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**By Certified Mail**

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**Re: Violations of the Endangered Species Act, Migratory Bird Treaty Act, and Bald and Golden Eagle Protection Act in Connection with the Mount Storm and AES New Creek Wind Power Facilities**

On behalf of Friends of Blackwater and the Allegheny Front Alliance, we are writing to urge the companies developing and operating the Mount Storm and New Creek wind power facilities, and the U.S. Fish and Wildlife Service (“FWS” or “Service”), the federal agency entrusted with enforcing the Endangered Species Act, 16 U.S.C. § 1531 *et seq.*, (“ESA”), the Migratory Bird Treaty Act, 16 U.S.C. §§ 703-11 (“MBTA”), and the Bald and Golden Eagle Protection Act, 16 U.S.C. §§ 668-668d (“Eagle Act”), to take concrete, expeditious measures to avoid, minimize, and mitigate these projects’ impacts to wildlife. As explained in detail below, we are very concerned that these wind power facilities are now violating or will soon violate these important federal wildlife statutes, resulting in the needless loss of wildlife, when regulatory mechanisms and emerging technologies exist to greatly minimize and mitigate such adverse environmental effects.

**BACKGROUND**

**A. Relevant Statutes**

A number of federal environmental laws apply to wind power facilities that disturb, harm, and/or kill wildlife, including endangered bat species, migratory birds, and bald and golden eagles. Thus, wind power facilities must be designed and operated to comply with such laws and to avoid unnecessary harm to wildlife.

1. Endangered Species Act

Congress enacted the ESA to ensure that endangered species are treated with an abundance of caution, with federal agencies working to halt or reverse their declines, whatever the cost. See TVA v. Hill, 437 U.S. 153, 174, 184 (1978). Under the ESA, the FWS must afford species listed under the Act the “highest of priorities.” Id. at 174; accord Animal Welfare Inst. v. Beech Ridge Energy LLC, 675 F. Supp. 2d 540, 543 (D. Md. 2009) (“Beech Ridge”) (“The text of the Act as well as its legislative history unequivocally demonstrate that Congress intended that protection of endangered species be afforded the highest level of importance.”).

Section 9 of the ESA prohibits any “person” from “taking” any member of an endangered species. 16 U.S.C. § 1538(a). The term “take” is defined broadly to include “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect.” Id. § 1532(19). The FWS has further defined “harass” to include “an intentional or negligent 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, including breeding, feeding, or sheltering.” 50 C.F.R. § 17.3. In addition, “harm” is defined to “include significant habitat modification or degradation where it actually

kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.” Id.

Section 10 of the ESA provides a limited exception to the otherwise strict prohibition against the take of an endangered species. Pursuant to section 10, the FWS may issue a permit allowing an entity to take a listed species where such taking is “incidental to, and not the purpose of, carrying out of an otherwise lawful activity.” 16 U.S.C. § 1539(a)(1)(B). An applicant seeking such an “incidental take permit” (“ITP”) must submit a detailed “conservation plan” describing, among other things: (1) the impacts of the proposed taking; (2) procedures the applicant will use to mitigate, monitor, and minimize such impacts; (3) an explanation of why there are no feasible alternatives to the proposed taking; and (4) information establishing that sufficient funding exists to implement the plan. Id. §1539(a)(2)(A); 50 C.F.R. § 17.22. The FWS has published a step-by-step guide for landowners developing a section 10 conservation plan, also known as a “habitat conservation plan” (“HCP”). See FWS & National Oceanic & Atmospheric Administration Fisheries Service, *Habitat Conservation Planning Handbook* (1996).<sup>1</sup> Without an ITP, anyone who undertakes activities that are likely to take members of listed species, or who authorizes such activities, 16 U.S.C. § 1538(g), are subject to criminal and civil federal enforcement actions, as well as civil actions by citizens for declaratory and injunctive relief. See 16 U.S.C. § 1540.

The impact of wind energy facilities on wildlife is a serious issue because wind turbines kill and harm several species of wildlife, including species listed as endangered under the ESA, such as Indiana bats and Virginia big-eared bats. In Beech Ridge, Judge Titus of the District Court for the District of Maryland examined the potential conflict between two federal policies relevant to wind energy projects, one favoring the protection of endangered species under the ESA, and the other encouraging development of renewable energy resources, and observed that “[t]he two vital federal policies at issue in this case are not necessarily in conflict” so long as the project developer obtains take authorization in accordance with the ESA. Beech Ridge, 675 F. Supp. 2d at 582-583. He admonished, “[t]he development of wind energy can and should be encouraged, but wind turbines must be good neighbors.” Id.

## 2. Migratory Bird Treaty Act

The MBTA prohibits the killing of listed birds without the authorization of the Secretary. Enacted to fulfill the United States’ treaty obligations, the MBTA 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.” 16 U.S.C. § 703(a) (emphasis added). The

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<sup>1</sup> Available at, <http://www.fws.gov/endangered/hcp/hcpbook.html>

Secretary is authorized to permit the killing of birds otherwise protected by the MBTA when doing so would be compatible with the migratory bird conventions. Id. § 704(a).

The MBTA authorizes the Secretary to determine when, to what extent, if any, and by what means the take of protected birds is compatible with the terms of the related treaties. However, the FWS has not promulgated a regulation which expressly authorizes the issuance of permits allowing incidental take from industries like wind power development. Consequently, incidental take of birds listed under the MBTA is a violation of the Act, for which the FWS can impose criminal violations, regardless of intent. Thus, the FWS has the authority to pursue an enforcement action against wind energy developers for violations of the MBTA. See FWS, Draft Land-Based Wind Energy Guidelines at 2 (Feb 2011) (“Wind Turbine Guidelines”). Further, private parties may pursue civil claims against federal agencies for violations of the MBTA under the Administrative Procedure Act. 5 U.S.C. §§ 701-706 (“APA”); City of Sausalito v. O’Neill, 386 F.3d 1186, 1204 (9th Cir. 2004); Humane Soc’y of the U.S. v. Glickman, 217 F.3d 882, 888 (D.C. Cir. 2000).

### 3. Bald and Golden Eagle Protection Act

The Eagle Act provides that “[w]hoever . . . shall knowingly, or with wanton disregard for the consequences of his act take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import, at any time or in any manner . . . any golden eagle, alive or dead, or any part, nest, or egg thereof . . . shall be fined not more than \$5,000 or imprisoned not more than one year or both.” 16 U.S.C. § 668(a). Violators are also subject to civil penalties. Id. § 668(b).

Implementing regulations allow the FWS to issue permits to take eagles otherwise protected under the Eagle Act in certain situations where the take is “associated with but not the purpose of the activity.” 50 C.F.R. § 22.26(a). For a permit to be issued, the take must be “compatible with the preservation of the bald eagle and the golden eagle; necessary to protect an interest in a particular locality;” and practically unavoidable. Id. Further, some courts have held that the Eagle Act, which is worded similarly to the MBTA, allows private plaintiffs to pursue claims under the APA against federal agencies for failure to adhere to the Eagle Act. See, e.g., Jaeger v. Cellco Partnership, 2010 WL 965730 (D. Conn. Mar 16, 2010); Humane Soc’y of the U.S. v. Lujan, 768 F. Supp. 360 (D.D.C. 1991).

## **B. Species Affected by the Projects at Issue**

### 1. Indiana Bats

The FWS listed the Indiana bat as endangered in 1967 under the predecessor to the current Endangered Species Act. 32 Fed. Reg. 4001 (Mar 11, 1967). Even after the Indiana bat was listed, its range wide population declined precipitously. According to the FWS, “[e]ven with the

discovery of many new, large hibernacula, the range wide population estimate dropped approximately 57 percent from 1965 to 2001.” See FWS, Indiana Bat (*Myotis sodalis*) Draft Recovery Plan: First Revision at 33 (2007) (“Indiana Bat Recovery Plan”).<sup>2</sup> The 2007 range wide population estimate was approximately 468,000 Indiana bats. FWS, Indiana Bat Five-Year Review 12 (Sept 2009).<sup>3</sup>

The West Virginia population of Indiana bat is critical to the species’ survival. Several Indiana bat hibernacula and Indiana bat maternity colonies occur in West Virginia. Indiana Bat Recovery Plan at 23, 28. Indeed, Hellhole Cave in Pendleton County, West Virginia contains approximately 12,000 Indiana bats and has been designated by the Service as critical habitat for the species. In contrast to the generally declining range-wide population numbers, the West Virginia population is faring better, increasing in size and now accounting for 3 percent of the total species population. See Richard A. Lambert, The Proposed New Creek Mountain Wind Project’s Proximity to Regional Endangered Bat Habitats And Possible Cumulative Effects at 7 (Jan. 29, 2009) (“Attachment A”). The positive population trend for Indiana bats in West Virginia underscores this population’s vital role in the species’ recovery.

Indiana bats begin to travel to their hibernacula in August and hibernate over winter. See Carol A. Peterson & Richard A. Lambert, The Potential Impacts of Wind Power Facilities on Rare and Endangered Bats at the Proposed Highland New Wind Project Site 5 (Apr 11, 2006), (“Potential Impacts of Wind Power”).<sup>4</sup> Once they emerge from hibernation for the spring and summer, Indiana bats “can migrate hundreds of kilometers from their hibernacula.” Indiana Bat Recovery Plan at 44 (noting studies documenting the distances traveled by Indiana bats during migration, including a study finding that twelve female Indiana bats migrated an average of 296 miles, with a maximum migration of 357 miles); see also Potential Impacts of Wind Power at 5 (noting that Indiana bats have been found to migrate 330 miles); J.E. Gardner & E.A. Cook, Seasonal and Geographic Distribution and Quantification of Potential Summer Habitat 9-20 (2002) (noting that banded Indiana bats have been found 325 miles away from hibernacula). They are known to fly ten to sixty miles in one night, and one female has been tracked moving thirty-five miles in approximately eighty-five minutes. Indiana Bat Recovery Plan at 44.

Exacerbating the traditional threats to the species, such as conversion of forested land, tree harvesting, and the removal of dead trees, the FWS has recognized new grave threats to the

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<sup>2</sup> Available at, <http://www.mcrcc.osmre.gov/MCR/Resources/bats/pdf/IN%20BAT%20DRAFT%20PLAN%20apr07.pdf>

<sup>3</sup> Available at, [http://www.fws.gov/midwest/endangered/recovery/5yr\\_rev/pdf/INBA5Yr30Sept2009.pdf](http://www.fws.gov/midwest/endangered/recovery/5yr_rev/pdf/INBA5Yr30Sept2009.pdf)

<sup>4</sup> Available at, [http://vawind.org/Assets/Docs/Comments/VHG\\_HNWD\\_041107.pdf](http://vawind.org/Assets/Docs/Comments/VHG_HNWD_041107.pdf)

survival and recovery of the Indiana bat, including collisions with wind-energy turbines “given the rapid proliferation of wind farming,” and the large scale mortality of bat species at wind farms, and has concluded, “[w]ind-energy developments, particularly near hibernacula or along potential migration routes where large numbers of Indiana bats could be impacted, should be evaluated as a potential threat.” Indiana Bat Recovery Plan at 101 (emphasis added) (citation omitted).

In addition to direct collisions with wind turbines, recent scientific evidence confirms that wind projects also threaten Indiana bats by creating low-pressure zones near turbines that lead to a fatal condition called barotrauma.<sup>5</sup> Erin F. Baerwald et al., Barotrauma Is a Significant Cause of Bat Fatalities at Wind Turbines, *Current Biology*, Vol. 18, R695 (2008); see also Wind Turbine Guidelines at 9 (explaining that in addition to direct mortality from barotrauma, bats may also experience “hearing impairment and other internal injuries that may allow the bats to fly or otherwise move away from the vicinity but would ultimately result in their death”). Bats have died in alarming numbers at wind power facilities after colliding with turbines and from barotrauma. See Thomas H. Kunz et al., Ecological Impacts of Wind Energy on Bats: Questions, Research, Needs, and Hypotheses, 5 *Frontiers in Ecology and the Env’t* 315, 316 (2007) (“Recent monitoring studies indicate that some utility-scale wind energy facilities have killed large numbers of bats”).

Nothing is unique about Indiana bats that allows them to avoid the mortality at wind power facilities that has proven to be so devastating to other bats. At trial in the Beech Ridge case, renowned bat biologist Dr. Thomas Kunz testified that he knew of no reason why Indiana bats should not suffer the same fate as other species of bats. 675 F. Supp. 2d at 577-78. His testimony was supported by other experts who were credited by the court. The Beech Ridge court, considering defendants’ argument that Indiana bats fly at heights that would allow them to fly around turbines without colliding with the blades, found that “there is no reason why Indiana bats would not fly at a height of 137 to 389 feet above the ground, within the rotor swept area of the turbines[.]” Id. at 578.

More important, we need not speculate whether Indiana bats can be killed by wind turbines, because, shortly after the Beech Ridge ruling, the FWS has confirmed an Indiana bat mortality at a wind power facility in Indiana. News Release, FWS, U.S. Fish and Wildlife Service and Wind Farm Owners Work Together (Feb 8, 2010).<sup>6</sup> The death, caused by collision with a turbine, occurred during migration. See id. This mortality – predicted by the experts in the Beech Ridge

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<sup>5</sup> “Barotrauma” is damage to lungs and eardrums due to a rapid change in air pressure and has been observed in bats who have died at wind power facilities.

<sup>6</sup> Available at, <http://www.fws.gov/midwest/News/release.cfm?rid=177>

case – disproves that there is anything unique about Indiana bats that prevents them from colliding with wind turbines.

The threat posed by wind power facilities is particularly concerning because huge numbers of Indiana bats are now dying from White-Nose Syndrome (“WNS”). WNS has emerged as a significant threat to bat populations. In some hibernacula, the FWS has reported mortality rates of 90 percent or more. The effects of this disease, the cause of which is unknown, have been observed in West Virginia, and the neighboring states of Virginia, Pennsylvania, and Maryland. See Lizzie Buchen, Disease Epidemic Killing Only U.S. Bats, 463 *Nature* 144, 144 (2010). In fact, the West Virginia Department of Natural Resources has reported that WNS is present in Hellhole Cave, West Virginia’s largest bat cave. Press Release, W.V. Dep’t of Natural Res., West Virginia’s Most Important Bat Cave Has White-Nose Syndrome (Feb 23, 2010).<sup>7</sup> The FWS biologists have cautioned that, if WNS is not contained, “we’re going to see extinctions of listed species, and some of species that are not even listed,” see Tina Kelley, Bats Perish and No One Knows Why, *N.Y. Times* (Mar 25, 2008), which has led to “concern[s] about the continuing viability of the Indiana bat population in the Northeast.” FWS, White Nose Syndrome in Bats (2008).<sup>8</sup> This unprecedented threat to Indiana bats and other bats means that eliminating and mitigating additive sources of mortality (particularly from wind energy projects) is of especially critical importance.

## 2. Virginia Big-Eared Bats

Even more imperiled than the Indiana bat, the Virginia big-eared bat is a subspecies of the Townsend’s big-eared bat (*Corynorhinus townsendii*). In West Virginia, the Virginia big-eared bats reside in five counties, including Grant County where the Mount Storm and AES New Creek projects are located. See FWS Species Profile for Virginia Big-eared Bat.<sup>9</sup> The Virginia big-eared bat resides in caves at elevations greater than 1500 feet throughout the year. FWS, Recovery Plan for the Ozark Big-eared Bat and the Virginia Big-eared Bat at 13 (2007) (“VBEB Recovery Plan”).<sup>10</sup> Colonies often have roosts in multiple caves and move among roosts even during cold weather. Virginia big-eared bats have been documented migrating 40 miles between caves, and are known to forage mostly “along forested edges.” Id. at 14.

Virginia big-eared bats “long have been restricted to relatively small areas, and are dependent on a few specific kinds of caves for hibernation and reproductive activity.” Listing of Virginia

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<sup>7</sup> Available at, <http://www.wvdnr.gov/2010news/10news031.shtm>

<sup>8</sup> Available at, <http://www.fws.gov/northeast/pdf/white-nosefaqs.pdf>

<sup>9</sup> Available at, <http://www.fws.gov/ecos/ajax/speciesProfile/profile/speciesProfile.action?sPCODE=A080>

<sup>10</sup> Available at, [http://www.fws.gov/ecos/ajax/docs/recovery\\_plan/840508.pdf](http://www.fws.gov/ecos/ajax/docs/recovery_plan/840508.pdf)

and Ozark Big-eared Bats as Endangered Species, and Critical Habitat Determination, 44 Fed. Reg. 69206, 69207 (Nov 30, 1979). More than half of the global population is found in West Virginia, with the largest known maternity colony and the largest hibernating concentration in the world found in that state. FWS, Virginia Big-eared Bat 5-Year Review 6 (Summer 2008) (“VBEB 5-Year Review”);<sup>11</sup> W.V. Div. of Natural Res. & FWS, Notice to Cavers: White Nose Syndrome - A New Threat to Cave Bats (2008).<sup>12</sup> Six counties in West Virginia and four nearby counties in West Virginia have Virginia big-eared bats. Attachment A at 9. As the FWS has noted, “[t]he species has a limited range and is highly susceptible to changes in habitat.” 44 Fed. Reg. at 69207. In fact, there are 22 Virginia big-eared bat caves within 30 miles of the proposed AES New Creek project site; 39 caves within 40 miles; and 65 caves with records of Virginia big-eared bats within 74 miles of the proposed project site. See Attachment A at 9. The location for the proposed AES New Creek project is located in a Virginia big-eared bat recovery area and a known migratory corridor. Id. at 18.

The FWS listed the Virginia big-eared bat as endangered in 1979, and designated five caves in West Virginia as critical habitat at that time. 44 Fed. Reg. 69206. The Service completed a recovery plan for the Virginia big-eared bat and the Ozark big-eared bat in 1984. VBEB Recovery Plan.

Current estimates of the Virginia big-eared bat population show fewer than 12,000 remaining individuals. VBEB 5-Year Review at 7. The population decline is primarily attributed to human disturbance and habitat loss. However, the Service has expressed serious concerns about the effect of wind power on this species, concluding that foraging and migratory Virginia big-eared bats are “vulnerable to mortality at wind turbines,” id. at 14, and further that “current regulatory mechanisms in regard to wind power production may not be adequate to protect [Virginia big-eared bat] populations.” Id. at 13. In addition, WNS is expected to also affect Virginia big-eared bats. Id. at 12. Given that bat populations have declined as much as 97 percent in caves where the syndrome’s presence has been confirmed, WNS could prove to be a particularly grave threat to this species, meaning that all additive sources of mortality, such as anticipated deaths from wind power, should be eliminated or, at the very least, minimized and mitigated to ensure the species’ survival and recovery.

### 3. Bird Species

Most migratory and resident birds in West Virginia are protected by the MBTA. See 50 C.F.R. § 10.13 (listing the birds protected by the MBTA); Final List of Bird Species to Which the MBTA Does Not Apply, 70 Fed. Reg. 12710 (Mar 15, 2005). Among the West Virginia

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<sup>11</sup> Available at, [http://www.fws.gov/ecos/ajax/docs/five\\_year\\_review/doc1963.pdf](http://www.fws.gov/ecos/ajax/docs/five_year_review/doc1963.pdf)

<sup>12</sup> Available at, <http://www.fws.gov/northeast/pdf/WNSWVDNR%20notice%20to%20cavers022908.pdf>

birds protected by the MBTA are broad-winged hawk, red-tailed hawk, sharp-shinned hawk, turkey vulture, warblers, red-eyed vireo, gray catbird, ovenbird, wood duck, cedar waxwing, American redstart, common yellowthroat, eastern wood-pewee, gray-cheeked thrush, wood thrush, swainson's thrush, veery, yellow-bellied flycatcher, yellow-billed cuckoo, rose-breasted grosbeak, ruby-crowned kinglet, golden-crowned kinglet, ruby-throated hummingbird, tree swallow, American crow, American robin, American woodcock, chimney swift, scarlet tanager, field sparrow, and white-eyed vireo. Birds of all of the above mentioned species, among others, have been reported to be killed at the Mount Storm project site, and would be expected to be killed at the AES New Creek site, which has similar topography.

Overall, wind turbines pose a serious threat to many protected bird species. In fact, the American Bird Conservancy has reported that the FWS estimates that more than 400,000 birds each year are killed by wind turbines and that this figure is expected to rise significantly as more wind power facilities become operational. See American Bird Conservancy, [Wind Development Threatens Iconic American Birds](#) (Dec 29, 2010).<sup>13</sup>

Golden eagles are protected both by the MBTA and the Eagle Act. In 2005, the National Aviary began a golden eagle tracking study in West Virginia. The study has found that most individuals in the eastern North American population of golden eagles migrate through one or more narrow (30-60 mile) bottlenecks in the mid-Appalachian mountains. These bottlenecks have also been identified as prime locations for wind power facilities. The size of the eastern North American population of golden eagles is small and therefore highly vulnerable to demographic perturbations. See Todd Katzner, National Aviary et al., [Raptors and Wind Energy Development in the Central Appalachians: Where We Stand on the Issue](#), at 2 (Aug 2008).<sup>14</sup> Researchers involved in the study are concerned that even low levels of mortality from wind power facilities may be significant because golden eagles are long-lived and have low reproductive rates. Id. at 2-3. Because of their demography, migratory and winter flight behavior, and vulnerability to wind turbines, eastern golden eagles are considered to be the raptor species at greatest risk of population-wide impacts from wind energy development in the Appalachians. Id. at 3. Available monitoring data and modeling strongly suggest that the Allegheny Front, where the Mount Storm and AES New Creek projects are located, is a zone of high risk for potential impacts to golden eagles. Id. Audubon Christmas Bird Count data suggest that some regions of West Virginia including Grant County, where the Mount Storm and AES New Creek projects are located, are important wintering areas for golden eagles, and immature golden eagles also regularly summer in these areas. Id.

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<sup>13</sup> Available at, <http://www.abcbirds.org/newsandreports/releases/101229.html>

<sup>14</sup> Available at, <http://www.aviary.org/cons/pdf/WindEnergyRaptorsWhitePaper.pdf>

### C. The Mount Storm Wind Energy Project's Wildlife Impacts

In 2003, the West Virginia Public Service Commission (PSC) granted NedPower Mount Storm LLC (NedPower) a conditional certificate to construct and operate the NedPower Mount Storm Wind Energy Facility. The project is located in Grant County, in northeast West Virginia, on a forested ridgeline in the Allegheny Front. The Allegheny Front is part of the Appalachian mountain range and is an important migration corridor for several bird and bat species. See Letter from Jeffrey K. Towner (FWS) to Jessica L. Yeager, Potesta & Associates (NedPower's environmental consultant) (Aug 30, 2002) ("Attachment B").

Even before the project was approved by the PSC, the FWS had informed NedPower that a wind power facility at this location could harm the Indiana bat and the Virginia big-eared bat, and that "[r]egardless of the existence of a [s]ection 7 nexus, any project proponent or landowner is required under [s]ection 9 of the ESA to ensure that their actions do not result in unauthorized take of a federally listed species without special exemption." Attachment B (emphasis added). Having evaluated the adverse impact of the Mount Storm project on wildlife after the commencement of its operations, the FWS now believes that there is "no question that many bats and birds are being killed" and estimates 37,875 dead birds and 174,200 dead bats over 25 years (the lifespan of the project). See Email from Jim Zelenak (FWS) to Laura Hill (FWS) (Mar 16, 2010) ("Attachment C") (emphasis added).

The certificate issued by the PSC is contingent upon the NedPower's compliance with the ESA, the MBTA, and the National Environmental Policy Act, 42 USC § 432 1 et seq. The certificate also requires the fulfillment of several conditions intended to minimize impacts on migratory bird and bat species and to ensure compliance with the ESA and the MBTA, including conducting post-construction studies for a three year period to assess the bird and bat mortality at the project site, and addressing any concerns raised by the FWS. See Commission Order, Case No. 02-1189-E-CN, NedPower Mount Storm LLC, at 116, 119-123 (Apr 2, 2003) ("PSC Order").<sup>15</sup> We understand that to date, four monitoring reports have been provided to the PCS and the FWS for 13 operational weeks between July – October 2008 ("Fall 2008 Report"); 9 operational weeks between March – June 2009 ("Spring 2009 Report"); 12 operational weeks between July – October 2009 ("Fall 2009 Report"); and 4 operational weeks between April – July 2010 ("Spring 2010 Report"). The Fall 2008 Report and the Fall 2009 Report indicate that during a limited period of time (12 - 13 weeks), approximately 211 bats were killed by the project. On the whole, despite the short duration of the study periods (ranging from 4 to 12 weeks), the post-construction mortality studies confirm the deaths of 553 bats and 131 birds over 38 weeks (between Fall 2008 and Spring 2010) when the turbines were in operation.

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<sup>15</sup> Available at, <http://www.psc.state.wv.us/scripts/orders/ViewDocument.cfm?CaseActivityID=102728&Source=Archives>.

These figures are significant especially because the mortality rates “appear[] to be underestimated.” Email from Laura Hill (FWS) to Manuela Huso, Consulting Statistician, Oregon State University (July 7, 2010) (“Attachment D”). Further, the developer of the Mount Storm project has failed to estimate the total annual bird and bat mortality rate which is crucial to assess the actual extent of bat and bird mortality and to identify effective operational changes to reduce the mortality rate. See Letter from Deborah Carter (FWS) to Robert Williams and Bryanne Tait (environmental consultants of NedPower) (July 30, 2009) (“Attachment E”) (“We are concerned that cumulative mortality rates for bats and birds may be high, necessitating the need for curtailment studies (such as seasonal feathering) to reduce mortality.”) (emphasis added); see also Wind Turbine Guidelines at 42 (emphasizing the need to determine overall fatality rates and fatality patterns). Although the FWS has emphasized the need to extrapolate annual bird and bat mortality and accordingly recommended calculating the estimated total annual mortality rate for all towers in the project, NedPower has failed to do so, claiming that “due to the limited study period covered in the report, results of the studies are relevant only to the [number of weeks studied] and should not be considered annual estimates of impacts or representative of other seasons.” Spring 2009 Report at 1; Fall 2009 Report at 1; Spring 2010 Report at 20; see also Attachment D (“[D]espite having collected 4 seasons of baseline data on fully operational turbines (spring and fall seasons during two years), the consultants have not provided an estimate of mortality for the entire project. Instead they say the results are only valid for each 12-week study period and should not be considered estimates of impact or representative of other seasons.”).

Furthermore, the FWS has also expressed a concern about the formulas used by NedPower’s consultant to estimate mortality rates, the sample size of the plots studied, and the frequency of carcass searches. See generally Email from Manuela Huso, Consulting Statistician, Oregon State University to Laura Hill (FWS) (July 7, 2010) (“Attachment F”) (“I’m afraid the equation [for calculating bird and bat mortality] [that NedPower’s consultants] provide is unintelligible, which is a bit disconcerting in and of itself.”). These concerns about the methods used by NedPower’s environmental consultant to calculate bird and bat mortality are significant because they indicate that the data reported by NedPower, which represent alarmingly high bird and bat mortality, are underestimates of the actual (higher) mortality rates. Therefore, NedPower is likely underestimating the risk of taking federally listed bat and bird species and discounting the urgent need to undertake preventive measures to address the actual high bird and bat mortality at the project site.

In addition, although NedPower’s environmental consultant conducted limited acoustic AnaBat surveys to identify bird and bat species in the project area, it has failed to utilize the acoustic data to identify specific species, and has instead merely categorized bats observed into broad acoustic categories based on high or low frequency calls. The FWS has called for species-specific analyses of the acoustic bat surveys, see Attachment E, but NedPower has apparently failed to engage in these analyses, even though species-specific data would be instrumental in

ascertaining the presence of listed species at the project site. See Beech Ridge, 675 F. Supp. 2d at 570-575 (“In one study acoustical detectors were more than twice as effective as mist nets in identifying Indiana bats using the study area.” Id. at 571 (internal citation omitted)).

We understand that discussions between the FWS and NedPower about the serious adverse impact of the project on wildlife are ongoing, however we do not believe any concrete steps for adopting and implementing additional mitigation of risk to bird and bat species have been agreed upon.

#### **D. The AES New Creek Wind Project’s Risks to Wildlife**

We also have a serious concern with the New Creek Mountain development proposed by AES, which, like Mount Storm, is slated for a forested ridgeline that provides habitat to a rich array of resident and migratory wildlife, including at least 64 species of breeding birds and several bats, and is in close proximity to Mount Storm. The FWS has described the proposed project as “located along ridgelines considered to be part of the Allegheny Front, a known major migration corridor for birds and bats.” Letter from Deborah Carter (FWS) to Trevor Peterson (Stantec Consulting) (Sept. 30, 2009) (“Attachment G”).

Among the species occurring at the site of the proposed New Creek facility are bald and golden eagles, other raptors and migratory birds, and federally endangered Indiana bats and Virginia big-eared bats. Not only do bald and golden eagles migrate through the site, but there is a bald eagle nest approximately 10 miles away, large numbers of migrating golden eagles have been observed within 5 miles, and the majority of raptors observed within the 1-kilometer survey area were flying within the rotor-swept zone. The FWS has described the location of the proposed New Creek facility as a “zone of high risk for potential impacts to golden eagles from wind turbines.” Id. at 7. The FWS has also expressed concern about the project’s effect on other migrating raptors and other birds. Finding that data from 2007-08 radar studies indicated a higher level of passage at New Creek Mountain than in most other documented radar surveys, as well as a higher average rate of birds flying at altitudes where they could be harmed by wind turbines, the FWS cautioned that the site may present an elevated risk of mortality. When discussing raptors specifically, the FWS cautioned that the differences in raptor migration observed at New Creek and a nearby wind power facility “highlight[ed] the need for multi-year pre-construction surveys and raise concerns that the New Creek project may post as high a risk to raptors as documented in the Pinnacle study area [where there is a high level of raptor migration].” Id. at 6.

Further, the FWS believes that endangered Indiana and Virginia big-eared bats may use the area for migration or foraging. Mist net surveys at the project site have caught a large number of northern myotis, which use many of the same food sources as Indiana bats, display many of the

same foraging characteristics, and have many of the same behaviors as Indiana bats.<sup>16</sup> As noted previously, bat populations are already in decline due to anthropogenic sources of mortality and WNS, and any additional mortality could have devastating effects.<sup>17</sup> The FWS cautioned that the cumulative effect of multiple wind power facilities in the region could “reduce the overall bat populations during the duration of these facility operations (typically 25 to 30 years).” Id. at 10. Moreover, the FWS has warned that if AES fails to minimize and mitigate the predicted 78,250 to 112,125 bat deaths that will result from the New Creek wind power facility, it could lead to “population level impacts” to many species of bats. Attachment A at 18.<sup>18</sup>

While AES has conducted some pre-construction studies of the site – including visual and radar surveys, mist netting, nest surveys, and acoustic monitoring – the FWS has expressed concerns about the length and duration of this research. In comments pursuant to the ESA, Eagle Act, and MBTA on the consultant’s pre-construction reports for New Creek, the FWS stated that data from a single year gave only a snapshot of wildlife use of the site, which was insufficient to predict bird and bat mortality:

[B]ecause of variability in populations and detection rates due to a variety of local and regional factors, one year of data does not necessarily reflect overall species composition or abundance at a site. Thus, the Service recommends multiple years of pre-construction surveys in order to establish a more complete data set.

Id. at 4.

Obtaining accurate information on the wildlife use of the project site is particularly important given the biological and legal significance of the species known or believed to use the forested ridgeline, which would be put at risk by the construction and operation of wind turbines. Moreover, because this project would have additive effects to other wind power facilities in the area, it is incumbent upon AES to collect data sufficient to gauge this project’s cumulative effects.

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<sup>16</sup> The northern myotis also belongs to the same genus (*myotis*) as the Indiana bat and little brown myotis. The three species tend to be associated, and thus the FWS has used the little brown myotis as a surrogate for the Indiana bat at other wind power facilities.

<sup>17</sup> In a draft biological opinion on another Appalachian wind power project in Pennsylvania, the FWS found that the threat posed by WNS significantly reduced the number of bats the wind power facility could take without leading to maternity colony extirpation over time. See FWS Draft Biological Opinion for the Shaffer Mountain Wind Farm (Nov. 2010) (excerpts at “Attachment H”). This biological opinion also uses little brown bats as surrogates for Indiana bats.

<sup>18</sup> For reasons explained below, even these numbers may be inaccurate, and the harm to bat species may be even more grave.

Information available to us through public records requests does not provide a clear picture of what measures AES plans to take to minimize and mitigate bird and bat mortality at the site. We are aware, however, of an October 4, 2010 letter from AES to the FWS that indicates the company's intent to provide an avian and bat protection plan comparable to that proposed for a nearby project called Laurel Mountain, which raises a significant concern that the company will not comply with the ESA. The Laurel Mountain plan does not indicate that the company intends to seek an ITP for listed species prior to construction and operation of the wind turbines at Laurel Mountain. Instead, the plan only contemplates applying for an ITP, with a related HCP, after a protected species has already been taken, which is a patent violation of the ESA. See Beech Ridge, 675 F. Supp. 2d at 580-581. Similarly, we are not aware that AES is planning to apply for a permit under the Eagle Act.

## **DISCUSSION**

### **A. Federally Listed Species are Being Taken and Will be Taken in the Future by the Mount Storm Project in Violation of the ESA and the MBTA.**

We have over the past several years expressed concern about the adverse impact of the Mount Storm project on wildlife. See, eg., Notice Letters from Friends of Blackwater and Defenders of Wildlife (February 3, 2003), and Friends of Blackwater et al. (May 8, 2008) to NedPower and FWS. In response to our concerns, NedPower had previously stated that "it has been working actively... to develop and implement a positive wildlife compliance strategy." Letter from Sam Kalen, VanNess Feldman (Attorney for NedPower) to Eric Glitzenstein, Meyer Glitzenstein & Crystal (June 25, 2008). Now that the project's operations are well underway, and the figures and estimates of wildlife casualties are available, it is evident that there is an inadequate conservation and compliance strategy in place and we therefore continue to be extremely concerned about the take of protected bat and bird species in violation of section 9 of the ESA and the MBTA, as well as the projects' overall impacts on birds and bats. We understand that there are ongoing discussions between the FWS and the developer about the unacceptable impact of the project on wildlife, however we do not believe the agency and the developer have agreed to any concrete steps for adopting and implementing additional mitigation of risk to bird and bat species.

Despite the clear risk that the wind power facility is taking endangered Indiana and Virginia big-eared bats in violation of section 9 of the ESA, the project continues to operate without obtaining an ITP under section 10 of the ESA, an avenue that a federal court has decreed to be "the only way in which the Court will allow the [wind energy] project to continue." Beech Ridge, 675 F. Supp. 2d at 580. Further, in light of the documented and ongoing killing of a large number of bird species protected under the MBTA, the developer is repeatedly and continuously violating the MBTA's prohibition against the take of migratory birds.

We are also concerned, as explained previously, that although the developer has conducted bird and bat mortality studies, these studies are lacking in thoroughness and rigor, which calls into question NedPower's decision to not seek an ITP for the project. See Beech Ridge, 675 F. Supp. 2d at 570, n.37 (observing in the context of ESA violations on the ground of bat mortality due to wind turbines, "[t]he rigor of [bat presence] surveys is relevant to determine the weight the Court must accord the survey results - results which suggest, if credited, that it is less likely that there are Indiana bats present at the [wind energy] project site").

Taking into account the continuing risk to protected wildlife, there is a critical need for the developer to apply for an ITP under the ESA and for the FWS and NedPower to quickly identify effective mitigation measures to significantly reduce bat and bird mortality.

1. The Mount Storm Project is Likely Taking and Will Continue to Take Endangered Indiana Bats and Virginia Big Eared Bats.

It is inevitable that the Mount Storm project is likely taking and will take Indiana bats and Virginia big-eared bats by killing, injuring, wounding, and/or harassing members of those species via turbine collision and barotrauma, in light of several grounds explained below, including the on-going killing of various species of bats over a short period of time at the Mount Storm project site, and the high estimates of overall bat mortality calculated by the FWS. Further, the take of these species by the project has not been permitted by the FWS through the ITP process under section 10 of the ESA. Consequently, NedPower is also in violation of the PSC Order which is contingent upon the project's compliance with the ESA. See PSC Order at 120-121.

Even before NedPower commenced construction of the project, the FWS had informed NedPower that the project would potentially impact endangered bat species such as the Indiana bat and the Virginia big-eared bat. See Attachment B. Despite this information, NedPower refused to obtain an ITP. Since NedPower completed construction of the Mount Storm project and began project operations, bat acoustic surveys conducted at the site indicate a high level of bat activity. See Fall 2008 Report at 32-34; Fall 2009 Report at 35-36. The FWS estimates that the Mount Storm project will kill approximately 174,200 bats over the lifespan of the project, confirming that there is "no question many bats and birds are being killed... [we] [n]eed to switch over to operational changes (cut-in speed adjustment) and studies designed to determine efficacy of those changes." Attachment C. In the span of 12-13 weeks in the fall season alone, nearly 211 bats of various species were killed by the project, including *myotis* species closely related to the Indiana bat. See Fall 2009 Report at 24; Fall 2008 Report at 22. As explained previously, these figures, although substantial, may underestimate the actual bat mortality levels, thus counseling strongly in favor of adopting immediate mitigation measures and beginning the ITP process rapidly as the project is likely taking Indiana bats and Virginia big-eared bats, and will inevitably do so in the future in the absence of an effective protective scheme.

Regardless of the fact that NedPower has not yet reported killing Indiana or Virginia big-eared bats, NedPower should nonetheless be required to obtain an ITP because there is evidence that protected bat species are present at the project site and the project is reasonably certain to either have already taken or imminently harm such species in violation of section 9 of the ESA. See Beech Ridge, 675 F. Supp. 2d at 563-64.

There is substantial evidence confirming the presence of Indiana bats at the project site. Bat acoustic surveys conducted by NedPower for a limited period of time in the fall season alone at a few turbines indicate that more than half of the total bat calls recorded were high frequency bat calls. See Fall 2008 Report at 32-34; Fall 2009 Report at 35-36. The fact that a substantial percentage of the bats in the project area are high frequency bats is cause for concern because Indiana bats come under the category of bat species that call in high frequency. Despite the FWS's requests that it do so, NedPower has not analyzed the acoustic data to identify individual bat species. We strongly recommend that the FWS obtain species-specific data from NedPower and should NedPower continue to decline the FWS's second request, the FWS must make appropriate arrangements with NedPower to obtain copies of the acoustic data so that an independent expert can analyze them for the agency.

Further, in each of the four limited post-construction studies conducted, NedPower has reported the killing of a large number of little brown bats, a species of *myotis* that has similar physical and behavioral characteristics as Indiana bats. During mist net surveys conducted as part of the Appalachian Corridor H study, of which eleven of the sites sampled were within 5 miles of the Mount Storm project site, 35 bats were documented in the sites near the Mount Storm Project, of which 28 bats were from the *myotis* species of bats. See West, Inc., Biological Assessment for the Federally Endangered Indiana Bat (*Myotis sodalis*) and Virginia Big-eared Bat (*Corynorhinus townsendii virginianus*): NedPower Mount Storm Wind Project, Grant County, West Virginia 10-12 (Oct 2003). The little brown bat /*myotis* mortality rates are significant not only relative to the individual species, but also for estimating the impact of the project on the endangered Indiana bat species. Employing little brown bats as a surrogate indicator species to estimate the take of Indiana bats is a practice employed by the FWS and federal courts alike. See, e.g., Attachment H (“[Little brown bats] [are] an appropriate surrogate species because the Indiana bat and little brown bat are closely related, use similar foraging habitats, have overlapping ranges, hibernate in the same caves, and have similar physical characteristics.”); Beech Ridge, 675 F. Supp. 2d at 578. The Beech Ridge case is instructive here because in that case the Court held the developer liable for taking Indiana bats in violation of section 9 of the ESA despite the absence of documented Indiana bat casualties at the project:

Defendants also point out that no Indiana bat has been confirmed dead.... However, other *Myotis* species have been reported killed at wind power projects. Plaintiffs' experts opined that biologically, Indiana bats are no less vulnerable than other *Myotis* species to turbine collisions and barotraumas. The Court agrees with these very credible expert opinions. Plaintiffs have presented compelling

evidence that Indiana bats behave no differently than other *Myotis* species that have been killed by wind turbines and Defendants have failed to rebut this fact. Furthermore, the Court is not surprised that no dead Indiana bat has yet been found at any wind project because few post-mortality studies have been conducted, mortality searches are generally inefficient, and Indiana bats are rare.

Id. at 577-579 (emphasis added) (internal citations omitted).

As noted, the Court's ruling proved prescient since, shortly after the decision, an Indiana bat death was confirmed at a wind power facility in Indiana. News Release, FWS, U.S. Fish and Wildlife Service and Wind Farm Owners Work Together (Feb. 8, 2010).<sup>19</sup>

Moreover, there is no doubt that Indiana bats not only migrate through the project site during the spring and fall, but that they are likely present in the project area year around. Indiana bats use the project area for foraging and roosting habitat. Several Indiana bat hibernacula are located in close proximity to the Mount Storm project area. For example, two Indiana bat hibernacula are located approximately 18 miles south or southwest of the project site and another Indiana bat hibernaculum is located approximately twenty two miles from the project. See West Inc., An Assessment of Potential Collision Mortality of Migrating Indiana Bats (*Myotis sodalis*) and Virginia Big-eared Bats (*Corynorhinus townsendii virginianus*) Traversing Between Caves - Supplement to Biological Assessment 8 (Apr 4, 2004) ("Supplemental Biological Assessment").<sup>20</sup> Ten current Indiana bat hibernacula are within 30 miles of the proposed location for the AES New Creek Wind Power Project, meaning they are also in close proximity to Mount Storm.<sup>21</sup> Lambert Study at 6. Hellhole Cave – situated in the neighboring Pendleton County in West Virginia – is home to more than 12,500 Indiana bats and has been designated by the FWS as critical habitat for the species. Indiana Bat Recovery Plan at 24, 70. At least forty bats were counted, including little brown bats and eastern pipistrelles, both of which are known to hibernate in caves with Indiana bats at a cave that was discovered less than one mile from the NedPower project site. See Dr. Pamela C. Dodds & Arthur W. Dodds, Jr., Bat Survey Report for Small-Foot Cave (Jan 2008).

Additionally, an Indiana bat has been identified at Big Run Bog, which is located approximately 14 miles from the Mount Storm project site. Karen E. Francl, Community Characterization of High Elevation Central Appalachian Wetlands 114 (2003).<sup>22</sup> Approximately

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<sup>19</sup> Available at, <http://www.fws.gov/midwest/News/release.cfm?rid=177>

<sup>20</sup> Available at, <http://www.west-inc.com/reports/finalbatsupplement.pdf>

<sup>21</sup> It should be noted that the NedPower Mount Storm Wind Energy Project and the proposed AES New Creek Wind Energy Project are located in close proximity (approximately three miles) of each other, signifying that the wildlife impacts of the two projects are to a large extent similar.

<sup>22</sup> Available at, <http://coweeta.uga.edu/publications/francl.pdf>

10 miles from Big Run Bog, a stable colony of Indiana bats are being monitored around Big Springs Cave at the Fernow Experimental Forest, which is a known winter hibernaculum for Indiana bats. *Id.* The research conducted on the presence of bats near the Big Run Bog indicates that there is a substantial level of bat activity at high mountain bogs. *Id.* at 116. This fact is relevant because a significant bog called the Helmick Run Bog is located next to the Mount Storm project site.

In sum, although NedPower has not reported any taking of Indiana bats to date, failure to report dead Indiana bats does not mean Indiana bats are not being taken, especially in light of the presence of Indiana bats near the project site; the fact that Indiana bats travel many miles to migrate and forage; the substantial bat casualties caused by the ongoing operations of the project and other nearby wind energy facilities, including the killing of a large number of little brown bats (used as a surrogate for the Indiana bat); the identification by acoustic surveys of a substantial number of bat passes as high frequency bats; and the problems related to the post-construction mortality studies conducted by NedPower, including the limited number of turbines studied, and problems related to searcher efficiency and the scavenging of carcasses between searches.

For similar reasons, given the high bat mortality documented at the project, the project is also likely taking the endangered Virginia big-eared bats. The project is located within five miles of at least two caves known to be used by Virginia big-eared bats. Supplemental Biological Assessment at 8. The closest is approximately 3.5 miles southeast of the southern end of the project site where the FWS has documented the presence of two male and five female Virginia big-eared bats in the cave. *Id.* Further, part of the project site is considered to be within essential foraging and roosting habitat of Virginia big-eared bats. Moreover, 42 caves used by Virginia big-eared bats are located within approximately 54 miles of the project site and the nearby Mountaineer wind energy facility (located approximately 14 miles west of the Mount Storm project site) where unprecedented levels of bat mortality have been documented.

In light of the high bat mortality rate at the project site, the considerable distances traveled by Virginia big-eared bats, the fact that their migratory behavior is highly variable, and the proximity of caves containing these bats to the project site, it is likely that there is and will be take of endangered Virginia big-eared bats caused by the project.

It should be stressed that a project that takes even a single member of a listed wildlife species has violated section 9 of the ESA. See Wind Turbine Guidelines at A7 (explaining the meaning of “take” under the ESA). Given that it is inevitable that the Mount Storm project will result (or will continue to result) in the incidental taking of Indiana bats and Virginia big-eared bats by killing, injuring, wounding, and/or harassing members of those species via turbine collision and barotraumas, NedPower should immediately take appropriate steps to minimize and mitigate

ongoing bat impacts and must apply for the ITP in order to avoid liability under section 9 of the ESA. See e.g., Wind Turbine Guidelines at 58-60 (recommending certain operational measures such as changes in blade but-in speed; blade feathering or idling; seasonal shutdowns or shutdowns of an entire facility; using best practices published by the Avian Power Line Interaction Committee; minimizing lighting on turbines; and turbine setbacks from ridge edges). Just as the court held in the Beech Ridge case, the project may not proceed until and unless NedPower takes appropriate steps to reduce the risks of listed species impacts and to obtain an ITP from the FWS – the legally mandated process for addressing whether and how the takes of endangered species can be authorized. Pursuant to the ITP process, a variety of measures to significantly reduce bat mortality could be adopted. For example, in the draft biological opinion for the Shaffer Mountain wind farm, the FWS required that the developer adopt a tiered approach to implementing protections for Indiana bats, setting forth clear instructions as to the reasonable and prudent measures (“RPM”) necessary to minimize bat mortality and when each measure is triggered. See Attachment H. The biological opinion states:

The adaptive management strategy will reduce the risk of turbine-related mortality. Level 1 of the strategy includes the adoption of a 5.5 m/s turbine cut-in speed during times of the year when Indiana bats are present to reduce fatalities to a level that is RPM-compliant. If the per turbine bat fatalities and proportion of little brown bat fatalities approximate the mean we used to derive fatality estimates for the Shaffer Mountain Wind Farm, we would expect Level 1 of the adaptive management strategy to reduce Indiana bat fatalities to a level that meets or is close to meeting the RPM. However, if take of Indiana bats or the surrogate indicator species (little brown bat) exceeds that which is RPM compliant, the adaptive management strategy sequentially proceeds to additional measures that will further reduce the risk of fatalities, until Indiana bat fatalities are RPM compliant.

Id. at 2.

Further, the Shaffer Mountain draft biological opinion also requires a plan for surveying, monitoring, and reporting on the Indiana bat population within and adjacent to the project area in order to ensure compliance with the established level of incidental take; to assess the effectiveness of the RPMs; and to determine the need for adjustments to turbine operations in accordance with the adaptive management strategy. Id. at 6; see also Wind Turbine Guidelines at 12. Thus, Shaffer Mountain provides an example of certain RPMs that can be adopted by the wind farm developer through a formal consultation process under the ESA, such as the ITP process. Measures such as the RPMs recommended in the biological opinion for the Shaffer Mountain wind power facility are relevant for the Mount Storm project as well, and provide an example of certain RPMs that can be adopted by NedPower through a formal process under the ESA for authorizing incidental take.

## 2. The Mount Storm Project is Taking Migratory Birds Protected under the MBTA.

The MBTA prohibits killing listed birds without the authorization from the Secretary permitting such killing. 16 U.S.C. § 703. The FWS estimates that 37,875 birds will be killed over the lifespan of the project. See Attachment C. The limited post-construction mortality studies conducted by NedPower reveal that over only 38 operational weeks when the studies were conducted (between Fall 2008 and Spring 2010), nearly 131 birds were killed, almost all of which are protected under the MBTA. Avian species protected under the MBTA that have been killed by the Mount Storm wind power facility include broad-winged hawk, red-tailed hawk, sharp-shinned hawk, turkey vulture, red-eyed vireo, wood duck, cedar waxwing, American redstart, and several warblers, including, the common yellowthroat.

In light of this incontrovertible evidence indicating the ongoing killing of several species of migratory birds protected under the MBTA, NedPower is in violation of the MBTA and must urgently adopt effective measures to prevent and mitigate the bird mortality at the project. Further, NedPower is also in violation of the PSC Order which is contingent upon the project's compliance with the MBTA. See PSC Order at 120-121.

Under the MBTA the developer can be held strictly liable for the incidental take of migratory birds, and it is irrelevant whether there is any intention to kill birds. See, e.g., United States v. Apollo Energies, Inc., 611 F.3d 679, 684 (10th Cir. 2010) (“the [MBTA] does not supply a mens rea requirement.”); United States v. Manning, 787 F.2d 431, 435 (8th Cir. 1986) (“it is not necessary to prove that a defendant violated the [MBTA] with specific intent or guilty knowledge.”). Additionally, where a project developer could have, but did not, take reasonable care to prevent avian mortality, it may be held liable under the MBTA. See, e.g., United States v. FMC Corp. 572 F.2d 902, 906 (2d Cir. 1978) (“a person failing to act when he has a duty to do so may be held to be criminally liable just as one who has acted improperly”) (affirming criminal convictions under the MBTA for bird deaths related to pesticide use); United States v. Apollo, 611 F.3d at 684 (failure to bird-proof oil drilling equipment is actionable under MBTA); United States v. Moon Lake Elec. Ass'n, 45 F. Supp. 2d 1070 (D. Co. 1999) (defendant electrical association held liable under the MBTA for the killing of protected birds resulting from its failure to install protective equipment on its power poles).

The FWS has the authority to prosecute wind energy developers for the incidental take of protected migratory birds. See Wind Turbine Guidelines at 6. Indeed, the Wind Turbine Guidelines stress that the FWS should consider a developer's efforts to reduce bird mortality by complying with the Guidelines when it exercises its prosecutorial discretion. Id. Accordingly, there can be no doubt that the FWS could wield its enforcement authority as leverage to ensure implementation of additional protective measures for migratory birds.

Indeed, in the context of the Mount Storm project, the FWS has stated that its Office of Law Enforcement will enforce the MBTA against companies that take migratory birds without implementing conservation measures. See Letter from Thomas Chapman (FWS) to Hieronymus Niessen, NedPower (Aug 7, 2008) (“Attachment I”). The FWS has maintained that “post-

construction assessments [for the Mount Storm project] need to move beyond counts of dead birds and bats in order to begin identifying effective operational parameters that avoid and minimize bird and bat mortality.” See Attachment E. In fact, the FWS has recommended operational changes in the Mount Storm project, such as shutting or feathering down wind turbines from mid-July to mid-October in the early evening hours to substantially reduce mortality, while reducing energy production by only 7 percent. Id.

We understand that the developers of Mount Storm have been in consultation with the FWS over measures to avoid and minimize bird mortality. However, despite such extensive consultations since 2002, in light of the extensive ongoing killing of protected wildlife, no effective measures to reduce bird mortality have been adopted for the Mount Storm project. If the developers of the Mount Storm project do not expeditiously adopt and implement effective conservation measures to avoid and minimize bird mortality, the FWS should make clear that it will enforce the MBTA by prosecuting NedPower for repeated violations at the Mount Storm project site.<sup>23</sup>

**B. The Proposed AES New Creek Project Will Result in the Taking of Protected Species in Violation of the ESA, the Eagle Act and the MBTA.**

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<sup>23</sup> Unfortunately, there are indications from the wind power industry that the FWS has adopted a general policy of non-enforcement of the MBTA with regard to wind power projects. See Laura J. Beveridge, The Migratory Bird Treaty Act and Wind Development, available at, <http://www.stoel.com/files/Stoel0509.pdf>. (“Despite the specter of MBTA liability for incidental take, the wind industry can take some comfort in the fact that criminal enforcement of the act is solely the province of the federal government... While such discretion does not remove liability under the MBTA, it can provide wind developers with some assurance that avian mortality attributable to turbines will not be criminally prosecuted.”). It should be noted that while the FWS does possess enforcement discretion in deciding whom to prosecute, its non-enforcement decisions are reviewable by courts if the agency “has consciously and expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibilities” and if the agency engages in a “pattern of non-enforcement of clear statutory language.” Heckler v. Chaney, 470 U.S. 821, 833 n.4 (1985) (citing Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973)); see also id. at 839 (Brennan, J., concurring) (“It may be presumed that Congress does not intend administrative agencies, agents of Congress’ own creation, to ignore clear jurisdictional, regulatory, statutory, or constitutional commands[.]”). To avoid any potential litigation over whether the FWS has such a policy of non-enforcement as applied to the wind power industry, the FWS should make clear to companies such as NedPower that, unless steps are taken to reduce unacceptable migratory bird impacts, appropriate enforcement actions will be forthcoming. If such steps are not taken, the FWS should initiate enforcement action in the same manner that it would for other significant MBTA violations. An ongoing failure to do so will expose the FWS to liability for policy of MBTA non-enforcement in the context of wind power projects.

We are troubled by the developer's failure to undertake the pre-construction wildlife surveys urged by the FWS and its steadfast commitment to constructing the facility in this specific location, despite indications that New Creek Mountain may serve as an important migration corridor and that construction of the project would therefore result in unreasonable levels of bird and bat mortality. We are also concerned about the apparent disinterest of AES in applying for incidental take permits under the Eagle Act and ESA for that take that is unavoidable. The information available to us suggests that the proposed AES New Creek project will have similar unacceptable wildlife impacts as the Mount Storm project given the close proximity in which the two projects are located. Despite the experience at the Mount Storm site, AES has not committed to taking the measures required by the Eagle Act, ESA, and MBTA to prevent bird and bat mortality in connection with its proposed New Creek Mountain facility.

As discussed above, the FWS has expressed concern about the effect of the project on migrating raptors, other birds, and endangered bat species. Given that radar data indicate a particularly high level of passage at New Creek Mountain, especially at altitudes in the rotor-swept zone, this particular site may well present an unacceptably high risk of mortality to federally protected wildlife. Prior to investing any further resources into developing this particular site, AES should heed the FWS's recommendation that it undertake multi-year pre-construction surveys to evaluate how migrating raptors, endangered Indiana and Virginia big-eared bats, golden eagles, and other species use the area.

In the Beech Ridge decision, the FWS had recommended that the wind power developer conduct multiple years of pre-construction surveys and conduct mist-net surveys during fall and spring migration to assess the project's impact on endangered bats. 675 F. Supp. 2d at 554; see also Wind Turbine Guidelines at 23 ("The first step for developers will likely be to identify and eliminate from consideration those areas that are precluded from development or are inappropriate for development based on high levels of risk to fish, wildlife, and/or their habitats.") (emphasis added). There, Judge Titus expressed the court's displeasure that the company had ignored these recommendations due to "the *financial burden* on Defendants and [the] *delay* [to] construction of the project," despite the presence of nearby hibernacula, the physical characteristics of the project site, and the known presence of *myotis* bats. 675 F. Supp. 2d at 582. The company's failure to implement the pre-construction surveys recommended by the Service inspired "little confidence" in the court, which expressed skepticism that the company would actually implement adaptive management strategies to reduce bat mortality after the project was constructed, as defense counsel had argued. Id. at 579-80. Thus, the court enjoined the wind power facility until the developer sought an ITP permitting it to take endangered bats. AES risks a similar outcome at the New Creek project site if it continues to ignore the recommendations of the FWS that multi-year pre-construction surveys are necessary to assess the wind power facility's impacts to endangered bats and federally protected raptor species, including golden eagles. Therefore, we strongly urge AES to conduct the pre-

construction studies urged by the FWS if it decides to continue to pursue the development of a wind power facility at New Creek Mountain.

As explained previously in the context of the Mount Storm project, the developer should not discount the possibility – which is supported by many of the data from preliminary studies – that developing a wind power facility at this particular location would pose an excessive risk to Virginia big-eared bats or Indiana bats, particularly given the species’ precarious population status. At minimum, additional surveys would play a crucial role in micro-siting, i.e., determining where turbines should be located to minimize bat and bird impacts. See Wind Turbine Guidelines at 56 (“If a proposed wind development is poorly sited with regard to wildlife effects, the most important mitigation opportunity is largely lost and the remaining options can be expensive, with substantially greater environmental effects.”).

If such pre-construction surveys indicate that this location would allow for development of a wind power facility without excessive wildlife impacts –which is far from certain, given the preliminary data – then AES must set forth a clear plan for minimizing and mitigating bird and bat mortality at the site before construction begins. As explained above, an avian and bat protection plan comparable to that proposed for a nearby project called Laurel Mountain would not comply with the requirements of the ESA. Where there is an indication that the site is likely to take endangered or threatened wildlife species, or harm golden eagles, the company must seek incidental take authorization prior to construction and operation of the wind power facility.

Given the serious concerns that the FWS has expressed over the future take of golden eagles and ESA-listed bat species at the proposed New Creek Mountain wind power facility, we believe that if AES does decide to go forward with constructing a wind power facility at this location, it must pursue incidental take authorizations prior to construction. The approach proposed by the developer in the Laurel bird and bat protection plan – upon which the New Creek Mountain bird and bat protection plan would be based – is insufficient to comply with the Eagle Act and the ESA, since the plan only contemplates applying for a permit to take endangered species after an individual of that species has been killed. Both the Eagle Act and the ESA are intended to be protective statutory mechanisms, and both now provide mechanisms to allow individuals and companies to apply for permits to authorize the “take” of protected species incidental to lawful activities. Take permits under both statutory and regulatory schemes are prospective, requiring application and authorization prior to killing or harming protected species, and allowing the FWS to take enforcement action if take exceeds the amount set forth in a permit. See, e.g., 50 C.F.R. § 22.26(d)(1) (encouraging early coordination with the FWS on activities that may result in the incidental take of eagles).

Applying for permits prospectively is the only lawful approach, as this project is likely to kill or harm golden eagles and Indiana and Virginia big-eared bats, for many of the same reasons that the Mount Storm facility is likely taking these species now, and both the Eagle Act and the ESA have prohibitions on take that would apply absent valid permits. Further, applying for these

permits is the only approach that ensures the conservation of these species. Under the ESA, the FWS may only issue permits where the take will not jeopardize the species; similarly, the Eagle Act regulations require that the take be “compatible with the preservation of the bald eagle and the golden eagle.” *Id.* § 22.26(a). These requirements ensure that the amount of take is sustainable, particularly given the cumulative effects of NedPower and other nearby projects. Permits under both statutory frameworks also allow the FWS to impose RPMs to reduce take and require mitigation for the take that is authorized, thus minimizing and negating, to the extent possible, the harm from the activity. For example, as noted previously, the draft biological opinion for the Shaffer Mountain wind power facility requires the developer to adopt the “adaptive management strategy” to minimize bat mortality. *See* Attachment H. At a minimum, before any construction proceeds, similar measures should be considered for the New Creek Mountain facility, pursuant to an ITP process.

For the reasons discussed above in relation to the NedPower Mount Storm wind power facility, AES must also fulfill its responsibility to minimize take at New Creek Mountain as much as possible to prevent violations of the MBTA. At a minimum, in addition to pre-construction surveys as recommended by the FWS, the developer should adopt temporary, seasonal shutdowns during periods of peak bird use, such as certain times of day or weather conditions during migration. In other locations, economic analysis of such temporary, seasonal shutdowns has shown that they result in a negligible loss of income to the developer. *See, e.g.,* Jonathan A. Lesser, Critical Analysis of the Barclays Capital Letter Opinion Regarding Proposed Operating Restrictions for the Cape Wind Project to Comply with the Endangered Species Act (April 2010) (“Attachment J”).

Moreover, as the developer of the nearby Laurel Mountain wind power facility, AES itself stands in a unique position to make a meaningful contribution to reducing cumulative impacts to migratory birds by taking protective measures at both facilities, and by applying data collected at one facility to the other via adaptive management. AES should plan the placement of turbines based on the best information about factors that increase risk of mortality for migratory birds, and once the facility is operational, reduced cut-in speeds, temporary shutdowns, and any other available mechanisms should be employed to reduce mortality.

If AES does not take all available precautions to avoid and reduce mortality of migratory birds, the FWS has the responsibility and duty to enforce the MBTA as previously discussed. *See supra* at 19. To be clear, enforcement of the MBTA is not limited to actions that are intended to take migratory birds. Elsewhere, the FWS has brought enforcement actions against defendants where the take of migratory birds was incidental to otherwise lawful activities, including energy generation. In those cases, the FWS has explicitly argued, and courts have found, that the protections of the MBTA do not require intent to harm or kill birds. *See, e.g., United States v. Moon Lake*, 45 F. Supp. 2d 1070 (holding that the MBTA prohibits the unintentional killing of protected birds by power lines); *United States v. Corbin Farm Serv.*, 444 F. Supp. 510, 532-36 (E.D. Cal. 1978) (holding that the MBTA prohibits the unintentional killing

of protected birds by pesticide poisoning); see also Sen. Rep. No. 99-445 at 16 (1986), reprinted in 1986 U.S.C.C.A.N. 6113, 6128 (explaining that an amendment to the MBTA requiring scienter for felony violations does not prevent application of a strict liability standard in other contexts).

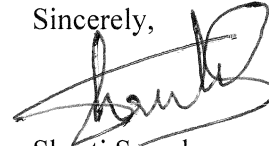
## CONCLUSION

At both Mount Storm and New Creek, we are deeply concerned that the FWS and the developers are failing to translate factual findings of significant wildlife impacts and risks into effective measures to avoid and minimize bird and bat mortality. In the absence of a comprehensive compliance and enforcement mechanism taking the place of the current ad hoc system of consultation between the FWS and the developer, the taking of listed species at these sites, although avoidable, appears to be inevitable and in violation of federal laws. Congress has provided for such an enforcement mechanism in the form of the permitting process under the ESA and the Eagle Act; however, NedPower and AES have failed to pursue this mandatory process. In the Beech Ridge case, where the wind power project developer did not apply for the ITP under the ESA, the court held that “[b]ecause entirely discretionary adaptive management will not eliminate the risk to Indiana bats, the Court has no choice but to award injunctive relief....while this Court cannot require [the developer] to apply for or obtain [the ITP], it is the only way in which the Court will allow the [ ] Project to continue.” Beech Ridge, 675 F. Supp. 2d at 580-81. The court concluded that the only avenue available to the developers “to resolve the self-imposed plight in which they now find themselves is to do belatedly that which they should have done long ago: apply for an ITP.” Id. at 583. Here too, pursuing an ITP for the take of endangered bats is the only appropriate course of action if these projects are to proceed. Additionally, the FWS must ensure that the developers of the Mount Storm and the AES New Creek projects adopt and implement appropriate conservation measures to avoid, minimize and mitigate mortality of migratory birds protected under the MBTA, and in the event of their failure to do so, the FWS must take appropriate enforcement action against the liable parties.

Accordingly, we request that you document, as soon as practicable, concrete actions that the FWS and/or developers of the Mount Storm and AES New Creek projects intend to take to address the concerns raised in this letter, including any decision as to whether take authorization will be pursued under the ESA and Eagle Act. We also request information on what measures to avoid, mitigate and minimize bat and bird mortality the developers of the Mount Storm and AES New Creek projects have adopted, in consultation with the FWS.

Please do not hesitate to contact us if you wish to discuss this matter or have any questions concerning this letter. We would like to work with the FWS and the companies to address the serious wildlife impact, and threats, posed by the Mount Storm and AES New Creek projects, although we will consider alternate avenues of ensuring compliance with federal wildlife protection laws if necessary.

Sincerely,



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