Comments received via email: Erin Wiedower
Date: 05/17/2011

To Whom It May Concern,

Attached is a PDF document outlining Akuo Energy USA, Inc.'s comments regarding the draft USFWS Eagle Conservation Plan Guidance. This document also includes comments regarding the related draft USFWS Land-Based Wind Energy Guidelines. We will be submitting the same document under the corresponding Land-Based subject heading, as well.

Thank you for your consideration of our concerns.

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May 17, 2011

ATTN: Wind Energy Guidelines
Division of Fisheries and Habitat Conservation
US Fish and Wildlife Service
4401 North Fairfax Drive
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Arlington, VA 22203-1610

RE: Industry Comments Regarding the *Draft Voluntary Land-Based Wind Energy Guidelines* and *Draft Eagle Conservation Plan Guidance*
Akuo Energy USA, Inc.

To Whom It May Concern:

Akuo Energy USA, Inc. ("Akuo") is submitting comments regarding the *Draft Voluntary US Fish and Wildlife Service* ("USFWS") *Land-Based Wind Energy Guidelines* and *Draft USFWS Eagle Conservation Plan Guidance* (herein collectively referred to as the "Guidelines") published in the Federal Register on February 18, 2011. As a whole, Akuo is opposed to the proposed voluntary Guidelines in their current form, because they will in their own merits create undue pressure and challenges on an energy source that is one of the most environmentally-friendly methods of electricity production, and that is already subject to a rigorous level of environmental review.

Akuo Energy is a French-based renewable energy producer that for over 10 years has successfully developed, financed, constructed, and operated a range of renewable energy projects, of which wind represents a majority of the activity. We currently have offices in 10 countries, including the United States, with over 80 experienced team members worldwide, and are still growing. Akuo has a philosophy of siting and operating projects in a responsible manner that minimizes negative environmental impacts. Due to the increasing level of wind energy development in the Midwest region of the United States, we are proactively collaborating with USFWS Region 3, the American Wind Energy Association, and other wind energy companies forming a WEBAT cooperative to develop a seminal Programmatic Multi-Species Habitat Conservation Plan for the region.

Based on our environmental project experience and thorough review of the documents, Akuo has the following concerns with the *Draft Voluntary Land-Based Wind Energy Guidelines* ("Guidelines"), in no particular order of importance:

1) Throughout the document, there is a lack of scientific basis or justification for many of the recommendations pertaining to study design, monitoring, and mitigation. Several citations utilized are non-peer-reviewed and inconclusive, providing no reliable guidance on best management practices. There also seems to be a built-in assumption of developer-supplied research in order to fill knowledge gaps, which is an inappropriate application of the Guidelines. The wind industry cannot solely fund and execute

research that will benefit a broad spectrum of stakeholders, including the USFWS.

2) Specifically, the Guidelines impose "adaptive management" requirements that increasingly include operational changes without a peer-reviewed scientific foundation, and which create unpredictability in project costs, revenues, and schedules, and unnecessary uncertainty as a whole for the capital investments required to deploy wind power projects and sustain our nation's wind industry and associated economic activity.

3) Already time-costly projects may be delayed by up to three additional years due to increased pre- and post-construction monitoring burdens. Additionally, understaffed USFWS field and regional offices will almost certainly struggle to keep up with the increased level of project review, making timely responses from the USFWS unlikely. Wind energy developers generally have very strict timelines imposed by the interconnection, local permitting, financing, and power-purchase processes so this unpredictability will make financing wind energy projects even more challenging. As a very likely consequence, wind-generated electricity, arguably one of the major present and future potential sources of carbon-free electricity, will be made even less competitive with respect to conventional electricity generation technologies that are not as carbon- and environmentally-friendly. This seems to us in complete contradiction with the promotion of high ambitions for globally-enhanced environmental preservation standards.

4) Relatedly, the additional monitoring efforts will significantly increase the financial burden of already costly projects in unpredictable ways, making wind projects economically risky ventures.

5) Project risk levels are subjective and open to interpretation by field and regional offices, making the tiered approach and pre- and post-construction monitoring expectations continue to be unpredictable from a project planning perspective.

6) USFWS has reduced the scope of impacts from "significant adverse impacts" to "adverse impacts". This modification, while seemingly semantic, greatly increases the possible scope of project impacts, leaves impact levels open to a higher level of interpretation, and removes any risk-based threshold.

7) Similarly, USFWS does not include an emphasis on species that are most likely to be impacted by wind energy development. This lack of focus broadens the scope of review to encompass all species, listed and non-listed alike. Non-listed species, such as migratory birds, already have protections under federal regulations such as the Migratory Bird Treaty Act (MBTA), and therefore the species included in these Guidelines should be discreet and predictable. This lack of focus again opens unacceptable, unlimited possibilities of interpretation, and hence impractical legal uncertainty.

8) These Guidelines imply that the burden of proof for project impacts is placed on the developer. This responsibility needs to rely on all stakeholders involved with a project, not just the developer, including the USFWS, state and local agencies, etc.

In addition to the concerns listed above, Akuo has the following concerns specifically relating to the *Draft Voluntary Eagle Conservation Plan Guidance* ("Guidance"):

1) Both the bald eagle and golden eagle are already afforded federal regulatory protection under the MBTA and Bald and Golden Eagle Protection Act (BGEPA)and, therefore, do not require an additional set of arduous requirements pertaining to their

protection.

2) The Guidance imposes "adaptive management" requirements that increasingly include operational changes without a peer-reviewed scientific foundation, and which create unpredictability in project costs, revenues, and schedules. Additionally, the Guidance requests analysis on wildlife-based sound impacts without any peer-reviewed scientific evidence, not to mention the simple impractical, non-realistic, and unrestricted nature of such analyses. At the very least, if this was required from the wind industry, it seems to us that is should also be required in a consistent manner from any other human-induced, service, or industrial activities.

3) Three years mandatory pre- and post-construction surveys for eagles (at a minimum), as well as much more intensive surveillance (daily activities, migration counts, etc.) are unreasonable for these species. It should be incorporated into the document that the level of pre- and post-construction monitoring should be representative of the level of risk assessed for each project. During post-construction monitoring while the facility is in operation, impacts should be re-evaluated at the end of each year, and the monitoring data assessed jointly by USFWS and the developer to determine whether additional advanced conservation practices are warranted. If not, then the mandatory minimum of three years post-construction monitoring should be waived.

4) The pre- and post-construction eagle monitoring requirements will immediately apply to approved and operational projects when the Guidance goes into effect. Existing facilities did not account for this unforeseen financial burden when determining the cost effectiveness and risk level of the development, and as such additional costs and risks could be fatal to certain projects and in turn detrimental to our nation's wind industry, its induced economic activity, and long-term development potential.

5) If eagles are present within a project area, the developers will be required to obtain a BGEPA permit before an Incidental Take Permit (ITP) for any other Endangered Species Act-listed species will be issued. This lack of concurrent permitting will add a significant and non-realistic amount of time to an already time-intensive process. Wind energy projects are generally on strict timelines due to financing constraints and cannot be infinitely flexible to increased permitting times, challenges, and costs.

6) The Guidance is a blanket guidance for both golden and bald eagles across all of the United States, but some of the recommendations are not appropriate for bald eagles or certain geographic locations. For example, there is an automatic 10-mile inclusion radius from the project boundary for site-specific eagle surveys and this large distance is more applicable to the patterns of golden eagles than bald eagles. Appendix C even justifies the 10-mile distance as the "area nesting population for golden eagles to be the 'number of pairs of golden eagles known to have a nesting attempt during the preceding 12 months within a 10-mile radius of a golden eagle nest'". This is a very expansive distance and unreasonable perimeter for a bald eagle in the Midwest, for instance. While the USFWS provides alternative approaches when the nesting density makes this radius infeasible, this once again puts the burden of proof on the developer in order to implement one of these approaches, and an alternative method may or may not be accepted by the permitting field office.

7) The automatic requirement of any project within 10 miles of a documented eagle to get a BGEPA permit, write a Habitat Conservation Plan to acquire an ITP, and perform a full National Environmental Policy Act (NEPA) assessment is infeasible and unreasonable

given the high costs and extensive timeline of each - not even taking into account the stringent pre- and post-construction monitoring requirements – and unnecessary given the environmental protections that each as a stand alone document would afford the eagle species.

8) Relatedly, based on current trends, it is anticipated that when there is a federal nexus at a project site, the precedent will be to require a full Environmental Impact Statement (EIS) during the NEPA process, rather than an EA, because an EIS is less subject to legal challenge. Once again, this significantly increases the permitting time, cost, risk, and effort burden on already challenged wind energy developments, very possibly to a level that makes wind projects unfeasible.

9) Specifically referring to adaptive management (Appendix A), there is a built-in assumption of developer-supplied research in order to fill knowledge gaps, even on a population-level scale, which is an inappropriate application of the Guidance. The wind industry cannot solely fund and execute eagle research that will benefit a broad spectrum of stakeholders, including the USFWS. While adaptive management efforts should be based on the soundest science available at the time, the wind industry cannot be expected to supply the necessary research to answer all questions across the distribution of eagles.

10) Introducing the possibility that eagle locations may be additionally subject to review under Section 106 of the National Historic Preservation Act (NHPA) is an unnecessary extension of the protections already afforded to bald and golden eagles under both the MBTA and BGEPA, and to cultural resources under the NHPA.

11) The USFWS anticipates that the Guidance and the recommended methods and metrics will "evolve rapidly" as the process is applied to the first wind energy development projects. This expectation is dubious considering the staffing strain that already exists in all levels of the USFWS, and is also concerning from a predictability standpoint, because it is doubtful that the USFWS will be able to adequately and efficiently update and train their personnel in a consistent manner across all USFWS offices implementing these permits.

In order to reliably implement both of the Guidelines in a manner that is consistent with their intention, the USFWS is relying on a significant amount of training of USFWS personnel in field and regional offices. This level of training, given the growing number of wind energy projects in development, will be a time and financially burdensome effort on the part of the USFWS. The training of personnel would also need to be effectively complete prior to implementation of the Guidelines.

Overall, the significant increase in federal reviewing and training workload on the USFWS, without the hiring of additional staff (which is unlikely given the current budgeting climate) will only increase the burdensome timeframe of an already time-costly permitting process.

Additionally, while both guidance documents are considered "voluntary", precedent suggests that USFWS field and regional offices, not to mention all agencies and parties, will refer to these documents as regulation, in the absence of any other established guidelines, with no room for deviation.

Akuo understands that the MBTA and BGEPA are federal regulations and are not subject to negotiation; however, we feel that wind energy projects can adequately fulfill the wildlife protections afforded by these acts without the increased level of pre- and post-construction studies proposed by these two guidance documents.

In summation, Akuo submits this letter to express our very serious formal concerns regarding the draft guideline recommendations based on the items described above, and would like to strongly oppose final publication in their current form. Akuo believes that the publication of the guidelines in their currently proposed form would have a severe impact on the development and operation of wind power projects throughout the United States. As a very likely consequence, the growth and investment potential of one of our nation's most promising industries would be impaired. And what should be considered as anything else but a sound environmental and economic bet compared to other available viable power-generation alternatives might not be given the chance it deserves to materialize. These Guidelines significantly reduce the flexibility of wind developers to viably site projects while also taking into consideration respect for wildlife and natural resources. We request that the Guideline documents be modified in such a way as to preserve the goals of wildlife protection, while encouraging the production of a clean, renewable, and economic energy source. Without this, the current Administration's renewable and energy independence targets have no hope of being met.

Please contact me or Jean Lemaire at (312) 291-4647 or wiedower@akuoenergy.com / lemaire@akuoenergy.com if you have any questions or require additional information regarding these comments.

Sincerely,

Erin Wiedower

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