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MEMORANDUM

TO: BOWMAN-SLOPE SOIL AND WATER CONSERVATION
DISTRICT LAND USE PLAN STEERING COMMITTEE

VIA: EMAIL
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FROM: KAREN BUDD-FALEN & CONNER NICKLAS
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THROUGH: BRENDA YOUNKIN
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DATE: SEPTEMBER 12, 2017

RE: WIND ENERGY AND FEDERAL WILDLIFE LAWS

I. BACKGROUND

With the implementation of the Energy Policy Act of 2005 there has been a massive growth of wind energy in the country. Potentially the greatest impact on wind energy developments is its effect on avian populations and the regulations involved in protecting those populations. There are four federal statutes that concern bird protection and wind energy. Those statutes include the Endangered Species Act (ESA), Bald and Golden Eagle Protection Act (BGEPA), Migratory Bird Treaty Act (MBTA), and the National Environmental Policy Act (NEPA).

A. The Endangered Species Act

One act that has a great impact on wind energy in North Dakota in particular is the Endangered Species Act (ESA). The ESA prohibits the unauthorized taking of a listed species. 16 U.S.C. § 1531. Taking is broadly defined to include not only injuring or killing a listed species, but also includes destruction of critical habitat. *Id.* at § 1531. Violations of the ESA can lead to criminal prison sentences or penalties. Civil penalties can be up to \$25,000

and criminal penalties can reach up to \$50,000 and up to one year of prison for each violation. *Id.* at § 1540.

One way a project that can anticipate the taking of a species can protect itself from an enforcement action is by applying for an incidental take permit. *Id.* at § 1539. In order to obtain an incidental take permit, a project must submit a proposed Habitat Conservation Plan and an application for an Incidental Take Permit to the US Fish and Wildlife Service. The main goal of the Habitat Conservation Plan is to minimize impacts and takings of listed species and to provide mitigation for those takings. US Fish and Wildlife Service, *Habitat Conservation Plans Under the Endangered Species Act 2* (Apr. 2011), <https://www.fws.gov/endangered/esa-library/pdf/hcp.pdf>. For the Incidental Take Permit to apply to the taking, it must accurately predict impacts to listed species. The greatest benefit of having an effective Habitat Conservation Plan and being granted an Incidental Take Permit is the “no surprise rule,” which provides assurance to permit holders that an ESA enforcement action will not be brought against them so long as the species was included in the Habitat Conservation Plan and the requirements of the permit were being followed.

The ESA is of particular consequence to wind energy projects in the area because the Northern Long-eared Bat is native to North Dakota and is listed as a threatened species. North Dakota Game and Fish Department, *Threatened and Endangered Species*, <https://gf.nd.gov/wildlife/endangered> (last updated May 2015). Further, bats collide with wind turbine blades as the blades rotate in the sky and cause avian mortalities.¹ The greatest issue facing these impacts is predicting how many bats will collide with a future wind project that exists only on paper. *Id.* Since avian impacts has not traditionally been a criteria for site selection, the issue rarely appears until the planning process of a project. *Id.* at 82. Further, the science used to predict potential avian impacts is an imprecise science. *Id.* at 81-83 Thus, it is often unknown how many bats will be impacted by the wind energy developments, which could impact many Habitat Conservation Plans, making it difficult to create effective mitigation measures for taking of those bats. It could also affect a local community’s goal to achieve delisting of a species from the ESA.

¹ John Arnold McKinsey, *Regulating Avian Impacts Under the Migratory Bird Treaty Act and Other Laws: The Wind Industry Collides with One of Its Own*, *The Environmental Protection Movement*, 28 *Energy L.J.* 71, 81 (2007).

B. The Bald and Golden Eagle Protection Act

The Bald and Golden Eagle Protection Act (BGEPA) is another statute that impacts wind energy projects. Much like the ESA, the BGEPA prohibits the taking of a bald or golden eagle. 16 U.S.C. § 668. The Fish and Wildlife Service has identified several ways a wind energy project can cause a taking. First, much like bats, the turbines can kill eagles when the eagles impact with the blades. United States Fish and Wildlife Service, *Eagle Conservation Plan Guidance* ii (April, 2013) https://www.fws.gov/migratorybirds/pdf/management/eagleconservationplan_guidance.pdf. Second, construction and operation of the plant could cause disturbances to the eagles and result in a loss of productivity at nearby nests. *Id.* Finally, the plants could cause permanent or long-term loss of nesting territory. *Id.*

Also like the ESA, the Fish and Wildlife Service has created a take permit. 50 C.F.R. § 22.26, 27. Under these rules the Fish and Wildlife Service can authorize individuals to take an eagle when the take is associated with, but not the purpose of, an otherwise lawful activity and when the activity cannot be avoided. When there is likely to be more than one occurrence of a taking, the Fish and Wildlife Service can issue a programmatic taking permit which allows for future takings after the implementation of Advanced Conservation Practices. Advanced Conservation Practices is defined as “scientifically supportable measures that are approved by the Service and represent the best available techniques to reduce eagle disturbance and ongoing mortalities to a level where remaining take is unavoidable.” *Id.* at § 22.3. However, the Fish and Wildlife Service has not approved any uniform Advanced Conservation Practices that would guarantee an issuance of a permit. United States Fish and Wildlife Service, *Eagle Conservation Plan Guidance* iv. Despite not approving any uniform Advanced Conservation Programs, the Fish and Wildlife Service has approved programmatic taking permits for local wind energy projects. *Id.* Further, the agency has published a handbook to guide wind energy developers on how to create a viable Advanced Conservation Practice. *Id.*

C. The Migratory Bird Treaty Act

Just like the ESA and the BGEPA, the Migratory Bird Treaty Act (MBTA) prohibits the taking of or killing of migratory birds. 16 U.S.C. § 703. Unlike the other statutes however, there is a dispute as to whether the MBTA applies to

non-intentional takings.² The Eighth Circuit has definitively ruled that the MBTA does not apply to non-intentional takings. *Newton County Wildlife Ass'n*, 113 F.3d at 115. When determining the issue of the scope of the MBTA the Eighth Circuit stated:

strict liability may be appropriate when dealing with hunters and poachers. But it would stretch this 1918 statute far beyond the bounds of reason to construe it as an absolute criminal prohibition on conduct, such as timber harvesting, that indirectly results in the death of migratory birds.

Id. Other circuits have agreed with the Eighth Circuit, including the Ninth Circuit and the Fifth.³ However, there are other circuits that believe in a broad interpretation of the MBTA and believe that even non-intentional takings should be a violation of the act.⁴

With the split in circuit decisions there could be a chance that the dispute could be brought to the Supreme Court to resolve the conflict. However, as it currently stands, the MBTA likely does not apply to wind energy in the area because the Eighth Circuit MBTA does not apply to non-intentional takings.

D. The National Environmental Policy Act

The National Environmental Policy Act (NEPA) requires that all federal agencies assess the environmental consequences of proposed governmental actions and alternatives to avoid those consequences. National Environmental Policy Act of 1969, 42 U.S.C. § 4332 (2016). To do this, federal agencies

² See *Newton County Wildlife Ass'n v. US Dep't of Agriculture*, 113 F.3d 110, 115 (8th Cir. 1997) (ruling that the MBTA only applies to intentional acts of taking and killing and does not apply to incidental acts, such as timber harvesting); however, see also *United States v. Apollo Energies, Inc.*, 611 F.3d 679 (10th Cir. 2010) (ruling that the MBTA is a strict liability misdemeanor crime which covers all deaths of migratory birds).

³ See *United States v CITGO Petroleum Corp.*, 801 F.3d 477 (5th Cir. 2015); *Seattle Audubon Soc'y v. Evans*, 952 F.2d 297, 302 (9th Cir. 1991).

⁴ See *United States v. FMC Corp.*, 572 F.2d 902 (2^d Cir. 1978); *United States v. Apollo Energies, Inc.*, 611 F.3d 679 (10th Cir. 2010).

prepare Environmental Impact Statements and Environmental Assessments to study the environmental impacts of an area as a whole. Avian deaths and effects on wildlife habitat are both factors that agencies look at when conducting an Environmental Impact Statement. McKinsey *supra* p. 2 at 79.

In fulfilling the requirements in NEPA federal agencies must cooperate “to the fullest extent possible to reduce duplication” with state and local requirements. 40 C.F.R. § 1506.2(b) (2017). Cooperation must include (1) joint planning processes, (2) joint environmental research and studies, (3) joint public hearings (except where otherwise provided by statute), and (4) joint environmental assessments. *Id.* Further, federal, state, or local agencies, including at least one Federal agency, may act as joint lead agencies to prepare an environmental impact statement. *Id.* at § 1501.5(b). Thus, depending on how much a local government wants to be involved in the NEPA process, the local government impact wind projects on federal public lands in their jurisdiction.

II. ISSUES FOR BOWMAN-SLOPE LAND USE PLAN

Given this analysis, I believe that the Bowman-Slope land use plans should consider including issues regarding wind energy in federal wildlife laws. Those issues may include (but are not limited to):

- A.** What are the impacts of wind energy on local endangered species in the area and will the impact affect the county’s goal of delisting those species?
- B.** How much involvement does the county want to have in the NEPA process for local wind energy projects in the area?
- C.** Are there other avian species not listed on the ESA or the BGEPA that should require consideration when creating wind energy plants?

Should you have any questions, please do not hesitate to contact us.