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April 25, 2017

**Comments regarding the February 24, 2017
Proposed Information Collection regarding
Federal Fish and Wildlife Permit Applications and
Reports – Migratory Birds and Eagles**

Submitted by:

Energy and Wildlife Action Coalition

Filed electronically to the attention of:

Re: OMB Control Number 1018-0022
Service Information Collection Clearance Officer
U.S. Fish and Wildlife Service Headquarters
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The Energy and Wildlife Action Coalition ("EWAC") submits these comments in response to the U.S. Fish and Wildlife Service's ("Service") proposed information collection regarding Service permit applications and reports with respect to migratory birds and eagles (the "Information Collection").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.

The Service's Information Collection includes permit applications for take permit applications under the Bald and Golden Eagle Protection Act ("BGEPA"), specifically Form 3-200-71 "Eagle Take Programmatic."² On January 23, 2017, the Service published a notice in the Federal Register announcing that the Office of Management and Budget ("OMB") had approved the information collection requirements for the revised BGEPA permit regulations published December 16, 2016 ("Eagle Rule") and provided a table documenting the "Estimated Hour and Cost Burden for Long-Term Eagle Take Permits" ("Hour and Cost Table").³ It is our understanding, however, that the Service published the Hour and Cost Table without providing an opportunity for public comment. The Information Collection requests that comments focus on the following considerations:

- Whether or not the collection of information is necessary, 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;
- 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 respondents.

Given the nature of EWAC member 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 an eagle permit at this time through the current Information Collection, as Form 3-200-71 is one of those listed in the programs under consideration. Consistent with the purpose of the Information Collection, EWAC has limited its comments to focus on the cost and burdens associated with Form 3-200-71. EWAC has, however, in the past commented on the Eagle Rule and offered recommendations to reduce the

¹ 82 Fed. Reg. 11599 (February 24, 2017).

² 81 Fed. Reg. 91494 (Dec. 16, 2016). The Eagle Rule renamed the "programmatic" eagle take permits to "incidental" take permits. Therefore, this letter uses the term "incidental take permit" or "eagle take permit" when discussing the information collection burden related to Form 3-200-71.

³ Eagle Permits; Revisions to Regulations for Eagle Incidental Take and Take of Eagle Nests; Final rule; information collection requirements, 82 Fed. Reg. 7708 (Jan. 23, 2017).

burden and the cost of pursuing an eagle take permit (“ETP”).⁴ EWAC encourages the Service to revisit EWAC’s comments (attached), and EWAC welcomes the opportunity to discuss potential solutions with the Service.

I. Whether or not the collection of information is necessary, 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 costs the burdens and risks they impose in Part II below):

Monitoring. As further discussed below, EWAC questions the need and efficacy of extensive post-construction monitoring for eagle take permits (“ETPs”), particularly with the additional requirement that monitoring must be conducted by an independent third-party consultant.⁵ The Service provides no further detail in the Eagle Rule as to how third-party monitoring will be managed, what value third-party monitoring adds (particularly as compared to the additional burden for a permittee), and why the Eagle Rule requires third-party monitoring when others, such as incidental take permits under the Endangered Species Act (“ESA”), do not. It is unclear how much authority the applicant will have over the scope of the contract with the third-party conducting the monitoring or whether an applicant can review the reported findings for accuracy prior to the report being submitted to the Service. The third-party monitoring requirement is unclear, its utility is questionable, and the cost to applicants is prohibitive.

Monitoring should be commensurate with the facility’s risk to eagles. In many of our members’ experiences in both the BGEPA and ESA contexts, the Service has been requesting more and more data at increasing cost and with little, if any, additional value to conservation or administering the Eagle Rule or ESA. Furthermore, in many EWAC members’ experiences, the level of data requested is largely independent of project risk (e.g., a low-risk project may be required to collect as much, or almost as much, data as a high-risk project).

The Eagle Rule’s mortality monitoring provision, including the third-party monitoring requirement for ETPs with durations longer than five years, applies to all industries. EWAC questions the need and practicability of mortality monitoring requirements (particularly third-party monitoring) for electric transmission and distribution. How these requirements will be applied to electric transmission and distribution lines is unclear. Where existing electric transmission systems have tens to hundreds of thousands of miles of linear infrastructure and seek an ETP, the scoping and cost of monitoring the lines to document compliance with ETP take limits would be insupportably expensive. It remains uncertain whether monitoring electric infrastructure will meaningfully result in any statistically sound data, confirm permit compliance, or inform adaptive management decisions.

⁴ EWAC’s Comments regarding the May 6, 2016 Proposed Revisions to Regulations for Eagle Incidental Take and Take of Eagle Nests (FWS-R9-MB-2011-0094), submitted July 5, 2016.

⁵ The Hours and Cost Table lists “pre-construction monitoring” but does not specify whether this line item includes estimates for third-party monitoring. Cost ranges for third-party monitoring are provided in Part II.

In the wind context, it is unclear what the duration of the required monitoring will be, and to what intensity. Eagles are large birds, and the carcasses persist in the landscape for long periods of time and thus can be readily observed by facility operations and maintenance staff at much lower cost.⁶ Further, as has been suggested in recent Service publications, there is no evidence that the wind industry requires special policing to warrant this requirement.⁷ This additional scrutiny is inconsistent with the treatment of other generation sources by other agencies, which, for instance, have allowed for self-reporting of air and water permit compliance for decades.

Finally, the significant resources spent on fatality monitoring for eagles provide little, if any, direct conservation benefits to eagles. It is not uncommon for monitoring costs exceeding the costs of the required mitigation. EWAC members believe that funds would be much better spent on actions that provide direct conservation benefits to eagles.

Pre-Construction Surveys. The Eagle Rule requires that applicants conform to industry protocols and/or coordinate with the Service to determine the appropriate approach to gathering data. Conducting pre-construction surveys on new electric transmission and distribution systems would be infeasible, highly inefficient, and has no known relationship between pre-construction data and eagle risk. In addition, the requirement has no relevance to existing transmission and distribution systems. The Eagle Rule sets forth several pre-construction survey requirements, including two years of year-round eagle use surveys. If, for example, an applicant has a site where eagles are highly unlikely to be present except for in the winter, it is of questionable value to require year-round pre-construction surveys. In northern tier states (e.g., the Dakotas), the winters can make it physically challenging and unsafe to perform these 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. 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 some EWAC members.

Local Area Population. The Eagle Rule explains that compensatory mitigation is likely not required for bald eagles, and will be mitigated at a 1.2:1 ratio for golden eagles. However, the Eagle Rule requires that the Service conduct a local area population ("LAP") analysis. If the LAP analysis demonstrates that the take estimated at a facility will result in cumulative authorized take within the LAP being more than 5% of the LAP or unauthorized take within the LAP being more than 10% of the LAP, an applicant may be required to provide additional compensatory mitigation and cover the costs for additional National Environmental Policy Act ("NEPA") analysis (costs that are not included in the Hours and Cost Table). The Eagle Rule does not provide an upper limit on how much compensatory mitigation may be required under those circumstances. While the applicant does not have the burden of conducting the LAP analysis, an

⁶ Hallingstad, E., Rabie, P. A., Telander, A., Erickson, W, and Roppe, J. 2016 Developing an Operations Staff-Based Monitoring Protocol for Eagle Fatalities at Wind Energy Facilities. Wind Wildlife Research Meeting XI. December 1, 2016. Broomfield, CO. Oral presentation.

⁷ See e.g., Draft Programmatic Environmental Impact for the Eagle Rule Revision (May 2016), p. 172, available at <https://www.fws.gov/migratorybirds/pdf/management/EagleRuleRevisions-DPEIS.pdf>.

applicant also has no ability to discern how much take the Service has authorized within an LAP. Nor can an applicant ascertain how much unauthorized take is occurring within an LAP. Therefore, the applicant cannot plan for compensatory mitigation costs unless and until the Service conducts the LAP analysis and can then only rely on the results of that analysis without the ability to verify or question it. Additionally, applicants have encountered situations where Service offices have declined to run the LAP analysis until after the application has been submitted, placing the applicant in a position of great uncertainty and risk. As a result, the output of the LAP analysis and the delay in learning the results of the LAP analysis creates uncertainty and potentially additional costs that cannot be planned for in advance.⁸

II. The accuracy of the Service’s estimate of the burden for this collection of information.

In response to the Information Collection, EWAC polled its members (involved in both wind energy development and electric transmission and distribution) to obtain the ranges of hours and costs that members are experiencing or have estimated based on knowledge of the process as it stands today as they prepare applications for ETPs under the Eagle Rule. While the current iteration of the Eagle Rule is new and no ETPs have been issued under its authority,⁹ many EWAC members are currently undertaking the necessary steps to support an ETP application (e.g., eagle use surveys, take estimates, mitigation estimates, development of monitoring approaches, document preparation, etc.) and have been for several years now. 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 mortality reporting), which must be determined at the application stage.¹⁰ In order to better inform our comments, we also examined the Hour and Cost Table to understand how the Service arrived at its estimates. As written, the Hour and Cost Table seemed to indicate that the Service anticipated 15 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. This would result in an assumed per applicant cost of \$53,226.

However, the supporting text for the Hour and Cost Table notes that this total cost is calculated on a per applicant basis and not a total of the estimated 15 applicants:

\$798,395 for gathering information required to support an application, which may include preparation of an Eagle Conservation Plan (ECP). This amount includes 650 hours for preconstruction monitoring surveys of eagle use of the project site and 700 hours of post-construction monitoring for each respondent. Preparation of the application, which may include preparation of an ECP, will take approximately 200 hours per respondent.¹¹

⁸ Ranges of costs for compensatory mitigation and NEPA are provided in Part II.

⁹ We understand that some “disturbance” ETPs have been issued, but to our knowledge, no long-term (greater than five-year) ETPs have been issued under the Eagle Rule.

¹⁰ Several EWAC members are pursuing ETPs and have based their estimates on coordination efforts with the Service to date.

¹¹ 82 Fed. Reg. at 7711 (emphasis added).

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.

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 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. 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 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 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 too 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 (wind facilities only);
 - 700–1,500 hours for preparing and negotiating the ECP for wind facilities;
 - 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. This 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 six times higher;
 - For reasons stated elsewhere in this letter, it is unclear what the Service expects for a post-construction monitoring of electric transmission and distribution facilities, but if one assumes 10% of the service area would need to be searched, the range could be 25,000–32,000 hours;
 - 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 wind energy and electric transmission and distribution facilities.

As outlined above, considering the increased hourly rates and hour estimates, the cost estimates provided in the Hours and Cost Table should be doubled, at a minimum, if revised to reflect actual costs.

Further, we also note there are other high cost elements of the ETP process that were not captured by the Hours and Cost Table and would significantly increase the cost for applicants:

NEPA: It is unclear why the Service excluded cost to the applicant for funding the Service’s NEPA analysis, but this cost burden should be considered. Based on EWAC members’ collective experiences, we estimate that the applicant’s NEPA costs will range from \$85,000-\$225,000 (with an average cost of \$140,000).¹²

Compensatory Mitigation: The cost of mitigation is one of the largest expenses associated with participating in the ETP process, and this cost must be planned for in the application phase. Yet these costs are not mentioned or otherwise captured anywhere in the Information Collection. In EWAC’s experiences, the number of power pole retrofits required to offset an eagle ranges from 9-13, with the cost per power pole retrofit ranging from \$4,500-\$9,000. Therefore, an applicant with a facility estimated to take one golden eagle a year over the course of 30-years (with the Eagle Rule’s 1.2:1 mitigation ratio) could expect to incur compensatory mitigation costs ranging from \$216,000-\$702,000 for the first five years of the project. These costs could potentially be repeated throughout the ETP term depending on the results of each five-year review (as required by the Eagle Rule). In some instances, Service offices have also taken the position that retrofits are not functional for the life-of-the-project, or that each retrofit provides credit only for a ten-year review period. Further, in instances where bald eagles or golden eagles exceed the 5% or 10% LAP threshold, then mitigation ratios may increase to an unidentified level, thus incurring unknown, additional costs that were not accounted for in the Hours and Cost Table.¹³

ETP Application: Another significant cost not included in the Hours and Cost Table is the administrative cost of preparing the ETP application and other ancillary documents (e.g., mitigation agreements). Member companies estimate the costs to be \$20,000 - \$60,000.

In sum, the ETP application process has a far greater cost burden on the regulated community than reflected in the Hours and Cost Table.

¹² While the Eagle Rule does allow for tiering off the Programmatic EIS, tiering requires additional NEPA documentation. Also, the results of the LAP analysis, whether the project exceeds Eagle Management Unit thresholds, and the type of compensatory mitigation selected can impact the level of NEPA analysis. EWAC has assumed an EA-level of effort.

¹³ The Eagle Rule does not specify the upper range of mitigation ratios. Some EWAC members have had discussions with the Service where the Service has discussed mitigation ratios in the 2:1 and 3:1 range.

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 respondents.

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 ITP program on applicants and/or Service resources:

Low-Risk or General Permit Program. EWAC strongly believes that a low-risk or general permit program for eagles is essential to resolving many of the issues surrounding ETPs. A low-risk or general permit program is advantageous for both the regulated community and the Service. Because of the burdensome requirements of the Eagle Rule and Service policy to recommend seeking an ETP even in low-risk scenarios, Service resources are stretched thin and the Service is unable to issue ETPs in a timely fashion. A streamlined approach to obtaining an ETP would have a substantial reduction in regulatory burden on the applicant, and in turn reduce the burden on Service resources. EWAC has provided suggestions for approaches to a low-risk or general permit program in its July 5, 2016 comments on the proposed Eagle Rule.¹⁴ EWAC would appreciate an opportunity to discuss and further develop those suggestions with the Service.

Third-party Monitoring. Monitoring requirements should be commensurate with risk. Having a blanket requirement for third-party monitoring for all long-term ETPs is of limited utility and significant cost. The Service should consider removing this requirement.

Local Area Population. The LAP analysis creates a “black box” scenario for permit applicants. By requiring the Service to determine 5% and 10% thresholds, and particularly by it being unclear how the 10% threshold will be calculated or what the mitigation ratios for crossing these thresholds would be, the applicant is left in a wait-and-see situation until the Service conducts the analysis. This has significant implications for compensatory mitigation and NEPA analyses, both of which result in greater cost and time for the applicant and the Service. The Service should not condition the amount of mitigation and NEPA analyses on the LAP results, or it should commit to providing LAP analyses early on in the applicant/Service coordination process and use transparent methods and data when doing so.

Waivers. The Eagle Rule allows for the Service to waive certain information collection requirements where circumstances warrant a waiver. These waivers could be particularly useful under the following circumstances: (1) those prospective facilities that have been collecting data in the years prior to the issuance of the Eagle Rule in coordination with USFWS and may not meet the Eagle Rule requirements; (2) operating or existing facilities for which pre-construction surveys that meet the current Eagle Rule standards would not be attainable (and only post-construction data can be attained); and (3) where wind energy facilities would be required to conduct surveys in areas or seasons where eagle use is minimal. Some EWAC members have encountered reluctance from the Service to issue waivers under the Eagle Rule, even where projects have fallen under the above-listed circumstances. If the Service is unwilling to issue waivers, then many

¹⁴ For example, a general permit program would be especially applicable to bald eagles (in the vast majority of their range) in that their population continues to grow rapidly.

facilities may face several year delays, the prospect of no permit, additional costs, and/or legal risk as a result.

Modules for Electric Transmission and Distribution. While the Service has stated that the Eagle Rule applies to all sources of eagle mortality, as written, the Eagle Rule is strongly focused on the wind energy sector and, as a result, several aspects of the Eagle Rule are unclear in their application to electric transmission and distribution. The result of this lack of clarity means potential delays, costs, and litigation risks that a non-wind energy applicant must bear. The Service should prioritize the development of guidance for the electric transmission and distribution industry and work collaboratively with the industry to ensure that the guidance is consistent with the practical realities of industry operations.

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 would welcome further dialogue with the Service on the topics above.

Please feel free to contact the following EWAC representatives:

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ATTACHMENT 1

July 5, 2016

**Comments regarding the May 6, 2016 Proposed Revisions to Regulations
For Eagle Incidental Take and Take of Eagle Nests**

Submitted by:

Energy and Wildlife Action Coalition

Filed electronically to the attention of:

Public Comments Processing

Attn: FWS-R9-MB-2011-0094

Division of Policy, Performance and Management

U.S. Fish and Wildlife Service

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The Energy and Wildlife Action Coalition (EWAC) submits these comments in response to the U.S. Fish and Wildlife Service (Service) May 6, 2016 announcement of Proposed Revisions to Regulations for Eagle Incidental Take and Take of Eagle Nests (Proposed Rule),¹ which would revise the Service's 2009 rulemaking that established a permit program (Eagle Permit Program) under the Bald and Golden Eagle Protection Act (BGEPA) for non-purposeful take of eagles and eagle nests (2009 Eagle Rule).²

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. 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, transmission and distribution 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.

As a whole, EWAC believes the Proposed Rule³ improves upon the 2009 Eagle Rule; however there are specific aspects of the Proposed Rule that should be revised or clarified. In short, we are concerned that the improvements, warranted as they may be, are skeletal in nature and critical decisions on the details that would make the Eagle Permit Program workable and successful have been avoided or postponed. These decisions must be rendered quickly and incorporated in the final rule or in ancillary documents for public comment simultaneously with the publication of the final rule, so as to make this voluntary permit program truly attractive to the regulated community. Below, EWAC notes those areas that improve upon the 2009 Eagle Rule, identifies areas of concern, and offers recommendations on how the Proposed Rule should be improved in its final iteration to make this voluntary permit program truly functional to the regulated community.

I. EWAC SUPPORTS SEVERAL ASPECTS OF THE PROPOSED RULE.

EWAC believes the Proposed Rule improves upon the Eagle Permit Program in several respects. Namely, EWAC supports the following aspects of the Proposed Rule:

- **Practicability.** EWAC applauds the Service's proposed revisions to 50 CFR § 22.26 that would: collapse the two types of incidental take permits (standard take permits and programmatic take permit) together into a single "incidental take" permit (eagle permit); remove the "unavoidable even though advanced conservation practices are being implemented" programmatic permit issuance standard; and, instead, establish "cannot be practicably avoided" as the permit issuance standard.⁴ These are important and necessary changes that will assist the Service in administering the Eagle Permit Program, incentivize project proponents to obtain eagle permits, and create a more legally defensible standard for permit issuance and permit terms. EWAC does have suggestions

¹ 81 Fed. Reg. 27934 (May 6, 2016).

² Eagle Permits; Take Necessary to Protect Interests in Particular Localities; Final Rules, 74 Fed. Reg. 46836 (Sept. 11, 2009).

³ For purposes of this letter, "Proposed Rule" includes both the proposed revised regulation and the preamble (including comments and responses).

⁴ Throughout this comment letter, we will use "eagle permit" when referring to BGEPA incidental take permits to minimize confusion where we also discuss Endangered Species Act Section 10 incidental take permits.

regarding the phrasing of the practicability standard. The Proposed Rule uses the phrase “cannot be practicably avoided” and then defines “practicable” to include the term “mitigation.”⁵ Mitigation as used in the definition of “practicable” in turn relies on the Council for Environmental Quality definition of mitigation, and that definition includes “avoidance.”⁶ The Service should retain “practicability” in the eagle permit standard, but should consider either revising the eagle permit standard or revising the definitions to avoid using the term being defined in the definition itself. For example, revising the standard to mirror the incidental take permit standard in Section 10(a)(2)(B) of the Endangered Species Act (ESA) -- “to the maximum extent practicable, minimize and mitigate” -- would resolve this concern.

- Thirty Year Permit Term. EWAC commends the Service for proposing to re-institute the 30-year permit term for eagle permits. The availability of a 30-year permit is vital to financial viability of large, capital intensive projects designed for a long operational life. However, as discussed below, EWAC continues to have concerns over the lack of “No Surprises” Assurances.
- Eagle Management Units (EMU). EWAC generally supports the use of EMUs based on the existing migratory bird flyway system. The existing North American flyway units provide a better biological foundation than the past arbitrary Bird Conservation Regions and Service regions used in the 2009 Eagle Rule. However, there are still outstanding issues with this approach, as explained below.
- Mitigation Options. EWAC commends the Service for supporting mitigation methods other than power pole retrofits. Conservation banking and in-lieu fee programs are valuable tools for providing larger-scale mitigation. We provide additional thoughts on mitigation below.
- Mitigation in EMUs. EWAC strongly supports the Service’s position that mitigation can be implemented on the EMU scale rather than requiring that mitigation projects be implemented near locations where the impacts may occur. This provides flexibility for the Service and eagle permit applicants in selecting a mitigation project that confer a greater benefit to eagles.
- ESA Section 7. EWAC is encouraged by the Service’s statement that the ESA Section 7 process triggered by the issuance of an eagle permit can be used to address ESA-listed species that may be associated with a project.⁷
- National Environmental Policy Act (NEPA) tiering. EWAC supports the Service’s tiered approach to NEPA for eagle permit issuance. However, without further guidance as to eagle conservation banks, we question whether their establishment will be timely enough to justify the Service’s inclusion of banks as a threshold criterion for the availability of tiering. We offer additional thoughts below.

⁵ Proposed Rule at 27939 (We propose to revise the definition of “practicable” by adopting the definition from the Service’s proposed mitigation policy . . .).

⁶ 81 Fed. Reg. 12379, 12381 (Mar. 8 2016) (The CEQ mitigation definition remains unchanged since codification in 1978 and states that “Mitigation includes: . . . Avoiding the impact altogether by not taking a certain action or parts of an action; . . .”)

⁷ Proposed Rule p. 27964.

- Nests in developed areas. EWAC appreciates the Service’s discussion of nests “coming to the project.”⁸ EWAC members have experienced scenarios where eagles (especially bald eagles) will begin building nests near projects that are under construction or are already constructed. EWAC supports the Service’s position that a minimal level of compensatory mitigation is appropriate when these instances involve golden eagle nests. However, the Service should clarify that no compensatory mitigation is required when these instances involve bald eagle nests.
- Bald eagles. EWAC generally supports the Proposed Rule’s treatment of bald eagles. In particular, EWAC agrees with the Service’s assessment that the bald eagle’s current population data are such that compensatory mitigation is not needed in most instances.
- Voluntary Process. EWAC appreciates the Service’s clarification that eagle permits are voluntary and that, except under certain circumstances (e.g., settlement agreements), the Service cannot require an eagle permit. This is an important point of understanding and consistent with how incidental take permits are treated under ESA Section 10. This clarification also helps to properly frame the scope of future NEPA analyses (tiered or otherwise) associated with eagle permits since, unlike some other federal actions such as funding or special use permits, an eagle permit authorizes take of eagles and does not authorize the construction or operation of a facility.

II. THE EAGLE PERMIT PROGRAM MUST BE WORKABLE AND CONSISTENTLY IMPLEMENTED ACROSS THE UNITED STATES.

EWAC supports an Eagle Permit Program that is workable and predictable. Use and application of an Eagle Permit Program that has these qualities will ensure that eagle permits are willingly sought and, consequently, that desired conservation benefits are delivered to eagles. However, the Proposed Rule sets forth several concepts that, without further guidance and clarification, will likely result in inconsistencies at the local level and produce an Eagle Permit Program that lacks the desired workability and predictability. In other words, the Proposed Rule is missing certain critically needed substance to be successful in building a robust permit program and providing meaningful eagle conservation.

The combination of inevitable program start-up problems and the failure to provide the needed substance has resulted in disturbingly inconsistent applications of the 2009 Eagle Rule across Service regions (not justified by biology) and has led to prolonged delays in the processing of, and demands for varied and disparate avoidance, minimization, and mitigation measures in, eagle permits. Uniformity of application of a new rule should be a high priority to minimize the opportunity for differing treatment of applicants. In these comments, EWAC identifies several areas where further guidance and clarification are needed to ensure that the Eagle Permit Program will operate as efficiently and effectively as the Service intends. EWAC urges the Service to issue for public comment, concurrently with the issuance of a final rule, a draft guidance document addressing these issues so that the regulated community (not solely the wind energy industry) and Service offices nationwide are well-poised to participate in and administer, respectively, the Eagle Permit Program. EWAC envisions a guidance document that

⁸ Proposed Rule at 27960.

would serve a similar function as does the Service's HCP Handbook.⁹ Like the HCP Handbook, notice of availability of, and request for public comment on, this guidance document should be published in the Federal Register. EWAC believes such a document is critical to the success of the Eagle Permit Program by ensuring that the regulated community receives consistent and equal treatment in all regions.

III. THE EAGLE MANAGEMENT UNIT AND LOCAL AREA POPULATION APPROACHES HAVE ISSUES THAT THREATEN THE FUNCTIONALITY OF THE EAGLE PERMIT PROGRAM.

EWAC appreciates the Service's efforts to revise the Eagle Permit Program to make it less equivocal, more dependable for potential applicants, and easier for the Service to administer. However, EWAC is concerned that certain aspects of the EMU and Local Area Population (LAP) approaches will create as many problems as the Proposed Rule would solve.

While EMUs are more uniformly applied across the country (as compared to the previous Bird Conservation Regions and Service regions used in the 2009 Eagle Rule), the EMUs do not include populations of eagles in Canada and Mexico. This is a significant omission and inconsistent with other Service management programs. For example, waterfowl management and harvest targets take into account the Canada and Mexico populations. Much like migratory waterfowl, both bald and golden eagles frequently cross U.S. borders during migration. These border crossings have been documented by Service telemetry and banding studies. There is no biological reason why these populations should be omitted from an analysis of eagles and permissible take levels. The final rule should use the best available science to establish take limits, which should include the Canada and Mexico populations.

EWAC continues to be troubled by the Preservation Standard in both the 2009 and this Proposed Rule because, as we have asserted previously, the BGEPA applies this standard only to certain special purpose permits and not to eagle programmatic or incidental take permits.¹⁰ Moreover, we believe the assertion of the Preservation Standard for eagle permits is even more problematic under the Proposed Rule because of the Service's inclusion of the LAP concept in its interpretation of the Preservation Standard. The application of the Preservation Standard for local eagle populations is particularly problematic and difficult to justify from a biological standpoint. Issues associated with the LAP approach are outlined in the next several paragraphs.

The LAP approach inadequately considers the dynamics of eagle ecology and other natural forces. In the Proposed Rule¹¹ the Service admits that the LAP analysis is simplistic, does not account for seasonal influxes due to migration and dispersal, and assumes uniform eagle densities across EMUs. More specifically, the LAP analysis inadequately considers migratory populations, juveniles, sub-adults and non-breeding floaters. At a local scale, there are many natural variables that affect local populations on a seasonal or year-to-year basis. These variables include local weather conditions, prey cycles, disease outbreaks such as West Nile virus, and many other natural and/or biological factors. Year-to-year numbers of sub-adults reaching breeding age and non-breeding floaters available to re-occupy breeding territories are also highly variable at a local scale. While a temporary reduction in LAP may occur from both

⁹ Habitat Conservation Planning and Incidental Take Permit Processing Handbook (Nov. 4, 1996).

¹⁰ Proposed Rule at 27947.

¹¹ Proposed Rule at 27938.

permitted and non-permitted anthropogenic sources of mortality, to tease these instances of mortality out from the natural population fluctuations at a local scale would be nearly impossible. EWAC believes that, as long as national and EMU populations stay stable or increase, the Service's goals for eagles have been met.

The LAP approach is also burdened by additional issues. First, it penalizes project proponents for siting projects (or having existing projects) in EMUs with fewer eagles. These areas will reach the 5% cap faster than those EMUs with more eagles. Therefore project proponents would arguably have a better chance of obtaining an eagle permit in EMUs with higher eagle populations, where there is less likelihood of exceeding 5% at the LAP level. In fact, the single existing eagle permit (Shiloh IV) was estimated to take 12.3% of the LAP. Therefore under the proposed approach, without even considering the cumulative unauthorized take in the LAP, no additional eagle permits within the LAP can be obtained, with the potential exception of repowering. This is a truly unfortunate result. It discourages project proponents across any industry to pursue eagle permits in this LAP.

The LAP approach is also problematic in that many regions may already be exceeding the 5% cap by virtue of the existing development to which unauthorized take is attributed.¹² Take estimates are necessarily speculative for these unauthorized take sources; however, Service personnel can use the 5% LAP cap to deny an eagle permit. This, in turn, means that unpermitted projects are essentially given priority over applications for eagle permits, which minimizes the eagle conservation value of the Eagle Permit Program and is a disincentive for new permit applications. The LAP approach is also problematic for long, linear projects such as electric transmission lines that may extend hundreds of miles or for large utility service areas that contain thousands of miles of distribution lines. Calculating and analyzing impacts over multiple LAPs for a single transmission line project or utility service area would be overly complex and very difficult for both the project proponent and the Service, particularly if the lines cross LAPs where the 5% cap is already exceeded. EWAC strongly believes this LAP approach allows for too much autonomy and room for arbitrary process resulting in inconsistency at the field office level. The Proposed Rule goes so far as to suggest that local offices could require that applicants, just to create the opportunity to pursue eagle permits, provide greater compensatory mitigation in areas where the 5% cap is already exceeded.¹³ This approach gives preference to unpermitted projects. And it can be misapplied and manipulated easily, thereby diminishing the predictability of the Eagle Permit Program.

EWAC urges the Service to select an alternative where the LAP analysis is not incorporated into the regulations, and instead focuses on the full bald eagle and golden eagle populations, including the Canada and Mexico populations. If the Service is unwilling to select such non-LAP alternative, then the Service must revise the LAP concept to address the issues outlined above and assure consistency in analysis at field office level, particularly for larger

¹² The "Bald and Golden Eagles: Population demographics and estimation of sustainable take in the United States, 2016 update" ("Population Report") issued concurrently with the Proposed Rule recognizes that other human activities such as shootings, poisonings, car collisions, etc. far surpass the collective mortality from wind energy and electric utilities. These sources alone could exceed LAP caps and prevent any eagle permits from being issued. Population Report p. 14.

¹³ Proposed Rule at 27938-39. "One situation where we may issue a permit that would result in authorized take above 5% of the LAP is if a project is already in operation and the permit conditions would result in a reduction of take or compensatory mitigation that offsets impacts to eagles within the LAP."

projects that may involve multiple offices. As written, the LAP approach allows for speculation, bias, and other issues that may arise from arbitrary accounting for unauthorized existing take. Rather than promoting an Eagle Permit Program that works, this LAP approach will further the delays and compound the issues that have plagued the Eagle Permit Program since 2009.

IV. THE EAGLE PERMIT PROGRAM SHOULD INCLUDE “NO SURPRISES” ASSURANCES AND SHOULD NOT PENALIZE PERMITTEES OR PROSPECTIVE PERMITTEES FOR CIRCUMSTANCES BEYOND THEIR CONTROL.

EWAC is disappointed that the Service did not include a “No Surprises” assurances concept in the Proposed Rule and, instead, retained the 5-year review process that all but eliminates predictability in the Eagle Permit Program even after eagle permits are issued and can greatly impact the cost and operational efficacy of a project. While the Service’s extension of permit terms to 30 years is commendable, the 5-year review period causes cost and project management uncertainties that create difficulties for project planning and financing. In short, the discretion accorded the Service to renegotiate permit terms or revoke permits altogether in or between each 5-year review makes the 30-year permit term illusory in many respects. A rule governing eagle permits should mirror the rule for incidental take permits issued under Section 10 of the ESA, and an eagle permittee should receive “No Surprises” assurances just as does the holder of an ESA incidental take permit. A BGEPA permitting program should not have less regulatory certainty than the ESA permitting program.

The Service has successfully implemented the ESA Section 10 permit program for incidental take of ESA-listed species for more than three decades (including more than two decades with “No Surprises” assurances”), allowing permits of 30+ years with “No Surprises” assurances and without 5-year reviews. Concerns regarding the duration of eagle permits can be resolved through robust changed circumstances and adaptive management provisions in eagle conservation plans, as are routinely provided in habitat conservation plans for ESA-listed species. As currently written, the Service proposes to reserve the right to rewrite the eagle permit terms, or decide not to renew the permit, every 5 years. The Proposed Rule in effect provides for a succession of 5-year eagle permits accompanied by new permit fees. This approach vastly reduces the utility and regulatory certainty of a 30-year eagle permit. In fact, we are aware of a number of companies that are contemplating seeking only 5-year eagle permits even if a final rule would authorize 30-year eagle permits.

Further, the Proposed Rule’s discussion of when additional compensatory mitigation may be required during one of the 5-year reviews could put a permittee’s eagle permit at risk for circumstances beyond the permittee’s control. The Proposed Rule identifies circumstances when additional mitigation may be required: “Such circumstances include but are not limited to: [1] a higher than anticipated take rate, [2] take resulting from an unexpected source within the permittee’s purview, or [3] an unanticipated significant detrimental change in the status of the local area or regional eagle population.”¹⁴ A permittee has no control over circumstances 2 and 3, yet could be required to provide additional mitigation at any 5-year review stage, or worse, have its permit revoked. Permittees should not be penalized for circumstances out of their control. In essence, the Service is potentially asking the permittee to pay for mitigation for take

¹⁴ Proposed Rule at 27955.

caused by another source, to be responsible for the actions of third parties. BGEPA does not authorize and the U.S. Constitution would not permit such a requirement.

V. THE FEE STRUCTURE IN THE PROPOSED RULE IS EXCESSIVE.

The existing \$36,000 eagle permit fee is orders of magnitude more expensive than the fee for any other wildlife permit issued by the Service.¹⁵ The Proposed Rule language requiring \$15,000 for each 5-year review makes the fee structure even more untenable. A 30-year project would cost over \$100,000 in permit fees alone.¹⁶ This fee structure for a voluntary permit is grossly disproportionate to the fee structures of other wildlife permits (with no reasonable justification). EWAC is uncomfortable with the justification that this fee structure is needed to run the Eagle Permit Program, unless and until it is clear that the fees are not deposited in the General Treasury, but are actually being held by the Service and directed to eagle permit processing. Given that astonishingly few eagle permits have been issued to date, it is not clear that the fee has aided the administrative process.

VI. THE CONCEPT OF “OTHERWISE LAWFUL” SHOULD BE REMOVED.

EWAC is disappointed to see that the Proposed Rule carries forward the concept of “otherwise lawful” as an implied criterion for obtaining an eagle permit.¹⁷ This concept is built into the ESA statutory language, but is notably absent from BGEPA. The concept has been misconstrued and inappropriately applied in both ESA and BGEPA permitting. Particularly, it can cause confusion concerning, significant delay in, and occasional litigation over,¹⁸ permit processing and issuance. Inclusion of this concept has the potential to prolong the processing of eagle permits for reasons having nothing to do with the preservation of eagles.

VII. THE SUGGESTION THAT EAGLE PERMIT APPLICANTS MUST RESOLVE ANY PREVIOUS TAKE BEFORE BEING ELIGIBLE FOR PERMIT ISSUANCE IS FLAWED AND SHOULD BE REMOVED.

The Proposed Rule suggests in several places that settlement of prior eagle takes will be required before the Service will issue an eagle permit application. For example:

Applicants for incidental take permits whose activities have been taking eagles prior to 2009 and have had more than 6 years to apply for permits may be required to address past take by entering a settlement agreement before being issued a permit for future take. Such agreements would require the company to undertake corrective actions and pay penalties for unpermitted past take, among other actions.¹⁹

¹⁵ 81 Fed. Reg., 8001, 8002 (Feb. 17, 2016). The application fee for an incidental take permit under ESA Section 10, in contrast, is \$100 without renewal fees (as there is no five-year review process).

¹⁶ Similarly, the Proposed Rule’s increase in the permit fee for a commercial applicant to take a single nest from \$500 to \$2,500 is also excessive and not sufficiently justified.

¹⁷ Proposed Rule, pp. 27934-5.

¹⁸ *Center for Biological Diversity v. U.S. Fish and Wildlife Service*, 450 F.3d 930 (9th Cir. 2006); *Environmental Protection Information Center v. U.S. Fish and Wildlife Service*, 2005 WL 3877605, at *4 (N.D. Cal. Apr. 22, 2005).

¹⁹ Proposed Rule at 27949.

Using an example of an existing transmission line system, this statement implies that the transmission line provider would need to take corrective actions and/or make payments for all takes over the life of the system, which may have been in operation since the early 1900's. It is unreasonable and ineffective to require that those seeking a voluntary permit must "settle up" with the Service over their existing projects. Further, throughout the Proposed Rule, take prior to 2009 is treated as part of the baseline. Therefore settlement for take prior to 2009 should not be required for eligibility to pursue an eagle permit. The 2009 Eagle Rule set forth a flawed system for securing permits. Had it been otherwise, takes that occurred from 2009 on might indeed have been authorized. In any case, an eagle permit issued under the 2009 Eagle Rule would authorize only future take, not pre-2009 take. Prospective permittees that are not the subject of enforcement actions should not be required to calculate and address speculated take in order to avail themselves of the voluntary Eagle Permit Program. The Proposed Rule thus requires a voluntary applicant to incriminate itself to obtain an eagle permit. Considering this requirement and the fees mentioned above, along with the uncertainty of the permit term, the Service has built some very strong disincentives into the Proposed Rule that virtually guarantee its failure. EWAC strongly believes the Service must remove any language suggesting it may require projects to acquiesce in civil settlement agreements before it fulfills the responsibility it discovered and assigned itself in the 2009 Rule to issue eagle take permits.

VIII. MONITORING PROVIDES MINIMAL BENEFIT TO EAGLES AND ANY MONITORING REQUIREMENTS SHOULD CONSIDER THE COST AND BENEFIT OF THE MONITORING PROGRAM.

Language in the Proposed Rule suggests that all permittees will be required to monitor their permitted projects: "Holders of permits that authorize eagle mortalities would be required to use approaches to searching for injured and killed eagles and for estimating total take that use statistically rigorous, unbiased, estimators."²⁰ This is not the highest and best use of resources, and is commercially unreasonable for certain projects. For example, where the project to be permitted is a large portion of an existing transmission system, monitoring would be exorbitantly expensive, administratively challenging, and impractical and would not further the purposes of the eagle permit. The same can be said for wind energy facilities. Project budgets have already been set, which, in many cases, include Avian Protection Programs or Bird and Bat Conservation Strategies that likely address implementing adaptive management responses when and where fatalities are observed. Requiring monitoring, thereby diverting projects' budgets away from solution-oriented measures such as power pole retrofitting and line-marking, creates a situation where funding is directed to an activity that provides very little if any conservation benefit. Eagle carcasses are large and highly conspicuous and they persist on the landscape for long periods of time. Utility and wind site personnel who are trained to look for eagle carcasses in their routine job duties will find many of the eagle fatalities associated with their projects. It is likely that these incidental finds of eagle carcasses are numerous enough to generate robust estimates of eagle mortality for eagle permit compliance purposes. The Service should not impose mandatory monitoring requirements in the final rule. Permit monitoring requirements should be commensurate with the risk of the project and the impacts of monitoring on the project

²⁰ Proposed Rule at 27941.

(including the cost of monitoring and diversion of project resources), and weighed with the limited benefit that monitoring confers to eagles.

IX. EWAC RECOMMENDS THAT THE SERVICE USE CAUTION WHEN CODIFYING THE EAGLE CONSERVATION PLAN GUIDANCE PROTOCOLS.

The Proposed Rule codifies by reference the wind industry-specific Eagle Conservation Plan Guidance (ECPG) survey protocols set forth in Appendix C and D of the ECPG.²¹ These protocols are in a constant state of flux and codifying them for a single industry greatly complicates the Proposed Rule and may limit the application of improved science in future to the detriment of eagle conservation. Moreover, the ECPG protocols are already out of date and not consistent with the protocols Service offices are currently applying. Therefore, even the industry that is singled out by the Proposed Rule and ECPG cannot abide by the protocols that the Proposed Rule would codify. Further, other industries that may avail themselves of an eagle permit cannot rely on these protocols. Indeed, by singling out the wind energy industry to the exclusion of all other industries, the Service may be eliminating permit opportunities for those other industries – certainly an undesirable outcome. Wind energy is not the leading cause of eagle mortalities. Singling out the industry by codifying the ECPG appendices is not warranted or appropriate. All industry protocols should either be referenced in the guidance document we recommend in Section II above or exist independently from the regulation.

X. FURTHER GUIDANCE IS NEEDED ON MITIGATION.

As noted in Section I above, EWAC supports the Service's expansion of mitigation options to activities other than power pole retrofits. Retrofitting of power pole as the sole accepted type of compensatory mitigation is problematic for several reasons.²² The current proposal for expansion is consistent with the preamble of the 2009 Eagle Rule.²³ Conservation banking and in-lieu fee programs are valuable tools for providing larger-scale mitigation, and habitat preservation is a highly beneficial mitigation approach that has been employed successfully under the ESA.

With the increased emphasis on habitat preservation, the Service should promptly develop a set of guidelines embodied in a guidance document by which its offices can approve banks and in-lieu fee programs. Previous efforts to generate habitat preservation to offset eagle take have been stymied by the lack of metrics to translate saving and restoring land into an economically viable mitigation option. While we commend the Service's desire to use peer-reviewed research to establish these metrics, that self-imposed pre-condition appears to be frustrating the timely development of alternative mitigation methods. We also note that the Service readily establishes habitat-based mitigation metrics for endangered and threatened

²¹ Proposed Rule at 27974.

²² Power pole retrofits require, in the scenario where the permittee is not the utility with the power poles, that the utility be willing to enter into an agreement with a permittee. This reduces the number of poles that may serve as mitigation for a utility's own mitigation needs. The agreement must address access, liability, and maintenance. Whether the permittee is the utility or not, APLIC Suggested Practices do not call for all poles to be retrofitted, and the Service should not be involved in determining which poles are appropriate for retrofitting.

²³ 2009 Eagle Rule at 46855 ("Some compensatory mitigation options we are considering at this point include: purchase and preservation of habitat or potential habitat; use of conservation easements to protect important eagle use areas or potential nest sites; and contributions to a fund established to benefit eagles.")

species under the ESA on the basis of best professional judgment. Experience has shown that the absence of guidance on establishing and offering mitigation opportunities can result in significant delays in approval of mitigation for an eagle permit. It also can result in uneven requirements and reduce the quality of mitigation in the Eagle Permit Program generally. The guidance document EWAC seeks is essential for the Eagle Permit Program to flourish. Without clear guidance, Service offices and prospective mitigation providers will have to determine, in piecemeal fashion, acceptable management activities and credit allocation formulas. Having a guidance document that Service staff and prospective mitigation providers can rely on will greatly increase the likelihood that conservation banks and in-lieu fee programs will be established in the near term, and that such banks and programs will be consistent across Service regions and/or EMUs.

Given the high value that conservation banks and in-lieu fee programs will offer to the regulated community and for eagle conservation, it is critical that guidance be developed concurrently with the finalization of the Proposed Rule or immediately following. This is particularly important if the final rule, as does the Proposed Rule, includes mitigation via conservation banking as a criterion by which a permittee can tier its NEPA review. As an additional interim solution, EWAC recommends that the Service expand the third criterion for NEPA-tiering to include in-lieu fee programs in addition to conservation banks (as written in the Proposed Rule, only conservation banks are included in the criterion).²⁴ The National Fish and Wildlife Foundation (NFWF) has an existing in-lieu fee program that has been the recipient of penalty payments arising out of criminal and civil enforcement cases under the BGEPA and Migratory Bird Treaty Act and conservation donations. Permit applicants could pay a set fee per eagle to the NFWF in-lieu fee program to satisfy mitigation requirements and qualify for tiering until other in-lieu fee programs and conservation banks are established.

Finally, while EWAC agrees that the inclusion of conservation banks and in-lieu fee programs is an important and positive step for the Eagle Permit Program, power pole retrofits should not be excluded from this NEPA-tiering criterion. Project proponents should be able to use power pole retrofits as a compensatory mitigation without having “disqualified” the project from tiering off the DEIS. The Service should not penalize those electing to use the only mitigation method that has been approved for the past seven years. In particular, electric transmission and distribution providers should have the opportunity to retrofit their own lines without being disqualified from NEPA-tiering. The NEPA-tiering criterion should include power pole retrofit in addition to conservation banking and in-lieu fee programs.

XI. THE SERVICE SHOULD PROVIDE MORE GUIDANCE TO ITS LOCAL OFFICES REGARDING MITIGATION RATIOS, NET BENEFIT, AND OFFSET.

The Proposed Rule uses the terms “compensatory mitigation,” “offset,” and “net benefit” throughout. Because the Service does not employ these terms consistently, their use may cause confusion across Service offices as to what is required to support eagle permit issuance. The Service should use “compensatory mitigation” consistently throughout the final rule and DEIS to minimize confusion and inconsistent application. The Proposed Rule also states that compensatory mitigation for golden eagles will be at a greater than 1:1 ratio, but provides no

²⁴ Proposed Rule at 27945. The Programmatic Draft Environmental Impact Statement (p. 6) reflects a broader third criterion than what was provided in the Proposed Rule.

other guidance to suggest whether this means 2:1 or 2,000:1.²⁵ If eagle populations are stable,²⁶ then a net benefit is not required to be in accordance with the permit issuance standards. The Service even suggests that ratios may change within an eagle permit term:

compensatory mitigation for any authorized take of golden eagles that exceeds take thresholds would be designed to ensure that take is offset at a greater than one-to-one ratio to achieve a net benefit to golden eagles to achieve an outcome consistent with the preservation of golden eagles as the result of the permit. Based on the uncertainty in the effectiveness of a particular compensatory mitigation practice, we are likely to require further adjustments to mitigation ratios to provide a buffer in the event that the planned mitigation is less effective than anticipated.²⁷

The Service must be careful to provide guidance to ensure that a “sky’s the limit” approach does not become the norm for local Service offices. Otherwise, local Service offices may impose ratios inconsistently and arbitrarily. Further, if eagle populations are stable, imposition of a net benefit standard should not be obligatory. Practicability is essential when determining compensatory mitigation. Moreover, a question of constitutional takings could arise if compensatory mitigation ratios are not carefully applied.

XII. THE SERVICE SHOULD DEVELOP A PERMITTING PATHWAY FOR LOW-RISK PROJECTS.

EWAC urges the Service to establish a low-risk category that allows a qualifying project to follow a streamlined approach to permit issuance. In its haste to issue the Proposed Rule, the Service has postponed decisions on elements in the Eagle Permit Program that are needed and beneficial; the failure to develop a low-risk permit category is an unfortunate example of this. The effort to establish a low-risk permit category should be a high priority item for the Service and must not be deferred further. Put simply, the absence of a streamlined eagle permitting procedure can be a significant disincentive for projects with moderate or low risk to eagles – an outcome that is not in the interest of eagle conservation.

EWAC is supportive of higher participation in the Eagle Permit Program. The best driver of increased participation is the provision of a low-risk project permitting pathway. The prolonged processing and excessive costs for eagle permit applications under the 2009 Eagle Rule, particularly for low-risk projects, often make pursuit of eagle permits uneconomical and may factor negatively into the decision whether to apply for an eagle permit.

A low-risk permit category could be a “General,” “Nationwide” or even a “General EMU Permit” akin to the Army Corps of Engineers Nationwide or Regional General Permit program or the National Pollutant Discharge Elimination System Construction Stormwater General Permit program. EMUs with robust populations could use a streamlined process for eagle permitting. Additionally, given the current population numbers and trajectory, EWAC believes that projects that may take bald eagles are particularly well-suited to qualify for low-risk permits. EWAC has specific suggestions for how the Service may establish a low-risk category.

²⁵ Proposed Rule at 27941, 27959.

²⁶ As indicated by at least one of the population models included in the Population Report.

²⁷ Proposed Rule at 27941

- If, despite the significant issues highlighted above, the Service includes the LAP approach in its final rule, low-risk categorization should consider the potential carrying capacity of the EMU and LAP to allow for LAPs that naturally have low population densities of eagles (e.g., resident population is low or non-existent and population is primarily migratory birds and floaters) to have a low-risk permitting pathway.
- We suggest the Service determine a take threshold for bald eagles that serves as a qualifying criterion for low-risk permits. Projects whose take estimates (using the best available science) meet that criterion would qualify for a streamlined permitting process. Indeed, the Proposed Rule already would remove the requirement for compensatory mitigation for bald eagles at the current population levels; this would bolster the position that permits solely for take of bald eagles should qualify for the low-risk category.
- Geography-based general permits (e.g., a General EMU Permit) should be used for low-risk activities in EMUs with robust and growing bald eagle populations, where take levels (both unpermitted and permitted) at the regional and/or local levels continue to be outpaced by bald eagle population growth.
- An additional qualifying criterion could be to specify distances from active nests and other best management practices designed to minimize take of bald eagles that, if adopted, automatically qualify a project for streamlined permit processing.
- In addition to the circumstantial or geographical criteria suggested above, certain industry activities could automatically qualify for the low-risk category for both bald and golden eagles. For example:
 - New transmission and distribution lines that develop and implement Avian Protection Plans using APLIC Suggested Practices;²⁸
 - Existing transmission and distribution lines (historical take is a part of the baseline); and
 - Wind projects with moderately low eagle risk that employ robust best management practices and install proven eagle detection/curtailment technology to significantly minimize take.

Low risk permits, especially for existing infrastructure, should be categorically excluded from NEPA review and should require only incidental monitoring.

The establishment of a low-risk permit category benefits the regulated community, the Service, and eagles by:

- Allowing for a more streamlined permitting process for low-risk projects in areas with robust and growing bald eagle populations;
- Allowing Service staff to focus resources on eagle permit applications for activities that are likely to have greater impacts to eagles; and

²⁸ The Proposed Rule incorrectly references APLIC documents – for purposes of this letter, where we say APLIC Suggested Practices, we are referring to “Avian Power Line Interaction Committee (APLIC). 2006. *Suggested Practices for Avian Protection on Power Lines: The State of the Art in 2006*. Edison Electric Institute, APLIC, and the California Energy Commission.

- Allowing Service staff to address a broader range of eagle conservation efforts, including other anthropogenic activities that are more significant in limiting eagle population growth (e.g., lead and rodenticide poisoning).

EWAC members would support a modest low-risk permit fee for low risk eagle permits. When compared to the cost of preparing an individual Eagle Conservation Plan and an individual NEPA document and of conducting ongoing fatality monitoring for an individual eagle permit, a modest permit fee for a general permit makes good economic sense. These permit fees could be used by the Service to monitor eagle populations, to fund research, and to fund eagle conservation actions that directly benefit eagles.

It is important to remember that for decades agencies have been streamlining permitting programs for scarce natural resources with success. For example, the U.S. Army Corps of Engineers (USACE) has successfully administered the General/Nationwide Permit program for small amounts of discharges of dredged and fill material into waters of the U.S since 1992. Activities that fit into the different categories of Nationwide Permits are automatically approved by following pre-determined BMPs. The impacts of these Nationwide Permits are evaluated under NEPA as a group, not as individual projects. No reason exists why a similar approach cannot be used for the Eagle Permit Program, especially since neither eagle species is threatened or endangered and a general permit would only be available for low-risk projects/actions. To further reduce real or perceived risk concerns with a general permit approach, a low-risk permit could be structured such that the Service could re-evaluate the terms/conditions of the general permit on a 5-year cycle to account for new information, population status trends and improved understanding of BMPs. The USACE uses a similar approach by re-evaluating the details of the Nationwide Permits every 5 years and is currently undertaking the 5-year review of their Nationwide Permits.

XIII. THE BAYESIAN MODEL IS INAPPROPRIATE FOR BALD EAGLES.

EWAC urges the Service to revisit its stance on the applicability of the Bayesian model to bald eagles. Although the Service admits to problems in the model, it appears to continue to defer resolution of this issue. This is another unresolved matter that, unless addressed promptly, will render the final rule less useful than it should be. EWAC feels strongly that this model is inappropriate for bald eagles and results in outcomes that are not desirable for the Service or projects that are considering whether to seek eagle permits. Use of the model for bald eagles yields higher take estimates for bald eagles, which give the public a false perception as to how much take is actually happening. Moreover, the 4,200 bald eagle take limit will be allocated more quickly under this model, which may impact the mitigation required at the LAP level. The model, in inflating take, creates artificially high mitigation demands that will continue to be a disincentive for companies to seek the voluntary eagle permit and to exacerbate public perception that wind energy development is responsible for large numbers of eagle takes.

The Bayesian model also has issues when used for golden eagles. EWAC member experience has found that even with identical input data, different results are derived depending on who runs the model. Further, Service staff with knowledge and technical expertise to run the model is very limited, which results in long delays in permit processing.

Finally, as is the case with several aspects of the Proposed Rule, this model is applicable to only one industry – wind energy. The standard for estimating take should be the “best

available science.” This standard is well established in the ESA realm and has been used often by both wind and utility ESA Section 10 permit applicants. Also, in alignment with the ESA, there should be no requirement that take-estimating methods employed by applicants be published and peer reviewed. The best available science standard could then apply beyond the wind energy industry and resolve some of our noted concerns with the model. Other industries, such as electric delivery could move through the permit process more readily if they are not waiting on a Bayesian-esque models to be developed. Electric utilities, following APLIC Suggested Practices, can perform risk assessments to determine areas of focus along transmission and distribution corridors where power poles should be evaluated for retrofitting to reduce collision or electrocution risk. Historical records from incidental monitoring of eagle impacts along electricity infrastructure corridors can be used to determine expected levels of take with relatively high confidence. As we suggest for monitoring, industry-specific protocols should be allowable and be referenced in the guidance document we recommend in Section II above or otherwise exist independently from the regulation.

XIV. THE EAGLE PERMIT PROGRAM SHOULD NOT REQUIRE A BIRD AND BAT CONSERVATION STRATEGY.

The Service provided a response to comments that implies requiring a Bird and Bat Conservation Strategy (“BBCS”) as a precondition for eagle permit issuance is consistent with its regulations;

By regulation (50 CFR 13.21(c)), any permit “automatically incorporates within its terms the conditions and requirements of subpart D of this part and of any part(s) or section(s) specifically authorizing or governing the activity for which the permit is issued, as well as any other conditions deemed appropriate and included on the face of the permit.” Development and compliance with Bird and Bat Conservation Strategies to reduce take of other federally protected species is appropriate in light of the Service’s responsibilities under Federal wildlife protection laws.²⁹

First and foremost, if an eagle permit is issued with its terms and conditions requiring a permittee to abide by the ECPG focused on eagle take, then a BBCS is irrelevant to the permit processing. Moreover, a BBCS is a vehicle created by the 2012 Land-based Wind Energy Guidelines (WEG). The contents of the WEG were carefully drafted with input from the federal advisory committee. The WEG themselves are expressly voluntary, and the WEG expressly describe a BBCS document as but one option to demonstrate adherence to the WEG. In fact, the WEG specifically state that a BBCS can be a document or a collection of documents.³⁰ Therefore requiring a BBCS contradicts the voluntary nature of the WEG, and also contradicts the WEG-created concept of the BBCS. For the Eagle Permit Program and generally, the Service should assume the responsibility to clarify for its local office personnel and in the preamble to the final rule that a BBCS (or collection of documents that serve the function of a BBCS) is voluntary.

²⁹ Proposed Rule at 27950-51.

³⁰ WEG p. 55

XV. THE EAGLE PERMIT PROGRAM SHOULD NOT REQUIRE ADHERENCE TO APLIC SUGGESTED PRACTICES.

The Preamble suggests that the Service will incorporate the APLIC Suggested Practices as permit terms and conditions.³¹ Similar to the WEG, the APLIC Suggested Practices are voluntary, apply to only one industry that may seek eagle permits, and do not prescribe a certain set of best management practices or measures that a transmission or distribution provider must follow. Instead, the APLIC Suggested Practices are to be used as a toolbox for companies to employ in assessing and managing risk. For example, the application of APLIC Suggested Practices may be unnecessary in areas that a company determines to be low risk (e.g., urban or similar areas). Mandatory and uniform imposition of the APLIC Suggested Practices as set forth in the Proposed Rule is not appropriate.

XVI. THE SERVICE MISCHARACTERIZES THE EAGLE POPULATION STUDIES AND THEN FAILS TO ACKNOWLEDGE THE LEADING CAUSES OF EAGLE MORTALITY.

The Population Report identifies several anthropogenic activities that are major contributors to eagle mortalities. However, the Proposed Rule continues to focus on regulating wind energy facilities and to a lesser degree, electric utility projects. The Service should acknowledge in the final rule that these two activities are not the highest sources of mortality, and the other sources of mortality also trigger application of BGEPA. As written, there is a disproportionate emphasis on lesser sources of mortality without adequate recognition of other, leading sources. In fact, throughout the Proposed Rule, using the Population Report as a reference, uneven emphasis is given to the matrix demographic data forecasting population model that shows a slight decline in golden eagle populations but little to no recognition is accorded to the time series composite model that uses actual golden eagle count data from late summer aerial transects over multiple years. This composite model study shows golden eagle populations have been stable for the last 40 years. The final rule should provide more even treatment of anthropogenic causes of eagle mortality as well as the two eagle population studies models evaluated in the Population Report.

XVII. THE PROGRAMMATIC DRAFT ENVIRONMENTAL IMPACT STATEMENT (DEIS) SHOULD BETTER EXPLAIN WHICH IMPACTED RESOURCES IT EXCLUDES FROM ANALYSIS.

The DEIS should better explain which impacted resources the Service chose to exclude from analysis. For example, the Draft Environmental Impact Statement for the Midwest Wind Energy Multi-Species Habitat Conservation Plan (“MWE MSHCP DEIS”)³² is similarly wide-ranging, authorizes incidental take across a large region, and examines many more resources. This is not to say that the DEIS should mirror the MWE MSHCP DEIS, but the DEIS should consider providing more explanation as to its approach.

³¹ Proposed Rule at 27958.

³² Availability of the Draft Midwest Wind Energy Multi-Species Habitat Conservation Plan and Draft Environmental Impact Statement, 81 Fed. Reg. 22299 (Apr. 15, 2016).

XVIII. THE DEIS ANALYSIS INAPPROPRIATELY EXPANDS BEYOND THE FEDERAL ACTION IT IDENTIFIES.

The DEIS identifies the federal action as:

a number of revisions to eagle nonpurposeful (incidental) take permit regulations (50 CFR 22.26) and eagle nest take regulations (50 CFR 22.27). One proposed revision would extend the maximum permit duration from five to thirty years. The proposed actions also include revisions to the permit fee schedule at 50 CFR 13.11, several definitions in 50 CFR 22.3, and two provisions that apply to all eagle permits (50 CFR 22.4 and 22.11).³³

In reality, the DEIS analyzes the effects of the projects applying for the eagle permits as if the federal action is the approval of the projects themselves. An eagle permit does not authorize a project – it is an authorization for take of eagles. Further, revisions to the Eagle Permit Program do not authorize the take of eagles nor do they authorize projects. The effects analysis should be limited to the direct, indirect, and cumulative effects of the revisions to the 2009 Eagle Rule. Further, this same limited scope applies to future NEPA documents, tiered or otherwise, because, again, issuance of a specific eagle permit in the future would also not be authorizing the construction or operation of a particular facility, but rather only the incidental take of eagles. The issuance of an eagle permit must not be equated with federal actions such as rights-of-way grants or special use permits, which can and do authorize projects. This critical distinction must be made in the final rule to avoid local field offices requiring inappropriately broad NEPA documents in future.

XIX. THE DEIS MAKES AN UNQUALIFIED REMARK REGARDING THE WIND ENERGY INDUSTRY.

The DEIS (p. 172) makes an unqualified remark, based on an unfaithful recitation of Pagel et al. 2013, that wind energy providers do not report eagle fatalities. The statement implies that the wind energy industry is generally nefarious in its reporting of eagle fatalities, which is not the proper conclusion from Pagel et al. The Pagel paper suggests that much of the reporting of eagle fatalities during the study period came from incidental reporting, making fatality rate estimation more difficult than from the Service-preferred regular post-construction monitoring program. That the reporting arose from incidental observation does not mean that wind energy operators were not compliant with any obligations or that such data are of no use. The wealth of data of wind-eagle interactions directly contradicts the conclusion made in the DEIS with respect to the reporting of eagle fatalities due to wind energy. Thus, the statement is without merit and inappropriate for inclusion in the DEIS.

XX. THE DEIS INACCURATELY REPRESENTS ITS SOURCES.

There are several instances throughout the DEIS where the references cited do not support the text provided. We request that the Service revisit the citations in the DEIS and confirm that the sources cited support the assertions made in the DEIS. For examples of these inconsistencies, please see APLIC's comments on the Proposed Rule.

³³ DEIS p. 5.

XXI. THE EAGLE PERMIT PROGRAM SHOULD BE ADMINISTERED BY THE ECOLOGICAL SERVICES DIVISION RATHER THAN THE MIGRATORY BIRD DIVISION.

EWAC continues to believe that the Eagle Permit Program should be administered by the Ecological Services Division. This Division of the Service is best equipped to process a permit program of this magnitude. It already possesses the experience of managing a similarly broad incidental take permit program under the ESA, with associated NEPA and ESA Section 7 processes, whereas the Migratory Bird Division's permit programs are more limited in scope and entail less complex processes (e.g., no NEPA or Section 7). Moreover, the Migratory Bird Division's ability to process eagle permits is hampered by its very small staff, which is located in Regional offices away from the Ecological Services field offices with their on-the-ground permitting experience and knowledge of local conditions. EWAC believes Ecological Services is better poised to make the Eagle Permit Program a success with timely permitting and delivery of conservation benefits.

XXII. THE SERVICE MISCHARACTERIZES THE ESA IN THE PREAMBLE.

The Service references the ESA throughout the Proposed Rule to explain its approach. Some of these statements contradict the Service's own guidance and jurisprudence. To avoid confusion, EWAC recommends that these statements be clarified in the final rule.

- “Reasonably Certain...Not To Occur.” The preamble to the Proposed Rule, in discussing data collection and analysis, includes the statement that “intensive sampling is required to be reasonably certain that eagle take is not expected to occur and that the project would not require an eagle take permit.”³⁴ This is backwards from how the courts have discussed that same risk assessment under the ESA. As noted in the Proposed Rule, the decision to pursue an ESA Section 10 incidental take permit is voluntary and dependent on the project proponent's assessment of the project's likelihood to cause take. If the threshold inquiry is whether a project was reasonably certain not to cause take, given the Bayesian model's conservative outputs, nearly every project would need to pursue a permit based on speculative possibility.

BGEPA regulates take, not any possibility of take, and a project proponent's decision to pursue an eagle permit rests on its analysis of whether it is reasonably certain it will violate BGEPA. It is inappropriate and contradicts analogous ESA case law³⁵ to say that the project proponent's burden is to prove a negative. Several courts have held that violations of the ESA do not arise where take is but a speculative possibility; rather courts have required a showing that take is reasonably certain to occur. The Service should state clearly in the preamble to the final rule that the regulated community's burden under BGEPA is no different from ESA guidance and jurisprudence.

³⁴ Proposed Rule p. 27953.

³⁵ See e.g., Arizona Cattle Growers' Assn' v. U.S. Fish and Wildlife Service, 273 F.3d 1229, 1245 (9th Cir. 2001); Protect Our Water v. Flowers, 377 F.Supp.2d 844, 881 (E.D. Cal. 2004);

- Regulation of habitat. The preamble to the Proposed Rule includes a comment response that implies the ESA gives the Service the authority to protect or otherwise regulate habitat:

The Eagle Act, unlike how the ESA protects ESA-listed species, does not give the Service authority to protect or otherwise regulate eagle habitat (other than eagle nests and habitat destruction that directly causes lethal take or disturbance), but project proponents can and do voluntarily protect habitat as mitigation for permitted take.³⁶

However, other than for designated critical habitat with a federal nexus and for those impacts to habitat that rise to the level of harm under the factors set forth in *Sweet Home*,³⁷ the ESA does not protect or otherwise regulate habitat. This clarification should be made to avoid any misunderstanding.

XXIII. EVEN CONSIDERING THE CONTENT OF THE PROPOSED RULE, THE EAGLE PERMIT PROGRAM REMAINS MORE STRINGENT AND COMPLEX THAN THE ESA.

As we state at the outset, EWAC is supportive of many of the changes set forth in the Proposed Rule and believes that, with prompt issuance of critically missing guidance, these changes may render the Eagle Permit Program more workable and beneficial to both affected industries and species. However, even with the proposed revisions to the 2009 Eagle Rule, the Eagle Permit Program remains more onerous than the ESA Section 10 incidental take permit program (5-year reviews, lack of “No Surprises” assurances, industry-bias, peer-reviewed models that few can run, etc.) -- a fact that is very difficult to understand since both species of eagles are doing better than the imperiled species protected under the ESA. We note the 2009 Eagle Rule expressly contemplated that the Eagle Permit Program would be “less extensive and easier to compile than permits under the ESA.”³⁸ The Eagle Permit Program must continue to move in the direction of the proven and highly successful ESA permit program or an even more streamlined approach.³⁹ The Service should more directly employ its three decades of experience in developing and administering the ESA permit program to revive the faltering Eagle Permit Program. Eagle conservation can happen at a faster pace and on a much greater scale if the Eagle Permit Program is made more workable and predictable for project proponents and the Service alike.

XXIV. CONCLUSION

EWAC appreciates the Service's consideration of these suggestions and recommendations as it continues to evaluate the Proposed Rule. EWAC looks forward to working with the Service in its effort to continually improve implementation of federal wildlife laws and the effectiveness

³⁶ Proposed Rule p. 27963.

³⁷ *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995)

³⁸ 2009 Eagle Rule at p. 46849.

³⁹ In fact, because the two eagle species are faring better than endangered and threatened species, the BGEPA permitting process ought to be *less* onerous than the ESA incidental take permitting process.

of mitigation programs prescribed by those laws. Please feel free to contact the following EWAC representatives should the Service seek additional clarity on any of the above:

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