



# PACIFIC LEGAL FOUNDATION

July 17, 2014

Environmental Protection Agency  
EPA Docket Center, Mail Code 28221T  
Attn: Docket ID No. EPA-HQ-OAR-2013-0602  
1200 Pennsylvania Avenue N.W.  
Washington, DC 20460

VIA [www.regulations.gov](http://www.regulations.gov)

Re: Comments re: Carbon Pollution Emission Guidelines for  
Existing Stationary Sources: Electric Utility Generating Units

## INTRODUCTION

Pacific Legal Foundation, Dalton Trucking, Inc., and the Center for Environmental Science, Accuracy, and Reliability submit these comments on the proposed rule of the Environmental Protection Agency (EPA) to establish carbon pollution emission guidelines for fossil-fuel-fired power plants under Section 111(d) of the Clean Air Act, 42 U.S.C. § 7411(d). *See* 79 Fed. Reg. 34,830 (June 18, 2014).

EPA has shirked its responsibility under the Endangered Species Act (ESA) to insure that the agency's actions do not jeopardize the continued existence of ESA-listed species or adversely modify their critical habitat. *Cf.* 16 U.S.C. § 1536(a)(2). In determining the emission performance goals that the states and the power plant industry must meet, EPA's proposed rule relies in part on wind and solar energy. It is reasonably foreseeable that, as a result of EPA's incorporation of wind and solar energy in its emission reduction analysis, energy from such sources will be used more heavily than would otherwise be the case to meet the country's power needs. Contrary to EPA's analysis, the proposed rule, through its reliance on wind and solar energy, is likely to adversely affect listed species and their critical habitat. Accordingly, EPA must consult with the United States Fish and Wildlife Service and the National Marine Fisheries Service (Wildlife Agencies) prior to finalizing its proposed rule.

## THE COMMENTERS

Founded over forty years ago, Pacific Legal Foundation is the nation's largest and most experienced nonprofit legal foundation that advocates for private property rights, individual liberty, and limited government. To further these ends, the Foundation regularly participates in EPA rule-makings. *See* Merit Oil Co., *et al.*, Comments Regarding California State Nonroad Engine Pollution Control Standards, California Nonroad Compression Ignition Engines for In-Use Fleets, Authorization Request (Oct. 17, 2012); Pac. Legal Found., *et al.*, Petition for Reconsideration of Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule (Apr. 21, 2011); Pac. Legal Found., *et al.*, Comments on the Joint Proposed Rule . . . on Greenhouse Gas Emissions Standards for Medium- and Heavy-Duty Engines and Vehicles (Jan. 28, 2011); Pac. Legal Found., Petition for Reconsideration of Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202 of the Clean Air Act (Feb. 5, 2010).

Dalton Trucking was founded in 1963 as a dump truck operation to serve Fontana Slag Mills. Dalton was incorporated in 1970 in the state of California and in 1977 Dalton was purchased by Terry Klenske (The Klenske Family Trust), the current owner. Terry, along with his two sons, Matt Klenske and Josh Klenske, are actively running the business. The company employs 250 full-time people and currently owns over 130 power units and 450 trailers plus over 50 pieces of off-road equipment like forklifts, scrapers, and loaders. The company is concerned about EPA regulatory overreach, and has participated in EPA rule-makings. *See* Merit Oil Co., *et al.*, Comments Regarding California State Nonroad Engine Pollution Control Standards, California Nonroad Compression Ignition Engines for In-Use Fleets, Authorization Request (Oct. 17, 2012); Pac. Legal Found., *et al.*, Petition for Reconsideration of Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule (Apr. 21, 2011); Pac. Legal Found., *et al.*, Comments on the Joint Proposed Rule . . . on Greenhouse Gas Emissions Standards for Medium- and Heavy-Duty Engines and Vehicles (Jan. 28, 2011).

The Center for Environmental Science, Accuracy and Reliability (CESAR) is a California nonprofit corporation. CESAR's primary purposes are to bring scientific rigor to regulatory decisions undertaken pursuant to environmental statutes, and to ensure consistent application of these statutes throughout all industries and sectors. CESAR believes that achieving these goals will generate additional support for environmental statutes, because the results of and bases for regulatory actions will be transparent and supported by science. CESAR is particularly concerned when the Endangered Species Act is enforced selectively. Such selective enforcement gives the public the impression that environmental laws are more about giving one interest group leverage over others than about good-faith, reasonable regulation of endangered wildlife. CESAR is a regular participant in administrative decision-making under the Endangered Species Act. *See, e.g.*, Petition of CESAR, *et al.*, to Remove the Coastal California Gnatcatcher from the List of Threatened Species Under the Endangered Species Act (May 29, 2014); Petition of CESAR, *et al.*, to Delist the Southern Resident Killer Whale Distinct Population Segment under the Endangered Species Act (Aug. 1, 2012);

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Petition of CESAR to List the American Eel as a Threatened Species under the Endangered Species Act (Apr. 30, 2010).

The Foundation, Dalton Trucking, and CESAR are concerned that EPA's proposed rule not only will hurt the economy by making energy more expensive, but also—owing to inadequate environmental review—will hurt wildlife and damage their habitat.

## ARGUMENT

### **SECTION 7(a)(2) OF THE ENDANGERED SPECIES ACT REQUIRES EPA TO CONSULT WITH THE WILDLIFE AGENCIES ON THE EFFECTS TO ESA-LISTED SPECIES AND THEIR CRITICAL HABITAT CAUSED BY THE PROPOSED RULE'S INCORPORATION OF WIND AND SOLAR ENERGY INTO THE AGENCY'S "BEST SYSTEM FOR EMISSION REDUCTION" OF CARBON DIOXIDE FOR FOSSIL-FUEL-FIRED POWER PLANTS**

#### I

#### **EPA'S PROPOSED RULE RELIES ON AND ANTICIPATES INCREASED USE OF WIND AND SOLAR ENERGY**

On June 18, 2014, EPA published in the Federal Register a proposed rule to establish, among other things, an emission guideline and related best system of emission reduction for carbon dioxide emissions from existing fossil-fuel-fired electric generating units. *See* 79 Fed. Reg. at 34,830. *Cf.* 42 U.S.C. § 7411(a)(1), (d)(1); 40 C.F.R. § 60.22(a). The rule proposes state rate-based carbon dioxide emission performance goals, 79 Fed. Reg. at 34,957-58 (proposed 40 C.F.R., Pt. 60, Sbpt. UUUU, Tbl. 1), that each state must achieve through plans that incorporate performance standards for existing fossil-fuel-fired power plants, *see id.* at 34,952 (proposed 40 C.F.R. § 60.5740(a)(4)). EPA calculated the states' emission guidelines based on the agency's assessment of the "best system of emission reduction." *See* 79 Fed. Reg. at 34,836. *Cf.* 42 U.S.C. § 7411(a)(1). This system comprises four building blocks, one of which is "Building Block 3—Using an Expanded Amount of Less Carbon-Intensive Generating Capacity." *See* 79 Fed. Reg. at 34,866-69. EPA counts wind and solar energy as an element of Building Block 3. *See id.* at 34,883.

## II

### WIND AND SOLAR ENERGY CAN ADVERSELY AFFECT WILDLIFE AND THEIR HABITAT

Wind energy generation has significant impacts on wildlife.<sup>1</sup> For example, over 500,000 birds—many of them ESA-protected species—are killed each year by the nation's wind farms.<sup>2</sup> Solar energy generation also adversely affects wildlife.<sup>3</sup> For example, the much ballyhooed Ivanpah Solar Electric Generating System in California's Mojave Desert has caused dozens of bird deaths,<sup>4</sup> and its construction entailed substantial risks to the ESA-listed desert tortoise.<sup>5</sup> More generally,

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<sup>1</sup> See Edward B. Arnett, *et al.*, *Patterns of bat fatalities at wind energy facilities in North America*, 72 *J. Wildlife Mgmt.* 61 (2008); Thomas H. Kunz, *et al.*, *Ecological impacts of wind energy development on bats: questions, research needs, and hypotheses*, 5 *Frontiers in Ecology & Env't* 315 (2007); Thomas H. Kunz, *et al.*, *Aeroecology: probing and modelling the aerosphere*, 48 *Integrative & Comp. Biology* 1 (2008); Comm. on Env't'l Impacts of Wind Energy Projects, Nat'l Research Council, *Environmental Impacts of Wind Energy Projects* (2007), cited in J.M. Kiesecker, *et al.*, *Win-Win for Wind and Wildlife: A Vision to Facilitate Sustainable Development*, PLoS ONE, Apr. 2011, at 2.

<sup>2</sup> See David Blackmon, *The Endangered Species Act and Wind Power: A Rule, or More of a Guideline?*, *Forbes*, May 16, 2013, <http://www.forbes.com/sites/davidblackmon/2013/05/16/the-esa-a-rule-or-more-of-a-guideline/>.

<sup>3</sup> See Erin Lieberman, *et al.*, *Making Renewable Energy Wildlife Friendly* 7-8 (Defenders of Wildlife, n.d.); Phil Leitner, *The promise and peril of solar power: As solar power facilities spread, desert wildlife faces risk*, in *The Wildlife Professional*, Spring 2009, at 48-53.

<sup>4</sup> See Garrett Hering, *4 reasons the Ivanpah plant is not the future of solar*, *GreenBiz.com* (Feb. 19, 2014), <http://www.greenbiz.com/blog/2014/02/19/largest-solar-thermal-plant-completed-ivanpah>; Ken Wells, *Where Tortoises and Solar Power Don't Mix*, *Business Week* (Oct. 10, 2012), <http://www.businessweek.com/articles/2012-10-04/where-tortoises-and-solar-power-don't-mix>; Kiera Butler, *Big Solar's Death Panels*, *Mother Jones*, Mar./Apr. 2011, <http://www.motherjones.com/environment/2011/03/solar-panels-desert-tortoise-mojave>.

<sup>5</sup> See Todd Woody, *Spot The Tortoise?*, *Forbes*, June 8, 2011, <http://www.forbes.com/forbes/2011/0627/technology-brightsource-turtles-energy-solar-spot-tortoise.html>.

given its acreage requirements,<sup>6</sup> solar energy generation can contribute to habitat fragmentation, a significant threat to conservation.<sup>7</sup>

### III

#### **EPA’S INCORPORATION OF WIND AND SOLAR ENERGY WITHIN ITS PROPOSED RULE IS A DISCRETIONARY AGENCY ACTION UNDER THE ESA’S CONSULTATION REGULATIONS**

The ESA forbids federal agencies to undertake any action that may jeopardize the continued existence of an ESA-listed species, or adversely modify its critical habitat. *See* 16 U.S.C. § 1536(a)(2). Generally speaking, an agency must consult with the Wildlife Agencies if its proposed discretionary action may affect listed species or their critical habitat. 50 C.F.R. §§ 402.03, 402.14(a).

EPA’s proposed rule is an “action.” *See id.* § 402.02 (defining “[a]ction” to mean “all activities . . . of any kind authorized, funded, or carried out” by a federal agency, including “the promulgation of regulations” and “actions directly or indirectly causing modifications to the land, water, or air”). Moreover, EPA has some discretion in formulating the rule, particularly with respect to the “building blocks” that make up the suggested best system of emission reduction. *See* 79 Fed. Reg. at 34,878 (inviting comment on alternative building block proposals). Therefore, the proposed rule is presumptively subject to ESA consultation.

### IV

#### **EPA’S PROPOSED RULE, THROUGH ITS RELIANCE ON WIND AND SOLAR ENERGY, REQUIRES CONSULTATION BECAUSE THE RULE “MAY AFFECT” PROTECTED WILDLIFE AND THEIR HABITAT**

In its proposed rule, EPA argues that it has no obligation to consult with the Wildlife Agencies on the proposed rule’s impacts to listed species and their critical habitat. 79 Fed. Reg. at 34,933-34. The agency acknowledges that “questions may exist whether actions such as increased utilization of solar or wind power”—which the propose rule incorporates into its best system of emission

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<sup>6</sup> Sean Ong, *et al.*, National Renewable Energy Laboratory, *Land-Use Requirements for Solar Power Plants in the United States* 17 (June 2013), available at <http://cleantechnica.com/2013/08/02/nrel-report-firms-up-land-use-requirements-of-solar-power-plants/> (“On a capacity basis, the total-area capacity-weighted average for all solar power plants is 8.9 acres [per megawatt] . . .”).

<sup>7</sup> U.S. Fish & Wildlife Serv., *Strategic Habitat Conservation*, available at <http://www.fws.gov/landscape-conservation> (noting “large-scale habitat fragmentation” to be among the “widespread threats” to fish and wildlife conservation).

reductions—may negatively affect listed species and their habitat. *Id.* at 34,934. But EPA concludes that those negative effects cannot be attributed to its proposed rule, because the states have the ultimate responsibility to determine whether to use renewable energy in formulating their standards of performance. *Id.* Therefore, the negative effects of renewable energy are not “sufficiently certain.” *Id.*

EPA’s argument cannot be squared with the Wildlife Agencies’ consultation regulations. As noted above, consultation is required if an agency’s action “may affect” a listed species or its critical habitat.<sup>8</sup> *See* 50 C.F.R. § 402.14(a). The effects of an action include not just direct effects but also “indirect effects,” which are “caused by the proposed action and are later in time, but still are reasonably certain to occur.” *See* 50 C.F.R. § 402.02. Accordingly, the threshold “for an agency action to trigger consultation . . . is low,” and “[a]ny possible effect, whether beneficial, benign, adverse, or of an undetermined character, triggers the formal consultation requirement.” *Western Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 496 (9th Cir. 2010) (internal quotation marks omitted). *See Col. Env’tl. Coalition v. Office of Legacy Mgmt.*, 819 F. Supp. 2d 1193, 1221-22 (D. Colo. 2011) (formal consultation required notwithstanding that effects “would be highly unlikely”).

It is reasonably certain that EPA’s rule will lead states and power plant operators to rely on wind and solar power in order to meet EPA’s emission performance levels. EPA’s proposed carbon dioxide emission performance goals are a function of EPA’s proposed best system of emission reduction, which depends in part on the availability of wind and solar energy substitutes. *See* 79 Fed. Reg. at 34,836. EPA believes that its carbon dioxide emission performance levels are reasonable and achievable in part because wind and solar energy are available as substitutes to fossil-fuel energy and that the agency’s chosen performance levels are more ambitious than they might otherwise be were wind and solar energy substitutes unavailable. *See id.* at 34,866 (noting that the agency’s expectation of emission reductions attributable to renewable energy sources is “reasonable and consistent with policies that a majority of states have already adopted based on their own policy objectives and assessments of feasibility and cost”); *id.* at 34,878 (observing that a system that includes renewable energy sources “can achieve greater overall CO<sub>2</sub> emission reductions” than one that does not). *See also id.* at 34,893 (noting that “[t]ogether the building blocks establish a reasonable overall level of reductions and effort that the EPA considers appropriate at this time”); *id.* at 34,896 (explaining the computation of annual emission reduction rates based in part on “the estimated annual net generation from renewable . . . generating capacity”).

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<sup>8</sup> Notwithstanding the “may affect” threshold, formal consultation is not required if the Wildlife Agencies concur in the action agency’s determination that adverse effects are unlikely, or if a preliminary biological opinion is converted into a final biological opinion. *See* 50 C.F.R. § 402.14(b). The proposed rule, however, does not rely on either of these exceptions. *Cf.* 79 Fed. Reg. at 34,934.

Therefore, it is reasonably foreseeable that EPA's rule will lead to expanded wind and solar energy generation, which in turn "may affect" listed species and their critical habitat.

V

**EPA'S RELIANCE ON NON-ESA CASE LAW  
TO SHIRK CONSULTATION IS UNCONVINCING**

The proposed rule's reliance on *American Trucking Association v. EPA*,<sup>9</sup> to support its "no consultation required" conclusion is unconvincing. In *American Trucking*, the petitioners argued that, as part of its designation of national ambient air quality standards, EPA was required to conduct an analysis under the Regulatory Flexibility Act, 5 U.S.C. § 601, *et seq.*, to estimate the designation's impact on small entities, including small businesses. That Act, as interpreted by the D.C. Circuit, applies only to agency actions that directly affect or regulate small entities. *See Motor & Equipment Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 467 (D.C. Cir. 1998). In *American Trucking*, the D.C. Circuit concluded that the Act does not apply to EPA's designation of air quality standards because that action does not directly regulate small entities. *See American Trucking*, 175 F.3d at 1044.

Attempting to analogize the Regulatory Flexibility Act to the ESA, the proposed rule reads *American Trucking* for the proposition that consultation under the ESA is only required for agency actions that *directly* regulate or affect listed species and their habitat. Because EPA's proposed rule does not directly regulate power plants, much less species or their habitat, the agency concludes that it has no obligation to consult. *See* 79 Fed. Reg. at 34,934.

The error in EPA's analysis is its false analogy between the Regulatory Flexibility Act and the ESA. As noted above, *American Trucking*'s interpretation of the Regulatory Flexibility Act's scope is based on that Act's limitation to agency actions that directly affect or regulate small entities. But the ESA's consultation provision does not contain any such limitation. To the contrary, the consultation regulations expressly take account of direct *and* indirect effects, 50 C.F.R. § 402.02, and require consultation for any agency action that "*may* affect listed species or critical habitat," *id.* § 402.14(a) (emphasis added). Whether the agency action directly regulates or affects listed species or habitat is irrelevant. *American Trucking* is inapposite.

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<sup>9</sup> 175 F.3d 1027 (D.C. Cir. 1999), *rev'd in part on other grounds sub nom. Whitman v. Am. Trucking Ass'n*, 531 U.S. 457 (2001).

VI

**CASE LAW INTERPRETING THE ESA  
CONSULTATION OBLIGATION CONFIRMS THAT  
EPA MUST CONSULT ON ITS PROPOSED RULE**

More importantly, EPA's interpretation cannot be reconciled with ESA case law, which confirms that the consultation obligation applies even if the causal chain between agency action and species impact is indirect, *i.e.*, the agency action merely authorizes or enables species-affecting activity. *See, e.g., Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006 (9th Cir. 2012) (agency approval of mining permits requires consultation); *Wash. Toxics Coal. v. EPA*, 413 F.3d 1024 (9th Cir. 2005) (agency registration of pesticides requires consultation). For example, in *Defenders of Wildlife v. EPA*,<sup>10</sup> the environmental plaintiffs challenged EPA's failure to consult in connection with the agency's transfer of permitting authority under the Clean Water Act to the State of Arizona. The Ninth Circuit held that EPA was required to consult, notwithstanding that EPA's decision merely enabled but did not require that any species-affecting action occur. *See Defenders of Wildlife*, 420 F.3d at 961-62. Similarly here, EPA's rule does not require that states or power plants use wind and solar energy substitutes, but the rule certainly incentivizes and encourages that use, and it is EPA's expectation that the states will use these sources of energy. *See* 79 Fed. Reg. at 34,893, 34,896.

In other ways as well, *Defenders of Wildlife* supports the conclusion that EPA must consult on its proposed rule. Notably, the causal connection in *Defenders of Wildlife* between agency action and species impacts was even more attenuated than the connection between the proposed rule's reliance on wind and solar energy and adverse wildlife impacts. In *Defenders of Wildlife*, the causal connection required three steps: individual discretion to apply for a discharge permit; state discretion to grant the permit; and individual discretion to engage in species-affecting activities after obtaining the permit. But EPA's proposed rule requires only one step to species impacts: state discretion to mandate use of wind and solar energy substitutes to meet EPA's emission reduction goals. In other words, the proposed rule will directly affect listed species and their critical habitat because it will result in greater wind and solar energy use; and EPA itself essentially acknowledges that such energy sources may affect species and habitat. *Cf.* 79 Fed. Reg. at 34,934 (“[Q]uestions may exist whether actions such as increased utilization of solar or wind power could have effects on listed species . . .”).

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<sup>10</sup> 420 F.3d 946 (9th Cir. 2005), *rev'd on other grounds sub nom. Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007).



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## CONCLUSION

The ESA requires federal agencies to consult over the effects of their actions on protected species and their habitat. EPA's proposed rule to reduce carbon dioxide emissions from fossil-fuel-fired power plants relies on increased generation of wind and solar energy. It is well established that these energy sources adversely affect wildlife, and therefore it is reasonably foreseeable that the proposed rule's reliance on wind and solar energy will produce adverse effects on listed species and their critical habitat. EPA must consult.

Sincerely,

A handwritten signature in blue ink, appearing to read "Dm Schiff".

DAMIEN M. SCHIFF  
Principal Attorney