



September 17, 2010

By email to [OR Burns NS Transmission Line EIS@blm.gov](mailto:OR_Burns_NS_Transmission_Line_EIS@blm.gov)  
Bureau of Land Management  
Burns District Office  
Attn.: North Steens Transmission Line EIS Project Lead  
28910 Highway 20 West  
Hines, OR 97738

Dear Project Lead:

Please accept these comments from Friends of Living Oregon Waters (“FLOW”) on the draft Environmental Impact Statement (“DEIS”) for the proposed North Steens transmission line and four associated wind energy generation sites (the “project”). In addition to these comments on the impacts to aquatic resources, including wetlands, riparian areas and streams, we join in broader comments submitted by the Oregon Natural Desert Association on behalf of a large coalition of organizations concerned about the environmental impacts of the project.

Founded in 2002, FLOW’s mission is to provide public education, field monitoring and legal oversight to protect Oregon Waters from pollution and development. FLOW members and volunteers visit, recreate, and engage in restoration activities throughout the state, including in the Steens Mountain area. We are concerned about the threats posed by the proposed project to the unique Steens area habitat generally, and specifically about the impacts to water resources in an area of the state with few aquatic resources.

**The DEIS Fails to Give Adequate Consideration to Likely Impacts to Water and Wetlands Resources in Violation of NEPA and FLPMA**

The project site is in a very dry area of Oregon. The general lack of water resources make those aquatic resources that are present all the more important as habitat, and render deleterious impacts to those resources all the more severe. The DEIS gives only cursory treatment to the anticipated impacts to waterbodies, riparian areas and wetlands associated with the proposed project, and fails to provide more than the vaguest

of mitigation proposals. This cursory treatment violates both the letter and intent of the National Environmental Policy Act (“NEPA”) 42 U.S.C. § 4321 *et seq.*, by failing to provide both the public and the action agencies with information adequate to make informed decisions. Additionally, the insufficient analysis fails to comply with the requirements of the Federal Lands Policy and Management Act (“FLPMA”), the Clean Water Act, and Oregon state law.

Under NEPA, in the EIS an agency must “‘rigorously explore and objectively evaluate all reasonable alternatives’ to a proposed plan of action that has significant environmental effects.” *NRDC v. USFS*, 421 F.3d 797, 813 (9th Cir. 2005) (citing 40 C.F.R. § 1502.14(a)). NEPA requires federal agencies “consider every significant aspect of the environmental impact of a proposed action . . . [and] inform the public that it has indeed considered environmental concerns in its decision-making process.” *Earth Island Inst. v. USFS*, 351 F.3d 1291, 1300 (9th Cir. 2003). To accomplish this goal, NEPA imposes procedural requirements to ensure that federal agencies “take a ‘hard look’ at environmental consequences.” *Id.* Specifically, NEPA requires the preparation of an environmental impact statement (EIS) for all agency actions that “may have a significant effect on the quality of the human environment.” Federal agencies are directed to “exercise a degree of skepticism in dealing with self serving statements from a prime beneficiary of the project and to look at the general goal of the project rather than only those alternatives by which a particular applicant can reach its own specific goals.” *Env’tl. Law & Policy Center v. U.S. Nuclear Reg. Comm.*, 470 F.3d 676, 683 (7th Cir. 2006) (quoting *Simmons v. U.S. Army Corps of Eng’rs*, 120 F.3d 664, 666 (7th Cir. 1997)). Here, the DEIS fails to adequately explore alternatives and to take the requisite hard look at impacts. The DEIS does not provide adequate information for the public or federal and state agencies to make informed decisions about the proposed project.

The Bureau of Land Management’s management obligations regarding public lands under its jurisdiction derive from FLPMA. Regarding Right of Way (“ROW”) grants, FLPMA states:

Each right-of-way shall contain...

(a) terms and conditions which will (i) carry out the purposes of this Act and rules and regulations issued thereunder; (ii) minimize damage to scenic and esthetic

values and fish and wildlife habitat and otherwise protect the environment; (iii) require compliance with applicable air and water quality standards established by or pursuant to applicable Federal or State law; and (iv) require compliance with State standards for public health and safety, environmental protection, and siting, construction, operation, and maintenance of or for rights-of-way for similar purposes if those standards are more stringent than applicable Federal standards; and

(b) such terms and conditions as the Secretary concerned deems necessary to (i) protect Federal property and economic interests; (ii) manage efficiently the lands which are subject to the right-of-way or adjacent thereto and protect the other lawful users of the lands adjacent to or traversed by such right-of-way; (iii) protect lives and property; (iv) protect the interests of individuals living in the general area traversed by the right-of-way who rely on the fish, wildlife, and other biotic resources of the area for subsistence purposes; (v) require location of the right-of-way along a route that will cause least damage to the environment, taking into consideration feasibility and other relevant factors; and (vi) otherwise protect the public interest in the lands traversed by the right-of-way or adjacent thereto.

43 U.S.C. § 1765. The DEIS, however, fails to include such terms and conditions to adequately protective the waterbodies, wetlands and riparian areas affected by the project, or evaluate any alternatives that consider potential conditions. The DEIS contains none of the mandatory terms and conditions to carry out the purposes of FLPMA and “minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment.” *Id.* § 1765(a). Nor has the DEIS demonstrated that any ROW would “prevent unnecessary or undue degradation” of the lands BLM manages on and near Steens Mountain, including the rare and essential aquatic resources there. *Id.* § 1732(b).

### **The DEIS Fails to Provide Adequate Information on Clean Water Act Compliance**

In addition to failure to comply with FLPMA, the DEIS does not provide adequate information or analysis to demonstrate compliance with the Clean Water Act. The purpose of the Clean Water Act (“CWA”), 33 U.S.C. §1251 et seq., is to restore and maintain the chemical, physical, and biological integrity of waters of the United States. Section 404 of the CWA prohibits the discharge of fill material without a permit. The purpose of the Environmental Protection Agency’s (“EPA”) CWA §404(b)(1) Guidelines is “to restore and maintain the chemical, physical, and biological integrity of waters of the United States through the control of discharges of dredged or fill material.” The

proposed wetland fill activities will require a CWA section 404 permit as well as a National Pollution Discharge Elimination System permit.

The 404 Guidelines explain:

(f)undamental to these Guidelines is the precept that dredged or fill material should not be discharged into the aquatic ecosystem, unless it can be demonstrated that such a discharge will not have an unacceptable adverse impact either individually or in combination with known and/or probable impacts of other activities affecting the ecosystems of concern.” EPA 404(b)(1) Guidelines at 230.1(c). Moreover, **“(f)rom a national perspective, the degradation or destruction of special aquatic sites, such as filling operations in wetlands, is considered to be among the most severe environmental impacts covered by these Guidelines. The guiding principle should be that degradation or destruction of special sites may represent an irreversible loss of valuable aquatic resources.**

*Id.* at 230.1(d) (emphasis added). Under 40 CFR Section 230.1(c):

Fundamental to these Guidelines is the precept that dredged or fill material should not be discharged into the aquatic ecosystem, unless it can be demonstrated that such a discharge will not have an unacceptable adverse impact either individually or in combination with known and/or probable impacts of other activities affecting the ecosystems of concern.

The proposed action would cause unacceptable adverse impacts both individually and in combination with known and/or probable impacts of other activities affecting the ecosystems of concern. The DEIS lacks essential information for the agencies to determine whether the proposed action would comply with the 404(b)(1) guidelines.

Under 40 CFR Section 230.12(a):

On the basis of these Guidelines (subparts C through G) the proposed disposal sites for the discharge of dredged or fill material must be:

...(3) Specified as failing to comply with the requirements of these Guidelines where:

...(iv) There does not exist sufficient information to make a reasonable judgment as to whether the proposed discharge will comply with these Guidelines.

In numerous essential aspects, sufficient information does not exist in the DEIS to make a reasonable judgment as to whether the proposed wetland fill activities will comply with these Guidelines. It is the burden of the applicant, not the federal and state agencies, to produce such information. Here, the applicant has failed to provide the requisite information. For example, the locations of the transmission line poles have yet to be

determined. DEIS at 3.4-23. The DEIS contains only vague statements that poles will be placed in wetlands. *See e.g.* id.; 3.4-19; 3.4-21 (“so three poles would be placed in wetlands at that crossing”). Likewise, the required Erosion and Sediment Control Plan has yet to be drafted, let alone set out for agency and public review.

The proposed action would alter wetlands that perform functions important to the public interest. Under 33 CFR Section 320.4(b):

- (2) Wetlands considered to perform functions important to the public interest include:
  - (i) Wetlands which serve significant natural biological functions, including food chain production, general habitat and nesting, spawning, rearing and resting sites for aquatic or land species;
  - (ii) Wetlands set aside for study of the aquatic environment or as sanctuaries or refuges;
  - (iii) Wetlands the destruction or alteration of which would affect detrimentally natural drainage characteristics, sedimentation patterns, salinity distribution, flushing characteristics, current patterns, or other environmental characteristics;
  - (iv) Wetlands which are significant in shielding other areas from wave action, erosion, or storm damage. Such wetlands are often associated with barrier beaches, islands, reefs and bars;
  - (v) Wetlands which serve as valuable storage areas for storm and flood waters;
  - (vi) Wetlands which are ground water discharge areas that maintain minimum baseflows important to aquatic resources and those which are prime natural recharge areas;
  - (vii) Wetlands which serve significant water purification functions; and
  - (viii) Wetlands which are unique in nature or scarce in quantity to the region or local area.
- ...(4) No permit will be granted which involves the alteration of wetlands identified as important by paragraph (b)(2) of this section or because of provisions of paragraph (b)(3), of this section unless the district engineer concludes, on the basis of the analysis required in paragraph (a) of this section, that the benefits of the proposed alteration outweigh the damage to the wetlands resource.

Here, the wetlands proposed for destruction are important, as defined by 33 C.F.R § 320.4(b)(2) because the wetlands serve significant biological functions, contain important environmental characteristics, are groundwater discharge areas, serve significant water purification functions, and are scarce in quantity in this region.

### **The DEIS Fails to Assess All Potential Impacts to Wetlands and Riparian Areas**

The DEIS states that “most springs are typically dry by May,” DEIS at 3.4-2, yet field visits to the proposed Echanis Project site to determine the presence of wetlands and

riparian areas were conducted in late May and June 2008 – the dry season. DEIS at 3.4-2. The DEIS continues “(t)hese areas were inspected again in July 2008 to finalize the location of the main access road.” *Id.* Conducting the wetland delineation field visits during the dry summer months likely led to an improperly low count of wetland areas. Delineation field visits should have occurred during the wet season in this dry area of the state. Moreover, the ordinary high water mark of streams was determined through direct observation. *Id.* This observation similarly should have occurred during the wet months when stream flow is at its peak.

Also problematic is the complete lack of analysis on wetlands within the project footprint. The DEIS states “wetlands were not delineated in areas where there would be no direct effect from construction of new access roads; wetland areas within the ROW that would be completely spanned by the transmission line were not delineated.” DEIS at 3.4-2. Indirect effects of this construction on adjacent wetlands are entirely possible and should have been analyzed. All wetlands in the project area should have been analyzed. Small adjustments in the proposed route could affect these wetlands, yet they are entirely ignored by the DEIS. Likewise, the DEIS ignores wetlands that would “be completely spanned by the transmission line.” DEIS at 3.4-2. Again, both potential direct and indirect effects to these wetlands are part of any complete environmental analysis of the project.

Further, the DEIS refers to directional drilling as a proposed technique for stream crossings, yet has no discussion of the potential impacts of this activity. Horizontal directional drilling (“HDD”) crossings, when successful, have impacts in areas adjacent to rivers where staging and construction areas occur. HDDs also require the disposal of materials extracted from the drill hole. Without knowing the length and width of the proposed HDDs, it is impossible for the public to meaningfully comment on the impact of the HDD and the disposal of spoils. Worse yet, HDD attempts frequently fail, causing drastic impacts to water quality and fish habitat. In recent history, many HDD attempts along the 12-inch Coos County natural gas pipeline failed, resulting in “frac-outs,” situations in which large amounts of sediment and bentonite clay (used as a drilling lubricant) were released into streams. Bentonite clay and sediment released through frac-

outs can disrupt fish spawning habitat, increase turbidity, and potentially introduce other contaminants to impacted waterways.

### **The DEIS Fails to Provide the Public with Adequate Information on Proposed Mitigation for Loss of Wetlands**

The DEIS does not describe the mitigation proposed for the loss of wetlands due to the proposed project. The DEIS says only that these specific mitigation measures “**will be** described in the Compensatory Wetland Mitigation (CWM) Plan” in a revised application to the Corps and Oregon Department of State Lands. The utter lack of this information in the DEIS deprives the public of an opportunity to comment on the proposed mitigation plans. The general description of mitigation measures is incredibly vague and generalized. *See e.g.* DEIS at 3.4-18 (“mitigation would consist of wetland creation and riparian enhancement planting.”) The DEIS simply does not contain enough information on the impacts to wetlands for the agencies to make informed decisions.

EPA describes the proper mitigation sequencing as follows:

In 1990, the Environmental Protection Agency (EPA) and the Department of Army entered into a Memorandum of Agreement (MOA) to clarify the type and level of mitigation required under Section 404 regulations. The agencies established a three-part process, known as mitigation sequencing to help guide mitigation decisions:

1. Avoid - Adverse impacts are to be avoided and no discharge shall be permitted if there is a practicable alternative with less adverse impact.
2. Minimize - If impacts cannot be avoided, appropriate and practicable steps to minimize adverse impacts must be taken.
3. Compensate - Appropriate and practicable compensatory mitigation is required for unavoidable adverse impacts which remain.

*Available at <http://www.epa.gov/owow/wetlands/pdf/CMitigation.pdf>.*

The MOA describes the legal requirements:

*Avoidance.* Section 230.10(a) allows permit issuance for only the least environmentally damaging practicable alternative. The thrust of this section on alternatives is avoidance of impacts. Section 230.10(a) requires that *no discharge shall be permitted if there is a practicable alternative* to the proposed discharge which would have less adverse impact to the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences. In addition, Section 230.10(a)(3) *sets forth*

*rebuttable presumptions* that 1) alternatives for non-water dependent activities that do not involve special aquatic sites are available and 2) alternatives that do not involve special aquatic sites have less adverse impact on the aquatic environment. *Compensatory mitigation may not be used as a method to reduce environmental impacts* in the evaluation of the least environmentally damaging practicable alternatives for the purposes of requirements under Section 230.10(a).

Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency, 1990 (emphasis added). In addition, adequate mitigation must replace habitat values with “in-kind” and “in-place” habitat. The MAO states:

Generally, in-kind compensatory mitigation is preferable to out-of-kind. There is continued uncertainty regarding the success of wetland creation or other habitat development. Therefore, in determining the nature and extent of habitat development of this type, careful consideration should be given to its likelihood of success.

*Id.*

Here, The DEIS fails to follow the legal requirements, skipping the avoidance and minimization steps, and then fails entirely to set out any detail on the proposed mitigation. The DEIS lacks information on the proposed location of mitigation, timing, and any detail beyond the proposed 1:1.5 mitigation ratio. The filling of the wetlands and their resulting destruction will be certain, permanent, and imminent. In contrast, the measures to be implemented in the as yet undrafted CWM Plan, and the effectiveness of such measures, are highly uncertain. Furthermore, even if the measures of a future CWM Plan are successfully implemented, the benefits from the measures may accrue slowly while sensitive, endangered and threatened species are put in further jeopardy by a lack of essential habitat.

### **The Application Fails to Incorporate Practicable Steps That Will Minimize Potential Adverse Impacts of the Discharge on the Aquatic Ecosystem**

Under 40 CFR Section 230.10(d):

Except as provided under section 404(b)(2), no discharge of dredged or fill material shall be permitted unless appropriate and practicable steps have been

taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem.

Because the DEIS lacks any detailed discussion of proposed mitigation, it is impossible for the public or the agencies to evaluate whether all appropriate and practical steps will be taken to minimize impacts and mitigate for those that can not be eliminated. The DEIS fails to disclose specific information for adequate evaluation of the mitigation designs and procedures to be used mitigating these environmental impacts. The agencies and the public can not possibly evaluate the effectiveness of any mitigation plans proposed by the applicant without the specifics of the plans. Simply stating that Best Management Practices (“BMPs”) will be used is insufficient for evaluation of mitigation measures specific to this site. In fact, the list of BMPs included in the DEIS as Appendix A states: “impact avoidance and mitigation measures developed in consultation with appropriate land management and regulatory agencies and other interested parties will be implemented subsequent to the completion of the NEPA compliance document. In addition, supplemental surveys of appurtenant impact zones beyond the corridor will be undertaken as needed.” DEIS Appendix at A-3. This sequence turns the NEPA process on its head. Likewise, the listing of BMPs to be used is inadequate for a proper analysis of the effectiveness of the vague proposed sediment control measures.

The description of a general BMP without site specific considerations is worthless to the public, and the agencies, for proper evaluation of the measures to be used for mitigation of environmental impacts caused by construction activities.

- Lack of specifics regarding the water quality and habitat impacts of the improvements to roads
- Lack of design specifics and analysis of potential impacts of directional drilling
- Failure to assess how much of an increase in semi-impervious surfaces will result from road improvements, and how surface flow runoff will be affected by said road improvements. These forms of pollution could be increased sedimentation due to the increased surface flow runoff, or debris and hydrocarbons such as oil washed from the road surfaces during storm events. The DEIS should evaluate the effects of greater semi-impervious areas and changes in storm water drainage dynamics resulting from road widening and construction, and also evaluate the potential from increased pollutants entering riparian areas, streams, and wetlands, from the resulting increased storm water runoff
- Lack of specific work windows
- Lack of timeline for replanting and habitat restoration
- Lack of specific information on use of herbicides in wetland and riparian areas
- Lack of specific information on tower placement in wetlands and riparian areas

## **The Proposed Project Would Violate Oregon’s Water Quality Standards and Antidegradation Policy**

The proposed project would violate Oregon’s water quality standard for temperature by removing riparian vegetation that shades streams, causing stream heating along a wide construction easement. The proposed project would also violate Oregon’s water quality standard for turbidity by causing an increase in turbidity levels in stream segments impacted by the installations. The DEIS states only that 20% of the 516 streams mapped in the watershed are listed as having Total Maximum Daily Loads (“TMDL”). DEIS at 3.2-5. Most of these are for excess temperature. Others are impaired by turbidity or dissolved oxygen levels, or multiple parameters. The DEIS, however, fails entirely to analyze specific impacts to these impaired streams or to explain how the applicant will or can comply with Oregon’s water quality standards.

The project would cross waterbodies that are listed on the 303(d) list as impaired for various parameters, including temperature, dissolved oxygen and sedimentation. The Ninth Circuit Court of Appeals recently made clear that new dischargers may not add a pollutant into a water body that is water quality limited. *See Friends of Pinto Creek v. United States Environmental Protection Agency*, 504 F.3d 1007 (9th Cir. 2007) *cert. denied* 129 S. Ct. 896 (2009). These impaired waterbodies are listed by the state to have the beneficial use of resident fish and aquatic life, and some are listed for salmon spawning. Under state law: “the creation of ... conditions that are deleterious to fish or other aquatic life ... may not be allowed.” 340-048-007 (11). Yet the Applicant has failed entirely to demonstrate that these beneficial uses will be protected and that the waters will not be further degraded by the project. The applicant has failed to prove the necessity of this project, and therefore the state will not be able to determine that the benefits of the diminished water quality outweigh the environmental costs of the reduced water quality.

The proposed action would violate Oregon’s water quality standard for turbidity. Under OAR 340-041-0036 (Turbidity):

No more than a ten percent cumulative increase in natural stream turbidities may be allowed, as measured relative to a control point immediately upstream of the turbidity causing activity. However, limited duration activities necessary to

address an emergency or to accommodate essential dredging, construction or other legitimate activities and which cause the standard to be exceeded may be authorized provided all practicable turbidity control techniques have been applied and one of the following has been granted:

(1) Emergency activities: Approval coordinated by the Department with the Oregon Department of Fish and Wildlife under conditions they may prescribe to accommodate response to emergencies or to protect public health and welfare;

(2) Dredging, Construction or other Legitimate Activities: Permit or certification authorized under terms of section 401 or 404 (Permits and Licenses, Federal Water Pollution Control Act) or OAR 141-085-0100 et seq. (Removal and Fill Permits, Division of State Lands), with limitations and conditions governing the activity set forth in the permit or certificate.

Put more simply, a violation of Oregon's water quality standard for turbidity occurs when an activity causes a more than 10% increase in natural turbidity levels, unless the activity is necessary to accommodate essential dredging, construction or other legitimate activities AND all practicable turbidity control techniques have been applied. No such showing of necessity is possible for this project, and no complete analysis of turbidity impacts is included in the DEIS. Instead the DEIS relies on BMPs, yet the DEIS gives little specific information to justify the assumption that, particularly in steep areas, BMPs will be adequate to prevent turbidity impacts to streams.

Moreover, the proposed action would violate the state of Oregon's antidegradation policy for already impaired waterbodies. Under 340-041-0004:

(1) Purpose. The purpose of the Antidegradation Policy is to guide decisions that affect water quality such that unnecessary further degradation from new or increased point and nonpoint sources of pollution is prevented, and to protect, maintain, and enhance existing surface water quality to ensure the full protection of all existing beneficial uses. The standards and policies set forth in OAR 340-041-0007 through 340-041-0350 are intended to supplement the Antidegradation Policy...

(7) Water Quality Limited Waters Policy: Water quality limited waters may not be further degraded except in accordance with section (9)(a)(B), (C) and (D) of this rule.

Simply put, the DEIS fails entirely to demonstrate that the project will comply with FLPMA, the CWA, or Oregon state law. The failure to analyze the impacts to wetlands, riparian areas and streams in any detail, the total lack of a mitigation plan and

erosion and sediment control plan, and the heavy reliance on general and unspecific BMPs is entirely inadequate under NEPA.

Dated this 18 day of September, 2010.

A handwritten signature in cursive script that reads "Bethany Cotton". The signature is written in black ink and is positioned above a horizontal line.

Bethany Cotton

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