

**COMMENTS ON THE BIOLOGICAL OPINION (BO)
OF
THE US FISH & WILDLIFE SERVICE (USF&WS)
TO
THE BUREAU OF LAND MANAGEMENT (BLM)
REGARDING THE OCOTILLO WIND ENERGY
FACILITY**

OPINIONS BY

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The Section 7 review by the USF&WS for the issuance of a Right-of-Way grant by BLM and an Individual Permit under Section 404 of the Clean Water Act by the US Army Corps of Engineers was formalized in the BO dated April 25, 2012. The BO was developed by the Carlsbad Office of the USF&WS and directed to the District Manager of BLM in Moreno Valley.

My overall impression, after reading through the entire document is that the Biological Opinion of the USF&WS is predicated on the notion that the project is already approved, there is no room for taking a hard line on the protection of natural resources. In general I find the conclusions made by the USF&WS to be vague, conciliatory, and rather unbelievable. Politics seeps through every page.

I find that the sole federal agency charged with safeguarding the Endangered Species Act has done a fairly good job of *researching* the literature on the bighorn sheep of the Peninsular Ranges. The USF&WS reveals many potential threats the Ocotillo Wind Energy Facility poses to bighorn and bighorn habitat, ***but for each case it makes, it sells out and makes weak excuses to support the development of the wind turbine project.*** A constant theme throughout the BO is that even though a threat to bighorn or its habitat exists, the construction of wind turbines will not threaten the overall population of bighorn or the long-term recovery of the endangered population in the Peninsular Ranges. They have chosen their words carefully. Toward the end of the BO the Service actually makes it clear that as many as five bighorn ewes and five lambs may be “Taken”, which means they could be forced to move off their current range, could be subject to harassment by the project, and may even die as a result of project action—all permitted by USF&WS.

Following is a page by page analysis of the Biological Opinion, with comments:

Page 1, BO reads, “*Because no Critical Habitat has been designated within the action area, no Critical Habitat would be adversely affected.*” It would seem worthy of mention that in fact, a significant amount of the subject lands had been officially designated as Critical Habitat soon after the population of bighorn sheep in Peninsular Ranges was listed as Endangered. It was later “undesigned” through political action by the USF&WS. They claim this was a result of “new science” and a legal challenge, but they’ve never produced the science to substantiate their reduction of CH from over 800,000 acres to the current 370,000 acres. Their discussions of bighorn on and adjacent to the action area further support the concept that the project site and adjacent habitat is essential to the long-term vigor of the local subpopulation of desert bighorn.

Page 2, Much of the project proponent’s program is based on mitigation of potential bighorn habitat at Carrizo Marsh. State Parks would accept \$3.5M worth of restoration of Carrizo Marsh which could improve the potential for bighorn to use the water there as they were reported to have done in the 1940’s. **What if State Parks now finds it unacceptable to participate in the mitigation program, which seems so key to Pattern Energy’s permits so far?** If Parks refuses to go ahead with the Carrizo Marsh restoration, where would that leave Pattern? It would be a huge undertaking for Pattern to find a suitable alternative bighorn mitigation project, especially before the end of the year.

Page 3, Where did the 600 yard extension in Peninsular bighorn sheep (PBS) habitat outside of the project area come from? They claim this is the “maximum expected range sheep are likely to react to wind turbines”. This is highly speculative and the 600 yard figure doesn’t relate to anything in the literature regarding 460’ tall wind turbines. It came from a group of “experts” who asked for a buffer area of 400 to 1,200 yards between developments and the lambing pens at the Bighorn Institute in Palm Desert. USF&WS came up with the 600 yards as what they call an “intermediate” distance coming from the expert opinion. “Intermediate” between 400 and 1200 yards would be 800 yards, so why don’t they use the 800 yard figure in their discussion?

Page 5, 2nd Para. The 50’ biological monitoring tower---used for birds, bats, and bighorn? All from a single point? This seems to have been inserted in the project to appease environmental critics and nothing else. Raptors cannot be observed through binoculars or spotting scopes at more than about 1 ½ miles, so how can this tower allow the monitors to see all the way across a six mile wide project area? How are bighorn going to be observed from the same tower that monitors use for raptor and bat observation? Looks good on paper, but to me it is “smoke and mirrors”.

4th Para. O&M What are the acceptable dates for “Major Activities”? Specify dates—too vague—looks good, but is meaningless as written. Too much wiggle room for the project proponent and does not give BLM any firm, enforceable language to control activity on-site.

Page 6, 1st Para. “At BLM’s discretion, roads would be removed”---upon closure and reclamation, how about a large **Decommissioning Bond** and call for **ALL roads constructed for the project are removed and rehabilitated?**

3rd Para. #2, where is the Integrated Weed Management Plan? Mandate that Anza-Borrego Desert State Park Environmental Scientists must approve the plan, since common boundary of 5

miles is shared between proposed project and the Park. BO states, **“This plan will be submitted and approved by BLM, the County of Imperial, and {State Parks?} prior to start of construction and implemented for life of the project.”** How can they be prepared to start grading next week if all these plan approval have not be completed? Where’s the document?

#3 Who will enforce and implement lighting guidelines?

#4 “Prior to project initiation a Worker Education Awareness Program (WEAP) will be developed and implemented in English and Spanish. The WEAP to be approved by BLM, SDF&G, and USF&WS and wallet sized information cards will be issued to all employees” Has this program been completed and implemented ??

Page 7, #5 “Prior to ground-disturbing activities” a biologist will be designated and approved by the USF&WS and BLM. Has this been done, and if so, who is the official on-site biologist?
#5a, The BO calls for “Notify BLM and USF&WS 14 days before initiation of ground disturbing activities”. If grading of roads is planned for this Friday, or the following week, has this official notification happened and been signed off??

Page 8, #6 BO calls for all boundaries of areas to be disturbed to be flagged prior to disturbance. Has this occurred? Are they in compliance on the ground?

#8, Why is Dos Cabezas Road approved for construction activity and grading w/i .75 mi. of a documented lambing area?

Page 9, #9 “Prior to construction” Has the PBS Monitoring Plan been approved by USF&WS, BLM, and CDF&G?

#10, What is basis for the 325 yard protocol for ceasing construction?? Again, here’s a figure they came up with that may have no connection to the real world. Why mention the bighorn monitor having access to radar? Do they claim their radar will detect bighorn sheep in the wild?

#12, Has Habitat Restoration/Revegetation Plan been approved by BLM, USF&WS, and CDF&G? **“Must be approved in writing prior to vegetation disturbance activities.”**

Page 10, #1A “Bighorn Monitor to be on-site in PBS habitat for life of project”. Will this happen? Again, the figure of 325 yards as a disturbance distance is used. Should be far greater—no substantiation for the 325yds.

Page 12, #7 All wildlife mortality reports should be required to be filed with USF&WS and CDF&G—weekly. Such data is vital to analyzing future projects. This project is on public land and the Public has the right to all information being generated on their property, subsidized by their tax dollars.

Page 13, #3 Recommend PBS status report be required every year—not just the first three years.

Page 15, #12 Where will the \$500,000 endowment be submitted and held? Should go to a local non-profit, such as the Anza-Borrego Foundation. Remove wording of “up to \$500,000”. Too much wiggle room again. Could end up being \$1, if it reads, “up to \$.....”

Page 16, 3rd Para. The reference to the undesignation of 500,000 acres of Critical Habitat---
“Following a challenge in court and a review of the best scientific information” Weak

Page 24, 1st Para 8 turbines are proposed w/i .75 mi. of a documented lambing area—why not call for elimination of the 8 turbines?

3rd Para. With the statements of all the increasing human impacts in the region, how can the BO not consider the overwhelming cumulative impacts being generated in the area? Wind Turbines, two Powerlinks, I-8, Border Patrol increase in activity, illegal immigrant traffic, recreation, railroad??????

Page 25, 1st Para. Cumulative impacts.....same as on Page 24, 3rd Para.

Page 26, 3rd Para. Behavioral Avoidance---BO claims turbines will occupy only 43 acres of bighorn habitat, up to 124 acres during construction. “Footprint” of the turbines does not measure the occupation and impacts of the project on habitat. Claims “ungulates are relatively unaffected by operation and maintenance of wind turbines”. Where did that statement come from and are they saying bighorn will be unaffected?? Based on what??

Page 28 Unsubstantiated speculation on what behavior of sheep may be with regards to human activities. Cumulatively, increasing human activities will pose negative results for the bighorn. Gov’t cannot keep approving one project after another without considering the cumulative impacts. CEQA and NEPA do not allow segmenting these impacts and NOT considering overall cumulative issue.

Page 29, 2nd Para Claims 5,150 acres of bighorn habitat is not a substantial loss of habitat. By what and whose measure?? One loss after another become substantial and cumulative.

Page 30-31, Paras. #1, 3,4 Extensive discussion of vegetation impacts, slow recovery in deserts, than dismissal of veg. loss to sheep. Continued minimalization of project impacts to bighorn sheep.

Page 31, 3rd Para. Speculation regarding lambing near 8 turbines. Suggest removal of all 8 turbines from the proposal. Of course, we’d like to see the entire project denied, but the insistence of these 8 turbines so close to a documented lambing area is especially offensive.

Page 32, 1st sentence, Speculation, not substantiated. 2nd para Turbines 24 & 25—less than 600 yards from lambing ---“not likely to threaten survival or recovery of subpopulation”. Of course not, but that’s not the point—the point is these turbines will impact a bighorn sheep lambing area and USF&WS is charged with protecting this endangered population---and it is not showing any leadership in safeguarding the ESA.

Page 33, 2nd para Astounding F&WS can make these conclusions and permit the loss of ewes and lambs! 3rd para Does ESA allow for this cavalier attitude by F&WS allowing “Take” of endangered bighorn?

Page 38, 3rd para Attempt to equate loss of known lambing area in SW section of project w/ improvement of Carrizo Marsh---where it is *hoped* sheep may return *someday*—not a fair assessment or statement.

Page 39, Last para Again, F&WS attempts to give approval to loss of 5 reproductive ewes. NO EXCUSE for this action!

Page 40, Again, statements of threats to bighorn, followed by weak justifications for loss of habitat and sheep (who's watching over the Endangered Species Act?)

Page 43, Carrizo Marsh has never been a part of State Park's cowbird removal program. They have about ten cowbird traps operated from April thru June, but Carrizo Marsh is not one of them.

Page 46, #6 Potential loss of 5,156 acres of habitat unacceptable
#7 Loss of lambing area unacceptable

Page 48, TAKE---five ewes, 5 lambs displaced under permit. What if number of ewes exceeds the limit of five? What will be done? This is not acceptable for USF&WS to permit.

4th para 600 yard figure is said to be intermediate considering "expert" recommendations of 400 yards to 1,200 yards---wouldn't 800 yards be "intermediate"? Why are any turbines allowed near lambing areas????

Page 50, 4th para Impact of Incidental Take----Using this rationale, one could argue a take of 20-30 bighorn also would not "jeopardize the continued existence or significantly impair the recovery of the PBS---50 bighorn??? 75????

Page 51, #1) How will BLM and Pattern ensure level of take? What if they don't? What will happen and why is this not written in the BO?

Terms and Conditions b) Low commitment of hours for the PBS monitor in first year and subsequent 4 yrs. There is no commitment of time---weak commitment of monitoring---should be mandated for more hours per week, and should be incorporated for life of the project.

Page 52, Disposition of sick or dead animals....BO states these animals should be transported to a qualified vet, but does not say by whom---are they going to allow a Pattern employee to transport a sick endangered bighorn?? Even a dead one?? Needs to be strengthened and designate who will be allowed to handle and transport. Should be far more rigid. Collection of biological material should only be conducted by a trained person---collection of samples and handling needs to be re-written and formalized.

Mark Jorgensen, May 2, 2012
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