



Wind Energy and Eagles

“The Permit”

Anne E. Mudge

September 17, 2014

Topics Covered

- Background on BGEPA
- Programmatic Eagle Take Permit
- First out of the Chute: Shiloh IV



Bald and Golden Eagle Protection Act

Background

- The BGEPA (1940) prohibits anyone, without a permit issued by the Secretary of the Interior, from "taking" bald eagles, including their parts, nests, or eggs.
- “Take” is defined as pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, destroy, molest or disturb. Note: disturbance.
- Criminal penalties:
Maximum penalty of \$5,000 and one year imprisonment for first conviction and \$10,000 and two years for second conviction. The violator could also be subject to a \$100,000 penalty under the Criminal Fines and Improvement Act of 1987 for a misdemeanor, and \$250,000 for a felony conviction. An organization could be held liable for penalties of \$200,000 and \$500,000 for a misdemeanor and felony conviction, respectively.
- Civil penalties
Maximum fine of \$5,000 per violation.
See 16 U.S.C. § 668; 18 U.S.C. § 3571(b)-(c)

Eagle Take Permit Program

- In 2009, new rules allowing a take permit to be issued where the taking is associated with but not the purpose of the activity and cannot practicably be avoided.
- Take permits must be compatible with the BGEPA goal of maintaining a stable or increasing population.
- Individual v. programmatic permits
 - One time (e.g. Native American cultural take) v. ongoing take (wind project)
- Authorized take can be issued for disturbance, not just mortality
- Originally, permit limited to 5 years (renewable).
- In 2013, USFWS issued a new rule extending the maximum term for programmatic take permits to 30 years.

Eagle Take Permit Program (continued)

Take permitted under four main conditions:

- Take is necessary to protect legitimate interests
- “Consistent with the goal of stable or increasing breeding populations.”
- “No Net Loss” to breeding populations.
- Take cannot be practically avoided.
- Compensatory mitigation will be provided for any remaining take.





Golden Eagle Programmatic Take Permit Program

- "If avoiding take is not practicable, the project proponent may apply for a take permit. **A permit is not required to conduct any particular activity**, but is necessary to avoid potential liability for take cause by the activity."

Fed. Reg. Vol. 74, No. 175 at 46841

- "A programmatic permit is **optional**."

Fed. Reg. Vol. 74, No. 175 at 46842

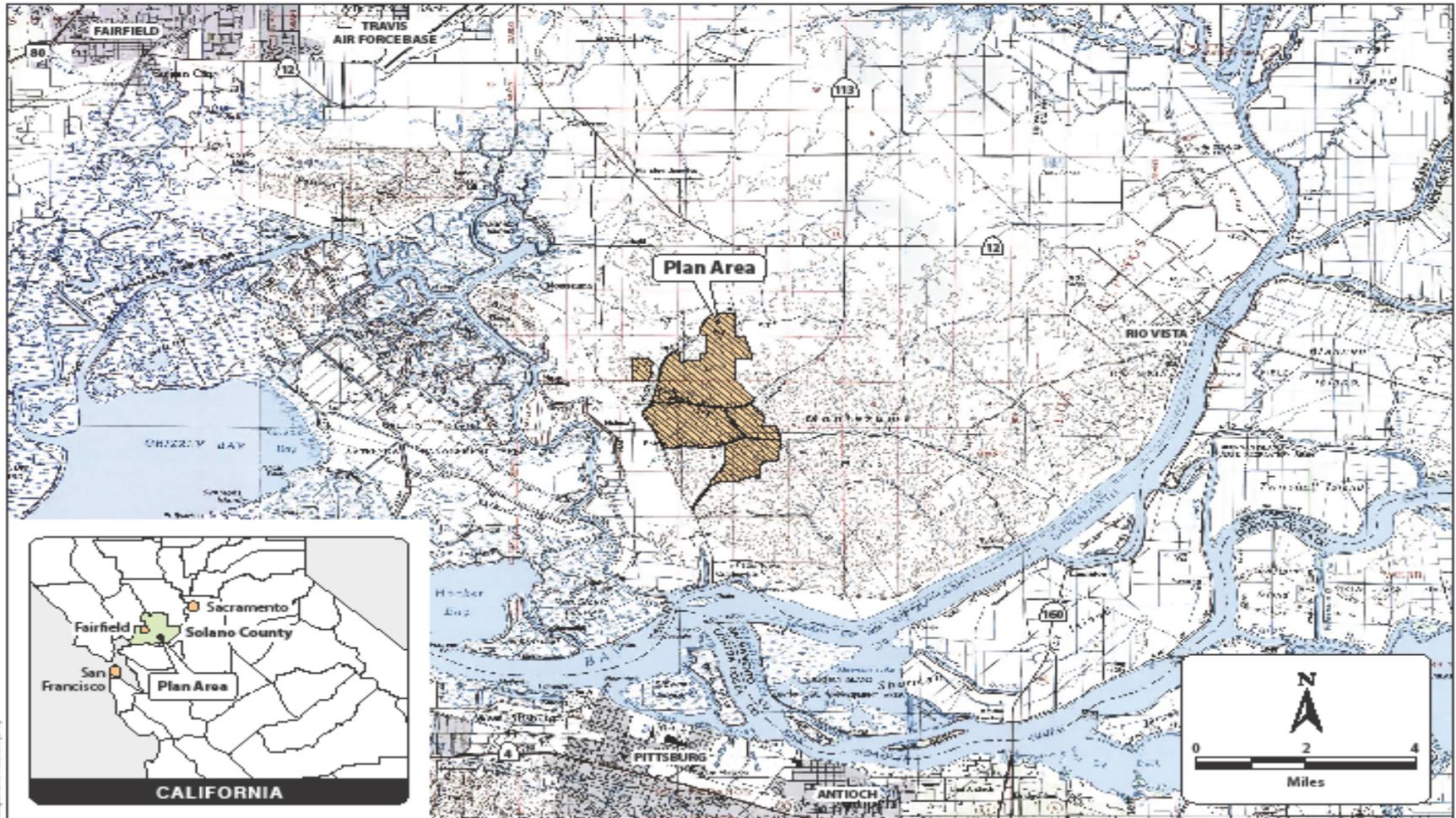
- But like fire insurance ...



The Shiloh IV Project

- Montezuma Hills, Solano County California
- 100 MW, 50 turbine project
- Repower and infill project
- Removed approximately 230 Kennetech legacy turbines
- EIR prepared by Solano County to support CUP
- Operational December 2012

Shiloh IV Project Area

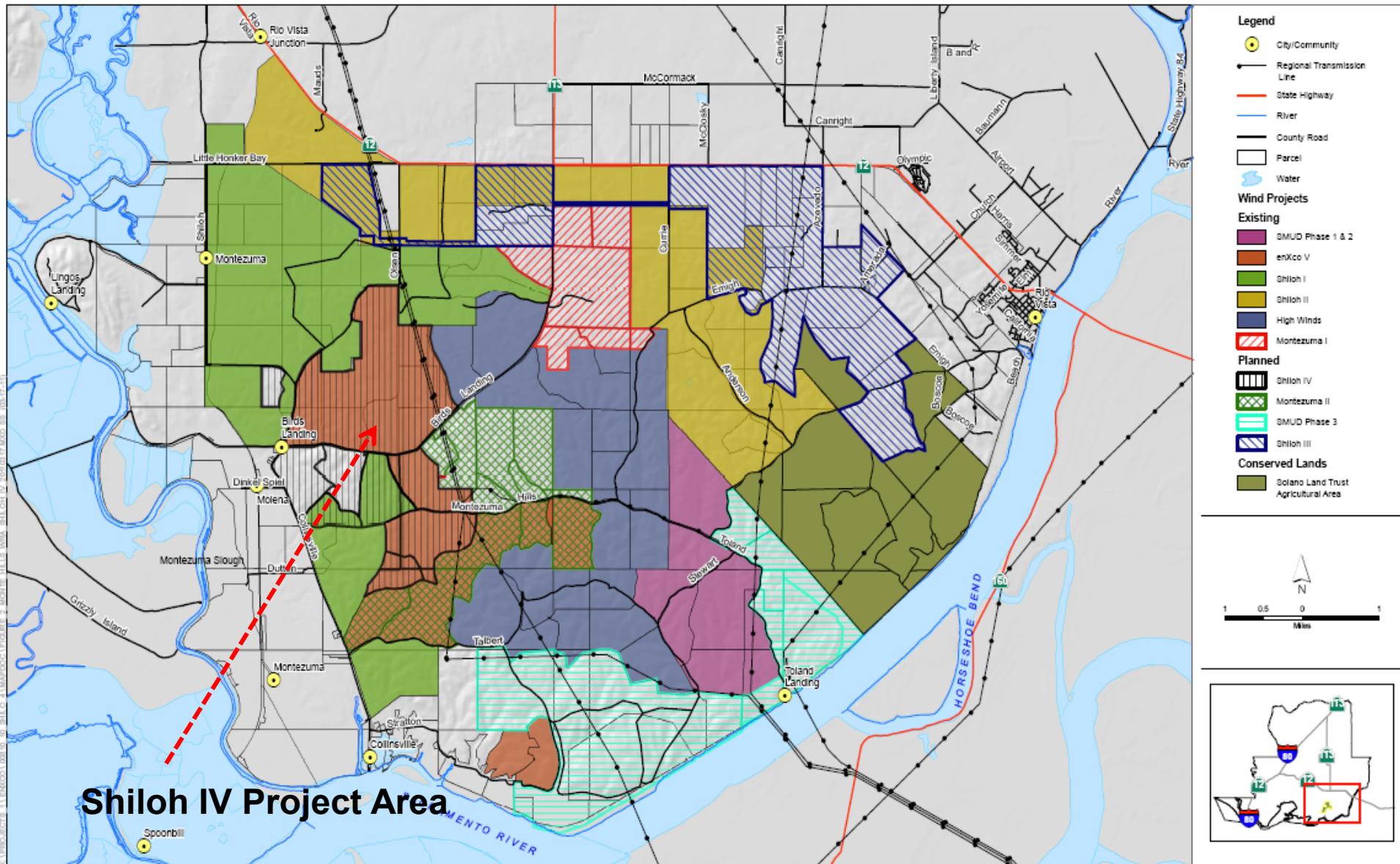


Graphic: EBD/10/17



Figure 1
Shiloh IV Project Location

Wind Projects in Priority Wind Area



Shiloh IV Eagle Take Permit

- First eagle take permit issued to Shiloh IV Wind Energy Project in July 2014
- 5 year permit (renewable)
- Projects mortality using Bayesian model: very conservative
- Allows take of up to 5 eagles over 5 years
- Advanced Conservation Practices
- If take exceeds expectations: adaptive management set forth in the Stepwise Table
 - Includes the possibility of visual deterrents, intensified monitoring, radar, curtailment
 - Measures considered “experimental”
- Compensatory Mitigation to eliminate take elsewhere: 133 Power Pole retrofits
 - Must retrofit power poles within 1 year of permit issuance
 - Mitigation may be “banked” if there are fewer than 5 eagles taken in 5 years

NEPA Review

- EA/FONSI
- What is the project?
- Alternatives
- Cumulative impacts
 - 140 mile radius local area population (includes Altamont)
 - Acknowledgement of greater than 5% take of population in local area population

Why did the Shiloh IV Take Permit Take So Long?

- Shiloh IV was a “poster child” for a take permit:
 - Repower/infill
 - Low eagle mortality
 - The “un-Altamont”
- Nonetheless, permit process was lengthy:
 - Started process in 2011
 - Not issued until 2014

Timing, (continued)

- First permit
 - FWS wanted to “get it right”
- FWS desire to validate the Bayesian model
- NEPA issues: what was “project”
- Negotiations over the stepwise table

U.S. FISH & WILDLIFE SERVICE



DEPARTMENT OF THE INTERIOR
U.S. FISH AND WILDLIFE SERVICE

FEDERAL FISH AND WILDLIFE PERMIT

F. You are authorized under the Bald and Golden Eagle Protection Act (Eagle Act) to incidentally take (injure or kill) a total of 5 golden eagles (*Aquila chrysaetos*) during operations and maintenance activities as described in the ECP. Take is allowed only within the five-year duration of this permit. Take must be incidental to otherwise lawful activities associated with the operations and maintenance activities as described in the ECP, and as authorized herein. Specifically:

Compensation for Legacy Take

- Issuance of Shiloh IV permit has spawned initiative at FWS to obtain compensation for legacy take at existing wind projects
 - 5 year statute of limitations
- Discussions occurring between FWS and wind operators about obtaining take authorization for existing assets and payments to compensate for past take

30 Year Permit

- A 30 year permit rule announced in 2013
- American Bird Conservancy filed lawsuit in June, 2014 in federal court to set aside 30 year permit rule
 - Claims violations of BGEPA, NEPA, APA
- FWS taking additional public comments on the 30 year rule
- Comment period ends September 22

Conclusion

Eagle take permits are a new and likely permanent part of the permitting landscape

Process should get easier and faster as more permits are issued

Stay tuned for how FWS will apply 5% goal and 30 year permit rule

