



September 23, 2011

Attention: Revised 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

Re: Comments of the American Wind Energy Association on the September 13, 2011, Revised Draft Land-Based Wind Guidelines

Submitted via email to windenergy@fws.gov

Summary

The American Wind Energy Association (AWEA)¹ appreciates the opportunity to provide these written comments on the U.S. Fish and Wildlife Service's ("the Service") *Land-Based Wind Energy Guidelines* ("revised draft") dated September 13, 2011. Barring major unexpected changes from the Service in the next version, AWEA believes the Service is close to having a workable set of voluntary guidelines.

AWEA appreciates and recognizes that the revised draft has moved notably closer to the consensus recommendations of the state, environmental non-governmental organization, and industry experts who have been serving for four years on the Federal Advisory Committee on Wind Turbine Siting Guidelines ("Advisory Committee").

While progress has been made in more adequately balancing conservation needs with the need to deploy non-polluting sources of energy like wind energy, there are a number of important issues that remain to be clarified. The following issues must be resolved in order to maximize the likelihood that the voluntary guidelines will be widely adopted by wind energy project developers and, therefore, the expected conservation benefits are realized:

- Enforcement assurances must not be eroded;
- A phase-in period for adherence needs to be added;
- Revert to prior definition of "significant" as recommended by the Advisory Committee
- The role of the Service needs further refinement;

¹ AWEA is the national trade association representing a broad range of entities with a common interest in encouraging the deployment and expansion of wind energy resources in the United States. AWEA's members include wind turbine manufacturers, component suppliers, project developers, project owners and operators, financiers, researchers, renewable energy supporters, utilities, marketers, customers and their advocates.

- Overly broad use of Avian and Bat Protection Plans (ABPPs) needs to be addressed by reverting to Advisory Committee recommendation for a guidance adherence file;
- Expanded responsibilities related to plant communities of concern should be removed;
- The scope of Tier 4b habitat studies should be narrowed;
- The language related to carcass salvage permits should be removed;
- Several passages need to be edited to be consistent with the focus of the guidelines on significant adverse impacts;
- Several passages related to covered species need to be clarified to be consistent with the focus on species of concern; and,
- A temporary exemption should be provided for distributed wind and community wind projects while guidelines more appropriate for such projects are developed.

AWEA is confident these critical issues can be addressed. Failure to satisfactorily resolve these issues could prevent the expanded conservation benefits envisioned in the original Advisory Committee recommendations from being fully realized, which would be an avoidable lost opportunity.

We are happy to answer any questions you may have. Please do not hesitate to contact us for clarification on any of the issues mentioned above and detailed in the document to follow.

Sincerely,



Tom Vinson
Senior Director, Federal Regulatory Affairs
American Wind Energy Association



John Anderson
Director, Siting Policy
American Wind Energy Association

Specific comments of the American Wind Energy Association Revised Draft (September 13, 2011) of the USFWS Land-Based Wind Energy Guidelines

Enforcement Assurances

The original Advisory Committee recommendations committed the industry to analysis and conservation measures that go beyond what is required under federal statute and regulations. The Service guidelines incorporate that approach as well. In exchange for agreeing to go beyond what is otherwise required and voluntarily being held to a higher standard than any other industry with respect to analysis, careful siting, and mitigation, the industry supported, and the whole Advisory Committee recommended, language (which was also signed off on by the Department of Interior Solicitor's office), providing some level of assurance the Service would not take enforcement actions or refer projects adhering to the guidelines to the Department of Justice for prosecution.

Revised enforcement assurances language was presented to the Service by the Advisory Committee at the September meeting in an effort to address some concerns raised by the Service. AWEA supports this revised language to read as follows:

Consideration of the Guidelines in MBTA and BGEPA Enforcement

The Service urges voluntary adherence to the guidelines and communication with the Service when planning and operating a facility. While it is not possible to absolve individuals or companies from MBTA or BGEPA liability, the Office of Law Enforcement focuses its resources on investigating and prosecuting those who take migratory birds without identifying and implementing reasonable and effective measures to avoid the take. The Service will regard a developer's or operator's adherence to these guidelines, including communication with the Service, as appropriate means of identifying and implementing reasonable and effective measures to avoid the take of species protected under the MBTA and BGEPA. The Chief of Law Enforcement or more senior official of the Service will make any decision to refer for prosecution any alleged take of such species, and will take such adherence and communication fully into account when exercising discretion with respect to such potential referral. Each developer or operator will be responsible for maintaining internal records sufficient to demonstrate adherence to the guidelines and response to communications to and from the Service. Examples of these records could include: studies performed in the implementation of the tiered approach; an internal or external review or audit process an avian and bat protection plan; or a wildlife management plan.

AWEA is also concerned that the Voluntary Adherence and Communication paragraph (Page 13, lines 13-16), which triggers enforcement assurances, is currently drafted to apply only to future projects. By contrast, in the original Advisory Committee recommendations, there was language that explained what this meant with respect to projects that had already commenced. AWEA urges inclusion of this language in the final Service document, "For projects commencing prior to the Effective Date of the guidelines, 'voluntary adherence and communication' shall mean that the developer has communicated with USFWS early in the process and can produce records that demonstrate they have applied recommendations of the tiered approach relevant to activities at the project which occur after the date the USFWS publishes final guidelines."

AWEA Recommendation: Adopt the revised enforcement assurances language proposed at the September Advisory Committee meeting and adopt the original Advisory Committee recommendation with respect to Voluntary Adherence and Communication of projects that commenced prior to the guidelines being finalized.

Need for Phase-In

The revised draft continues to state that it is to be implemented immediately upon publication in the *Federal Register* (Page 15, Lines 8-9). Further, it indicates the training of Service personnel and other stakeholders will begin within six months after implementation, at best (Page 15, Lines 9-11).

As stated in the joint comments filed by AWEA, National Audubon Society, Defenders of Wildlife and others in May 2011, a phase-in of some period of time is necessary to ensure Service personnel, the States, industry (and consultants to industry) and other stakeholders are adequately trained to implement the guidelines. It is also necessary to give industry time to assess their portfolios and understand the implications for individual projects, and determine how individual projects will fit into the tiered process. The line between tiers is not always black and white. Therefore, while the language included that a project does not have to go back to any tier already surpassed is helpful, it is not sufficient. Further, parts of the guidelines, such as risk models, are still not known. Nor has the Service or states designated species of habitat fragmentation concern yet.

AWEA Recommendation: AWEA continues to strongly urge a phase-in of at least one year. Further, the training should be completed within six months to a year of implementation, not merely start within six months. In order to address the Service's concern that a phase-in might mean stakeholders don't do anything in the interim, AWEA recommends inclusion of language along the lines of the following from the aforementioned joint comments: "During the interim period it is expected that developers will begin their due diligence in order to bring their projects into alignment with the guidelines as the phase-in period ends. A phase-in is consistent with major regulatory programs, such as the Clean Air Act and the Clean Water Act."

Definition of significant

As the Service acknowledges, the Advisory Committee recommended a definition for "significant" as a qualifier for "adverse effects" that was rooted in CEQ NEPA regulations. This was done in order to remove some subjectivity since there is a body of case law establishing what significant is and is not with respect to the CEQ definition.

By rewriting the definition and failing to root it in underlying statute or regulations, the Service has introduced a massive amount of subjectivity that introduces a level of uncertainty into the revised draft that will undermine its usefulness.

Further, the definition as drafted uses terms that are unclear and unbounded. For example, what does "affects the particular locality or region" mean? Economic effects? Something else? What does "likely to affect the long term status of the population(s)" mean?

AWEA Recommendation: Return to the revised definition of "significant" recommended in August 2011 by the Advisory Committee.

Role of the Service

AWEA appreciates the revised draft continues the gradual move back toward the Advisory Committee recommendations with respect to the role of the Service. However, there are still passages that include the term "coordinate" rather than "communicate" or otherwise imply a broad role for Service staff. "Coordinate" implies a greater degree of consensus or possibly de facto approval of an action by the Service prior to being able to do something. AWEA believes the document needs to consistently use the term communicate. Passages of concern are:

- Page 13, "Although the guidelines leave decisions up to the developer, the Service retains authority to verify that developer efforts to avoid, minimize and mitigate impacts are sufficient; and

to refer for prosecution any take of migratory birds that it believes to be reasonably related to lack of responsiveness to Service communications or insufficient compliance with the guidelines.”

- Page 17, “If the Service provides comments at a later time, the developer should incorporate the comments if feasible.”
- Page 37, “At the end of Tier 3, developers should coordinate with the Service to complete the Tier 3 decision process. The Service will provide written comments to a developer on study and project development plans that identify concerns and recommendations to resolve the concerns.”
- Page 64, “At the end of Tier 3, developers should coordinate with the Service to complete the Tier 3 decision process. The Service will provide written comments to a developer on study and project development plans that identify concerns and recommendations to resolve the concerns. The developer and, when applicable, the permitting authority, will make a decision regarding whether and how to develop the project.”

AWEA also recommends the inclusion of two passages from the Communications Protocol recommended by the Advisory Committee in August that were left out when the Service translated that Protocol into the chart in the revised draft on page 14. The two passages say:

- “Consistent with the voluntary nature of the guidelines, the Service should focus its response on using the best available scientific information to provide technical assistance and advice to developers related to the assessment, avoidance, minimization, and mitigation of biological and ecological risks or impacts to wildlife and habitat.”
- “Service communication at this stage should avoid pre-emptive legal conclusions regarding the project, law enforcement, and whether the developer has ‘adhered’ to the guidelines.”

AWEA agrees with the position articulated by the conservation organizations at the July Advisory Committee meeting with respect to the role of the Service vis-à-vis developers in the tiered process, which was later incorporated into the communications protocol submitted in August by the Advisory Committee: (1) the developer initiates communication (2) the Service responds (3) the developer agrees or documents why it differs with the Service’s opinion and the reasoned departure from it (4) the developer moves forward (or not) and accepts the risk of enforcement if it is done without addressing concerns raised by the Service and significant adverse impacts occur.

AWEA Recommendation: (1) On Page 13 replace “compliance” with “adherence.” The guidelines are not regulatory. (2) Remove “coordinate” references on Page 37 and 64 with respect to the decision process at the end of Tier 3 and replace with “communicate.” (3) Incorporate the two aforementioned passages from the Advisory Committee recommended Communications Protocol.

60-day responses

AWEA appreciates the Service responding to calls to put timelines on responses from the Service. While performance varies by field office, with some offices being very responsive, it is not uncommon for developers to never get a response from a field office, or to get one so late in the process that it is difficult, if not impossible, to incorporate any of the suggestions.

AWEA Recommendation: In addition to the 60 day timeline, AWEA suggests further boundaries to ensure the timeline is meaningful –

- ***The number of extensions that can be requested and unilaterally adopted (as opposed to requiring concurrence of the developer) by the Service should be limited, such as a single 30-day extension, so as to not extend the time in perpetuity;***
- ***In order to avoid the possibility of misuse of extensions, the clock on the response time should not re-start every time a request for additional information is made;***
- ***The ability to make suggestions after the response time has closed should be strictly limited (for example, if there is a changed circumstance of a species of concern) so as to***

avoid the possibility of last minute surprises as a developer is working diligently to move a project to construction.

Avian and Bat Protection Plans (ABPPs)

The Service explained its rejection of the Advisory Committee recommendation to replace the use of the term ABPPs with the concept of a Guidance Performance (or “Adherence”) File by saying the introduction of a new term would create confusion at the field office level. AWEA believes the opposite would be the case: continued reliance on ABPPs in the context of the guidelines will create confusion.

The content of ABPPs is already largely defined by an August 3, 2010, memo from the Service. And, a Bureau of Land Management (BLM) instruction memorandum dated July 9, 2010, says that projects on BLM lands that may have golden eagle issues will not advance until the project has a Service-approved ABPP. Therefore, field office staff arguably understands ABPPs as a specific document with specific features that is generally required (at least for public lands) and that is subject to Service approval. There is plenty of anecdotal evidence that field offices today are recommending ABPPs for virtually all wind energy projects. AWEA believes it will create more confusion to continue to use the term ABPP when the document envisioned in the guidelines document is different than the ABPPs to which field office staff is accustomed.

Further, on page 35 (beginning on line 19), the revised draft continues to conflate an ABPP with regulatory tools under the Endangered Species Act and the Bald and Golden Eagle Protection Act. This also adds to the confusion since the Service has said an ABPP is not considered a regulatory document requiring Service approval.

AWEA is also concerned that the revised draft sends mixed signals on ABPPs. It does indicate in some places that an ABPP is merely one option to demonstrate adherence. However, on page 106 is an entire paragraph extolling the virtues of an ABPP and noting that an ABPP “may facilitate Service review,” thus signaling a clear preference for ABPPs.

AWEA Recommendation: Remove all references to ABPPs and replace with the Guidance Performance File (i.e. not a stand-alone plan or a single document, but rather a collection of project documentation) concept proposed by the Advisory Committee in August. AWEA also recommends with respect to this File the inclusion of language on page 106-107 (beginning on line 29) in the revised draft that is currently drafted specific to ABPPs, “Any Service review of, or discussion with a developer, concerning its Guidance Performance File is advisory only, does not result in approval or disapproval of the File by the Service, and does not constitute a federal agency action subject to the National Environmental Policy Act or other federal law applicable to such an action.”

Eagles

AWEA Recommendation: AWEA supports the Advisory Committee recommendation made at the September meeting to revise the eagle language on pages 10-13, including the specific language recommended for Page 13, lines 4-7, to incorporate language from the 2009 permit rule that separates projects that should get a permit from those that do not need to do so based on whether the project is “likely to result” in take.

Plant Communities of Concern

As was discussed at the September Advisory Committee meeting, the expanded references to “plant communities of concern” is of concern to industry. In prior drafts, analysis of plant communities of concern in early tiers was included. However, in the revised draft, presence of a plant community of

concern is justification to abandon a project (Page 36). Further, “plant communities of concern” is not defined.

AWEA Recommendation: AWEA urges the final draft to strike the language inserted on page 36 that mere presence of a plant community of concern is cause to abandon a project. Unoccupied habitat should not be cause for project abandonment. Further, it is generally possible to avoid direct impacts to individual plant species for example by re-routing roads or adjusting turbine locations.

Tier 4b Studies

As was discussed at the Advisory Committee meeting in September, the Service added new language expanding the scope of Tier 4b studies to species of concern. AWEA strongly urges the Service to narrow the scope of Tier 4b studies to species of habitat fragmentation concern. Examples of passages that need to be narrowed include:

- Page 78, line 23: “The purpose of Tier 4b studies is to evaluate predictions of direct and indirect impacts to habitat and potential for significant adverse impacts on species of concern...”
- Page 78, lines 25-26: “Tier 4b studies should be conducted if Tier 3 studies indicate the presence of species of habitat fragmentation concern or if Tier 3 studies indicate significant direct and indirect impacts to species of concern (see discussion below).”
- Page 79, lines 2-3: “What are the effects of habitat loss, degradation, and fragmentation on species of concern, including species of habitat fragmentation concern?”
- Page 79, beginning on line 19: “Impacts to a species of concern resulting from the direct and indirect loss of habitat are important...”
- Page 80, line 4: “Significant direct or indirect loss of habitat for species of concern...”
- Page 80, line 21: “Predictions of impacts to species of concern from habitat loss...”

In addition, in August, the Advisory Committee recommended the following questions for Tier 4b habitat studies:

“Tier 4b studies should evaluate the following questions:

1. How do post-construction habitat quality and spatial configuration of the study area compare to predictions for species of concern identified in Tier 3 studies?
2. Do studies identify potentially biologically significant adverse impacts on the affect population of the species of concern?
3. If biologically significant adverse impacts were not predicted in Tier 3, but Tier 4b studies indicate the potential for such impacts, can these impacts be mitigated or are Tier 5 studies necessary to evaluate the biological significance of these impacts?”

By contrast, the revised draft (Page 79) says:

“Tier 4b studies should evaluate the following questions:

1. What are the effects of habitat loss, degradation, and fragmentation on species of concern, including species of habitat fragmentation concern?
2. Were any behavioral modifications or indirect impacts noted in regard to species of concern?
3. If significant adverse impacts were not predicted in Tier 3 because of loss, degradation, or fragmentation of habitat, but Tier 4b studies indicate such impacts may be occurring, a) can these

impacts be mitigated and b) are Tier 5 studies necessary to evaluate the biological significance of these impacts?”

AWEA is concerned that questions 1 and 2 in the Service draft significantly expand the scope – through the inclusion of language like “What are the effects...” and “Were any behavioral modifications...” – beyond that proposed by the Advisory Committee and beyond the descriptive paragraphs that follow the questions. The more detailed effect studies belong in Tier 5 research.

AWEA believes that the Advisory Committee questions better reflect the scope included in both the Advisory Committee recommendations and the Service’s revised draft (Page 78, beginning on line 22 and Page 79 beginning on line 13).

AWEA Recommendation: Narrow the scope of Tier 4b studies to species of habitat fragmentation concern and revert to the Advisory Committee question formulation for Tier 4b.

Salvage Permits

Salvage permits are needed only when MBTA birds are “salvaged and processed.” Post-construction mortality monitoring can be accomplished without handling or possessing the birds. It is common practice to avoid such handling and is not technically necessary for the project biologists and facility staff to handle or possess carcasses. The language in the revised draft (which was also included in the July draft) presumes such permits are needed and directs the developer (as opposed to contractors) to obtain permits for this purpose. However, there are no further references to any other necessary permits throughout this document, which brings into question the purpose of identifying this particular permit.

AWEA Recommendation: Remove salvage permits language on page 73, lines 24-25. Instead, if necessary from the Service’s perspective, include a generic reference in Tier 3 and Tier 4 to “obtaining any necessary federal and/or state permits for certain activities.”

Covered Impacts

The passages below are inconsistent with the document’s focus on “significant adverse impacts.”

AWEA Recommendation: AWEA urges the Service to edit the following passages to add in the needed qualifier “significant” -

- Page 6: “The Service’s Land-based Wind Energy Guidelines are founded upon a ‘tiered approach’ for assessing potential adverse effects to wildlife species of concern and their habitats.”
- Page 8: “These guidelines are intended to... (4) Avoid, minimize, and if appropriate, compensate for potential adverse effects on species of concern and their habitats;”
- Page 16: “Project evaluation should consider all potential effects to species of concern...”
- Pages 39, 59: “What are the potential risks of adverse impacts of the proposed project to individuals and local populations of species of concern and their habitats?”
- Page 54: “The distribution and abundance of nesting and brood rearing habitats can be used to help in the assessment of adverse impacts of the proposed project to prairie grouse and sage grouse.”
- Page 59: “Developers are encouraged to assess adverse impacts potentially caused by development for those species most likely to be negatively affected by such development.”
- Page 94: “During site planning and development, careful attention to reducing risk of adverse impacts to species of concern from wind energy projects, through careful site selection and facility design, is recommended...Use of these BMPs should ensure that the potentially adverse impacts to most species of concern and their habitats present at many project sites would be reduced...”

- Page 103: “In cases where adverse effects cannot be avoided or minimized, it may be possible to offset all, or a portion, of these effects through compensation.”
- Page 104, lines 21-22: “If adverse effects have not been adequately addressed, additional mitigation for those adverse effects from operations may need to be implemented.”

Covered Species

The passages below are inconsistent with the documents focus on “species of concern.”

AWEA Recommendation: AWEA urges the Service to edit the following passages to ensure the focus on “species of concern” is maintained throughout the documents -

- Page 16, lines 20-21, beginning “The tiered approach is designed to lead to the appropriate amount of evaluation in proportion to the anticipated level of risk that a project may pose to wildlife and their habitats...”
- Page 27, line 27 and page 32, line 18 “Are there known areas of wildlife congregation...”;
- Page 38, line 8 and page 34, line 28: “Which species of birds and bats...”;
- Page 41, lines 26-28, starting with “Several factors can be considered to assess the potential effects to various species.”
- Page 40, beginning on line 26, concluding on Page 41, “Such movements should be considered for all potentially affected species...” and “Developers should conduct monitoring of potential sites to determine the types of migratory species present...”;
- Page 42, beginning on line 4, “Wind developers need to determine not only what species may migrate through...” and “Once likely presence has been determined or assumed...”;
- Page 108, lines 20-31, repeatedly refers to “wildlife and their habitats” rather than “species of concern.” For example, “The tiered approach is designed to lead to the appropriate amount of evaluation in proportion to the anticipated level of risk that a project may pose to wildlife and their habitats.”

Additional Suggestions

On Page 72, lines 1-3, add a reference to the most recent National Wind Coordinating Collaborative Methods and Metrics document. The paragraph should read, “More detailed descriptions and methods of fatality search protocols can be found in the 1 California (California Energy Commission 2007) and Pennsylvania (Pennsylvania Game 2 Commission 2007) state guidelines, in Kunz et al. (2007) and Smallwood (2007), and in the recently updated comprehensive guide to wind /wildlife interactions from the National Wind Coordinating Collaborative (Strickland et al. 2011).”

On page 74, lines 9-10, the Service should consider alternatives to housing the data in the Office of Law Enforcement Bird Mortality Reporting System. These lines should be amended to include an option such as the American Wind Wildlife Institute’s Research Information System.

Application to Distributed Wind and Community Wind Projects

AWEA continues to have serious concerns about the following language: “While these Guidelines are designed for utility- scale wind projects, the general principles may also apply to distributed and community-scale wind energy projects. Developers should contact the Service to determine applicability of the Guidelines to their particular project.” (Pages 15-16, beginning on line 23)

While we recognize the language says “may also apply” and that it provides flexibility to determine applicability to field offices, in practice, we have already seen instances where field offices are requesting compliance with the full suite of recommendations in the guidelines. Full adherence will make these projects uneconomic as the cost of the studies alone will rival the cost of the turbine(s), and as a result lead to widespread project abandonment.

AWEA Recommendation: AWEA recommends a temporary exclusion for this class of wind turbines and projects for a two year period while the limited existing studies and additional data are collected and scientifically reviewed. During that time, guidelines appropriate to this class of installations would be cooperatively developed, using a similar multi-stakeholder process that has been undertaken for the commercial wind farm applications. The process would include considerations for appropriate mitigation strategies.