



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
Attn: Eagle Conservation Plan Guidance
Division of Migratory Bird Management

U.S. Fish and Wildlife Service
4401 North Fairfax Drive
Mail Stop 4107
Arlington, VA 22203-1610
Re: Wind Energy Guidelines Comments and Eagle Conservation Plan Guidance

Comments

Dear Sir/Madam:

We offer these comments pursuant to the Service's Draft Voluntary Land-Based Wind Energy Guidelines ("Wind Guidelines") and the Draft Eagle Conservation Plan Guidance ("Eagle Guidance") (jointly, the "Guidelines"), prepared by the U.S. Fish and Wildlife Service ("FWS" or "Service").

The Allegheny Highlands Alliance ("AHA"), a grassroots organization comprised of members residing in West Virginia, Virginia, Maryland, Pennsylvania and North Carolina, submits the following comments to the U.S. Fish & Wildlife Service ("Service") regarding the Service's Draft Land-Based Wind Energy Guidelines (the "Guidelines"). AHA expresses its support for and endorsement of the comments submitted to the service concurrently on behalf of Friends of Blackwater, the Center for Biological Diversity and the Wildlife Advocacy Project.

The Allegheny Highlands Alliance (AHA) mission is “Protecting Our Mountains for Future Generations”. In furtherance of our stated mission, AHA’s specific purposes shall include but not be limited to the following:

- (A) To advance public knowledge and understanding of the cultural, biological, environmental diversity, uniqueness, and sensitivity of the major ridgelines that comprise the Allegheny Highlands;
- (B) To preserve and protect areas of particular scenic, geologic, biologic, historic, wilderness, and/or recreational importance in the Allegheny Highlands;
- (C) To aid in the establishment of responsible policies to protect scientific, educational or aesthetic values;
- (D) To conduct regional and resource studies as a basis for the wise use of the various resources of the Allegheny Highlands; to develop programs in energy conservation and wise production; to serve local communities, the region, the people of the Allegheny Highlands as an agency for popular enlightenment. For cultural improvement, and for scientific advancement;
- (E) To advocate governmental policies for the conservation and wise management of energy and natural resources of the Allegheny Highlands.

There is growing concern regarding the potential for listed species, Bald and Golden Eagles, as well as unlisted species and the resultant population declines given the rapid proliferation of industrial wind energy facilities and the documented large-scale mortality that has already occurred at some facilities. There is limited knowledge of migration and other movement behaviors of listed species, Bald and Golden Eagles, as well as unlisted species and of behavioral responses to landscape changes and turbine designs and operation limits as well as with the Service’s ability to understand interactions with wind power facilities, the impacts of Project alternatives, the effectiveness of mitigation measures, and the cumulative impacts of the numerous threats to listed species, Bald and Golden Eagles, as well as unlisted species throughout their range which are highly uncertain and must be evaluated using the best available data, reasonably obtainable new data developed and risk assessments.

The following bulleted list highlights uncertainties regarding the local impacts of industrial wind energy projects on listed species, Bald and Golden Eagles, as well as unlisted species.

- uncertainty about listed species, Bald and Golden Eagles, as well as unlisted species needs and use;
- uncertainty about how many listed species, Bald and Golden Eagles, as well as unlisted species will be killed by the Project’s wind turbines over the next several decades;
- uncertainty about the relationship between local features of the industrial wind energy project sites and mortality at these sites;
- uncertainty about the technical specifications of these industrial wind energy facilities and mortality at these sites;
- uncertainty about the impacts of these industrial wind energy projects on migration and summer and winter habitat degradation;
- uncertainty about the ability of possible mitigation and minimization strategies to compensate for the loss of individuals and reproductive potential.

In addition, the following bulleted list highlights uncertainties regarding the cumulative impacts on the listed species, Bald and Golden Eagles, as well as unlisted species.

- uncertainty about demographic parameters, population trends, and habitat needs and use;
- uncertainty in the relationship between local features of a site and bat, bird and other species mortality at that site;
- uncertainty about the technical specifications of wind energy facilities and mortality at the site;
- uncertainty about the impacts of wind energy development on species migration and summer and winter habitat degradation;
- uncertainty in the ability of possible mitigation and minimization strategies to compensate for the loss of individuals and reproductive potential;
- uncertainty in the degree of wind energy development in the Eastern and Midwestern U.S. over next several decades;
- uncertainty in how many listed species, Bald and Golden Eagles, as well as unlisted species individuals will be killed by wind turbines over the next several decades;
- uncertainty regarding the impact and spread of White Nose Syndrome;
- uncertainty about the impact of climate change on habitat and hibernacula;
- uncertainty about the aggregate impact of multiple other threats, such as pathogens and climate change, and the availability of high quality summer and winter habitats, migration pathways, foraging, nesting, hibernacula, and swarming sites over the next several decades.

Using the Indiana bat as our example, the Service Has Identified Numerous Uncertainties that Restrict its Ability to Manage and Recover Indiana Bats.

As the Service states, “significant information gaps remain regarding the species’ ecology that hinder sound decision-making on how best to manage and protect the listed species, Bald and Golden Eagles, as well as unlisted species.”

Our recommendations follow:

FWS Must Determine the Cumulative Impact of Industrial Wind Energy Projects Sited Throughout the Country.

“Cumulative impact” is defined in NEPA as “the impact on the environment [that] results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.” Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time. Cumulative impacts are thus the total effect, including both direct and indirect effects, on a given resource (in this case listed species, Bald and Golden Eagles, as well as unlisted species), of all actions taken, no matter who has taken the actions (federal, nonfederal, and private).

It is a fact that the human environment continues to change in unintended and unwanted ways in spite of improved federal decision making resulting from the implementation of NEPA is largely attributable to cumulative impact. The cumulative impact on listed species, Bald and Golden Eagles, as well as unlisted

species of multiple wind energy facilities combined with the numerous other identified threats will require an in-depth evaluation.

Scientific literature extensively documents concerns for wildlife due to the harm created by such forest fragmentation. Forest fragmentation has basically two components: the loss or reduction of habitat and the breaking of remaining habitat into smaller, more isolated patches. Among the negative effects of fragmentation on particular species are: the elimination of some species due to chance events; increase in isolation among species populations due to a reduction of their ability to move about the landscape; reduction in local population sizes sometimes leading to local extinctions; and disruption of ecological processes. For the forest as a whole, roads and maintenance of roads and infrastructure are known to have a number of negative effects, ranging from barriers to immigration and migration, corridors for introduction of native predators and competitors, as well as avenues allowing the spread of non-native, invasive species.

The clearing of wide corridors for miles along the crests of forested mountain ridges to construct and operate industrial wind energy facilities will be a major contributor to forest fragmentation and loss of forest interior habitat (existing more than 100 meters from a clearing). High elevation forest interiors offer optimum habitat conditions for the survival of certain species-- and it is the type of habitat most easily destroyed by development.

This forest fragmentation for industrial wind energy projects will create hardship for a variety of wildlife and plants. Fragmentation of forests via the construction of industrial wind energy facilities can impact interior nesting birds in an adverse manner. Less mobile animals like tree frogs, snakes, salamanders and small mammals living in the trees and understory cannot easily flee as the chainsaws and bulldozers eat away at the boundaries of the forest like a cancer and are killed outright. More mobile animals can flee the advancing line of fallen forest, but they eventually end up in the fragmented sections of the forest where they could suffer the ills brought on to a species relocated to smaller habitats. The size and number of wind power developments in the future are also of concern with respect to habitat loss and fragmentation. Certainly this is a primary ecological consideration in future wind power developments in these habitats.

The Guidelines Must Be Made Mandatory and Binding Upon All Industrial Wind Energy Projects and Must Provide for Meaningful Enforcement of Violations.

AHA wishes to stress its position that the Guidelines, particularly the pre-construction and post-construction monitoring provisions, should be mandatory and binding upon wind project developers and owners. The Service should not only require adherence to the Guidelines, but should also demand that wind energy developers and owners utilize well-qualified and sufficiently independent consultants in carrying out biological studies designed to assess the risks to wildlife from wind turbines.

Recent experience with the state regulatory structure in West Virginia relating to the construction and operation of wind turbines reveals the lack of statutory mandate—not to mention the practically nonexistent political will—necessary to provide adequate safeguards for maintaining the integrity of various bird and bat species. This systemic failure is significant because West Virginia is home to a host of hibernacula which are home to

two endangered bat species (the Indiana bat and the Virginia big-eared bat),¹ as well as several other bat species for which a current petition for threatened or endangered listing is pending with the Service.

Because all industrial-scale wind energy facilities sought to be constructed in West Virginia to date have aimed to function as exempt wholesale generators (“EWG”) under federal law, the proponents of such facilities have, for several years, been required to obtain a siting certificate from the Public Service Commission of West Virginia (“PSC”). Although the siting certificate statute requires the PSC to “appraise and balance the interests of the public, the general interests of the state and local economy, and the interests of the applicant,”² the PSC’s review has, in practice, devoted precious little energy to analyzing the threat such facilities pose to federally-protected birds and bats. This is true even though the PSC has held that, in the main thrust of its review, it will:

perform its duty to appraise and balance: (a) an applicant’s interest to construct an electric wholesale generation facility; (b) the State’s and region’s need for new electrical generating plants; and (c) the economic gain to the state and local economy, against: (i) community residents’ interest in living separate and apart from such a facility; (ii) a community’s interest that a facility’s negative impacts be as minimally disruptive to existing property uses as is reasonably possible; and (iii) the social and **environmental impacts of the proposed facility on the local vicinity, the surrounding region, and the State.**

Longview Power, LLC, W. Va. Pub. Serv. Comm. Case No. 03-1860-E-CS (Comm. Order dated Aug. 27, 2004 at 190-91, Conclusion of Law #6) (emphasis added).

A notable example of the failure of the regulatory structure in West Virginia emerged recently in the context of Beech Ridge Energy, LLC’s proposal to construct a massive wind energy facility along a series of high-elevation ridgetops in the vicinity of known endangered bat hibernacula in Greenbrier County, West Virginia. In the course of the siting certificate proceedings, the PSC declined to recognize any threat to endangered bats posed by the project, and failed to impose any meaningful conditions with respect to wildlife protection upon Beech Ridge. Subsequently, the U.S. District Court for the District of Maryland found there to be “a virtual certainty that Indiana bats will be harmed, wounded, or killed imminently by the Beech Ridge Project.” *Animal Welfare Institute et al. v. Beech Ridge Energy, LLC et al.*, 675 F.Supp.2d 540, 579 (2009). The Court proceeded to identify the obvious frailties of the PSC’s order in the underlying siting certificate proceeding as follows:

Defendants point to adaptive management after completion of construction as the appropriate way to address any perceived threat to Indiana bats. Even if adaptive management is ultimately the best way to reduce the risk of death and injury to Indiana bats posed by the Beech Ridge Project, Defendants are not currently required to implement any minimization or mitigation

¹ See *Indiana Bat (Myotis sodalis) Draft Recovery Plan: First Revision* at 245-46 (2007), available at

<http://www.mcrcc.osmre.gov/MCR/Resources/bats/pdf/IN%20BAT%20DRAFT%20PLAN%20apr07.pdf>; FWS Species Profile for Virginia big-eared bat, available at

<http://www.fws.gov/ecos/ajax/speciesProfile/profile/speciesProfile.action?scode=A080>;

² W. Va. Code § 24-2-11c.

techniques. The West Virginia Public Service Commission's August 28, 2006 Order contains only precatory language.

Specifically, the Order states only that Defendants must “consult” with the TAC regarding the “potential for adaptive management” and agree to “test adaptive management strategies.” Beech Ridge Energy LLC, No. 05-1590-E-CS, 2006 W. Va. PUC LEXIS 2624, at *184-86 (W. Va. Pub. Serv. Comm'n Aug. 28, 2006) (emphasis added). Only if (i) the project causes “significant levels of bat or bird mortality”- numbers which are not defined; and (ii) adaptive management techniques are “proven effective”-a level of effectiveness which is not established; and (iii) adaptive management techniques are “economically feasible”- the feasibility of which will be determined by the project developers-must Beech Ridge Energy make a “good faith effort to work with the Commission” to implement adaptive management strategies. Id. at *185 (emphasis added). **The Order states that adaptive management is discretionary and it imposes no consequences on Defendants if they fail to adopt necessary minimization and mitigation strategies.**

Id. (emphasis added)

Not only have the members of AHA witnessed the shortcomings of the PSC's processes, but also the conspicuous absence of the state's Division of Natural Resources, with its critical internal expertise in wildlife biology, in such proceedings. The insufficiency of the state regulatory process governing the construction and operation of industrial-scale wind turbines is not confined to West Virginia; rather, it has come to be considered the norm in bordering states where wind energy development is occurring.

For the reasons discussed here, AHA firmly believes that universal enforcement of the Guidelines and policing of the use of consultants by wind developers is crucial, given the lack of scrutiny focused by the regulatory bodies of West Virginia and other states in the region upon pre-construction biological surveys and the very grave threats to the continued viability of bat and bird populations resulting from rampant and relatively unchecked wind energy development.

Wind Energy Projects Must Comply With Federal Wildlife Protection Laws.

Again, we are considerably concerned with documented attempts to circumvent existing Federal and state laws through governmental mandates, failures to enforce those laws and blatant disregard of those laws by the industrial wind energy industry. As a result of our research we have concluded that compliance with major Federal and State laws established for the protection of our “Commons” are circumvented, blatantly ignored and consciously broken by this industry and the federal and state agencies charged with enforcement thereof are ignoring their responsibilities. The industrial wind energy project developers and operators are relying on lack of staff and funding at federal and state agencies to provide adequate monitoring of their projects. An example of Federal and state laws that must be enforced follows:

In 1973 Congress passed the Endangered Species Act to "provide a means whereby the ecosystems upon which endangered and threatened species depend may be conserved, and to provide a program for the conservation of these species." The United States Department of the Interior Fish and Wildlife Service is responsible for protection of terrestrial species, which form the majority of listed species. The Endangered Species Act prohibits both government agencies and private citizens from "taking" listed species, whether on public or private land. A "take" is any activity that kills or harms listed species or that destroys their habitat. In 1983

Congress adopted Section 10 of the Endangered Species Act as a way to promote "creative partnerships between the public and private sectors and among governmental agencies in the interest of species and habitat conservation." Section 10 authorizes states, local governments, and private landowners to apply for an Incidental Take Permit for otherwise lawful activities that may harm listed species or their habitats. To obtain a permit, an applicant must submit a Habitat Conservation Plan outlining what he or she will do to "minimize and mitigate" the impact of the permitted take on the listed species. The principle underlying the Section 10 exemption from the ESA is that some individuals of a species or portions of their habitat may be expendable over the short term, as long as enough protection is provided to ensure the long term recovery of the species.

Congress enacted the National Environmental Protection Act in December 1969 and it was signed into law on January 1, 1970. The National Environmental Protection Act was the first major environmental law enacted in the United States and is often called the "Magna Carta" of environmental laws. Most importantly, the National Environmental Protection Act established our national environmental policies. Because the impact of the proposed location of industrial wind energy projects in the forests is likely to be significant, the National Environmental Protection Act will require the preparation and evaluation of an environmental impact statement to assess the impact and allows for public involvement in the process. Three government agencies are charged with overseeing the National Environmental Protection Act, the Council for Environmental Quality, the Environmental Protection Agency and the United States institute for Environmental Conflict Resolution.

In 1782 the Continental Congress adopted the bald eagle as a national symbol. In 1940, to prevent the species from becoming extinct, Congress passed the Bald Eagle Protection Act. The Act was extremely comprehensive, prohibiting the take, possession, sale, purchase, barter, or offer to sell, purchase, or barter, export or import of the bald eagle at any time or in any manner. In 1962, Congress amended the Bald Eagle Protection Act to cover golden eagles, a move that was partially an attempt to strengthen protection of bald eagles, since the latter were often killed by people mistaking them for golden eagles. The golden eagle, however, is accorded somewhat lighter protection under the Act than the bald eagle.

The Migratory Bird Treaty Act, originally passed in 1918, implements the United States' commitment to four bilateral treaties, or conventions, for the protection of a shared migratory bird resource. The MBTA provides that it is unlawful to pursue, hunt, take, capture, kill, possess, sell, purchase, barter, import, export, or transport any migratory bird, or any part, nest, or egg or any such bird, unless authorized under a permit issued by the Secretary of the Interior. Some regulatory exceptions apply. Take is defined in regulations as: "pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to pursue, hunt, shoot, wound, kill, trap, capture, or collect." The Migratory Bird Treaty Act protects over 800 species of birds that occur in the United States.

Federal and state decision makers must also consider the provisions and requirements of the National Forest Management Act, the Federal Land Policy and Management Act and the National Historic Preservation Act to assess the impact of industrial wind energy projects.

AHA appreciates the opportunity to comment upon the Guidelines, and the organization sincerely hopes that the Service will take its perspective into account in finalizing these important rules and safeguards.

Sincerely,

Larry V. Thomas, President
Allegheny Highlands Alliance