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# WIND TURBINE GUIDELINES ADVISORY COMMITTEE MEETING: TELECONFERENCE AND WEBCAST, AUGUST 23, 2011

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## Attendees

### Federal Advisory Committee:

Taber Allison, Mass Audubon  
Dick Anderson, California Energy Commission  
Ed Arnett, Bat Conservation International  
Michael Azeka, AES Wind Generation  
Kathy Boydston, Texas Parks & Wildlife  
Department  
Aimee Delach, Defenders of Wildlife  
Sam Enfield, MAP Royalty, Inc.  
Robert Manes, The Nature Conservancy  
Winifred Perkins, NextEra Energy

Steven Quarles, Crowell & Moring, LLP  
Rich Rayhill, Ridgeline Energy, LLC  
Robert Robel, Kansas State University  
Keith Sexson, Kansas Department of Wildlife  
and Parks  
Mark Sinclair, Clean Energy States Alliance  
Patrick Traylor, Hogan & Hartson, LLP

### Department of the Interior/U.S. Fish and Wildlife Service:

Michael Bean, Counselor, DOI  
David Cottingham, Senior Advisor, FWS  
Jerome Ford, Assistant Director, Migratory Bird  
Management, FWS

## **PROCESS SUPPORT**

Patrick Field, Facilitator, Consensus Building Institute  
Johnathan Raab, Facilitator, Raab & Associates Inc.

## **MEETING PURPOSE**

For the Federal Advisory Committee (FAC) subcommittees to present their recommendations to the full FAC for discussion and for the U.S. Fish and Wildlife Service (FWS) to provide a response to the full FAC's deliberations regarding the *Draft Land-Based Wind Energy Guidelines* (Draft Guidelines) dated July 12, 2011.

## **MEETING OBJECTIVES**

- To allow the subcommittees to present suggestions to the full FAC regarding specific issues in the FWS Draft Guidelines.
- To allow FWS to respond to FAC suggestions.
- To offer the FAC members and the public an opportunity to provide comments on the FWS revised Draft Guidelines.
- To inform the FAC members and the public on next steps in revising the Draft Guidelines.

## OPENING REMARKS:

David Cottingham (U.S. Fish and Wildlife Service) thanked the subcommittees for their work since July and for their herculean effort in meeting the September deadline. Pat Field (Consensus Building Institute) outlined the issues that would be covered in the meeting and the general protocol for the webinar: each subcommittee designee will lay out the general issues for discussion by the full FAC, after which FWS will respond to the full FAC's suggested action on each issue. D. Cottingham acknowledged that FWS received approximately seven hundred public comments on the July 12, 2011 draft. While there were a few new comments, most were very similar to comments received on the Draft Guidelines published in the *Federal Register* on February 18, 2011. FWS will consider the suggestions provided by the FAC and public comment in revising the Draft Guidelines. The draft will undergo internal review and will be made public and sent to the FAC by the 13<sup>th</sup> or 14<sup>th</sup> of September for review before the September 20-21, 2011, meeting. The revised version will clearly mark the changes that have been made from the July 12 version to aid in review.

## ISSUES DISCUSSION:

### ADAPTIVE MANAGEMENT

**Summary:** The Adaptive Management Subcommittee presented its recommended edits to the full FAC. The recommendations emphasize that adaptive management should be used in limited circumstances. After discussion and further clarification of the issue, suggested revised wording was accepted by the full FAC and recommended to FWS. Details from the discussion are as follows:

#### **Pg. 20-21, Lines 13-15:**

- The subcommittee recommended adding language from original FAC recommendations to lines 13-15 emphasizing that the tiered approach informs the decision as to when adaptive management is necessary.
- The language also explained that adaptive management may not be warranted for every project. However, FWS should be able to recommend adaptive management when appropriate.
- A FAC member raised the concern that the subcommittee's recommendations could erroneously be read such that where a project's impact is anticipated to be significant and post-construction monitoring confirmed that impacts were significant, adaptive management would be excluded from that scenario. Other FAC members agreed that the point was reasonable.
- Several FAC members were concerned that if impacts may be considered significant regardless of whether they are anticipated, adaptive management could be overused. Unless actual impacts exceed expected impacts by a biologically significant amount, then adaptive management should not be necessary, as made distinct from statistical significance.
- Questions were raised about whether the Bureau of Land Management (BLM) is obligated to adhere to all FWS recommendations with respect to the Guidelines. Federal agencies are not

required to carry out all FWS recommendations (i.e., in Section 7 consultations) except in the instance of jeopardy findings.

**Pg. 2 lines 1 & 2:**

- Added “or application of mitigation techniques are sufficient to avoid, minimize and compensate for impacts”

**FWS Response (D. Cottingham, Christy Johnson-Hughes):** FWS follows the Department of the Interior policy on adaptive management. Adaptive management can include a broad range of actions, and the FWS field office recommendations will vary depending on the circumstances at individual project sites. In general, FWS concurred with the FAC’s recommendation, which included revisions to the Adaptive Management Subcommittee language. In response to other questions raised by the FAC, in a non-jeopardy situation FWS gives conservation recommendations but the BLM retains its flexibility in siting decisions.

**PHASE-IN OF GUIDELINES:**

**Summary:** The subcommittee recommended to the full FAC that the Guidelines should be implemented no later than 6 months after final publication. The FAC discussed whether Tier 4 monitoring should apply to existing projects and recently completed projects. The general conclusion was that in order to be granted enforcement discretion, existing facilities would have to show that fatality monitoring was conducted at the facility, regardless of age. However, projects that have been in operation over an extensive period without problems would likely not seek enforcement discretion. The subcommittee’s recommended language was revised to reflect this discussion, including:

- The Guidelines should not recommend a project do fatality monitoring when the facility has been in operation for a long period of time without issue.
- Projects that are operational prior to the Guidelines effective date should apply Tiers 4 and/or 5 if the proponent seeks enforcement discretion.

**FWS Response (D. Cottingham):** FWS will aim to have as many of our staff trained as possible within the 6 month phase-in. FWS approves of a phase-in period of less than 24 months. Clarifying that operational projects should incorporate the Guidelines “where feasible” is appropriate for older projects that haven’t experienced problems in the past and are not seeking enforcement discretion. However, projects that have not recorded fatality monitoring, despite their age, should not be grandfathered in and given enforcement discretion.

**AVIAN AND BAT PROTECTION PLANS (ABPPs):**

**Summary:** The ABPP Subcommittee suggested that ABPPs should be retitled “Guidelines Performance Documentation” (GPD) to avoid confusion with ABPPs. The FAC discussed in which situations ABPPs should be prepared. The FAC concluded that ABPPs would be relevant in Tiers 1, 2 and 3. Tiers 1 and 2 involve data collection, and preparation of an ABPP would not occur until Tier 3. Points made during the FAC discussion included the following:

**Pg. 1**

- The FAC discussed whether the ABPP section is subject to the language on pg. 1 line 15-16 regarding FWS authorities. It was questioned whether or not FWS has the authority to come on site and request records as oppose to the proponent providing the records to FWS.

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- The FAC discussed whether ABPPs/GPDs should be addressed in Tiers 2 and 3. Some thought Tier 2 is too soon for ABPPs/GPDs, and should not be developed until Tier 3 when developers have a better estimate of the anticipated impacts.

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- The FAC does not believe that ABPPs should be required for every project.
- The FAC is concerned about the terminology “ABPP”. FWS considers ABPPs to be voluntary, however BLM has made them a requirement for projects on their lands.
- The FAC agreed that language regarding how to prepare a GPD was appropriate.
- A GPD should include mitigation measures adopted and document the steps, analyses and studies progressing from one Tier to the next.
- A GPD may be a stand-alone document or a reference to other documents demonstrating adherence to the Guidelines.

**FWS Response** (D. Cottingham): The Office of Law Enforcement added language to explain their authority. The GPD nomenclature is acceptable in principle; FWS will accept any materials that include the necessary information. However, FWS has used ABPPs for a long time and this is a term of art. Changing the terminology may cause confusion.

**ROLE OF FWS**

**Summary:** The FAC recommended two-way communication with FWS whereby developers would strongly consider FWS advice and document those considerations. The FAC discussion included the following points:

- The FAC believes developers will protect non-federal trust species for enforcement discretion.
- Developers are not seeking a pre-construction letter from FWS conferring enforcement discretion. Instead, developers would follow the Guidelines and consider FWS advice as projects proceed. If an enforcement action is brought against the developer, the developer would provide documentation of adherence and communication with FWS. FWS would decide

whether to use its enforcement discretion, and may recommend adjustments to the project to avoid enforcement action.

- Subcommittee recommendations include edits to clarify that enforcement discretion would be sought retrospectively.
- The Subcommittee recommends the addition of a “Communications Protocol” that describes the necessary steps in two-way communication with FWS, including meaningful consideration and use of FWS advice.
- Included in the protocol is that FWS should contact states about species under state responsibility. If a state agency is contacted first, they should coordinate with FWS.
- On pg. 1, “in many cases verbal communication would be appropriate” should be deleted.
- The FAC acknowledges that there was concern in the public comment that the 30 day comment period would be only for ministerial requests. The language was not intended to hamper the FWS review periods for substantive issues.

**FWS Response** (D. Cottingham): The Subcommittee’s recommendation differs substantially from what FWS had intended. The FWS review may not be entirely retrospective. There will be circumstances where one time meetings with FWS will not be adequate. FWS field offices require adequate information from developers in order to provide technical assistance. FWS Regional offices will provide further feedback on this issue.

#### **TIER 4 MONITORING AND HABITAT FRAGMENTATION:**

**Summary:** The Habitat Fragmentation Subcommittee recommended separation of Tier 4 into 4a (fatality monitoring) and 4b (habitat studies). The Subcommittee also recommended the addition of Tables 1a and 1b to illustrate the study decision making process. The FAC discussion of these recommendations included the following:

- Habitat impacts should be evaluated in Tier 4. Tier 4a and Table 1a deal with fatality monitoring. Tier 4b and Table 1b deal with habitat impacts to species of habitat fragmentation concern.
- Language edits through Tiers 4 and 5 clarify what developers should do if actual impacts are higher than predicted.
- In Tier 5, if impacts are greater than predicted and are determined to be biologically significant, factors leading to impacts are assessed and alternative mitigation strategies are evaluated. Demographic effects to species of concern are also assessed in Tier 5 when Tier 4 studies suggest potential biologically significant impacts.
- It was noted that the subcommittee did not address impacts on habitat itself looking especially at old growth forest impacts or tall grass prairie and suggested that the full FAC consider how

direct habitat impacts be addressed more thoroughly in Tables 1a and 1b, even when species of concern are not present.

- Some FAC members disagreed, noting that there are over 100 occurrences of the word “habitat” in document. Table 1b was designed to be flexible to prevent overly burdensome study requirements where projects are sited in previously disturbed habitats.
- It was noted that Tier 4b Question 3 relates back to Tier 3. If there are threats identified to habitat, developers will need to mitigate for impacts. Otherwise, developers should avoid these habitats in the first place.
- There was concern that the FAC limited Table 1b to species of habitat fragmentation concern, thereby circumventing the issue of direct and indirect impacts to species of concern that aren’t vulnerable to habitat fragmentation. Page 80, Tier 4b protocol design issues describe direct and indirect impacts to habitats that should be considered. Table 1b is not clear on how to conduct this analysis.

**FWS Response** (D.Cottingham): FWS approves of going back to a Tier 4a and 4b organization that includes habitat impacts. We will review the language and discuss the tables internally.

**MITIGATION:**

- New preamble language has been added to the mitigation section clarifying the FAC’s intention regarding mitigation. The goal of the language is to encourage compensatory mitigation where it would otherwise not be required.
- A FAC concern was raised that the second sentence implies that every project is encouraged to do compensatory mitigation. Low risk projects should not have to do compensatory mitigation. A subcommittee member clarified that this issue was considered and addressed in a later paragraph.
- The FAC sought to encourage developers to adhere to the Guidelines. Developers committed to do more to promote conservation though the Guidelines remain voluntary.

**FWS Response** (D. Cottingham, C. Johnson-Hughes): FWS can live with this recommendation. The direction is consistent with FWS policy.

**DEFINITION OF SIGNIFICANT:**

- The Subcommittee recommended that the bulleted list from CEQ definition be deleted. The context of the CEQ definition remains intact. Cumulative impacts language doesn’t need to be specially highlighted because the issue has been addressed elsewhere in the Guidelines.

FWS Response (D.Cottingham): The bullet about cumulative effects should be retained. FWS will consider how to include cumulative effects in this definition. There may be situations where an individual action wouldn't be significant, but combined with other actions, may become significant.

### **PUBLIC COMMENT:**

**Michael Fry (American Bird Conservancy):** This has been illuminating and I appreciate the strong response on the FWS's part. My comment is mainly that although these issues are couched in terms of clarification, the clarifications water down the effects of the subjects being talked about. Regarding post-construction monitoring, the inclusions imply that definitions need to be determined by state agencies. This excludes academic studies in journals, for example. Without certification, this won't be considered. All science should be taken into consideration. The role of the FWS has had its response time decreased down to 30 days. We will have written comments and we are not happy with these clarifications.

**Shruti Suresh (Meyers, Glitzenstein and Crystal):** I concur with Dr. Fry's comments. The proposed recommendations from the subcommittees weaken the Guidelines. Transcripts of meetings are not provided to the public, against the requirements of the Federal Advisory Committee Act. With these Guidelines, it is far more likely to develop bad projects. You have gone from merely a document to implicit endorsement of bad projects.

**Debbie Evans (Palm Beach County, Florida):** Where did the best management practices (BMPs) for decommissioning, removal of foundations come from? These BMPs treat all soils the same. For example, the Everglades project has mucky soils. I'd like more information on the language.

### **NEXT STEPS:**

D. Cottingham explained that an FWS team will begin internal review of public comment and the FAC recommendations and will develop a revised draft. FWS anticipates that this draft will be available to the public and the FAC by September 12 or 13 to provide time to review the draft in advance of the meeting on September 20-21. After the FAC meeting, FWS will consider further FAC and public comment. Following a final internal review, the document will be provided to the Office of Management and Budget for an interagency review which may take 60-90 days. FWS anticipates publishing a final document following the interagency review, by the end of the calendar year.