee did not miss eagle carcasses. Thus, maximal monitoring effort is required for projects that are expected to have minimal impacts to the species. This is not only a discouraging and inequitable result, but also an illogical one. EoA for a 30-year permit for a project predicted to take minimal eagles results in *millions of dollars* spent on monitoring efforts purely to overcome the uncertainty of EoA. It creates a perverse incentive to cite facilities in areas with higher eagle use to increase the likelihood that compliance monitoring obligations can be successfully met.

In some instances, the *g*-value required by the Service is not even attainable because of project characteristics beyond the applicant's control.[88] Weather, crops, and variability in carcass persistence can all significantly impact an applicant's ability to meet target *g*-values. Even if a permittee has found zero eagles, the permittee may still find itself in a non-compliance scenario. Permittees are unable to know whether they are in compliance with permit terms because the estimates produced by the results of EoA monitoring are not known until well after the monitoring season. As a result, it is impossible to know if a project is in compliance in real time. This situation occurs because of the complicated probability statistics and because EoA essentially speculates about what might have happened based solely on measurements of likely search effort success, not risk to eagles. This, as a result, introduces significant uncertainty in the value of eagle fatality monitoring results required by the permit that has nothing to do with actual eagles that may have been killed at a project. Results can be deemed "insufficient" for purposes of meeting *g*-value for reasons beyond the permittee's control (weather conditions, scavenger rates, anomalous searcher efficiency, etc.).

The Service is increasingly requiring all permittees to commit to a *g*-value of 0.35. In addition to the legal issues raised by imposing guidance as an additional permit requirement without notice and comment,[89] requiring a blanket *g*-value contradicts the Service's own conclusions. In the Appendix to the DEA, the Service acknowledges that higher take requires less monitoring to

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[86] 50 C.F.R. § 22.80(c)(2)(ii). This position is also consistent with the Service's Five Point Policy, which states, "The scope of the monitoring program should be commensurate with the scope and duration of the operating conservation program and the project impacts." 65 Fed. Reg. 35242, 35254 (June 1, 2000).

[87] *See* Renewable Energy Wildlife Institute, *Compensatory Mitigation for Golden Eagles: Reducing Vehicle Collisions*, *supra* note 21, at 4-5.

[88] Topography, crops, weather events, and other factors can limit the *g*-value attainable at a project site.

[89] *See supra*, Section I.H.

demonstrate compliance and the level of monitoring (level of *g*) should be determined based on the permitted take.[90] In fact, the Service states: "This is because the expected number of fatalities decreases as the number of enrolled turbines decreases, and sampling intensity is linked to the expected number of fatalities."[91] The Service itself has therefore acknowledged a blanket *g*-value is inappropriate, yet it continues to require a blanket *g*-value of permittees.

Some Service regions have taken the position that not meeting the *g*-value goal set forth in an Eagle Conservation Plan ("ECP") is "non-compliance," *even if the monitoring estimates produced by the monitoring effort are sufficient to demonstrate the permittee is in compliance with its permit*. Such an improper use of statistical tools goes beyond the Service's regulatory authority. The BGEPA prohibits take of eagles.[92] It does not prohibit hypothetical take. A wind turbine operator cannot be convicted of violating BGEPA by the use of EoA that hypothecates an eagle may have been taken. The government would have to produce actual evidence of a take. Likewise, the Service stretched its statutory authority to require an applicant to use a model that presumes noncompliance even if no eagle fatalities are found.

For the Eagle Permit Program to be workable, a permittee must be able to reasonably and reliably ascertain its day-to-day compliance with permit requirements. The insistence on using EoA at either an annual (typical for permits issued under the 2009 Eagle Rule) or five-year (typical for permits issued under the 2016 Eagle Rule) frequency to determine whether the permittee's estimated take is on a trajectory to not exceed the permitted take limit ensures that a permittee cannot know whether they are within their predicted trajectory unless and until the Service completes its analysis, review, and approval after the fact.[93] The Service's evaluation of fatality monitoring results is unclear. The Service has not been forthcoming as to whether it is using the "average" annual fatality estimate produced from EoA, the total estimated take over the monitored period at the mean, a 50 or 80 credible limit, or the weighted mean of the probability distribution. The Service's process is not transparent and cannot be replicated.

The level of effort required by EoA and the uncertainty presented by the results is unnecessary and disproportionate to the impacts to the species and does not create a conservation benefit for either species of eagle. It also creates an unnecessary drain on Service and project resources. The Service should not insist on EoA monitoring as a condition to an Eagle Permit. Other proven options involve a more proportional level of effort and cost to verify that eagle impacts at a project are within permitted expectations. The Service has adopted an approach that saddles the projects with both disproportionally high monitoring costs and compliance uncertainty.

EWAC has the following recommendations to resolve the issues created by use of EoA for specific permits:

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[90] DEA, *supra* note 9, at 128-29.
[91] *Id.* at 129.
[92] *See* 16 U.S.C. § 668c (expressly defining take under BGEPA); *see also supra* note 8 (discussing the breadth of regulatory authority under BGEPA).
[93] Further, the EoA inputs are not black and white, so in some cases qualified statisticians would approach EoA differently.

- The Service should assess compliance based on eagle fatalities actually discovered (i.e., not on estimated fatalities).

- The Service can demonstrate fulfillment of the Preservation Standard without requiring intensive project-specific monitoring. The Service could alleviate the level of effort required at the project-level but still have enough data to feel confident that eagle populations remain stable or are increasing (or that the permitted take is not the cause of population decreases or instability).[94]

- Project-specific monitoring using EoA can help inform overall estimated take from wind in a particular area or regions and population-level trends for purposes of meeting the Preservation Standard.[95] However, EoA should not be used to determine compliance at the project-level over short intervals.

- EoA should only be applied to a project when assessing take over the life of project (i.e., 30-years, not 5-year intervals).

VII. EWAC is Concerned the DEA Does Not Satisfy NEPA Requirements.

EWAC notes several aspects of the DEA that do not satisfy a number of NEPA requirements. NEPA establishes "twin aims" for all environmental review documents: to ensure that the agency has taken a "hard look" at the environmental consequences of its proposed action, and to make information on the environmental consequences available to the public, which may then offer its insight to assist the agency's decision-making through the comment process.[96] Here, the DEA has deficiencies in meeting both objectives.

A. The DEA is improperly scattered and conclusory.

Large portions of the DEA have nothing to do with the potential environmental impacts of the Proposed Rule or alternatives to the Proposed Rule. Rather, the Service has used the DEA to describe, and seek to justify, a number of statutory and regulatory interpretations, proposed changes or aspects of the existing Eagle Permit Program, and proposed changes to Service policies. All the descriptions of the Proposed Rule's workings and the explanation of changes to the existing Eagle Permit Program belong in the preamble for the Proposed Rule or a regulatory impact analysis, not the DEA. An environmental assessment may be accompanied by other planning or decision-making documents, but the portion of the document that analyzes environmental impacts "must be clearly and separately identified and not spread throughout or interwoven into other sections of the document."[97] The DEA does not meet this basic formatting requirement. Instead,

[94] *See supra* section VI.B (explaining that program-wide, Service-conducted fatality monitoring is not needed to meet the Preservation Standard).
[95] EWAC believes that while monitoring using EoA can inform the take levels attributable wind projects, the Preservation Standard should be informed by population surveys and GPS studies given wind energy is neither the sole nor leading cause of eagle mortalities.
[96] Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350, 356 (1989).
[97] 43 C.F.R. § 46.315 (2017).

the Service has used the DEA to explain the Proposed Rule, not to evaluate the potential environmental impacts of the Proposed Rule and alternatives to that action.

B. The Service used an improperly narrow purpose and need and range of alternatives.

The DEA's statement of the need for the proposed action elevates the relative risk to eagles above all other considerations, which is an unreasonably narrow statement of purpose and need and does not comply with NEPA requirements. An agency cannot define the objectives of its action so unreasonably narrow that only one alternative would accomplish the goals of the agency's action. To do so renders the environmental review a foregone conclusion, particularly where there are other environmentally benign alternatives that are within the agency's authority.[98] Here, the narrow focus on relative eagle risk biases the DEA and analysis of alternatives.

The DEA's need statement begins with an appropriately broad description of the need to improve "the system of regulations for authorizing incidental take and eagle nest take."[99] It follows with an equally broad purpose statement: "to increase the conservation benefits provided to both eagle species by encouraging increased participation in eagle incidental-take permitting and improving our efficiency in reviewing permit applications and administering permits."[100] However, the DEA then closes its need statement with the much narrower criteria that the Service actually used to screen alternatives, three of which focus on relative risk to eagles. One of the alternatives even prioritizes influencing where wind energy projects are constructed, which has nothing to do with increasing participation in the permitting program or improving the efficiency of permitting review and is entirely outside the Service's authority. Throughout the DEA, these risk-focused criteria supplant the broad statement of purpose and need that begins the section, as is demonstrated by the alternatives the Service selected for detailed evaluation and its preferred alternative.

These narrower screening criteria prioritize minimizing relative risk to eagles above all other considerations throughout the Service's considered alternatives. That bias was further amplified by focusing on eagle abundance as the single measure of relative risk. In prioritizing eagle risk and focusing on eagle abundance as the primary metric, the Service foreclosed serious consideration of Alternative 2, even though Alternative 2 would achieve the broad purposes of increasing Eagle Permit Program participation, increasing eagle conservation, improving program efficiency, and would account for eagle risk. The Service did so solely because Alternative 2 does not prioritize minimizing relative risk to eagles in the way that the Service would prefer. This suggests that the Service used its improperly narrow purpose and need statement to dictate the outcome of its analysis.

The purpose and need for the agency action determines the scope of alternatives to be analyzed in the environmental review.[101] Here, the Service improperly elevated a particular measure of relative risk to eagles above all other considerations as it chose among alternatives. This error was

[98] Friends of Se.'s Future v. Morrison, 153 F.3d 1059, 1066 (9th Cir. 1998).
[99] DEA, *supra* note 9, at 11.
[100] *Id.*
[101] League of Wilderness Def.-Blue Mountains Biodiversity Project v. U.S. Forest Serv., 689 F.3d 1060, 1069 (9th Cir. 2012).

facilitated by the improperly narrow screening criteria that close the DEA need statement. As a result, the outcome of the DEA's analysis was a foregone conclusion.

C. The Service performed an inadequate evaluation of alternatives.

The "touchstone" of NEPA compliance is whether the "selection and discussion of alternatives fosters informed decision-making and informed public participation."[102] The alternatives analysis "should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decision maker and the public."[103] Here, the DEA merely reinforces the Service's predetermined objective of limiting the general permit program to areas of the country that have few eagles. It does not provide the Service or the public with a clear basis for choosing between a relative abundance-based GP program and other alternatives like that proposed in Alternative 2.

The Service's decision to select relative eagle abundance – determined by a crowd-sourced database – as the primary measure of risk to eagle populations, has fundamentally skewed the DEA's evaluation of alternatives. For example, the DEA dismisses Alternative 2 on grounds that some projects with relatively high eagle abundance would qualify for a general permit.[104] However, in Appendix A, the DEA acknowledges the evidence that eagle abundance is a poor predictor of eagle fatalities at wind energy facilities.[105] Thus, the primary justification that the DEA offers to reject an approach like Alternative 2 is substantially undercut by evidence that the agency's preferred proxy for eagle risk is unreliable. The DEA improperly dismisses without further evaluation the evidence that abundance does not directly equate to exposure or fatality risk. In so doing, the DEA does not take a "hard look" at alternative proxies for the risk of eagle fatalities, and so has failed to satisfy NEPA's requirements.[106]

The myopic focus on relative abundance entirely overlooks the question of whether a GP that is only available in areas of the country that have few eagles will actually attract a significant number of applicants. The Service assumes that will be the case, but the DEA offers no evidence or analysis to support that conclusion. The Service does not explain why it believes that project owners with low eagle use at their projects would, nevertheless, find it attractive to obtain GP coverage. Nothing in the DEA or Appendix A supports the conclusion that a GP that is limited to the lowest risk areas will attract a large number of applicants.

The DEA states that using eagle abundance, and limiting GP to areas with low eagle populations, gives the Service confidence that cumulative eagle fatalities will remain below EMU take limits.[107] However, this is misleading at best, given that EMU take limits are a percentage of the eagle population, not a fixed number. In areas with greater eagle abundance, the potential for eagle take

[102] Westlands Water Dist. v. Dep't of the Interior, 376 F.3d 853, 872 (9th Cir. 2004).
[103] 40 C.F.R. § 1502.14 (2020).
[104] DEA, *supra* note 9, at 80.
[105] *Id.* at 119.
[106] Nat'l Parks Conservation Ass'n v. Semonite, 916 F.3d 1075, 1077 (D.C. Cir. 2019) (stating that an agency must "rigorously appraise[] the project's environmental effects").
[107] DEA, *supra* note 9, at 35.

is offset by the larger size of the eagle population and would remain compatible with the Service's Preservation Standard of stable or increasing breeding populations.

Appendix A of the DEA also demonstrates an implicit assumption that the Service made about the design of a GP program that caused it to favor relative abundance as a proxy for risk: the desire to map where the GP will be available. Appendix A describes this geographic focus: "Another advantage of using eagle relative abundance to establish an a priori general permit zone is that eagle relative abundance can be mapped."[108] In discussing Alternative 2, the Service comments that because it does not know where all eagle nests are on the landscape, it is "unable to perform as rigorous an analysis of the Alternative's impacts."[109] However, Alternative 2 requires certification of more than the minimum distance between turbines and eagle nests. Thus, the Service had the information it needed to evaluate the risk posed by Alternative 2. It simply could not define a "general permit zone" on a map. But nowhere in the DEA or the Proposed Rule does the Service justify limiting GP alternatives to those that can be depicted on a map. As stated above in Section III.C.1, limiting GP eligibility to those that qualify under the Service's relative abundance maps is inappropriately limiting and not supported by the data.

D. The Service inadequately considered mitigation alternatives.

The DEA recognizes that a number of methods could provide compensatory mitigation for eagle take, but does not evaluate or consider any single mitigation alternative to power pole retrofits. The Proposed Rule also would allow compensatory mitigation to be provided by paying in lieu fees, but those fees would only be used for power pole retrofits. The failure to seriously consider alternatives to power pole retrofits violates NEPA requirements. NEPA requires "a reasonably complete discussion of possible mitigation measures."[110] It is not enough for the Service to acknowledge the existence of alternative mitigation strategies but dismiss them from further consideration with the comment that the Service may approve them in the future. The DEA does not provide any discussion of mitigation alternatives, let alone a "reasonably complete" exploration of those alternatives. NEPA obligates the Service to explore possible mitigation measures, beyond power pole retrofits.

Moreover, the DEA provides no evaluation of whether there are sufficient power pole retrofit opportunities available to meet the demand that the Service is attempting to foster. The agency has set an objective of increasing participation in the Eagle Permit Program. If it succeeds in advancing that objective, then there will be increased demand for power pole retrofits, since that is the only form of compensatory mitigation the Service has approved. The DEA cannot provide a "reasonably complete discussion of possible mitigation measures" without exploring how that increased demand will play out, including whether the method of mitigation that the Service would require through its Proposed Rule will actually be available.

[108] DEA Appendix A, at 119.
[109] DEA, *supra* note 9, at 80.
[110] Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 352 (1989).

E. The Service did not adequately analyze socioeconomic impacts.

As discussed previously, the DEA erroneously used Harness (2000) as the basis to extrapolate the number of poles that would need retrofitting to prevent electrocutions. Because this analysis relied on an assumption of 76% of existing poles to be avian-safe, the DEA grossly underestimated the number of poles potentially needing retrofitting and therefore significantly underestimated the costs of the power pole permit, specifically the proactive retrofit component. For EWAC utility members, their estimated permit cost may be hundreds or even thousands times greater than the Service's estimated cost; this was obviously not analyzed in the DEA.

The DEA has not analyzed the cost of the impact of eagle disturbance permits on activities that have to date been otherwise considered *de-minimus*. Activities such as vegetation management, linear infrastructure maintenance, and aerial line inspections are currently conducted by utilities without additional permitting requirements, are considered routine O&M or *de-minimus* by other federal and state agencies, and can be required by other agencies (such as FERC). Failure to conduct these activities in a timely manner can result in significant utility fines for non-compliance or risks associated with wildfires, outages, or reliability. For example, if nest disturbance permits were required for all utility O&M activities within the proposed buffer distances, the estimated costs would be hundreds of thousands of dollars for environmental reviews and permitting alone, and the cost for non-compliance with other reliability regulations would be in the millions. These costs have not been evaluated in the DEA.

VIII. Questions Posed by the Service.

- Are the anticipated number of annual permits to be issued for each permit type a reasonable estimate?
    - As written, the Proposed Rule presents too much uncertainty to gauge the accuracy of the estimates provided by the Service, but EWAC believes the number is too high. The proposed reliance on relative abundance mapping for the wind energy GP and the above-described concerns identified in the power line GP are likely to discourage participation.

- Are the costs associated with each permit type reasonable estimates?
    - No, the costs provided severely underestimate the cost of implementing the proposed power line GP as written. With respect to the wind energy GP, it is unlikely to be accurate. The DEA suggests the average project size is 36 turbines. If this was the project size used to estimate costs, this is likely an underestimate.

- 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?
    - Power pole maintenance, rehabilitation and reconstruction is variable depending on a number of factors including service area conditions (e.g., humidity,

snow), age of the system, and materials used. Please see Sections I.D and II.D for discussion of retrofit considerations, including APPs.

- We propose the use of abundance criteria as a threshold qualification for a wind energy general permit. Are there other eligibility criteria for wind-energy general permits, either based solely on population abundance or beyond population abundance, we should consider adopting that would provide certainty and simplicity in the permit process for eligible projects while still meeting the Eagle Protection Act's preservation standard, including the criteria analyzed in Alternative 2 of the DEA?
    - EWAC does not support the use of abundance maps as the primary eligibility criterion. An explanation for its position and potential alternatives are provided in Section III.C.1.

- Should the relative abundance thresholds for wind energy general permits (listed in table 1) be updated automatically based on new data, and if so, how often?
    - If abundance thresholds are retained in a final rule, they should be updated based on new data every five years.

- Should the Service consider different thresholds for when a project is disqualified from general-permit eligibility, such as creating categories based on the generalized probability of detection?
    - As discussed in Section VI.B probability of detection should not be used in the GP or specific permit program. EWAC discusses disqualification considerations in Section III.C.3.

- Is the amount of compensatory mitigation required under this proposed rule sufficient to meet the preservation standard, considering risk, and uncertainty?
    - The proposed wind energy GP improperly imposes requirements beyond the Preservation Standard by requiring compensatory mitigation for bald eagles.

- How should the Service analyze the potential cost savings to industry from this rulemaking, and does the public have data to bolster this analysis in the final rule?
    - The proposed GP program does not guarantee cost savings. *See* Section I.F above.

- Are there estimates or projections of the spatial distribution of anticipated wind energy industry growth that are relevant to this proposed rulemaking?
    - EWAC does not have data responsive to this question.

- In the DEA, the Service estimates that retrofitting 11 power poles is required to offset one eagle. Assuming a retrofit costs $7,500, each credit is therefore assumed to cost $82,500 in the marketplace. Are these assumptions, the retrofit cost, and the market price of an ''eagle credit'' reasonable?
    - EWAC members have reported a range of prices.

- 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?
    - As noted in Section I.G, a uniform audit program should be developed with input from the audited sectors.

IX. Conclusion

EWAC members strongly support an amended BGEPA Eagle Permit Program that achieves greater participation, improves conservation, and is legally defensible. EWAC members, both in the wind and power line industries, have a vested interest in a successful Eagle Permit Program that provides a clear, practicable pathway to obtaining liability protection under BGEPA. A GP program is critical to a successful Eagle Permit Program. EWAC appreciates that the Service has proposed a GP program, and EWAC is committed to work with the Service to establish a successful GP program. The proposed GPs are a good foundation and currently contains many necessary aspects to make a general permit successful. However, to achieve the level of participation desired by the Service and the industry, EWAC believes changes consistent with the recommendations of this letter need to be made to any final program.

***

Please feel free to contact the following EWAC representatives:

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ATTACHMENT A

Power Line General Permit Conditions
Version 9.15.2022

A. **Authorization**. You are authorized to injure and/or kill bald eagles and golden eagles incidental to operations of power line infrastructure in the state(s) listed in the location above. ~~Take is authorized provided there is no practicable alternative.~~ The authorization applies only to incidental take resulting from activities conducted in accordance with the description contained in the general permit application and the terms of the permit. You are authorized to transport injured eagles to a permitted migratory bird rehabilitator or a licensed veterinarian. You are ~~authorized~~permitted to possess and transport eagles for authorized disposal purposes.

B. **Prohibited.** This permit does not authorize disturbance of an eagle nest or eagle nest take, including substantively modifying nesting substrate sufficient to render the substrate unsuitable for eagle nesting. Except as provided elsewhere, this ~~This~~ permit does not authorize the possession of eagles, nestlings, or eggs ~~except for authorized disposal purposes~~.

C. Avoidance, Minimization, and Adaptive Management:
(1) ~~All~~ N~~n~~ew construction and reconstruction of poles in eagle risk areas must be ~~electrocution~~avian-safe as defined in 50 CFR § 22.260, as limited by the need to ensure human health and safety. The Service recommends the technical reference Suggested Practices for Avian Protection on Power Lines by the Avian Powerline Interaction Committee (available at aplic.org).

(2) ~~For new construction and reconstruction, you must incorporate information on eagles into siting and design considerations as practicable, including siting a safe distance from nests, foraging areas, and roosts; considering the population status of the species; and considering human health and safety, overly burdensome engineering, and/or significant adverse effects to biological, cultural, or historical resources.~~ For new construction, consider eagle nest buffers (660 ft. for bald eagle and 0.5 mile for golden eagle; active nests only) and communal winter roost buffers (bald eagle only) into construction schedules, subject to human health and safety, and/or significant adverse effects to biological, cultural, or historical resources. In areas with natural features such as mountains, waterways, and other features that separate the landscape or anthropogenic features such as highways or urban/industrial development, buffer sizes may be reduced. The use of biological monitors may also be allowed in cases when work is necessary inside buffer zones. An emergency exemption for all buffers is allowed in the case of restoring power or addressing an immediate human health/safety/fire emergency.

(3) You must ~~implement a reactive retrofit plan. A reactive retrofit plan is a strategy to respond to incidents where eagles are electrocuted or killed. The reactive retrofit plan must include information on how eagle electrocutions are detected and identified. 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 circuit that caused the electrocution may be counted towards this retrofit requirement only if all poles in the circuit~~

~~are already electrocution-safe.~~ implement a reactive retrofit strategy following all incidents involving the electrocutions of eagles; the number and location of poles retrofitted will address eagle risk within one half-mile of nearby company power lines. The total poles retrofitted for the reactive action will total no more than 11 poles, although additional poles may be addressed and counted as proactive poles.

~~(4)You must implement a proactive retrofit plan to convert all existing infrastructure to be electrocution-safe. A proactive retrofit plan is a strategy to convert existing infrastructure to electrocution-safe infrastructure. The proactive retrofit plan must include information on how poles are identified as not electrocution-safe, how poles are prioritized for retrofit, what retrofit designs are used, and how the plan is to be implemented. The proactive retrofit plan must identify annual targets for the number of poles to be retrofitted.~~
(4) You must implement a proactive retrofit strategy to convert high eagle risk existing poles to avian-safe.

- For utilities that do not have APPs or do not know what percentage of their system is avian-safe: the company must develop a process to identify high eagle electrocution risk poles on your system and document this process in an APP or other corporate commitment document. Utility must develop and implement a program to identify and convert high-risk poles that are not avian-safe. This proactive strategy must demonstrate improvement (a reduction in number of un-safe poles) over the duration of the permit.
- For utilities with established APPs that include an existing process to identify eagle risk areas, the company should retrofit a set percentage of poles within high eagle risk areas over the five-year period, as identified as part of the utility's APP. Eagle risk areas would be identified by the utility and may be based on circuits, poles, or geographic areas.

~~You must convert one tenth of infrastructure that is not electrocution-safe, as of the effective date of your first general permit, to be electrocution-safe within the duration of this permit. You must prioritize poles that are high risk to eagles.~~

(5) You must implement ~~a collision response plan. A collision response plan is a strategy that describes the steps the permittee will take to identify, assess, and respond to eagle collisions with power-line infrastructure. The assessment should include the species, habitat, daily and seasonal migration patterns, eagle concentration areas, and other local factors that might be contributing to eagle collisions. The response options should consider eagle collisions in the engineering design (e.g., burying the line, rerouting the line, or modifying the line to reduce the number of wires), when modifying habitat, and when marking the power line.~~ an eagle collision response strategy that is appropriate on a case-by-case basis following an eagle/power line collision. This response must address risk in the immediate area of the collision on a case-by-case basis.

(6) You must ~~implement an eagle-shooting response plan. This plan is a strategy to 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 the steps to identify when eagle shooting occurs, options for response, and implementation of the response.~~ notify USFWS OLE in the case of confirmed or suspected shooting or poisoning of eagles found on or below utility infrastructure.
~~The Service does not consider the power line entity at fault when raptors are illegally shot on power line infrastructure. However, there is a mutual benefit to addressing illegally shot raptors, as illegal shooting can also damage power line infrastructure. At a minimum, the plan should~~

~~outline the process for field personnel to report illegal shooting internally and for the permittee to contact the Service Office of Law Enforcement. Develop additional response options using innovative approaches is encouraged.~~

The above plans may be combined into a single, comprehensive plan, such as an Avian Protection Plan.

D. **Monitoring Measures.** You are required to implement methods for discovering eagles at your project.

(1) On-site personnel must be trained on how to visually scan for eagle remains.

(2) On-site personnel must conduct visual scans when on site.

E. **Reporting Discovered Eagles.** Discovered eagles must be reported to the Service.

(1) You must collect the following relevant information (if known):

i. Discovery date;
ii. Collection date;
iii. Species;
iv. Sex and age (fledgling, juvenile, adult), if known;
vi. Condition (alive or dead);
vii. Description (if alive, indicate if sick or injured; if dead, indicate if intact, freshly killed (eyes moist), semi-fresh (stiff, eyes desiccated), partially decomposed feathers and/or bones, or other);
viii. GPS coordinates in decimal degrees with datum clearly identified (the reference system that geographic coordinates are associated with such as WGS 84) for the location where found, OR nearest turbine/pole/structure ID number;
ix. Type and configuration of structure or features found near eagle remains and potentially responsible for injury/mortality;
x. Ground distance (estimated or exact) remains found from nearest pole, line, or other structure;
xi. Suspected cause of mortality/injury (collision with turbine, collision with wire, collision with other structure, electrocution, other);
xii. Disposition (freezer onsite, National Eagle Repository, left in place, rehabilitator, Office of Law Enforcement (OLE));
xiii. Record any Federal Band number, Color Markers, or transmitter descriptions; report Federal Band and Color Markers to the U.S. Geological Survey's Bird Banding Laboratory at: <reportband.gov> and provide the Service with the date this information was reported;
xiv. Any special notes or additional information (e.g., if associated with a mortality event involving unusually high numbers of eagle takes associated with a particular ~~turbine or feature~~structure; weather conditions at likely time of death, if known); and
xv. Photos of the eagle remains, including image of leg and foot, if available.

~~(2) *Annual Report.* You must report all eagles discovered in the previous year in your annual report. You must report incidental take using Form 3-202-15. You must submit valid reports in a timely and accurate manner.~~

H. **Disposition**. You must dispose of eagles in accordance with Service instructions.

1. *Injured Birds*: If an eagle is injured, Permittee must immediately contact a permitted migratory bird rehabilitator or a licensed veterinarian and follow their instructions for transport, care, and/or disposition of birds. We encourage you to offset the costs of treating injured eagles by paying the expenses through donations, in-kind assistance, or other means.

2. *Freshly Deceased*: If the eagle is freshly dead (has no smell, eyes are not sunken in, and the body is usually intact and has not been scavenged), OR has a telemetry unit, you may either:
I. contact the Southeast Cooperative Wildlife Disease Study Lab (SCWDS Lab) at 706-542-1741to see if the remains are acceptable and the lab is able to accept them.

i. If the SCWDS is able to accept the remains, fill out the lab's submission form.
ii. If possible, refrigerate remains rather than freezing.
iii. Send the remains by Federal Express or as directed by the lab.

Or (II) follow existing agreements with OLE regarding recovery and disposition of carcass.

~~2.~~3. *Other Eagle Remains*. If the eagle is not freshly dead, or the lab is not able to receive the remains, OR it is not feasible for your station to ship the remains to the lab, you must ship the remains to the National Eagle Repository following the Repository's Shipping Guidelines, or follow existing agreements with OLE. The guidelines are available at <http://www.fws.gov/eaglerepository/factsheets.php>.

I. **Annual Report:**

(1) You must submit an annual report by March 31st for the prior calendar year.
(2) You must report all eagles discovered using Form 3–202–15.
(3) You must provide, upon request, records to document compliance. This request will be made as part of the audit program administered by the Service. The Service will provide written notification to the permittee advising them of the audit and allow 90 days for the requested records to be submitted electronically. The Service may request records that include documentation of mitigation compliance for the reactive and proactive commitments made by the permittee as outlined in the APP for the active permit term, all eagle discovery reports for the active permit term, all annual reports for the active permit term, any collision minimization measures undertaken for the active permit term, and any additional information that may be available for any of the eagles taken under the permit, during the active permit term.

~~I.~~ J. **Subpermittees.** You may designate subpermittees to conduct some or all of your permitted activities. Subpermittees must be at least 18 years of age. You ~~must~~ may either: include all trained company employees as subpermittees or designate subpermittees in writing, including the name and contact information of the individual or entity and the date(s), location(s), and activitie(s) authorized. ~~Subpermittees must have a copy of their subpermittee~~ The permittee and subpermittees must be able to provide this permit upon request~~designation and this permit when conducting activities and display it upon request whenever exercising its authority~~. You are responsible for ensuring that your subpermittees are qualified to perform the work and adhere to the terms of your permit. ~~You are also responsible for maintaining current records of designated subpermittees.~~ As the permittee, you are ultimately legally responsible for

compliance with the terms and conditions of this permit ~~and that responsibility may not be delegated~~.

K~~J~~. **Other Conditions**.

1. You must comply with all of the regulations and permit conditions in 50 CFR part 21 ~~of this subchapter, including any provisions specific to authorizing incidental take of migratory birds~~.

2. You must keep records of all activities conducted under this permit, including any subpermittee activities carried out under the authority of this permit (see 50 CFR § 13.46 ~~of this subchapter~~). Your records must include an internal, discovered-eagle reporting system for bald eagle and golden eagle remains found at the site of the activity.

3. By accepting this permit, you are authorizing the Service to inspect the ~~location, as legally authorized, and~~ records relating to the activity (see 50 CFR § 13.21(e) ~~of this subchapter~~) and the location, but only if the Permittee is legally authorized to grant such access~~, and records relating to the activity (see § 13.21(e) of this subchapter)~~. The Service may require you to participate in the Service's program-wide monitoring, such as providing access to Service staff ~~or contractors.~~, but only if the Permittee is legally authorized to grant such access. The Service will provide reasonable notice for requests to access sites and negotiate with the permittee about practicable and appropriate access conditions to protect human health and safety and address physical, logistical, or legal constraints.

~~4. You are responsible for ensuring that the permitted activity complies with all Federal, Tribal, State, and local laws and regulations.~~

~~5.~~4. The Service may amend, suspend, or revoke a permit issued under this subpart ~~if new information indicates that revised permit conditions are necessary, or that suspension or revocation is necessary, to safeguard local or regional eagle populations. This provision is in addition to the~~in accordance to the general criteria for amendment, suspension, and revocation of Federal permits set forth in 50 CFR §§ 13.23, 13.27, and 13.28 ~~of this subchapter~~.

~~6.~~5. Notwithstanding the provisions of 50 CFR § 13.26 ~~of this subchapter~~, you remain responsible for all outstanding monitoring requirements and mitigation measures required under the terms of the permit for take that occurs prior to cancellation, expiration, suspension, or revocation of the permit.

~~7.~~6. The Service will regularly evaluate whether the take of bald eagles and golden eagles under general permits remains compatible with the preservation of eagles. If the Service finds, through the best available information, that the general permit program is not compatible with the preservation of bald eagles or golden eagles, the Service may suspend issuing general permits in all or in part after publishing a notice in the Federal Register. If the Service suspends general permitting, take currently authorized under this general permit remains authorized until expiration unless you are notified otherwise.

ATTACHMENT B

Wind General Permit Conditions
Version 9.15.2022

A. **Authorization**. You are authorized to injure and/or kill bald eagles and golden eagles incidental to operations of the wind energy project listed in the location above. ~~Take is authorized provided there is no practicable alternative.~~ The authorization applies only to incidental take resulting from activities conducted in accordance with the description contained in the general permit application and the terms of the permit. You are authorized to transport injured eagles to a permitted migratory bird rehabilitator or a licensed veterinarian. You are authorized to possess and transport eagles for authorized disposal purposes.

(1) If you discover the take of four golden eagles ~~eagles of any one species~~ during the tenure of the general permit, the project may continue to be authorized to incidentally take eagles through the term of the existing general permit but will be denied eligibility for future general permits for incidental take. You may apply for a specific permit for incidental take at that project or may implement activities or technology to reduce take to within general permit levels. You may request reconsideration of this denial by following the review procedures set forth at 50 C.F.R. § 13.29 ~~of this subchapter~~, including providing the information required in 50 C.F.R. § 13.29(b)(3).

(2) If the Service conducts monitoring at a wind project, any eagles discovered by the Service will not ~~may~~ be attributed to the wind project. No discovered eagles will be included in the project-specific take estimate unless discovered by operations staff. ~~The number of eagles considered as discovered will be adjusted based on the Service-monitoring detection rate.~~

B. **Prohibited.** This permit does not authorize the take of an eagle nest or disturbance of an eagle nest, including substantively modifying nesting substrate sufficient to render the substrate unsuitable for eagle nesting. This permit does not authorize the possession of eagles, nestlings, or eggs except for authorized disposal purposes.

C. **Compensatory Mitigation**. ~~You must implement required compensatory mitigation.~~
(1) You ~~obtain~~ fund the required eagle credits from a Service-approved conservation bank, ~~or~~ in-lieu fee program, or other approved mitigation strategy (such as a mitigation being used for a specific permit) within 90 days of the effective date of your permit. Based on the hazardous volume of the project, you must fund ~~obtain~~ eagle credits at the following rates:

Atlantic/Mississippi EMUs: 6.56 eagles/km3,
Central EMU: 7.88 eagles/km3, and
Pacific EMU: 11.48 eagles/km3.

The hazardous volume of a project is calculated in cubic-kilometers as the number of turbines multiplied by $0.200\pi(d/2)^2$ where d is the diameter of the blades in kilometers.

(2) You must keep records to document compliance with this requirement and provide them to the Service with your annual report.

(3) Compensatory mitigation for golden eagles is not required if the project is part of the baseline infrastructure.

D. **Avoidance and Minimization:**

(1) **Hazardous Attractants**. Avoid attracting eagles to the project due to anthropogenically created or enhanced hazardous attractants. Remove existing and avoid creating new anthropogenic eagle attractants throughout the project, including resources that could attract foraging, roosting, and/or nesting behavior. These include:

(a) Any garbage/waste discovered in the project site must be collected and disposed of in an appropriate trash receptacle securely protected from wildlife.

(b) Permittee shall be responsible for developing a carcass removal plan and training operations and maintenance staff on the plan to increase the chances of locating an animal carcass. Permittee shall also develop programs for landowner education and engagement in carcass removal efforts as practicable.

(c) Remove any discovered animal carcasses squirrel-size or larger on project controlled lands to the extent practicable according to landowner requirements, safety, disposal requirements, and authorities having jurisdiction as quickly as practicable. Dispose of animals in a manner that will not attract eagles, such as beyond line-of-sight of Project infrastructure or at a designated disposal site such as a landfill. ~~To increase the chances of locating animal carcasses, you must:~~

~~(i) Look for animal carcasses while travelling within the Project Footprint. Look for eagles, vultures, or other scavenging birds that are consistently present and/or consistently circling (e.g. in a kettle) in one area.~~

~~(ii) Report discovered animal carcasses or animal behavior that suggests a carcass may be present to the site manager within 8 hours. For animal behavior, search the vicinity within 24 hours.~~

~~(iii) Remove discovered animal carcasses from the site as soon as possible but not to exceed 72 hours of discovery.~~

(d~~e~~) As practicable, ~~M~~minimize anthropogenic creation of shelter and forage for small mammals in the project footprint, such as debris storage and waste materials.

(e) Implement lead abatement programs as practicable designed to reduce eagle ingestion of lead bullets used by hunters.

(2) **Collision Risks**. You must avoid and minimize collision risks in the project, including collisions with turbines, vehicles, towers, and collector and/or generation-tie-line.

(a) As practicable, m~~M~~aintenance vehicle movement must be restricted to pre-designated access, Project personnel or contractor-required access, or public roads. ~~Where feasible, use existing roads and previously disturbed areas during construction, operation, and maintenance to minimize impacts to native habitat.~~

(b) Implement a maximum 25mph speed limit within the project-controlled roads if safety allows. Be alert for wildlife. Require additional caution in low-visibility conditions when driving any vehicle.

(c) When practicable and if appropriate based on other resources ~~applicable~~, bury collection lines to minimize eagle collision and electrocution risk associated with above-ground lines. Any above-ground lines must be ~~electrocution~~avian-safe, as limited by the need to ensure human health and safety.

~~(d) Implement practicable measures to reduce collision with wind turbines.~~

E. **Adaptive Management.** You must develop an adaptive management plan. Your adaptive management plan must be based on the best available science ~~and monitor advances in scientific understanding regarding the effects of a project, adjustments to project operations and practices~~, and identify criteria for implementation of the mitigation hierarchy, including avoidance, minimization, and compensation actions.

~~If you discover three or more eagles of a single species at your project, you must submit your adaptive management plan with your notification and a description and justification of which adaptive management approaches you will be implementing.~~

F. **Monitoring Measures.** You are required to implement methods for discovering eagles at your project.

(1) On-site personnel, such as staff and~~,~~ contractors~~, and volunteers,~~ must be trained how to visually scan for eagle remains.
(2) On-site personnel must conduct visual scans when on site.
(3) Each wind turbine must be searched at least once every 3 months. To the extent practicable, this should correspond to the local peak of the four eagle-use seasonal abundance periods:

Feb 15~~22~~ - May 16~~Apr 11~~,
May 17-Sept 27~~6~~,
Sept 28-Dec 13, and
Dec 14-Feb 14.

G. **Reporting Discovered Eagles.** Discovered eagles must be reported to the Service.
(1) You must collect the following relevant information:

i. Discovery date;
ii. Collection date;
iii. Species;
iv. Sex and age (fledgling, juvenile, adult), if known;
v. How eagle remains were located;
vi. Condition (alive or dead);
vii. Description (if alive, indicate if sick or injured; if dead, indicate if intact, freshly killed (eyes moist), semi-fresh (stiff, eyes desiccated), partially decomposed feathers and/or bones, or other);
viii. GPS coordinates in decimal degrees with datum clearly identified (the reference system that geographic coordinates are associated with such as WGS 84) for the location where found, OR nearest turbine/pole/structure ID number;
ix. Type and configuration of structure or features found near eagle remains and potentially responsible for injury/mortality (structure type; ~~nameplate information; manufacturer, model number, height;~~ presence/absence of guy wires; turbine, pole, ~~-~~ structure ID#; etc.);
x. Ground distance (estimated or exact) remains found from nearest pole, line, turbine, or other structure;
xi. Suspected cause of mortality/injury (collision with turbine, collision with wire, collision with other structure, electrocution, other, unknown);
xii. Disposition (freezer onsite, National Eagle Repository, left in place, rehabilitator, U.S. Fish and Wildlife Service Office of Law Enforcement (OLE));

xiii. Record any Federal Band number, Color Markers, or transmitter descriptions; report Federal Band and Color Markers to the U.S. Geological Survey's Bird Banding Laboratory at: <reportband.gov> and provide the Service with the date this information was reported;
xiv. Any special notes or additional information (e.g., if associated with a mortality event involving unusually high numbers of eagle takes associated with a particular turbine or feature; weather conditions at likely time of death, if known); and
xv. Photos of the eagle remains.

(2) *Annual Report.* You must report all eagles discovered in the previous year in your annual report. You must report incidental take using Form 3–202–15. You must submit valid reports in a timely and accurate manner.

(3) *2-Week Report.* If you discover three or more eagles of any one species during the tenure of the general permit, you must notify the Service in writing within two weeks of discovering the take. Your notification must include the reporting data required in G~~F~~(1) for each discovered eagle, your adaptive management plan, and a description and justification of which adaptive management approaches you will be implementing.

H. **Disposition**. You must dispose of eagles as described below, unless you are directed otherwise by the Service.
(1) *Injured Birds*: If an eagle is injured, Permittee must immediately contact a permitted migratory bird rehabilitator or a licensed veterinarian and follow their instructions for transport, care, and/or disposition of birds. We encourage you to offset the costs of treating injured eagles by paying the expenses through donations, in-kind assistance, or other means.

(2) *Freshly Deceased*: If the eagle is (a) freshly dead (has no smell, eyes are not sunken in, and the body is usually intact and has not been scavenged) or (b) has a telemetry unit: contact the Southeast Cooperative Wildlife Disease Study Lab (SCWDS Lab) at 706-542-1741 to see if the remains are acceptable and the lab is able to accept them.

If the SCWDS is able to accept the remains, fill out the lab's submission form. If possible, refrigerate remains rather than freezing. Send the remains by Federal Express or as directed by the lab.

(3) *Other Eagle Remains*. If the eagle is not freshly dead, or the lab is not able to receive the remains, OR it is not feasible for you~~r station~~ to ship the remains to the lab, you must ship the remains to the National Eagle Repository following the Repository's Shipping Guidelines. The guidelines are available at <http://www.fws.gov/eaglerepository/factsheets.php>. Eagles may be held locally in a freezer, as safety allows, prior to shipping.

I. ~~I.~~ Annual Report:
(1) You must submit an accurate annual report by March 31st.
(2) ~~(2) *Annual Report.*~~ You must report all eagles discovered in the previous year in your annual report. You must report incidental take using Form 3–202–15.
(3) You must provide records to document mitigation compliance.
~~You must submit valid reports in a timely and accurate manner.~~

J. **Subpermittees.** You may designate subpermittees to conduct some or all of your permitted activities. Subpermittees must be at least 18 years of age. You ~~must~~ may either include all trained company employees as subpermittees or designate subpermittees in writing, including the name and contact information of the individual or entity and the date(s), location(s), and activitie(s) authorized. ~~Subpermittees must have a copy of their subpermittee designation and this permit when conducting activities and display it upon request whenever exercising its authority.~~ The permittee and subpermittees must provide this permit upon request. You are responsible for ensuring that your subpermittees are qualified to perform the work and adhere to the terms of your permit. You are also responsible for maintaining current records of designated subpermittees. As the permittee, you are ultimately legally responsible for compliance with the terms and conditions of this permit and that responsibility may not be delegated.

J. **Other Conditions**.

~~1. You must comply with all of the regulations and permit conditions in part 21 of this subchapter, including any provisions specific to authorizing incidental take of migratory birds.~~

~~2~~1. You must keep records of all activities conducted under this permit, including any subpermittee activities carried out under the authority of this permit (see 50 C.F.R. § 13.46) ~~of this subchapter)~~. Your records must include an internal, discovered-eagle reporting system for bald eagle and golden eagle remains found at the site of the activity.

~~3~~2. By accepting this permit, you are authorizing the Service to inspect the location and records relating to the activity (see C.F.R. 50 § 13.21(e) ~~of this subchapter~~). The Service may require you to participate in the Service's program-wide monitoring, such as providing access to Service staff or contractors. The Service will provide reasonable notice for requests to access sites and negotiate with the permittee about practicable and appropriate access conditions to protect human health and safety and address physical, logistical, or legal constraints.

~~4. You are responsible for ensuring that the permitted activity complies with all Federal, Tribal, State, and local laws and regulations.~~

~~5~~3. The Service may amend, suspend, or revoke a permit issued under this subpart if new information indicates that revised permit conditions are necessary, or that suspension or revocation is necessary, to safeguard local or regional eagle populations. This provision is in addition to the general criteria for amendment, suspension, and revocation of Federal permits set forth in see 50 C.F.R. §§ 13.23, 13.27, and 13.28 ~~of this subchapter~~.

~~6~~4. Notwithstanding the provisions of 50 C.F.R. § 13.26 ~~of this subchapter~~, you remain responsible for all outstanding monitoring requirements and mitigation measures required under the terms of the permit for take that occurs prior to cancellation, expiration, suspension, or revocation of the permit.

5~~7~~. The Service will regularly evaluate whether the take of bald eagles and golden eagles under general permits remains compatible with the preservation of eagles. If the Service finds, through the best available information, that the general permit program is not compatible with the preservation of bald eagles or golden eagles, the Service may suspend issuing general permits in all or in part after publishing a notice in the Federal Register. If the Service suspends general permitting, take currently authorized under this general permit remains authorized until expiration unless you are notified otherwise.