

Friends of Blackwater Canyon



**Animal Welfare
Institute**

www.awionline.org



August 26, 2011

By Certified and Electronic Mail

Attn: Wind Energy Guidelines
Division of Fisheries and Habitat Conservation
U.S. Fish and Wildlife Service
4401 North Fairfax Drive
Mail Stop 4107
Arlington, VA 22203-1610
windenergy@fws.gov

Re: Additional Comments on Proposed Changes to the Revised Guidelines for Land-Based Wind Energy Projects

Dear Sir/Madam,

In the Wind Turbine Guidelines Federal Advisory Committee (“Committee”) meeting held on August 23, 2011, the U.S. Fish and Wildlife Service (“FWS” or “Service”) stated that it was willing to accept additional comments on the recent changes proposed by the subcommittees to the Revised Draft Land-Based Wind Energy Guidelines (“Revised Guidelines”). Friends of Blackwater Canyon, the Center for Biological Diversity, Animal Welfare Institute and the Wildlife Advocacy Project (hereinafter, “Commenters” or “we”) submit these comments on the proposed changes.

We believe that the changes proposed by the industry-dominated subcommittees would substantially weaken the Revised Guidelines and, consequently, the Service should therefore

allow the public to submit comments on any such changes that it may consider adopting. For example, the changes proposed by the subcommittee on the “Role of the Service” is entirely unacceptable because it will enable project developers to merely document Service recommendations and their reasons for “disagreeing” with the Service to show compliance with the guidelines - consequently putting the Service in a difficult position with respect to enforcement action against such allegedly “complying” projects. Further, the subcommittee’s proposed changes would allow project developers to pressure FWS regional offices by threatening to proceed, without the Service’s involvement, if the agency does not meet the truncated 30-60 day review period. As per the subcommittee recommendations, “[i]f the Service does not timely respond with respect to a sixty-day communication, the developer may proceed without further communication with the Service on that point.” Furthermore, the recommendations would impose arbitrary unlawful restrictions on the statutory authority of the Service wherein the subcommittee urges the Service to “avoid expressing pre-emptive legal conclusions regarding the project, law enforcement, and whether the developer has ‘adhered’ to the guidelines.” These recommendations cannot be reconciled with the Service’s authority and responsibility to enforce relevant federal laws such as the Endangered Species Act, 16 U.S.C. § 1531 *et seq.*, the Migratory Bird Treaty Act, 16 U.S.C. § 703 *et seq.*, the Bald and Golden Eagle Protection Act, 16 U.S.C. §§ 668-668(c), and the implementing regulations.

In addition, some of the other major changes proposed by the subcommittees, which weaken the already voluntary guidelines even further, include:

1. Introduction of a new concept called “guidelines performance documentation” in lieu of Avian and Bat Protection Plans, described by the subcommittee as documentation that “is not warranted for all commercial wind energy projects, but occasionally may be useful when significant adverse impacts to wildlife are predicted.” The recommendations do not delineate when such documentation would be “useful” and this is particularly problematic because the above statement proposed by the subcommittee would enable projects that do have significant wildlife impacts to not maintain appropriate documentation – in fact the subcommittee recommendations specifically state that the developer may “choose” to prepare such documentation and that the Service’ review of the documentation is not binding on the developer.
2. Substantial watering down of language on adaptive management resulting in a complete shift in policy on that issue – specific language such as “[t]he Service recommends use of adaptive management,” has been deleted and replaced with language that reflects an entirely different position – “[a]daptive management is not typically applied to projects... The Service recognizes that adaptive management would not be applied to most projects and should be reserved for situations where adverse impact to species of concern both exceed significantly expected levels and are significant.”
3. The inclusive list of factors to be taken into consideration to assess wildlife impacts (factors such as violation of laws or requirements imposed for the protection of the environment, adverse impacts on endangered/threatened species or their habitat, or potential for cumulative impacts) has been deleted from the definition of “significant” – a

term used throughout the Revised Guidelines in the context of impacts on wildlife and the measures required to be adopted to avoid and minimize such impacts.

4. Modification of the previously broad definition of “species of habitat fragmentation concern” to now only include those species whose habitat has been found to be impacted by “a relevant federal, state, tribal, and/or local agency[.]”
5. The Revised Guidelines “strongly encouraged” the use of the Eagle Conservation Plan (ECP) Guidance “if eagles are identified as a potential risk at a project site,” however, the subcommittee proposal eliminates the emphasis on the use of the ECP Guidance and instead merely refers to the implementation of the eagle permit regulations under 50 C.F.R. §§ 22.26 and 22.27 and only if “incidental take of eagles” by a wind energy project is likely to occur.
6. While the Revised Guidelines were applicable to all existing projects, as per the subcommittee recommendations, existing projects would only implement the guidelines “where feasible”.
7. Proposed modification of language in the mitigation section such that mitigation measures would only be adopted “to the greatest extent practicable for that project.”

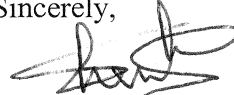
We commend the Service for pushing back on at least some of the most harmful changes proposed by the subcommittees during the August 23, 2011 meeting. Nevertheless, we strongly urge the Service to allow the public to comment if any further changes are made to the Revised Guidelines. This is particularly important in light of the fact that since the guidelines were introduced in February 2011, subsequent changes made to the guidelines, mostly influenced by the industry-dominated¹ Committee and subcommittees, have only (predictably) weakened these

¹ While we understand the need for taking into consideration the views of the wind industry in order to obtain a “fairly balanced” point of view as required by the Federal Advisory Committee Act (“FACA”), 5 U.S.C. App. 2 § 5(b)(2), the FACA process on the wind guidelines is a clear contravention of the Act in that, the advice and recommendations of the Committee/subcommittees are being “inappropriately influenced” – indeed, dominated – by a “special interest” and wildlife protection interests are clearly outweighed by industry advocates. *Id.* § 5(b)(3). Indeed, by far the largest single voting bloc on the Committee is constituted by industry interest representatives (excluding the FWS official who works for the agency receiving the recommendations, there are 21 current members in the Committee – 43% are wind industry representatives where 7 members work in wind energy companies and 2 members are lawyers who represent wind energy companies). Further, the fact that the Service’s (now abandoned) February 2011 wind guidelines were more favorable for wildlife than the March 2010 recommendations of the Committee and the recent changes proposed by the Committee/subcommittees, reinforces the inappropriate influence of industry-driven special interest in this process. In addition, even though the current administration has adopted a policy on federal advisory committees that is purportedly designed to “reduce the influence of special interests on the Federal Government and the American public,” U.S. General Services Administration, Registered Lobbyists Serving on Advisory Committees (2010), – particularly by excluding registered lobbyists from advisory committees – at least one of the current industry representative is a registered lobbyist, although it is our understanding that a past member from an environmental group representing wildlife interests (Mr. Michael Daulton of the National Audubon Society) was removed from the Committee on this basis. In any event, it is difficult to imagine

“voluntary” guidelines in favor of the wind industry, making it more likely for wildlife to be harmed by wind energy projects.²

In conclusion, we again urge the Service not to abdicate its statutory responsibilities under federal wildlife laws and to instead impose strong mandatory measures for avoiding and minimizing wildlife impacts at wind energy projects, the need for which is increasingly apparent as wind energy projects, in the absence of such measures, continue to harm golden eagles and numerous other migratory bird and bat species across the nation.

Sincerely,



Shruti Suresh
Eric Glitzenstein
Meyer Glitzenstein & Crystal
1601 Connecticut Av. NW, Suite 700
Washington, DC 20009
202-588-5206
ssuresh@meyerglitz.com
eglitzenstein@meyerglitz.com



Lisa T. Belenky, Senior Attorney
Center for Biological Diversity
351 California St., Suite 600
San Francisco, CA 94104

a “special interest” playing more of a role in shaping an important federal environmental policy than has been permitted to occur with the wind power guidelines.

² Additionally, we believe that the Service should make available to the public all information and records, including meeting transcripts/minutes, of the so-called “subcommittees” of the Committee. It should be noted that the public access requirements of the FACA are triggered when a committee’s advice is transmitted directly to the federal agency or when a FACA committee merely “rubber stamps” its subcommittee’s recommendations with little or no independent consideration. Nat’l Anti-Hunger Coal. v. Exec. Comm. of President’s Pvt. Sector, 711 F.2d 1071, 1075-76 (D.C. Cir. 1983). It was evident from the proceedings of the August 23, 2011 meeting that both these criteria were satisfied thereby equating the advice of each of these so-called “subcommittees” (whose members are also members of the full committee), to that of a full federal advisory committee that is subject to the requirements of FACA. In that meeting, the subcommittees presented their advice to the Service and urged the Service to adopt their recommendations on important government policy. Further, the full Committee merely posed certain questions to the sub-committees with no independent consideration of the subcommittee’s recommendation, thereby effectively rubber-stamping the subcommittees’ advice. Thus, in accordance with Section 10(b) of FACA, the Service should provide all records related to the recommendations of the subcommittees on an expedited basis. However, as we have previously explained, the Service has yet to even make the records of the full Committee meeting available to the public in the manner required by FACA.

415-632-5307
lbelenky@biologicaldiversity.org