

**Defenders of Wildlife
Audubon California
Natural Resources Defense Council**



August 13, 2012

David L. Harlow, Director
Desert Renewable Energy Conservation Plan (DRECP)
California Energy Commission
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California Energy Commission
Dockets Office, MS-4
Docket No. 09-RENEW EO-01
1516 Ninth Street
Sacramento, CA 95814-5512
docket@energy.state.ca.us

Re: Golden eagle Take Permits under the DRECP

Dear Mr. Harlow:

By this letter, Defenders of Wildlife (“Defenders”), Audubon California and the Natural Resources Defense Council (“NRDC”) are submitting comments and recommendations regarding conservation of Golden eagles under the DRECP and specifically on the issue of the USFWS issuing programmatic incidental take permits for this species. Our comments and recommendations are based on information presented by the USFWS during the DRECP Stakeholder meeting on July 26 (“Permitting Golden Eagle Take in the DRECP”) and subsequent review of the slide presentation, which was posted on the DRECP website on August 1, 2012. Included in this letter are recommendations (see item 4: Pathway forward) for conserving Golden eagles and avoiding and minimizing their incidental take while including wind power development within the critical landscape level planning of the DRECP, which would require completion of baseline population estimate and a conservation plan.

Our organizations support development of renewable energy to reduce greenhouse gas emissions and the effects of climate change on natural biological communities including birds and their habitats. To that end, our organizations have played a key role in advocacy for AB32 and Renewable Energy Portfolio Standards in California.

Climate change poses a serious, long-term threat to natural communities and the diversity of species that inhabit them as well as altering ecological processes. However, loss of habitat and direct and indirect impacts to both sensitive and common birds continues to have the greatest impact, resulting in their continued decline.

Renewable energy development must be located in appropriate areas to avoid and minimize impacts on natural communities and species, and this is especially true for wind energy because impacts of

wind turbines on birds can extend far beyond the boundary of a wind turbine field. We consider impact avoidance the most appropriate standard in conserving biological resources, followed by impact minimization and compensation.

Our comments and recommendations regarding Golden eagle take permitting through the DRECP, summarized below, are consistent with our more thorough and comprehensive comments recently submitted to the USFWS on their Notice of Proposed Rulemaking and Advanced Notice of Proposed Rulemaking for Eagle Permits.¹ In addition, Audubon California serves on the U.S. Fish and Wildlife Service Golden Eagle Working Group for Region 8 (CA and NV), and the Golden eagle is a priority species for national and state organizations of the Audubon Society.

1. Legal authorities and standards: Federal protection for Golden eagles is provided by the Bald and Golden Eagle Protection Act (BGEPA), and California provides protection through its Fish and Game Code which designates Golden eagles as Fully Protected. The Fish and Game Code prohibits the Department of Fish and Game (DFG) from issuing an incidental take permit for such species; however, recent revisions to the Fish and Game Code authorized by Senate Bill 618 allow DFG to issue programmatic incidental take permits for Golden eagles, and other Fully Protected Species, provided such permits are the result of a Natural Communities Conservation Plan (NCCP), which is the case with the DRECP.

Although Golden eagles are not listed under the federal Endangered Species Act (ESA), the USFWS is considering the possibility of issuing section 10(a)(1)(B) incidental take permits to cover adverse impact to the species under the DRECP. Such an approach is problematic because it would not satisfy the requirements of the BGEPA. The ESA and BGEPA are separate statutes, with separate permitting regimes and compliance requirements. If incidental take permits under the ESA are used to satisfy BGEPA permitting requirements, the ESA permits must, at a minimum, incorporate all BGEPA requirements. The section 10(a)(1)(B) permits under consideration for the DRECP would not achieve this outcome. Among other reasons, the BGEPA currently allows the USFWS to issue incidental take permits for up to five years, provided such take is for the purpose of conserving or protecting Golden eagles. By contrast, section 10(a)(1)(B) permits under consideration would be effective for up to 30 years, and the standards would include simply minimizing adverse impacts to the maximum extent practicable. The USFWS has proposed new rules under BGEPA that would authorize incidental take permits for this species for up to 30 years, but such rules have not been finalized. As a result, 30 year ESA permits cannot currently satisfy permitting requirements under the BGEPA.

2. Golden eagles in DRECP: An accurate estimate of the Golden eagle population within the DRECP area does not exist, and it is our understanding that such a baseline will not be completed for approximately two or three more years. In the absence of a baseline estimate it will be impossible for the wildlife agencies to issue incidental take permits without knowing the impacts to the overall population or subpopulations within the plan area. Golden eagles in the plan area include breeding adults, juveniles, “floaters” and migrants. To date the main focus of Golden eagle surveys have focused on breeding adults associated with nesting sites and territories. That survey

¹ National Audubon Society, Natural Resources Defense Council, Defenders of Wildlife, The Wilderness Society, the Sierra Club, and 88 Audubon Chapters and State Offices. Docket No. FWS-R9-MB-2011-0094, submitted on July 12, 2012; and Defenders of Wildlife, Natural Resources Defense Council, National Audubon Society, the Sierra Club, The Wilderness Society and 89 Audubon Chapters and State Offices. Docket No. FWS-R9-MB-2011-0054, submitted on July 12, 2012.

work is incomplete, and little or no progress has been made with regard to the occurrence and abundance of juveniles, floaters and migrants. Since Golden Eagle population numbers fluctuate in cycles depending on availability of prey base and other factors, datasets must be robust enough to incorporate this fluctuation in population estimates.

We find no indication in the recent USFWS presentation that the data exist to ensure that a take permit issued for Golden eagles can ensure their preservation and achieve a net-conservation benefit, which is required under the implementing rules for the BGEPA. Furthermore, the DRECP process has yet to establish biological goals and objectives, and biological reserves for conservation, including those for Golden eagles.

3. Programmatic incidental take: According to the USFWS presentation on “Permitting Golden Eagle Take in the DRECP” a five-percent incidental take of the “local area eagle population in the DRECP is being considered and that “research will inform permitting activities.” Furthermore, it is clear that effectiveness of impact mitigation and compensation measures is unproven in the plan area, and it is unknown to what extent such opportunities even exist. Given these unknowns, including the lack of an accurate baseline population for Golden eagles, we are extremely concerned that any authorized incidental take will likely add to the cumulative loss of this species in the plan area and that such loss will not be adequately minimized and compensated.

It is still unclear which projects within the plan area would be eligible for or receive incidental take permits through allocation of a programmatic take level based on the DRECP. For example, would take permits be issued for certain future projects or would existing projects also qualify? This is a very important issue for us considering existing and recently permitted wind energy projects are located in areas with relatively high Golden eagle populations, including breeding adults (i.e, McCain Valley in eastern San Diego County, Tehachapi Mountains and Southern Sierra Nevada).

Very little is known regarding mortality and risks to Golden eagles from wind energy projects in the plan area, largely due to lack of monitoring and reporting requirements, confidentiality of records, etc. The only project for which Golden eagle mortality has been reported is the Pine Tree wind farm in the Southern Sierra Nevada, where 8 Golden eagles have died over the past two years, and Pine Tree is only one of many operating wind farms in the plan area. We are very concerned that Golden eagle take permits are being considered at this time given the nearly complete lack of information on mortality from wind farms and other sources.

Presently, the FWS does not have proven mitigation options to support Golden eagle take permits. To offset eagle mortality, the FWS relies heavily on power pole retrofits, which are finite in nature and may not be available as an option to offset take for even five, let alone 30 years, to a given eagle population. In addition, offset mitigation options must be in addition to, and not in lieu of, mitigation measures required of other entities, such as electric utilities. Mitigation measures must provide the highest level of conservation for golden eagles with tangible net benefits to the species in the form of either mortality prevention or increased recruitment.

4. Pathway forward: We strongly recommend that any Golden eagle take permits issued on a programmatic basis for the DRECP are only considered after a Golden eagle conservation strategy is completed for the DRECP, and that they are issued under the provisions of the BGEPA. Such a conservation strategy must 1) be science-based, 2) include an accurate baseline population estimate, 3) ensure implementation of systematic monitoring, 4) and be subject to modification through an

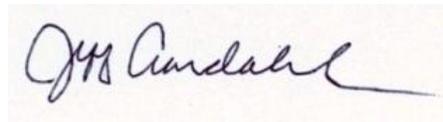
adaptive management process so that Golden eagle conservation in the planning area will be achieved over the life of the plan.

A Golden eagle conservation component of the DRECP must be developed through a public process and subject to analysis under the provisions of the National Environmental Policy Act (NEPA) and California Environmental Quality Act (CEQA). If a draft Golden eagle conservation component or element is missing from the draft DRECP, a supplement would be required that would include public scoping and analysis under NEPA and CEQA.

Consideration of a limited five-year Golden eagle take permit issued under provisions of the BGEPA on an interim basis may be acceptable within the planning area. For example, such a permit could be considered for an operating wind farm project currently lacking a take permit provided the take allowance is limited and conditioned upon development and implementation of all practicable impact avoidance, minimization and compensation measures including operational changes such as curtailment. There would need to be a mechanism for reviewing and potentially revoking the permit if the conditions of the permit were not met, or if incidental take of Golden eagles exceeded the allowable take.

Upon completion of a Golden eagle baseline population estimate and a conservation plan for the DRECP, the wildlife agencies would be able to identify areas of high, medium and low importance go Golden eagles, and be in an informed position to consider issuing a programmatic take permit that would be consistent with conservation and preservation of this species in the planning area.

Sincerely,



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A handwritten signature in black ink that reads "Garry George". The signature is written in a cursive style and ends with a long horizontal line extending to the right.

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A handwritten signature in black ink that reads "Johanna H Wald". The signature is written in a cursive style.

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