

April 13, 2020

Via E-Mail

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**RE: DEMAND LETTER URGING FEDERAL ENVIRONMENTAL LAW
COMPLIANCE FOR THE BLACK ANGUS WIND FACILITY**

Dear Mr. Goodwin, et al.,

On behalf of the North Texas Heritage Association—a nonprofit organization devoted to, among other interests, preserving and protecting native wildlife such as the highly endangered whooping crane—I submit the following letter strongly urging APEX Clean Energy, Inc. and Black Angus Wind, LLC (collectively referred to as “APEX”) to ensure timely compliance with all federal environmental laws that apply to APEX’s proposed Black Angus wind energy facility in Clay County and Montague County, Texas (the “Project” or the “Black Angus Project”). Applicable laws include, but are not limited to, the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531-1544; Section 404 of the Clean Water Act (“CWA”), 33 U.S.C. § 1344; the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321-4347; and the National Historic Preservation Act (“NHPA”), 54 U.S.C. §§ 300101-307108. While these stringent legal obligations require pre-construction compliance for any industrial-scale energy facility—renewable or otherwise—compliance is especially crucial for this Project because it will be sited in a particularly high-risk location for the extremely imperiled whooping crane, which utilizes this same geographic area for its biannual migration; stopover habitat during migration; and critical biological functions such as breeding, feeding, and sheltering.

Because the Project will be sited in an extremely sensitive location for the whooping crane—one of the most endangered and vulnerable wildlife species in North America (among many other species that will be impacted by the Project)—this letter is sent with the goal of starting a robust dialogue between my client and APEX to assist APEX in examining less risky project locations or at least to immediately commence the necessary procedural steps to ensure this Project can be built in a sustainable and legally compliant manner. While wind power can be an important tool in fighting climate change and reducing fossil fuel dependence (thereby



supplying indirect benefits to wildlife and their habitat), wind energy development, when poorly sited, can also negatively impact birds through collisions with turbines and associated power lines, through loss of essential habitat, and through impacts to energetics and crucial biological functions that affect foraging, reproductive, and migratory success. As a result, my client urges APEX to give this letter serious consideration, and to engage with us at this early stage in the process. Opening a productive dialogue between interested stakeholders will help us all avert a much more adversarial (and totally avoidable) process as this Project moves closer to construction and legal compliance becomes far more costly under condensed construction timelines and other factors.¹

BACKGROUND

I. LEGAL AND REGULATORY FRAMEWORK

A. Endangered Species Act

The ESA is the “most comprehensive legislation for the preservation of endangered species ever devised by any nation.” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1973). The statute declares a broad national policy that “all Federal departments and agencies [of the federal government] shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter.” 16 U.S.C. § 1531(c)(1). The purposes of the ESA are to “provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved” and to “provide a program for the conservation of such endangered species and threatened species.” *Id.* § 1531(b). An “endangered species” is defined by the Act as one that is presently “in danger of extinction throughout all or a significant portion of its range,” and a “threatened species” means “any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” *Id.* § 1532(6), (20).

¹ As you are likely aware, Eubanks & Associates, LLC (previously Meyer Glitzenstein & Eubanks LLP) has long been one of the nation’s leading public interest environmental firms, specializing in renewable energy matters, among other specialties. For example, we successfully obtained the first-ever ruling under Section 9 of the ESA, 16 U.S.C. § 1538, finding after extensive discovery and a trial that a wind energy facility would “take” an endangered species and thus ordering the developer to obtain an incidental take permit pursuant to Section 10 of the ESA, *id.* § 1539—a process which ultimately resulted in a significantly reduced project footprint. *See Animal Welfare Inst. v. Beech Ridge Energy, LLC*, 675 F. Supp. 2d 540 (D. Md. 2009). In addition, we twice succeeded in overturning legally defective environmental analyses prepared in connection with the Cape Wind project, which ultimately resulted in the complete abandonment of that project. *Pub. Emps. for Envtl. Resp. v. Hopper*, 827 F.3d 1077 (D.C. Cir. 2016); *Pub. Emps. for Envtl. Resp. v. Beaudreau*, 25 F. Supp. 3d 67 (D.D.C. 2014). Moreover, we successfully challenged the U.S. Fish and Wildlife Service’s substantial increase in permit duration under the Bald and Golden Eagle Protection Act, which the agency promulgated to assist the wind energy industry in facilitating a major expansion of wind turbines throughout the country. *See Shearwater v. Ashe*, No. 14-cv-2830, 2015 WL 4747881 (N.D. Cal. Aug. 11, 2015).

Both endangered and threatened species are entitled to broad legal protections under the ESA. The ESA generally makes it unlawful for “any person subject to the jurisdiction of the United States” to “take” any species listed as endangered, in the absence of appropriate authorization from the U.S. Fish and Wildlife Service (“Service”). 16 U.S.C. § 1538(a)(1). By regulation, the Service has generally extended that prohibition on unauthorized take to threatened species as well. *See* 50 C.F.R. § 17.31(a), (c). “Take” is defined by the ESA to include “harass,” “harm,” “wound,” or “kill.” 16 U.S.C. § 1532(19). “Harm” is further defined by regulation to “include significant habitat modification or degradation where it actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.” 50 C.F.R. § 17.3. “Harass” is defined to mean an “act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.” *Id.*

The ESA provides that the Service may, under narrow circumstances, authorize take that would otherwise be prohibited. Section 10 provides that for any take that is “incidental to, and not the purpose of, the carrying out of an otherwise lawful activity,” the Service may authorize take by issuing an incidental take permit (“ITP”) when certain enumerated criteria are satisfied, including that the applicant prepares a “conservation plan”—referred to as a habitat conservation plan (“HCP”)—specifying “what steps the applicant will take to minimize and mitigate” the activity’s impacts. 16 U.S.C. § 1539(a)(1)(B), (a)(2)(A). To approve such an ITP/HCP, the Service must find, among other things, that the “applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking” and that the “taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild.” *Id.* § 1539(a)(1)(B)(ii), (a)(1)(B)(iv).

The ESA also requires that each federal agency “shall, in consultation with and with the assistance of the [Service], insure that any action authorized, funded, or carried out by such agency [] is not likely to jeopardize the continued existence of any endangered species or threatened species” 16 U.S.C. § 1536(a)(2). This “consultation” process “shall use the best scientific and commercial data available,” *id.*, and culminates in a Biological Opinion issued by the Service. *Id.* § 1536(b). Where, as here, the Service is both the “action agency”—because it is asked to issue a permit under Section 10 of the ESA—and the consulting agency, it must engage in “intra-Service section 7 consultation.” *See* Service & National Marine Fisheries Service, *Habitat Conservation Planning and Incidental Take Permit Processing Handbook* (Dec. 2016), at 3-27–3-28 (“ITP/HCP Handbook”), https://www.fws.gov/endangered/esalibrary/pdf/HCP_Handbook.pdf.

The Biological Opinion issued at the end of the consultation process must “[e]valuate the effects of the action and cumulative effects on the listed species,” and address whether the agency action, “taken together with cumulative effects, is likely to jeopardize the continued existence of [any] listed species” 50 C.F.R. §§ 402.14(g)(3), (4). The “effects of the action” include the “direct and indirect effects” on listed species . . . together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline” in the relevant “action area.” *Id.* § 402.02. The “action area” is defined as “all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.” *Id.* “Indirect effects are those that are caused by the

proposed action and are later in time, but still are reasonably certain to occur.” *Id.* “Cumulative effects” are “those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation.” *Id.*

Where take of a member of an endangered or threatened species is likely to occur as a result of an activity, the entity seeking to undertake such action must obtain a lawful ITP (accompanied by a Biological Opinion) *before* project construction begins. As a court explained in a similar context in ordering a wind energy company to obtain an ITP, “construction of additional turbines should not be commenced unless and until an ITP has been obtained”; “[t]he simple reason for this is that the ITP process may find that some locations for wind turbines are entirely inappropriate, while others may be appropriate.” *Beech Ridge Energy*, 675 F. Supp. 2d at 581. In other words, because the ITP process is the point at which the Service, as the expert federal wildlife agency, has the maximum ability to examine siting alternatives and other measures to minimize and mitigate take for the benefit of listed species, it would contravene the explicit purposes of the ESA for a developer to construct a project and thus render it a *fait accompli* before the expert agency can provide critical feedback and analysis of alternatives that would better conserve endangered and threatened wildlife consistent with the purposes of Section 10 (and the ESA as a whole).

B. Clean Water Act

The CWA is designed to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). The CWA generally prohibits the discharge of pollutants, including dredged and fill material, into the waters of the United States (including wetlands) unless authorized by a permit. *See id.* § 1311(a). The term “discharge of fill material” is defined as “the addition of fill material into the waters of the United States” or the placement of fill necessary for the construction of any structure in the waters of the United States. 33 C.F.R. §§ 323.2(f), 323.3(c); 40 C.F.R. § 232.2. Section 404 of the CWA authorizes the Corps to issue permits for the discharge of dredge or fill material into waters of the United States. *See* 33 U.S.C. § 1344.

Any entity that will discharge dredged or fill material into jurisdictional wetlands, streams, or other waters of the United States must apply for and obtain a CWA Section 404 permit before commencing any activity that will result in discharge of material into these waters. While many situations require project-specific “individual permits,” in certain instances an entity may avail itself of a more generalized CWA Section 404 permit called a nationwide permit (“NWP”). Congress has clarified that an NWP can only be approved for activities that will “cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment.” 33 U.S.C. § 1344(e)(1). The Corps’ implementing regulations provide that even if a project otherwise falls within the strict terms of an NWP, if the District Engineer “finds that the proposed activity would have more than minimal individual or cumulative net adverse effects on the environment or otherwise may be contrary to the public interest” the Corps cannot approve an NWP, but may instead instruct the project proponent to apply for an individual permit. 33 C.F.R. § 330.1(d). The Corps has also adopted a number of “general conditions” that must be satisfied for an NWP to be invoked.

First, “[n]o activity is authorized under any NWP which is likely to directly or indirectly jeopardize the continued existence of a threatened species or endangered species” 82 Fed. Reg. 1,860, 1,999 (Jan. 6, 2017). Second, “[a]uthorization of an activity by an NWP does not authorize the ‘take’ of a threatened or endangered species as defined under the ESA.” *Id.* at 2,000. Consequently, to be eligible for an NWP, a permit applicant must demonstrate to the Corps that any take that will result from the project has been, or is being, properly authorized by the Service through an appropriate legal mechanism such as the Section 10 ITP process (and/or the Section 7 Biological Opinion process). Third, an activity may not be authorized under an NWP “until the requirements of Section 106 of the National Historic Preservation Act (NHPA) has been satisfied.” *Id.* Fourth, to qualify for an NWP, “[a]ctivities in waters of the United States that serve as breeding areas for migratory birds must be avoided to the maximum extent practicable.” *Id.* at 1,998.

The Corps has also adopted regulations, known as the “public interest” factors, to implement its CWA permitting authority under Section 404 whether through an individual permit or an NWP. 33 C.F.R. § 320. “Evaluation of the probable impact which the proposed activity may have on the public interest requires a careful weighing of all those factors which become relevant in each particular case. The benefits which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments. The decision whether to authorize a proposal, and if so, the conditions under which it will be allowed to occur, are therefore determined by the outcome of this general balancing process.” *Id.* § 320.4(a)(1). In addition, the Environmental Protection Agency (“EPA”) has promulgated regulations, known as the “404(b)(1) Guidelines,” for Section 404 permits. 33 U.S.C. § 1344(b)(1); 33 C.F.R. § 320.2(f). A permit must be denied if it is contrary to the public interest or does not comport with the Section 404(b)(1) Guidelines. 33 C.F.R. §§ 320.4, 323.6; 40 C.F.R. §§ 230.10, 230.12.

To ensure that these mandatory CWA requirements are satisfied, the Corps must fully evaluate the direct, secondary, and cumulative impacts of the proposed activity, including impacts to aesthetics, recreation, and fish and wildlife. *See, e.g.*, 33 C.F.R. §§ 320.4(a)(1), 336.1(c)(8) (fish and wildlife); 40 C.F.R. §§ 230.11(a)-(h), 230.20-23 (aquatic ecosystem), 230.31 (fish and wildlife), 230.51 (recreational and commercial fisheries), 230.53 (aesthetics). The Corps must also set forth its findings in writing on the short-term and long-term effects of the discharge of dredge or fill activities, as well as compliance or non-compliance with the restrictions on discharge. 40 C.F.R. §§ 230.11, 230.12(b). EPA’s 404(b)(1) Guidelines prohibit the Corps from authorizing an application for dredge and fill activities if there is a practicable alternative which would have less adverse impacts on the aquatic ecosystem. *See* 40 C.F.R. §§ 230.10(a), 230.12(a)(3)(i). In analyzing the relative impacts between the proposed action and alternatives to determine which option constitutes the least damaging action, the Corps must examine impacts to “[w]ildlife associated with aquatic ecosystems [such as] transient mammals, birds, reptiles, and amphibians,” as well as the potential “loss or change of breeding and nesting areas, escape cover, travel corridors, and preferred food sources for resident and transient wildlife species associated with the aquatic ecosystem.” *Id.* § 230.32(a), (b). Practicable alternatives are those alternatives that are “available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.” *Id.* §

230.10(a)(2). “Fundamental to [404(b)(1)] Guidelines is the precept that dredged or fill material should not be discharged into the aquatic ecosystem, unless it can be demonstrated that such a discharge will not have an unacceptable adverse impact either individually or in combination with known and/or probable impacts of other activities affecting the ecosystems of concern.” *Id.* § 230.1(c).

As with an ITP under the ESA, an entity undertaking an activity that requires a Section 404 permit must obtain such authorization from the Corps *before* commencing project construction or otherwise undertaking activities that will discharge dredge or fill material into jurisdictional waters or wetlands. This ensures that all discharges occur subject to a lawful permit, and also ensures that before any such material is discharged into waters of the United States the Corps, as the expert agency, has evaluated all practicable alternatives and determined that no less environmentally damaging alternative exists.

C. National Environmental Policy Act

NEPA is the “basic national charter for protection of the environment.” 40 C.F.R. § 1500.1(a). Its purposes are to “help public officials make decisions that are based on understanding of environmental consequences, and to take actions that protect, restore, and enhance the environment,” and to “insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken.” *Id.* § 1500.1(b), (c). The Council on Environmental Quality (“CEQ”)—an agency within the Executive Office of the President—has promulgated regulations implementing NEPA, *see* 40 C.F.R. §§ 1500-1508, which are “binding on all federal agencies.” *Id.* § 1500.3.

To accomplish its underlying goals, NEPA requires federal agencies to prepare a “detailed statement”—i.e., an Environmental Impact Statement (“EIS”)—for all “major federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(C). An EIS must describe: (1) “the environmental impact of the proposed action”; (2) “the adverse environmental effects which cannot be avoided”; and (3) “alternatives to the proposed action.” *Id.* §§ 4332(C)(i)-(iii).

Each EIS must “rigorously explore and objectively evaluate” the environmental impacts of “all reasonable alternatives” to the proposed action. 40 C.F.R. §§ 1502.13, 1502.14. The alternatives analysis is the “heart” of the NEPA process because it “present[s] the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public.” 40 C.F.R. § 1502.14.

In evaluating alternatives, NEPA requires that agencies take a “hard look” at the full range of effects of the proposed action as compared to all reasonable alternatives. *See* 40 C.F.R. §§ 1502.1, 1502.16. The EIS must address the direct, indirect, and cumulative impacts of the proposed action. *Id.* § 1508.25. Direct effects are those “caused by the action and occur at the same time and place,” while indirect effects are those “caused by the action” that occur “later in time or farther removed in distance, but are still reasonably foreseeable.” *Id.* § 1508.8. Cumulative impacts for purposes of NEPA are those that result from the “incremental impact[s]”

of the proposed action when added to the impacts of other past, present, and reasonably foreseeable future actions, whether undertaken by other federal or non-federal actors. *Id.* § 1508.7.

In assessing the significance of an action’s environmental impacts for purposes of preparing an EIS, a federal agency must consider various factors, including the “[u]nique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, 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”; “[t]he degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks”; the “degree to which the action may affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources”; or the “degree to which the action may adversely affect an endangered or threatened species” *Id.* § 1508.27(b). If even one of these factors is deemed “significant” for a particular activity, preparation of an EIS is required.

Where an activity requires a Section 10 ITP under the ESA or a Section 404 permit under the CWA—i.e., federal authorization to undertake the activity—such an activity requires appropriate NEPA review by the Service and/or the Corps. Ordinarily, this NEPA review process will be accompanied by notice and comment opportunities in which affected agencies, stakeholders, and members of the public can provide input concerning the activity’s impacts and feasible alternatives to it. Public participation is a key objective of NEPA to ensure a well-informed decisionmaking process. The NEPA process—as it applies specifically to ITPs—is outlined in the Service’s ITP/HCP Handbook. *See* ITP/HCP Handbook, *supra*, at 13-1–13-15.

D. National Historic Preservation Act

The National Historic Preservation Act (“NHPA”) aims to preserve the “historic and cultural foundations” of the United States in order to “insure future generations a genuine opportunity to appreciate and enjoy the rich heritage of our Nation,” particularly in response to proposals to expand “industrial developments” in historically and culturally valuable areas. Act of Oct. 15, 1966, Pub. L. No. 89-665, 80 Stat. 915 (codified as amended at 54 U.S.C. §§ 300101-307108). The NHPA directs the Secretary of the Interior to establish and maintain the National Register of Historic Places composed of historically significant “districts, sites, buildings, structures, and objects.” 54 U.S.C. § 302101. To be listed in the National Register of Historic Places, a resource must be historically significant; be over fifty years old; and maintain its integrity. *See* 36 C.F.R. part 60.

Section 106 of the NHPA provides that federal agencies, “prior to the issuance of any license, shall take into account the effect of the undertaking on any historic property.” 54 U.S.C. § 306108. Congress directed agencies to consult with the Advisory Council on Historic Preservation (“ACHP”) as well as each State’s designated Historic Preservation Officer (“SHPO”) to assess the impact on historic resources. *Id.* § 304108. The Section 106 regulations explain that the “goal of consultation is to identify historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize, or mitigate any adverse effects

on historic properties.” 36 C.F.R. § 800.3(a). An agency “shall ensure that the section 106 process is initiated early in the undertaking’s planning, so that a broad range of alternatives may be considered during the planning process for the undertaking.” *Id.* § 800.3(c). In assessing whether an action will have adverse effects on historic resources, the Section 106 consultation process must consider all “reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative.” *Id.* § 800.5(a)(1).

Where an activity requires a Section 10 ITP under the ESA or a Section 404 permit under the CWA—i.e., federal authorization to undertake the activity—such an activity requires appropriate NHPA Section 106 consultation between the Service and/or the Corps with the ACHP and state-specific SHPO. This process is outlined in the Service’s ITP/HCP Handbook. *See* ITP/HCP Handbook, *supra*, at App’x A.

II. FACTUAL AND SCIENTIFIC BACKGROUND

A. Whooping Crane Biology And Wind Energy

Whooping cranes are the tallest birds in North America and are also one of the most imperiled species with only 505 remaining members in the wild in a single migrating population. While mortality rates are relatively low for adults on their breeding and wintering grounds, 60% to 80% of annual deaths are estimated to occur during the spring and fall migration periods when they encounter various migratory obstacles, habitat destruction, and other threats along their 5,000-mile roundtrip migration. For a more complete synthesis of the peer-reviewed scientific literature concerning whooping cranes, Exhibit A to this letter is a professional habitat assessment report prepared by the biologists at Blair Wildlife Consulting, LLC (“Blair Wildlife”). *See* Blair Wildlife, *Proposed APEX & EDF Wind Farms Whooping Crane Habitat Assessment* (Apr. 10, 2020). In Figures 7 and 8 of Exhibit A, the report depicts the 95% and 50% migratory corridors for the whooping crane, which the Service and other biologists developed based on observational and tracking data across decades of whooping cranes migration seasons. This migratory corridor is especially crucial for protection since whooping cranes, with minimal variation, show strong fidelity to their migratory path and stopover habitat, especially in the areas of core stopover habitat.²

Despite the precarious status of the whooping crane and the consensus view among scientists that conservation of the crane’s migratory pathway is the best means of avoiding harm to this species, developers continue to build transmission lines, wind energy projects, and other substantial obstacles in this flyway. However, in a recent peer-reviewed article, Service biologists explained that even “1 to 2 additional mortalities per year could result in a declining population” of whooping cranes, given the extremely small population size. Butler, et al., *Are Whooping Cranes Destined for Extinction?*, 7 *ECOLOGY & EVOLUTION* 2821, 2833 (2017),

² Indeed, a recent peer-reviewed publication further underscores the importance of core stopover habitat in the whooping crane’s migratory pathway, and this core stopover habitat range overlaps directly with the Black Angus Project. *See* Pearse et al., *Heterogeneity in Migration Strategies of Whooping Cranes*, 122 *CONDOR: ORNITHOLOGICAL APPLICATIONS* 1, 1-15 (2020), <https://academic.oup.com/condor/article/122/1/duz056/5700702>.

<https://www.ncbi.nlm.nih.gov/pubmed/28428872>. Thus, given that even a single additive death might impair the species' recovery prospects, it is critically important to avoid placing known mortality threats (such as wind turbines and transmission lines) in key areas used year after year by whooping cranes during their migration.

Although there are gaps in scientific understanding about the causes of whooping crane mortality, the Service has repeatedly affirmed that transmission lines (which frequently accompany wind energy projects) pose the single greatest source of mortality due to whooping cranes' inability to avoid collisions based on their unique physiological characteristics. *See* Blair Wildlife at 21. Even setting aside the dangers associated with transmission lines, the Service and other whooping crane experts have expressed serious concerns about the impacts of wind energy facilities themselves on the species: “[d]irect mortality of whooping cranes may occur as whooping cranes encounter turbines in bad weather or low light conditions at the beginning or end of migration flights, or when flying between roosts and foraging areas at stopover sites.” Service, *Whooping Cranes & Wind Development* at 3 (Apr. 2009), <https://bit.ly/3aTXO6D>. While the Service has cautioned that “direct mortality due to collisions with turbines is expected to occur infrequently, because of low numbers of whooping cranes and their migration behavior,” it has also explained that “avoidance of stopover habitat by cranes, as well as the loss such habitat, due to the presence of turbines is a substantial indirect impact that is anticipated with the increase in wind energy development.” *Id.*

Because wind projects pose substantial threats to whooping cranes, the Service has clarified that “[f]or wind energy development projects in the whooping crane migration corridor with a Federal nexus, the action agency *will need to* initiate section 7 consultation under the [ESA]”; “[a] federal nexus is triggered when a federal (“action”) agency provides funding, authorizes or carries out a program or project.” *Id.* Further, “[m]any wind energy projects do not have a Federal nexus; however, *even in the absence of a Federal nexus*, developers still need to avoid violating the take prohibitions contained in section 9 of the ESA” by seeking and obtaining an ITP. *Id.* (emphases added); *see also id.* at 19 (describing Section 10 and Section 7 requirements as applied to wind projects in the whooping crane migration corridor). Accordingly, in the view of the expert federal wildlife agency, *all* wind projects in the whooping crane migration corridor must obtain a Section 10 ITP (or obtain authorization through Section 7 of the ESA) because there is no other legal mechanism for eliminating the threat of killing, harming, harassing, or otherwise taking whooping cranes.

Moreover, the Service has urged that “[w]ind farms *should not be built near traditional whooping crane stopover locations, and should be placed as far away from the centerline of the whooping crane migration corridor as feasible.*” *Id.* at 21 (emphases added). In addition, projects built in whooping crane habitat should adopt appropriate measures both to immediately shut down turbines if cranes are spotted in the vicinity of wind project and to mitigate the loss of crane habitat due to project development. *Id.* at 21-23.

Separate from the Service's wind energy guidance for whooping cranes, the Service has also published guidance for transmission lines, which, once again, are the greatest source of whooping crane mortality. *See* Service, *Guidance for Minimizing Effects from Power Line Projects Within the Whooping Crane Migration Corridor* (Feb. 2010), <https://bit.ly/2UT52IH>. To

minimize effects to whooping cranes, the Service strongly recommends that “[p]roject proponents should avoid construction of overhead power lines within 5.0 miles of designated critical habitat and documented [whooping crane] high use areas” such as known stopover habitat, and that “[t]o the greatest extent possible, project proponents should bury all new power lines, especially those within 1.0 mile of potentially suitable habitat.” *Id.* at 2. Even with these take minimization measures in place, developers of transmission lines might still need to seek and obtain a Section 10 ITP (or authorization through Section 7 of the ESA if a federal nexus exists) when take is still reasonably certain to occur.

B. The Black Angus Wind Project

According to APEX, the proposed Black Angus Project will be located on approximately 30,000 acres of active farmlands in Clay and Montague counties and, at maximum efficiency, will be capable of producing up to 350 megawatts of energy. The Project is expected to consist of approximately 100 wind turbines spaced $\frac{1}{4}$ to $\frac{1}{2}$ mile apart, with each individual turbine and its associated access road typically requiring less than a half an acre of land. The Project has an anticipated lifespan of thirty years. The enclosed Blair Wildlife habitat assessment report (Exhibit A) contains maps and additional information about this Project and the land leased to date by APEX.

Based on known properties leased to date by APEX, the proposed location of the Project places it within the heart of the whooping crane’s migratory corridor. In fact, large components of the Project will obstruct the corridor’s centerline while others will abut the centerline, encroaching upon known stopover habitat in the “core” of the habitat range documented for this species. *See Blair Wildlife at 29-33; see also Pearse et al., supra at note 2.* Thus, the Project’s proposed location—intercepting the whooping crane migration corridor centerline—is in the most sensitive and detrimental location for a major obstacle of this kind in whooping crane habitat. Further exacerbating the likely effects on whooping cranes and other wildlife species, another wind project (a currently unnamed project proposed by EDF) will be constructed at sites in the immediate vicinity of the Black Angus Project. Relative to the Black Angus Project, this second unnamed EDF project will be located to the west and south, with yet more turbines to be constructed in the direct path of and adjacent to the migratory centerline. Thus, even more industrial wind turbines and transmission lines (and their associated stressors) are planned in a very sensitive location for this highly imperiled species. The map found in Figure 2 of Exhibit A shows the proximity of these two projects to the whooping crane migration corridor and its centerline:

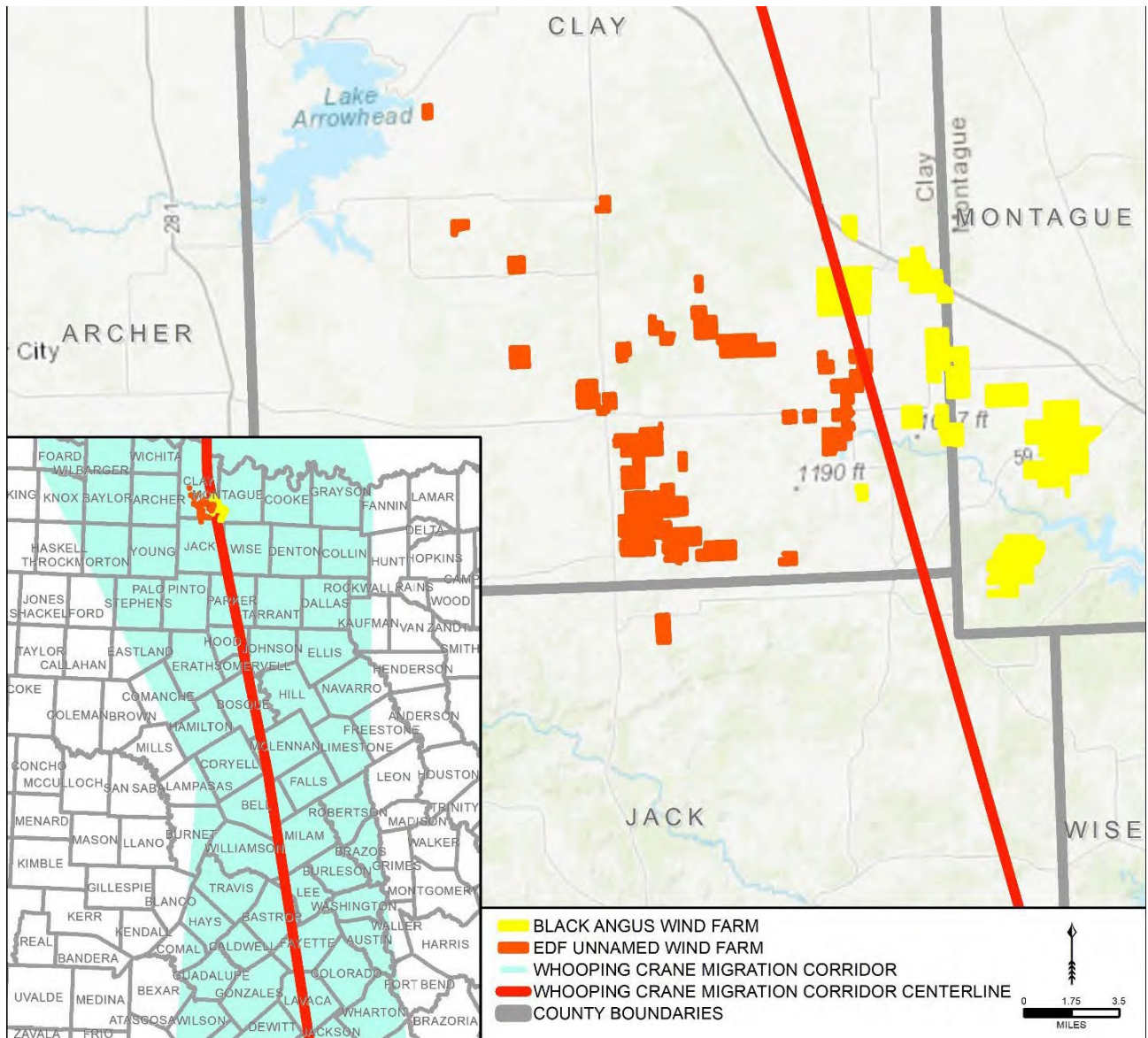


Exhibit A at Fig. 2.

Existing wind projects in the vicinity are demonstrative of the regulatory compliance necessary for the Black Angus Project to obtain federal approval. For example, there is an existing wind project located in Clay County called Shannon Wind Farm that commenced operations in late 2015. Although Shannon Wind Farm is located farther from the whooping crane migratory corridor centerline than the two proposed wind projects, the owners of Shannon Wind Farm are currently seeking a Section 10 ITP from the Service to analyze the impacts of the project on whooping cranes and other federally protected species and to adopt minimization and mitigation measures that will better conserve the whooping crane and other listed species for the duration of that project’s lifespan.

DISCUSSION

A. APEX Must Seek And Obtain An ITP For This Project Prior To Commencing Construction, And In The Process Must Comply With Applicable Federal Laws

By any objective measure, the location of the proposed Black Angus Project is an extremely high-risk site for whooping cranes and other species that migrate through this area. The imposing flight obstacles that the Project will present via its massive industrial turbines (and any associated transmission lines), constitute a grave threat to whooping cranes through direct collision risks with the turbines, associated transmission lines, and other related project-infrastructure. In addition, because the Black Angus Project's proposed location obstructs the whooping crane migration corridor centerline and will be built in known core stopover habitat for the species during its annual spring and fall migrations, this Project (as contemplated) poses serious risks of destroying or altering essential whooping crane habitat. The Project's contemplated location will also force whooping cranes to avoid or circumvent known migratory paths and stopover habitat, thereby requiring cranes to expend unnecessary energy that can adversely impact cranes' essential biological functions such as breeding, feeding, and sheltering. And, perhaps most concerning, the precarious status of the highly imperiled whooping crane population (which currently stands at approximately 505 individuals) means the death or other "take" of even a single whooping crane in addition to baseline take levels may well impair the species' recovery efforts and thus jeopardize the existence of the entire species—substantial biological concerns that are only magnified by the proximity of the unnamed EDF wind project, which will also obstruct the migration corridor and its centerline at locations to west and south of the Black Angus Project.

Indeed the high-risk nature of this concerned is summed up in the Blair Wildlife habitat assessment report:

In light of the especially sensitive location of these two proposed wind farm developments being contained entirely within the 50 percent core area of the whooping crane migratory corridor and bisected by the whooping crane migration corridor centerline—coupled with the unique physiological characteristics of the whooping crane affecting its flight maneuverability and the species' grueling biannual migration that significantly depletes its energetic resources—*it is our professional opinion, based on the best available scientific evidence, that these proposed wind farm development projects, both individually and in combination, are virtually certain to result in the 'take' of whooping cranes through lethal and/or non-lethal means.* Given the precarious status of the whooping crane, significant threats to the species continuance and recovery, and the existing baseline of incidental take authorizations already issued by the [Service], the additive take from each of these proposed wind development projects may well impair the recovery prospects of this species. Accordingly, based on the locality and existing characteristics of the proposed wind farm development sites, the available literature and data for the species, and our scientific expertise, *we conclude that construction and operation these two proposed wind farm developments must obtain incidental take authorization from the [Service], and in the process of obtaining such*

authorization must demonstrate that the construction and operation of these proposed wind development projects would not jeopardize the species, as that term is defined by the ESA.

Exhibit A at 34 (emphases added).

Accordingly, in light of the direct collision risks, habitat destruction and modification impacts, and the negative effects to whooping crane's essential biological functions, including energetics, it is obvious that this high-risk project cannot be built and operated without APEX first applying for and ultimately obtaining a Section 10 ITP. While we believe that the unprecedented risk of placing an industrial wind project in the immediate path of the migration corridor centerline counsels in favor of abandoning this site altogether for an alternate site with lower risk to whooping cranes and other federally protected species, at bare minimum we believe that this project is precisely the type of activity for which Congress developed the ITP process. Here, benefits for both listed species and APEX accompany the ITP process. For species impacted by the Project, the ITP process will bring to bear the specialized expertise of the Service and members of the public to ensure that all practicable measures are taken to eliminate or at least reduce take of listed species. The successful completion of the ITP process will, in turn, provide a measure a regulatory certainty to your company, potentially reducing the heavy financial costs that attend violations of the ESA.

As part of this legally required ITP process, there are several key steps that will occur to ensure that an ITP can lawfully issue under these circumstances, and to further ensure that the Service's issuance of a permit complies with other federal laws:

- The Service and APEX will work together to gather relevant information and ultimately to develop APEX's HCP that will accompany any final ITP issued by the Service and that will contain the terms and conditions necessary to comply with the ESA;
- The Service will issue for public comment a draft ITP, draft HCP, and a draft EIS prepared under NEPA given the "significance" of this action, which will examine feasible alternatives to the action as well as impacts of the action compared to alternatives;
- During the ITP process, the Service must also comply with other legal obligations that attach to federal actions of this kind, including but not limited to NHPA compliance through field surveys and consultation with the ACHP and the Texas SHPO;
- Before the Service makes a final decision as to whether to grant or deny APEX's ITP application, the Service must engage in intra-agency Section 7 consultation, culminating in a Biological Opinion that analyzes all effects of the action on whooping cranes and other listed species, and that ultimately determines whether issuance of this ITP is likely to jeopardize any listed species (and any terms and conditions that are necessary to avoid jeopardy);

- At the end of the ITP process, the Service will grant the permit but only if it can make certain statutorily required findings, including that the “applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking” and that the “taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild.” 16 U.S.C. § 1539(a)(1)(B)(ii), (a)(1)(B)(iv).

In our view, should APEX desire to construct an industrial wind energy facility in this extremely high-risk location for whooping cranes, the only lawful means of doing so is by APEX availing itself of the Section 10 ITP process and complying with all legal obligations (including those specified above) that attach to such a permitting process. In the absence of an ITP, APEX will lack legal authority to conduct activities (such as construction and operation of wind turbines and associated transmission lines) that are likely to kill, harm, harass, or otherwise take whooping cranes and/or other federally protected species. We look forward to further discussing the ITP process with APEX representatives and participating in the public process that accompanies the Service’s consideration of an ITP application.³

B. Even If There Is A Federal Nexus, APEX Must At Minimum Comply With Section 7 Of The ESA And Other Federal Laws That Apply To That Process

It is not clear from publicly available resources whether the proposed Black Angus Project has a federal nexus sufficient to confer APEX authorization through the Section 7 consultation process of the ESA. However, it is possible that this undertaking—whether through construction and/or operation of turbines, transmission lines, or other infrastructure—will, for example, result in dredged and fill material being placed into jurisdictional waters subject to Section 404 of the CWA. If so, then APEX arguably could obtain Section 7 authorization for this Project through consultation between the action agency (here, the Corps) and the consulting agency (here, the Service) on the basis of the Corps’ permitting authority under Section 404 of the CWA. Nevertheless, while Section 7 might appear at first blush to be a suitable alternative to obtaining an ITP, the Black Angus Project cries out for an ITP and compliance with all accompanying legal obligations through the ITP process.⁴

³ As explained above, it is the Service’s position that “[w]ind farms *should not be built near traditional whooping crane stopover locations, and should be placed as far away from the centerline of the whooping crane migration corridor as feasible.*” Service, *Whooping Cranes & Wind Development* at 21 (emphasis added). Even where wind energy facilities are sited much farther from the migratory corridor centerline than the proposed Black Angus Project—but nevertheless within the corridor, such as the Shannon Wind Farm that is actively seeking a Section 10 ITP—the Service urges all such projects to seek and obtain an ITP to avoid violating the ESA and other federal environmental laws. *Id.* at 3, 19. Simply put, because even less risky locations for wind turbines require an ITP to reduce the threat of whooping crane take to a legally permissible level under the ESA, a project of this magnitude proposed for siting in the riskiest of locations (in the direct path of the migration corridor centerline) has no means of escaping the inevitable conclusion that an ITP is legally required.

⁴ Assuming a CWA Section 404 permit is required for the proposed Black Angus wind project—whether related to wind turbines, associated transmission lines, or related infrastructure—it is our

Importantly, whether or not the Corps engages in Section 7 consultation with the Service in connection with impacts authorized by the Corps through any legally necessary Section 404 CWA permit for this Project, it is questionable whether that Section 7 consultation process may be expanded to cover private activities occurring outside of the Corps' jurisdiction (i.e., the vast majority of this Project), or whether instead such consultation must be limited to the impacts occurring at stream crossings and wetlands under the Corps' CWA jurisdiction. There is an open question under the ESA as to whether the Service and an action agency can lawfully sweep into Section 7 consultation private projects occurring mostly on private lands with no federal nexus, especially where such an approach would unnecessarily circumvent the explicit requirements Congress imposed in Section 10 to cover private activities that are likely to cause take of listed species. Even if such an approach is harmonious with the ESA—which, again, is highly questionable—it nevertheless would require either the Service or the Corps to conduct NEPA review, NHPA consultation, and ensure compliance with other applicable laws. This is so because the authorization under Section 7, via the incidental take statement contained in a Biological Opinion, is a major federal action permitting a private actor (here, APEX) to proceed with an action that is shielded from take liability so long as all terms and conditions of a Biological Opinion (and its Incidental Take Statement) are satisfied. *See, e.g., Sierra Club v. U.S. Army Corps of Eng'rs*, 803 F.3d 31, 46-47 (D.C. Cir. 2015) (“The Corps’ implementation of the ITS through its Clean Water Act verifications was federal action that required NEPA review . . .”).⁵

Accordingly, while we would have serious reservations about APEX bypassing its Section 10 obligations by piggybacking on any Section 7 consultation between the Service and the Corps that might be necessary under the circumstances, that approach would at least ensure some level of scrutiny by the expert federal wildlife agency (the Service) as well as the public through any legally required NEPA process.

CONCLUSION

We harbor very serious concerns about the proposed Black Angus Project. Based on our review of the Project and on the basis of a detailed biological assessment, *see* Exhibit A, the


view that this project may not avail itself of the generalized NWP approach and must instead obtain a project-specific individual permit due to the significant impacts to highly imperiled whooping cranes (and other listed species) that will likely result from this project.

⁵ The legality of this approach—referred to as the “small federal handle” process—is being litigated in a pending lawsuit. At the preliminary injunction stage, the court strongly suggested that sweeping private actions into the Section 7 consultation process is problematic under NEPA and possibly other laws. *See Austin v. Kinder Morgan Texas Pipeline, LLC*, No. 1:20-cv-138, 2020 WL 1324071, at *11 & n.10 (W.D. Tex. Mar. 19, 2020) (stating that “the Court questions” the use of this approach, and expressing concern that “neither Defendant could provide the Court with a single case referring to the legitimate use of the Section 7 consultation process by a private applicant to secure a safe harbor from take liability for project areas beyond the Corps’ limited jurisdiction”).

Project could not be proposed in a more environmentally damaging location for the highly endangered whooping crane. Thus, we urge APEX to seriously consider abandoning this site in favor of a less environmentally sensitive location. However, should APEX nevertheless wish to proceed with this location, at minimum we demand that APEX timely commence the Section 10 ITP process and comply with any and all applicable laws during this process.

Thank you for your consideration of this letter. We would appreciate receiving a prompt response to this letter, and in particular we would welcome a conference call or in-person meeting to facilitate a more in-depth discussion between my client and APEX representatives. If we do not receive a response, we will assume that APEX has no serious interest in discussing this matter and ensuring compliance with federal environmental laws. Consequently, we will consider all available options for enforcing the legal requirements that Congress enacted to prevent construction and operation of this kind of environmentally destructive project.

Respectfully,



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