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cc: Julie Falkner <JFALKNER@defenders.org>, "Kreitler, Ginny"  
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Subject: Midwest Wind HCP Scoping Comments

Please accept these comments on the Notice of Intent to Prepare the Midwest Wind Energy Multi-Species Habitat Conservation Plan, submitted on behalf of the Natural Resources Defense Council, National Audubon Society, and Defenders of Wildlife. Thank you for your consideration of our views.

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December 3, 2012

Regional Director  
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\*Submitted by U.S. Postal Service and via E-mail at [midwestwindhcp@fws.gov](mailto:midwestwindhcp@fws.gov).

Re: Comments on the Notice of Intent to Prepare the Midwest Wind Energy Multi-Species Habitat Conservation Plan

Dear Mr. Amidon:

On behalf of the Natural Resources Defense Council (NRDC), National Audubon Society, and Defenders of Wildlife, we write to comment on the U.S. Fish and Wildlife Service's (FWS) notice of intent<sup>1</sup> to prepare the Midwest Wind Energy Multi-Species Habitat Conservation Plan (MSHCP), under the Endangered Species Act of 1973, as amended (ESA). In its notice, FWS requests public input, suggestions, and information on any issues pertaining to this planning process, as well as regarding the permit area within the eight-state planning area.

We appreciate the opportunity to highlight our principal concerns at this initial scoping phase, which we believe are fundamental to a successful MSHCP. These issues can be summarized as:

- Ensuring a fully transparent, collaborative and scientifically-based process throughout the duration of the MSHCP;
- Incorporating quantitative standards and thresholds for both species and habitat impacts;
- Including impact avoidance, minimization, and mitigation measures consistent with the conservation and, where appropriate, recovery of the covered species;
- Considering identification of areas inappropriate for development based on high ecological and or cultural values, such as core habitats for imperiled or candidate species, Important Bird Areas and Natural Heritage sites;

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<sup>1</sup> Draft Midwest Wind Energy Multi-Species Habitat Conservation Plan Within Eight-State Planning Area, 77 Fed. Reg. 52754 (August 30, 2012).

- Delineating a prioritization of individual take issuance and conservation priorities, and providing flexibility to deal with changed or unforeseen circumstances;
- Considering inclusion of additional sensitive species that regularly occur in much or all of the proposed eight-state planning area that are declining rapidly and/or have very small populations or limited ranges, face major conservation threats and could benefit from inclusion in the MSHCP;
- Ensuring that the standards of the Bald and Golden Eagle Protection Act (BGEPA) are adhered to; and
- Ensuring the continued full and unimpaired oversight and enforcement authority of FWS throughout the life of the MSHCP, especially as it relates to the proposed permit structure.

Our groups strongly support the development of responsibly sited and mitigated renewable energy projects, including wind generation projects, to meet the challenge of climate change by reducing cumulative greenhouse gas emissions. However, renewable energy development is not appropriate everywhere and must be managed in such a way that, to the maximum extent possible, protects wildlife, wildlands and other natural resources while ensuring full compliance with all applicable laws. Pursuant to its statutory authority, FWS has a vital role to play on private and public lands in ensuring that wind projects are sited responsibly and properly mitigated; but the FWS must also safeguard against what are potentially unmitigable impacts. Hence, the consideration of this regional MSHCP represents a potentially important and positive prospective step forward in this regard.

**Recommendation: Prior to issuance of an Incidental Take Permit (ITP), FWS should clearly articulate the process for ensuring transparency throughout the full duration of the MSHCP, as well as the mechanisms that will be incorporated to ensure public access to the full suite of data and information gathered and evaluated as part of the MSHCP—for example, mortality and mitigation monitoring reports available through a publicly accessible database.**

From the onset, we believe that the FWS should approach this process with extreme caution given the expansive coverage and potential reach of the environmental impacts associated with this proposed action. The contemplated MSHCP and accompanying ITP could authorize take of numerous federally listed and candidate species within portions of Illinois, Indiana, Iowa, Michigan, Minnesota, Missouri, Ohio, and Wisconsin, covering decades of regional-level construction, operation, and maintenance associated with multiple commercial wind energy facilities, and potentially include over 27 million acres of covered lands.

For this reason, it is of the utmost importance that FWS guarantees a firm, upfront commitment to a collaborative, transparent and scientifically-based process in both assessing and administering this action. Moreover, any MSHCP must provide liberal room for continuous independent assessment and subsequent modification of its provisions based on evolving scientific developments and protocols. Such flexibility will provide crucial opportunities to assimilate potential technological advancements during the life of the MSHCP, while also ensuring the greatest benefits to wildlife resources. Finally, given the scale and scope of the proposed MSHCP, the public must be afforded real and substantial opportunities to engage in and monitor the development and implementation of this MSHCP.

**Recommendation: Identify definitive standards and thresholds for both species and habitat impacts, and delineate a clear prioritization of individual take issuance and conservation priorities.**

We recommend that FWS clearly identifies definitive standards and thresholds for both species and habitat impacts, based on quantifiable limits and durations, as well as sets forth a meaningful prioritization scheme for individual take authorization and mitigation measures. This is especially important when dealing with such imperiled species as the endangered Indiana bat (*Myotis sodalis*) and gray bat (*Myotis grisescens*), where investments in conservation measures to recover these species must not be compromised. Great care must also be given to other listed species—such as the piping plover (*Charadrius melodus*), interior least tern (*Sternula antillarum athalassos*), and Kirtland’s warbler (*Setophaga kirtlandii*)—and those other special status species that may benefit from inclusion in such an HCP.

Due to lack of comprehensive industry-specific data on a landscape scale and on localized impacts, as well as limitations in predicting future wind development scenarios, a wind industry-specific, eight-state planning area presents particular difficulties in estimating total species and habitat impacts likely to result from the MSHCP. In order to compensate for these uncertainties, it is vital that FWS sets forth a justifiable prioritization scheme that includes take permit issuance caps and other limitations placed on cumulative impacts to both sensitive species and habitats, as mentioned above, as well as a clear rationale for how the FWS will allocate take permits between applicants to meet or exceed conservation priorities and objectives.

Priorities should be delineated—with respect to issuance of individual take authorizations, associated avoidance, minimization and mitigation measures, and accompanying conservation priorities—with an ultimate goal of helping to identify priority areas for development, restricted areas and associated actions. FWS should not authorize permits based merely on the order that applicants line up in a queue, but rather based on the region-wide conservation objectives and landscape scale planning that is dictated by the proposed MSHCP. Articulating this process upfront will help to ensure that take permits and other impacts are authorized in a manner that facilitates properly sited and environmentally responsible renewable energy development. Such action will also be required, at a minimum, to ensure that authorized incidental take will be adequately minimized and mitigated to the maximum extent practicable and "not appreciably reduce the likelihood of the survival and recovery of the species in the wild."<sup>2</sup>

**Recommendation: The MSHCP must include impact avoidance, minimization, and mitigation measures in a manner consistent with the conservation and, where appropriate, recovery of the covered species.**

Benefits to species can include certain adverse impacts avoided as a result of a project, such as commitments to forgo actions that would harm covered species. FWS should evaluate benefits and harms using the same biological metric, and ensure that the metric directly or indirectly informs the FWS about the status of the species itself, as opposed to only the status of the species' habitat or other proxies for species status. For example, the FWS could evaluate how a proposed development project would diminish a species' probability of survival and reproductive rate, and compare that diminishment to the expected increase in both factors as a result of the avoidance, minimization, and compensatory mitigation performed under a project covered by the MSHCP.

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<sup>2</sup> 16 U.S.C § 1539(a)(2)(B).

**Recommendation: Consider identifying areas inappropriate for development based on high ecological and or cultural values, such as core habitats for imperiled or candidate species, Important Bird Areas and Natural Heritage sites.**

It is imperative that project approvals under this MSHCP remain consistent with the Land-Based Wind Energy Guidelines which emphasize the primacy of avoidance and which note that some areas “may be inappropriate for development because they have been recognized as having high wildlife value based on their ecological rarity and intactness.”<sup>3</sup> In addition, we note that the states’ proposal to establish this MSHCP argued that “a primary outcome of the Midwest Energy MSHCP is to develop avoidance and minimization measures that will protect important ecosystem functions.”<sup>4</sup> We suggest that FWS give consideration to a range of ecologically and culturally sensitive areas beyond just designated critical habitat for federally listed species, such as areas identified by state or federal agencies as core habitats for imperiled or candidate species, Important Bird Areas, Important Mammal Areas, and Natural Heritage sites, when identifying lands of known high ecological or cultural value where sound conservation planning would avoid negative impacts. The states’ 2009 plan also notes the ecological sensitivity of the Great Lakes shorelines,<sup>5</sup> further suggesting close examination of ecological impacts within this land-water interface.

**Recommendation: FWS must incorporate greater flexibility to deal with changed or unforeseen circumstances, including automatic triggers and meaningful provisions for reassessment and additional action.**

Considering the expansive scale and scope of the MSHCP as well as the many outstanding uncertainties associated with the proposed action, the success of this MSHCP will depend heavily on effective adaptive management. It will therefore be necessary to incorporate greater flexibility and ability for FWS to immediately require and incorporate adaptive management procedures into the ITP to deal with changed or unforeseen circumstances—including additional land, water, or financial compensation or additional restrictions on the use of land, water, or other natural resources. This would also include definitive mechanisms or triggers whereby negative impacts are identified, modified, mitigated and, where necessary, halted.

There are numerous mechanisms that FWS should consider to increase its ability to adaptively manage for changed circumstances including, for example:

- Definitive population and cumulative take thresholds with automatic triggers for remedial mechanisms;
- Additional public review processes with established decision points and a schedule of evaluation and reporting;
- Automatic feedback loops to assess changed circumstances and incorporate new information into the conservation plan, especially with respect to habitat or species status;
- Structured third party technical review, including data assessment as well as recommendations for incorporating meaningful adaptive management; or
- A shorter permit tenure or duration limits to enable renegotiation of conservation and mitigation measures.

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<sup>3</sup> U.S. Fish and Wildlife Service, *U.S. Fish and Wildlife Service Land-Based Wind Guidelines* (2012), p. vi.

<sup>4</sup> *Development of a Multi-species Habitat Conservation Plan for Wind Energy Development in the Midwest*, Submitted by the states of Indiana, Ohio, Michigan, Minnesota, and Iowa (August 2009), p. 12.

<sup>5</sup> *Id.*

While we believe that providing sufficient regulatory assurances to incentivize responsible wind development is vital to an effective MSHCP, in this particular case too rigid an application of the “no surprises” assurances policy may not be feasible. At a minimum, FWS should leave open the possibility to identify and ask participants to voluntarily commit additional conservation measures should certain unplanned events occur in the future. This could be done, for example, by incorporating language within “changed circumstances” provisions that identify certain population declines that warrant a re-evaluation of the conservation and mitigation measures set forth in the MSHCP. Certain identified “changed circumstances” could be significant enough to warrant revised conservation measures or permit termination. Such provisions may offer a critical safety net for responding to unexpected events that may prevent the MSHCP from fulfilling its conservation goals and will help to address scientific uncertainty. FWS must be mindful of the difficulty in estimating species and habitat impacts stemming from large-scale wind development, as well as the relative nascence of scientific data and modeling establishing such impacts, and especially where scientific uncertainty exists over accepted wildlife protection measures, best management practices, and take estimates.

**Recommendation: Consider inclusion of additional sensitive species that regularly occur in much or all of the proposed eight-state planning area that are declining rapidly and/or have very small populations or limited ranges, face major conservation threats and could benefit from inclusion in the MSHCP.**

We wish to initially flag our concerns regarding a larger set of species beyond those preliminarily identified for inclusion in the MSHCP and would ask that consideration be given to establishing a monitoring and mitigation framework that would include eight Audubon WatchList Red species that regularly occur in much or all of the eight-state area covered in this MSHCP. These species are declining rapidly and/or have very small populations or limited ranges, face major conservation threats and could benefit by inclusion in the MSHCP; some are identified species of global conservation concern.

Additional species relevant to the proposed MSHCP area that should be analyzed and considered for inclusion under the MSHCP include:

- greater prairie-chicken (*Tympanuchus cupido*)
- yellow rail (*Coturnicops noveboracensis*)
- black rail (*Laterallus jamaicensis*)
- whooping crane (*Grus Americana*)<sup>6</sup>
- buff-breasted sandpiper (*Tryngites subruficollis*)
- Bell’s vireo (*Vireo belli*)
- golden-winged warbler (*Vermivora chrysoptera*), and
- Henslow’s sparrow (*Ammodramus henslowi*).

Investigation into the probability of impact of wind development on these species is warranted because, in addition to current declines, these species may be affected by: 1) loss, fragmentation, and/or degradation of breeding or stopover habitat; 2) collisions with transmission structures, wires, or fences; 3) having a preponderance of the range in the MSHCP area or having the highest densities of breeding populations in the affected area; 4) almost complete loss of native breeding habitat, leading to increased importance of remaining native habitat; 5) listing as a FWS ‘focal

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<sup>6</sup> Our groups are aware of concurrent efforts to address impacts to whooping cranes, notably the Great Plains Habitat Conservation Plan. At this time we merely request additional clarification on whether and how consideration will be given to whooping cranes in this MSHCP, especially with respect to any experimental populations that occur within the eight-state planning area.

species;’ 6) significant financial investment in each individual of an Experimental population; and/or 7) potential imminent listing under the ESA.

**Recommendation: With respect to bald and golden eagles, in particular, FWS must ensure that the requirements of BGEPA are adhered to and should not incorporate eagles into this MSHCP until a legally sound and scientifically credible framework for the programmatic take of eagles has been established. If eagles are included in the MSHCP, however, FWS should clearly explain the terms of incorporation and adherence to the preservation standard.**

With respect to the bald eagle (*Haliaeetus leucocephalus*), in particular, we must highlight that federal protection for bald eagles is provided by BGEPA. The ESA and BGEPA are separate statutes, with separate permitting regimes and compliance requirements. If incidental take permits under the ESA are used to satisfy BGEPA permitting requirements, ESA permits must, at a minimum, incorporate all BGEPA requirements and standards. Likewise, with respect to golden eagles (*Aquila chrysaetos*), which are also protected under BGEPA, if bald eagles are incorporated as “covered species” then we recommend that golden eagles be simultaneously discussed and considered for inclusion—as the proposed MSHCP area also includes parts of their range.

As we’ve stated in previous comments,<sup>7</sup> we reiterate the need for FWS to institute a legally sound and scientifically credible framework for authorizing the programmatic take of bald and golden eagles here, and note that we will continue to be faced with confusion and uncertainty in analyzing eagle take issues until that time. Due to the continued lack of clarity provided by a comprehensive eagle permitting and conservation program, as well as outstanding proposed eagle permitting rules and draft eagle conservation plan guidance, we suggest that bald and golden eagles are not incorporated as covered species under this MSHCP.

If bald and golden eagles are incorporated into the MSHCP, though, FWS must fully satisfy and explain the incorporation of requirements under BGEPA in the MSHCP and ITP, including adherence to the preservation standard. More specifically, and while not exhaustive of our concerns, there are two immediate issues that must be addressed and adhered to under the current regulatory scheme if eagles are being considered as “covered species” under this MSHCP. First, FWS must delineate how any action authorized under the proposed MSHCP or potential ITP will ensure that any eagle take is compatible with the preservation of each species, defined by FWS as “...consistent with the goal of increasing or stable breeding populations.”<sup>8</sup> And second, FWS must ensure that any take authorized does not exceed that allowed by the preservation standard by adhering to regional take thresholds for each species determined using the methodology contained in the 2009 Final Environmental Assessment (FEA). This means that take thresholds for eagle permits must be set regionally by Bird Conservation Region (BCR) or FWS region, rather than programmatically throughout the MSHCP area—and we note that the proposed MSHCP area includes more than one BCR.<sup>9</sup>

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<sup>7</sup> Comments on Proposed Changes in the Regulations Governing Eagle Permitting submitted to FWS July 12, 2012, by National Audubon Society, Defenders of Wildlife, Natural Resources Defense Council, The Wilderness Society, Sierra Club, and numerous Audubon Chapters and Friends. Docket No. FWS–R9–MB–2011–0054 and FWS-R9-MB-2011-0094.

<sup>8</sup> 74 Fed. Reg. 46838-9 (September 11, 2009).

<sup>9</sup> *Id.*

**Recommendation: Consider accommodation of FWS' robust and unimpaired oversight and enforcement capability in choosing a permitting approach.**

Finally, with respect to the overall structure of the ITP—whether it be a template/ umbrella or programmatic MSHCP, we recommend that any structure chosen consider the accommodation of the robust and continuous oversight and enforcement capability of FWS. Considering the substantial scope of this potential ITP, FWS must be able to ensure full compliance with federal wildlife laws, including BGEPA, as well as successful monitoring for compliance, effectiveness, and impacts. Such authority must be the top priority in examining any alternative permit structures as it falls squarely within FWS' mission of working with others to conserve, protect and enhance fish, wildlife, and plants and their habitats for the continuing benefit of the American people. For these reasons and regardless of the permit structure chosen, it is imperative that FWS clearly articulates the manner in which it will exercise its statutory authority, as well as how it will ensure the continuing validity of all actions stemming from any proposed ITP.

Again, our groups recognize the groundbreaking effort being undertaken through this MSHCP and potential ITP, especially as a catalyst for facilitating the development and operation of wind projects in an environmentally responsible manner. Not only could such an authorization provide a greater degree of certainty for the development of wind resources throughout the region, but it could also create a reliable mechanism whereby landscape level environmental planning is effectively incorporated into such development.

Thank you in advance for considering our views. If you have any questions or would like further clarification, please do not hesitate to contact us.

Sincerely,

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