

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MICHIGAN  
NORTHERN DIVISION

GARDEN PENINSULA FOUNDATION,  
DENISE and FRANCIS ANSELL, JERRY  
and JEAN COLLINS, BYRON HAZEL,  
VIOLA LESTER, CALVIN and MARGARET  
RICHARD, MICHAEL and SUE ROCHEFORT,  
and NICOLE YOUNG,

Case No. 15-cv-        -  
Hon.

Plaintiffs,

v

HERITAGE SUSTAINABLE ENERGY, LLC,  
UNITED STATES FISH AND WILDLIFE SERVICE;  
KENNETH SALAZAR, in his official capacity  
as Secretary of the Interior of the United States  
Department of the Interior; Daniel M. Ashe, in his  
official capacity as the Director of the United  
States Fish and Wildlife Service,

Defendants.

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**COMPLAINT FOR DAMAGES, DECLARATORY JUDGMENT, AND INJUNCTIVE  
RELIEF**

NOW COME Plaintiffs, Garden Peninsula Foundation, Denise and Francis Ansell, Jerry and Jean Collins, Byron Hazel, Viola Lester, Calvin and Margaret Richard, Michael and Sue Rochefort, and Nicole Young by and through their attorneys, TOPP LAW PLC, by Susan Hlywa Topp, and by F. Michelle Halley, for their Complaint under the laws of the United States including the National Environmental Policy Act, Endangered Species Act, Bald and Gold Eagle Protection Act, Administrative Procedures Act, and the laws of the State of Michigan, including the Michigan Environmental Protection Act and Michigan common law, state as follows:

### **INTRODUCTION**

1. In 2012, Defendant Heritage Sustainable Energy, LLC (“Heritage”) began operation of 14 wind turbines on Michigan’s Garden Peninsula in Delta County. The Garden Peninsula is home to generations of farmers and is a rural and picturesque community on the shores of Lake Michigan. It is also a well-known migratory bird haven in a crucial migratory pathway. These turbines were constructed and began operation with no environmental impact assessment performed by any federal or state agency, despite known use of the area for nesting, foraging and migration by numerous birds including eagles and protected species. The Garden Peninsula is also known for its extraordinary bat populations. Since 2012, the environmental and human impacts from the towers have become more and more known to residents of the Garden Peninsula, including the plaintiff group and individual plaintiffs in this case. Now, defendant Heritage is planning additional turbines on the Garden Peninsula and just north of the Peninsula, near Cooks, Michigan. Additional turbines will mean additional negative impacts to humans and animals using these areas, including the Endangered Kirtland’s warbler. Defendant United States Fish and Wildlife Service (FWS) has made no indication that it intends to properly apply

environmental laws to the additional industrial wind development. The group and individuals herein seek compensation for negative impacts to their health and well-being, use and enjoyment of their property and diminution in value of their property due to the turbines. They also seek proper environmental reviews and enforcement of federal and state environmental laws to protect their own interests as well as those of impacted wildlife.

#### **JURISDICTION AND VENUE**

2. As required by the Endangered Species Act, § 16 U.S.C 1540 (g), Defendants and the Secretary of the Interior were provided with a 60-day Notice of the violations before this suit was filed sent by certified mail on June 1, 2014. (**Ex. 1, Notice**).

#### **PARTIES**

3. Plaintiff Garden Peninsula Foundation, is a Michigan non-profit corporation, whose members reside or own property in Delta or Schoolcraft Counties, State of Michigan, f/d/b/a/ the Concerned Citizens for Garden and Cooks, LLC, a Michigan limited liability company, f/d/b/a/ the Citizens for More Responsible Alternative Energy, (collectively, “The Foundation”).
4. Plaintiffs Denise and Francis Ansell, Jerry and Jean Collins, Byron Hazel, Viola Lester, Calvin and Margaret Richard, Michael and Sue Rochefort, and Nicole Young are residents of and own property in Delta County, Michigan (collectively “Individual Plaintiffs”).
5. Defendant Heritage Sustainable Energy, LLC is a Michigan limited liability company formed in 2004 which at all relevant times hereto has been doing business in the State of Michigan (“Heritage”).

6. Heritage developed and is the Operator of an industrial wind energy facility called the Garden I Wind Farm on lands leased from private individuals which is located in Garden Township, Delta County, in the Garden Peninsula, Michigan.
7. Defendant U.S. Fish and Wildlife Service (FWS) is the federal agency responsible for the protection of endangered species, migratory birds and eagles via its application and enforcement of the Endangered Species Act, the Migratory Bird Treaty Act, the Bald and Golden Eagle Protection Act and the National Environmental Policy Act, among other statutes.
8. The Foundation is a non-profit grassroots community organization based in the Garden Peninsula, Michigan, whose members either reside or own property in the Garden Peninsula, and who enjoy watching eagles and other migratory birds and bats in the Garden Peninsula including in the vicinity of the Garden Wind Farm. In addition, the Foundation and its members are involved in education and advocacy issues related to the negative impacts of wind turbines when sited improperly and has used its limited resources for the protection of the Kirtland's Warbler, Piping Plover, the Rufa red knot, eagles, other migratory birds and bats and their habitat located in the Garden Peninsula and in the vicinity of the Garden Wind Farm. The Foundation brings this action on its own behalf and also on behalf of its adversely affected members who live in and recreate in the Garden Peninsula and who enjoy the local ecosystem and the species within that ecosystem for recreation, scientific, spiritual, educational, aesthetic, and other purposes. These members also include Garden community residents, including farmers, living in close proximity to the Garden Wind Farm Project who enjoy the natural benefits provided by the migratory birds, avian and bat wildlife, such as tourism during migration periods, photography, and insect control.

9. The Foundation and its members believe that the existing Phase I of the Heritage Garden Wind Farm comprised of 14 industrial 2 MW wind turbines, and the proposed Phase II expansion in Cooks, Schoolcraft County and Phase III expansion in Delta County in the Garden Peninsula, Michigan, are or will be located in a migratory bird pathway and bat and Kirtland Warbler's habitat, will "take" or kill migratory birds, eagles, bats, Kirtland's Warblers, and other endangered or protected avian life in violation of Section 9 of the Endangered Species Act, 16 U.S.C. § 1538(a)(1)(B), the Bald and Golden Eagle Protection Act, 16 U.S.C. 668, the National Environmental Policy Act, 42 U.S.C. 4321-4347, the Administrative Procedure Act, and the Migratory Bird Treaty Act, 16 U.S.C.703-712. This unlawful "take" will undermine the survival and recovery of these species, and will therefore injure the Foundation and its members who derive recreation, scientific, spiritual, educational, aesthetic, and other benefits from the local ecosystem and the species within that ecosystem including migratory birds, eagles, bats, Kirtland's Warblers, and other endangered or protected avian life. FWS's failure under NEPA to perform an environmental impact assessment injured Plaintiffs by depriving them of information to which they are entitled by NEPA and the APA.
10. The Foundation and its members believe that the activities which are the subject of this action either will or are likely to unlawfully impair or destroy natural resources, including but not limited to rare, threatened, endangered, or protected avian and bat wildlife and their natural habitat in the Garden Peninsula, including eagles, Kirtland's Warbler, Piping Plover, the Rufa red knot, other migratory birds and bats in violation of the Michigan Environmental Protection Act.

11. The Individual Plaintiffs reside in and among the wind turbines of the Garden Wind Farm and the disturbing audible noise, vibrations, and shadow flicker from the wind turbines have invaded the Individual Plaintiffs' homes and properties and caused them personal harm and diminution in value of their property; Individual Plaintiffs seek damages and injunctive relief under Michigan common law including claims of nuisance and negligence.
12. The Foundation files this Complaint now because it has awaited and continues to await responses from Defendant FWS to several Freedom of Information Act requests (including data for bat populations on the Garden Peninsula), it has recently received post-construction bird and bat mortality data, and it has engaged in settlement discussions with both Defendants.
13. Individual Plaintiffs file this Complaint now because they now know the actual impacts upon them from the Heritage wind facility. They could not have known, until the turbines were constructed and had been operational for a period of time, what the impacts to them and their properties would be, including but not limited to noise, vibration and shadow flicker which requires a full year of operation to be fully known.

## **STATUTORY AND REGULATORY FRAMEWORK**

### **I. NATIONAL ENVIRONMENTAL POLICY ACT REVIEW and the ADMINISTRATIVE PROCEDURES ACT**

14. The National Environmental Policy Act ("NEPA"), 42 U.S.C. §4321 et seq. (1969), was enacted to ensure that all branches of government give proper consideration to the environment prior to undertaking any major federal action that significantly affects the environment.

15. Section 101(b)(1) requires the federal government to use all practicable means to "fulfill the responsibilities of each generation as trustee of the environment for succeeding generations." *Id.* § 4331(b)(1).
16. Section 101 (b)(2) requires the federal government to use all practicable means to "assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings." *Id.* § 4331 (b)(2).
17. Section 101 (b) (3) requires the federal government to use all practicable means to "attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences." *Id.* § 4331 (b) (3).
18. Section 101 (b) (4) requires the federal government to use all practicable means to "preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice." *Id.* § 4331 (b) (4).
19. NEPA requires the preparation of an "environmental assessment" when a categorical exclusion does not obviously apply or to determine if an Environmental Impact Statement is appropriate.
20. An "environmental assessment" briefly provides sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact, aids an agency's compliance with the Act when no environmental impact statement is necessary, and facilitates preparation of a statement when one is necessary. It shall include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted. 43 FR 56003 Sec. 1508.9.

21. “Impacts” and “effects” are synonymous in NEPA and include:

(a) Direct effects, which are caused by the action and occur at the same time and place.

(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial. 43 C.F.R. 56003 Sec. 1508.8.

22. USFWS violated NEPA and the Administrative Procedures Act when it failed to perform an environmental assessment or environmental impact statement when issuing a special take permit under the MBTA, failing to require ESA permitting and essentially giving Heritage a waiver on BGEPA compliance.

23. On information and belief, FWS has in its possession ample evidence such that it should have known that an environmental impact assessment was required.

24. The agency action is reviewed under the federal Administrative Procedures Act (APA).

25. The APA provides that a reviewing court shall “hold unlawful and set aside agency action, findings, and conclusions found to be:

(a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(b) contrary to constitutional right, power, privilege, or immunity;

(c) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(d) without observance of procedure required by law;

(e) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of any agency hearing provided by statute; or

(f) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error." Title 5 U.S.C. § 706(2).

26. Declaratory and injunctive relief are available under the APA and NEPA. 40 C.F.R. 1500.3.

27. The APA also authorizes the court to compel agency action unlawfully withheld or unreasonably delayed and set aside agency action found to be arbitrary and capricious or otherwise not in accordance with law. 5 U.S.C. § 706(1) and (2).

## **II. THE ENDANGERED SPECIES ACT**

28. One of the stated purposes of the Endangered Species Act ("ESA") is "to provide a program for the conservation of...endangered species and threatened species." 16 U.S.C. § 1531(b).

29. The Act defines an "endangered species" as "any species which is in danger of extinction." *Id.* at 1532(d). A "threatened species" is a species that is likely to become endangered in the foreseeable future. *Id.* at 1532(20).

30. Section 9 of the ESA prohibits the "taking" of any endangered species. *Id.* at 1538(a). The Act defines "take" broadly to include "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." *Id.* at 1532(19).

31. The term "harass" is defined as "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering." 50 CFR § 17.3.

32. The term “harm” is defined as “an act which actually kills or injures wildlife, which...may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.” *Id.*
33. Section 10 of the ESA provides a limited exception to the otherwise strict prohibition against the “taking” of an endangered species; an applicant can apply to the U.S. Fish and Wildlife Service for a permit authorizing a take if such taking is “incidental to, and not the purpose of, carrying out an otherwise lawful activity.” 16 U.S.C. § 1539(a)(1)(B).
34. The U.S. Fish and Wildlife Service may not issue an incidental take permit (“ITP”) unless certain species-specific safeguards are satisfied by the applicant, including the submission of a detailed “conservation plan.” *Id.* at 1539(a)(2)(A). An ITP may be issued only after an opportunity for public input on the application and conservation plan, and after findings by the U.S. Fish and Wildlife Service that must include that the applicant will “minimize and mitigate the impacts of such taking” and “the taking will not appreciably reduce the likelihood of the survival and recovery of the species.” *Id.* § 1539(a)(2)(B).
35. The Endangered Species Act authorizes citizens to enforce compliance with any provision of the Act. 16 USC § 1540(g).

### **III. THE BALD AND GOLD EAGLE PROTECTION ACT**

36. The Bald and Gold Eagle Protection Act (“Eagle Act”) was enacted in 1940 and provides for the protection of bald and golden eagles by prohibiting the take, among other activities, of any bald or golden eagle, unless allowed by permit. 16 U.S.C. § 668 et seq.
37. Upon Plaintiffs’ information and belief, reports have been submitted to U. S. Fish and Wildlife Service of the Heritage wind facility taking eagles.

38. Under the Eagle Act “take” means pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, destroy, molest, or disturb. 50 C.F.R. 22.3.
39. Under the Eagle Act “disturb” means to agitate or bother a bald or golden eagle to a degree that causes, or is likely to cause, based on the best scientific information available, (1) injury to an eagle, (2) a decrease in its productivity, by substantially interfering with normal breeding, feeding, or sheltering behavior, or (3) nest abandonment, by substantially interfering with normal breeding, feeding, or sheltering behavior. 50 C.F.R. 22.3.
40. In addition to immediate impacts, this definition also covers impacts that result from human-caused alterations initiated around a previously used nest site during a time when eagles are not present, if, upon the eagle’s return, such alterations agitate or bother an eagle to a degree that injures an eagle or substantially interferes with normal breeding, feeding, or sheltering habits and causes, or is likely to cause, a loss of productivity or nest abandonment.
41. The agency’s failure to enforce the BGEPA is challengeable under the APA.

#### **IV. THE MICHIGAN ENVIRONMENTAL PROTECTION ACT**

42. Part 17 of the Natural Resources and Environmental Protection Act, also known as the Michigan Environmental Protection Act, or “MEPA,” provides:

... any person may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against any person for the protection of the air, water and other natural resources and the public trust in these resources from pollution, impairment or destruction. MCL 324.1702(1).

43. The MEPA further provides:

The court may grant temporary and permanent equitable relief or may impose conditions on the defendant that are required to protect the air, water, and other natural resources or the public trust in the resources from pollution, impairment or destruction. MCL 324.1704(1).

## **FACTUAL BACKGROUND**

### **A. THE GARDEN PENINSULA**

44. The Garden Peninsula is a known migratory bird and bat flyway and is of recognized ornithological interest and importance, particularly during the avian and bat migration periods.
45. The use of the Garden Peninsula as an important migratory bird and bat pathway has been espoused by notable organizations including the American Bird Conservancy, the FWS, and Heritage itself.
46. On information and belief, FWS and Heritage possess significant data indicating extraordinary bat and bird populations on the Garden Peninsula; this, and additional, information is the subject of a pending Freedom of Information Act requests.

### **B. THE HERITAGE GARDEN I WIND PROJECT**

47. Heritage is in the business of utility scale wind energy production and builds, operates, and maintains wind turbine farms in the State of Michigan, including the Stoney Corners Wind Farm in McBain, Michigan, which began operations in 2008, Big Turtle Wind Farm in Huron County, Michigan which was under construction in 2014, and the Garden I Wind Farm located in Garden Township in the Garden Peninsula of Michigan completed in September 2012. Heritage also provided development assistance for Detroit Edison's Thumb Wind Park in Huron County which became operational in December of 2012.
48. In 2007, Heritage conducted preliminary avian studies in the Garden Peninsula in anticipation of construction of the Garden I Wind Project. Even at this early stage, Heritage recognized that the Garden Peninsula was of "recognized ornithological interest and importance, especially during migration".

49. From the inception of the Garden Wind Project in 2007, the FWS expressed significant concerns with siting the Project in the Garden Peninsula, and on December 18, 2007, the FWS informed Heritages' agent, Dr. Paul Kerlinger, that no wind turbines should be constructed within three miles of a Great Lakes shoreline.
50. In the spring of 2008, Heritage or its agent conducted a Spring Migratory Study, which study noted the large number of Bald Eagles that were observed.
51. On June 25, 2009, the FWS again informed Heritage that no wind turbines should be sited within three miles of the shoreline and further recognized that it would be very difficult to achieve this three mile distance at any place within the Garden Peninsula.
52. The Common Coast Research and Conservation group put the FWS on notice on March 7, 2011 that Kirtland's Warbler and Piping Plover, protected Endangered Species, occur in the area planned for the Garden Wind Project.
53. On April 1, 2011, Heritage requested concurrence from the FWS that the Garden Wind Project will have "no effect" and is not likely to adversely affect endangered, threatened, proposed and candidate species, or proposed and designated critical habitats. The FWS did not agree that the Project would have no effect and declined to issue said concurrence.
54. In September of 2011, Dr. Kerlinger, on behalf of Heritage, completed a "Comprehensive Avian Risk Assessment for the Garden Peninsula Wind Energy Project, Delta County, Michigan."
55. On October 18, 2011, Heritage informed the FWS that Heritage intended to move forward with the construction of the Garden Wind Farm regardless of the recommendations and concerns of the FWS.

56. Between September and November, 2011, the FWS engaged in numerous internal discussions pertaining to the Comprehensive Avian Risk Assessment for the Garden Wind Project submitted by Heritage. The FWS, which disagreed with the Comprehensive Risk Assessment from the outset, spent two months drafting and editing their response to Heritage. The FWS found the conclusions in the Risk Assessment were based on incomplete data and qualitative analysis that provided no basis to change the view that the Project should not be built in the Garden Peninsula. The FWS also notes that even though the Risk Assessment concludes that there will be no negative avian impact, the report confirms that 828 raptors were observed during the study period, which equates to four raptors per hour, which the FWS deemed to be “substantial.”

57. In a letter from the FWS to Heritage dated November 4, 2011, (**Ex. 2**) the FWS unequivocally stated the following:

- a. FWS again recommends that Heritage not construct a commercial wind energy development of the Garden Peninsula due to the high potential for avian mortalities and violations of Federal Wildlife laws, including the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act.
- b. The proximity of the Project to a Great Lakes shoreline and Big Bay de Noc, the proximity of the Project to adjacent wetland habitats, and the fact that the Peninsula will tend to funnel avian migrants and serve as a point of departure or arrival for birds crossing Lake Michigan, all likely lead to a high level of avian use on the Garden Peninsula that could result in high levels of avian mortality by wind turbines at the proposed site.

- c. The FWS strongly disagrees with the conclusions by Dr. Kerlinger advanced in the Comprehensive Avian Risk Assessment for the Garden Peninsula Wind Energy Project, Delta County, Michigan. To the contrary, the data indicates that the construction of a commercial wind energy development on the Garden Peninsula **is likely to pose a very high risk for avian mortalities**, including a **high risk for bald eagle mortalities**.
- d. Heritage has failed to sufficiently collect and analyze comprehensive information concerning avian use of the Project area prior to construction and Heritage is not adequately considering the limited data it has collected.
- e. The proposed wind turbine locations are in areas where Heritage has documented high avian use and thus are not adequately setback from the Great Lakes shoreline or other important wildlife habitats.
- f. The Garden Wind Project should be substantially reevaluated or abandoned.
- g. The taking or killing of migratory birds is a violation of the Migratory Bird Treaty Act. Heritage's Project specific data documents the high levels of avian use at the proposed Project site (122 large birds per hour and 366 small birds per hour) which supports that the Garden Peninsula is an avian migration corridor and important movement corridor as birds traverse the island chain that extends north from Door County, Wisconsin. This data does not take into consideration nocturnal movements of avians over the airspace within the Project boundaries on the Peninsula. Prior radar studies have shown large movements of land bird migrations in the fall at night passing directly through the Garden Peninsula. Avian mortality during nocturnal movements may be one of the most significant threats to migratory birds from the Project.

h. The proposed Project on the Garden Peninsula is likely to take bald eagles in violation of the Bald and Golden Eagle Protection Act. This assessment is supported by the Spring and Fall 2010 data submitted by Heritage.

i. The Project presents a very high risk for migratory bird mortalities and an alternative location should be selected with less potential for impacts to federally protected wildlife.

*Id.*

58. In response to the November 4, 2011 letter, Heritage agreed to temporarily suspend construction of the first wind turbine that was underway in the Garden Wind Farm, and in order to reduce the risk to eagles and other protected birds, Heritage offered to undertake several mitigation measures, including:

- a. Limit the construction of wind turbines on the Garden Peninsula to no more than 14 turbines total;
- b. Pursue an Eagle Take Permit under the Eagle Act. (**Ex. 3, November 29, 2011 Letter**).

59. On December 7, 2011, Heritage changed its position and informed the FWS that it only agreed to limit the *initial* Garden Wind Project to 14 wind turbines for up to three years until after post construction avian mortality monitoring was completed, which monitoring will be done strictly by Heritage personnel. Heritage admitted that siting of wind turbines in the southern tip of the Peninsula presents great risk and therefore, Heritage agreed that no wind turbines would be constructed south of the north lines of Sections 27, 28, 29, and 30 T38N, R19W. Heritage also offered to replace the Coast Guard Tower in the Garden Peninsula at Heritage's sole cost and expense, estimated to be \$280,000. (**Ex. 4, December 7, 2011 Letter**).

60. On February 14, 2012, Heritage requested that the FWS accept Heritage's plan for the Garden Wind Farm Project, and the FWS, yet again, informed Heritage that the FWS not only does not accept the Garden Wind Plan, but moreover, still recommends that Heritage not construct a wind farm on the Garden Peninsula since it is such an important migratory bird corridor.
61. An Initial Assessment for Eagle Risk was conducted by the FWS and sent to Heritage on March 16, 2012. (**Ex. 5, March 16, 2012 Eagle Assessment**). The Assessment determined there was "extensive" Eagle habitat and use of the Garden Wind Project area and vicinity and among other findings, that the Garden Wind Project area overlaps a Spring and Fall Eagle migration corridor. 52 Bald Eagles were sighted in 60 hours of observation, which is one Bald Eagle sitting every 1.2 hours. In the 2011 breeding season, there were at least nine known active Bald Eagle territories within 10 miles of the Garden Wind Project boundary.
62. The FWS was informed on April 3, 2012 that there were two active Bald Eagle nests within 10 miles of the Garden Wind Farm Project area.
63. Based upon this Initial Assessment and in accordance with the Draft Eagle Conservation Plan Guidance, the FWS determined that the Garden Wind Project would likely fall into Risk Category I-"High Risk to Eagles", and the FWS recommends such projects be substantially redesigned and re-evaluated, moved, or abandoned.
64. The first phase of the Garden Wind Farm consisted of 14 Gamesa G97 two megawatt wind turbines located on the northern shores of Lake Michigan. These wind turbines are at least 450 feet tall and the diameter of the rotor swept zone is estimated to be 97 meters with the height of the swept zone 138.5 meters and the bottom of the swept zone at 41.5 meters. The

construction of the first phase of the Garden I Wind Farm was complete as of September 14, 2012, and all fourteen wind turbines were operational as of that date.

65. On September 24, 2012 FWS issued a “Special Purpose Utility Permit for Migratory Bird Mortality Monitoring—Wind” to Heritage Garden Wind Farm, LLC.
66. On October 16, 2012, the FWS confirmed to Heritage that there are 10 active eagle territories within the 10 mile perimeter and two new eagle nest locations just outside the Garden Wind Farm project.
67. Also in October of 2012, upon information and belief, the FWS engaged Michigan Technological University to initiate a study an avian and bat mortality from the Garden Wind Farm.
68. In November of 2012, Heritage proposed plans to expand the Garden Wind Project by building additional wind turbines in the Garden Peninsula (Garden II Wind) as well as in the village of Cooks, Schoolcraft County, Michigan which is just North of the Garden Peninsula, and sought input from the FWS regarding the same.
69. On June 10, 2013, the FWS informed Heritage that they believed the Garden II Wind Farm site has the potential to present a significant risk for Bald Eagle mortalities given its proximity to the coastline and to an active Eagle nesting territories. Further, the FWS also informed Heritage that the Kirtland’s Warbler inhabited the area proposed for the Cooks Wind Farm.
70. In December of 2013, Heritage produced its “2013 Post-construction Bird and Bat Fatality Study Heritage Garden Wind Farm.” **Ex. 6.** Though no carcasses were found, the report states that Bald Eagles use the Heritage Garden airspace “year-round” and nest nearby. The report also states that “two carcass finds were wings only, probably *Myotis*, based on forearm

length and color, either Little Brown or Northern Long-eared (*vide* A. Kurta, email communication 2 December 2013).”

71. Northern Long-eared bats are currently proposed as Endangered.

72. In August of 2014, the American Bird Conservancy sent a letter to FWS expressing great concern regarding the Heritage Garden Wind Farm’s potential impacts to birds and bats and the FWS’s failures to properly regulate the activity. **Ex. 7**, August 4, 2014 Letter from ABC.

C. THE HERITAGE GARDEN WIND PROJECT IMPACTS AND LIKELY IMPACTS ON BATS AND BIRDS

The Kirtland’s Warbler

73. The Kirtland’s warbler was listed as endangered in March 11, 1967.

74. Kirtland’s warblers live in and migrate between northern Michigan and the Upper Peninsula of Michigan and the Bahamas. They nest and breed near Mio, Michigan and in certain areas of the Upper Peninsula, including Delta and Schoolcraft counties. From approximately August through May, they winter in the Bahamas and then trek nearly 1500 miles to their Michigan breeding grounds. They nest in dense young jack pine growth on nutrient-poor, sandy soils.

75. The Kirtland’s warbler is documented to nest in Delta and Schoolcraft counties, Michigan.

Piping plover

76. Piping plovers were listed as Endangered on December 11, 1985.

77. Piping plovers are migratory birds. In the spring and summer they breed in northern United States and Canada. There are three locations where piping plovers nest in North America: the shorelines of the Great Lakes, the shores of rivers and lakes in the Northern Great Plains, and along the Atlantic Coast. Their nesting range has become smaller over the years, especially in

the Great Lakes area. In the fall, plovers migrate south and winter along the coast of the Gulf of Mexico or other southern locations. Piping plovers use wide, flat, open, sandy beaches with very little grass or other vegetation. Nesting territories often include small creeks or wetlands. Great Lakes Piping plovers are endangered due to shoreline development and habitat disruption.

78. Piping plovers are known to nest in Delta and Schoolcraft counties, Michigan.

#### Eagles

79. Eagles are birds of prey. There are significant populations of Bald Eagles that live and nest around the Great Lakes states. These birds are visual hunters and settle near open water, estuaries, lakes and rivers where there is an abundance of fish, their major food source. Eagles mate for life and use the same nest enlarging it each year. They travel long distances but usually return to breeding grounds within 100 miles of where they were born. Eagles are very sensitive to human activity, particularly during courtship, nest building, egg laying, incubation and hatching as well as the in nestling through fledgling period. Wintering eagles are also sensitive to permanent landscape changes due to their established roost sites.

80. Golden Eagles are aerial predators that eat reptiles, birds and mammals. They build their nests on cliffs or in the tallest of trees to enable them to see their surroundings. Depending on their home location, these eagles may migrate from Canada and Northern United States to areas where the winter climate is milder. During these flights, they are known to use lift from warm air currents in open landscapes to aid their journey. Like the Bald Eagle, Golden Eagles have a single mate for many years or even for life. These couples may return to the same nest year after year.

81. Eagles are known to nest in Delta and Schoolcraft counties, Michigan.

Rufa red knot

82. Rufa red knots are known for their ability to fly extraordinary distances during migration.

Some fly more than 9300 miles north to the Canadian Arctic in the spring and return to the extreme south of Argentina and Chile in the fall. In order to cover such great distances, strategic stopping points are essential for nourishment during their migration. This bird is known to use interior flyways on its journey and uses the Great Lakes as a stopping point when passing through Michigan. The Rufa red knot is proposed as threatened under the Endangered Species Act due to declining food sources and habitat.

83. Rufa red knots are known to utilize migratory pathways and layover areas in Delta and Schoolcraft counties, Michigan.

Northern long-eared bat

84. The Northern long-eared bat is a medium sized brown bat distinguishable by its large ears. It winters in caves and mines and in the summer, roosts either singly or in colonies underneath bark or in crevices of trees. The Northern long-eared bat is proposed to be listed as an endangered species due to its dramatic decline in numbers.

85. In December of 2013, Heritage produced its “2013 Post-construction Bird and Bat Fatality Study Heritage Garden Wind Farm.” **Ex. 6.** The report states that “two carcass finds were wings only, probably *Myotis*, based on forearm length and color, either Little Brown or Northern Long-eared (*fide* A. Kurta, email communication 2 December 2013).”

86. The Northern long-eared bat is known to live and breed in Delta and Schoolcraft counties, Michigan.

D. THE HERITAGE GARDEN WIND PROJECT IMPACTS ON THE INDIVIDUAL PLAINTIFFS

87. All of the Individual Plaintiffs reside in or own property within or adjacent to the Garden I Wind Farm.
88. Before the construction and operation of the Garden Wind Farm, the Individual Plaintiffs properties were quiet, rural settings.
89. In order to induce the support of local officials for the construction of the industrial wind project and gain the approval of the Garden community residents, Heritage represented that the wind turbines would be quiet (no louder than a refrigerator) and that people living nearby would not even know they were there. Those representations were false.
90. At the time of the design and permitting of the Garden I Wind Farm, neither Garden Township nor Delta County had any regulations in place for wind turbines or wind farms.
91. When Heritage decided to site the industrial wind energy facility in the small rural village of Garden, the local officials had no experience with or understanding of the likely adverse effects of the massive noisy machines and what noise restrictions and setbacks would be necessary to protect nearby residents from nuisance noise and vibrations.
92. Unlike the locals, Heritage knew, by virtue of Heritage's wind energy experience with its other wind farms, its involvement with the wind energy industry, and its defense of litigation brought against it as a result of wind turbine noise and vibrations, that the siting of wind turbines in close proximity to homes may cause the occupants to experience nuisance noise and vibrations. During the time that the Garden I Wind Farm was being constructed, Heritage was also aware that organizations and other communities were recommending and/or adopting stringent wind turbine siting regulations requiring setbacks farther than one

mile from residences and nighttime noise levels lower than 45 dB(A) in order to protect residents from nuisance noise and vibrations.

93. On March 22, 2011, some of the Individual Plaintiffs and other residents of the Garden Peninsula, wrote letters to the Delta County Board of Commissions requesting that a moratorium be placed on the issuance of permits for wind turbines 200 feet or higher in height so that wind turbine setbacks and issues pertaining to human health, diminution of property values, impacts to the bird and bat population, and the negative impacts to the aesthetic character of the Garden Peninsula could be addressed.

94. Delta County declined to enact a moratorium, but rather, began drafting an amendment to the Zoning Ordinance 76-12 to add regulations pertaining to utility grade wind turbines.

95. On April 26, 2011 Heritage submitted applications for building permits to Delta County and Delta County issued the Building Permits on May 13, 2011 for the construction of 14 wind turbines.

96. Heritage notified Delta County on December 14, 2011 that “Heritage believes it has resolved the recent issues” with the FWS, and gives reference to Heritage’s December 7, 2011 letter to the FWS written in response the blistering letter from the FWS to Heritage dated November 4, 2011. Heritage gives notice that the first wind turbine will be tested in February 2012 and that the construction of thirteen additional wind turbines will be completed later in 2012.

Comment [A1]: All at same time??

97. On or around June 1, 2012, Heritage presented Wind Energy Leases to the Individual Plaintiffs, which the Individual Plaintiffs declined to sign.

Comment [A2]: all at same time??

98. The Garden Wind Farm became fully operational with all 14 wind turbines online on September 12, 2014.

99. Plaintiffs Denise and Francis Ansell primary residence is located at 16405 18<sup>th</sup> Road, Garden, MI 49835 which consists of approximately 5.5 acres and includes a single family home. The Ansell's have lived on this property for over 20 years and Francis Ansell has lived in the Garden Peninsula his entire life. The G2 Wind Turbine is approximately 1,250 feet from the Ansell residence and 830 feet from the Ansell property line. The G14 Wind Turbine is approximately 1,761 feet from the Ansell residence.
100. Plaintiffs Jerry and Jean Collins primary residence is located at 6955 00.25 Road, Garden, MI 49835 which consists of approximately 21 acres and includes a single family home, a 20 X 50 pole barn and other out structures. The property has been in Jean Collins family for over 84 years and they had planned to pass the property on to their children. The Collins residence is approximately within 2,329 feet and the property line approximately 1,896 feet of Wind Turbine G5.
101. Plaintiff Byron Hazel primary residence is located at 6956 00.25 Road, Garden, MI 49835 which consists of approximately 9 acres and includes a single family home and garage. The property has been the Hazel residence since 1970 and the Mr. Hazel planned on passing the property on to his children. The Hazel residence is within approximately 2,188 feet of Wind Turbine G5, 2,485 feet of Wind Turbine G7. The Hazel property line is approximately 1,585 feet from Wind Turbine G5 and 2,028 feet from Wind Turbine G7.
102. Plaintiff Viola Lester's primary residence is located at 7494 00.25 Road, Garden, MI 49835 which consists of approximately 52 acres and includes a single family home that the Lesters built on the property and an attached garage, a 20 X 50 foot pole barn and other ancillary structures. The Lester's have owned this property for more than 35 years and they along with Calvin and Margaret Richard had planned to build homes for the children of

Calvin and Margaret Richard on the property. The Lester residence is approximately 1,336 feet and the East property line approximately 826 feet from Wind Turbine G3. The Lester residence is approximately 2,422 feet and the south property line is approximately 916 feet from Wind Turbine G8. Lester also owns 65.5 vacant acres on Pp Road of Garden Township, the West property line of which is approximately 703 feet from Wind Turbine G2.

103. Plaintiffs Calvin J. and Margaret Richards primary residence is located at 7397 00.25 Road, Garden, MI 49835 which consists of approximately 5 acres and includes a single family home and garage, pole barn and sauna. This Richards have lived there since 1981, and they made improvements to the property by remodeling the interior, adding an addition, and constructing a deck on the waterfront side of the house. This property has been in Margaret Richard's family for about 40 years. The Richard residence is within approximately 2,383 feet and the Richard property line within approximately 2,114 feet of Wind Turbine G8. The Richard residence is approximately 2,490 feet and the Richard property line is approximately 2000 feet from Wind Turbine G3.

104. Plaintiffs Michael and Sue Rochefort primary residence is located at 6920 18<sup>th</sup> Road, Garden, MI 49835 which consists of approximately 1 acre and includes a single family home that the Rocheforts have substantially remodeled. The residence is within 1,763 feet of Wind Turbine G9, 1,831 feet from Wind Turbine G10, and 2,606 feet from Wind Turbine G7, and 2,856 feet from Wind Turbine G5.

105. The Rocheforts also own 20 acres located at 7015 00.25 Road, Garden, MI with a pole barn that they use for a workshop, camping, bonfires, and outdoor recreation. The workshop is approximately within 1,804 feet and the property line 1,490 feet of Wind Turbine G5. The workshop is approximately within 2,960 feet and the property line 2,730 feet from Wind

Turbine G7. The workshop is approximately within 3,000 feet and the property line 2,745 feet from Wind Turbine G9.

106. The Rocheforts also own a cabin on 80 acres that they use for camping and outdoor recreation identified as Parcel Code 21010-054-001-00 and 21010-054-001-00. The cabin is within approximately 3,165 feet of Wind Turbine G14 and 3,474 feet of Wind Turbine G4. Even at this distance the wind turbines are not only visible but still audible.

107. The Rocheforts also own a 6 acre vacant parcel on 18th Road, Garden, MI, Parcel Code 21010-055-021-00. That property line is within approximately 1,413 feet of the Wind Turbine G5 and 1,600 feet of Wind Turbine G7.

108. Plaintiff Nicole Young owns property located at 7028 00.25 Road, Garden, MI 49835 which consists of approximately 4 acres and includes a single family home and garage. Ms. Young purchased the property in 2007 and made substantial improvements including a horse barn, horse fencing, patio, and remodeled the interior. Ms. Young planned to pass this property on to her children. The Young residence is approximately within 1,430 feet of Wind Turbine G5, 2,600 feet of Wind Turbine G7, 3,168 feet from Wind Turbine G10, and 3,214 feet of Wind Turbine G9.

109. The Individual Plaintiffs properties have significant and irreplaceable sentimental value to the Individual Plaintiffs, for reasons including but not limited to Individual Plaintiffs' longevity in residing at their respective properties, the family history of their properties and/or the time, effort, and labor spent by Individual Plaintiffs to build on, remodel, maintain, and/or improve their properties.

110. On October 8, 2012, the Individual Plaintiffs as well as other residents, totaling 73 in all, who all live in the vicinity of the Garden Wind Farm, wrote a letter to Delta County

complaining about the excessive and disturbing noise from the Garden Wind Farm. The Individual Plaintiffs and others state that the noise is disrupting their use and enjoyment of their homes and affecting their health, especially due to sleep deprivation. (**Ex. 8, October 8, 2012, Letter to County.**)

111. Heritage's representations in obtaining the approval of the Garden community that the wind turbines would not be noisy and siting the wind turbines too close to the homes of the Individual Plaintiffs was intentional, outrageous, willful, wanton and/or reckless and in disregard of the rights of the Individual Plaintiffs and the Garden community at large.
112. The Individual Plaintiffs and other members of the Garden community relied upon Heritage's representations by declining to appeal various local and state approvals of the projects and by declining to sue to halt the project while under construction.
113. The construction and operation of the Garden Wind Farm by Heritage is incompatible with the surrounding uses of the Individual Plaintiffs and has negatively affected, invaded upon, and interfered with the Individual Plaintiffs' use and enjoyment of their properties by:
  - a. Creating sustained, incessant, cyclical, and highly disturbing and annoying audible noise created by and emitted from the turbines synchronized to the turning of the turbine blades, often described as sounding like a jumbo jet flying overhead except that the jet does not fly away;
  - b. Creating vibrations or amplitude modulation of sound pressures or a pulse sensation when the rotating blades of the turbines pass by the turbine pedestal;
  - c. Creating shadow flicker/strobe light effect that often covers some and/or all of the Individual Plaintiffs' properties and intrudes into their homes when sunlight passes through the rotating blades of the turbines;

- d. Creating highly visible glare or glint which emanates from the turbines when they reflect sunlight;
- e. Creating visual disturbance from flashing red lights which overwhelm the nighttime sky and are visible from inside the Individual Plaintiffs' homes, and flash on the windows of the homes;
- f. Creating disruption of the Individual Plaintiffs' viewshed and vistas by the turning blades of the wind turbines and the flashing red lights from the wind turbines which viewshed and vistas were previously unobstructed by flashing lights and massive turning blades;
- g. Negatively impacting the amount and number of wildlife and birds in the area to be viewed and enjoyed;
- h. Disrupting or preventing Individual Plaintiffs' ability to enjoy normal outdoor family activities on their properties such as gardening, picnics, barbeques, and other recreation activities;
- i. Disrupting or preventing Individual Plaintiffs' ability to entertain guests or relatives;
- j. Disrupting or preventing Individual Plaintiffs' ability to have grandchildren or other family members sleep over due to sleep disruption;
- k. Preventing Individual Plaintiffs' from keeping their windows open in an attempt to reduce the noise.

114. As a result of the operation of the Garden Wind Farm and the invasions therefrom set forth above, the Individual Plaintiffs, as the case may be, began and are experiencing some and/or all of the following:

- a. Inability to sleep, repeated awakening during sleep, and sleep deprivation;

- b. Headaches;
- c. Vertigo and/or dizziness;
- d. Nausea;
- e. Stress and tension;
- f. Extreme fatigue;
- g. Anxiety and emotional distress;
- h. Diminution in property value.

115. The Individual Plaintiffs have made these interferences with their use and enjoyment of their properties, such as noise and shadow flicker, known to Heritage and Heritage has refused to abate the same.

116. The impacts of wind turbines, including noise and shadow flicker, and resultant effects such as sleep deprivation, headaches, vertigo, and other interferences with use and enjoyment that cause diminution in property values are known by Heritage.

117. The Garden Wind Farm and impacts thereof on the Individual Plaintiffs' properties has diminished the value of the Individual Plaintiffs' properties and the Individual Plaintiffs have a legitimate interest and right to protect their property from such diminution in value. Upon information and belief, the Garden Wind Farm will continue to unreasonably interfere with the Individual Plaintiffs' property values, including but not limited to difficulty in leasing and/or selling their properties for their fair market value. Reports on the adverse impact of wind turbines on property values located within 2 miles of wind turbines, upon information and belief, reveal a range of 25% to 40% of value loss, and some residents have been forced to abandon their homes. Property within ¼ mile of a wind turbine have sustained diminution of values of at least 30%, especially if the turbine is within the viewshed of the property.

118. Garden Township, the taxing authority for the Individual Plaintiffs' properties, has already recognized that the properties are diminished in value and reduced the assessed value in 2014 for "proximity to wind energy device". Upon information and belief, Garden Township has indicated it will consider further reduction in the assessed values in 2015 for properties that are in "proximity to wind energy device".
119. As a direct result of the impact of the noise and vibrations from the Garden Wind Farm on the residents of Garden Township, Garden Township found that the nuisance noise detrimentally affects the health, safety and welfare of the Township residents. Garden Township passed the Garden Township Nuisance Noise Abatement Ordinance 2014 -1 on December 9, 2014 pursuant to its police powers under 1945 Public Act 246. The Nuisance Noise Ordinance, if enforced, will restrict wind turbine noise to 35dB(A) at the property line. At the time of filing of this Complaint, this Ordinance is not in effect.

**PLAINTIFFS' CLAIMS FOR RELIEF**

**COUNT I – VIOLATIONS OF THE NATIONAL ENVIRONMENTAL  
POLICY ACT AND THE ADMINISTRATIVE PROCEDURES ACT  
(Against FWS)**

120. Plaintiffs hereby incorporate the pre-ceding and post-ceding allegations as if fully restated herein.
121. FWS violated NEPA and the APA when it arbitrarily and capriciously failed to conduct an environmental assessment or environmental impact assessment of impacts from its decisions not to apply or enforce the ESA and the BGEPA to Heritage's construction and operations of its industrial wind facility on the Garden Peninsula, and when it issued a special take permit to Heritage under the MBTA. These actions and inactions are final agency actions that result in irreparable injury to Plaintiffs.

122. Now, Heritage has informed FWS that it plans to expand the wind farm; again, FWS has made no effort known to Plaintiffs to conduct proper review of those plans.
123. The major federal action, at a minimum, was FWS's failure to require the proper analysis, consultation and enforcement of the Endangered Species Act, Migratory Bird Treaty Act and Bald and Golden Eagle Protection Act, and the issuance of a special take permit under the MBTA.
124. Plaintiffs are injured by defendant FWS's violations of NEPA and the APA because the failure to act allows Heritage to construct and operate the wind farm without informing the public or eliciting public involvement of impacts of the "major federal action[s] significantly affecting the quality of the human environment." 42 U.S.C. 4322.

WHEREFORE, Plaintiffs respectfully request that this Honorable Court provide them with the following relief:

- A. Declare that FWS violated NEPA;
- B. Order FWS to conduct an environmental impact assessment of existing and proposed wind facilities on the Garden Peninsula and at Heritage's "Cooks" site;
- C. Issue a preliminary injunction enjoining further construction of wind turbines by Heritage on the Garden Peninsula and at its "Cooks" site, unless or until an environmental impact statement is performed;
- D. Award Plaintiffs their costs, exemplary damages, expert witness fees and reasonable attorney fees; and
- E. Grant Plaintiffs such other relief as this Court deems just and appropriate.

**COUNT II – VIOLATIONS OF THE ENDANGERED SPECIES ACT  
(Against FWS and Heritage)**

125. Plaintiffs hereby incorporate the pre-ceding and post-ceding allegations as if fully re-stated herein.
126. Heritage’s construction of further turbines at the Garden Peninsula and the “Cooks” site will very likely cause “takes” of protected species including Kirtland’s warbler and Piping plover in violation of ESA section 9, 16 USC § 1538(a)(1)(B) and the ESA’s implementing regulations.
127. Heritage’s construction of further turbines at the Garden Peninsula and the “Cooks” site will very likely cause “takes” of the Northern Long-eared bat, proposed as Endangered, and the Rufa red knot, proposed as Threatened.
128. Heritage’s operation of the existing turbines on the Garden Peninsula is likely to cause “takes” of protected species including Kirtland’s warbler and Piping plover in violation of ESA section 9, 16 USC § 1538(a)(1)(B) and the ESA’s implementing regulations.
129. Heritage’s operation of the existing turbines on the Garden Peninsula is likely to cause “takes” of the Northern Long-eared bat, proposed as Endangered, and the Rufa red knot, proposed as Threatened.
130. FWS’s failure to require any permit under the ESA violates ESA section 10, 16 USC § 1538(a)(1)(B) and the ESA’s implementing regulations.
131. Plaintiffs are injured by defendants’ violations of the ESA because Heritage’s activities are impairing and will likely continue to impair the survival and recover of the Kirtland’s warbler, Piping plover, Rufa red knot and Northern Long-eared bat in the vicinity of areas where plaintiffs engage in wildlife viewing for recreational, scientific and aesthetic purposes, and where plaintiffs receive natural benefits from the animals’ presence. Hence, Heritage’s

activities and FWS's failure to properly regulate those activities will make it more difficult for plaintiffs to observe and enjoy these species and to enjoy the benefits of the species. Defendants' taking or likely taking of the endangered animals without obtaining an Incidental Take Permit deprives plaintiffs of information to which they are statutorily entitled under section 10 of the ESA.

WHEREFORE, Plaintiffs respectfully request that this Honorable Court provide them with the following relief:

- A. Declare that defendant Heritage has violated and will violate the "take" prohibition of Sections 9 and 10 of ESA with respect to the Kirtland's warbler and Piping plover due to the construction and operation of the wind facility without a take permit;
- B. Enjoin defendant Heritage from violating the ESA with respect to Kirtland's warbler and Piping plover, unless and until defendant's obtain permission to do so from the FWS pursuant to the procedural and substantive requirements of Section 10 of the ESA;
- C. Declare that FWS has violated Sections 9 and 10 of ESA;
- D. Award Plaintiffs their costs, reasonable attorney fees for this action pursuant to the ESA, 16 USC § 1540; and
- E. Grant Plaintiffs such other relief as this Court deems just and appropriate.

**COUNT III – VIOLATIONS OF BALD AND GOLDEN EAGLE  
PROTECTION ACT  
(Against FWS)**

132. Plaintiffs hereby incorporate the pre-ceding and post-ceding allegations as if fully re-stated herein.
133. Heritage's construction of further turbines at the Garden Peninsula and the "Cooks" site will very likely cause "takes" of bald and golden eagles prohibited by sections 668(a) and 668(b) of the BGEPA.
134. Heritage's operation of the existing turbines on the Garden Peninsula is likely to cause "takes" of bald and golden eagles prohibited by sections 668(a) and 668(b) of the BGEPA.
135. FWS violated the BGEPA by failing to issue or require a take permit under section 668a of the BGEPA.
136. Plaintiffs are injured by defendant Heritage's violations of the BGEPA because Heritage's activities are likely to take bald and golden eagles in the vicinity of areas where plaintiffs engage in wildlife viewing for recreational, scientific and aesthetic purposes, and where plaintiffs receive natural benefits from the animals' presence. Hence, Heritage's activities and FWS's failure to properly regulate those activities will make it more difficult for plaintiffs to observe and enjoy bald and golden eagles and to enjoy the benefits of the species. Defendants' taking or likely taking of bald and golden eagles without obtaining any permit deprives plaintiffs of information to which they are statutorily entitled under section 668a of the BGEPA.

WHEREFORE, Plaintiffs respectfully request that this Honorable Court provide them with the following relief:

- A. Declare that defendant Heritage has violated and will violate the "take" prohibition of the BGEPA section 668(a) and 668(b) due to the construction and operation of the wind facility;

B. Enjoin defendant Heritage from violating the BGEPA, unless and until defendant Heritage obtains permission to do so from the FWS pursuant to the procedural and substantive requirements of section 668a;

C. Declare that FWS has violated the BGEPA by not carrying out the enforcement duties assigned to it under BGEPA section 668b;

D. Award Plaintiffs their costs, reasonable attorney fees for this action; and

F. Grant Plaintiffs such other relief as this Court deems just and appropriate.

**COUNT IV - MICHIGAN ENVIRONMENTAL PROTECTION ACT  
(Against Heritage)**

137. Plaintiffs hereby incorporate the pre-ceding and post-ceding allegations as if fully re-stated herein.

138. The Foundation and its members believe that the activities which are the subject of this action either will or are likely to impair or destroy natural resources, including but not limited to threatened, endangered, or protected avian and bat wildlife and their natural habitat in the Garden Peninsula, specifically, eagles, Kirtland's Warbler, Piping Plover, the Rufa Red knot, other migratory birds and bats.

139. The threatened, endangered, and protected avian and bat wildlife and their natural habitat mentioned above, and, specifically, eagles, Kirtland's Warbler, Piping Plover, other migratory birds and bats and are all natural resources under the MEPA.

140. Heritage's conduct in the siting of the Garden Wind Farm has or is likely to pollute, impair or destroy these resources.

141. Heritage's conduct in the siting, construction and operation of the Garden Wind Farm has impaired and destroyed natural resources and the public trust therein, in violation of the MEPA, in violation of other Parts of the NREPA read *in pari materia* with the MEPA, and in violation of Heritage's duty to prevent or minimize degradation of the environment.
142. The planned and proposed expansion of the Garden Wind Farm will or is likely to cause further impairment and destruction of natural resources and the public trust therein, in violation of the MEPA, in violation of other Parts of the Natural Resources and Protection Act, MCL 324.101 et seq. read *in pari materia* with the MEPA, and in violation of the Heritage's duty to prevent or minimize degradation of the environment.
143. There are feasible and prudent alternatives to the current operation of the Garden Wind Farm.
144. There are feasible and prudent alternatives to the proposed expansion of the Garden Wind Farm.

WHEREFORE, Plaintiffs respectfully request that this Honorable Court provide them with the following relief:

- A. Issue a Temporary Restraining Order, or in the alternative, a temporary stay, against Heritage, and a preliminary injunction or other equitable order, enjoining Heritage and its agents, contractors, or subcontractors from any expansion of the Garden Wind Farm in the Garden Peninsula; and order Heritage to take any necessary action that will prevent further, continuing or additional damage to avian and bat wildlife including eagles, Kirtland's Warbler, Piping Plover and their natural habitat and other natural resources, and the public trust therein;
- B. After a full hearing on the merits, issue a permanent injunction and such other declaratory or equitable relief as required to prohibit violations of the MEPA and to protect the avian

and bat wildlife, including eagles, Kirtland's Warbler, Piping Plover and other natural resources, and the public trust therein from impairment or destruction;

- C. Award Plaintiffs their costs, exemplary damages, expert witness fees and reasonable attorney fees;
- D. Grant Plaintiffs such other relief as this Court deems just and appropriate.

**COUNT V - NUISANCE**  
**(Against Heritage)**

- 145. Plaintiffs hereby incorporate the pre-ceding and post-ceding allegations as if fully re-stated herein.
- 146. The construction and operation of the Garden Wind Farm by Heritage has unreasonably interfered with the Individual Plaintiffs' normal use and enjoyment of their properties as set forth herein, and will continue to do so, and the Individual Plaintiffs have a right to protect their properties from the same.
- 147. Heritage, through the construction and operation of the Heritage Wind Farm, will continue to unreasonably harm the Individual Plaintiffs, their lessees and guests by subjecting them to disturbing and incessant noise, vibrations, shadow flicker/strobe lighting, and flashing red lights which has caused nausea, headaches, sleep deprivation, vertigo, dizziness, anxiety, and diminution of property values as more particularly described above.
- 148. Heritage was aware of the proximity of the Individual Plaintiffs property and the propensity for the wind turbines to generate invasive noise, vibrations, shadow flicker, and have negative impacts on birds and bats.
- 149. Heritage knew or should have known that by siting the wind turbines in such close proximity to the Individual Plaintiffs homes that the noise, vibrations, shadow flicker/strobe lighting and flashing red lights would invade the homes and properties of the Individual

Plaintiffs and interfere with Individual Plaintiffs' use and enjoyment of their properties and such siting was intentional and unreasonable, negligent, and reckless.

150. The invasions into the Individual Plaintiffs' use and enjoyment of their properties is offensive and intolerable, and out of character for the quiet, rural nature of the area.

151. To the extent the Garden Wind Farm complies with Amendment 4-11-PC to the Zoning Ordinance 76-12 enacted after the fact, this does not excuse the nuisance caused by the Wind Farm because Heritage understated the noisiness of the wind turbines, did not disclose the sound amplitude modulation/vibrations, stated the turbines would not negatively impact birds and bats, and placed the wind turbines too close to the residences to protect the occupants thereof.

152. Upon information and belief, Heritage's construction and operation of the Garden Wind Farm is in violation of the ESA, the MBTA, the BGEPA, and the MEPA, and therefore the Garden Wind Farm is a nuisance per se.

153. The Individual Plaintiffs have been significantly harmed and have incurred damages and will incur additional damages and pecuniary loss including but not limited to further diminished property values as a result of the actions of Heritage and the operation of the Garden Wind Farm and any expansion thereof.

154. As a result of the nuisance created by Heritage, the Individual Plaintiffs have suffered and will continue to suffer physical harm, anxiety and emotional distress, disruption of their lives, loss of use and enjoyment of their properties, and pecuniary loss from the construction and operation of the Garden Wind Farm and from any expansion thereof.

WHEREFORE, Plaintiffs respectfully request that this Honorable Court provide them with the following relief:

- A. Enter a Judgment against Heritage according to the proofs;
- B. Order Heritage to cease and desist the invasions and to abate this nuisance;
- C. Award Plaintiffs their costs, exemplary damages, expert witness fees and reasonable attorney fees;
- D. Grant Plaintiffs such other relief as this Court deems just and appropriate.

**COUNT VI - PUBLIC NUISANCE**  
**(Against Heritage)**

155. Plaintiffs hereby incorporate the pre-ceding and post-ceding allegations as if fully re-stated herein.
156. Heritages' conduct and operation of the Garden Wind Farm affects the Garden community at large and not just the Individual Plaintiffs.
157. Individual Plaintiffs have suffered unique harm, different than the harm suffered by the community at large, such as sleep deprivation, headaches, dizziness, and pecuniary loss.
158. As a result of the public nuisance created by Heritage, the Individual Plaintiffs have suffered and will continue to suffer physical harm, anxiety and emotional distress, disruption of their lives, loss of use and enjoyment of their properties, and pecuniary loss from the construction and operation of the Garden Wind Farm and from any expansion thereof.

WHEREFORE, Plaintiffs respectfully request that this Honorable Court provide them with the following relief:

- A. Enter a Judgment against Heritage according to the proofs;
- B. Order Heritage to cease and desist the invasions and to abate this nuisance;
- C. Award Plaintiffs their costs, exemplary damages, expert witness fees and reasonable attorney fees; and

D. Grant Plaintiffs such other relief as this Court deems just and appropriate.

**COUNT VII - NEGLIGENCE**  
**(Against Heritage)**

159. Plaintiffs hereby incorporate the pre-ceding and post-ceding allegations as if fully restated herein.
160. Heritage owes Plaintiffs a duty to use reasonable care in the design, construction, operation, and placement of the Garden Wind Farm so that the Wind Farm will not cause harm to nearby residents or to wildlife, including birds and bats.
161. Heritage, in working with and/or communicating with public officials in approving the Garden Wind Farm and in siting the wind turbines to protect local residents from nuisance noise and vibrations, owed the public a duty to communicate the negative effects of the wind turbines candidly, and to site the wind turbines a far enough distance away that would offer nearby residents genuine protection against nuisance noise and vibration.
162. Heritage, in communicating with public officials and the community of Garden on the impact of the wind turbines on birds and bats, owed the public a duty to communicate the negative effects of the wind turbines on birds and bats candidly, and to not locate the wind turbines in known migratory bird and bat flyways and/or areas used by rare, threatened, endangered, or protected species, including but not limited to Eagles, Kirtland's Warbler, Piping Plover, Rufa red knot and other migratory birds and bats that are likely to be harmed thereby.
163. Heritage owes a duty to the public and to the Plaintiffs to use reasonable care in selecting the location of each of the wind turbines for the Garden Wind Farm.
164. Heritage has constructed and operated the Garden Wind Farm in utter disregard for its impact on the Plaintiffs, violating Heritages' duty of reasonable care to Plaintiffs.

165. Heritage breached their duties to Plaintiffs by:
- a. Negligently, carelessly, and recklessly locating the wind turbines in such close proximity to the Individual Plaintiffs' property as to create the invasions, negative effects, and disturbances experienced by the Individual Plaintiffs as set forth in above;
  - b. Negligently, carelessly, and recklessly failing to locate and construct the turbines a safe distance from the Individual Plaintiffs' residences;
  - c. Negligently, carelessly, and recklessly understating or failing to disclose the negative impacts of the wind turbines caused by the noise, vibrations, and shadow flicker;
  - d. Negligently, carelessly, and recklessly locating the wind turbines in known migratory bird and bat flyways;
  - e. Negligently, carelessly, and recklessly locating the wind turbines in areas used by threatened, endangered, or protected species, including but not limited to the Eagles, Kirtland's Warbler, Piping Plover, other migratory birds and bats, and;
  - f. Negligently, carelessly, and recklessly failing to exercise reasonable care to prevent an unreasonable risk of harm to people and wildlife.
166. The actions of Heritage have directly and proximately caused Individual Plaintiffs substantial damage and harm, including but not limited to:
- a. Physical harm and sleep deprivation;
  - b. Disruption of Individual Plaintiffs' lives;
  - c. Anxiety and emotional distress;
  - d. Loss of use and enjoyment of Individual Plaintiffs' properties;
  - e. Inability to carry on normal outdoor activities;

- f. Diminution of the value of their property and pecuniary loss; and
- g. Other damages that naturally and consequently flow from Heritage's actions.

167. The ESA, the BGEPA, MTBA, and the MEPA were enacted to protect endangered, threatened and protected species, including eagles, bats, and migratory birds, from injury, harm, harassment or modification or degradation to their habitat.
168. Upon information and belief, Heritage has violated the ESA, the BGEPA, MBTA and the MEPA, and therefore is negligent per se.
169. Upon information and belief, FWS has violated the NEPA, APA, and ESA, BGEPA and MBTA and therefore is negligent per se.

WHEREFORE, Plaintiffs respectfully request that this Honorable Court provide them with the following relief:

- A. Enter a Judgment against Heritage according to the proofs;
- B. Award Plaintiffs their costs, exemplary damages, expert witness fees and reasonable attorney fees;
- C. Grant Plaintiffs such other relief as this Court deems just and appropriate.

Respectfully submitted,

\_\_\_/s/ Susan Hlywa Topp\_\_\_\_\_

Dated: January 15, 2015

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Dated: January 15, 2015

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