



1875 Eye Street, NW • 5th Floor
Washington, DC 20006

Telephone 202-429-2737

COMMITTEE FOR A CONSTRUCTIVE TOMORROW

July 11, 2012

Public Comments Processing
Attention: FWS-R9-MB-2011-0094
Division of Policy and Directives Management
U.S. Fish and Wildlife Service
4401 North Fairfax Drive • MS 2042-PDM
Arlington, VA 22203-1610

SUBMITTED VIA *Federal eRulemaking Portal*:

<http://www.regulations.gov/#!submitComment:D=FWS-R9-MB-2011-0094-0001>

Re: Eagle Permits; Revisions to regulations governing take necessary to protect interests in particular localities – Docket Number: FWS-R9-MB-2011-0094

The Committee For A Constructive Tomorrow (CFACT or the Committee) appreciates this opportunity to submit the following comments in response to the Fish and Wildlife Service's notice, **Eagle Permits; Revisions to regulations governing takings necessary to protect interests in particular localities**, as issued by the DOI/FWS and published on April 13, 2012 at 77 *Federal Register* 22278-22280.

With headquarters in Washington, DC, the Committee For A Constructive Tomorrow is a 501(c)(3) national and international environmental and educational organization dedicated to protecting both wildlife and ecological values and the needs and aspirations of people, families and communities.

CFACT strongly opposes any programmatic or other changes in existing regulations that would: (a) result in the disturbance, injury, maiming and killing of bald and/or golden eagles by wind turbine facilities; and/or (b) put local, regional or national populations of bald and/or golden eagles at risk of extinction in or displacement from any habitats in which they reside.

The Committee notes at the outset that the title of this proposal is somewhat misleading. A more accurate and transparent title would clarify that these proposed regulatory changes would likely result in the significant and widespread maiming, killing, dislocation and disappearance of eagles within numerous localities, for the purposes of advancing certain commercial interests and political agendas: namely large commercial/industrial wind turbine facilities, and a pro-renewable energy and anti-hydrocarbon energy political agenda. We believe this is manifestly inappropriate, illegal and contrary to the public interest.

We further note that the Fish & Wildlife Service is obligated to enforce existing laws and regulations to their fullest extent, and to bring operators of existing and proposed industrial wind turbine facilities into compliance with all applicable wildlife protection laws and regulations, to the same extent that such rules are applied to all other American citizens, businesses and industrial operations. The FWS is not to carve out special exceptions or establish preferential treatment for industrial wind facility operators.

I. If implemented, the proposed FWS rules would result in the repeated, widespread, long-term injury, maiming, killing, disturbance, dislocation and extinction of bald and golden eagles from numerous locations around the United States – in contravention and violation of the letter and spirit of US endangered species and other wildlife and environmental laws and regulations.

Bald eagles are the symbol of our nation; golden eagles are equally majestic. They soar in our skies and our imaginations. After years of being shot, poisoned and driven from their habitats, they have just returned from the verge of extinction. Eagles are now protected by laws, regulations and court orders that prohibit any human activities that might harm these great raptors. FWS rules and interpretations have even been used to prohibit mining, drilling, logging, home building and other activities in or near eagle habitats; proscribe and punish the mere possession of eagle feathers (even from eagles killed by cars or wind turbines); and even prevent fireworks events that might startle eaglets in suburban nests.

For the Fish & Wildlife Service to grant the operators of industrial wind turbine facilities a blanket or “programmatically” license to injure, maim and kill potentially hundreds of eagles annually, potentially for up to thirty years, is unconscionable, and contrary to the letter and spirit of our nation’s wildlife and environmental laws. It would drive these vitally important raptors to extinction in many parts of the country – and keep them from expanding their ranges – especially if more wind turbine operations are allowed to proliferate near eagle habitats.

Moreover, it is not just eagles that will be injured, maimed, killed, disturbed, dislocated and driven to extinction in many locales. Condors, hawks, peregrine and other falcons, whooping cranes, herons, egrets, snow geese, bats and other rare, threatened, endangered, vitally important and magnificent flying creatures would also be imperiled directly, as well as driven from countless habitats.

That would be a national and international wildlife, environmental and (for the FWS) public relations disaster. It would be completely unsustainable. But it will happen if these rules are promulgated.

II. It is impossible to calculate the number of eagles (and other raptors, birds and bats) injured, maimed and killed each year; determine the effects of these adverse consequences on ecosystems, predator-prey relationships, or wildlife and environmental conservation goals; or address the public’s right to know how FWS policies are affecting wildlife species and ecological sustainability – while the FWS also advances a narrow wind/renewable energy agenda.

The American Bird Conservancy and other experts have estimated that hundreds of eagles and hundreds of thousands of other birds are killed every year in the United States by wind turbines. The Conservancy says “millions” of birds and countless bats could be slaughtered annually by these giant “Cuisinarts of the Air” by 2030, if wind turbines are allowed to proliferate in and near habitats and migratory routes.

However, we will never know – certainly not in time to prevent ecological disasters.

Wind turbine operators conduct and control their own (understated and seriously flawed) mortality studies. They impose high security at wind farms, making it impossible for independent analysts to assess eagle (other bird and bat) injuries and mortalities. Wind industry personnel pick up eagle (and other bird) carcasses, under a “slice, shovel and shut up” philosophy or policy, while coyotes, foxes and other predators and scavengers carry off or devour still more injured and dead animals.

In addition, wind industry mortality studies are generally conducted using inadequately sized search areas that do not account for the long distances that eagles (and other species) might fly after being injured, or might be hurled by the force of impact with a turbine blade. Wind energy studies also utilize infrequent searches, which ensure that most of the casualties are eaten by coyotes, foxes, vultures, crows, ravens, and other predators and scavengers.

Furthermore, as best we can determine, the FWS does not require that whatever information is actually collected is ever be made public. Indeed, we have been told that the Service has taken over a year to respond to Freedom of Information Act requests. Equally problematical is another effort that has come to our attention – to put industry mortality data into an American Wind Wildlife Institute (AWWI) database that would offer limited or no access to “unapproved” researchers, under the guise that the data are “proprietary” and are located in non-governmental facilities that are not subject to the FOIA.

Making these concerns even greater is the fact that, on page 18 of its 2011 annual report and strategic plan, the American Wind Energy Association encourages its members to “Support AWWI in the organization’s efforts to identify data gaps and the research necessary to *create tangible, science-based data to support industry’s positions*” [emphasis added]. This strongly suggests that injury and mortality data will be gathered, filtered, massaged, manipulated and/or presented in ways which will make it appear that wind turbines have only minimal impacts on eagles (and other flying creatures) – so as to facilitate the construction of still more intrusive, injurious and lethal wind turbines in prime habitat areas.

Clearly, with billions of dollars in subsidies, feed-in tariffs and other revenues at stake annually, it is hard to imagine that the wind industry would ever voluntarily disclose that its turbines had killed even one bald eagle (or condor or whooping crane) – much less provide data that clarify just how harmful and lethal its enormous turbines actually are.

According to the American Bird Conservancy, the total number of “publicly acknowledged” deaths from wind turbines throughout the United States up to October 2011 is 54 golden eagles. However, as the preceding analysis makes clear, this figure is almost certainly only the tip of the carcass pile.

Having studied the situation for years, the Conservancy concludes that an estimated death toll of 100 golden eagles per year in California is “very reasonable.” Based on a death rate of 60-90 golden eagles annually just at the big Altamont Pass wind turbine facility, the death rate could easily be over 500 golden eagles a year from industrial wind facilities in the Western United States.

Moreover, according to the Conservancy, studies have documented a 50% decline in golden eagle nest sites near Altamont Pass since 2005 – and no golden eagles have nested in the 86 square mile Altamont Pass region itself for over 20 years, even though they once did and this is prime golden eagle habitat. These facts have likewise been hidden from public view, making CFACT highly doubtful about any assurances from the FWS or wind energy industry that turbines will not imperil eagles. We have seen no data on bald eagle injuries and deaths, but are absolutely certain that those incidents occur on a regular basis but have not been made public.

Finally, just last year, the Federal Government prosecuted seven oil and gas companies for inadvertently killing a mere 28 mallard ducks, flycatchers and other common birds that were found dead in or near uncovered waste pits across the entire state of North Dakota. Under the Migratory Bird Treaty Act, the companies and their executive officers faced fines of up to \$15,000 per bird, plus six months in prison.

To even suggest that 28 common birds should bring the wrath of the FWS and Justice Department down upon oil companies – while the wind industry should be exempted from virtually all wildlife protection laws, and allowed to maim and kill countless eagles (and other protected birds), without fear of prosecution or penalty – is preposterous and unacceptable.

And yet that is what the FWS appears to be proposing – even as eagle deaths mount, and the Department of the Interior moves rapidly to permit more wind facilities in California, Wyoming and other states where bald and golden eagles rule the skies. Federal agencies and many environmentalists remain intensely opposed to oil, gas, mining and other activities that will have comparatively minor impacts on bald and golden eagle populations. But they vigorously advocate for more wind bird-killing wind energy facilities. To CFACT that is unfathomable, unconscionable and unacceptable.

III. Contrary to Fish & Wildlife Service claims, “advanced conservation practices” will not reduce the disturbance and death of bald and golden eagles, under its proposed “programmatically” take regulations. The proposed FWS approach will be ineffective, destructive and hypocritical.

In its April 13, 2012 eagle “take” regulatory proposal, the Fish & Wildlife Service says “programmatically” permits authorize recurring take that is unavoidable even after implementation of advanced conservation practices.” It goes on to say, “We can issue programmatically permits for disturbances, as well as take resulting in mortalities, based on implementation of ‘advanced conservation practices’ developed in coordination with the Service.”

The FWS defines “advanced conservation practices” as “*scientifically supportable* measures that are approved by the Service and represent the *best available* techniques to reduce eagle disturbance and ongoing mortalities to a level where remaining take is *unavoidable*” and is “incidental to an otherwise lawful activity, such as mortalities caused by collisions with rotating wind turbines.” [emphasis added]

Referring to a related regulatory action, the Service adds that “additional adaptive conservation measures” may be implemented “if necessary to ensure the *preservation* of eagles.” [emphasis added]

It is clear from this that the FWS anticipates significant disturbance, dislocation, injury, maiming, mortality and other impacts on eagles, if wind turbines continue to be built and operated near eagle habitats in the United States; that these impacts will be unavoidable; that the Service will attempt to control and minimize those impacts; that even “advanced conservation practices” will not be sufficient in some or many cases; and that vague “additional” measures may be utilized to “ensure the preservation” of bald and/or golden eagles within undefined geographic regions.

Notwithstanding the vague assurances that (some) eagle populations will be preserved, the Committee is completely unconvinced that any actions the FWS might be promising here will actually safeguard eagles in areas where industrial wind turbine facilities are located. The Service (and Obama administration) clearly intend to promote wind energy and provide regulatory cover and legal protection for the wind energy industry, seemingly regardless of what this will do to eagle populations. The above language may obfuscate this reality somewhat, but it cannot alter the facts.

There are simply no practices, advanced or otherwise, nor any “additional adaptive measures,” that can alter the harsh reality. Wind turbines kill eagles. Where turbines are installed, eagle populations will be decimated. The approaches vaguely hinted at by the FWS will do little or nothing to reduce the slaughter and displacement, though they will create a host of new problems for wildlife conservation programs and additional regulatory and land use pressures on new categories of people and communities.

There are likewise no “scientifically supportable” measures that can be enlisted for this effort. For reasons explained above, data on eagle “takes” are and will continue to be insufficient, filtered, massaged, manipulated and presented in ways that minimize the actual impacts of wind turbines on eagles. That manipulation will be systemic, systematic and deliberate, and it will likely be actively assisted and/or obfuscated by the FWS and its regulations. The measures may be “approved by the Service,” they may even be “the best available,” and the remaining take may be “unavoidable.” However, “science” here is subjective and agenda-driven. And the impacts on eagles will be significant – and devastating.

The impacts may also be “incidental” to “otherwise lawful” wind turbine operations – meaning they will be *related to* turbine operations. But they will not be incidental, as in “minimal” or of limited impact on eagle populations. In fact, fireworks displays in Narrowsburg, NY and activities like oil and gas drilling, mining, logging and off-road vehicles are all “otherwise lawful.” In most cases, they also have truly incidental and inconsequential impacts on eagles. And yet the FWS has hyper-regulated or prohibited those activities in and near eagle habitats, and threatened companies, individuals and communities with significant fines for actions that *might* merely *disturb* eagles. This double standard is both hypocritical and a serious threat to eagles.

Simply put, programmatic take permits for industrial wind facilities will cause eagle populations to become threatened, endangered or extinct in many regions near those facilities. As in the Altamont Pass area, eagles not actually maimed or killed will be dislocated to subprime habitats, where carrying capacities are lower and fewer eagles will survive the poorer habitats and food supplies. The ultimate result will be the elimination (extinction) of eagles from many areas and geographic regions.

We wonder what advanced conservation practices, scientifically supportable measures, best available techniques or additional adaptive conservation measures the Service might have in mind to prevent this, reduce ongoing mortalities and ensure the preservation of eagles. We can conceive of very few.

Eagle injuries, deaths and dislocations are simply unavoidable wherever wind turbines are installed. They are also ecologically destructive, unsustainable and intolerable.

Perhaps the FWS could require that operators prevent turbine blades from turning from dawn to dark to protect eagles (and various rare, threatened and endangered bird species). Perhaps it could also require that turbines be shut down again from dusk until dawn to safeguard endangered species of nocturnal bats, owls and swallows. Of course, this would further reduce the turbines' already low electricity output.

It is more likely that the Service will instead impose onerous new restrictions on lands not directly covered or impacted by wind turbines – such as banning logging, drilling, vehicles, mining and other human activities from even more lands around the United States, in an effort to establish eagle rookeries in new locations, after wind turbines have eliminated them from prime locations.

This could be seen or portrayed as advanced or adaptive conservation measures to ensure the preservation of eagles – perhaps not anywhere near turbines, but somewhere in the same state or region, or at least somewhere in the continental USA. As turbines proliferate, the preservation goal may have to be expanded to focus solely on Alaska. That is hardly what Congress, the American people or the Eagle Protection and Endangered Species Acts contemplated; but it might satisfy the letter of these regulations.

IV. The wind energy systems in question do not merit the deference and defense given to them – and do not justify the slaughter and displacement of countless eagles.

To allow such widespread disturbance, displacement, injury, death, endangerment and extinction of so many bald and golden eagles and eagle populations is ecologically destructive and unconscionable for any reason. To do so for wind power is especially pernicious and indefensible.

Wind energy requires billions of dollars in perpetual subsidies – and billions more for backup generators fueled primarily by natural gas that the Sierra Club, Interior Department and other interest groups want restricted, further regulated or banned. The turbines and extensive transmission lines impact millions of acres of scenic, wildlife habitat and agricultural land – and require vast amounts of rare earth metals, steel, copper, concrete and other raw materials, whose extraction and processing further impair global land, air and water quality. On a Btu or megawatt per acre basis, wind turbines come in last.

Industrial wind operations generate far less electricity, at far higher cost, than do oil, gas, coal and nuclear facilities that are required to take far more extensive and costly steps than wind facilities to protect eagles. Indeed, wind energy fails every single honest and replicable scientific test: for energy generation, energy prices, subsidies, environmental impacts, and deliverable and delivered energy.

Wind turbines generate too little power when it is most needed, and too much when it is least needed. Their expensive, unreliable electricity kills two to four jobs for every job created – and raises lighting, heating, air conditioning, internet, appliance, machinery and other electricity costs for families, factories, farms, small businesses, internet companies, hospitals, churches, schools and every other entity in the United States. The soaring costs are especially harmful to minority, elderly and other poor families.

Because of these insurmountable shortcomings, wind energy is often justified as a way to reduce state or national carbon dioxide emissions (which they do not actually do, once backup power generation and turbine manufacturing and installation are considered) and prevent dangerous global warming. The case for manmade, CO₂-driven catastrophic global warming or climate change grows weaker with every revelation about the IPCC and every new study of natural causes of climate change.

However, even if average planetary temperatures were to warm by several degrees, eagles have proven that they can live in and adapt to warmer, colder, wetter or drier conditions. What they cannot adapt to are wind turbines. When industrial wind facilities are constructed, eagles either leave or get butchered.

The United States has vast natural gas, oil, coal and uranium resources that could provide far more reliable, far less expensive energy, from far less acreage per Btu or megawatt, with far fewer impacts on eagles, and under numerous environmental laws and regulations that will safeguard air and water quality, land and scenic resources. And yet those activities are delayed, hyper-regulated or banned outright, while wind energy is promoted heavily and given special treatment by the Fish and Wildlife Service.

To single wind power out for preferential treatment – to give only this land use and energy source a programmatic license to maim, kill and displace bald and golden eagles – is an indefensible abuse of agency discretion, a violation of law, an unsustainable policy, a wanton ecological crime.

V. Regarding the three specific questions raised by the FWS in its Federal Register notice, CFACT makes the following observations.

(1) *Clarifying the criteria for issuance of programmatic and standard permits.* Under the criteria, “take that cannot practicably be avoided” can be authorized with a standard permit; however, a programmatic permit requires that the take be “unavoidable.” The preamble accompanying the 2009 rule states, however, that “applicants for both types of permits must take all practicable steps to avoid and minimize take” ([74 FR 46838](#)). Should the regulations be revised so that the issuance criterion for programmatic permits is the same as for standard permits: That the project proponent has reduced take to the maximum degree practicable?

Absolutely not. The standards must not be relaxed even further than they already would be under these proposed programmatic take guidelines. To allow even laxer standards for disturbance, injury, maiming, death and dislocation, over as many as 25 or 30 years, in multiple locations, and with manifestly significant or even devastating impacts on bald and golden eagle populations, would be criminal.

CFACT strongly believes that industrial wind turbine facilities should simply not be permitted in areas known to be nesting, hunting, migratory or other habitats for eagles. “All practicable steps” must include not allowing turbines to be installed in these areas. Nothing else will suffice to protect these magnificent birds and prevent unsustainable impacts on local, state, regional and Lower 48 eagle populations.

The same rules should be applied to all industries and other applicants. If a New York community can be forced to cancel its annual Fourth of July fireworks; the Northern Arapaho Indians must complete a long permitting process to kill a mere two eagles for religious purposes; people can be prosecuted, fined and jailed for merely possessing an eagle feather; companies can be fined thousands of dollars for each common mallard that founders in uncovered waste pits; and numerous energy, mining, off-road vehicle and other commercial and recreational activities can be proscribed in and near eagle habitats –

then wind turbine operators must be treated the same way, under the same rules, according to the same restrictions for siting and operating wind turbines as for other industrial facilities, and with the same fines and jail terms meted out to turbine operators as to anyone else. Certainly the fines for maiming or killing eagles must be many times higher than for common ducks, flycatchers and similar birds.

(2) *Compensatory mitigation.* Under what circumstances should permittees be required to provide compensatory mitigation? To what degree should any required mitigation offset the detrimental impacts to eagles? We also welcome input regarding what types of specific compensatory mitigation measures may be appropriate.

CFACT does not believe it is possible to do adequate “compensatory mitigation,” to offset seriously detrimental impacts on eagles from wind turbine installations.

Eagles nest in prime habitat areas that they have found to be most suitable. Installing wind turbines in or near those areas kills eagles, drives them out of these preferred nesting and hunting areas, and dislocates them to less satisfactory locations.

Attempts to mitigate these significantly adverse impacts, even to a small degree, would restrict or prohibit other important activities in other areas that are owned, utilized or frequented by people and companies that have no relationship to the turbine operators, would receive no benefits from the turbines or their higher-cost electricity, and would likely not be compensated for their lost use and enjoyment of areas that would now be subjected to more highly restricted management. Nor would they likely be compensated for any lost rent, royalty or other revenue that they had previously received from those lands.

Compensatory mitigation would thus impose unacceptable economic and environmental injustices on numerous landowners, families, land users, mineral owners and other interests.

(3) *Eagle Act preservation standard.* The Eagle Act requires the Service to determine that any take of eagles it authorizes is “compatible with the preservation of bald eagles or golden eagles.” In the preamble to the final regulations for eagle non-purposeful take permits, and in the Final Environmental Assessment of the regulations, we defined that standard to mean “consistent with the goal of stable or increasing breeding populations.” We seek public input as to whether this standard is appropriate or whether it should be further refined or otherwise modified.

The term “compatible with the preservation of bald eagles or golden eagles” appears to be purposefully vague and open-ended. CFACT certainly cannot discern what it means.

In states and localities where multiple large-scale industrial wind turbine installations and their associated high voltage transmission lines are maiming, killing and displacing eagles, the concepts of “preservation” and “stable or increasing breeding populations” seem far-fetched, illusory and highly unlikely.

Do these terms suggest that the FWS goal is to have one eagle or a single breeding pair remain within or near areas that are directly impacted by the turbines and transmission lines? Somewhere within 50 or 100 miles of same? Somewhere within the same county, state, nearby state or general region? Or merely somewhere in the continental USA – or just Alaska – as turbine installations proliferate?

Who gets to define these standards? Wind energy companies? The FWS, with the advice and consent of (and eagle injury, displacement and mortality data from) wind energy companies? Will CFACT, the American Bird Conservancy or other independent groups have input, be granted equal access to eagle data, and be permitted to conduct their own independent studies in and near wind turbine installations?

These terms hardly constitute a “standard.” Where such vital raptors are involved, including our national symbol, the bald eagle, such vague, open-ended terminologies and policies are not acceptable.

VI. Concluding comments

The Fish & Wildlife Service has regulated, restricted and prohibited oil, gas, mining, timber cutting and other activities on many occasions, often over merely potential, theoretical or relatively minor or even inconsequential harms to eagles and other wildlife – and even when many of those activities would generate enormous amounts of energy, essential minerals, jobs and government revenue.

Now, on the basis of vague and open-ended science and terminology, potentially fraudulent data obtained and maintained by the very industry that is to be regulated under this proposed “programmatic take” regulation, the Service is saying it will give wind turbine operators (alone) what amounts to a 007 license to kill bald and golden eagles – imposing a maiming, death and extinction sentence on those magnificent birds, and on many other important, rare, threatened and endangered birds and bats.

There is no way these impacts can be truly mitigated under this proposal, especially in conjunction with other wind turbine regulations that have already been finalized. Wherever wind turbines are installed, flying creatures will be imperiled – and eagles will be reduced below breeding populations or driven to extinction in numerous localities, including many of their best habitats, and forced to relocate to far less suitable locations that have lower carrying capacities.

At the very least, the Service must require that wind operators allow independent wildlife experts to enter and conduct studies in and surrounding turbine installations, so that those studies can help chronicle and tally actual injuries, mortalities, dislocations, and risks to eagle and other species preservation – before species numbers reach such critically low levels that their continuation can no longer be assured.

CFACT further notes that these extraordinary and potentially disastrous regulations are being advanced to promote an energy source that requires perpetual subsidies and exemptions from numerous laws to survive; that will generate minimal amounts of very expensive electricity; and that will kill more eagles than all U.S. oil, gas, coal and nuclear energy facilities combined. This unreliable and substandard energy source will impose a death toll on eagles (and other protected species) that will rise steadily as more and more industrial wind facilities are approved and installed.

When dead, injured and displaced eagles are counted as ecological impacts per megawatt or million Btus of electricity actually produced per year (actual output, not theoretical or name plate amounts), wind turbines have such poor track records that the impacts on eagles (and other species) cannot be justified.

This is not regulation by law, science or common sense. It is regulation by executive fiat, junk or fraudulent science, and seriously preferential and unequal treatment. This programmatic eagle “take” proposal gives open-ended, unfettered discretion to the Fish & Wildlife Service and wind industry to proceed as they wish, with little oversight or control by Congress, the courts or the American people.

The proposal is almost lawless in its scope and intent. It bends, twists and distorts the Eagle Protection Act, Endangered Species Act and other laws to advance pro-wind and anti-hydrocarbon energy agendas – while enabling the FWS to use those same laws to delay, stymie, block and penalize other legitimate and legal activities, which will be granted little or no leniency or exceptions under the same laws and rules.

The proposed programmatic eagle take regulation is an ecological disaster in the making. It must not be promulgated and implemented. The wind industry must be compelled to comply with all wildlife and environmental laws and regulations, to the same extent and under the same conditions and penalties, as apply to all other industries and activities on public and other lands under FWS jurisdiction.

Thank you for considering our concerns and comments.

Respectfully submitted,

Paul K. Driessen

Paul K. Driessen, JD, Esquire, APR

Senior policy advisor, Committee For A Constructive Tomorrow