



# Animal Welfare Institute

900 Pennsylvania Avenue, SE, Washington, DC 20003  
awionline.org phone: (202) 337-2332 fax: (202) 446-2131

September 22, 2014

## **BY ELECTRONIC MAIL**

Attn: Public Comments Processing  
Attn: [FWS-R9-MB-2011-0094]  
Division of Policy and Directives Management  
U.S Fish and Wildlife Service  
4401 N. Fairfax Drive, MS 2042-PDM  
Arlington, VA 22203

## **Re: Proposed Rule on Eagle Permits; Revisions to Regulations Governing Take Necessary To Protect Interests in Particular Localities (Docket No. FWS-R9-MB-2011-0094)**

To Whom It May Concern:

On behalf of the Animal Welfare Institute (AWI), please accept the following comments on a proposal by the U.S. Fish and Wildlife Service (FWS) to revise the regulations for programmatic permits for non-purposeful take of golden eagles and bald eagles under the Bald and Golden Eagle Protection Act (“BGEPA”), Docket No. FWS-R9-MB-2011-0094-0491.

The benefit of reducing carbon emissions and fossil fuel dependence should not undermine the burden wildlife faces as a consequence of these technological advancements. As noted by various conservation organizations and as documented in the scientific literature, the ecological footprints of commercial wind energy facilities are typically extensive.<sup>1</sup> Thus, it is critical that these facilities be sited and operated in a manner that avoids negative ecological impacts to the greatest extent practical, and fully minimizes and offsets any remaining unavoidable impacts on species and habitats (in particular, those of conservation concern, including bald and golden eagles). Even when such facilities are authorized to be constructed it is imperative that the relevant permit duration be limited to provide the opportunity for regular reviews of the impacts of such facilities on the environment, including protected species, and to facilitate permit restructuring if necessary to mitigate, reduce, or eliminate documented impacts.

AWI, therefore, opposes the 30-year eagle take permit. This opposition is supported by the following concerns: 1) The proposed rule change was illegally exempted from environmental review required by the National Environmental Policy Act (“NEPA”), 2) The proposed change contradicts FWS’ previous statements in the 2009 eagle take permit rule regarding the need for short permits, and 3) there is simply no scientific justification for issuing 30-year permits.

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<sup>1</sup> See Nature Conservancy comments on Eagle Permits; Revisions to Regulations Governing Take Necessary to Protect Interests in Particular Localities; Federal Register 77(72):22278-22280, April 13, 2012.

## **I. The Proposed Rule Change was Illegally Exempted from Environmental Review Required by NEPA**

FWS failed to conduct any environmental reviews for the proposed rule change as mandated under NEPA. NEPA required this process to have occurred before the rule was issued, not after. Instead, FWS used a categorical exclusion to illegally exempt the rule change from the requisite environmental review. This illegal exemption was noted by many environmental organizations and in meetings with national environmental organizations held with the Administration.<sup>2</sup>

Exempting a rule change sought by the wind industry from NEPA is an example of a privilege the wind industry receives that other infrastructure and energy sectors do not. Given that eagles are public trust resources and important to the American people and to the overall history of the United States, NEPA compliance at least in the form of an environmental assessment (EA) but preferably through the preparation of an environmental impact statement (EIS) is essential.

Unlike the current decision-making process, NEPA compliance in the form of an EA or EIS would have included a detailed analysis of the potential impact of 30-year permits on eagle populations, an evaluation of a range of reasonable alternatives to the proposed action, an assessment of the full range of direct, indirect, and cumulative impacts, and, perhaps most importantly, would permit the public to participate meaningfully in the decision-making process.

## **II. The proposed change contradicts FWS' statements in the 2009 eagle take permit rule re: the need for short permits**

In 2009, FWS acknowledged that a permit longer than 5-years would be contrary to the conservation and protection of bald and golden eagles. The agency stated that:

“[T]he rule limits permit tenure to five years or less because factors may change over a longer period of time such that a take authorized much earlier would later be incompatible with the preservation of the bald eagle or the golden eagle.”<sup>3</sup>

The 2009 rule required that eagle take permits be compatible with the preservation of eagles, yet the proposed rule was arguably drafted at the request of the wind energy industry and represents a reversal of FWS's own findings. Such a reversal in the FWS position on permit duration requires a rational explanation which has not been provided by the FWS. Merely claiming that a proposed “internal review” process will be sufficient to address any threats to the conservation of eagle species is not only wrong but it entirely undermines the value of a transparent process allowing the public to participate in and contribute to such analyses.

In addition, FWS previously noted that a lack of rigorous research on population variance on bald and golden eagles is contrary to conserving the protected species. When FWS published the eagle take permit rule in 2009, it stated:

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<sup>2</sup> See Bird Conservation Networks comment on Eagle Permits; Notice of Intent to Prepare an Environmental Assessment or an Environmental Impact Statement.

<sup>3</sup> See 74 Fed. Reg. at 46856.

“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.”<sup>4</sup>

Unfortunately, FWS does not know how many eagles exist throughout the United States, much less how many eagles there will be 30 years from now. There are no national golden eagle or bald eagle population surveys and annual surveys by many states were discontinued around the year 2000.<sup>5</sup> In addition, a 2012 peer-reviewed article with 26 co-authors stated the golden eagle population in North America is declining.<sup>6</sup>

Factors that affect eagles and eagle populations will vary significantly over a 30-year period, and FWS’s ability to predict and plan for those changes is extremely limited.<sup>7</sup> These changes include the loss of habitat due to development, increasing frequency and intensity of wildfires, variability in prey abundance, climate change, and cumulative impacts of wind energy and other development in eagle occupied areas.<sup>8</sup> Given the lack of information FWS has concerning golden and bald eagle populations, it would be nonsensical to issue 30-year permits.

### **III. There is No Legal or Scientific Justification to Issue 30-Year Permits**

FWS is proposing to substantially extend the duration of permits to allow eagle take prior to implementing any measures proven to reduce eagle deaths at wind farms. According to the FWS’s own 2013 guidance for the eagle take permit rule, “there are currently no available scientifically supportable measures that will reduce eagle disturbance and blade-strike mortality at wind projects.”<sup>9</sup>

Moreover, the models that have been used in the past to predict potential eagle deaths at wind farms are still only theoretical and unproven. They have previously predicted little risk to eagles without a proper basis for their conclusion. For example, the Pine Tree wind project in California, which was thought to be low risk, now has a higher eagles-killed-per-turbine rate than the notorious eagle-killing wind turbines in Altamont Pass.<sup>10</sup> Furthermore, FWS has directly and clearly articulated a lack of information:

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<sup>4</sup> *Id.* at 46867.

<sup>5</sup> See FWS, Chart and Table of Bald Eagle Breeding Pairs in the Lower 48 States (August 4, 2010), available at <http://www.fws.gov/midwest/eagle/population/chtotfprs.html>.

<sup>6</sup> Katzner, Todd, et al. Status, Biology, and Conservation Priorities for North America’s Eastern Golden Eagle (*Aquila Chrysaetos*) Populations (January 2012). *The Auk*, Vol. 129, Number 1, page 168.

<sup>7</sup> These factors are discussed in the Final Environmental Assessment for the 2009 eagle take permit rules. See FWS, Final Environmental Assessment for Proposal to Permit Take as Provided Under the Bald and Golden Eagle Protection Act (2009), available at [http://www.fws.gov/migratorybirds/CurrentBirdIssues/BaldEagle/FEA\\_EagleTakePermit\\_Final.pdf](http://www.fws.gov/migratorybirds/CurrentBirdIssues/BaldEagle/FEA_EagleTakePermit_Final.pdf), and generally see page 10, FWS, Eagle Conservation Plan Guidance, Module 1 – Land Based Wind Energy, Version 2. April 2013.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> See Sahagun, Louis, U.S. probes golden eagles’ deaths at DWP wind farm. (February 16, 2012) Los Angeles Times, available at <http://articles.latimes.com/2012/feb/16/local/la-me-eagles-20120216>.

“We have relatively little information on the impacts of wind energy on eagles. . . . In addition to ensuring that the effects of the permitted activities are compatible with the preservation of eagles, monitoring data will be critical for assessing the impacts of the proposed facilities, small or large, in the future.”<sup>11</sup>

Ignoring this critical information will only frustrate future conservation initiatives.

## Conclusion

AWI urges FWS to return to the 2009 rule, limiting take to five-year permits. Not only did FWS violate NEPA in issuing the revised rule, but the lack of research available on the deaths of the bald and golden eagle at these facilities, coupled with the agency’s lax regulations on the wind industry, are dangerous to the future of these iconic birds and suggests a process that prioritizes the energy industry at the expense of eagles.

The five-year permit allowed for public participation in the decision-making process and provided the opportunity to deny permit renewal for facilities that were not in compliance with relevant federal laws. Although much needed information remains unavailable—particularly the number of birds killed at these facilities—the 2009 rule provided much stronger oversight and potential relief to damaged eagle populations around these wind energy facilities and turbines. In contrast, the revised rule would allow FWS to issue permits for as long as 30-years without any serious supervision. By eliminating the renewal process and replacing it with an “internal review,” FWS has restricted the potential for public oversight of the process.

Thank you in advance for providing this opportunity to comment on this status review and for considering these comments. Please send any future correspondence or information about this proposed status upgrade to Tara Zuardo, Wildlife Attorney at [tara@awionline.org](mailto:tara@awionline.org) or, by mail, at 900 Pennsylvania Ave SE, Washington, DC 20003. Should you have any questions or need clarification about anything in this letter, please contact me by email or by telephone at (202) 446-2148.

Sincerely,



Tara Zuardo  
Wildlife Attorney

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<sup>11</sup> See 77 Fed. Reg. 22268.