



Shaping the future for birds

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Subject: DEA for the West Butte Wind Project

Dear Chief Green:

American Bird Conservancy (ABC) would like to thank the U.S Fish and Wildlife Service (FWS) for the opportunity to comment on the West Butte Wind Project's Draft Environmental Assessment (DEA) for issuance of a Programmatic Incidental Take Permit for Golden Eagles. In addition, ABC thanks FWS for extending the public comment period for the permit by 15 days.

Although wind power could be an important part of the solution to global climate change, wind development can impact birds -- including eagles, songbirds, sage grouse, and endangered species -- through collisions with turbines and associated project infrastructure, and through loss of habitat. ABC believes that birds and wind power can co-exist if wind projects conform to bird-smart principles. Bird-smart wind power employs careful siting, operation and construction mitigation, bird monitoring, and compensatory mitigation to reduce and redress any unavoidable bird mortality and habitat loss.

ABC is very concerned about the impacts of wind energy on Golden Eagles, which face many threats¹ and are increasingly being killed at wind projects across the U.S. According to a FWS presentation at the Lewis and Clark Law School last October, 54 Golden Eagles were at that time known to have been killed at wind projects outside of Altamont Pass in California (Pagel 2011). Five of those deaths occurred at two wind facilities in Oregon. ABC understands that there may have been an additional Golden Eagle death at a wind project in Oregon since then, and two additional Golden Eagles were reported dead at the Pine Tree wind facility in California this week (Associated Press 2012). The West Butte Wind Project will almost certainly add to that

¹ Threats to Golden Eagles include habitat loss, ingestion of spent lead from hunting ammunition, electrocution by power lines, collisions with vehicles and power lines, renewable energy development, climate change, some range and grazing management practices, shooting, rodenticides, disease, drowning in stock tanks, and recreation-caused disturbance. See *Minutes and Notes from the North American Golden Eagle Science Meeting*, September 2010 (pages 15-23).

mortality. In addition, birds protected by the Migratory Bird Treaty Act (MBTA) will be killed at the West Butte Wind Project, and species designated by FWS as Birds of Conservation Concern (BCC) are also at risk.

Because of the conservation need to reduce bird mortality that occurs incidentally during otherwise lawful activities, ABC supports the regulation of incidental take through a careful permitting system based on sound science². The proposed eagle take permit for the West Butte Wind Project is an especially important one because, if issued, it would be the first incidental eagle take permit authorized under *50 CFR Parts 13 and 22 Eagle Permits; Take Necessary To Protect Interests in Particular Localities; Final Rules* (Eagle Take Permit Rules), and would thus be precedent setting. Wind developers, FWS staff, and the general public would look to it as the standard that wind projects must meet in order to earn an incidental eagle take permit.

ABC has conducted an in-depth analysis of the Draft Environmental Assessment (DEA) for the West Butte Wind Project. We have evaluated whether the DEA aligns with the Eagle Take Permit Rules and their associated National Environmental Policy Act (NEPA) documentation, as well as the MBTA and Executive Order 13186. We have also compared the DEA to other relevant federal documents, including the Final Environmental Impact Statement that the U.S. Bureau of Land Management (BLM) prepared for the West Butte Wind Power Right-of-Way, FWS Draft Eagle Conservation Plan Guidance, draft FWS Land-Based Wind Energy Guidelines, FWS Interim Golden Eagle Inventory and Monitoring Protocols, and FWS correspondence regarding the project.

In addition, ABC has assessed the DEA in light of the two overarching decisions that FWS must make through the NEPA process. First, FWS must determine whether the DEA is adequate to allow FWS to publish a Finding of No Significant Impacts (FONSI) or if an Environmental Impact Statement (EIS) is required. Second, FWS must determine whether or not to issue the permit.

As a result of this detailed examination, ABC has serious concerns about the proposed permit and DEA.

1. The DEA contains insufficient information to determine whether granting the incidental take permit would be compatible with the preservation of Golden Eagles.

According to the Eagle Take Permit Rules, before an incidental eagle take permit can be issued, FWS must find “The direct and indirect effects of the take and required mitigation, together with the cumulative effects of other permitted take and additional factors affecting eagle populations,

² Currently incidental take permits are available for federally listed endangered and threatened species, as well as Bald and Golden Eagles. There is no incidental take permit for other MBTA-protected birds at wind power developments, but ABC has formally petitioned FWS for a permitting system under the MBTA. The ABC petition is available at http://www.abcbirds.org/abcprograms/policy/collisions/pdf/wind_rulemaking_petition.pdf.

are compatible with the preservation of bald eagles and golden eagles.” (50 CFR § 22.26(e)(2). The Federal Register notice for the Eagle Take Permit Rules define “the preservation of bald eagles and golden eagles” as “consistent with the goal of stable or increasing breeding populations” (page 46850). The *Final Environmental Assessment: Proposal to Permit Take as Provided under the Bald and Golden Eagle Protection Act* also states, “We will not issue programmatic permits for wind-power developments unless the applicants can demonstrate that there will be no net loss for the species” (page 95). Furthermore, the Federal Register notice for the Eagle Take Permit rule asserts, “the Eagle Act requires the Secretary of the Interior to determine that take will be compatible with the preservation of eagles before he or she may authorize the take. To permit take without sufficient data to show that it will not result in a decline in the eagle population would violate the statutory mandate” (page 46867).

However, it is impossible to tell from the West Butte Wind Project’s DEA whether granting this incidental take permit would fulfill the commitments FWS made when it published the Eagle Take Permit Rules. There is insufficient information in the DEA regarding several key factors:

Baseline Golden Eagle population data:

In the Federal Register notice for the Eagle Take Permit Rules, FWS acknowledged the critical importance of good baseline population data: “the availability of permits will depend on the level of demand and the availability of reliable data reflecting healthy eagle populations. In addition, the process will be predictable in that the take thresholds for each year in each region will be known.” (page 46851). However, “reliable data reflecting healthy eagle populations” is not included in the DEA and appears to be unavailable. The DEA states, “Despite historical data and survey efforts, the size, distribution, and productivity of Golden Eagles nesting in Oregon has not been determined and statewide trends most likely have changed and are currently unknown” (page 15). This is supported by the Oregon Eagle Foundation’s December 2011 study of Golden Eagles nesting in Oregon, which asserts, “The trends in size and productivity of the nesting population statewide in Oregon are unknown because of insufficient monitoring, and trends may vary by region and have different causes” (page 11). Since FWS has committed to decision making based on “reliable data reflecting healthy eagle populations,” how will FWS acquire this crucial baseline population data before deciding whether to grant this incidental take permit?

In addition, the DEA does not discuss other sources of authorized and unauthorized eagle take in the area nor does it discuss the Golden Eagle programmatic incidental take threshold established by FWS for Region 1, making it impossible to truly judge the impacts of this proposed take permit. (Some other sources of unauthorized take are named, but their impact on eagle population is not analyzed.) Thus, ABC asks, how much authorized and unauthorized take of Golden Eagles is occurring in the region and the state? What numbers has FWS set as the thresholds for authorized take, including

incidental take, of Golden Eagles in Region 1? It is important for the public to be able to see these numbers and compare them to the proposed take at the West Butte Wind Project.

Avian-use survey data:

The West Butte Wind Project would be the first wind farm built in central Oregon. Since it represents the expansion of the wind industry into a new area which has not been studied for previous wind energy facilities, there needs to be especially good data gathering and analysis for this project. However, the DEA states that only one year of avian-use studies were conducted (page 18). This is insufficient. A single year of study does not provide enough data to adequately assess a proposed wind power site in an area new to wind energy development, nor does it address annual variability. The BLM FEIS for the project suggests one reason annual variability must be addressed: migrant Golden Eagles may be especially threatened by the project. “Golden eagle displacement is not expected because golden eagles will continue to be attracted to the wind currents on and around the butte. This is especially important in considering migrant golden eagles. They have not ‘learned’ the site and will be attracted to the butte by the wind” (page 3-25).

A single year avian-use study also contradicts the draft Eagle Conservation Plan Guidance (ECPG) developed to guide implementation of the Eagle Take Permit Rules. The ECPG recommends the use of multiple-year point count surveys to assess eagle use at a site: “Every point should be surveyed twice monthly in each of four seasons annually for at least 2 years, and preferably for 3 years” (page 55). The avian-use surveys for the West Butte Wind Project do not meet this standard.

The DEA addresses this lack of necessary data by commenting, “The most notable departure from the suggested approach in FWS (2011) was that data for the West Butte Wind Power Project were only collected over a single year, leaving uncertain how much annual variation in eagle use might occur in the project footprint. However, consistent with the FWS’s commitment to be flexible in working with wind projects already in the planning stages when the ECPG was released (UWSFWS 2011:8), we used the data available to estimate a fatality rate and confidence interval for the project” (page 51-52).

In fact, the paragraph about “flexibility” in the ECPG does not support this approach. It reads, “The Draft Eagle Conservation Plan Guidance is written to guide wind-facility projects starting from the earliest conceptual planning phase. For projects already in the development or operational phase, implementation of all stages of the recommended approach in these Draft Eagle Conservation Plan Guidance may not be applicable or possible. *Project proponents with operating or soon-to-be operating facilities at the time this Draft Eagle Conservation Plan Guidance were first released* that are interested in obtaining a programmatic eagle take permit should coordinate with the Service. The Service will work with project proponents to determine if the facility might be able to

meet the permit requirements in 50 CFR 22.26 by conducting eagle fatality and disturbance monitoring and by agreeing to adopt reasonable operational avoidance and minimization measures that might reduce the eagle fatalities detected through monitoring. Sections of the Draft Eagle Conservation Plan Guidance that address these topics are relevant to both planned and operating wind facilities” (page 8, emphasis added)

The draft ECPG was released in February 2011. The West Butte Wind Project was not then an operating or soon-to-be-operating facility, and one year later it is still not an operating or soon-to-be-operating facility. ABC understands that the proposed project has neither a power purchase agreement nor a firm commitment for space on the transmission grid. Therefore, FWS can and should require at least one additional year of avian-use survey data, conducted during weeks of the year chosen by FWS to capture the maximum use of the site by birds. The additional data will also provide an opportunity to gain a more robust data set for testing the currently unvalidated mathematical model which FWS plans to use when estimating take for eagle take permits.

Golden Eagle prey evidence

Another area where more data are needed is the assessment of how much prey is available to Golden Eagles in and around the project site. The prey base is a major factor indicating whether the project would be located in an important eagle use area and thus would pose risk to eagles from direct mortality and loss of habitat. The project developer claims that there is little prey for eagles at the site (DEA, page 26). However, both the DEA and the BLM FEIS suggest that the project’s prey base was not well studied, and therefore is unknown. The DEA says, “Golden Eagle prey species were not frequently encountered in the project area during bird surveys although no standardized surveys for prey abundance and density were conducted” (page 26).

The BLM FEIS states:

“Prey density at the West Butte Wind Project was not developed [in the pre-construction studies], but would include ground squirrel, sage-grouse, black-tailed jackrabbit and cottontail rabbit, all of which occur at both the high elevation area of the project and the proposed ROW [Right-of-Way]. The Project area consists primarily of big sagebrush and juniper woodland that preclude or hamper hunting efforts on the slopes of the butte; however, the upper open top and meadow area of the butte and portions of the ROW do provide optimum foraging habitat. Golden eagles need good visibility to spot and then pursue prey; they can cover 100 square miles in any given day. Hunt (2002) points out the role of prey base as an attractant, which puts golden eagle and other raptors at greater risk. Construction of the wind turbines would create open areas and thus hunting opportunities, which could result in higher use of the area by golden eagles for hunting purposes and could lead to additional impacts through collisions within the rotor sweep area. Even though there is an overall loss of habitat due to turbine and road construction,

the new environment could actually create more hunting habitat by opening up viable hunting grounds” (page 3-25).

Furthermore, the draft ECPG identifies the prey base as a crucial factor in FWS’s eagle Risk-Factor Analysis model. Whether a project site is “proximate to potential foraging sites” is one of six factors to be included in the analysis, and is so important that it receives a special note: “Because of the importance of factor 3 above, the Service recommends project proponents conduct thorough surveys to document the distribution and availability of eagle food sources within the project footprint to inform the turbine-specific risk-factor analysis” (pages 60-61).

Thus, understanding the project site’s prey base is critical to understanding the risk the project poses to eagles. The DEA and the BLM FEIS make clear that the prey base has not been well studied. In fact, the site’s prey base appears to be one of the factors that has led FWS to disagree with the project developer about the level of risk the project poses to eagles.³ In order to have enough data to make decisions on the permit and whether an EIS for the project is required, FWS should ask for prey base studies. As discussed earlier, operation of the project is not imminent.

Golden Eagle nest survey data

The DEA and other documents’ information about Golden Eagle nests suggest that the project site’s value to eagles is not adequately represented by the data collected by the project’s environmental consultant. The DEA says a helicopter nest survey in 2009 “occurred in late May, only surveyed out 2 miles and therefore may have missed a failed breeding attempt” (page 17). In addition, in 2011, an Oregon eagle expert saw a Golden Eagle pair roosting approximately 100 yards from a nest tree that is approximately 1.8 miles from the project (DEA page 17). There is also a historic nest ¼ of a mile from the project, located in a nest tree which burned in a BLM-prescribed burn. Although the DEA is silent on the total number of Golden Eagle nests near the project, a November 2010 email from Dan Ashe, then Deputy Director of FWS, said, “there are 8 active and inactive [Golden Eagle] nests within 10 miles of the project site”.⁴ Inactive nests should not be assumed to be worthless to Golden Eagles. The Final Environmental Assessment (FEA) for the Eagle Take Permit Rules states, “Individual eagle nests left unused for a number of years may be reoccupied. In a review of the available literature and reports

³ The Avian and Bat Protection Plan/Eagle Conservation Plan from the project developer describes the project as having “very low risk of impacts to Golden Eagles,” but FWS describes it as “high to moderate risk to eagles” (2011, West Butte Wind Project, page 22. FWS, 2011, page 7).

⁴ The law firm of Meyer Glitzenstein & Crystal (MGC) received FWS email correspondence regarding the West Butte Wind Project in response to a FOIA request. MGC shared them with American Bird Conservancy. Emails are available at http://www.abcbirds.org/abcprograms/policy/collisions/pdf/West_Butte_FWS_FOIA_emails.pdf, last visited 2/13/12.

regarding nest use by raptors, Megown et al. (2007) reported an interval of over 22 years during which golden eagles did not occupy a nest” (page 53).

These nearby nests suggest that the project area may indeed be valuable to Golden Eagles. Therefore, ABC would like the project’s NEPA documentation to address these questions: How many Golden Eagle nests, both active and inactive, does FWS currently believe are within 10 miles of the project site and what is the source of that information? Were the Golden Eagle nest surveys conducted during the weeks when birds were most likely to be nesting? Were avian-use studies conducted during the weeks when birds were most likely to be present? What recommendations for nest surveys and avian-use studies did FWS give the project and were they followed?

In addition, which study protocols did FWS suggest the project use for the eagle nest surveys and the avian studies? Did the project use them, and if not, which study protocols did the project use?

Potential mortality from project infrastructure other than wind turbines

Golden Eagles can be killed at wind energy facilities in ways other than collisions with wind turbines. Eagles can be struck by vehicles on access roads, or die in collisions with or electrocutions by project power lines. The BLM FEIS states that the project’s infrastructure will include 18 miles of new access roads and new overhead 115 kV and 14.4 kV power lines (pages 2-5 – 2-6). Does FWS’s projection of 0-17 eagles killed at the project include sources of mortality other than the wind turbines themselves?

2. The DEA presents evidence suggesting that the West Butte Wind Project may kill Bald Eagles, yet the proposed permit only addresses Golden Eagle fatalities.

The proposed incidental take permit is only for Golden Eagles, but the DEA contains multiple statements indicating that Bald Eagles may be present at the site and may therefore be at risk. “Bald Eagles may occur within the project area during the summer and winter months” (page 13). “Information from eagle experts in the area identified two active Bald Eagle nests seven to ten miles north of the West Butte project”; a Bald Eagle chick was produced in 2011 at an active nest nine to 10 miles from the project (page 14). “Bald Eagles may fly over the project area, and could potentially be found foraging on road kill on Hwy 20 during the winter months or in alfalfa fields approximately 5 miles to the north” (page 14). “Available survey data indicate that five golden eagle territories and three bald eagle territories are likely present in the West Butte Wind Power Project area at the project-area population scale” (page 54). This is of concern because Bald Eagles have been killed by wind turbines in the U.S. and Canada (Pagel 2011). In addition, a 2004 Bald Eagle species assessment prepared for the BLM states, “[i]t is assumed that an increase in the number and type of wind-power turbines will generally increase the number of bald eagle deaths by aerial collisions, especially if such turbines are positioned with little consideration of bald eagle habitat.” (Travsky and Beauvais 2004, page 25).

Therefore, it is possible that the project might kill, harm or disturb Bald Eagles in addition to Golden Eagles. Without an incidental take permit for Bald Eagles, any take of Bald Eagles by the project would be a violation of the Bald and Golden Eagle Protection Act. What steps are being taken by the project to avoid take of Bald Eagles? How will FWS ensure no take of Bald Eagles occurs? What will FWS do if the project nevertheless does take Bald Eagles? Does FWS's description of the project as being Category 2 (high to medium risk to eagles) apply to Bald Eagles as well as Golden Eagles?

3. The DEA's discussion of potential impacts of the project is not objective and shows bias toward granting the permit.

The DEA's discussion of potential impacts is unbalanced overall. For example, it argues in multiple paragraphs that not granting the permit might cause the project not to be built and thereby cause an increase in climate change. In contrast, the possible positive conservation benefits to birds if the project is not built are quickly dismissed in a couple of sentences. It may well be that on balance, FWS believes that granting this permit would be more beneficial than not. Nevertheless, the analysis of alternatives in the permit's NEPA documentation still needs to be even-handed.

In another example, the DEA states that if the project does not get a permit and is operated without one, there could be strong negative consequences such as no post-construction mortality monitoring (see page 21). Why does FWS believe that post-construction mortality monitoring would be "unlikely" if the project did not get a permit? Did the project developer or its consultants say this to FWS? Unless they have, there is not a good reason to believe there would be no post-construction mortality monitoring. After all, if the project did not have an eagle take permit, it would still need to conduct post-construction mortality monitoring if the developer wanted to reduce potential legal liability for violating the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act.⁵ Since this project has applied for the first-ever programmatic incidental take permit offered under the Bald and Golden Eagle Protection Act (BGEPA), it's reasonable to assume that the project developer cares about limiting legal liability.

In addition, the DEA's Indirect Effects analysis relies heavily on the project developer's characterization of the project as being low risk. Does FWS concur with that assessment? It rests primarily on a single year of avian surveys in 2008, which, as discussed earlier, does not meet FWS's own standards for pre-construction assessment for projects applying for incidental eagle take permits, as well as on the project developer's characterization of the site as having little Golden Eagle prey, despite the fact that the project's potential prey species were not well

⁵ The most recently published draft of the FWS voluntary wind guidelines indicated that projects already under development could gain some measure of assurance of low law enforcement priority for both MBTA and BGEPA if they picked up the tiered guidelines process at the appropriate step. Hence, post-construction mortality monitoring would be necessary if the project developer wanted to claim credibly that it was adhering to the guidelines.

studied. Furthermore, the BLM's FEIS hints at additional problems in describing the site as low-risk to Golden Eagles:

“Data compiled at various wind farms (WEST, 2006) point to golden eagles flying within the rotor sweep area of modern wind turbines; this indicates that golden eagles could be at relatively high risk of colliding with wind turbine blades within the Project Area due to the local topography and use of the area by breeding and non-breeding birds.

Topographic features, including ridge tops and upwind sides of slopes that generate high wind energy, may be especially attractive to raptors, specifically golden eagles, because these areas are favorable for hunting, soaring and flying, as well as for migratory flights (Barrios and Rodríguez, 2004; Hoover and Morrison, 2005); all of which are present in the Project Area.

The NWC study (2008) [done by the project developer's consultant] found that raptor use in the Project Area is lower than at other wind farms operating in the region; however, many of the other wind farms are in cultivated agricultural fields and do not include eagle nest territories or concentration areas.

Although golden eagle use at West Butte [as characterized by the project developer's consultant] is relatively low compared to other wind farms, effects locally could be important due to the close proximity of multiple nests and breeding pairs of golden eagles relative to the Project Area, as well as the relative low population number in the area as reported by BLM staff (2010). As reported by de Lucas et al. (2008), there is no clear relationship between species mortality and species abundance, indicating mortality is more likely to be related to species-specific flight behavior and morphology and/or weather and topography around the wind farm rather than abundance and use of the area. Construction of the Project will result in loss of golden eagle habitat.” (page 3-26).

4. The DEA contains insufficient measures to fulfill FWS's obligations under the Migratory Bird Treaty Act (MBTA).

FWS has stated that issuing an eagle take permit would give some protection from MBTA liability for deaths of birds other than eagles, as long as conservation measures that would protect migratory birds were implemented. The Federal Register notice for the Eagle Take Permit Rules notes, “No permit is currently available to authorize incidental take under the MBTA. However, many of the ACPs [Advanced Conservation Practices] that would minimize eagle take will also reduce other avian mortalities with the result that utilities that implement the ACPs under these Eagle Act regulations will minimize take of other migratory birds in addition to eagles, decreasing their liability under the MBTA. The Service focuses its enforcement resources on investigating and prosecuting individuals and companies that take migratory birds without regard for the consequences of their actions and the law, especially when available conservation measures have not been implemented” (page 46862). This is problematic because the primary compensatory mitigation factor proposed for the West Butte Wind Project take permit is the

retrofitting of power poles rather than the habitat-based mitigation discussed in the Federal Register notice for the Eagle Take Permit Rules (See, for example, page 28 in the DEA and page 46855 in the Federal Register notice.) Retrofitting power poles could benefit eagles and other raptors at risk of electrocution from power lines. However, most songbirds will not benefit substantially from power pole retrofits because they are too small; their wings don't stretch far enough to contact two electrical wires simultaneously. In contrast, habitat-based mitigation would be more likely to offer protective benefits to smaller birds. The DEA acknowledges that migratory birds other than eagles will almost certainly be killed by the project (page 34). Therefore, if FWS is going to consider exercising law enforcement discretion at the West Butte Wind Project in regard to the deaths of MBTA-protected birds other than eagles, the mitigation measures specified in the permit need to minimize and compensate for their deaths more fully.

5. The DEA contains insufficient measures to fulfill FWS's obligations under Executive Order 13186 -- Responsibilities of Federal Agencies to Protect Migratory Birds.

In order for FWS to fulfill its obligations under Executive Order 13186 (EO 13186), the permit must contain adequate conditions to protect and compensate for loss of migratory birds. EO 13186 states that federal agencies should "support the conservation intent of the migratory bird conventions by integrating bird conservation principles, measures, and practices into agency activities and by avoiding or minimizing, to the extent practicable, adverse impacts on migratory bird resources when conducting agency actions" and "restore and enhance the habitat of migratory birds, as practicable" (Sec. 3(e)(1) – 3(e)(2)).

Although EO 13186 is not legally binding, FWS states in the DEA that under EO 13186, it is, as a federal agency, compelled to consider the effects of its actions on migratory birds (page 7). Because the permit's proposed conditions are not adequate to protect and compensate for loss of migratory birds, the permit as proposed does not fulfill FWS's obligations under EO 13186.

6. The project appears likely to have impacts on Greater Sage-Grouse and to contradict FWS guidance about sage-grouse buffer zones.

According to FWS email correspondence about the project, "all 52 proposed turbines are within 3 miles of one or both of two [Greater] sage grouse leks" (Michael Bean to Dan Ashe, 11/2/10 11:10 am).⁶ According to FWS wind energy guidance documents, this is close enough that significant adverse impacts on sage-grouse may occur. For example, the current draft of the FWS voluntary wind guidelines states, "Based primarily on data documenting reduced fecundity (a combination of nesting, clutch size, nest success, juvenile survival, and other factors) in sage grouse populations near roads, transmissions lines, and areas of oil and gas development/production (Holloran 2005, Connelly et al. 2000), development within three to five miles (or more) of active sage grouse leks may have significant adverse impacts on the affected

⁶ FWS West Butte Wind Project emails referenced in this letter available at http://www.abcbirds.org/abcprograms/policy/collisions/pdf/West_Butte_FWS_FOIA_emails.pdf. Last visited 2/13/12.

grouse population” (FWS *Land-Based Wind Energy Guidelines*, 9/13/11, page 62). A supporting FWS document on the FWS wind guidelines website recommends “a minimum buffer range of 3.1 to 4 mi and beyond” (“Known and Predicted Impacts to Greater and Gunnison Sage-grouse and Lesser and Greater Prairie-Chicken” 2011, page 2).

Although Greater Sage-Grouse are not protected by BGEPA or the MBTA, FWS still has an obligation to consider effects on them because they are on the Candidate List for protection under the Endangered Species Act, and are a designated BCC. Moreover, FWS email correspondence for this project acknowledges that FWS must take action if the species is to avoid being listed: “As you know we made a warranted but precluded finding on sage grouse and if we are going to keep it off the list, we need to hold ourselves (and especially BLM) to a high standard.” (Dan Ashe to Michael Bean, 11/2/10 9:22 am). Greater Sage-Grouse are also significant because they are a Golden Eagle prey species, and the presence of nearby leks is another indication that the project site may be important to Golden Eagles.

7. The permit’s proposed avoidance, minimization and compensatory mitigation measures are problematic.

The DEA contains little discussion of what the project has done to avoid the deaths of Golden Eagles. Has alternative siting for the project or micrositing for individual turbines been considered? If not, why not?

Seasonal or other curtailment of the turbines is another possible eagle take avoidance measure, but turbine curtailment is proposed in the DEA only as a possibility if the third level of mitigation is triggered by excessive bird deaths. This means that the project may not avoid take to the maximum achievable level, a prerequisite of issuing the permit. Therefore, how much does FWS believe would seasonal or other turbine curtailment avoid take of eagles?

As a minimization measure, the DEA proposes manipulation of cut-in speeds. Although this practice is becoming well-known as a minimization measure for bats, ABC is unaware of documentation that it helps birds. Does FWS have documentation that this practice will help birds as well as bats?

In the Federal Register notice for the Eagle Take Permit Rules, FWS said that for compensatory mitigation measures, it was considering, “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” (page 46855).

However, for this first-ever proposed programmatic incidental eagle take permit, the FWS DEA instead asks the wind developer to retrofit existing power line poles that are known to be causing problems (pages 27-28). Those power line poles belong to a utility, not the wind developer, so if the poles are killing eagles, the utility company, not the wind developer, is currently violating BGEPA. It sets a terrible precedent if a firm that is violating BGEPA not only is not penalized for those violations, but can rely on FWS to ask another company to fix the cause of the eagle

deaths. Under this system, why should any utility company make the effort to reduce eagle electrocutions? Why not just wait for a wind energy developer to come along and do it?

FWS does not have to require power pole retrofits as compensatory mitigation. The power pole idea comes from the draft ECPG, which has yet not been finalized. In fact, the governing documents for this proposed permit are the Eagle Take Permit Rules and its accompanying NEPA documentation, not the ECPG.

Furthermore, ABC would like to know whether FWS has considered undertaking a study of the impacts of spent lead hunting ammunition and the potential mitigation benefits of having hunters use non-lead alternatives. Lead is a well-known threat to eagles and other birds. (See, for example, American Bird Conservancy's *Lead References* list.)

8. The duration of post-construction avian fatality monitoring is not clearly stated in the DEA and may be inadequate to determine true avian mortality at the project.

There is contradictory information in the DEA regarding the duration of the project's proposed avian mortality studies. Page 28 states, "The applicant commits to four years of post-construction monitoring to determine mortality rates at the developed site." Page 32, however, describes the project's mortality study as taking place over two years, one during the first year of the project's operation and the second occurring in year five. A third of the turbines would be searched "systematically once each month during winter and summer and twice each month during spring and fall, in the first year. Thirteen different turbines will be searched second year." This discrepancy needs to be clarified. ABC believes two years of avian fatality monitoring would be insufficient. After the initial year of monitoring, another four years will pass before monitoring begins again. Not only does this not account for annual variability until year five, it leaves FWS without a way of knowing if its recommended avoidance, minimization, and compensatory mitigation measures are working, especially since FWS does not currently have good baseline eagle population data for Oregon, as discussed earlier.

In addition, the frequency of monitoring during the two years is unlikely to give a true picture of bird and bat mortality. Once or twice a month monitoring is noted as sufficient for large raptors in the latest draft of the FWS wind guidelines, but not for smaller birds (*U.S. Fish and Wildlife Service Land-Based Wind Energy Guidelines*, September 13, 2011 draft, page 71). The DEA says there are 55 species of land birds at the project site (page 22), and the Biological Study Results prepared by the project's environmental consultant show that many are songbirds (Gerhardt 2008, pages 14-15). According to the National Wind Coordinating Collaborative (NWCC), most birds killed at U.S. wind projects are songbirds (NWCC 2010, page 4). Therefore, given FWS's obligation to protect wildlife and uphold the MBTA, FWS should require a post-construction monitoring frequency that could adequately determine whether birds in addition to eagles and large raptors are being killed by the project.

9. FWS does not have enough information in this DEA to determine whether an EA is sufficient or whether it will have to undertake an EIS.

In addition to determining whether to grant a programmatic incidental take permit for eagles, FWS must determine through this EA analysis whether it can issue a Finding of No Significant Impact or must proceed to an EIS. As this letter demonstrates, the DEA for the West Butte Wind Project does not contain enough information for FWS to make that determination credibly. In addition, the Council on Environmental Quality (CEQ) regulations for implementing NEPA include factors in determining significance that indicate an EIS rather than an EA may be the proper level of analysis for evaluating this proposed permit (see Sec. 1508.27). The regulations state,

“ ‘Significantly’ as used in NEPA requires considerations of both context and intensity:

(a) Context. This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

(b) Intensity. This refers to the severity of impact.” (Sec. 1508.27 (a) – (b))

ABC believes that issuing the first-ever programmatic incidental take permit ever under BGEPA would count as significant within many contexts: the nation, affected region, affected interests, and affected locality. This is supported by the many cumulative, direct, and indirect effects listed by the DEA.

In addition, the CEQ regulations discuss ten factors that should be considered in evaluating intensity. ABC believes the following intensity factors from the CEQ regulations are particularly relevant to FWS’s evaluation of this proposed permit:

“1. Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.”

“4. The degree to which the effects on the quality of the human environment are likely to be highly controversial.”

“5. The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.”

“6. The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.”

“7. Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively

significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.”

“10. Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.”

ABC has included this analysis of the CEQ regulations in our comment letter to demonstrate that a decision to issue a FONSI for this permit is not inconsequential. It can be argued credibly that the law requires an EIS. Therefore, we urge FWS to carefully deliberate on its decision and make sure that whatever it determines to be the proper level of environmental analysis for this permit meets all requirements.

Based on the preceding analysis in this letter and the precedent-setting nature of a first-ever incidental take permit for eagles, ABC has several recommendations to FWS before the agency proceeds with a decision:

- 1. Require at least another year of avian-use studies of the project site, based on a study protocol chosen by FWS’s eagle experts.**
- 2. Require a prey base study of the project site, based on a study protocol chosen by FWS’s experts.**
- 3. Once the results of those two studies are in hand, revise the project’s DEA incorporating the results and addressing other comments raised in this letter and by the public, including concerns about Bald Eagles. At that time, determine whether an EIS must be prepared.**
- 4. After all of the above has taken place, make a determination whether to grant a programmatic incidental take permit for Golden Eagles and/or Bald Eagles to the West Butte Wind Project.**

In closing, thank you again for this opportunity to comment on this proposed precedent-setting permit. Please add ABC to the notification list for this process, using the name and address below.

Sincerely yours,



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