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Re: NOTICE OF VIOLATIONS OF THE ENDANGERED SPECIES ACT, MIGRATORY BIRD TREATY ACT, BALD AND GOLDEN EAGLE PROTECTION ACT, AND NATIONAL ENVIRONMENTAL POLICY ACT IN CONNECTION WITH THE CAMP PERRY AIR NATIONAL GUARD WIND ENERGY PROJECT IN OTTAWA COUNTY, OHIO

The American Bird Conservancy and Black Swamp Bird Observatory (collectively, “ABC/BSBO”) hereby provide notice under section 11(g) of the Endangered Species Act, 16 U.S.C. § 1540(g) (“ESA”), of violations of the ESA caused by the installation and operation by the Ohio Air National Guard (“ANG”) of a wind turbine at Camp Perry in Ottawa County, Ohio.

As discussed below, although ANG has engaged in ESA section 7 consultation with the U.S. Fish and Wildlife Service (“FWS”) regarding the wind turbine project, ANG unlawfully tainted that process, in violation of section 7(d) of the ESA, 16 U.S.C. § 1536(d), by constructing the foundation for the wind turbine *before* the FWS could produce a Biological Opinion (“BiOp”). Not surprisingly, the BiOp produced under such circumstances – and on which ANG intends to proceed in completing construction of, and in operating, the turbine – fails to comport with the ESA and implementing regulations, including by analyzing the anticipated “take” associated with the project in isolation and without regard to the effect of any other take that has previously been authorized by the FWS with regard to the affected imperiled species.

ANG’s construction and operation of the wind turbine as proposed will also violate other federal environmental laws, including the Migratory Bird Treaty Act, 16 U.S.C. §§ 703-712 (“MBTA”), the Bald and Golden Eagle Protection Act, 16 U.S.C. §§ 668-668d (“BGEPA”), and the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370m (“NEPA”).

ABC/BSBO recognize that properly sited wind power projects can be an important tool in fighting climate change. When poorly sited, however, such projects can have significant adverse impacts on migratory birds and other wildlife. The proposed site for the Camp Perry project – in extremely close proximity to the Ottawa National Wildlife Refuge and in a major migration corridor – is one of the worst possible locations to construct and operate a wind power project. Accordingly, as ABC/BSBO have stressed in comments on the ANG’s draft Environmental Assessment (EA), ANG should abandon this ill-conceived and unlawful project and explore other, less harmful means of increasing its reliance on renewable energy.

BACKGROUND

A. ANG’s Prior Proposal For A Wind Power Project And Its Abandonment

This is not the first time that ANG has considered constructing a wind power project at the proposed location. When ANG first did so in 2007, the FWS vehemently objected in a December 4, 2007 letter, explaining to ANG’s hired wildlife consultant that the proposed project “lies within the Lake Erie watershed, and is within approximately 0.6 miles of Lake Erie and within 0.1 miles of Ottawa National Wildlife Refuge at its closest point (northeast corner).”

12/4/07 Letter from Mary Knapp, FWS, to Michael Curry, Curry & Kerlinger, L.L.C.¹ The FWS explained that it had a “number of concerns regarding this proposal, particularly due to the location of the project in an area of documented bird concentration.” *Id.* at 1. As to bird impacts generally, the Service explained that placing a wind turbine in close proximity to the Ottawa National Wildlife Refuge would be extremely harmful to local bird populations because:

[a]ccording to the Ottawa NWR Comprehensive Conservation Plan (2000), the refuge ‘ . . . provides critical wetland habitats for a diversity of wildlife, fish and plants. As a major migration corridor, the area is vital to migratory birds including waterfowl, shorebirds, raptors, and songbirds that need rest and food either after crossing Lake Erie on their way south or before they had back north over the water. As much as 70% of the Mississippi flyway’s population of black ducks use Lake Erie marshes for migration.’ Furthermore, Ottawa NWR has been designated as a site of regional significance in the Western Hemisphere Shorebird Reserve Network and the American Bird Conservancy has identified the refuge as a Globally Important Bird Area . . . ***As wind turbines throughout the world are known to cause mortality of a wide variety of bird species, the Service has serious concerns that installation of a wind turbine(s) adjacent to Ottawa NWR property may have significant impacts on birds.***

Id. at 2 (emphasis added); *see also id.* at 4 (“Because of the significant and documented bird use of the federal refuge adjacent to the project area, the Service believes that it is highly likely that the proposed project will result in bird mortality.”); *id.* (“Lake Erie serves as a migration barrier for some raptor species, which rely on thermal air drafts originating over land to fly. These raptors instead fly along the shoreline of the lake, and annual surveys . . . have documented more than 10,000 raptors flying through and around the project area each spring.”); *id.* at 5 (“All of the proposed project area lies within 1 mile of the Lake Erie coast. Birds stopping over during migration would be expected to travel at lower altitudes than migrating birds, and would be more susceptible to turbines than birds in locations that do not provide migration stopover habitat. The sheer number of birds passing through the region during migration, coupled with the proximity of the project to the Lake, ***indicate a high probability that, if this project moves forward as proposed, mortality of birds due to turbine strikes would occur.***”) (emphasis added).

In addition to expressing grave concerns over impacts on birds generally, the FWS’s 2007 letter also explained that constructing a wind turbine at Camp Perry would pose a particular risk to eagles. *Id.* at 2. The Service explained that the “project area lies adjacent to a woodlot that supports a nesting pair of bald eagles”; that “[a]dditionally, two more eagle nests are located within approximately 1.5 miles of the project area, and a total of 9 bald eagle nests exist within a 5 mile radius of the project site”; that the “marsh region of the western Lake Erie basin, where the proposed project is located, has the highest concentration of bald eagles in the state” and “serve[s] as staging areas for very large populations of immature bald eagles as well.” *Id.* Hence the “proposed project location is of serious concern to the Service because multiple studies have documented the death of various species of eagles” and “[w]ith such a large concentration of

¹ This letter was attached as an exhibit to ABC’s January 7, 2014 notice of violations of the ESA, MBTA, BGEPA, and NEPA in connection with ANG’s prior permutation of the wind power project. That notice and all of the attachments thereto are incorporated herein by reference.

bald eagles within the greater project area we believe it is likely that eagles will be impacted if the project moves forward as proposed.” *Id.* (emphasis added).

In June 2010, the FWS reiterated its concerns – in the course of providing comments on a draft Environmental Assessment (EA) on the proposed project – emphasizing that the “Service believes this site presents a high risk to migratory birds, and potentially bats, from turbine placement.” 6/16/10 Letter from Mary Knapp, FWS, to Michal P. Skomrock, ANG. The Service explained again that the “western Lake Erie marsh region” is a “***continentally significant area for congregations of migratory birds***, a federal trust resource managed by the Service” and that it is “highly likely that many individuals of various migratory species regularly fly across the project area.” *Id.* at 2, 3 (emphasis added). The Service further stressed that, even if ANG adopted mitigation measures in an effort to reduce bird impacts, “***due to the project setting it remains highly likely that migratory birds (potentially including state-listed species and the federally protected bald eagle) will still be taken by the project. This take would be a violation of the MBTA . . .***” *Id.* at 3 (emphasis added).

The FWS also advised ANG in 2010 that its proposal to operate the project and ***then*** “determine if waterfowl displacement occurs is also in opposition to NEPA’s requirements to assess the environmental effects of the action prior to implementing it.” *Id.* at 4. The Service explained that “NEPA does not allow for a ‘wait and see’ approach to potential impacts,” and, moreover, that an Environmental Impact Statement (EIS) must “be prepared to address the unique, uncertain, and currently unquantified potential risks to migratory birds (including bald eagles and federal and state listed species) that occur in the continentally significant habitat areas in close proximity (800 m) to the project area.” *Id.* at 5. According to the Service, such an EIS “should address ***the potential violations of the [MBTA] and [BGEPA] that could result from implementation of the proposed project.***” *Id.* (emphasis added).

Nonetheless, ANG opted to proceed with the project without even preparing an EIS. In 2012, ANG issued a Final EA, which stated that the “purpose of the proposed wind turbine project is to reduce electrical consumption and utilize wind resources that reduce emissions and greenhouse gas from fossil fuel generated systems.” 2012 Final EA at 6. The 2012 EA acknowledged that “Camp Perry is located within the vicinity of an Avian Concern Zone and important Bird Areas”; that the “predominant types of birds expected in the Proposed Action area are raptors, migrating songbirds, and waterfowl”; that “Four bald eagle nests are located within a three-mile radius of Camp Perry”; and that “[c]ollision impacts to avian and bat populations may result from the birds and bats that hunt, nest, or breed in the general proximity of Camp Perry.” *Id.* at 8. The EA concluded, however, that the proposed turbine “will not likely result in an adverse effect to avian and bat ***populations*** over a relatively large area.” *Id.* (emphasis added).

In a September 2012 letter to ANG, the FWS took serious issue with ANG’s EA, stating that the “current site, due to its proximity to state and federal areas designated for the protection of wildlife, the shoreline of Lake Erie, and wildlife resources including bald eagles and migratory birds, ***does not reflect a site that [] minimizes potential effects on wildlife.***” 9/25/12 Letter from Mary Knapp, FWS, to Environmental Engineer, 1st Lt Roger Nienberg, ANG, at 1-2 (emphasis added). The Service again reiterated that the “project area lies within a region that is

globally significant for migratory birds”; that the “presence of large state and federal wildlife refuges along the southwestern Lake Erie shoreline concentrate waterfowl/waterbirds, raptors, and neotropical songbirds during various portions of the year”; that “[o]f these bird groups, songbirds and raptors are among the most likely to be killed at wind turbines”; that “[b]irds stopping over during migration would be expected to travel at lower altitudes than migrating birds, and would be more susceptible to turbines than birds in locations that do not provide migration stopover habitat”; and that the “sheer number of birds passing through the region during migration, coupled with the proximity of the project to the Lake, **indicates a high probability of bird mortality due to turbine strikes.**” *Id.* at 10-11 (emphasis added). With regard to ESA-listed species, the Service expressed concerns about potential impacts on the Kirtland’s warbler and piping plover – both of which are federally listed as Endangered – and urged ANG to make a “determination of effects under Section 7 of the ESA” for these and several other potentially affected species. *Id.* at 4-5.

The Service’s 2012 letter also strenuously disagreed with the 2012 Final EA’s assertion that eagle impacts were unlikely. To the contrary, the Service explained that there are “**60** known bald eagle nests within 10 miles of the proposed project area,” the nearest of which is located approximately 0.58 miles northwest of the project area”; that the “[p]resence of nests and breeding areas indicates an important eagle-use area”; that the “migration and wintering data indicate the presence of a migration corridor and stopover area for bald eagles along the western basin of Lake Erie, which would include the project area”; that “[t]ake of bald eagles at several wind power facilities in the eastern U.S. and Canada has recently been documented, including take of a bald eagle at a single small turbine”; that “[g]iven the above breeding season and migration/winter season risk analysis, **we believe incidental take of bald eagles may be likely over the life of this project**” and that “[w]ithout a [BGEPA] permit, any eagle take resulting from the construction or operation of the turbine would be unlawful and the ANG may be liable.” *Id.* at 6-8 (first emphasis in original; second emphasis added).²

In September 2013, after ANG issued an EA “Addendum” that was prepared by its hired consultant and again sought to downplay the migratory bird and other wildlife impacts, the FWS yet again expressed its disagreement with ANG’s findings. *See* 9/10/13 Letter from Mary Knapp, FWS, to Capt. Roger Nienberg, ANG. The Service squarely rejected ANG’s assessment that the take of eagles was unlikely, again expressed concern for potential impacts on Kirtland’s warblers and piping plovers, and reiterated that the “project area is very significant for migratory birds” and, moreover, that for the federal government to site a project in this area “**may set a precedent and imply that siting wind turbines in this area is not a concern for birds, when the reality is that it is a concern.**” *Id.* at 2 (emphasis added).

When ANG nevertheless decided to press forward with the project, ABC/BSBO sent to ANG, along with the FWS and others, a formal Notice of Intent to Sue notifying the federal

² In September 2012, the Ohio Department of Natural Resources, Division of Wildlife (“DOW”) also commented on the 2012 Final EA by stating that “Camp Perry’s proposed location for this turbine falls in an area of greatest concern due to proximity to state and federal conservation areas, bald eagle nests, and the shoreline of Lake Erie[,] thus [causing] potential impacts to migratory birds” 9/25/12 Letter from Jennifer Norris, DOW, to Michael A. Hrynciw II, P.E. Maj., ANG, at 1; *id.* at 4 (“siting in an area that has significant bird-use **will likely result in significant mortality**”) (emphasis added).

agencies of multiple violations of the ESA, MBTA, BGEPA, and NEPA. See 1/7/14 Letter from William S. Eubanks II and Eric R. Glitzenstein, counsel for ABC, to ANG, FWS, and others. In response, by letter to ABC/BSBO's counsel dated January 28, 2014, the Director of the National Guard Bureau's Office of Installations and Mission Support informed ABC that he had "decided to withdraw the [Finding of No Significant Impact ("FONSI")]" for the project effective immediately," and that "[since the FONSI has been withdrawn, *the project will not go forward at this time.*" 1/28/14 Letter from Peter A. Sartori, National Guard Bureau, to William S. Eubanks II (emphasis added). The letter further stated that "[m]y environmental staff at the National Guard Bureau will review and coordinate the Environmental Assessment and all supporting documentation in accordance with [NEPA], as well as compliance with other environmental statutes including the [ESA]."

B. ANG's New Proposal To Build A Wind Turbine In The Same Location

Rather than cancelling a wind turbine project in the midst of a globally important area for birds, ANG has insisted on proceeding with the project, albeit with certain changes in its asserted purpose and the conditions under which it purportedly will operate. In July 2016, ANG issued a new Draft EA for "Installation and Operation of Wind Turbine at the 200th Red Horse Squadron" (2016 Draft EA), along with a new draft FONSI, which now describes the "purpose of the Proposed Action" as being to "install and operate a wind turbine *in order to study certain impacts of wind energy*, while at the same time assist Camp Perry ANG's with its move towards generating more of its energy on base through renewable resources." 2016 Draft FONSI at 1 (emphasis added). Thus, the principal purpose of the project is now to "study the impacts that construction and operation of this wind turbine will have on local Lake Erie natural resources for two years after construction has been completed," which will "include monitoring **avian and bat mortality rates**" and would then be "used to make recommendations on wind turbine operational modifications to reduce potential impacts to bird and bat populations at Camp Perry and perhaps elsewhere." *Id.* (emphasis added).

Put bluntly, the stated purpose of the project is to *see how many birds (and bats) the turbine kills by being placed in a crucial migratory pathway and globally important bird area* so that ANG can then make "recommendations" in view of the resulting mortality. See also 2016 Draft EA at 2-4 ("A primary purpose of the project would be to evaluate design and conservation measures associated with the operation of wind turbines *near migratory bird routes*") (emphasis added); *id.* at 2-5 ("part of the purpose of the Proposed Action is to provide opportunities for scientific research that could result in new or improved design and conservation measures *associated with the operation of wind turbines near migratory bird routes, which is Camp Perry's location*") (emphasis added).

While stating that the project's purpose is to *study* the effect of building a wind turbine near a major migratory route, and conceding that the "Camp Perry ANG's is located adjacent to the Ottawa National Wildlife Refuge (ONWR Darby Unit), which is known for its high diversity of birds," the 2016 Draft EA inconsistently (and nonsensically) asserts that "[n]o effects to wildlife are anticipated under the Proposed Action." 2016 Draft FONSI at 2. Flatly contradicting this assertion of "no effect," however, the Draft EA concedes that the "Black Swamp Bird Observatory along the Lake Erie shore has documented over 10,000 raptors each

year migrating around and through the Camp Perry area in 2006, 2008, and 2009” and that the Observatory in 2014 “recorded 139 species and 21,154 individuals during 46 days of point count surveys” in just one unit of the refuge. *Id.* at 4. Yet ANG makes no commitment in the Draft EA or Draft FONSI to pursue an MBTA scientific collecting permit for anticipated impacts on migratory birds, nor does ANG commit to obtaining a BGEPA permit despite conceding that “[b]ald eagle mortality may result as a consequence of collisions with the wind turbine and its rotating blades.” *Id.*³

The Draft FONSI and Draft EA do commit to certain mitigation measures, including “curtailing the operation of the wind turbines during dawn and dusk in spring and fall migration periods.” 2016 Draft FONSI at 7. However, while asserting that such measures will “greatly reduce the potential impacts on migratory birds,” *id.*, the Draft EA contains no analysis of how many birds will be killed through operation of the turbine during *most* of the year in extremely close proximity to a wildlife refuge and other areas that are heavily used by birds year-round.⁴ Rather, the Draft EA merely states that the project will allow ANG to “better understand how to reduce potential bird migratory injuries and mortalities,” *id.*, without explaining how that will occur or setting forth even the most rudimentary research methodologies and protocols that ANG intends to use.

The Draft EA sets forth only two alternatives – either building the project or not building it (the “no action” alternative). Thus, the EA considers no other means of reducing Camp Perry’s production of greenhouse gas emissions beyond construction of a wind turbine, thus suggesting that ANG has already predetermined the outcome of the NEPA process. Such predetermination is also evident from the fact, as admitted in the EA, that the “foundation for the wind turbine . . . *has already been constructed.*” 2016 Draft EA at 2-1 (emphasis added); *see also* Photograph 2-1. That construction violated the January 2014 representation made to ABC’s counsel by the National Guard Bureau that the project would not “go forward,” at least until further review was conducted in accordance with NEPA, ESA, and other federal environmental laws. In addition, as discussed further below, the construction of the foundation prior to the completion of the required NEPA or ESA processes violates those statutes and their implementing regulations.

³ The draft FONSI does say that ANG has “committed to developing an Eagle Conservation Plan,” 2016 draft EA at 4, which will “*enable* Camp Perry ANG to apply for a ‘voluntary’ eagle take permit,” *id.* at 7 (emphasis added), but makes no commitment to obtaining such a permit prior to project construction or even operation. Moreover, as discussed below, under the circumstances here, a BGEPA permit is hardly “voluntary”; rather, it is the only way in which ANG could bring itself into compliance with BGEPA.

⁴ While asserting that mitigation measures will “reduce” bird mortalities that would otherwise occur, the 2016 Draft FONSI and EA ignore at least one way in which the project as repackaged will be *worse* for birds (and bats) than the project previously considered. Specifically, the project now under consideration is *larger* – with a larger wind swept area – than the one previously considered, which necessarily entails greater risk for birds and bats. *Compare* 2012 Final EA at 6 (describing the proposed turbine as “stand[ing] 40 meters (131 feet), with a three-blade rotor with an overall diameter of approximately 41 meters (135 feet)”) *with* 2016 Draft EA at 2-1 (describing the turbine now proposed as having a “rotor diameter of 144 feet (44 meters) and a maximum height of approximately 200 feet (40 meters)”).

Although ANG has engaged in formal ESA section 7 consultation with the FWS regarding impacts of the turbine on Kirtland's warblers, piping plovers, and rufa red knots, as well as listed bat species, the FWS's March 2016 BiOp also makes clear that the "foundation for the wind turbines . . . has already been constructed," i.e., before the FWS could even set forth its view on the impact of the project on ESA-protected (or other) species. FWS, 3/8/16 "Biological Opinion and Incidental Take Statement for the Proposed Wind Turbine on the Ohio Air National Guard Station, Camp Perry, Ohio," at 5. The BiOp finds that there is the "potential that listed birds or bats may be struck by this turbine as they fly through the airspace surrounding the turbine," but concludes that, due to restrictions on turbine operation committed to by ANG, the project will "avoid take of listed species of bats," *id.* at 11, and is "not likely to jeopardize the continued existence of the rufa red knot, piping plover, or Kirtland's warbler." *Id.* at 19.

The BiOp "assumes" that the project will kill one Kirtland's warbler, one piping plover, and one rufa red knot over the life of the projected 25-year life of the project, and finds that this level of take is "unlikely to effect [sic] the distribution or reproductive success, or significantly impact the number of individuals within the population" of these species. *Id.* at 17, 18. However, other than summarily asserting that the Service "review[ed] the current status of the species" and the "environmental baseline for the Action Area," the BiOp presents no *analysis* whatsoever as to how the agency arrived at its conclusion. Nor does the BiOp address, at all, whether even a low level of take will impede the *recovery* of ESA-listed species that, by definition, are already facing the prospect of foreseeable extinction in the absence of concerted efforts to bring about their recovery.

In August 2016, ABC/BSBO submitted to ANG extensive comments on the 2016 Draft EA. See 8/8/16 Letter from Michael Hutchins, Ph.D, ABC, and Kim Kaufman, Executive Director, BSBO, to Col Andy "Stork" Stephan, ANG. These comments, which are incorporated herein by reference, explained that, notwithstanding "the amount of work that has gone into preparation of the EA and [BiOp]," the "fact remains that Camp Perry is a disastrous location for the installation of even a single wind turbine given its close proximity to the southern shoreline of Lake Erie – one of the most important confluences of neotropical migratory songbirds, bats and raptors moving to and from the boreal forests of Canada to breed." *Id.* at 1. The comments further explained that a newly released FWS radar study "clearly shows that vast numbers of birds and bats move through this area in Spring and Fall each year within five miles of the lake shore"; that "*migrating birds frequently descend at lower altitudes and move within the rotor sweep range of wind turbines, thus increasing the probability of collisions,*" and that "[t]his new FWS study completely invalidates the draft EA and the ANG-supported studies on which it is based." *Id.* at 1 (emphasis in original). The new FWS study is not addressed in either the Draft EA or BiOp, which were inexplicably issued without even awaiting the study's results.

The ABC/BSBO comments explain why, among other points, the studies conducted by ANG are "totally inadequate to assess risk" to birds, *id.* at 1; that the "primary purpose of this project as an experimental study to observe the number and types of birds killed under different mitigation regimes" means that "*any deaths due to this 'experimental' project are, in fact, 'purposeful' as opposed to 'incidental,'*" *id.* at 3 (emphasis in original); and that, given the draft EA's failure to explain how the proposed turbine will satisfy its stated goals, it seems apparent that the "ultimate purpose of this project and study is to open up the southern shoreline of Lake

Erie to extensive wind energy development, which could be disastrous for our native migratory birds and bats.” *Id.* at 3-4 (emphasis in original).

ANG has not responded to ABC/BSBO’s objections – which mirror many of those expressed by the FWS over the years. Accordingly, we set forth below the myriad ways in which ANG will violate federal environmental law should it proceed with the project in the manner that has been described in the 2016 Draft EA and BiOp.

VIOLATIONS OF LAW

A. Violations of the Endangered Species Act

ANG is in violation of the ESA, both by unlawfully undermining the section 7 consultation conducted with the FWS, and by relying on a FWS BiOp that contravenes the ESA and implementing regulations.

1. ANG’s Violation of Section 7(d)

By constructing the base for the project and spending \$200,000 of taxpayers’ money before awaiting the completion of formal section 7 consultation, ANG not only ignored the express representation made to ABC/BSBO in 2014 that the project would not move forward in the absence of full ESA and NEPA compliance, but also violated section 7(d) of the ESA, which provides that, “[a]fter initiation of consultation required under Subsection (a)(2) of this section, the Federal agency . . . ***shall not make any irreversible or irretrievable commitment of resources*** which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measure which would not violate subsection (a)(2) of this section.” 16 U.S.C. § 1536(d). The purpose of section 7(d) is to “maintain the status quo” during the section 7 consultation process, *Lane County, Audubon Soc’y v. Jamison*, 958 F.2d 290, 294 (9th Cir. 1997), and to “prevent federal agencies from steamrolling activities in order to secure completion of projects regardless of the impacts on endangered species.” *Fla Key Deer v. Brown*, 386 F. Supp. 2d 1281, 1284 (S.D. Fla. 2005), *aff’d sub nom.*, *Fla. Key Deer v. Paulison*, 522 F.3d 1133 (11th Cir. 2008).

ANG’s use of \$200,000 of taxpayer money to construct the physical base for the wind turbine is precisely the kind of “irreversible or irretrievable commitment of resources” that section 7(d) was designed to foreclose during ESA consultation. Indeed, ANG’s evident purpose in constructing the base before even obtaining the FWS’s BiOp was to “stream roll” the project so that the FWS would have less incentive to engage in a thorough review of project impacts and alternatives, such as distributed solar energy on its already-built environment.

ANG’s violation of section 7(d) has apparently had this very effect because the BiOp on which ANG is relying to discharge its ESA responsibilities falls far short of the requirements established by the ESA and the Act’s implementing regulations.

2. The BiOp Violates the ESA

First, although the BiOp summarily asserts that, “[a]fter reviewing the *current status of the species, the environmental baseline for the Action Area, the effects of the proposed action, and the cumulative effects*, it is our biological opinion that the action, as proposed, is not likely to jeopardize the continued existence of the rufa red knot, piping plover, or Kirtland’s warbler,” BiOp at 19, the BiOp contains virtually no analysis in support of this conclusion.

For example, while stating that the “Great Lakes population of piping plovers was estimated to be 126 individuals” and that “[a]t *current* population levels the take of one bird over a 25 year period would represent .79% of the population,” BiOp at 17 (emphasis added), the BiOp sets forth no analysis of how such a small population’s present and projected “baseline” condition will be impacted by the death of a plover *in conjunction with* other forms of authorized and/or anticipated take. In particular, the BiOp does not even indicate how many *other* “takes” from the same population the FWS has *already* authorized in previously issued BiOps/Incidental Take Statements under section 7 and/or Incidental Take Permits under section 10 of the ESA. This is essential to properly characterize the plover’s “baseline” condition in the area and whether an additional authorized death which may seem small in isolation may nonetheless have significant additive impacts that must be considered in formal consultation.

The ESA implementing regulations provide that during formal consultation, the FWS must evaluate the “effects of the action and cumulative effects on the listed species or critical habitat.” 50 C.F.R. § 402.14(g). The effects of the action include the “direct and indirect effects of an action on the species . . . together with the effects of other activities that are interrelated or interdependent with that action, *that will be added to the environmental baseline.*” *Id.* § 402.02 (emphasis added). The “environmental baseline,” in turn, is defined to include the “present impacts of all federal, state, or private actions and other human activities in the Action Area, the anticipated impacts of all proposed federal projects in the area that have already undergone formal or early section 7 consultation, and the impact of state or private actions which are contemporaneous with the consultation in process.” *Id.*

Consequently, the regulations make clear that an action’s impact on a species or population “*cannot be determined or analyzed in a vacuum*, but must necessarily be addressed in the context of other incidental take authorized by the FWS.” *Defenders of Wildlife v. Babbitt*, 130 F. Supp. 121, 127 (D.D.C. 2001) (emphasis added). Here, however, the BiOp makes no mention whatsoever of the incidental take that has already been authorized by the FWS and that will affect the same populations of piping plovers, Kirtland’s warblers, and rufa red knots that will be harmed by the proposed project. Nor does the BiOp address, at all, any of the “State or private actions which are contemporaneous with the consultation” for the Camp Perry wind turbine – such as *other wind projects* that have been built or are slated for construction on non-federal land and will have impacts on the species that have never been taken into consideration in any consultation.

For instance, the 2016 Draft EA acknowledges that there is an already operating turbine at the nearby Lake Erie Business Park, 2016 Draft EA at 2-3, which, based on the reasoning in the BiOp, is *already* having an adverse impact on the same ESA-listed bird populations

discussed in the BiOp (indeed, *more* of an impact since that turbine is presumably not abiding by any of the operational restrictions that the BiOp assumes for the Camp Perry project). Yet the BiOp makes no effort to incorporate the adverse current and anticipated effects of that project or any other project into the environmental “baseline”; in the absence of that analysis, the BiOp does what the ESA regulations forbid: it considers the anticipated take from the Camp Perry turbine in a “vacuum,” entirely divorced from the “context of other incidental take authorized by the FWS” in other consultations, as well as that which will likely occur but has never been authorized by the Service. See *Defenders of Wildlife*, 130 F. Supp. 2d at 127.

Second, the BiOp contains no analysis of whether even a low level of anticipated take for the affected imperiled species will undermine the *recovery* of the species. Section 7 requires that ANG, in consultation with the FWS, “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered or threatened species,” 16 U.S.C. § 1536(a)(2). In turn, the ESA implementing regulations define “jeopardize the continued existence of” to mean to “engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival *and recovery* of a listed species in the wild” 50 C.F.R. § 402.02 (emphasis added). Especially because many species are facing such dire threats that any impediment to recovery is tantamount to increasing their extinction risk, it is well-established that the Service’s evaluation of whether a federal action will “jeopardize” a species “must adequately consider the *proposed action’s impacts on the listed species’ chances of recovery.*” *Nat’l Wildlife Federation v. NMFS*, 524 F.3d 917, 933 (9th Cir. 2008) (emphasis added). Here, however, the BiOp does not even address the recovery prospects of the three affected bird species, let alone analyze the extent to which the anticipated take associated with the Camp Perry turbine, in conjunction with other current and prospective impacts on the species’ baseline condition, will forestall or prevent recovery.

3. ANG And FWS Are Required To Reinitiate Consultation In Light Of New Information.

Under the ESA implementing regulations, re-initiation of formal consultation is required when, among other circumstances, “new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered.” 50 C.F.R. § 402.16(b). As explained in ABC/BSBO’s comments, the newly released FWS radar study on the south shore of Lake Erie demonstrates that there is a much greater likelihood of collisions with the proposed Camp Perry turbine than is reflected in either the BiOp or 2016 Draft EA. Accordingly, ANG and FWS are required to reinitiate consultation so that the study can be taken into consideration in the FWS’s analysis of the anticipated level of take and the effect that will have on the species as a whole. See also 16 U.S.C. § 1536(a)(2) (requiring that “[i]n fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available”).

B. Violation Of MBTA

The 2016 Draft EA makes clear that ANG intends to proceed with the project without first obtaining, or even making any effort to obtain, an MBTA scientific collecting permit covering the project’s anticipated “take” of migratory birds. This constitutes a violation of the

MBTA. Section 703 of that statute provides that “[u]nless and except as permitted by regulations made as hereinafter provided in this subchapter, it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill . . . any migratory bird . . . included in the conventions” 16 U.S.C. § 703(a).⁵ Hence, “[a]s legislation goes, § 703 contains broad and unqualified language – ‘at any time,’ ‘by any means,’ ‘in any manner,’ ‘any migratory bird’”; the “one exception to the prohibition is in the opening clause – ‘[u]nless and except as permitted by regulations made and hereafter provided in this subchapter’” *Humane Soc’y of the U.S. v. Glickman*, 217 F.3d 882, 885 (D.C. Cir. 2000) (quoting 16 U.S.C. § 703).

Section 704 of the MBTA provides that, “in order to carry out the purposes of the conventions . . . the Secretary of the Interior is authorized and directed . . . to determine when, to what extent, if at all, and by what means, it is compatible with the terms of the conventions to allow . . . killing . . . of any such bird . . . and to adopt suitable regulations permitting and governing the same” 16 U.S.C. § 704(a). Pursuant to that authority, the FWS has adopted regulations that prescribe when permits may be issued, including for “scientific research or educational purposes,” 50 C.F.R. § 21.23, or for “special purpose activities related to migratory birds,” including where there is a “compelling justification” for such activities. *Id.* § 21.27.

The MBTA’s prohibition on the unpermitted take of migratory birds applies fully to federal agencies. *See Glickman*, 217 F.3d at 885 (holding that the MBTA’s prohibition on unauthorized take applies to federal agencies and may be enforced against them through the Administrative Procedure Act (“APA”). Accordingly, where, as here, it is inevitable that operation of a turbine at Camp Perry – immediately adjacent to a national wildlife refuge and in the midst of a globally important location for bird conservation – *will* kill migratory birds protected by the MBTA, there can be no serious question that ANG is legally prohibited from proceeding with the project without first obtaining an MBTA permit from the FWS.

Here, in contrast to commercial wind power projects – the sole purpose of which is to produce energy while having an “incidental” (if unavoidable) impact on birds – the stated **primary purpose** of the Camp Primary project is to “**study the impacts** that construction and operation of this wind turbine will have on local Lake Erie natural resources for two years after construction has been completed . . . includ[ing] **monitoring avian and bat mortality rates.**” 2016 Draft FONSI at 1 (emphasis added). In addition, an asserted “purpose of the Proposed Action is to provide opportunities for scientific research that could result in new or improved design and conservation measures **associated with the operation of wind turbines near migratory bird routes, which is Camp Perry’s location.**” 2016 Draft EA at 2-5 (emphasis added). In other words, causing bird mortality that may be studied is not merely an “incidental” result of a project focused on energy production but, rather, the very purpose of the project.

Under the plain language of the MBTA, however, as well as the statute’s implementing regulations, this project cannot be pursued without ANG **first** applying for and obtaining an MBTA permit from the FWS. Indeed, the Service’s regulations could hardly be clearer in

⁵ The MBTA implements four conventions between the United States and various countries committing the signatories to broad measures for conserving migratory birds – a “national interest of very nearly the first magnitude.” *Missouri v. Holland*, 252 U.S. 416, 435 (1920).

providing that a “scientific collecting permit is **required before any person may take, transport, or possess migratory birds, their parts, or eggs for scientific research or educational purposes.**” 50 C.F.R. § 21.23 (emphasis added). No such permit may be issued unless and until the FWS has fully analyzed the impact of the activity, determined that the permit applicant has established an adequate “purpose and justification for granting such a permit,” *id.* § 21.23(b)(3) along with other detailed information, *id.*, and attached appropriate “permit conditions” designed to limit the activity’s adverse impacts and ensure that the research serves a legitimate purpose related to bird conservation. *Id.* § 21.23(c). Such a permit is a legal prerequisite to the Camp Perry wind project proceeding any further.

Moreover, even if the Camp Perry turbine was intended *solely* to generate energy – so that migratory bird deaths could be considered purely an incidental, if inevitable, byproduct of the project – ANG would still be required to comply with the MBTA’s permitting regime. The FWS’s “‘longstanding position’ has been that the Act applies to harm that ‘occurs incidental to, and which is not the purpose of, an otherwise lawful activity’” *Public Employees for Env’tl Resp. v. Hopper*, 827 F.3d 1077, 1088 n.11 (D.C. Cir. 2016) (quoting 80 Fed. Reg. 30,032, 30,034 (May 26, 2015)). Indeed, ANG’s own 2016 Draft EA concedes that the MBTA “[r]equires Federal agencies to obtain permits from USFWS before any ‘take’ occurs, **even when the agency intent is not to kill or injure migratory birds.**” 2016 Draft EA at 3-2 (emphasis added). Consequently, regardless of how ANG characterizes the purpose of the proposed turbine, ANG cannot erect a wind turbine that will kill migratory birds without first obtaining an MBTA permit.⁶

C. Violation of BGEPA

As noted previously, while ANG has “committed to developing an Eagle Conservation Plan in collaboration” with the FWS, 2016 FONSI at 4, ANG has made no firm commitment to apply for or secure a BGEPA *permit* prior to proceeding further with the project – which is the only legal mechanism whereby the project could be brought into compliance with BGEPA. Indeed, the 2016 Draft EA admits that BGEPA broadly “prohibit[s] the take . . . of any bald or golden eagle . . . **unless allowed by permit.**” 2016 Draft EA at 3-2 (emphasis added) (citing 16 U.S.C. § 668(a); 50 C.F.R. § 22).

“Take” is broadly defined by BGEPA and implementing regulations to include “wound,” “kill,” and “disturb.” 16 U.S.C. § 668c; 50 C.F.R. § 22.3. The project’s close proximity to multiple eagle territories and nests makes it inevitable that eagles will be “taken” within the meaning of the Act, and thus the project cannot move forward in the absence of a BGEPA permit. Indeed, as set forth previously, the FWS has on many occasions opined on the high

⁶ As the U.S. Court of Appeals for the D.C. Circuit recently noted, industrial wind power projects may be “eligible to apply for a permit under 50 C.F.R. § 21.27, which authorizes ‘special purpose permits,’” *Public Employees for Env’tl Resp.*, 827 F.3d at 1088 n.11; *see also* 72 Fed. Reg. 8931, 8947 (Feb. 28, 2007) (explaining that one justification for a special purpose permit may exist “whereby take of migratory birds could result as an unintended consequence of” of an otherwise lawful activity). In addition, the FWS is considering issuing new regulations focusing on incidental take. *See* 80 Fed. Reg. at 30,034. Accordingly, even if ANG’s sole stated purpose was to produce energy rather than conduct research – which it is not – ANG could not claim that it is foreclosed from seeking an MBTA permit for the project.

likelihood that one or more eagles will be killed, injured, and/or disturbed by placing a project in such a hazardous location. ABC/BSBO's comments on the draft EA further reinforce the inevitability of eagle deaths, injuries, and disturbance from any wind turbine placed in this area. Consequently, should ANG embark on further construction or operation of the project without *first* applying for and obtaining a BGPA permit, ANG will be in patent violation of that statute. *See also* 5 U.S.C. § 706(2) (judicial review provision of the APA providing that the action of any federal agency must be set aside if it is "not in accordance with law" or is "without observance of procedure required by law").

D. Violation of NEPA

As set forth in ABC/BSBO's comments on the 2016 Draft FONSI and EA, as well as in the FWS's past comments, ANG cannot lawfully proceed with the project without preparing an EIS. In evaluating the need for an EIS, ANG must consider both the "context" and "intensity" of the action. 40 C.F.R. § 1508.27. As for "context," the regulations provide that "[s]ignificance varies with the setting of the proposed action," so that "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." *Id.* § 1508.27(a). However, this is an extraordinary situation in which the Camp Perry turbine is proposed to be built in such a disastrous location that it would have effects *both* in the "locale" and, given the globally important bird area that will be affected, the "world as a whole."

As for "intensity," the NEPA regulations set forth a number of factors that must be considered in assessing "significance," any one of which is sufficient to trigger the need for an EIS. *Id.* § 1508.27(b). Here, *virtually all* of those factors are implicated, including:

- there are "[u]nique characteristics of the geographic area such as proximity to . . . ecologically critical areas," *id.* § 1508.27(b)(3);
- the project's environmental impacts are "highly controversial," *id.* § 1308.27(b)(4), especially given the FWS's repeated objections to this location for a wind project and the Service's recommendations that no wind turbine be built within three miles of the Great Lakes shorelines;
- the project "involve[s] unique or unknown risks" to federal trust resources, *id.* § 1508.28(5);
- a federal entity's determination to build a turbine in such a crucial migratory corridor "may establish a precedent for future actions with significant effect or represents a decision in principle about a future consideration," *id.* § 1508.27(b)(6);
- the action is "related to other actions with . . . cumulatively significant impacts," *id.* § 1508.27(b)(7) – including other wind power projects affecting the same populations of birds and bats that will be harmed by the Camp Perry project;
- the project may "adversely affect . . . significant . . . cultural, or historical resources," *id.* § 1508.27(b)(8) – particularly the bald eagle, a species that not only has biological importance but also extraordinary cultural and historic significance to citizens of the U.S.;
- the project "may adversely affect an endangered or threatened species," *id.* § 1508.27(b)(9), including the three species discussed in the BiOp; and

- the “action threatens a violation of Federal . . . requirements imposed for the protection of the environment.,” *id.* § 1508.28(10) – including, as discussed previously, the ESA, MBTA, and BGEPA.

Preparation of an EIS would also afford ANG the opportunity to take the legally mandated “hard look” at project impacts, as well as reasonable alternatives to putting a wind turbine in one of the worst imaginable locations in the country for such a project. *See* 40 C.F.R. § 1502.14 (explaining that a consideration of alternatives is the “heart of” an EIS, which must “[r]igorously explore and objectively evaluate all reasonable alternatives”). As explained in ABC/BSBO’s comments, ANG’s legally deficient EA considers no alternatives whatsoever for decreasing Camp Perry’s greenhouse gas emissions *without* risking grave harm to invaluable wildlife resources. *See also Union Neighbors United, Inc. v. Jewell*, ___ F.3d ___, 2016 WL 415237, at **7-9 (D.C. Cir. Aug. 5, 2016) (holding that the FWS’s NEPA analysis was arbitrary and capricious where the Service authorized a wind power project without considering a reasonable range of alternatives that would avoid or minimize impacts on endangered Indiana bats); 40 C.F.R. § 1500.2 (explaining that the NEPA process is designed to “identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment”).

Finally, ANG’s preparation of an EIS is especially important where, as here, ANG has unlawfully undermined the NEPA (as well as the ESA) process by constructing the base of the turbine *before* even issuing a final EA, let alone an EIS. The central purpose of NEPA is to “integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts.” *Id.* § 501.2. Accordingly, the NEPA regulations require that “[a]gencies *shall not commit resources prejudicing selection of alternatives before making a final decision*,” *id.* § 1502.2 (emphasis added), and that a NEPA document “shall be prepared early enough so that it can serve practically as an important contribution to the decision making process *and will not be used to rationalize or justify decisions already made*.” *Id.* § 1502.5 (emphasis added). Building the base of the turbine before even issuing a draft EA for public comment (and before even completing consultation with the FWS) is a blatant NEPA violation.

CONCLUSION

ABC/BSBO would be pleased to discuss the issues raised in this letter and in ABC/BSBO’s comments with you or your staffs. Should ANG insist on proceeding with the project, however, ABC/BSBO intends to consider all available means, including litigation, to ensure compliance with federal environmental law.

Sincerely,

/s/ Eric R. Glitzenstein

Eric R. Glitzenstein

/s/ William S. Eubanks II

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