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Comments Regarding the January 13, 2023 Proposed Information Collection regarding Eagle Permits

**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”) January 13, 2023 notice of information collection; request for comment for Eagle Permits, OMB control number: 1018-0167 (“Information Collection”).² The Service’s Information Collection includes permit applications for incidental eagle take permits (“ETP”) under the Bald and Golden Eagle Protection Act (“BGEPA”), specifically Forms 3-200-71 “Eagle Incidental Take.” The Information Collection requests that comments focus on the following considerations:

- Whether or not the collection of information is necessary for the proper performance of the functions of the [the Service], including whether or not the information will have practical utility;
- The accuracy of [the Service’s] estimate of the burden for this collection of information, including the validity of the methodology and assumptions used;
- Ways to enhance the quality, utility, and clarity of the information to be collected; and
- Ways to minimize the burden of the collection on respondents.³

Given the nature of EWAC members’ operations and the Service’s focus on the Eagle Rule as it applies to wind energy operations and electric transmission and distribution lines, EWAC is uniquely positioned to respond to the Information Collection. We appreciate the opportunity to comment on the cost implications of obtaining eagle permits. EWAC previously submitted comments on the 2017 information collection for eagle take permits (“2017 Information Collection”),⁴ the Advance Notice of Proposed Rulemaking for Eagle Permits and Incidental Take,⁵ and most recently submitted comments on the Proposed Rule: Permits for Incidental Take of Eagles and Eagle Nests (“Proposed Rule”).⁶

On September 30, 2022, the Service published the Proposed Rule. EWAC submitted comments to the Proposed Rule on December 29, 2022.⁷ While EWAC generally supports the Service’s efforts to improve the existing Eagle Permit Program, EWAC provided comments on the Proposed Rule with suggested changes to better achieve a successful, legally defensible, and widely-used Eagle Permit Program. Many of the concerns EWAC identified with the Proposed Rule are prevalent with the current eagle permit program (“Eagle Permit Program”) and relate directly to the Service’s inquiries for the Information Collection. Therefore, while EWAC expressly

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 88 Fed. Reg. 2369 (Jan. 13, 2023).

³ Due to the nature of overlap between these final two considerations, EWAC has chosen to address them together below in Section III.

⁴ 82 Fed. Reg. 11599 (Feb. 24, 2017).

⁵ 86 Fed. Reg. 51094 (Sept. 14, 2021).

⁶ 87 Fed. Reg. 59598 (Sept. 30, 2022).

⁷ EWAC, Comments Regarding the September 30, 2022 Proposed Rule: Permits for Incidental Take of Eagles and Eagle Nests (Dec. 29, 2022), https://downloads.regulations.gov/FWS-HQ-MB-2020-0023-9341/attachment_1.pdf [hereinafter Proposed Rule Comments].

addresses many of the same issues in its comments on the Information Collection as it did in its comments on the Proposed Rule, EWAC incorporates by reference all comments on the Proposed Rule. While the Service's recent actions are consistent with a shared desire to achieve an effective and workable Eagle Permit Program, many permit requirements are unnecessarily burdensome and would not be alleviated by the changes set forth in the Proposed Rule.

I. Whether or not the collection of information is necessary for the proper performance of the functions of the Service, including whether or not the information will have practical utility.

EWAC has identified areas of the Eagle Rule where the value and utility of the information required to accompany Form 3-200-71 warrants further consideration (we provide additional information regarding the cost burdens and risks they impose in Part II below):

- a. Monitoring. The primary objective of compliance monitoring is to demonstrate compliance with the permitted take. The Service should work to ensure that monitoring requirements are commensurate with the facility's eagle risk.⁸ EWAC continues to question the need and efficacy of extensive post-construction monitoring for ETPs. In particular, EWAC is concerned with the level of precision currently required, which is neither legally necessary for demonstrating compliance nor cost-effective. In the Proposed Rule, the Service recognized that the third-party monitoring requirement has proven impracticable for long-term permits and thus the Service proposed to remove this monitoring requirement for certain permit types.⁹ EWAC supports this proposed change. EWAC cautions against requiring any data that is largely independent of project risk or is not legally necessary to demonstrate compliance with take authorization. The current emphasis on use of Evidence of Absence ("EoA") as the method for post-construction monitoring is problematic, not in the least being that this type of monitoring was never intended to be used as a compliance tool. Further, the statistical estimates derived from EoA do not meaningfully add to an understanding of risk to eagles, and the time and cost burden of preparing an EoA monitoring plan, conducting the monitoring to a level sufficient to achieve the levels of certainty required as an ETP condition, and the time and cost of analyzing that data are grossly disproportionate to the risk posed by most permits. Requiring use of EoA is unduly burdensome and does not provide practical utility that justifies its use, nor is it legally

⁸ In the 2016 Eagle Rule, the Service acknowledged that the level of monitoring should be commensurate with the magnitude of impacts to the species where it states "[t]he frequency and duration of required monitoring will depend on the form and magnitude of the anticipated take and the objective of associated avoidance, minimization, or other mitigation measures, not to exceed what is reasonable to meet the primary purpose of the monitoring . . ." 50 C.F.R. § 22.80(c)(2)(ii). In the Service's Five Point Policy, it also states that "[t]he 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).

⁹ 87 Fed. Reg. 59598, 59601.

necessary for the Service to demonstrate statutory compliance and guarantee that permittees are not exceeding their take authorizations.¹⁰

The significant resources spent on fatality monitoring for eagles provides minimal direct conservation benefits to the species. In most cases, monitoring costs exceed the funding provided for mitigation.¹¹ As set forth in EWAC's comments on the Proposed Rule, the proposed Wind Energy General Permit would still result in monitoring costs exceeding the cost of mitigation. Wind projects should be able to allocate their available funds towards the efforts that can have the greatest conservation benefits to eagles. Creating a much simpler approach to monitoring under both the specific and general permits, contemplated in the current rule making, and focusing on what the minimum level of monitoring is needed to demonstrate that take authorization is not being exceeded would allow for more money to be directed towards actual eagle conservation. Allowing these funds to be spent on actions that provide direct conservation benefit to eagles would further support the Service's own desire to increase conservation benefits to both eagle species.¹²

In the Power Line General Permit context, EWAC supports the Service's proposed approach to monitoring set forth in the Proposed Rule for its proposed Power Line General Permit.¹³ Limiting monitoring requirements to reasonable documented efforts by trained onsite staff is consistent with the typical Avian Protection Plan practices for detecting eagle mortalities.¹⁴

- b. Pre-Construction Surveys. With respect to authorizations under the proposed Power Line General Permit, EWAC is supportive of the approach taken in the Proposed Rule where pre-construction surveys are not a requirement. Conducting pre-construction surveys on new electric transmission and distribution systems would be infeasible, highly inefficient, and unlikely to result in identification of any potential risks as there is no known relationship between pre-construction eagle presence and activity and post-construction/operational risk. In addition, the requirement has no relevance to existing transmission and distribution systems.

¹⁰ In its Proposed Rule Comments, EWAC noted that "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." Proposed Rule Comments, *supra* note 6, at 45. In the experience of EWAC members, when the Service informs a member of the required EoA monitoring for projects, it does not cite to proper Service rules that have gone through the requisite notice and comment procedures, but instead cites to its own regional or in-development guidance. *Id.*

¹¹ For example, one EWAC member recently reported its administrative (monitoring) fees to total \$462,000 while their mitigation fee was \$297,000. Another member reported its administrative (monitoring) fees to total \$189,000 while their mitigation fee was \$99,000. *See id.* at 12.

¹² *See* Draft Environmental Assessment for the Proposed Rule, at 11 (providing a 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").

¹³ 87 Fed. Reg. at 59606.

¹⁴ For further discussion of EWAC's support for the Proposed Rule's monitoring requirements for the Power Line General Permit, see Proposed Rule Comments, *supra* note 6, at 20.

With respect to wind energy, the Eagle Rule sets forth several pre-construction survey requirements, including two years of year-round eagle use surveys. Many existing wind energy facilities cannot demonstrate that they have met the Eagle Rule's pre-construction survey requirements despite having coordinated earlier pre-construction survey efforts with the Service. In addition, year-round eagle use surveys may not be practicable where eagles do not utilize the sites year-round. While the Eagle Rule allows for a waiver, the availability of a waiver under the Eagle Rule is of questionable value if the Service is resistant to granting them, as has been the experience of EWAC members. As set forth in Section III below, site-specific data should be incorporated wherever available and other approaches to predicting eagle risk should be acceptable for use by wind energy applicants.

- c. Local Area Population. In the Proposed Rule, the Service reiterated the requirement from the 2016 Eagle Rule that compensatory mitigation for golden eagles will be required at a minimum offset ratio of 1.2 to 1 for golden eagles.¹⁵ The Service also noted that it plans to continue requiring a local area population ("LAP") analysis, which may trigger additional mitigation requirements for both golden eagles and bald eagles.¹⁶ The Service's current (and proposed) method for LAP analysis lacks transparency and makes it impossible for applicants to plan for the future requisite compensatory mitigation. Additionally, the results of the LAP analysis can prompt additional analysis under the National Environmental Policy Act ("NEPA"). In general, NEPA costs are not included in the Service's projected costs provided. As discussed further in Section III, the Service should not condition the amount of compensatory mitigation and NEPA analyses on the LAP results.

II. The accuracy of the Service's estimate of the burden for this collection of information, including the validity of the methodology and assumptions used.

The Information Collection continues to incorporate, an Hour and Cost Table provided in the 2017 Information Collection, which EWAC believes is not reflective of the current actual costs to obtain and implement an eagle take permit.¹⁷ In response to the 2017 Information Collection, EWAC polled its members to obtain the ranges of hours and costs that members experience or estimate as they prepare applications for ETPs based on the process as it currently stands, and provided those estimates in our comments at that time. EWAC polled its members again in response to this Information Collection and provides that information below. The Service states the Information Collection is an "[e]xtension without change of the currently approved collection."¹⁸ In the years since the most recent iteration of the Eagle Rule, EWAC members have continued applying for and gaining an understanding of the true cost and burden of applying for an ETP, which has aided in EWAC's thinking on the issue and our response here.

¹⁵ *Id.* at 59601.

¹⁶ *Id.*

¹⁷ It appears that the comments by EWAC and the American Clean Power Association were largely ignored and the cost tables remain generally unchanged despite our feedback.

¹⁸ 88 Fed. Reg. 2369, 2370 (Jan. 13, 2023). The 2019 Information Collection also reinstated a prior information collection with revisions. 84 Fed. Reg. 60106, 60107 (Nov. 7, 2019).

EWAC assessed the cost of seeking authorization under the Eagle Rule, including the cost of complying with anticipated permit requirements (e.g., post-construction monitoring and fatality reporting), which must be determined at the application stage. To inform EWAC's comments, we also examined the Service's previous Hour and Cost Table from 2017 to understand how the Service arrived at its estimates. EWAC has previously expressed its concerns that the Hour and Cost Table made several underestimations. For example, the Service seemed to indicate that it anticipated 15 individual companies would be applying for ETPs on an annual basis, and that the total dollar value of the burden hours associated with those permit requests would be \$798,395.¹⁹ This would result in an assumed per applicant cost of \$53,226.²⁰ If the \$798,395 represents the total costs estimated for 15 together, then the Service significantly underestimated the costs. If the supporting text describing the \$798,395 as a per application cost is the correct interpretation of the Service's estimates, then that \$798,395 figure is closer to reality, but excludes some critical cost components, which, taken together, would dramatically increase the cost incurred by a company seeking an ETP under the Eagle Rule.

Additionally, the Hour and Cost Table appears to include several incorrect assumptions, which result in lower than actual estimates of the costs to the applicant. After polling both our wind energy and electric transmission and distribution member companies, we note that both the "Cost/Hour" and "Average Completion Time per Response (hours)" are significantly lower than the companies' actual incurred or estimated costs.

With respect to the cost/hour, the \$34.26/hour rate assumed by the Service for applicant staff and consultants is too low and does not reflect the reality of the range of costs related to external technical/biological and legal assistance incurred by the applicant when applying for and implementing an ETP.²¹ Pursuing an ETP is a complex process and typically requires assistance from external consultants; therefore, this distinction has a meaningful impact on cost. For example, an applicant must account for the costs associated with conducting surveys and monitoring, preparation of the Eagle Conservation Plan ("ECP"), modeling take estimates, calculating mitigation amounts, meetings and calls with Service staff to negotiate the terms of the ETP, negotiating the terms of the mitigation with the mitigation provider, and this list is not exhaustive. In EWAC members' experiences, hourly rates across the board are much higher than the Service's estimate. For example, internal staff "hourly rates" reported by companies range

¹⁹ To further the Biden administration's climate goals and implementation of the Inflation Reduction Act, there will likely be an anticipated increase in buildout of wind energy and transmission and distribution line projects. This increased infrastructure will result in the need for more eagle take permits that the Service should account for in its estimates.

²⁰ EWAC recognizes that in the Proposed Rule, the Service provided some updated numbers relating to the annual cost and permit count comparison between the existing Eagle Permit Program and the proposed program (including wind general permits, power line general permits, nest disturbance, and nest take permits).

²¹ EWAC believes that the \$34.26/hour rate is based on the U.S. Bureau of Labor Statistics's 2016 Employer Costs for Employee Compensation estimates. See U.S. Bureau of Labor Statistics, *Employer Costs for Employee Compensation News Release* (Sept. 8, 2016), available at: https://www.bls.gov/news.release/archives/ecec_09082016.htm. At a minimum, the hour rate should be updated to reflect the Bureau's most recent estimates, which provide that the total compensation for an employee in the natural resources, and maintenance occupations group is \$41.55/hour. See U.S. Bureau of Labor Statistics, *Employer Costs for Employee Compensation – September 2022* (Dec. 15, 2022), available at: <https://www.bls.gov/news.release/pdf/ecec.pdf>. But, even then, the hourly rate is not reflective of EWAC member experiences.

from \$72 - \$125, while hourly rates for biological consultants range from \$60 - \$200 (depending on activity and seniority of the employee) with an average cost of \$150/hour, and hourly rates for external counsel range from \$350 - \$500.

With respect to the average completion times for the listed activities, these also appear to underestimate the burden in most instances, with member companies reporting the following ranges per application:

- 700–1,250 hours for pre-construction surveys for wind energy facilities, compared to the Service’s estimate of 650 hours;
- 700–1,500 hours for preparing and negotiating the ECP for wind facilities, compared to the Service’s estimate of 200 hours;
- 1,110–5,100 hours for preparing and negotiating the ECP for electric transmission/distribution lines;
- 1,300–7,000 hours for post-construction monitoring for wind facilities, compared to the Service’s estimate of 700 hours. EWAC’s estimate assumes 2-3 years of intensive monitoring at the beginning of the ETP term and limited periodic monitoring after that. Some Service offices have suggested more intensive monitoring for the entire ETP term. In those instances, projected hours burden (and therefore costs) could be up to 6 times higher;
- 8–40 hours for annual reporting at wind facilities;
- 25–300 hours for annual reporting at electric transmission and distribution companies; and
- 90–450 hours anticipated for the five-year review for ETPs issued under the existing Eagle Rule, compared to the Service’s estimate of 8 hours.²²

Taken together, the hourly costs and volume of hours required to apply for an ETP is much higher than what has been estimated by the Service. In addition, the Service’s estimates do not include two elements of ETPs that significantly impact cost: mitigation and curtailment costs. In the Proposed Rule, the Service estimated a cost of \$82,500 per eagle,²³ and thus, at a minimum the Service should include the average cost of mitigation in its ETP cost estimations here. Second, for wind energy permittees, the Service’s estimation does not include the cost of implementing a curtailment regime for its wind turbines. For permittees implementing curtailment as a minimization measure,²⁴ curtailment has a material impact on power production resulting in a significant cost to the permittee through lost power production.²⁵ Curtailment implementation can also include significant additional expenses beyond power production loss, including the employment of biomonitors and the implementation of minimization technology to inform

²² 89 Fed. Reg. 7708, 7709 (Jan. 23, 2017).

²³ 87 Fed. Reg. at 59614.

²⁴ At least one region has guidance that imposes automatic curtailment where wind turbines occur within a certain distance of nests. *See supra* note 10.

²⁵ It is also worth noting that reducing the amount of power produced by a wind energy project means that additional turbines will be added to the landscape to meet power production needs and state renewable portfolio standards.

curtailment.²⁶ As a result, the cost estimates provided in the Hour and Cost Table should be increased to reflect actual costs of an ETP.

In the Proposed Rule, the Service also provided updated numbers relating to the annual cost and permit count comparison between the existing Eagle Permit Program and the proposed program. The purpose of the numbers provided in the Proposed Rule was to compare the full financial cost of the current program compared to those anticipated under the proposed permit programs, including wind and power line general permits, wind energy specific permits, nest disturbance permits, and nest take permits.²⁷ As noted in EWAC's comments to the Proposed Rule and reiterated here, EWAC believes that the Proposed Rule's financial cost estimates still severely underestimate the cost of acquiring and implementing a specific wind energy permit. To illustrate the cost concerns for the Permit Program, EWAC members estimated that the cost of participating in the proposed Wind Energy General Permit program could total nearly \$2 million over the life of a project, which is disproportionate to the impacts of the authorization sought.²⁸ In nearly every instance, the cost of monitoring outweighed the cost of mitigation, and for at least a few members, the cost of the proposed Wind Energy General Permit was equal to the cost of pursuing an ETP under the Eagle Rule.

III. Ways to enhance the quality, utility, and clarity of the information to be collected and ways to minimize the burden of the collection of information on respondent.

EWAC addresses the last two topics solicited by the Information Collection together. EWAC has identified several areas in which the Service could reduce the burden of the eagle permit program on applicants and/or Service resources. These topics are described in depth in EWAC's comments on the Proposed Rule, but some particularly relevant comments are briefly restated here.

Collision Risk Model. The current Collision Risk Model ("CRM") is the Service's required approach to predict take for wind energy ETP applicants. The Service recognized in the 2016 Eagle Rule that the CRM most often results in an overestimation of take predictions, which in turn increases the overall cost of obtaining and implementing an eagle take permit.²⁹ Since the [2017 Information Collection], the Service has updated the CRM priors and developed priors specific to bald eagles. Despite this, the CRM—and the Service's administration of the CRM—continue to pose problems that create additional costs and time delays.³⁰ As set forth in its comments to the Proposed Rule, EWAC recommends the Service move away from the

²⁶ In the experience of EWAC members, the total cost of technology installation, power generation loss, and maintenance can easily exceed \$10 million over the life of a project.

²⁷ See 87 Fed. Reg. 59598, 59611-12 (Sept. 30, 2022).

²⁸ See Proposed Rule, *supra* note 6, at 12. Some EWAC members also believe that the cost of participating in the proposed general permit for select projects results in no cost difference compared to the Eagle Permit Program. For a detailed comparison of the estimated cost comparisons between general and specific permit programs, see American Clean Power Ass'n, *Attachment 3 – Supplemental Analysis and Costs Comparisons and Examples of General and Specific Permit Programs*, 5-6 (Dec. 29, 2022), available at: https://downloads.regulations.gov/FWS-HQ-MB-2020-0023-9349/attachment_3.pdf.

²⁹ 87 Fed. Reg. at 91520.

³⁰ EWAC's proposed revisions to the CRM are discussed in further detail in its Proposed Rule Comments. See Proposed Rule Comments, *supra* note 6 at 41-44.

CRM as the sole acceptable method for predicting eagle take for ETPs. Applicants should be allowed to proffer their own take authorization estimates that they believe are commensurate with their risk evaluations and the Service could then review the proffered approach to ensure these evaluations are scientifically sound. Any approach to predicting take produced by the Service should be based on site-specific data that is transparent and replicable by the applicant (which is not currently the case with the use of CRM).

General Permit Program for Wind Energy and Power Lines Infrastructure. A general permit program for wind turbines and power lines is an important step towards improving the burden of the Eagle Permit Program on the Service and regulated community. A streamlined general permit program would result in a marked reduction in regulatory burden on the applicant, and in turn, reduce the burden on Service resources. EWAC strongly believes that if the recommendations provided its comments on the Proposed Rule are incorporated into any final rule, it would help effectively reduce this burden while optimizing participation in the Eagle Permit Program and reduce the hour and cost burden on the Service and regulated community.

Wind Energy Compliance Monitoring Requirements. Compliance monitoring requirements must be commensurate with the risk to eagles. EWAC was pleased to see in the Proposed Rule that the Service proposes to remove the third-party monitoring requirement for longer term Eagle Permits. However, the Proposed Rule proposes a Service-conducted monitoring program for the proposed Wind Energy General Permits and includes the cost of the monitoring in its proposed fees. The proposed Service-conducted monitoring is unduly burdensome. As set forth in EWAC's comments to the Proposed Rule and outlined above, the costs associated with monitoring are disproportionate to risk and do not further conservation goals. The proposed Service-conducted monitoring program would also create other time and cost burdens to ensure safety, access, and other considerations are appropriately addressed.³¹ EWAC member surveys have shown that, as proposed, a significant amount of the funding provided by the proposed Wind Energy General Permit would be directed to Service-conducted monitoring rather than actual conservation of eagles. EWAC supports removal of the third-party monitoring requirement from the Eagle Permit Program, but strongly opposes the proposed Service-conducted monitoring approach outlined in the Proposed Rule for the multitude of reasons set forth in EWAC's comments on the Proposed Rule.

Local Area Population. In the 2016 Eagle Rule, the Service stated its goal of managing eagles through the LAP and reiterated its reliance on the LAP in the Proposed Rule.³² In its comments on the Proposed Rule and above EWAC reasserts its view that requiring eagle management at the LAP goes beyond the Service's regulatory authority under BGEPA and lacks biological justification due to the panmictic nature of bald and golden eagles.³³ The Service's process lacks transparency, particularly as to how it will calculate the 10% threshold for unauthorized

³¹ See *id.* at 11-12.

³² 81 Fed. Reg. 91494, 91497 (Dec. 16, 2016).

³³ See Proposed Rule Comments, *supra* note 6, at 7. The biology of bald and golden eagles does not support the application of managing eagles through the LAP. As stated in EWAC's comments on the Proposed Rule, "[b]ald and golden eagles are panmictic species and therefore population-level analysis is sufficient to ensure their populations are stable or increasing." *Id.* Implementing the LAP into the preservation standards, creates a framework that "ignores the population size, genetics, or that eagles are a panmictic species." *Id.*

take in an LAP or what mitigation ratios will be used for surpassing these thresholds. This uncertainty can have significant cost and time implications for the permit applicant and the Service. The Service should not condition the amount of compensatory mitigation and NEPA analyses on the LAP results, or it should commit to providing LAP analyses earlier in the applicant/Service coordination process and use transparent methods and data when doing so.

IV. Conclusion

Thank you for the opportunity to comment on the Information Collection. EWAC looks forward to continuing to work with the Service in its efforts to improve implementation of BGEPA and the Eagle Permit Program and would welcome further dialogue with the Service on any of the topics above.

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