

**TESTIMONY OF DAN ASHE, DIRECTOR
U.S. FISH AND WILDLIFE SERVICE
DEPARTMENT OF THE INTERIOR
BEFORE THE
U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON NATURAL RESOURCES
HEARING ON “COLLISION COURSE: OVERSIGHT OF THE OBAMA
ADMINISTRATION’S ENFORCEMENT APPROACH FOR AMERICA’S WILDLIFE
LAWS AND ITS IMPACT ON DOMESTIC ENERGY”**

March 26, 2014

Introduction

Good morning Chairman Hastings, Ranking Member DeFazio, and Members of the Committee. I am Dan Ashe, Director of the U.S. Fish and Wildlife Service (Service). Thank you for inviting me to testify today on the Committee’s oversight involving the Migratory Bird Treaty Act (MBTA) and the Bald and Golden Eagle Protection Act (Eagle Act).

The Service’s mission is working with others to conserve, protect, and enhance fish, wildlife, plants and their habitats for the continuing benefit of the American people. The Service’s long track record of working with industries, agencies, and individuals to conserve migratory birds, including eagles, supports that mission. Today, impacts to migratory birds from anthropogenic activities are myriad and expanding. For decades, the Service has worked cooperatively with its partners to minimize these impacts and facilitate compliance with the MBTA and other federal statutes, like the Eagle Act. Although many bird populations are currently in decline, there is much to be encouraged about. Bald eagle populations increased to the point that we removed them from the endangered and threatened species list. In some areas, like the Chesapeake Bay, bald eagle populations are increasing rapidly. Our management and conservation of migratory waterfowl with our state and international partners is one of history’s great conservation success stories. Many decades ago the viability of waterfowl populations was in question, but sustained conservation and management actions with our partners, grounded in science, has produced robust populations that enable hunting activity along all four flyways in the United States.

The MBTA prohibits the taking of migratory birds, including eagles, and the Eagle Act prohibits the taking of bald and golden eagles. The Service works with industries, agencies, and other stakeholders to develop best management practices to facilitate compliance with these laws. These guidelines are based on the best available science and employ practical, common-sense actions that allow individuals and organizations to carry out otherwise lawful activities in ways that reduce impacts on migratory birds.

The Service focuses its resources on developing partnerships with industries and other stakeholders to identify actions that can be taken to minimize or eliminate take of migratory birds. After the Service identifies best management practices that are practicable and effective, our expectation is that people will use them. Examples of successful partnerships include the Avian Power Line Interaction Committee, which is a partnership with the electric transmission

line industry; and guidelines for oil companies to cover open oil pits that attract birds. For the nascent wind industry, the Service convened the Wind Turbine Guidelines Advisory Committee to develop guidelines for siting and operating wind turbines. All of these are voluntary programs.

Committee Oversight and Document Requests

The Service recognizes and respects the Committee's oversight role of the federal agencies within its jurisdiction. The Committee requested documents from the Service pertaining to the enforcement of the MBTA and the Eagle Act against energy companies, including: (1) copies of documents related to Service investigations, as well as referrals to the Department of Justice, created between January 2009 and the present; (2) copies of communications between the Service and representatives from wind energy companies; (3) copies of policies, legal analysis, and emails related to enforcement discretion under the MBTA and Eagle Act; (4) communications between the Service and the American Wind Wildlife Institute; and (5) documents related to meetings concerning proposed revisions to the eagle take regulations.

The Department of the Interior (Department) and the Service continue to cooperate with the Committee to provide information that is responsive to its concerns about these issues. Since receiving the Chairman's original letter on May 16, 2013, the Department has provided approximately 5,000 pages of documents to the Committee on September 18, 2013, December 2, 2013, December 13, 2013, and February 28, 2014. To compile this information, Service staff spent thousands of hours reviewing years of records and files to comply with the Committee's request.

On December 17, 2013, Committee staff met with Mr. William Woody, Chief of the Service's Office of Law Enforcement, who answered questions related to enforcement of the MBTA and the Eagle Act. At that meeting, Chief Woody discussed the Chief's Directive on "Enforcement of the Migratory Bird Treaty Act as it Relates to Industry and Agriculture." The Chief's Directive is a responsible way to focus Service law enforcement efforts on entities that ignore best management practices that are well known to avoid and minimize takes of migratory birds, including bald eagles and golden eagles.

In response to the subpoena issued on March 11, 2014, we have once again reached out to staff across the country to compile requested documents. We hope to provide these to the Committee in the near future.

Background on the Migratory Bird Treaty Act and Bald and Golden Eagle Protection Act

When Congress passed the MBTA in 1918 it sought to put an end to the commercial trade in birds and their feathers that, by the early years of the 20th century, had wreaked havoc on the populations of many native bird species. The MBTA decrees that all migratory birds and their parts (including eggs, nests, and feathers) are protected under federal law, and all migratory bird "take" is governed by the MBTA. Killing, possessing, transporting, and importing migratory birds is illegal except as authorized under a valid permit. Additionally, the MBTA authorizes and directs the Secretary of the Interior to determine if, and by what means, the take of migratory birds should be allowed and to adopt suitable regulations permitting and governing take, such as those embodied by hunting seasons

and bag limits.

Since the enactment of the MBTA, great strides have been made in conserving wild bird populations. Yet, the threats that human activities pose to these bird populations continue to increase. The United States population in 1915 reached 100 million people. Today it exceeds 300 million people. It continues to increase. Development of housing, electricity and communications, transportation systems and other infrastructure directly and indirectly affect migratory bird populations. The Service has adopted an approach to implementing the MBTA that allows us to focus our enforcement activities on individuals and organizations that disregard the law and repeatedly ignore best management practices that minimize impacts to migratory birds.

When Congress passed the Bald Eagle Protection Act in 1940, it sought to protect bald eagles, our national symbol, from exploitation. In 1962, Congress added the same protections for golden eagles and changed the statute's title to the Bald and Golden Eagle Protection Act (Eagle Act). The Eagle Act protects the bald eagle and the golden eagle by prohibiting the take, possession, sale, purchase, barter, offer to sell, purchase or barter, transport, export or import, of any bald eagle or golden eagle, alive or dead, including any part, nest, or egg, unless allowed by permit. Additionally, the Eagle Act allows for members of federally-recognized Native American Tribes to take a very limited number of eagles for their religious ceremonies, and it permits the take of eagles where they are a threat to human health and safety.

Permitting Eagle Take

The Eagle Act protects bald eagles and golden eagles, but it authorizes the Secretary of the Interior to issue regulations, consistent with the preservation of the species, permitting some take of eagles. The permitting process under the Eagle Act is a key mechanism to avoid and minimize the take of eagles from various industries and activities that can impact eagles. Permits may be issued for some limited take of eagles as a result of otherwise lawful activities. An applicant for such a permit must demonstrate he or she is doing everything possible to avoid and minimize risk to eagles, and if needed, to compensate in some way for any unavoidable deaths so that the eagle populations do not decline.

Any entity, including wind energy facilities, developers building strip malls, utility companies constructing and operating power lines, and highway departments building roads, may apply for one of these permits. In December 2013, the Service finalized revisions to the 2009 eagle incidental take regulations to extend the maximum duration of permits from 5 years to up to 30 years. Applicants can request permits of any length up to 30 years. Permits will be subject to annual reporting requirements and 5-year reviews, which allow for revisions to the permit requirements. Such permits provide a greater level of predictability to industry for ongoing projects, while providing much needed data on the effects of long-term projects on eagles and on the effectiveness of the mitigating measures and terms and conditions of the permits.

Based on reported data, population data, and other information, at the 5-year review, the Service will determine whether changes to the terms and conditions of the permit are necessary to avoid and minimize take, and can prescribe such changes going forward.

The Service is working closely with other federal agencies, private landowners, and developers to minimize conflicts between the emerging wind energy industry and eagles. As with other industries, wind energy companies are not required to obtain an eagle take permit to operate; however, also as with other industries, they risk federal penalties, including criminal prosecution, for any unauthorized take of eagles. Wind farms may adversely impact eagles, by disturbance of nesting areas, migratory and foraging habitat, and by taking individuals via collision with turbine blades. Therefore, we believe it is important that they apply the voluntary wind energy guidelines, apply for an Eagle Act permit where eagle take is anticipated, and implement the conservation measures required under these permits.

The permit process provides the Service the opportunity to work closely with wind developers and other project proponents on site selection, surveys and monitoring, and operational measures that will minimize impacts to eagles and other birds, as well as bats. These long-term permits will incorporate an adaptive management framework under which the Service will review the project and make adjustments to ensure the permitted activity does not unduly impact eagles. The Service has been working with a variety of stakeholders to develop guidelines and best management practices on siting and operations to avoid and minimize the take of eagles, other migratory birds, and bats. We are working to educate and communicate these guidelines to the industry so they are broadly implemented, and so that companies are aware of the potential enforcement consequences of not following these guidelines.

Eagle Conservation Plan Guidance and Land-based Wind Energy Guidelines

In 2003, the Service issued *Interim Guidance on Avoiding and Minimizing Wildlife Impacts from Wind Turbines*. This Guidance addressed the responsible development of wind energy projects and suggested best management practices in the selection, siting, and operation of wind farms that would earn the agency's forbearance of enforcement of unavoidable takings. The Interim Guidance was in place until 2012, when it was replaced by voluntary *Land-based Wind Energy Guidelines*, developed during several years of consultation between the agency, industry and other stakeholders. In 2013, the Service issued *Eagle Conservation Plan Guidance* for wind energy developers that complemented the voluntary *Land-based Wind Energy Guidelines*. Together, these two recent documents guide the process for wind energy development and provide information on how to prepare conservation plans for eagles and other species of concern. The process focuses on assessing project risks to eagles and other species and identifying modifications that would reduce those risks. These guidance documents benefitted from input provided by the public, other agencies, nongovernmental organizations, and wind energy operators.

The Service uses its voluntary *Eagle Conservation Plan Guidance* and *Land-based Wind Energy Guidelines* to assist project developers in minimizing impacts to avian and bat species and in developing permit applications for eagle take that cannot be avoided. The Service is also actively engaging numerous stakeholders (agency staff, states, wind energy companies, nongovernmental organizations, and other interested citizens) in wind energy training, which began with a major workshop held at the National Conservation Training Center in fall 2012, and continues with regularly scheduled national broadcasts that include a wide variety of wind energy issues, including the Wind Energy Guidelines, eagle conservation planning, facility siting

and operations, and research and monitoring. In general, wind energy operators have been very receptive to these efforts and are collaborating with the Service to minimize the impacts of wind facilities on wildlife.

Enforcement of the Migratory Bird Treaty Act and Bald and Golden Eagle Protection Act

As outlined in the Chief's Directive, the Service has long employed a policy of encouraging industry and agriculture to utilize best management practices aimed at minimizing and avoiding the unpermitted take of protected birds. To promote compliance with the law and protect migratory birds from "take," the Service's Office of Law Enforcement will look for opportunities to foster relationships with, and provide guidance to, individuals, companies, and industries during the development and maintenance of their operational plans. We recognize that the take of migratory birds may occur even when individuals and companies consult with the Service, comply with best management practices, and follow the Service's recommendations. Our goal is to focus Office of Law Enforcement investigative efforts on bird take that is foreseeable, avoidable, and proximately caused by industry or agriculture.

The Office of Law Enforcement pursues potential violations of the MBTA and the Eagle Act regardless of the industry, individual, or agency at issue. There is no preferential application of the statutes to the wind energy industry compared to traditional energy development. However, industrial-scale wind facilities are relatively new on the landscape. As we learn more about how to avoid and minimize the effects of these facilities on migratory birds and other wildlife, the Service will continue working with the wind energy industry to develop guidelines and best management practices on siting and operations. This effort will include education and communication components to ensure these guidelines are broadly implemented across the wind energy industry so that companies are aware of the potential law enforcement consequences of not following these guidelines and taking eagles and migratory birds.

Additionally, the first prosecution under a law sets a precedent for future cases and is a cautionary example for other potential violators of the law. To strike a balance between energy production, conservation of migratory birds, and the effective use of limited law enforcement resources, it is important to work with industry to develop and communicate guidelines broadly and promote best management practices that minimize the accidental take of migratory birds and also avoid the necessity for law enforcement action. The Service took a similar approach decades ago with the oil and gas industry. Best management practices were developed for open oil pits that attracted and killed waterfowl. The practices were communicated to industry, and enforcement actions were taken against those who did not follow them and took migratory birds. The Service continues to follow this approach. We anticipate a similar future for the wind industry, where most entities are following the guidelines and those who are not are priority investigative targets and are prosecuted when take occurs.

Currently, 17 wind energy cases are under investigation by the Service. Seven cases have been referred to the Department of Justice for future investigation and possible prosecution for violating either the Endangered Species Act, BGEBA or the MBTA. The Service investigated golden eagle and other migratory bird fatalities at Duke Energy's "Campbell Hill" and "Top of the World" wind facilities in Wyoming. Despite prior warnings from the Service, Duke Energy

failed to make all reasonable efforts to build its wind facilities in a way that would avoid the risk of avian deaths by collision with turbine blades. After lengthy discussions between the Service, the Department of Justice, and Duke Energy, the company pleaded guilty to violating the MBTA in connection with the deaths of protected birds, including golden eagles, at the two Wyoming projects. The settlement requires Duke Energy to: 1) develop eagle conservation plans and apply for eagle take permits at its facilities; 2) institute extensive monitoring programs; and 3) curtail operation of certain high-risk turbines during eagle migration seasons; and 4) support a variety of eagle conservation measures in Wyoming. This case is significant because it establishes a precedent for the prosecution of other violations; because eagle take will be reduced through implementation of best management practices; and because Duke Energy cooperated in getting to a speedy and effective solution.

Conclusion

In closing, the Service works diligently and effectively with industries, agencies, and other stakeholders to ensure fish and wildlife conservation and compliance with the law. We appreciate the Committee's oversight role, and we look forward to continuing to cooperate with the Committee to provide information that is responsive to your concerns and inquiries about the MBTA and the Eagle Act.

Thank you for the opportunity to present testimony today. I will be pleased to answer any questions that you may have.