Friends of Blackwater Canyon

Animal Welfare Institute
www.awionline.org

August 4, 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: Comments on the Revised, Draft Guidelines for Land- Based Wind Energy Projects

Dear Sir/Madam,

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 Revised Draft Land-Based Wind Energy Guidelines (“Revised Guidelines”), as a supplement to our previous comments, that we hereby incorporate by reference, on the Draft Voluntary Land-Based Wind Energy Guidelines released in February 2011 (“February 2011 Guidelines”) by the U.S. Fish and Wildlife Service (“FWS” or “Service”). Because it appears that our detailed comments, and particularly our explanation of the legal basis and empirical need for enforceable standards, have been totally disregarded by the Service – which is instead now apparently operating under a politically driven mandate to do whatever it takes to appease

the wind power industry – we will simply provide our most far-reaching concerns with the regrettable direction in which the agency is now heading.[1]

Commenters continue to strongly support imposing effective, mandatory and enforceable obligations on wind energy projects to anticipate and avoid wildlife impacts before they occur. We believe that the Revised Guidelines have eliminated important recommendations that the Service had initially adopted in the February 2011 Guidelines – thereby weakening the so-called "requirements" in the guidelines that continue to be, in any event, merely "voluntary." We believe that in developing the Revised Guidelines, the Service has largely ignored public comments, failed to provide any explanation for the changes made in the February 2011 Guidelines, and has apparently weakened the guidelines in light of pressure from the industry-dominated Wind Turbine Guidelines Federal Advisory Committee ("Committee").

The Service's actions are legally problematic because, as explained in our previous comments, under the Federal Advisory Committee Act, 5 U.S.C. App. 2 §§1-16 ("FACA"), the Committee's recommendations are not and cannot be treated as binding in any fashion upon the Service, and in fact the Service is obligated to disregard the Committee's recommendations to the extent that they depart from the Service's legal responsibilities under federal law. Id. § 9(b) ("advisory committees shall be utilized solely for advisory functions. Determinations of action to be taken and policy to be expressed with respect to matters upon which an advisory committee reports or makes recommendations shall be made solely by the President or an officer of the Federal Government." (emphasis added)). That the Committee is dominated by a "special interest" – i.e., the wind power industry – and that it is obviously not "balanced in terms of the points of view represented and the functions to be performed" in violation of Section 5 of FACA (for example, not a single Committee member advocated for mandatory standards for wind energy development), only underscores the illegality of treating the Committee as the de facto decision maker to which the Service must defer. Id. §§ 5(b)(2)-(3).

Further, while it is evident that the Committee has been working with the Service in developing the Revised Guidelines, the public has not been provided with any information and documentation of the meetings and discussions between the Service officials and the Committee, as well as of the internal meetings and deliberations among the Committee members. See, e.g., April 27, 2011 Committee Meeting Summary at 18 (describing the Service's assurances to the Committee that the Service will continue to "find ways to call on the expertise of the FAC and their colleagues"); see also id. (describing the request of the FAC to "see[] the changes the FWS planned for the final document so they could discuss those changes and perhaps steer the FWS around some of the changes before the document is finalized… FAC members asked to be included in the remaining process so that they are not surprised by the final Guidelines. FAC members hoped the FWS still intended for the Guidelines to mirror the FAC Recommendations

[1] When the Service solicited public comments on the February 2011 Guidelines, it expressly requested the public to provide comments and potential solutions to specific questions, particularly, whether the guidelines should be made mandatory for wind energy projects. In developing the Revised Guidelines, the Service has not only failed to respond to the detailed comments that we submitted providing the precise information that the Service had initially requested from the public, but it appears that the Service has all together abandoned the issue of whether the guidelines should be made mandatory for wind energy projects on public and/or private lands.

as closely as possible, so they encouraged the FWS to communicate with the FAC when considering how the final document would be revised. If mirroring the intention of the FAC Recommendations was the goal, the FWS missed the target, and should consider additional input through meetings or phone conferences." (emphasis added)).

Thus, while excluding public involvement, the Service continues to discuss, and indeed "negotiate," with the Committee on what should and should not be in the guidelines. This failure to maintain an ongoing transparent process by providing timely information to the public on the development of the wind guidelines is a patent violation of FACA which requires that "the public should be kept informed" of the activities of the Committee, 5 U.S.C. App. 2 § 2, and specifically provides that:

> the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee shall be available for public inspection… Detailed minutes of each meeting of each advisory committee shall be kept and shall contain a record of the persons present, a complete and accurate description of matters discussed and conclusions reached, and copies of all reports received, issued, or approved by the advisory committee.

Id. §§ 10(b)-(c) (emphasis added); see also Natural Resources Defense Council v. Johnson, 488 F.3d 1002, 1003 (D.C. Cir. 2007) ("the government's obligation to make documents available under FACA does not depend on whether someone has filed a FOIA request for those documents."); Food Chemical News v. Dep't of Health and Human Services, 980 F.2d 1468, 1469, 1472 (D.C. Cir. 1993)) ("all [FACA] 10(b) materials must be available for public inspection and copying before or on the date of the advisory committee meeting to which they apply."). The Service and the Committee are violating these openness obligations under FACA in many ways. Crucial materials necessary to understand the Committee's and the subcommittees' work, and their interactions with the Service, including minutes of meetings and the role, agenda and work of subcommittees, see, e.g., April 27, 2011 Committee Meeting Summary at 18 (where the FAC advises the FWS to "take better advantage of their expertise, perhaps in the form of subcommittees." (emphasis added)), are not being made "available for public inspection" on an ongoing, timely, and proactive manner as required by FACA. Further, it appears that both the Service and the Committee have engaged in and continue to engage in mechanisms by which the Committee may influence the Service's policy discussions, including through conference calls, meetings and discussions that do not take place in public. This is a complete violation of FACA's openness mandate.

Even apart from the violations of FACA now taking place, in the absence of any rationale provided by the Service as to its course of action, coupled with the lack of any empirical evidence to suggest that a "voluntary" approach has successfully resulted in avoiding and reducing wildlife mortality caused by wind energy projects, the Service is willingly abdicating its statutory obligations to protect migratory birds and other wildlife by merely rubber-stamping the Committee's demands and failing to carry out an independent analysis in developing the wind

guidelines. In fact, a glaring example of this biased approach is that while the guidelines are entirely "voluntary" in nature, the only measure which is "mandatory" as such is imposed on the Service itself, and not the wind energy developer. Remarkably, while the Revised Guidelines impose no obligation on wind energy developers to do anything, it requires the Service to respond to industry proposals for site location within a truncated time frame, i.e., 60 days from receipt of the proposal, and if the Service fails to provide a response within 60 days, then the developer can proceed with construction of the project without waiting for Service input. Moreover, if the Service takes more than 60 days to respond to the industry proposal, the developer need only consider the Service's recommendations "if feasible" and no comparable flexibility is given to the Service, regardless of the size or complexity of the project, or its risk to wildlife.

The categorical 60-day review requirement imposed on the Service by the Revised Guidelines reflects the underlying premise of the Revised Guidelines which favors the developers' financial interests over the conservation mandate of the Service under the Endangered Species Act, 16 U.S.C. § 1531 et seq. ("ESA"), the Migratory Bird Treaty Act, 16 U.S.C. § 703 et seq., ("MBTA"), the Bald and Golden Eagle Protection Act, 16 U.S.C. §§ 668-668(c) ("BGEPA"), and the implementing regulations. For instance, while the Revised Guidelines are designed to provide maximum flexibility and discretion to the wind energy developers, no such flexibility is provided to the Service in the time allotted to it for its "review." It is pertinent to note that while the Revised Guidelines eliminate specific durations for pre-construction and post-construction monitoring by wind energy developers and instead recommend monitoring for a duration based on the "level of risk"(minimum three years monitoring was previously required under the February 2011 Guidelines), no such leeway is provided to the Service in the event that it determines a project proposal cannot reasonably be evaluated within 60 days owing to the level of wildlife risks or other factors. In sum, regardless of the size, the potential "level of risk" of the project, or any feasibility considerations or resource constraints, the Service has 60 days to process, consider, and evaluate industry proposals, and to formulate effective recommendations in response – recommendations that the developer may nonetheless disregard. We urge the Service to eliminate the 60 day period requirement, because this is an unwarranted limitation on the authority, and indeed responsibility of the Service to comprehensively and thoroughly evaluate the impacts of wind energy projects on wildlife. At the least, the Service could commit to make best endeavors to respond to industry proposals as soon as practicable. The Service could also establish a mechanism by which that review period may be lengthened for large projects or those involving complex or difficult issues. In any event, the guidelines should expressly state that regardless of whether or not the Service responds to industry proposals within a specific time frame, the Service has the authority to take action against wind energy developers for any violation of applicable federal laws, including the ESA, MBTA and BGEPA.

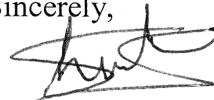
Moreover, an abbreviated time limit of 60 days for the Service to evaluate proposals undermines the purpose of the evaluation which should be to steer projects away from sites that may have the highest impacts to birds and bats, and provide recommendations and other enforceable measures that minimize impacts of projects built in any area. For example, the Service's recently opened investigation into the high number of golden eagle deaths at the Pine

Tree Wind Project[2] shows that project siting in that area has high impacts to eagles and other birds. The Service must have the time to use the information gleaned from that investigation to evaluate other proposals nearby before they can move forward.

Additionally, we note that the Revised Guidelines emphasize correctly that "it is not possible to absolve individuals or companies from MBTA or BGEPA liability." Revised Guidelines at 12. However, despite the Service's statement that it will take into account voluntary adherence by wind energy developers "when exercising its discretion with respect to any potential referral for prosecution," id., the risk of prosecution remains an empty threat because there is at present little reason to believe that the Service will affirmatively exercise its discretion to prosecute wind energy developers that disregard the guidelines and violate federal wildlife laws. Thus, unless the Service takes action to establish a meaningful enforcement scheme, which has been utterly lacking in the past, there is no meaningful incentive for the industry to "voluntarily" comply with either the guidelines or applicable federal laws, particularly, the MBTA.

In conclusion, we believe that the direction in which the Service is heading places it in a legally tenuous position under FACA and various federal wildlife laws – a direction that will inevitably be disastrous for the many birds, bats, and other wildlife that will be killed and injured by poorly sited wind power projects, since the industry will have little, if any, motivation to take such impacts into consideration in making siting decisions. We urge the Service to promulgate a policy that genuinely meets the objectives of wind energy development consistent with federal wildlife protection laws and the adoption of effective measures to avoid, minimize, and mitigate impacts on wildlife.

Sincerely,



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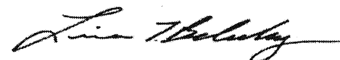

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[2] Louis Sahagun, Federal Officials Investigate Eagle deaths at DWP Wind Farm, L.A. Times, Aug. 3, 2011, http://www.latimes.com/news/local/la-me-wind-eagles-20110803,0,2891547.story