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By Electronic and Certified Mail

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**Re: Notice of Intent to Sue for Violations of the National Environmental Policy Act, the Endangered Species Act, and the Bald and Golden Eagle Protection Act In Connection with the Fish and Wildlife Service's Final Rule Authorizing the Issuance of Eagle "Take" Permits for Thirty Years**

Dear Secretary Jewell and Director Ashe:

On behalf of the American Bird Conservancy ("ABC") – the nation's leading bird advocacy and protection organization – we hereby notify you that ABC intends to bring suit in federal court in order to address multiple violations of federal law in connection with the U.S. Fish and Wildlife Service's ("FWS" or "Service") December 9, 2013 final regulation that "extend[ed] the maximum term for programmatic permits" to kill or otherwise take bald and golden eagles from five years to thirty years. 78 Fed. Reg. 73704. As discussed below, this major rule change – which will apply to industrial activities of all kinds that incidentally take eagles but, as acknowledged by the Service, was promulgated specifically to respond to the wind power industry's desire to facilitate the expansion of wind power projects in occupied eagle habitat, *id.* at 73709 – was adopted in violation of several federal wildlife protection and



environmental laws, including the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370f (“NEPA”), the Endangered Species Act, 16 U.S.C. §§ 1531-1544 (“ESA”), and the Bald and Golden Eagle Protection Act, 16 U.S.C. §§ 668-668d (“BGEPA”). Consequently, ABC is initiating legal action in order to have the rule invalidated pending full compliance with federal statutes that are designed to ensure that the environmental impacts of, and alternatives to, agency actions are thoroughly analyzed before those actions are implemented.

ABC strongly supports wind power and other renewable energy projects when those projects are located in an appropriate, wildlife-friendly manner and when the impacts on birds and other wildlife have been conscientiously considered and addressed before irreversible actions are undertaken. On the other hand, when decisions regarding such projects are made precipitously and without compliance with elementary legal safeguards designed to ensure that our nation’s invaluable trust resources are not placed at risk, ABC will take appropriate action to protect eagles and other migratory birds. The 30-year eagle permit rule – adopted in the absence of *any* NEPA document or *any* consultation under section 7 of the ESA, 16 U.S.C. § 1536, and in a manner that subverts the fundamental eagle protection purpose of BGEPA – is a glaring example of an agency action that gambles recklessly with the fate of the nation’s bald and golden eagle populations.

## **BACKGROUND**

BGEPA prohibits the “take” of any bald eagle or golden eagle “at any time or in any manner” “without being permitted to do so” by the FWS. 16 U.S.C. § 668(a). The statute imposes strict liability, providing for civil penalties for any unauthorized take and criminal penalties for unlawful take caused “knowingly, or with wanton disregard.” *Id.* §§ 668(a), (b). “Take” is defined to include “wound, kill . . . molest, or disturb,” *id.* § 668c, and includes incidental take as well as intentional actions directed at eagles. *Id.* BGEPA allows the FWS to issue permits authorizing the take or disturbance of bald and golden eagles provided that such take “is compatible with the preservation” of eagles. *Id.* § 668a.

In 2009, the Service promulgated implementing regulations under BGEPA, which provide for take permits for both individual instances of incidental take as well as “programmatic permits” for take that is recurring from a long-term activity. *See* 50 C.F.R. § 22.26. The Service may issue an eagle take permit so long as the take is: (1) “compatible with the preservation” of eagles; (2) necessary to protect an interest in a particular locality; (3) associated with but not the purpose of the activity; and (4) for individual instances of take, the take cannot practically be avoided, and for programmatic take the take is unavoidable even though “advanced conservation practices” are being implemented. *Id.* § 22.26(f). For purposes of the BGEPA regulations, “compatible with the preservation” of eagles means “consistent with the goal of stable or increasing breeding populations.” *Id.*

When the FWS issued the 2009 regulations, the Service expressly provided that the maximum term for programmatic permits was “five years or less *because factors may change over a longer time such that a take authorized much earlier would later be incompatible with the preservation of the bald eagle or golden eagle.* Accordingly, we believe that five years is a long enough period within which a project proponent can identify when the proposed activity

*will result in take.*” 74 Fed. Reg. 46856 (emphasis added). A permit holder could seek to renew a permit when its previous permit was set to expire, but issuance of a renewal required new findings on the public record by the Service that the permitted activity continued to be consistent with eagle conservation and, at least for projects triggering the NEPA obligation to prepare an Environmental Assessment (“EA”) or Environmental Impact Statement (“EIS”), applications for renewal were accompanied by an opportunity for public comment in connection with NEPA review on each permit renewal.

Moreover, the 2009 regulations were themselves informed by an extensive EA analyzing various alternatives and potential impacts, *see* FWS, Final Environmental Assessment, Proposal to Permit Take as Provided Under the Bald and Golden Eagle Protection Act (Apr. 2009) (“2009 EA”), as well as a Finding of No Significant Impact (“FONSI”). Of particular relevance here, the EA recognized that the availability of eagle take permits may result in “greater increases in siting of wind development in areas where eagles occur” with, among other impacts, “increasing loss and fragmentation of golden eagle habitat.” 2009 EA at 102-03. However, the EA and FONSI relied on safeguards built into the rule, *including the Service’s obligation to revisit permitting conditions “at least once every five years,”* accompanied by public input, as a basis for concluding that the 2009 regulations would not have significant impacts on either eagle populations or habitat, or other wildlife. FONSI at 4 (emphasis added); 2009 EA at 103 (“Re-evaluation and potential adjustments of the permit thresholds and conditions, as well as comprehensive evaluation of cumulative effects at the permit-issuance stage will minimize the cumulative effects of the permit and factors affecting habitat.”).

But just four years later, in December 2013, the FWS “extend[ed] the maximum term for programmatic [BGEPA] permits to 30 years.” 78 Fed. Reg. 73707 (Dec. 9, 2013). In lieu of permit renewal and potential public input through the NEPA process every five years, the new rule simply provides that the Service will conduct its own *internal* review every five years, with no provision for public comment or even any assurance that the Service’s internal analysis will be made available to the public. *Id.* at 73725.

The preamble to the new rule leaves no doubt that that the six-fold increase in the maximum duration of permits and the significant weakening of public review and comment on BGEPA permitting decisions was adopted at the behest of industry and specifically the wind power industry, which has claimed that the shorter permit duration was somehow impeding the expansion of the industry in eagle habitat, although no empirical data were presented in the preamble to the rule to support that contention. *See, e.g., id.* at 73709 (“Wind developers have informed the DOI and the Service that 5-year permits have inhibited their ability to obtain financing, *and we changed the regulations to accommodate that need.*”) (emphasis added).

Further, this significant change from the 2009 permitting regime was accompanied by no NEPA review whatsoever, i.e., the Service did not prepare an EIS – which is required for every “major federal action” that may “significantly affect” the environment, 42 U.S.C. § 4332(C) – or even an EA and FONSI, as the Service did in 2009. Instead, in response to myriad complaints from the environmental community – including in comments submitted by ABC – that *some* NEPA review was plainly required for a policy change of this magnitude that will undoubtedly facilitate increased wind energy production in occupied eagle habitat and consequently result in

on-the-ground environmental impacts, the FWS declared that the rule change was “categorically excluded” from any NEPA review on the grounds that the change being made was “primarily administrative” in nature and that any environmental impacts would be considered when the agency is making project-by-project decisions concerning whether to issue programmatic permits. 78 Fed. Reg. 73722.

The Service thereby avoided any comprehensive analysis of the wildlife-related impacts of the rule change *as a whole* on eagles as well as other migratory bird populations and wildlife habitat that may be impacted by expanding wind power operations within the range of bald and golden eagle populations. The agency also thereby avoided any consideration of alternatives to the rule adopted – i.e., alternatives that might address any legitimate complaints the wind power industry might have with the BGEPA permitting program while at the same time better protecting eagles and other wildlife.

The Service also refused to conduct any internal section 7 consultation on the rule change. Instead, the agency asserted in the preamble that “consultation under ESA Section 7 may be required prior to issuance of a permit for an individual project” that may affect a listed species. 78 Fed. Reg. 73722. Once again, however, the Service did not explain how any project-by-project review could adequately address the *cumulative* nationwide effect of the regulation on endangered and threatened species, especially given the Service’s concession – in the 2009 EA – that promoting the development of wind power projects in areas occupied by eagles may in fact result in the cumulative “loss and fragmentation” of wildlife habitat. 2009 EA at 102-03.

### LEGAL VIOLATIONS

For several reasons, the 30-year eagle permit rule was adopted in patent violation of federal environmental law.

**First**, the notion that a rule change of this magnitude – which is explicitly *intended* to have an impact on the environment – may be categorically excluded from any NEPA review whatsoever is legally baseless. By circumventing the preparation of an EIS or even EA, the Service has unlawfully placed eagle and other bird populations at risk by failing to analyze in any comprehensive manner the cumulative effects of the sweeping rule change. As the Supreme Court has explained, “NEPA’s core focus [is] on improving agency decisionmaking,” *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 769 n.2 (2004), and specifically ensuring that agencies take a “hard look” at potential environmental impacts and environmentally enhancing alternatives “as part of the agency’s process of deciding whether to pursue a particular federal action.” *Baltimore Gas and Elec. Co. v. Nat. Res. Def. Council*, 462 U.S. 87, 100 (1983); *see also Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) (NEPA “ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts”).

Here, however, the Service has literally taken no look at all – let alone the “hard look” mandated by NEPA – at the environmental impacts associated with a substantial rule change that will undoubtedly have impacts on eagle populations, eagle habitat, and other migratory bird and wildlife populations that use the same habitat as eagles. Although ABC believes that a rule

change of this magnitude clearly calls for an EIS, at the very least the Service was obligated to conduct an EA in order to evaluate the need for an EIS – as the Service did in 2009 when it made programmatic decisions bearing on BGEPA implementation, including establishing a five-year maximum permit term.

Instead, the FWS has declared that the rule change is “categorically excluded” from any NEPA review although, under the Interior Department’s own regulations, such exclusions may only be applied to a “kind of action that has *no* significant or cumulative effect on the quality of the human environment.” 73 Fed. Reg. 61318 (Oct. 15, 2008) (emphasis added). Contrary to the Service’s assertion in adopting the rule, the Service cannot circumvent NEPA review merely by labeling the rule change as “primarily administrative in nature.” 78 Fed. Reg. 73722. Indeed, if, as the Service claimed in the preamble to the rule, the existing five-year permitting period has in fact been inhibiting the development of wind power in occupied eagle habitat (an unsubstantiated assertion), ***then the entire premise of the rule is that increasing the maximum permit term will in fact facilitate the development of wind power (and presumably other) projects in habitat occupied by bald and golden eagles.*** That impact must be scrutinized in a NEPA document before the new permitting regime is implemented.<sup>1</sup>

Nor is there any legal or logical basis for the Service’s assertion that NEPA review is unnecessary on the rule change because such review will be conducted on a permit-by-permit basis. *See* 78 Fed. Reg. 73721. Not only does the rule actually *undermine* NEPA review on individual permitting decisions – by eliminating affirmative renewal decisions at least every five years and replacing them with internal FWS “reviews” that will evidently *not* be accompanied by any NEPA or public review – but the NEPA analysis for the initial permit applications will focus on the impacts associated with the individual permits; at most they may address impacts in a particular geographical region. But that cannot possibly substitute for a program-level analysis of impacts associated with facilitating industrial wind power and other major projects in eagle habitat throughout the country. Indeed, if a programmatic NEPA analysis was necessary and appropriate when the Service adopted the 2009 rule – as the Service evidently recognized in preparing an extensive EA at that time – then it is surely required when the agency abruptly reverses position on one of the central features of the 2009 rule (i.e., five-year permit terms with mandatory, affirmative renewal reviews) and replaces it with a maximum permit duration that is six times as long and relies on (at best) internal, non-public reviews in lieu of transparent, publicly accountable decisions.<sup>2</sup>

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<sup>1</sup> Paradoxically, the 30-year permit rule states that the “Service may develop eagle permitting regulations specifically tailored to wind-energy projects in the future” and that “[i]f the Service chooses to develop such regulations, it will comply with NEPA at that time and review the anticipated impact of such regulations.” 78 Fed. Reg. 73714 (emphasis added). But the 30-year rule *is* plainly one that is “specifically tailored to wind-energy projects”; as the preamble to the rule makes clear, the desire to “better correspond to the operational timeframe of renewable energy projects,” *id.* at 73705, and to address the wind industry’s purported complaint that “five-year permits have inhibited their ability to obtain financing,” are the *explicit* rationales for the rule. *Id.* at 73709 (“[W]e changed the regulations to accommodate that need . . .”) (emphasis added). Consequently, the Service’s claim that it will comply with NEPA if and when it adopts *additional* wind-energy specific regulations in the future, but need not do so for the 30-year rule, makes no sense.

<sup>2</sup> The Service’s regrettable lack of transparency on issues concerning the impacts of wind power projects on eagles and other migratory birds has also compelled ABC to sue the Service under the Freedom of Information Act in order to obtain dozens of documents that have been withheld from public scrutiny on various grounds. The documents at issue in that case include records relating to the 30-year eagle permitting regulation that is the subject of this letter,

**Second**, the Service has also violated section 7 of the ESA, which requires all agencies to “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species.” *Id.* § 1536(a)(2). To carry out that obligation, an agency undertaking any action that “may affect listed species” must consult with the FWS concerning the impacts of the action on listed species unless the Service concurs in a finding that “that the proposed action is not likely to adversely affect any listed species.” 50 C.F.R. § 402.14. If effects are likely, the agency requesting consultation must “provide the [Service] with the best scientific and commercial data available,” *id.*, and “formal consultation” commences, which results in the issuance by the Service of a Biological Opinion that includes, among other items, terms and conditions specifically designed to minimize the take of endangered and threatened species. 16 U.S.C. § 1536(b). Where, as here, one component of the FWS takes an action that may affect listed species, it is not relieved of the obligation to comply with the section 7 process but, rather, must engage in “internal” consultation with the Service’s experts on listed species. *Nat’l Wildlife Fed’n v. Babbitt*, 128 F. Supp. 2d 1274, 1286 (E.D. Cal. 2000) (“When the action agency is the Service itself . . . it must engage in internal consultation under § 7, and may issue the permit [or rule] only upon a finding that it ‘is not likely to jeopardize the continued existence of a protected species, or result in the destruction or adverse modification of critical habitat’”).

Here, however, the Service avoided the legally mandated process for analyzing and addressing impacts on listed species, although it is apparent that the rule change “may,” at minimum, harm myriad such species in various ways. Again, assuming that the rule accomplishes its stated objective of facilitating project development – and, specifically, industrial wind development – in habitat that is occupied by eagles, then the rule will also inevitably impact threatened and endangered species that rely on the same habitat. Because, as explained in the 2009 EA, the “breeding and wintering habitats of bald eagles and golden eagles together comprise a large portion of the United States,” and “both species use a variety of habitats and geographical areas,” 2009 EA at 55, promoting the expansion of wind power in occupied eagle habitat entails impacting the airspace and/or ground habitat used by other species, including those presently protected by the ESA or proposed for such protection. Examples of such species that are known or likely to be adversely affected by wind power projects built in problematic locations are the California condor, whooping crane, Indiana bat, piping plover, Kirtland’s warbler, and various species of sage grouse.

Paralleling the FWS’s position regarding NEPA review, in promulgating the 30-year permit rule, the Service asserted that “[t]his rule, which amends the regulations governing administration of the permitting process under the Eagle Act, will not affect endangered or threatened species or designated critical habitat” because the rule “simply increases the number of years that a programmatic permit may be valid under certain conditions and requires the FWS to conduct 5-year reviews to monitor compliance with the permit conditions.” 78 Fed. Reg. 73722. But that rationale is no more persuasive in the ESA context than it is in the NEPA context. Once again, by “increas[ing] the number of years that a programmatic permit may be

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as well as records reflecting the impacts of individual projects on eagles and other migratory birds. The case is pending in the U.S. District Court for the Eastern District of Virginia. See *American Bird Conservancy v. U.S. Fish and Wildlife Service*, Case No. 1:13-cv-723 (E.D. Va.).

valid,” the Service is *purposefully* removing a supposed regulatory obstacle to the development of wind power projects in known eagle habitat, which will indeed “affect endangered or threatened species or designated critical habitat,” *id.*, that overlap with the range of bald and golden eagles. These inevitable adverse impacts of the rule on federally listed species certainly satisfy the “low threshold triggering the duty to consult under the ESA.” *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1029 (9th Cir. 2012) (en banc).

In addition, in contrast to the present system – in which permit renewals every five years are *themselves* agency actions that trigger the obligation for section 7 consultation – there is no assurance that any remotely rigorous ESA compliance will occur pursuant to internal “5-year reviews to monitor compliance with the permit conditions,” *id.*, even assuming that reviews are conducted at all given the Service’s resource and personnel constraints. Consequently, the notion that this radically new approach to BGEPA permitting has no consequences for listed species – and hence that section 7 consultation on the rule change may be avoided – is fanciful. Simply put, there is no valid legal basis for the Service to have bypassed section 7 compliance and the rule was therefore adopted in violation of the ESA.

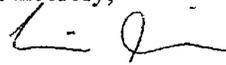
**Third**, the rule change is also in irreconcilable tension with BGEPA itself. As noted, in adopting the rule, the FWS acknowledged that its principal, if not sole, purpose was to “accommodate” the purported “needs” of the wind power industry for longer permit terms, 78 Fed. Reg. 73709, and to “provide project developers the *certainty* provided by a permit for the anticipated project life.” *Id.* at 73709 (emphasis added). But the Service never explains how, in enacting BGEPA, Congress indicated (or even suggested) that accommodating the desires of one particular industry and affording project developers regulatory “certainty” notwithstanding the unprecedented risks to eagle populations posed by doing so is any way consonant with the objectives of the Act. To the contrary, Congress made it abundantly clear that the Act is, first and foremost, intended to “increase the protection afforded bald and golden eagles,” S. Rep. 92-1159, 92d Cong., 2d Sess. (Sept. 15, 1972), 1972 U.S. Code Cong. Admin. N. 4285 (“1972 Senate Report”). That statutory objective hardly supports affording “certainty” to project developers while playing dice with two of the country’s most iconic bird species.

That such impermissible gambling is precisely what is at stake here is highlighted by the fact that, in adopting the 30-year rule, the Service did not even attempt to reconcile the rule with the finding the Service made, only four years earlier, that a permit duration of only “five years or less” was appropriate “because factors may change over a longer time such that a take authorized much earlier would later be incompatible with the preservation of the bald eagle or golden eagle.” 74 Fed. Reg. 46856. Hence, the agency pointed to no new science or studies that purportedly supported a significantly longer permit duration or a dramatically different permitting process in which, once a long-term permit is issued, the burden is expressly imposed on the Service to justify revisiting the permit terms rather than on the project developer to justify renewal. Consequently, while this rule change undoubtedly “increase[s] the protection afforded” project developers, the same cannot be said for the bald and golden eagles that are the principal beneficiaries of BGEPA. 1972 Senate Report, 1972 U.S. Code. Cong. Admin. N. 4285.

## CONCLUSION

The 30-year rule violates NEPA, the ESA, and BGEPA and undermines the nation's longstanding commitment to conservation of eagles – unique animals that are “ubiquitous in U.S. culture, attesting to the widespread symbolic importance the [ ] eagle holds in U.S. society.” 2009 EA at 70. ABC will pursue legal action to address these violations and ensure that eagles, and the millions of Americans who enjoy and benefit from them, obtain the legal protections to which they are entitled under U.S. law.

Sincerely,



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