



***Bureau of Land Management  
Director's Summary Protest Resolution  
Report***

**Borderlands Wind Project  
RMP Amendment and Final  
Environmental Impact  
Statement (PRMPA/FEIS)**

July 20, 2020

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## *Acronyms*

<b>BLM</b>	Bureau of Land Management
<b>BLWP</b>	Borderlands Wind Project
<b>DEIS</b>	Draft Environmental Impact Statement
<b>EIS</b>	Environmental Impact Statement
<b>FEIS</b>	Final Environmental Impact Statement
<b>NEPA</b>	National Environmental Policy Act
<b>PRMPA</b>	Project Amendment and Final Environmental Impact Statement
<b>RMP</b>	Resource Management Plan
<b>USFWS</b>	U.S. Fish and Wildlife Service
<b>USGS</b>	U.S. Geological Survey

## *Protesting Party Index*

<b>Letter No.*</b>	<b>Protester</b>	<b>Organization</b>	<b>Determination</b>
PP-NM-BorderlandsRMPA-20-003	Stephen Hooper		Dismissed – Comments Only
PP-NM-BorderlandsRMPA-20-004	William May		Dismissed – Incomplete <sup>Δ</sup>
PP-NM-BorderlandsRMPA-20-006	Lif Strand		Dismissed – Comments Only
PP-NM-BorderlandsRMPA-20-007	Laura Brush		Dismissed – Comments Only
PP-NM-BorderlandsRMPA-20-008 <sup>†</sup>	Alex Daue	The Wilderness Society	Denied
PP-NM-BorderlandsRMPA-20-009	Ralph & Jennifer Fink		Dismissed – Comments Only

\* Letters PP-NM-BorderlandsRMPA-20-001 and -002 were test entries by the Bureau of Land Management. They are not included here. Letter PP-NM-BorderlandsRMPA-20-005 was submitted by the Gila National Forest, but was specifically noted by the Forest Service as not being a protest letter. Therefore, it is not included here.

† This letter had multiple signatories in addition to Alex Daue with The Wilderness Society. They included Garry George with National Audubon Society, Rupak Thapaliya with Defenders of Wildlife, and Katie Umekubo with Natural Resources Defense Council.

Δ The protesting party did not include one or more of the requirements at 43 CFR 1610.5-2(a)(2)(i)-(v) with their submission:

- The name, mailing address, telephone number, and interest of the person filing the protest
- A statement of the issue(s) being protested
- A statement of the part(s) of the proposed plan or amendment being protested
- A copy of all documents addressing the issue(s) that were submitted during the planning process by the protesting party or an indication of the date the issue or issues were discussed for the record during the planning process (at a minimum the protesting party must indicate how they participated in the planning process)
- A concise statement explaining why the State Director's decision is believed to be wrong

## *NEPA – Wildlife Impact Analysis*

### *The Wilderness Society*

*Alex Daue*

**Issue Excerpt Text:** Applicant’s Eagle Management Plan was not provided in the DEIS for public comment, but included only in the FEIS to analyze the Affected Environment and Environmental Consequences across all Alternatives, and the FEIS does not indicate whether the USFWS has approved or even worked with Applicant on this plan.

In effect, BLM is setting a disturbing precedent through the seeming blanket adoption of Applicant’s Eagle Management Plan and its associated science, data, modeling and proposed mitigation measures without USFWS approval and full public engagement...

BLM includes only minimal data, science and coordination from USFWS in the environmental review process or FEIS, seemingly from one consultation, and defers final decision-making on actions to mitigate impacts to eagles such as the voluntary compensatory mitigation amount to a later date. BLM instead relies significantly on and presents data and science from Applicant’s Eagle Management Plan, which is only loosely based on USFWS guidance documents and includes privately conducted modeling and analyses to determine expected eagle take....Because the Eagle Management Plan is only just being presented in the FEIS, the public has yet to have an opportunity to provide meaningful comments

### *The Wilderness Society*

*Alex Daue*

**Issue Excerpt Text:** This is especially concerning because expected impacts to eagles have been deemed “major” at BLWP with an expected take of two eagles within the first five years of operation...Without an eagle permit and close coordination with the USFWS over the life of the project, the true impact to eagles at this site and to the population of eagles in the Eagle Management Unit monitored by USFWS through the permit process will be unknown...

BLM cites USFWS data or science that there “would be a cumulative take of two golden eagles over a five- year period.” BLM then denies any analysis of the cumulative effects of the Proposed Action on eagles and states that “ an assessment of eagle take for the 35-year life of the project is not currently available” because “USFWS typically re-evaluates the potential for take every 5 years based on post-construction monitoring data and documented fatalities” (FEIS, p. 3-77). However, this standard of review only occurs if an Applicant has an eagle permit and would therefore not occur in this case since Applicant has decided not to apply for a permit.

BLM concludes with the analysis that “[mortality of golden eagles that may result from the Proposed Action would constitute localized and regional, short- and long-term, major impacts on golden eagle populations” and provides no effort to minimize this major impact other than Applicant’s Eagle Management Plan (emphasis added).

The same conclusion applies for bald eagles: “mortality of bald eagles that may result from the Proposed Action would constitute localized and regional, short- and long-term, major impacts on bald eagle populations.” (FEIS, p. 3-77). BLM has failed to describe any details surrounding these conclusory statements and the FEIS is noticeably devoid of mechanisms or strategies to address, nonetheless avoid and minimize, such impacts.

### *The Wilderness Society*

*Alex Daue*

**Issue Excerpt Text:** Instead of incorporating the “best available science” and broad range of expertise in eagle management and conservation from USFWS, USGS or other federal agencies or eagle experts in the FEIS, BLM almost exclusively relies on the data and science provided by

Applicant in their Eagle Management Plan. This science includes an alternate Collision Risk Model that predicts mortality of eagles by collision with turbines at half that predicted by USFWS Collision Risk Model, with no accompanying data on that model and no review of that model by USFWS. BLM seemingly relies on voluntary compensatory mitigation based on Applicant's model in the FEIS, without consultation with the USFWS and in contradiction with its eagle permit program.

**Summary:**

BLM failed to provide adequate impact analysis for bald and golden eagles because:

- They relied on the applicant's Eagle Management Plan (EMP) for the baseline data, science, data, modeling, and proposed mitigation in the analysis without input from the U.S. Fish and Wildlife Service (USFWS) or U.S. Geological Survey (USGS) or other federal experts;
- They did not perform an adequate cumulative analysis of the take of eagles; and,
- The EMP was not provided in a timely manner to allow for public comment on its content.

**Response:**

As described in Section 2.2.2, *Resource Management Plan (RMP)* of the Borderlands Wind Project Amendment and Final Environmental Impact Statement (PRMPA/FEIS) (BLM 2020), the RMP amendment analyzed in the build alternatives is to amend the Visual Resource Management (VRM) Class II and III objectives in the Socorro Field Office RMP to VRM Class III and IV objectives, respectively, for the proposed management activities. The proposed amendment would also amend the existing plan to remove the right-of-way (ROW) avoidance area along U.S. 60.

The Council on Environmental Quality's (CEQ) regulations implementing National Environmental Policy Act (NEPA) require that agencies use "high quality information" (40 Code of Federal Regulations [CFR] 1500.1(b)). NEPA regulations require the BLM to "insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements" (40 CFR 1502.24).

*The Bureau of Land Management (BLM) NEPA Handbook* also directs the BLM to "use the best available science to support NEPA analyses, and give greater consideration to peer-reviewed science and methodology over that which is not peer-reviewed" (BLM Handbook H-1790-1, p. 55). Under the BLM's guidelines for implementing the Information Quality Act, the BLM applies the principle of using the "best available" data in making its decisions (BLM Information Quality Act Guidelines, February 9, 2012).

Additionally, NEPA directs that data and analyses in an Environmental Impact Statement (EIS) must be commensurate with the importance of the impact (40 CFR 1502.15), and that NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail (40 CFR 1500.1(b)). The BLM is required to take a "hard look" at potential environmental impacts of adopting the Borderlands Wind PRMPA/FEIS.

The level of detail of the NEPA analysis must be sufficient to support reasoned conclusions by comparing the amount and the degree of change (i.e., impact) caused by the proposed action and alternatives (BLM Handbook H-1790-1, Section 6.8.1.2). The BLM need not speculate about all conceivable impacts, but it must evaluate the reasonably foreseeable significant effects of the proposed action.

The BLM consulted with USFWS throughout the planning process and preparation of the EIS. As described in Section 3.6.1 and Section 3.8.1 of the Borderlands Wind PRMPA/FEIS, baseline wildlife data was obtained from the USFWS and used to perform impact analysis through the

incorporation by reference of the USFWS’s *Programmatic EIS for the Eagle Rule Revision* (FEIS reference USFWS 2016a) and *Bald and Golden Eagles: Population demographics and estimation of sustainable take in the United States, 2016 update* (FEIS reference USFWS 2016b). Further, avian use surveys have been conducted twice per month within the Proposed Action area (which encompasses the Alternatives 1 and 2 area) from March 2017 through March 2019. Eagle-focused nest surveys were also conducted within 10 miles of the area and a raptor species nest survey was also conducted within 1 mile of the Proposed Action area (FEIS p. 3-74).

The proponent’s Eagle Management Plan was not yet written by the time the Draft EIS was released and all baseline data and analysis provided in the Draft EIS was developed by the BLM separately from the proponent’s EMP. Appendix B contains the design features and Best Management Practices (BMPs) that would be incorporated into each phase of the project to minimize impacts to eagles, as described in Section 3.8.2.1 of the Borderlands Wind PRMPA/FEIS.

The EMP was completed between release of the Draft EIS and Final EIS; information from the EMP was incorporated into the mitigation elements in the Final EIS, and the EMP was included as Appendix M, *Bird and Bat Conservation Strategy and Eagle Management Plan*, pages POD-M-64 to POD-M-175, of the Final Plan of Development (Appendix C of the Borderlands Wind PRMPA/FEIS). The BLM considered the information in the EMP during development of the Final EIS and determined that it did not trigger supplementation of the EIS under 40 CFR 1502.9(C) and Section 5.3 of BLM NEPA Handbook H-1790-1. The BLM has reviewed the protests received on the FEIS as part of the planning protest period per 40 CFR 1502.9(b), 1503.1(b), and BLM NEPA Handbook Section 9.6.1, *Comments Received Following Issue of the Final EIS* (p. 102). Any comments received on the FEIS during the protest period that do not meet the requirements for filing a valid protest described in 43 CFR 1610.5-2, including those related to the EMP, will be addressed in the Record of Decision (ROD).

As the EMP notes, the plan was developed in consultation with the BLM and the USFWS, and revisions will be incorporated in coordination with the BLM, USFWS, and New Mexico Department of Game and Fish as the Project design is finalized; postconstruction data for the Project are evaluated; and new postconstruction survey and analysis techniques, industry standards, or policies are developed (p. POD-M-64). The EMP was developed following the USFWS’s *Eagle Conservation Plan Guidance* (ECPG) (USFWS 2013), the iterative five-stage decision-making process to determine whether a site will meet standards for issuance of an Eagle Take Permit. The process is used to identify avoidance and minimization measures to reduce eagle disturbance and ongoing mortality to a level at which it is practically unavoidable (USFWS 2016a). Additionally, Table 1 presents USFWS-recommended (2016a, 2016b) EMP contents covered in the EMP (p. POD-M-71). The EMP documents coordination held with the Proponent, federal agencies, and state agencies in Section 1.3, Consultation History (POD-M-74).

The BLM must discuss the cumulative effects of the proposed action and the alternatives when preparing an EIS (BLM Handbook H-1790-1, Section 6.8.3). The CEQ regulations define cumulative effects as “...the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such actions” (40 CFR 1508.7).

Cumulative impacts analysis specific to bald and golden eagles is provided in Section 3.10.4.4 of the Borderlands Wind PRMPA/FEIS. As the FEIS notes, the BLM considered and analyzed a range of past, present, and reasonably foreseeable actions that could potentially impact eagles, such as “livestock grazing, community development, off-highway vehicle use, transmission line development, roads, vegetation management, and forest health management (including prescribed burning)” in addition to the direct and indirect effects presented by the project (p. 3-101). The analysis notes that the Proposed Action and Alternatives 1 and 2 may have a major contribution to



the cumulative effect on eagles, but would be partially offset through the voluntary compensatory mitigation that the proponents have offered.

The BLM, in consultation with the USFWS, developed measures to avoid and/or minimize adverse effect and are included in Appendix B of the Borderlands Wind PRMPA/FEIS. As described in Section 3.8.2.1 of the Borderlands Wind PRMPA/FEIS, the design features and BMPs in Appendix B would be incorporated into each phase of the project to minimize impacts to eagles.

Regarding compensatory mitigation, NEPA requires the BLM to include a discussion of measures that may mitigate adverse environmental impacts (40 CFR 1502.14(f), 40 CFR 1502.16(h)). Potential forms of mitigation include: (1) avoiding the impact altogether by not taking a certain action or parts of an action; (2) minimizing impacts by limiting the degree or magnitude of the action and its implementation; (3) rectifying the impact by repairing, rehabilitating, or restoring the affected environment; (4) reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action; or (5) compensating for the impact by replacing or providing substitute resources or environments (40 CFR 1508.20).

As described under the “Additional Measures to Avoid and/or Minimize Impacts” heading on page 3-78 in Section 3.8.2.1, *Direct and Indirect Impacts of the Proposed Action in the Borderlands Wind PRMPA/FEIS*, the project proponent included a commitment in their EMP to provide voluntary compensatory mitigation to offset the anticipated impacts on eagles. Additional details regarding the proponent’s commitment to provide voluntary compensatory mitigation can be found in Section 5.3, *Voluntary Compensatory Mitigation*, in Appendix M of the *Bird and Bat Conservation Strategy and Eagle Management Plan*, which is within Appendix C, *s*. The EMP provides details on the analysis used to evaluate resource equivalency to offset the predicted mortality of eagles due to the project. IM 2019-018 states that the BLM must not require compensatory mitigation from public land users, and the BLM will not accept monetary payment to mitigate impacts of a proposed action. The proponent has committed to provide voluntary compensation to minimize the impacts to eagles, in accordance with IM 2019-018.

Therefore, the BLM met all the requirements for an adequate impact analysis and complied with NEPA.

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## References

- Bureau of Land Management. 2020. *Borderlands Wind Project Final Environmental Impact Statement and Proposed Resource Management Plan Amendment* (DOI-BLM-NM-A020-2019-0002-RMP-EIS). Available: <https://eplanning.blm.gov/epl-front-office/eplanning/planAndProjectSite.do?methodName=renderDefaultPlanOrProjectSite&projectId=116245> Last accessed May 21, 2020.
- U.S. Fish and Wildlife Service. 2013. *Eagle Conservation Plan Guidance. Module 1 – Land-based Wind Energy, Version 2*. Available: <https://www.fws.gov/migratorybirds/pdf/management/eagleconservationplanguidance.pdf>. Last accessed: May 26, 2020.
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- \_\_\_\_\_. 2016b. *Bald and Golden Eagles. Population Demographics and Estimation of Sustainable Take in the United States, 2016 update*. Available: <https://www.fws.gov/migratorybirds/pdf/management/EagleRuleRevisions-StatusReport.pdf>. Last accessed May 26, 2020.