

# ***Conservation Congress***

**P.O. Box 2076  
Livingston, MT 59047  
406-222-2723  
conservationcongress-ca.org**



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Public Comments Processing  
Attn: FWS-R9-MB-2011-0094-0491  
Division of Policy and Directives Management  
U.S. Fish & Wildlife Service  
4401 North Fairfax Drive, MS 2042-PDM  
Arlington, VA 22203-1610

Subject: Comments on “Eagle Permits; Notice of Intent To Prepare an Environmental Assessment or an Environmental Impact Statement”

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## **Introduction**

On behalf of Conservation Congress (CC), please accept and consider fully these comments on the Advanced Notice of Public Rulemaking for the possible modification of the current management objectives for eagles. Docket No. FWS-R9-MB-2011-0094-0491; Eagle Permits; Notice of Intent To Prepare an Environmental Assessment or an Environmental Impact Statement (NOI). We appreciate the opportunity to comment on this docket and the important issues it raises concerning the obligations imposed by the Bald and Golden Eagle Protection Act (BGEPA), 16 U.S.C. §§668-668d, and the regulations and guidelines adopted by the U.S. Fish and Wildlife Service (FWS), 50 C.F.R. Ch. I, Subch. B, Part 22, specifically including Section 22.26 “Permits for eagle take that is associated with, but not the purpose of, an activity,” 50 C.F.R. §22.26 (Eagle Permit Rule).

Since 2004, CC has pursued its mission of providing a voice for native wildlife of the western United States. CC is a grassroots Section 501(c)3 nonprofit conservation organization that includes individual members and organizations who are dedicated to protecting and preserving National Forests and native wildlife in western states. CC

makes these comments in the furtherance of its mission and as part of its ongoing engagement on the important issue of eagle conservation as demonstrated by its previous comments dated July 11, 2012 to the “Advance Notice of Proposed Rulemaking--Eagle Permits: Modifications to Regulations Governing Take to Protect Interests in Particular Localities” (FWS-R9-MB-2011-0094-0001) and the “Duration Rule” (FWS-R9-MB-2011-0054).

The tribes, legislators, organizations and individuals that join CC in making these comments have an ongoing interest in eagle conservation in general and the issues raised by the NOI in particular.

### **Summary of Issues and Comments**

The concerns and recommendations of CC regarding the specific issues upon which comments have been solicited by the FWS in the NOI, and on additional matters which CC desires to have addressed by an Environmental Assessment (EA) or an Environmental Impact Statement (EIS) to be developed under the National Environmental Policy Act, 42 U.S.C. §§4321-4335 (NEPA), are summarized below:

- Eagle Preservation Standard and Management Objectives. Maintain the current preservation standard and management objectives, with expanded analysis of breeding populations at all geographical and temporal scales, application of a low level of risk tolerance and refinement of the parameters of compensatory mitigation.
- Alternative Preservation Standard. Retain current “quantitative” standard instead of adopting a subjective “qualitative” standard.
- Programmatic Permit Conditions and Duration. Require mandatory compliance with the Eagle Conservation Plan Guidance, Module 1 – Land-based Wind Energy Version 2 (Apr. 2013) (ECPG) and the Land-Based Wind Energy Guidelines (Apr. 2012) (WEG) to achieve the “unavoidable” criteria specified in the Eagle Permit Rule for the issuance of an eagle take permit (ETP) for programmatic take at all new wind energy facilities. Make the FWS’ national eagle management structure and practices, and the permit review process, transparent and open to full public review and comment procedures.
- Compensatory Mitigation. Retain current objective of net-zero breeding population loss, to be analyzed and applied at all geographical and temporal scales with compensatory mitigation that is directly and verifiably effective.

- Need for Robust and Effective Enforcement. Institute robust prosecution of unpermitted takings at wind energy facilities, including the criminal prosecution of flagrant violators seeking meaningful monetary penalties and the conviction of executives of corporate violators.
- Comprehensive Unified NEPA Analysis. Withdrawal of the Duration Rule for improper lack of analysis under NEPA, which should be considered only as part of a comprehensive environmental analysis of the FWS' national eagle management program, the ECPG and WEG, and all contemplated changes to the Eagle Permit Rule.

## **Discussion of Issues and Comments**

### Eagle Preservation Standard and Management Objectives

The current preservation standard set forth in Section 668a of BGEPA requires that any taking must be “compatible with the preservation of the bald eagle or the golden eagle.” 16 U.S.C. §668a. In the NOI, the FWS has requested comments on whether its existing management objectives for eagles should be modified and, if modified, how to do so in a manner that will meet the statutory preservation standard set forth in BGEPA.

The FWS asserts in the NOI that, “The language of the Bald and Golden Eagle Protection Act provides flexibility with regard to defining management objectives for bald and golden eagles.” In exercising its discretion whether and to what extent to modify the current management objectives, the FWS must proceed with the utmost care because of the clarity of the statutory preservation standard and its keystone importance to the effectiveness of BGEPA.

As a starting point in considering these questions, it should be noted that in adopting BGEPA, Congress's primary purpose was 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. Further, the U.S. Supreme Court has unambiguously interpreted BGEPA to be, first and foremost, a wildlife conservation statute, and accordingly has set an extremely high standard favoring the protection of eagles. *See Andrus v. Allard*, 444 U.S. 51, 52-53, 60 (1979). It is therefore reasonable to conclude that the preservation standard set forth in Section 668a must be interpreted in such a way that places the greatest weight on conservation of Bald and Golden Eagles to achieve the statute's purpose.

With this overarching goal of providing the maximum protection for eagles when permitting taking under Section 668a, CC asserts that the management objectives should be as follows:

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Population Management. The current objective of population management consistent with the goal of maintaining stable or increasing breeding populations over 100 years should not be changed. Maintaining the current standard allows verification of successful or unsuccessful management efforts against a quantifiable population level, assuming there is robust research and monitoring to gather accurate breeding population data. Further, continuing the use of the current objective will foster consistency in evaluating the effectiveness of current and future management efforts, which is particularly important as the Eagle Permit Rule is being implemented and the FWS, permittees and other stakeholders are working through the development and implementation of effective take management techniques and tools. Adopting a new population management objective at this time and in the foreseeable future will undermine such consistency during a critical time when the effects of Eagle Permit Rule are being evaluated and the wind energy industry is developing rapidly across the United States.

Geographical Scales. The geographical scales at which management objectives are analyzed and established should be expanded to include three different geographical scales: National (or other large landscape multi-population scale), regional/EMU and local/project-impacted areas. For example, when assessing the direct, indirect and cumulative impacts of permitted takings of Bald and Golden Eagles and whether the population management objective is being met, the analysis should look at the national/large landscape scale as well as at the regional/EMU scale and the local/project scale. This broader analysis incorporating national/large landscape scale will be particularly important as the boundaries of regional populations are altered by adaption to the effects of climate change, and the cumulative impacts of factors other than climate change (such as habitat loss or degradation associated with human activities) are analyzed. As stated in a recent report issued by The National Audubon Society,

One of the major challenges for understanding the effects of climate change on species distributions lies in identifying the appropriate spatiotemporal scales at which species distributions can and cannot be reliably predicted from a mechanistic knowledge of climate dependence. As a first approximation, species distributions considered at small scales tend to be mostly influenced by biotic interactions, mid scales by habitat and resource availability, and large scales by climate, putatively through interactions with the physiological limits of the organism. Gary Langham, *et. al.*, AUDUBON'S BIRDS AND CLIMATE CHANGE REPORT: A PRIMER FOR PRACTITIONERS, Natl. Audubon Soc'y. (2014) at 20.

Specifically regarding the effects of climate change on the ranges of eagle populations, applying the analysis set forth in the BIRDS AND CLIMATE CHANGE REPORT the National Audubon Society forecasts that only 26% of the Bald Eagle's 2000 Summer breeding range will remain viable in 2080. 314 SPECIES ON THE BRINK, Natl. Audubon Soc'y (Sept. 9, 2014) *available at* <http://climate.audubon.org>. That report also indicates that although the Bald Eagle may potentially recover up to 73% of its breeding range in new areas by 2080, such potential recovery will result in part from the current breeding range shifting northward. *Id.* at <http://climate.audubon.org/birds/baleag/bald-eagle>. The same report forecasts that the breeding range for the Golden Eagle will decrease 41% by 2080 compared to 2000, and the non-breeding range by 16%. *Id.* at <http://climate.audubon.org/birds/goleag/golden-eagle>. Accurately tracking these dramatic potential losses and shifts in the ranges of the Bald and the Golden Eagle, and analyzing the effect on breeding and non-breeding populations, will require monitoring and analysis at the national/large landscape scale, and likely at the international scale as well, as ranges for domestic populations shift northwards into Canada.

Further, the upper limits on take should continue to be set at both the regional/EMU and local/project geographical scales with consideration to the effect of such take on national/large landscape populations. As noted by the NOI and the discussion immediately above, full analysis of large-to-local effects is necessary to capture adverse effects at the local scale, such as population sinks from a specific or several projects, as well as the cumulative effects of permitted taking and other anthropogenic impacts on diverse populations in larger geographical scales.

Finally, regarding the analysis of effects at all geographical scales, CC supports the FWS' intention to continue further research, field studies and data analysis incorporating updated information on eagle movements, population size and natal disbursement distances. This information will undoubtedly be invaluable in the continued monitoring of eagle populations and assessment to determine if the statutory preservation standard and the population management objective are each being met.

Risk Tolerance. Maintaining a low level of risk tolerance in management actions is mandated by the substantial uncertainty in the effects of permitted take on national, regional and local populations of Bald Eagles and Golden Eagles. An example of this is illustrated when considering appropriate levels of authorized take. Although the availability and quality of data on population size, movements and natal disbursement is improving due in no small part to the recent efforts of the FWS, at best the overall knowledge base will not be adequate for high-

confidence modeling of eagle populations at all geographical and temporal scales for at least several more years. Further, at this time no permits for eagle take have been issued and there has been no opportunity to observe the direct, indirect and cumulative impacts of permitted taking on eagle populations at any geographical or temporal scale. Until the effects of permitted taking have been observed directly there is no justification for increasing the level of risk tolerance in reliance on modeling alone. Although further study and direct observation may improve confidence and permit higher risk tolerance in the future, at this time it is premature to favor “flexibility in permitting” over having a high level of confidence in the impacts on breeding populations and other potential effects of permitted take. It is also important to note that maintaining a low level of risk tolerance is mandated when other important considerations, such as the cultural and religious value of eagles to tribes and their esthetic value to many communities, are to be included in any management decisions affecting eagle populations.

Compensatory Mitigation. The use of compensatory mitigation to achieve population management consistent with the goal of net-zero population loss from permitted taking should be analyzed and applied all geographical and temporal scales with compensatory mitigation that is both proven to be directly effective and, whenever possible, applied at the same geographical and temporal scale as the impact to be mitigated. [Please see additional comments on compensatory mitigation below.]

#### Alternative Preservation Standard

As noted in the NOI, as an alternative to the current management objective of maintaining a “stable or increasing breeding population” the FWS could adopt a “qualitative” standard such as “to not meaningfully impair the bald or golden eagle’s continued existence.” For several reasons, CC strongly believes that such a change will ill-serve the goals of BGEPA and the species it protects.

The proposed standard finds its genesis in the Endangered Species Act, 16 U.S.C. §§1531-1544 (ESA), which specifies in Section 7 that “any [agency action] is not likely to jeopardize the continued existence of any endangered species or threatened species.” 16 U.S.C. §1536(a)(2). However, applying the ESA’s “jeopardy standard” would eviscerate the standard mandated in BGEPA by equating “preservation” (which is synonymous with “conservation”) with “existence” (which is synonymous with “survival”). At this time neither the Bald Eagle nor the Golden Eagle is in danger of extinction, and BGEPA’s conservation-oriented standard requires a higher benchmark than the mere “survival” of these species.

Further, adoption of a “qualitative objective” similar to the ESA’s standard for an Incidental Take Permit (ITP) under Section 10 of the ESA is likely to create more uncertainty in BGEPA permitting program. At present, the FWS relies on quantitative regional and local take thresholds that provide a numerical standard against which to measure the direct, indirect and cumulative impacts of permitted taking and the success of compensatory mitigation efforts. In considering the clarity and utility of a “qualitative objective” one need look no further than the plethora of litigation spawned by the interpretation and application of the “jeopardy standard” found in Section 7(a)(2) of the ESA. *See e.g.* National Wildlife Federation v. National Marine Fisheries Service, 524 F.3d 917 (9<sup>th</sup> Cir. 2008). In addition, a qualitative standard should require less expertise to apply when analyzing potential impacts in the course of conducting environmental assessments under NEPA.

Although disagreements exist regarding the comparative effectiveness of quantitative vs. qualitative standards in assessing the effects of adverse impacts on a species’ population, there is enough doubt about the preference of a qualitative standard to conclude that its adoption as BGEPA’s population management objective would be imprudent until clear and convincing scientific evidence supports such a change. A cautionary approach is especially warranted at the early stages of implementing the Eagle Permit Rule when there is a lack of data with which to assess the effectiveness of the current population management objective. The emphasis on conservation that is required when applying the statutory preservation standard mandates a conservative and cautionary approach when considering such a significant change to the population management objective.

It should be noted that proponents of the wind energy industry advocate changing to a qualitative standard. Such proponents assert that the statutory preservation standard set forth in BGEPA should be interpreted by looking to the standard for issuance of an ITP, which requires that permitted taking cannot “appreciably reduce the likelihood of the survival and recovery of the species in the wild.” 16 U.S.C. §1539(a)(2)(B)(iv). Further, industry proponents contend that any standard requiring “no net loss” of eagles from permitted taking should be applied to the national (not regional) population of each eagle species.

However, setting the threshold for endangerment at the lowest possible level and applying it to the largest possible population is incompatible with BGEPA’s preservation standard. To support their argument for a change to a qualitative standard, industry proponents find a false equivalency between BGEPA and the ESA when asserting that BGEPA’s preservation standard should be interpreted as requiring no greater, and possibly less, protection than required by the ESA. Further, their argument that the “jeopardy” standard of Section 7(a)(2) only prohibits taking that jeopardizes an entire listed species (*e.g.* the national population of an eagle species) is an overly narrow representation of the jeopardy standard. Although the FINAL ESA SECTION 7

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CONSULTATION HANDBOOK states that as a general policy a jeopardy opinion will usually be based on a conclusion that the continued existence of an entire species is jeopardized, it does so with the caveat, “However, for some wideranging species or those with disjunct or fragmented distributions, strict adherence to this general policy can result in significant accumulated losses of habitat and population that may, in total, result in a jeopardy situation.” FINAL ESA SECTION 7 CONSULTATION HANDBOOK, U.S. Fish and Wildlife Serv. & Natl. Marine Fisheries Serv. (March 1998) at 4-38. The FINAL ESA CONSULTATION HANDBOOK further clarifies that this exception to the general policy allows a jeopardy finding to be based on the assessment of impacts to a distinct population segment or to recovery units that are necessary to the survival and recovery of the listed species. *Id.*

#### Programmatic Permit Conditions and Duration

Permit Standards. The Eagle Permit Rule provides that permits for “programmatic” take may only be issued if, “any ongoing or programmatic take must be unavoidable even after the implementation of advanced conservation practices (ACPs).” ECPG at iii; 50 C.F.R. §22.26(f)(4) & (5). “Standard” permits for non-recurring take may be issued if the take “cannot practicably be avoided.” ECPG at iii; 50 C.F.R. §22.26(f)(4). In the NOI, the FWS requests comments on whether the “unavoidable” standard for programmatic permits should be changed to match the “practicably” criteria for standard permits.

Preliminarily, as with many of the proposed changes to the Eagle Permit Rule upon which comments are being sought, the fact that such changes are being considered before the issuance of even a single programmatic permit to any wind energy project make them premature and ill-advised. Considerable effort and expertise, based on scientific data, was invested in the drafting of the Eagle Permit Rule and the ECPG. Making changes to the comprehensive permitting program implemented in 2009 before gaining the knowledge and experience from allowing the existing regulatory framework to be tested will only make its implementation fragmented and potentially compromise the effectiveness and benefits of the program. As with other potential changes, the high standard placed on conservation when applying BGEPA’s statutory preservation standard requires a conservative and cautionary approach in implementing the still-fledgling permit program.

Specifically addressing the wisdom of lowering the “unavoidable” standard for programmatic permits, CC asserts that the alleged problems are less with the current regulations and more from the lack of full implementation of the staged-tiered process described in the ECPG and the WEG for the permitting of taking at wind energy projects. For programmatic permits for the activities of wind energy projects, any doubt about the measures that must be taken for incidental take to be “unavoidable” would be removed if compliance with the siting, construction and operational guidance provided in the ECPG and WEG, and consultation with the FWS during all phases, was **required** for a

determination that any taking will be “unavoidable.” 50 C.F.R. §22.26(f)(5). As discussed more fully below, the “voluntary” nature of the ECPG and WEG, together with a lack of vigorous enforcement of BGEPA taking and disturbance prohibitions at wind energy facilities, has resulted in the wind industry’s widespread disregard of the most basic and effective mitigation measures available to project developers. In short, the problem is not with the permit standard or the availability of ACPs, but with the wind industry’s widespread failure to cooperate with the FWS in the siting, development and operation of wind energy facilities within the process described in the ECPG and WEG. *See e.g.* United States v. Duke Energy Renewables, Inc., No. 2:13-cr-00268-KHR (D. Wyo. Sentence entered Nov. 22, 2013).

The most glaring example of the importance of full implementation of the ECPG and WEG guidance to achieve the “unavoidable” criteria for permit issuance is project siting. As unequivocally stated in the ECPG, “The most important factor when considering potential effects to eagles is the siting of a wind project.” ECPG at 78. Siting should be the starting point for all new wind energy projects in assessing whether all steps to mitigate take have been made and any resulting take is “unavoidable.” See ECPG at 50-52. Once a suitable site has been located, the design of the project, including the location of specific turbines within the project boundaries, is another example of ECPG guidance that should be required to meet the “unavoidable” criteria. *See* “Examples of conservation measures that could be considered before and during project construction . . .” ECPG at 78-79.

Wind industry proponents contend that the lack of any specific measures that can or must be taken, other than the imposition of ACPs when the same become available, make the “unavoidable” standard unworkable and subject to abuse by the FWS. However, such assertions ring hollow because, as discussed above, the ECPG provides clear guidance for mitigating take to a level that is “unavoidable.” The wind energy industry has failed to embrace such guidance, and until it is willing to cooperate with the FWS and implement the ECPG when developing wind energy projects, any criticism of the existing standard can only be viewed as unjustified and self-serving.

Permit Duration and Review. In late 2013 the FWS amended the Eagle Permit Rule to lengthen the maximum duration of a programmatic ETP to 30 years and to provide for the periodic review of any permit with a term longer than 5 years. 78 F.R. 73704, 73705 (Dec. 9, 2013). Effective as of January 8, 2014, the Duration Rule was enacted for the stated reason that, “it became evident that the 5-year term limit imposed by the 2009 regulations (see 50 C.F.R. §22.26(h)) should be extended to better correspond to the operational timeframe of renewable energy projects.” 78 F.R. 73705. Also, in its rulemaking notice the FWS stated that, “We will revisit the provisions of this rule during our review of the 2009 eagle rule.” *Id.* Finally, the FWS invoked a categorical exclusion

to exclude the Duration Rule from environmental analysis under the NEPA. 78 F.R. 73721-22.

Preliminarily, regarding the environmental assessment of the Duration Rule and in the current rule making, it is important to note that the Finding of No Significant Impact Eagle Permits; Take Necessary to Protect Interests in a Particular Locality (May 19, 2009) (2009 FONSI) set forth specific mitigation measures (such as the development of step-down implantation guidelines) to address impacts identified in the Final Environmental Assessment Proposal to Permit Take Under the Bald and Golden Eagle Protection Act (April 2009). At this time, none of the mitigation required in the 2009 FONSI has been implemented, which implicates any environmental analysis that relies or builds upon the 2009 FONSI.

Specifically regarding the Duration Rule, CC continues to oppose any provision which allows a tenure greater than 5 years for any programmatic ETP, and requests that the FWS withdraw the Duration Rule for the reasons set forth below and in its earlier comments made in opposition to the adoption of the Duration Rule dated July 11, 2012 in Docket FWS-R9-MB-2011-0054 which are hereby incorporated by reference.

Further, although the initial process of granting a new programmatic ETP will be subject to the “hard look” and the notice and comment provisions of NEPA, the Duration Rule eliminated any opportunity for public review and comment in the process to periodically review existing permits. The Duration Rule instituted a 5-year “review” process that will be a wholly internal agency procedure, opaque to outside review or comment and relying solely on the eagle fatality data or “other pertinent information” provided by the permit holder. 50 C.F.R. §22.26(h). Although the Duration Rule provides that, “The 5-year review will be comparable to the initial review of the permit,” *Id.*, by removing the requirement that an existing programmatic permit must be “renewed” after its previously maximum term of 5 years, the Duration Rule effectively created a shortcut around the public notice and comment provisions of NEPA, as well as the requirement that the FWS take the “hard look” required by NEPA, in determining whether the terms of the permit should be revised or if the permit should be suspended or revoked.

It is also important to note that the 5-year review process excludes any public insight or input in the many important adjustments that may be made to a permit as part of the adaptive management process that was cited as a fundamental reason why long-term permits would not have adverse long-term impacts. 50 C.F.R. §22.26(h)(1)-(3); 78 F.R. 73706. Specifically, in response to a comment raising the issue of uncertainty regarding future eagle population trends, the FWS stated, “The adaptive management elements that will be built into permits, along with our 5-year evaluations, provide the Service with the ability to manage the permits to ensure adequate mitigation is provided by permittees to offset detrimental impacts to eagles throughout the life of the permit.” 78 F.R. 73708.

For the reasons stated above and in its prior comments to the Duration Rule, CC requests that the FWS withdraw the Duration Rule and reinstate a maximum 5-year tenure for a programmatic ETP, and that any application for renewal of such a permit at the end of its term be subject to a full notice and comment procedure as provided by NEPA.

### Compensatory Mitigation

Regarding the requirement for compensatory mitigation under the Eagle Permit Rule, CC makes the following comments:

- As is presently required under the Eagle Permit Rule, compensatory mitigation should be required for take that is “unavoidable,” subject to the above comment that permit applicants should be required to comply with the guidelines set forth in the ECPA and WEG to establish when programmatic taking is “unavoidable.” 50 C.F.R. §22.26(h)(3); ECPG at viii-ix. In addition, compensatory mitigation should be required for adverse impacts to eagle habitat where indicated in the relevant environmental review under NEPA.
- As with all types of mitigation, each form of compensatory mitigation should be evaluated relative to its contribution in meeting specified conservation objectives at each relevant geographical scale and temporal scale of analysis. As discussed in more detail below, only those forms of compensatory mitigation that make a significant and verifiable contribution to the relevant conservation objective should be “approved” as acceptable to offset unavoidable taking and adverse impacts to eagle habitat.
- As noted previously, population management consistent with the goal of net-zero breeding population loss from permitted taking of each species should continue as described in the ECPG. The types of compensatory mitigation used to achieve the net-zero goal must be both proven to be effective and, whenever possible, applied at the same geographical scale and temporal scale as the impact to be mitigated (*e.g.*, an adverse impact on a local Golden Eagle population from a specific project should require local compensatory mitigation specific to that species, whereas cumulative adverse impact from a number of projects on the regional population in an EMU will require species-specific compensatory mitigation at the regional scale). An important issue to be analyzed is how and where to apply compensatory mitigation measures for the taking of “free-ranging” or “migratory” individual members of a given population outside of the population’s normal range.

- “Approved” compensatory mitigation must be proven to be effective at mitigating actual loss of eagles in a given area. This may be achieved by pre-mitigation assessment (*e.g.* eagle fatality data from collisions with vehicles while feeding on carcasses) as described in the ECPG, but the actual effectiveness of the compensatory mitigation should not only be a “credible estimate” of eagle mortalities avoided but also substantiated by post-mitigation monitoring to determine if the level of eagle deaths from the mitigated hazard are actually reduced. *See* ECPG at 93.
- Further, to have a direct beneficial effect in reducing eagle mortality, “approved” compensatory mitigation should not include many forms that have an indirect effect on eagle conservation. For example, the funding “eagle research” as a form of compensatory mitigation is far too vague and potentially self-serving to be acceptable as credible compensatory mitigation, such as by allowing the funding of research projects by organizations that promote or oppose wind energy development or by private consultants who perform other work for the party funding the research. However, an exception to disallowing compensatory mitigation with an “indirect” beneficial effect on eagle conservation would be the funding of habitat acquisition, preservation or rehabilitation to preserve or expand the range of an eagle population, or to offset impacts to eagle habitat where indicated in the relevant environmental review under NEPA. This type of mitigation is especially important in those areas where eagles are poorly distributed, subject to cumulative human development pressures, or at risk from the effects of climate change. In those areas, compensatory mitigation should provide measures to improve the adaptive ability of the eagle species and the habitat that supports it.

#### Need for Robust and Effective Enforcement of BGEPA

A fundamental flaw with the FWS’ implementation of the Eagle Permit Rule is that adherence to the siting and other guidelines set forth in the ECPG is voluntary for wind energy developers. As stated in the ECPG, “Preparation of an ECP and consultation with the Service are voluntary actions on the part of the developer. There is no legal requirement that wind developers apply for or obtain an eagle take permit, so long as the project does not result in take of eagles. However, the take of an eagle without an eagle take permit is a violation of BGEPA, so the developer or operator must weigh the risks in his/her decision.” ECPG at 5. Compliance with the WEG is also voluntary on the part of a wind project developer. WEG at 4, 6.

Voluntary compliance with the WEG and EPCG has proven to be a failure with a limited number of project developers working with the FWS to follow the voluntary guidelines. It is likely that the lack of voluntary compliance is due to a lack of vigorous enforcement

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406-222-2723**

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when eagle taking occurs at wind energy projects, and a failure to seek penalties that are substantially adequate to deter large corporate defendants or the prosecution of culpable corporate officers. Further, as discussed above, there is no requirement for compliance with the process set forth in the WEG and ECPG for the developer to meet the “unavoidable take” standard and obtain a programmatic ETP after a wind energy project is operational and takings occur, resulting in a situation where “it is easier to ask for forgiveness than for permission.”

The lack of vigorous enforcement to incentivize voluntary compliance with the WEG and BGEPA is illustrated by prosecution of Duke Energy Renewables for the taking of eagles and other protected avian species at two of its wind energy facilities in Wyoming. *United States v. Duke Energy Renewables, Inc.*, No. 2:13-cr-00268-KHR (D. Wyo. Sentence entered Nov. 22, 2013). In the Duke Energies Renewables Plea Agreement, the defendant admitted that it knew the operation of its facilities, which were sited and built over the express concerns and recommendations of the FWS, would result in the killing of species protected under the Migratory Bird Treaty Act 16 U.S.C. §§703-711 (MBTA) and BGEPA, and failed to take all reasonable steps prior to operation necessary to avoid and minimize such takings. Plea Agreement, Duke Energy Renewables, Inc., No. 2:13-CR-00268, 2013 BL (D. Wyo. Nov. 7, 2013) (No. 2), Attachment A at 11. Notwithstanding the clear admission of liability under both the MBTA and BGEPA, the Plea Agreement provided a sentence that required the payment of monetary fines and restitution that only amounted to a “slap on the wrist” given the size of the projects (less than .3% of the two projects’ combined construction costs), and for the defendant to develop a Migratory Bird Compliance Plan (MBCP), an Eagle Conservation Plan and apply for an ETP. What Duke Energy Renewables received in return was far more valuable, including (1) a non-prosecution agreement from the Department of Justice for any takings at all four of the defendant’s Wyoming wind energy projects under both the MBTA and BGEPA before or after the date of the Plea Agreement for a period of up to almost ten years, so long as Duke Energy Renewables is in compliance with the terms of the Plea Agreement (including implementation of the MCBP) and is diligently pursuing an ETP, and (2) permission for Duke Energy Renewables to continue operations of the two wind energy facilities where the takings occurred in spite of the fact that the projects do not comply with the voluntary guidelines for siting and development detailed in the WEG and ECPG or the “unavoidable” take standard for a programmatic ETP. Further, no individual corporate officers of Duke Energy Renewables were charged or admitted to any wrongdoing under the Plea Agreement.

In addition to demonstrating that the lack of vigorous prosecution for egregious violations of BGEPA and the MBTA have failed to incentivize wind energy developers to follow the guidelines set forth in the WEG and ECPG, the prosecution and settlement of the Duke Energy Renewables case also illustrates a fundamental flaw of the FWS’s policy of after-the-fact prosecution for avoidable takings: Preventative regulation is effective only

if it is enforced before the harm occurs. Poorly sited wind projects will remain in operation killing protected birds for decades unless they are shut down by either denying them a programmatic ETP on the basis the taking was avoidable if the defendant followed the guidelines set forth in the ECPG and WEG, or in egregious cases of continued taking by bringing criminal actions against corporate violators and their officers.

Given the continued lack of meaningful enforcement of the take prohibitions contained in BGEPA (and the MBTA as well, although not a part of this comment) as illustrated by the Duke Energy Renewables case and non-prosecution of other documented taking at wind energy facilities, any analysis of the environmental effects of maintaining or changing the FWS' implementation of BGEPA must include an analysis of the lack of voluntary compliance with the ECPG and WEG that is fostered by the current enforcement policy. Such analysis should also include the possible effects that more vigorous and consistent enforcement of BGEPA taking prohibitions at existing and planned wind energy projects would have on promoting development in compliance with the ECPG and WEG.

#### Comprehensive Unified NEPA Analysis

Inappropriate Exclusion of the Duration Rule Making from NEPA Analysis. In its promulgation of the Duration Rule, the FWS improperly and without substantial justification excluded the environmental effects of its action from any environmental assessment under NEPA. In the rule making the FWS invoked a Department of Interior categorical exclusion which excludes from further NEPA analysis those actions “whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively, or case-by-case.” 43 C.F.R. §43.210(i). The FWS stated the categorical exclusion applied to the Duration Rule because, in essence, the issuance of any ETP would be subject to the environmental review provisions of NEPA and would be analyzed at that time. Further, the FWS stated any permit would contain adequate provisions to ensure compliance with the statutory preservation standard, with the likelihood that longer permits would have more provisions. 78 F.R. at 73721-22. As to whether “extraordinary circumstances” were present that made reliance on a categorical exclusion improper under 43 C.F.R. §46.215, the FWS simply stated that that it had reviewed their reliance on the categorical exclusion against the list of extraordinary circumstances and found that none applied. 78 F.R. at 73722.

However, courts have held that reliance on a categorical exclusion is misplaced for the broad far-reaching type of action such as the FWS' adoption of the Duration Rule. For example, in *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 481 F. Supp. 2d 1059 (N.D. Cal. 2007), the court found that reliance on a categorical exclusion was misplaced

to exclude a “broad, far-reaching, programmatic action” from NEPA review “if there is the possibility that an action *may have* a significant environmental effect,” *Id.* at 1087 [emphasis in original]. Further, an agency relying on a categorical exclusion must provide a reasonable explanation for the basis upon which its reliance on a categorical exclusion is based. *See* Final Guidance for Federal Departments and Agencies on Establishing, Applying, and Revising Categorical Exclusions Under the National Environmental Policy Act, 75 F.R. 75628-01, 75636 (Dec. 6, 2010); *Reed v. Salazar*, 744 F.Supp.2d 98, 118 (D.D.C. 2010).

Further, it should be noted that the invocation of the categorical exclusion relied in part on the 2009 FONSI that, as discussed above, provided for mitigation that has not been implemented which impacts the applicability of the categorical exclusion relied on in this case.

In the case of the Duration Rule, the FWS prematurely adopted an important element of a nationwide program for the management of eagles authorized under Section 668(a), and improperly excluded the rulemaking from NEPA review with improper and unsubstantiated reliance on a categorical exclusion and lack of exceptional circumstances. The improper reliance on a categorical exclusion or, at a minimum, the lack of explanation why the categorical exclusion applies, requires the withdrawal of the Duration Rule and a full environmental analysis of its impacts as part of the current rule making.

Improper Segmentation of Duration Rule Making from the Current Rule Making. Under NEPA, actions that are “similar” or “connected” or that have cumulative effects must be considered together in one EA or EIS. 40 C.F.R. §1508.25. Segmentation or “piecemealing” the analysis of the parts of an integrated program can constitute a violation of NEPA. *See* *Hammond v. Norton*, 370 F.Supp.2d 226, 243-44 (D.D.C. 2005) *citing* *Taxpayers Watchdog v. Stanley*, 819 F.2d 294, 298 (D.C. Cir. 1987).

Under 40 C.F.R. §1508.25(1), the Duration Rule is indisputably “connected” to the other parts of the Eagle Permit Rule and it should have been considered in the NEPA analysis to be prepared in the current rule making. The segmentation prohibition is especially applicable in this situation since the notice of the proposed Duration Rule and the notice of advanced rule making were made simultaneously on April 13, 2012, and the NEPA analysis in the current rule making will specifically, “Further analyze the effects of longer term nonpurposeful take permits.” *See* NOI “Analysis Under the National Environmental Policy Act.” The stated justification for the Duration Rule “to better correspond to the operational timeframe of renewable energy projects” is an inadequate basis to separate its adoption from the present comprehensive reexamination of the Eagle Permit Rule.

Finally, the effect of this improper segmentation was compounded by exemption of the Duration Rule from NEPA analysis by invoking a categorical exclusion. The adoption of the Duration Rule ahead of and separate from the current rule making raises the question whether the Duration Rule was adopted separately specifically for the purpose of fitting it within the categorical exception and thereby avoiding NEPA review.

Accordingly, for the various reasons discussed above, CC asserts that the Duration Rule must be withdrawn by the FWS. The environmental effects of an ETP's tenure should be part a programmatic analysis of the impacts of the actions contemplated in the NOI and, as discussed below, all other actions taken by the FWS under BGEPA to manage eagles.

Need for Programmatic Environmental Impact Analysis. Rather than the piecemeal approach used to date, the objectives, structure and practices of the national eagle management program under BGEPA should be analyzed in a Programmatic EIS. Such analysis should include not only the issues raised in the NOI, but also those issues discussed, and those that were excluded, in the 2009 Mitigated FONSI for the Eagle Permit Rule. The Programmatic EIS should also analyze the ECPG and the WEG which, as discussed above, should be incorporated fully into the Eagle Permit Rule. The Programmatic EIS should also commit to the full implementation of the 2009 Mitigated FONSI, including full transparency of the management structure and decision-making processes of the internal group charged with implementing the national eagle management program.

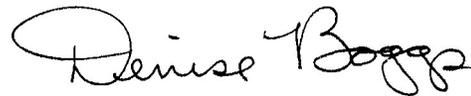
Full implantation of the 2009 FONSI also requires the development of implementation guidance for the Eagle Permit Rule and prescribing standards or requirements for applying NEPA at the permit processing level. One such standard should be to require full transparency for environmental assessments at the permit processing level, such as mandating public scoping for all environmental assessments of programmatic permits or permits for lethal take under the Eagle Permit Rule. Another should be to consult with tribes in the processing of permits, as required by applicable law and the FWS' tribal trust responsibilities. Finally, the implementation standards should include development of a centralized web site where environmental analyses and other NEPA documentation for all permits and other actions is easily available to the public.

### Conclusion

The FWS has undertaken a difficult task in attempting to balance the purpose and intent of BGEPA against the needs of an industrial society to engage in activities that will inevitably result in the killing of eagles. In performing its obligations as trustee for the nation's birds and wildlife, the FWS has developed the parameters of a permitting regime that, if applied properly, may result in achieving that balance.

However, as described above, much work remains to satisfy the requirements of NEPA in developing a national program for the management of eagles under BGEPA and the adoption and implementation of the Eagle Permit Rule. At a minimum, the adoption of the Duration Rule and other changes to the Eagle Permit Rule contemplated in the present rule making forsake the conservation intent of BGEPA in favor of expediting the development of wind energy and other anthropogenic industrial sources of eagle deaths. The precautionary principle suggests, and NEPA requires, that such changes be delayed until a comprehensive review of the national eagle management program, and the environmental impacts of such a program and the current permitting regime, can be assessed in a fully transparent process.

Respectfully submitted,

A handwritten signature in black ink that reads "Denise Boggs". The signature is written in a cursive, flowing style.

Denise Boggs  
Executive Director,  
Conservation Congress

[Additional signatories on following pages.]



The following Indian Tribe, 32 Organizations, 1 Legislator and 44 Individuals representing 25 states join Conservation Congress in making the forgoing comments.

**TRIBES:**

**Osage Nation**

**Geoffrey M. Standing Bear, Principal Chief**

**Raymond W. Red Corn, Asst. Principal Chief**

**Ronald Shaw MD, Congressman**

**Robert J. Walker, Jr., Congressman**

Office of the Chiefs

Osage Nation Executive Branch

627 Grandview

Pawhuska, OK 74056

918-287-5582

**ORGANIZATIONS:**

**Allegheny Highlands Alliance**

Larry V. Thomas, President

P. O. Box 194

Circleville, WV 26804

304-567-2602

[larryvthomas@aol.com](mailto:larryvthomas@aol.com)

“Protecting Our Mountains for Future Generations”: The Allegheny Highlands Alliance (“AHA”) is a nonprofit organization seeking to advance public knowledge and understanding of the cultural and environmental significance of the major ridgelines that comprise the Allegheny Highlands and to preserve and protect areas of particular importance in this region. AHA’s membership is comprised of residents from West Virginia, Virginia, Pennsylvania, Maryland and North Carolina.

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Livingston, MT 59047  
406-222-2723**

[www.conservationcongress-ca.org](http://www.conservationcongress-ca.org)

**Brighton Ridge Protectors**

Pam Arborio, President  
202 Arthur John Rd.  
Island Pond, VT. 05846

The Brighton Ridge Protectors, was formed to ensure the vital forests, ridge lines and low lands of the Northeast Kingdom of Vermont remain as working forests. The conservation of these areas and the wildlife they nurture must be protected from developers of, in particular, industrial wind and the devastation they wreak on our avian population.

**Chesapeake Audubon Society**

Karen E. Meadow, President  
2304 South Road  
Baltimore, MD 21209-4430  
410-664-7196  
410-367-7106 (Fax)  
410-852-2800 (cell)  
[karen.meadow@verizon.net](mailto:karen.meadow@verizon.net)

The Chesapeake Audubon Society works in the Maryland region to promote the stewardship of natural ecosystems through conservation, restoration, education and advocacy. We are a Chapter of the National Audubon Society whose Mission is: To conserve and restore natural ecosystems, focusing on birds, other wildlife, and their habitats for the benefit of humanity and the earth's biological diversity.

**Friends of Beautiful Pendleton County**

Larry V. Thomas, President  
P. O. Box 218  
Franklin, WV 26807  
304-567-2602  
[larryvthomas@aol.com](mailto:larryvthomas@aol.com)

Friends of Beautiful Pendleton County, Inc. (FOBPC) is a citizen organization in Pendleton County, West Virginia dedicated to preserving the rich heritage, protecting the natural environment and insuring that the residents and landowners of Pendleton County receive responsible, factual information. FOBPC works to inform the residents and landowners about the potential effects on the natural environment, including the ecosystem on which our wildlife biodiversity depends, the potential economic effects on the county, its residents and landowners and the potential affects to the infrastructure of the county on which its economy, visitors, residents and landowners depend. FOBPC sponsors public meetings and suggests or

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publishes newspaper articles and notices through which this information is made available to the public (excluding sensitive species locations) for educational purposes.

**Friends of Blackwater**

Judith Rodd, Director  
501 Elizabeth St.  
Charleston, WV 25311  
304-345-7663  
<http://www.saveblackwater.org>

**Friends of the Clearwater**

Gary Macfarlane, Ecosystem Defense Director  
P.O. Box 9241  
Moscow, ID 83843  
(208) 882-9755  
[www.friendsoftheclearwater.org](http://www.friendsoftheclearwater.org)

**Friends of Lana`i,**

Sally Kaye  
P.O. Box 631854  
Lana`i City, HI. 96763  
808-565-6276  
[skaye@runbox.com](mailto:skaye@runbox.com)

**Friends of the Bitterroot**

Larry Campbell, Conservation Director  
P.O. Box 442  
Hamilton, MT 59840

**Friends of the Wild Swan**

Arlene Montgomery, Program Director  
P.O. Box 103  
Bigfork, MT 59911  
[arlene@wildswan.org](mailto:arlene@wildswan.org)

**Fund for Wild Nature**

P. O. Box 900  
Kelso, WA 98626  
360-636-6030  
[fwn@fundwildnature.org](mailto:fwn@fundwildnature.org)

**Great Lakes Concerned Citizens**

Alan Isselhard  
8135 North Huron Rd.  
Wolcott, NY 14590  
315-594-2742  
[speedway2742@gmail.com](mailto:speedway2742@gmail.com)

**Great Lakes Sport Fishing Council**

Thomas Marks, NY Director  
7004 Waring Circle  
Derby, NY 14047  
716-997-6919

**Greenwich Neighbors United (GNU)**

Kevin Ledet, Chairperson  
3205 Omega Rd.  
Greenwich, Ohio 44837  
[419-706-3997](tel:419-706-3997)  
[kaledet1@gmail.com](mailto:kaledet1@gmail.com)

**Highlanders for Responsible Development**

Lewis Freeman, President  
P.O. Box 685  
Monterey, VA 24465  
703-298-8107

Highlanders for Responsible Development is a citizens' group that promotes stewardship of Highland County's unspoiled landscape, natural resources and exceptional quality of life. We support policies and activities that are based upon informed community discourse, democratic decision making, prudent land use and sustainable economic development.

**Heartwood**

Ernie Reed, Council Chair  
P. O. Box 1926  
Bloomington, IN 47402

Heartwood is a cooperative network of grassroots groups, individuals, and businesses working to protect and sustain healthy forests and vital human communities in the nation's heartland and in the central and southern Appalachians.

**Hoosier Forest Watch**

Myke Luurtsema  
323 South Davisson Street  
Bloomington, IN 47403

**Idaho Sporting Congress**

Ron Mitchell, Executive Director  
P.O. Box 1136  
Boise, ID 83701  
208-761-1597  
[ronbomitchell@hotmail.com](mailto:ronbomitchell@hotmail.com)

**Kootenai Environmental Alliance**

Adrienne Cronebaugh, Executive Director  
P.O. Box 1598  
Coeur d'Alene, ID 83816  
(208) 667-9093  
[kea@kealliance.org](mailto:kea@kealliance.org)  
[www.kealliance.org](http://www.kealliance.org)

Kootenai Environmental Alliance is the oldest non-profit conservation organization in Idaho. Our mission is to "conserve, protect and restore the environment of the Idaho Panhandle, with particular emphasis on the Coeur d'Alene Basin."

**Laurel Mountain Preservation Association**

Arthur W. Dodds, Jr., President  
Pam Dodds  
P.O. Box 217  
Montrose, WV 26283

**Maryland Conservation Council**

Paulette Hammond, President  
2304 South Road  
Baltimore, MD 21209-4430  
443-418-5479  
[www.mdconservationcouncil.org](http://www.mdconservationcouncil.org)

MCC is a statewide organization founded in 1969 to preserve Maryland's rich natural heritage and biological diversity, and to ensure wise use of its natural resources.

**New Hampshire Wind Watch**

Lori Lerner, President  
215 Lake Street  
Bristol, NH 03222.  
603-744-2300  
[info@nhwindwatch.org](mailto:info@nhwindwatch.org).

New Hampshire Wind Watch is a 501(C)(3) organization in the Newfound Lake Region of New Hampshire dedicated to providing education and information about Industrial Wind Power Projects in New Hampshire.

**Protect Our Communities**

Kelly Fuller  
Executive Director  
P.O. Box 305  
Santa Ysabel, CA 92070  
[kelly@kellyfuller.net](mailto:kelly@kellyfuller.net)  
[www.protectourcommunities.org](http://www.protectourcommunities.org)

Protect Our Communities defends communities and nature in San Diego County, Imperial County, and Northern Baja California from harmful energy projects and advances better energy solutions through advocacy and law.

**RESTORE: The North Woods**

Michael Kellett, Executive Director  
9 Union Street  
Hallowell, Maine 014347

RESTORE: The North Woods is a nonprofit organization working to restore, preserve, and defend the natural integrity of the North Woods of the United States and Canada through advocacy, public awareness, and citizen action.

**Save Our Allegheny Ridges**

Laura Jackson, President  
P.O. Box 178  
Everett, PA 15537  
814-652-9268  
[mljackson2@embarqmail.com](mailto:mljackson2@embarqmail.com)

Our mission: Save Our Allegheny Ridges, Inc. (SOAR) is a non-profit organization dedicated to preserving Pennsylvania's Allegheny Mountains, a valuable and scenic resource. Our

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Livingston, MT 59047  
406-222-2723**

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mountains and ridge tops are at risk because unregulated wind power development will alter Pennsylvania's mountaintops forever. SOAR is dedicated to the preservation and protection of the historic, natural, and scenic integrity of Pennsylvania's mountain ridges.

**Sequoia ForestKeeper®**

Mr. Ara Marderosian  
P.O. Box 2134  
Kernville, CA 93238  
(760) 376-4434  
[ara@sequoiaforestkeeper.org](mailto:ara@sequoiaforestkeeper.org)  
[www.sequoiaforestkeeper.org](http://www.sequoiaforestkeeper.org)

**Swan View Coalition**

Keith Hammer - Chair  
3165 Foothill Road  
Kalispell, MT 59901  
406-755-1379 (ph/fax)  
[keith@swanview.org](mailto:keith@swanview.org)  
<http://www.swanview.org>

**West Virginia Highlands Conservancy**

Cynthia D. Ellis  
3114 Steel Ridge Road  
Red House, WV 25168-7724  
304 586-4135  
[cdellis@wildblue.net](mailto:cdellis@wildblue.net)  
[wvhighlands.org](http://wvhighlands.org)

The purposes of the Conservancy shall be to promote, encourage, and work for the conservation—including both preservation and wise use—and appreciation of the natural resources of West Virginia and the Nation, and especially of the Highlands Region of West Virginia, for the cultural, social, educational, physical, health, spiritual, and economic benefit of present and future generations of West Virginians and Americans.

**Western Lands Project**

Janine Blaeloch, Director  
PO Box 95545  
Seattle, WA 98145  
206.325.3503

**P. O. Box 2076  
Livingston, MT 59047  
406-222-2723**

[www.conservationcongress-ca.org](http://www.conservationcongress-ca.org)

**WildEarth Guardians**

John Horning, Executive Director  
516 Alto Street  
Santa Fe, NM 87501  
505-988-9126

**WildWest Institute**

Matthew Koehler  
P.O. Box 7998  
Missoula, MT 59807  
406.396.0321  
[info@wildwestinstitute.org](mailto:info@wildwestinstitute.org)

**Wind Action Group**

Lisa Linowes, Executive Director  
603-838-6588  
286 Parker Hill Road  
Lyman, NH 03585  
[llinowes@windaction.org](mailto:llinowes@windaction.org)

**Yellowstone to Uintas Connection**

John Carter, Manager  
P.O. Box 62  
Paris, Idaho 83261  
[Y2uconn@hughes.net](mailto:Y2uconn@hughes.net)  
[www.yellowstoneuintas.org](http://www.yellowstoneuintas.org)

Yellowstone to Uintas Connection is a 501c3 organization dedicated to protecting and restoring critical wildlife corridors and habitats in Idaho, Utah and Wyoming.

**LEGISLATORS:**

**Seneca Scott, (Choctaw)**

Oklahoma State House of Representatives, District 72, Tulsa  
Oklahoma Legislators Native American Caucus, Secretary  
Speaker of the House Appointed to Council of State Government's Energy and Environment  
Committee and National Conference of State Legislators Natural Resources and  
Infrastructure Committee  
[senescott@cox.net](mailto:senescott@cox.net)

P. O. Box 2076  
Livingston, MT 59047  
406-222-2723

[www.conservationcongress-ca.org](http://www.conservationcongress-ca.org)

**INDIVIDUALS:**

**Robert C Anderson**

2221 Timber Trail  
Bellefontaine, Ohio 43311  
937-599-1280  
[randerson@o-a-b.com](mailto:randerson@o-a-b.com)

**Melissa Bolton**

10679 520th St  
West Concord MN 55985  
507-330-4845  
[bolton.melissa@ymail.com](mailto:bolton.melissa@ymail.com)

**Paul Brouha**

92 Queen Elizabeth Farm Ln.  
Sutton, VT 05867  
[802-467-3460](tel:802-467-3460)  
[paul.brouha@gmail.com](mailto:paul.brouha@gmail.com)

**Greg Bryant**

P.O. Box 26  
Barton, VT. 05822  
[lpfarm1@gmail.com](mailto:lpfarm1@gmail.com)

**Judy Bundorf**

1800 Sterling Point Court  
Henderson, NV 89012  
702-682-9963  
[Jbundorf@cox.net](mailto:Jbundorf@cox.net)

**Roger N. Canfield**

**Bernice E. Eubank**

3915 Maple Sugar Road  
Blue Grass, Virginia 24413  
540-474-3757  
[sprocketandbee@gmail.com](mailto:sprocketandbee@gmail.com)

**Jim and Luann Culp**

11388 SR 47  
West Mansfield, OH 43358  
937-355-7355  
[luannculp@embarqmail.com](mailto:luannculp@embarqmail.com)

**Dawn Davis**

751 Eastgate Drive  
Spencerville, OH 45887  
419.647.6375

**Kathleen A K Davis**

7640 County Road 12  
Rushsylvania, OH. 43347  
937-935-3545  
[kathleen.kinney.davis@gmail.com](mailto:kathleen.kinney.davis@gmail.com)

**Paul Edwards**

630 Monroe Avenue  
Helena, MT 59601  
406-449-8024.  
[hgmnuke@bresnan.net](mailto:hgmnuke@bresnan.net)

**Larry & Deborah Goodman**

P.O. Box 310  
Hebron, NH 03241

**David Govus**

3709 Big Creek Rd  
Ellijay, Ga 30536

**Marilyn Hampton**

13121 Louetta Rd., 1115  
Cypress, Texas 77429

**Mary & Thomas Hartman**

849 Fox Chase Rd SW  
Rochester MN 55902

P. O. Box 2076  
Livingston, MT 59047  
406-222-2723

[www.conservationcongress-ca.org](http://www.conservationcongress-ca.org)

**Sandy Hevener**  
General Delivery  
Blue Grass, VA 24413  
[hevener@htcnet.org](mailto:hevener@htcnet.org)

**Joe & Linda Hughes**  
6320 State Route 540  
Bellefontaine, Ohio 43311  
[j.hughes@2access.net](mailto:j.hughes@2access.net)  
937 592-1123

**M. Paul Iwao**  
PO Box 66  
Blue Grass, VA 24413  
540 474 3673  
[mpauliwao@gmail.com](mailto:mpauliwao@gmail.com)

**Mary Kay & Don Klausung**  
18918 St Rt 66  
Delphos, OH 45833  
419-303-5420  
[Mkklausung@embarqmail.com](mailto:Mkklausung@embarqmail.com)  
[Klausungdon@gmail.com](mailto:Klausungdon@gmail.com)

**Frederick J Kroesen III**  
1117 Waynewood Blvd  
Alexandria, Va. 22308  
[fkroesen@yahoo.com](mailto:fkroesen@yahoo.com)

**Nancy & Dewain McClees**  
7950 Anne Bonny Ct  
Russells Point, OH 43348

**Rochelle & Thomas Nygaard**  
12110 355th St  
Goodhue MN 55027  
651-258-4333  
[nygaard228@sleepyeyetel.net](mailto:nygaard228@sleepyeyetel.net)

**Wade Nygaard**

10679 520th St  
West Concord MN 55985  
651-380-2766  
[wadertot@live.com](mailto:wadertot@live.com)

**Dave and Mary Jo O'Reilly**

33474 200th Ave  
Red Wing, MN 55066  
[shamrock2@sleepyeyetel.net](mailto:shamrock2@sleepyeyetel.net)

**Rob Pforzheimer**

339 Michaud Dr.  
Sutton, VT 05867  
802 467 1108  
[rpforz@hotmail.com](mailto:rpforz@hotmail.com)

**Gary and Lu Anne Reeck**

29949 230<sup>th</sup> ST  
Paynesville MN 56362  
320-243-4500  
[ghreeck@lkdllink.net](mailto:ghreeck@lkdllink.net)

**Janet Renaud**

89 Gould Hill  
Greenfield, NH 03047  
(603) 547-3433  
[jromane202@myfairpoint.net](mailto:jromane202@myfairpoint.net)

**Frank Robey**

12 Shirley Valley Lane  
Stoneham ME 04231

**Ed Rogers**

9247 CR 130  
Kenton, Ohio 43326  
419-673-08955  
[rogerse@indianlake.k12.oh.us](mailto:rogerse@indianlake.k12.oh.us)

**Barry Rosenberg**  
487 Greenhood Rd.  
Priest Lake, ID 83856  
208-699-0843  
[barryrosenberg88@gmail.com](mailto:barryrosenberg88@gmail.com)

**Milo Schaffner**  
16525 Wetzel Rd.  
Van Wert, Ohio 45891  
419-587-3562  
[jschaffner@tds.net](mailto:jschaffner@tds.net)

**Duane Short**  
P.O. Box 532  
246 Dudes Drive Unit 2  
Rollinsville, CO 80474-0532  
307.460.0514

**Rocky Smith**  
Forest Management Consultant and Analyst  
1030 Pearl St. #9  
Denver, CO 80203  
303 839-5900  
[2rocksmith@gmail.com](mailto:2rocksmith@gmail.com)

**Jeffrey St. Clair**  
P.O. Box 228  
Petrolia, CA 95558  
(707) 629-3683

**Barbara A. Stussy**  
14884 420th Street  
Zumbrota, MN 55992  
507-732-5115  
[barbstussy@hcinet.net](mailto:barbstussy@hcinet.net)

**Mark H. Watson**  
35 Stone Glade Lane  
Groton, NH 03241  
(603)380-0965  
[rattlesnake@reagan.com](mailto:rattlesnake@reagan.com)

P. O. Box 2076  
Livingston, MT 59047  
406-222-2723

[www.conservationcongress-ca.org](http://www.conservationcongress-ca.org)

**George Wuerthner**  
P.O. Box 8359  
Bend, OR 97708

P. O. Box 2076  
Livingston, MT 59047  
406-222-2723

[www.conservationcongress-ca.org](http://www.conservationcongress-ca.org)