

Meyer Glitzenstein & Eubanks LLP

4115 Wisconsin Avenue, N.W., Suite 210
Washington, D.C. 20016
Telephone (202) 588-5206
Fax (202) 588-5049
lmink@meyerglitz.com

3206 Norwood Court
Fort Collins, CO 80525
Telephone (970) 703-6060
Fax (202) 588-5049
beubanks@meyerglitz.com

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Ms. Caren Hendrickson
Environmental Planner
Naval Facilities Engineering Command
(NAVFAC) Mid-Atlantic
9324 Virginia Avenue
Norfolk, VA 23511
Caren.Hendrickson@navy.mil

RE: COMMENTS ON PROPOSED MT. STORM WIND ENERGY PROJECT

Dear Ms. Hendrickson:

I am writing on behalf of Friends of Blackwater, the Allegheny Front Alliance, the Allegheny Highlands Alliance, the Stewards of the Potomac Highlands, the Friends of Beautiful Pendleton County, the West Virginia Highlands Conservancy, and the Friends of the Allegheny Front, in response to the Department of the Navy's November 22, 2016 request for comments on its proposed Power Purchase Agreement ("PPA") for the Mt. Storm Wind Energy Project ("Mt. Storm" or "the Project"), located in Grant County and Tucker County, West Virginia. Although Friends of Blackwater generally supports the Navy's transition to renewable energy, the Navy must ensure that it procures renewable energy from projects that are sited and prepared with care for the environment and vulnerable wildlife and that fully undergo environmental review as required by federal law.

The Mt. Storm Project and the Navy's PPA have not undertaken adequate environmental review and, as a result, the project poses unacceptable risks to vulnerable wildlife. Because the Project will have significant environmental impacts, both on its own and in combination with other nearby wind energy development, the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370h, requires the Navy to prepare an Environmental Impact Statement ("EIS") to fully analyze the impacts of, and alternatives to, this project. As part of the NEPA process, the Navy must also provide an opportunity for public comment on a draft of any environmental review it produces. The Navy must also enter into formal consultation with the United States Fish & Wildlife Service ("FWS") under the Endangered Species Act ("ESA") regarding the Project's impacts on threatened and endangered species. 16 U.S.C. § 1536(a)(2); 50 C.F.R. 402.14(g). Finally, the Navy must either itself obtain a permit from the FWS for the project's impacts on bird species protected by the Migratory Bird Treaty Act ("MBTA"), 16 U.S.C. §§



703-712, and the Bald and Golden Eagle Protection Act (“BGEPA”), 16 U.S.C. §§ 668-668d, or require that the project developer obtain such permits.

I. STATUTORY AND REGULATORY FRAMEWORK

A. The National Environmental Policy Act

NEPA is the “basic national charter for protection of the environment.” 40 C.F.R. § 1500.1. NEPA’s “national policy” is to “encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment . . . [and] enrich the understanding of the ecological systems and natural resources important to the nation . . .” 42 U.S.C. § 4321. To guard against environmental damage, Congress required all federal agencies to prepare a “detailed statement” for each “major federal action significantly affecting the quality of the human environment” that includes “the environmental impact of the proposed action” as well as a thorough consideration of alternatives to the proposed action. *Id.* § 4332(c).

In light of NEPA’s mandates, the Supreme Court has reasoned that NEPA is “intended to reduce or eliminate environmental damage and to promote ‘the understanding of the ecological systems and natural resources important to’ the United States.” *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 756 (2004) (quoting 42 U.S.C. § 4321).

To achieve NEPA’s goals, federal agencies may employ two mechanisms to evaluate the environmental impacts of federal actions—an Environmental Assessment (“EA”) and an EIS. *See* 42 U.S.C. § 4332(c); 40 C.F.R. §§ 1508.9, 1508.11. These procedural mechanisms are designed to inject environmental considerations “in the agency decision making process itself,” and to “help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.” *Pub. Citizen*, 541 U.S. at 768-69 (quoting 40 C.F.R. § 1500.1(c)). Therefore, “NEPA’s core focus [is] on improving agency decisionmaking,” *Pub. Citizen*, 541 U.S. at 769 n.2, and specifically on ensuring that agencies take a “hard look” at potential environmental impacts and environmentally enhancing alternatives “as part of the agency’s process of deciding whether to pursue a particular federal action,” *Balt. Gas and Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 100 (1983).

Importantly, the NEPA process “shall serve as the means of assessing the environmental impact of proposed agency actions, *rather than justifying decisions already made.*” 40 C.F.R. § 1502.2(g) (emphasis added); *see also id.* § 1502.5 (requiring that NEPA review “shall be prepared early enough *so that it can serve practically as an important contribution to the decision making process and will not be used to rationalize or justify decisions already made*”) (emphasis added).

An agency must prepare an EIS for every “major Federal action significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(c). Under NEPA’s implementing regulations, “significance” requires consideration of both context and intensity. 40 C.F.R. § 1508.27. “Context” considerations include the affected region, interests, and locality, varying

with the setting of the action, and include both short and long-term effects. *Id.* § 1508.27(a). “Intensity” refers to the severity of impact, including: impacts that may be both beneficial and adverse; unique characteristics of the geographic area, such as proximity to wetlands, wild and scenic rivers, or ecologically critical areas; the degree to which the effects on the quality of the human environment are likely to be highly controversial; the degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration; whether the action is related to other actions with individually insignificant but cumulatively significant impacts; the degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act; and whether the action threatens a violation of federal law imposed for the protection of the environment. *See* 40 C.F.R. § 1508.27(b). Where an action is not expected to result in a significant environmental impact, the agency must still prepare an EA and make a finding of no significant impact (“FONSI”). *Id.* §§ 1508.9, 1501.3.

Under NEPA, to determine the proper scope of an EIS an agency “shall consider 3 types of actions,” including cumulative actions, and similar actions. *Id.* § 1508.25. Cumulative actions are those that “with other proposed actions have cumulatively significant impacts.” *Id.* 1508.25(a)(2). And similar actions “when viewed with other reasonably foreseeable or proposed agency actions have similarities that provide a basis for evaluating their environmental consequences together.” *Id.* § 1508.25(a)(3). An agency should analyze similar actions together “when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.” *Id.*

To comply with NEPA, a federal agency must also consider all direct and indirect impacts associated with a federal action. 40 C.F.R. § 1508.8. Direct effects “are caused by the action and occur at the same time and place.” *Id.* § 1508.8(a). Indirect effects “are caused by the action and are later in time, but are still reasonably foreseeable.” *Id.* § 1508.8(b).

A federal agency must also consider all of a federal action’s cumulative impacts. A cumulative impact is “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.” 40 C.F.R. § 1508.7. “Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.” *Id.*

B. The Endangered Species Act

The ESA “represent[s] the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978). Section 9 of the ESA prohibits any “person” from “taking” any member of an endangered or threatened species. 16 U.S.C. § 1538(a). Where federal action is involved, including federal funding or approval for a project that is likely to take or otherwise impact listed species, the action agency must engage in consultation under section 7 of the ESA. 16 U.S.C. § 1536.

If a federal agency's action may affect a threatened or endangered species or its critical habitat, the agency taking that action ("the action agency") must enter into consultation with either the U.S. Fish & Wildlife Service ("FWS" or "the Service"). *Id.* To determine the necessary level of input from the FWS, the action agency may elect to undergo "informal consultation," which is defined as "an optional process that includes all discussions, correspondence, etc., between the Service and the Federal agency . . . designed to assist the Federal agency in determining whether formal consultation or a conference is required." 50 C.F.R. § 402.13. If the action agency determines that a project is not likely to adversely affect a protected species "with the written concurrence of the Service," then informal consultation concludes. *Id.* (emphasis added). However, if an action is likely to adversely affect a protected species, then the action agency must enter into the more rigorous process of formal section 7 consultation. *Id.* § 402.14(a). Formal consultation requires extensive participation by FWS or NMFS and culminates in a biological opinion as to whether the project will likely jeopardize the continued existence of a protected species or destroy or adversely modify its critical habitat. *Id.* § 402.14.

Section 7 consultation involves analysis analogous to the consideration of cumulative impacts under NEPA. Section 7 consultation requires consideration of "the direct and indirect effects of an action on the species . . . that will be added to the environmental baseline." 50 C.F.R. § 402.14(g)(3). The "environmental baseline," in turn, includes "the past and present impacts of all Federal, State, or private actions and other human activities in the action area [and] the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation." *Id.* The "action area" is "all areas to be affected directly or indirectly by the federal action and not merely the immediate area involved in the action." *Id.* Thus, the ESA requires consideration of how a project will contribute to cumulative impacts on protected species.

C. The Migratory Bird Treaty Act

The "International Convention for the Protection of Migratory Birds," 39 Stat. 1702 (1916), between the United States and Great Britain (on behalf of Canada) addressed a "national interest of very nearly the first magnitude." *Missouri v. Holland*, 252 U.S. 416, 435 (1920). The treaty "recited that many species of birds in their annual migrations traversed certain parts of the United States," but "were in danger of extermination through lack of adequate protection." *Id.* at 431.

The United States subsequently entered into conventions for the protection of migratory birds with Mexico, Japan, and the former Soviet Union. These "migratory bird conventions impose substantive obligations on the United States for the conservation of migratory birds and their habitats, and through the [MBTA], the United States has implemented these migratory bird conventions with respect to the United States." Exec. Order No. 13186, 66 Fed. Reg. 3853 (Jan. 10, 2001); *see also* 72 Fed. Reg. 8931, 8946 (Feb. 28, 2007) ("The Japan and Russia treaties each call for implementing legislation that broadly prohibits the take of migratory birds.").

In enacting the MBTA, Congress intended to "prohibit[] the killing, capturing or selling of the migratory birds included in the terms of the treaty except as permitted by regulations"

issued and administered by FWS. *Missouri*, 252 U.S. at 431. Section 703 of the Act provides that:

[u]nless and except as permitted by regulations made as hereinafter provided in this subchapter, it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill . . . any migratory bird . . . included in the terms of the conventions

16 U.S.C. § 703(a). Congress imposed these prohibitions on federal agencies as well as private parties whose actions “take” migratory birds: “As legislation goes, § 703 contains broad and unqualified language – ‘at any time,’ ‘by any means,’ ‘in any manner,’ ‘any migratory bird’”; the “one exception to the prohibition is in the opening clause – ‘[u]nless and except as permitted by regulations made as hereafter provided in this subchapter’” *Humane Soc’y of the U.S. v. Glickman*, 217 F.3d 882, 885 (D.C. Cir. 2000) (quoting 16 U.S.C. § 703)).

The MBTA provides FWS with authority to issue regulations to permit otherwise unlawful take of protected birds. In particular, Section 704 provides that:

in order to carry out the purposes of the conventions . . . the Secretary of the Interior is authorized and directed . . . to determine when, to what extent, if at all, and by what means, it is compatible with the terms of the conventions to allow . . . killing . . . of any such bird . . . and to adopt suitable regulations permitting and governing the same

16 U.S.C. § 704(a). Pursuant to that authority, the FWS has adopted various permitting regulations that can be invoked to authorize various forms of “take” of migratory birds, including take associated with activities conducted by federal agencies that, while not designed to kill migratory birds, directly and foreseeably do so.

One FWS regulation, for example, provides that the “Armed Forces may take migratory birds incidental to military readiness activities” provided that the military “cooperate[s] with the Service to develop and implement appropriate conservation measures to minimize or mitigate . . . significant adverse effects.” 50 C.F.R. § 21.15(a)(1). Another FWS implementing regulation authorizes the issuance of permits for “special purpose activities related to migratory birds,” including where there is a “compelling justification” for such permitted activities.” *Id.* § 21.27. The FWS has stated that one such justification may exist “whereby take of migratory birds could result as an unintended consequence” of an otherwise lawful activity. 72 Fed. Reg. at 8947.

D. The Bald and Golden Eagle Protection Act

BGEPA strictly prohibits “take” of any bald or golden eagle “at any time or in any manner” “without being permitted” by FWS. *See* 16 U.S.C. § 668(a) (imposing criminal penalties for unlawful take done “knowingly, or with wanton disregard”), *id.* § 668(b) (imposing civil penalties for unlawful take on a strict liability basis). BGEPA defines the term “take” broadly to include “wound, kill . . . molest or disturb.” *Id.* § 668c. “Take” under BGEPA includes direct incidental take, such as electrocution of eagles from power lines or collisions with

wind turbines, as well as indirect incidental take, such as habitat modification or other human disturbances that adversely impact eagles.

BGEPA allows the Service to issue permits authorizing the take or disturbance of golden eagles provided that such take “is compatible with the preservation of . . . the golden eagle.” 16 U.S.C. § 668a. In 2009, the Service promulgated implementing regulations for issuing incidental take permits. 50 C.F.R. § 22.26. The Service may issue an eagle take permit only after finding that: (1) the take is “compatible with the preservation” of eagles; (2) the take is necessary to protect an interest in a particular locality; (3) the take is associated with but not the purpose of the activity; (4) the applicant has applied all appropriate and practicable avoidance and minimization measures to reduce impacts; and (5) the applicant has applied all appropriate and practicable compensatory mitigation measures. *Id.* § 22.26(f). For purposes of the BGEPA regulations, “compatible with the preservation” of eagles means “consistent with the goal of stable or increasing breeding populations.” FWS, Final Rule: Eagle Permits; Take Necessary to Protect Interests in Particular Localities, 74 Fed. Reg. 46,837 (Sept. 11, 2009) (codified at 50 C.F.R. pt. 22); *see also* FWS, Final Rule: Eagle Permits: Revisions to Regulations for Eagle Incidental Take and Take of Eagle Nests, 81 Fed. Reg. 91,494, 91,259 (Dec. 16, 2016).

To avoid liability under BGEPA, a project developer that wishes to build a project in known eagle habitat must coordinate with FWS before construction commences to determine whether the project is likely to kill or disturb eagles and, if so, whether such take can be avoided, or if it is unavoidable whether take can at least be substantially minimized by readily available measures. During this process, the Service must evaluate several factors, including eagles’ prior exposure and tolerance to similar activity in the vicinity; the availability of alternative suitable eagle nesting or feeding areas that would not be detrimentally affected by the activity; cumulative effects of other permitted take and other additional factors affecting eagle populations; and the possibility of permanent loss of an important eagle use area. *See* 50 C.F.R. § 22.26(e). If the take or disturbance of eagles cannot be avoided entirely, a permit must be acquired prior to project construction. However, if FWS determines that “take is not likely to occur,” a permit is not required. *See id.* § 22.26(g). Acquisition of a permit where there is a likelihood of eagle take ensures compliance with BGEPA by authorizing ongoing unavoidable take, as well as by promoting eagle conservation through required implementation of avoidance and mitigation measures such as compensatory mitigation. *Id.* § 22.26(c).

To carry out the statutory directive that BGEPA permits are “compatible with the preservation” of golden eagles, 16 U.S.C. § 668a, the Service has issued guidance for wind energy companies explaining that golden eagle take permit “applicants must reduce the unavoidable mortality to a no-net-loss standard for the duration of the permitted activity.” *See* FWS, April 2013 Eagle Conservation Plan Guidance at v.¹ The no-net-loss standard “means that these actions either reduce another ongoing form of mortality to a level equal to or greater than the unavoidable mortality, or lead to an increase in carrying capacity that allows the eagle population to grow by an equal or greater amount.” *Id.*

¹ Available at <http://www.fws.gov/windenergy/PDF/Eagle%20Conservation%20Plan%20Guidance-Module%201.pdf>.

Although FWS does issue permits for incidental take of golden eagles, their declining populations mean that “there is no opportunity for authorizing additional unmitigated take of this species . . . and take limits would be zero, without compensatory mitigation to offset the take.” 81 Fed. Reg. 91,498. In other words, projects that will likely take golden eagles must obtain a permit to do so and must include some compensatory mitigation measures in order to be eligible for the permit.

II. FACTUAL BACKGROUND

A. **The Environment Affected By the Mt. Storm Project**

Located in Grant County and Tucker County, West Virginia near the Maryland border, the Mt. Storm Wind Energy Project is sited in an area with valuable but vulnerable environmental attributes. For example, the project is sited in a relatively undisturbed area in West Virginia. *See* Attachment A (depicting local landscape integrity). More critically, the Project is located in or near occupied habitat of three bat species that are listed as threatened or endangered under the ESA: the Northern Long-Eared Bat (*Myotis septentrionalis*), the Indiana Bat (*Myotis sodalists*), and Virginia Big-Eared Bat (*Corynorhinus townsendii virginianus*). *See* Letter from Michael H. Jones, U.S. Dept. of Navy, to John Schmidt, FWS, Sept. 27, 2016, at 5. The project area includes viable roosting habitat for the Northern Long-Eared Bat and the Indiana Bat, and a nearby cave has provided habitat for the Virginia Big-Eared Bat as well. *Id.* These species have all faced significant population-level declines due to White Nose Syndrome that make these species increasingly vulnerable to any additional level of mortality, including death resulting from collisions with wind turbines.

The Mt. Storm Wind Project is also located in the habitat of, and a major migration corridor used by, numerous avian species, including federally protected migratory birds, bald eagles, and golden eagles. The threat to golden eagles is perhaps the most severe, due to the precarious status of golden eagles in the eastern United States. The population of golden eagles in the eastern United States is small and vulnerable to any cause of mortality. FWS has found that the total population of golden eagles in the eastern United States is at most only 5,000 individuals, and that “[t]he best available information indicates that ongoing levels of human-caused mortality of golden eagles likely exceed sustainable take rates, potentially significantly.” 81 Fed. Reg. 27,941. Golden eagles regularly roost in the vicinity of the Mt. Storm project during the winter. *See* Attachment B (depicting golden eagle telemetry data in the project area). Wind turbines have a well-documented history of killing golden eagles,² and a wind energy project located in the winter habitat and an important migratory corridor of a vulnerable golden eagle population presents a significant risk to this protected species. *See* Baker et al., Draft Mt.

² *See* American Bird Conservancy, *Golden Eagle*, <https://abcbirds.org/bird/golden-eagle/> (“One of the biggest threats comes from the ever-growing gauntlet of wind turbines being built in areas that are critically important for Golden and Bald Eagles and other birds.”).

Storm Wind Project Bird and Bat Conservation Strategy, Nov. 2015, at 19–20 [hereinafter BBCS] (modeling the likelihood of annual take of eagles). The project poses similar risks to bald eagles and other federally protected migratory birds, as the developer has effectively conceded. *See id.* (noting the presence and likely take of bald eagles); *id.* at 12, App’x A (noting that federally protected migratory birds are present on the project site and that similar nearby projects have in fact killed large numbers of such birds).

The Project is also located near areas with valuable aesthetic and natural resources. Although the Project itself is sited on lands that have been previously disturbed by mining and logging, the area surrounding the Project includes several valuable natural areas, including the Monongahela National Forest, Blackwater Falls State Park, the Potomac State Forest, and the Canaan Valley National Wildlife Refuge, which hosts the largest preserved wetlands area in the southern Appalachian Mountains and functions as important habitat for migratory birds and other threatened and endangered species, such as the Indiana Bat.

The Project is also located within the largest concentration of existing wind turbines in the southern Appalachian Mountains.³ The other wind farms in this area have caused significant environmental impacts in the past, including one of the largest bird kills in the history of wind installations in the United States⁴ and the lethal take of an endangered Indiana Bat.⁵ The presence of numerous existing wind turbines in the area of this Project makes a cumulative impacts analysis critically important.

B. The Mt. Storm Wind Energy Project

The Mt. Storm Wind Energy Project will consist of 72 wind turbines, as well as affiliated infrastructure such as collection lines, transmission lines, and access roads. Each turbine will be nearly 500 feet tall, and the blades of each turbine will sweep through an area of nearly 114,000 feet. In total, the project will sprawl across 5,000 acres, or 7.8 square miles.

The planning process for developing the Mt. Storm Wind Energy Project has been underway since at least 2002, when the West Virginia Public Service Commission granted a certificate of convenience and necessity for the project. The Project has since passed through a series of owners, and is now under the ownership of Mt. Storm Windforce, LLC, a subsidiary of Next Era Energy Resources, LLC, one of the nation’s largest renewable energy development companies.

Despite the large scale of this project and the lengthy process behind it, the Project’s environmental impacts have *never* been fully analyzed. The Project developer has undertaken a voluntary study of the Project’s impacts on birds and bats, but has no intention of going through

³ See <https://eerscmmap.usgs.gov/windfarm/> (depicting wind development throughout the U.S. and showing that the area in northern West Virginia is part of the largest concentration of wind turbines in the Appalachian mountains).

⁴ See http://green.blogs.nytimes.com/2011/11/09/nearly-500-birds-found-dead-at-wind-farm/?_r=0

⁵ See <https://www.fws.gov/westvirginiafieldoffice/ibatfatality.html>.

the process to obtain relevant permits required by federal law, which would entail more thorough analysis of the project's impacts and required mitigation by experts within FWS. Indeed, the project developer only intends to enter into the process for obtaining any permit under the ESA, the MBTA, or BGEPA *after the Project kills protected species*. This course of action is contrary to the core purposes of these statutes, which aim to *protect* species and *prevent* adverse impacts to them, not to give project developers a free pass to kill protected species before embarking on the permit process. This course of action is also contrary to the purpose of the statutes' permitting schemes, which aim to involve experts in designing mitigation measures to be included within the project *before it is built*. Many measures that could protect wildlife, such as siting turbines to avoid adverse impacts, simply cannot be implemented after the project is already constructed.

For its part, the Navy is undertaking the development of an Environmental Assessment, which will by definition provide only a significantly limited analysis in comparison to an Environmental Impact Statement. Similarly, the Navy has indicated that it does not intend to undertake formal consultation with FWS regarding this project's foreseeable impacts on threatened and endangered species. Because this project will likely have significant impacts both on its own and in combination with existing development in the area, a more thorough analysis is necessary.

III. ANALYSIS

A. The Navy Must Prepare an Environmental Impact Statement for the Mt. Storm Wind Energy Project.

NEPA requires federal agencies to prepare an Environmental Impact Statement ("EIS") for any "major federal action significantly affecting the quality of the human environment." 42 U.S.C. § 4332(c). To determine whether an action has an effect significant enough to require an EIS, agencies must consider factors regarding the project's "context" and "intensity." 40 C.F.R. § 1508.27. "[T]he presence of one or more of these factors should result in an agency decision to prepare an EIS." *E.g., Ark Initiative v. Tidwell*, 64 F. Supp. 3d 81, 99 (D.D.C. 2014). Here, several factors show that the Mt. Storm Wind Energy Project will have significant environmental effects, requiring the Navy to prepare an EIS.

1. Context

NEPA's implementing regulations require an agency to consider a project's "context," including "the affected region" and any "long-term effects." 40 C.F.R. § 1508.27(a). In brief, "[c]ontext refers to the setting in which the proposed action takes place." *Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846, 865 (9th Cir. 2004). As described above, the Mt. Storm Project will directly impact over 7 square miles through the construction of 72 wind turbines and associated infrastructure, adding significantly to an area that already features the highest concentration of wind turbines in the southern Appalachian Mountains. The Project will

be located within the known habitat of three threatened or endangered species, within an important migratory corridor for federally protected avian species, and near a national forest, a state park, and a national wildlife refuge. The Project will have impacts on all of these resources, both on its own and in combination with the large number of existing wind energy projects in the area. As such, the Project's sensitive context alone indicates that the project will have significant impacts necessitating the preparation of an EIS.

2. Intensity

NEPA's implementing regulations also require an agency to consider ten factors related to a project's "intensity." 40 C.F.R. § 1508.27(b). Four of these factors are especially relevant in demonstrating why the Navy must prepare an EIS for this Project. First, the agency must consider "[t]he degree to which the action may adversely affect an endangered or threatened species." *Id.* § 1508.27(b)(9). The Project involves the construction of 72 wind turbines within over 7 square miles of habitat of three threatened or endangered bat species. Wind turbines have a well-documented history of killing bats. *See* Letter from Michael H. Jones, *supra* (noting that "bat mortality rates at some wind power projects along the Appalachian Mountains have been among the highest reported"). Although this Project will feature cut-in speeds designed to limit the number of bats that collide with the turbines, whether this measure will actually be effective and what impacts to protected bats may result from both the construction and operation of the project are *precisely* the types of issues that an EIS is intended to evaluate. In particular, an EIS must analyze whether *more* protective cut-in speeds should be required. *See Union Neighbors United, Inc. v. Jewell*, 831 F.3d 564, 577 (D.C. Cir. 2016) (requiring FWS to consider alternative cut-in speeds in connection with incidental take permit for wind project in Indiana bat habitat).

Second, and similarly, the NEPA regulations explain a project has significant impacts necessitating the preparation of an EIS if it "threatens a violation of Federal . . . law or requirements imposed for the protection of the environment." *Id.* § 1508.27(b)(10). This project will be built in an important migratory corridor for federally protected bird species, including bald eagles, golden eagles, and other migratory birds. The Project's developer anticipates that it *will* kill birds, based on similar bird fatality rates at nearby wind energy facilities and on computer modeling. The *expected* fatalities include migratory birds, bald eagles, and golden eagles. Indeed, presuming the Project operates for 30 years, which is typical for a wind energy facility, the Project will likely kill between 27 and 102 bald eagles, and between 12 and 15 golden eagles. *See* BBCS at 19–20 (modeling the likelihood of annual take of eagles). However, the Project developer does not intend to obtain any permit for the *expected* incidental take of protected avian species. *Id.* at 47–49 (identifying permitting as an "adaptive management" strategy). As such, the Project developer has effectively conceded that this Project not only "threatens" but will in fact cause a violation of federal environmental laws, necessitating the preparation of an EIS.

Third, NEPA's implementing regulations indicate that a project may have significant impacts necessitating the preparation of an EIS when the project's area has "unique characteristics" "such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas." 40 C.F.R. § 1508.27(b)(3). The Mt. Storm Wind Energy Project is located near the Monongahela National Forest, which includes many caves that provide habitat for threatened and endangered bats, Blackwater Falls State Park, Potomac State Forest, and the Canaan Valley National Wildlife Refuge, which hosts the largest preserved wetlands area in the southern Appalachian Mountains, as well as important habitat for migratory birds and threatened and endangered species, such as the Indiana Bat. The Project is also located within an important migratory route for numerous avian species, including federally protected migratory birds, bald eagles, and golden eagles. Thus, the Project area's "unique characteristics" also demonstrate that the Navy must prepare an EIS.

Fourth, NEPA's implementing regulations clearly demonstrate that agencies have a duty to consider "whether the[ir] action is related to other actions with individually insignificant but cumulatively significant impacts." *Id.* § 1508.27(b)(7). The regulations explain that "[s]ignificance exists if it is reasonable to anticipate a cumulatively significant impact on the environment." *Id.* The Mt. Storm Project is located in an area with the largest concentration of wind turbines in the southern Appalachian Mountains. Other wind turbines in the area have already caused significant environmental impacts, including the killing of hundreds of migratory birds and at least one endangered Indiana Bat. *See supra* notes 2 & 3. In combination with this large concentration of existing wind turbines, the Mt. Storm Wind Energy Project will have significant cumulative impacts, indicating that the Navy must prepare an EIS for this Project.

B. The Navy Must Publicly Disclose Documents It Relies On Regarding the Project's Environmental Impacts and Proposed Mitigation Measures.

The Navy has publicly issued only a small subset of the documents in its possession regarding the Mt. Storm Project's environmental impacts and the proposed mitigation measures. For example, the Navy has not publicly disclosed avian or other wildlife studies or the Project's proposed Bird and Bat Conservation Strategy. Although the Project developer has disclosed *some* of these documents to Friends of Blackwater in response to discovery requests in ongoing proceedings before the West Virginia Public Service Commission, this disclosure is not a substitute for a public disclosure by the Navy for two key reasons. First, while NEPA requires agencies to facilitate meaningful public input in agency decision-making, 40 C.F.R. § 1506.6, the discovery response in the PSC proceeding bears no relationship to the mandatory effort by a federal agency to obtain input on the agency's decision. Second, the discovery response does not include critical documents. For example, the Project developer provided a *draft* Bird and Bat Conservation Strategy, but has not provided a final version of this important document. The Navy has a duty to facilitate meaningful public input on its decision to enter into this PPA by publicly disclosing highly relevant documents on which the agency is relying as it makes this decision.

Similarly, the Navy has a duty to publicly disclose many of these documents under the Freedom of Information Act (“FOIA”). Friends of Blackwater filed FOIA requests with both the Navy and FWS on November 2, 2016 for “any and all communication and other documentation involving the US Department of the Navy and Mt. Storm Windforce, LLC, whether under its original ownership or any other ownership including its present owner NextEra Energy Resources” from January 1, 2000 to the present. Friends of Blackwater specifically noted that it would expect a reply within FOIA’s statutory deadline of 20 working days. That deadline has now passed, meaning a response from the Navy to Friends of Blackwater’s FOIA request is now overdue, potentially exposing the Navy to a lawsuit to compel the disclosure of the requested information. Accordingly, the Navy has a duty to disclose information on this Project’s environmental impacts and proposed mitigation under both NEPA and FOIA.

C. The Navy Must Provide a Draft For Public Comment of any Environmental Document It Produces for the Mt. Storm Project.

Regardless of whether the Navy proceeds with its current plan to prepare only an EA for the Mt. Storm Project, or whether it more properly decides to prepare an EIS, the Navy must circulate a draft of either document for public comment. Although Friends of Blackwater appreciates the current opportunity to comment on this Project, the current comment period is not a substitute for an opportunity to comment on a draft of an EA or EIS for several reasons.

First, NEPA requires agencies to “[m]ake diligent efforts to involve the public” in decision-making. 40 C.F.R. § 1506.6; *id.* § 1503.1 (requiring agencies to solicit comments on draft EISs); *id.* § 1504.1 (“[t]he agency shall involve . . . the public to the extent practicable”). The Navy’s regulations similarly emphasize “[t]he importance of public participation,” especially where—as here—“the magnitude of the environmental considerations” is large and “[t]he extent of public interest” is strong. 32 C.F.R. § 775.11 (noting that public participation’s importance is “clearly recognized”); *see also* SECNAV Instruction 5090.6A § 5(f) (“It is the DON policy . . . to . . . [e]ncourage effective and practical public participation in environmental planning”). In order to act consistently with these policies, the Navy must make a draft EA or EIS available for public comments.

Second, the current comment period does not offer the public the opportunity to provide input on the information on which the Navy will base its decision, on the Navy’s analysis of such information, or on the Navy’s proposed decisions. The current comment period is akin to the opportunity to comment on a scoping notice, which allows the public to provide input on the scope of issues that an agency should consider. 40 C.F.R. § 1501.7. Again, Friends of Blackwater appreciates this opportunity and hopes that the Navy will carefully consider the issues raised in these comments, but notes that because the public does not have access to the Navy’s reasoning regarding its decision or the information that forms the basis of the Navy’s decision, these comments cannot serve the same purpose as the opportunity to comment on a draft EA or EIS.

D. The Navy Must Enter Into Formal Consultation With FWS Regarding The Project's Impacts on Threatened and Endangered Species.

As described above, the Mt. Storm Wind Energy Project is located in the habitat of three threatened and endangered species of bats. The Project is within suitable roosting habitat for the Northern Long-Eared Bat and the Indiana Bat, and a nearby cave has provided habitat for the Virginia Big-Eared Bat as well. Wind turbines have an amply documented history of killing bats, and although this Project includes some voluntary mitigation measures intended to reduce the likelihood of these turbines taking these threatened or endangered species, the Project's likely impacts on these species must be considered along with the numerous existing wind turbines in the area, and the degree to which this Project contributes to a cumulatively significant threat to these species must be the subject of formal consultation with FWS. 50 C.F.R. § 402.14(g)(3).

Rather than entering into formal consultation with FWS to obtain the expert agency's biological opinion on the degree to which this Project may pose risks to threatened and endangered species, the Navy has instead elected to undertake only informal consultation "in order to support the construction schedule" for the Project. Letter from Michael Jones, *supra*, at 2. The desire to support the construction schedule is *not* a valid reason under the ESA for choosing to undertake informal consultation rather than formal consultation. See *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 178–79 (1978) (noting that even where preservation of endangered species may require "the sacrifice of the anticipated benefits of [a] project . . . Congress intended endangered species to be afforded the highest of priorities").

Nor has the Navy provided substantial justification for its conclusion that the Project is "not likely to adversely affect" threatened or endangered species—particularly in light of the large concentration of existing wind turbines in the area and the developers acknowledgement that it *expects* avian and bat mortalities as a result of the project. Indeed, the Navy itself has acknowledged that "bat mortality rates at some wind power projects along the Appalachian Mountains have been among the highest reported," *id.* at 5, although the Navy has apparently not considered the fact that a nearby windfarm has in fact *already* killed at least one endangered Indiana Bat. The Navy does recognize that "[t]he Indiana bat was documented at four locations within the project area during summer acoustic surveys, and acknowledges that suitable roosting and foraging habitat occurs throughout the project area," including at 35 proposed turbine locations. *Id.* Similarly, the "northern long-eared bat was documented at seven locations within the project area during summer acoustic surveys" and also has "suitable roosting and foraging habitat" throughout the project area. *Id.* Furthermore, the Project is "located within a 6-mile buffer of a mine portal where Virginia big eared bats have been documented." *Id.* The Navy relies on the absence of the Virginia big eared bat "during mist nets or acoustic surveys" without considering that this bat species is unusually difficult to detect during acoustic surveys. See BBCS at 21 (noting that this is "considered a 'whispering bat' because it has very faint echolocation calls and can therefore be difficult to detect acoustically"). Similarly, the Navy does not take into account the fact that as an endangered species, this species has low enough population levels that it may be difficult to detect during mist-net surveys as well. See *Animal*

Welfare Inst. v. Beech Ridge Energy LLC, 675 F. Supp. 2d 540, 582 (D. Md. 2009) (emphasizing the need for surveys that realistically assess the likelihood that a species may be present).

The Navy does note that the Project will include “avoidance and minimization measures . . . to the maximum extent practicable.” *Id.* at 6. The most significant of these mitigation measures is to “[f]eather turbines below a cut-in speed of 5.5 m/s from sunset to sunrise 1 April to 15 May and below a cut-in speed of 6.9 m/s from sunset to sunrise 16 May to 31 October.” *Id.* Although Friends of Blackwater generally supports the inclusion of such mitigation measures, these are not a substitute for formal consultation with FWS for several reasons. First, the indication that the Project will only include these mitigation measures voluntarily and “to the maximum extent practicable” leaves the public with little assurance that these measures will actually be implemented in a manner that is sufficiently protective of these vulnerable species. In contrast, where FWS undertakes formal consultation, the result is a set of binding mitigation measures. 50 C.F.R. § 402.14(i).

Second, although these mitigation measures may reduce the likelihood of take from this Project when considered in isolation, the large number of wind turbines in the vicinity of this project significantly exacerbate the risks that this Project poses to these threatened and endangered species. As described above, the ESA requires that this Project’s impacts be considered in light of a “baseline” that includes “the past and present impacts of all Federal, State, or private actions and other human activities in the action area.” 50 C.F.R. § 402.14(g)(3). In the context of this Project, the baseline must include the threats to these species posed by *all other wind turbines in the area*, as well as other human activities in the area. Given that the threats from nearby wind farms include at least one documented instance of a wind turbine killing an endangered species, this Project, when added to the environmental baseline, is likely to additionally adversely affect threatened and endangered bats. The same reasoning holds true for the Project’s potential to take bats through the destruction or modification of their habitat. The Navy’s informal consultation letter to FWS reveals *no* consideration of these issues, which demonstrate why the Navy must enter into formal consultation with FWS.

E. The Navy Must Either Obtain Permits for the Project’s Impacts on Federally Protected Birds Or Must Require the Project Developer to Obtain Such Permits.

As described above, the Mt. Storm Wind Energy Project is located in an important migratory corridor for numerous avian species, including federally protected migratory birds and bald eagles and golden eagles. As such, the Project’s impacts will likely include the incidental take of protected birds, including bald and golden eagles. Nevertheless, neither the Project developer nor the Navy have demonstrated any intention to obtain permits for incidental take under either the MBTA or BGEPA.

Regarding the MBTA, this Project’s developer has confirmed that it *expects* this Project to kill birds, and that several species protected under the MBTA are expected to be present on the Project site. BBCS at 12; *see also id.* at App’x A. Similarly, the developer notes that the Project

is sited within 20 miles of *five* different “Important Bird Areas,” which are sites identified by the National Audubon Society for providing essential breeding, wintering and/or migrating habitat. BBCS at 12–13. The Project developer also indicates that nearby projects have in fact killed hundreds of birds protected under the MBTA. *See* BBCS at App’x A. Accordingly, there can be no legitimate question that the Mt. Storm Project will kill federally protected migratory birds.

Nevertheless, neither the Project developer nor the Navy have any intention of obtaining a permit for the take of these federally protected birds. The Navy has stated that “[s]ince the USFWS has not yet finalized MBTA rules that would expressly authorize the issuance of permits for incidental take, there presently is no means to address incidental take that may occur from the otherwise lawful activity associated with operation of wind energy facilities.” Informal Consultation Letter at 8. However, this assertion is simply false. “Special use permits” are available under 50 C.F.R. § 21.27. Such permits can be obtained in circumstances “whereby take of migratory birds could result as an unintended consequence of” an otherwise lawful activity. 72 Fed. Reg. 8931, 8947 (Feb. 28, 2007). The United States Court of Appeals for the D.C. Circuit has expressly noted that industrial wind power projects may be “eligible to apply for a permit” under this regulation. *Public Employees for Envtl. Resp. v. Hopper*, 827 F.3d 1077, 1088 n.11 (D.C. Cir. 2016). Accordingly, contrary to the Navy’s claim, there is a mechanism to obtain a permit for incidental take of migratory birds. Thus, in order for this Project to proceed in compliance with federal law, either the Project developer or the Navy must obtain such a permit before construction commences.

Similarly, a permitting mechanism for incidental take also exists under BGEPA. 50 C.F.R. § 22.26. Indeed, FWS very recently released a final rule allowing incidental take permits under BGEPA to last for 30 years, instead of 5 years as formerly allowed, precisely in order to “encourage more proponents to seek and obtain permits for activities that otherwise would continue to take eagles without implementing the conservation measures that are critical to eagle conservation nationally, regionally, and locally.” 81 Fed. Reg. 91,494, 91,496 (Dec. 16, 2016). Because the Project developer has stated that “[b]ald eagles would be found at the Project throughout the year and nest nearby, and golden eagles would be likely during migration and in the winter,” BBCS at 9, and because the developer’s own modeling indicates that this Project is expected to kill bald and golden eagles over its life, BBCS at 19–20, there can be no legitimate doubt that this Project must obtain an incidental take permit under BGEPA.

Obtaining an incidental take permit under BGEPA is especially critical for this Project not only due to the small and vulnerable population of golden eagles in the eastern United States, but because the permitting regime will require the Project to undertake a commitment to compensatory mitigation measures. 81 Fed. Reg. 91,498 (“requiring that all authorized take be offset by compensatory mitigation”). Because golden eagle populations are continuing to decline due to human activities, “all permits for golden eagle take . . . must incorporate compensatory mitigation.” *Id.* at 91,504. Such compensatory mitigation “must provide benefits beyond those that would otherwise have occurred through routine or required practices or actions, or obligations required through other legal authorities or contractual agreements.” *Id.* at

91,505. These measures “may include conservation banking, in-lieu fee programs, and other third-party mitigation projects or agreements” subject to FWS approval. *Id.* In other words, to obtain the incidental take permit required under BGEPA, a Project must commit to taking compensatory mitigation actions that benefit the eagle species. Although this Project does incorporate some measures designed to reduce the likelihood of taking bald and golden eagles, as currently planned it falls short of this clear requirement.

Despite the availability of permits for incidental take under both the MBTA and BGEPA, neither the Navy nor the Project developer have stated any intention of obtaining such a permit before the Project is built and comes online. Instead, the Project developer has stated that it intends to pursue a permit under BGEPA only *after* the Project kills an eagle.⁶ BBCS at 43. The Project developer states no intention to ever pursue a permit under the MBTA. Both the MBTA and BGEPA are strict liability statutes that aim to *protect* species. In passing these statutes, Congress did not intend to allow developers to kill protected species *before* obtaining the necessary permits. Not only does such an approach fly in the face of the congressional intent behind these statutes, it also flies in the face of common sense. When project developers approach an expert agency to obtain a permit for the incidental take of protected avian species, FWS has the opportunity to use its expertise to both require design or operational changes to the project that minimize the risk of incidental take and to require mitigation measures as a permit condition. Once a project has been built, however, many of the options available at the design stage are no longer feasible. Accordingly, the process that the Navy and the Project developer here propose to undertake is not only contrary to law but also significantly constrains the options for mitigating the damage that this Project will likely cause to protected species.

Thus, in order for the Mt. Storm Project to proceed in compliance with the MBTA and BGEPA, either the Navy or the Project Developer must obtain a special use permit for incidental take of migratory birds under 50 C.F.R. § 21.27 and a permit for the incidental take of bald and golden eagles under 50 C.F.R. § 22.26.

CONCLUSION

The undersigned groups appreciate the opportunity to comment on the Navy’s intent to enter into a PPA for the purchase of renewable energy from the Mt. Storm Wind Energy Project. We look forward to the opportunity to address the issues described above in greater detail in future comments on a draft of any environmental review that the Navy issues for this project. We would further welcome the opportunity to discuss any of these issues with you.

⁶ The same is true of the Developer’s intent to pursue an Incidental Take Permit under the Endangered Species Act for protected bat species. The Developer intends to pursue such a permit only *after* the Project kills a threatened or endangered species. BBCS at 48.

Sincerely,

/s/ William N. Lawton

William N. Lawton

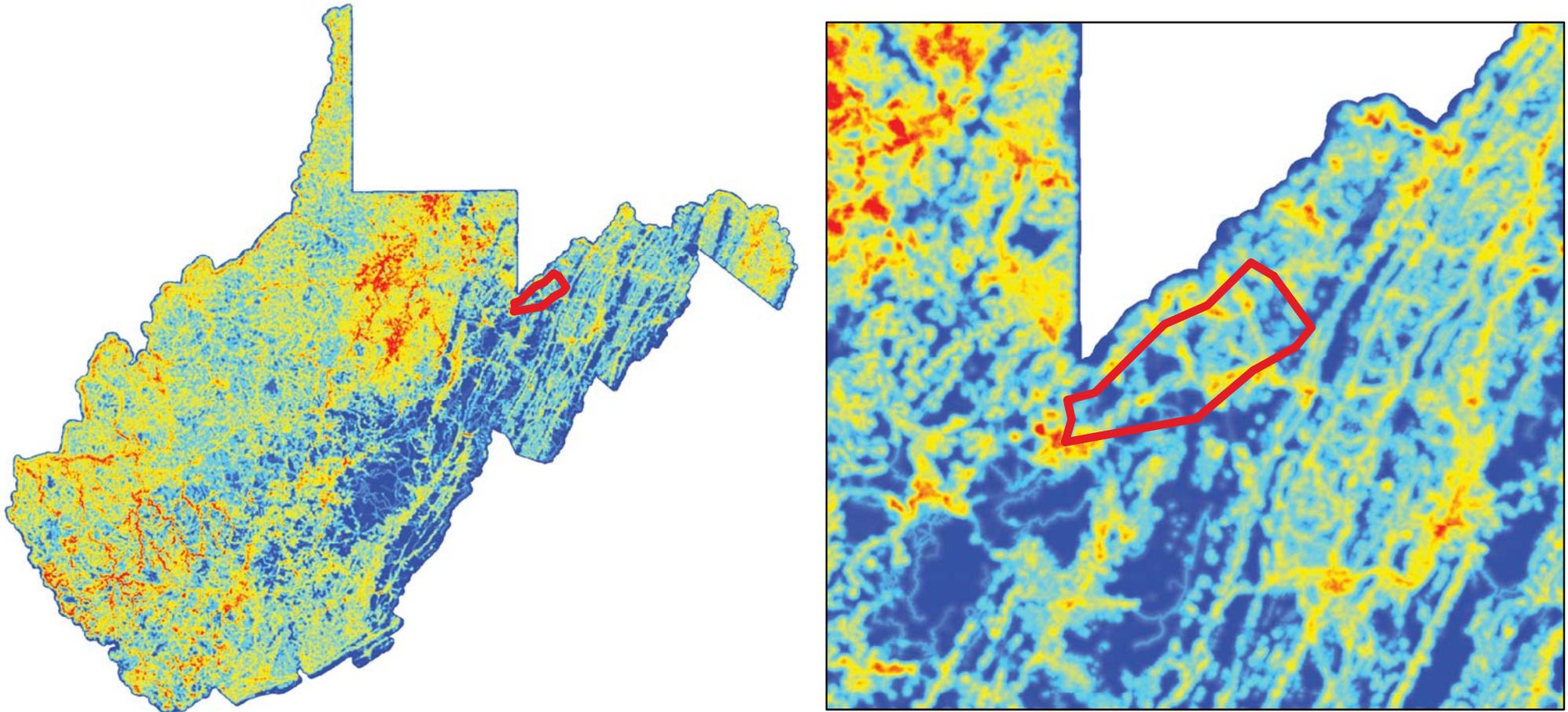
Meyer Glitzenstein & Eubanks LLP
4115 Wisconsin Avenue, N.W.
Suite 210
Washington, DC 20016
(202) 588-5206
(202) 588-5049 (fax)
nlawton@meyerglitz.com

On behalf of Friends of Blackwater,
The Allegheny Front Alliance,
The Allegheny Highlands Alliance,
The Stewards of the Potomac Highlands,
The Friends of Beautiful Pendleton County,
The West Virginia Highlands Conservancy,
and the Friends of the Allegheny Front.

Attachment A

Map of Landscape Integrity in West Virginia

Landscape Integrity Index



Landscape integrity is a measure of habitat fragmentation. Warmer colors represent greater habitat fragmentation, whereas cooler colors represent more intact habitat.

Source: Dougherty & Beyers, Preliminary Calculation of Landscape Integrity in West Virginia Based on Distance from Weighted Disturbances, West Virginia Department of Natural Resources, May 2008.

Attachment B

Map of Golden Eagle Use of Project Area

Golden Eagle Telemetry Locations (2009-2016)

