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AVOIDING THE DERAILMENT OF WIND POWER DEVELOPMENT: WHY FEDERAL SITING REGULATIONS ARE NECESSARY NOW FOR U.S. WIND DEVELOPMENT

by Nathan Borgford-Parnell*

In the United States and around the globe, governments are responding to climate change and energy security concerns by shifting their energy policies to facilitate the rapid development of renewable energy.¹ Today, wind energy is the fastest growing renewable technology,² but in the rush to combat climate change, officials have often ignored another brewing conflict which looms larger with every turbine erected. It is a conflict between two would-be allies, wind developers and wildlife conservationists, which if left unchecked has the potential to derail wind energy development in the United States.³

The dispute centers around the dark secret of the wind industry: the fact that poorly sited turbines can kill large numbers of birds and bats.⁴ As wind farms spread across the country, many scientists and conservation groups are concerned that the cumulative effect will be devastating to already threatened bird and bat populations.⁵ Pressure is growing from conservation groups to enforce wildlife protection laws that the government has only lightly enforced against wind farms so far.⁶ To date, the U.S. Fish and Wildlife Services (“FWS”), which is responsible for protecting bird and bat populations, has refused to initiate legal action against wind developers for their illegal taking of endangered bird species.⁷ Three federal statutes under the FWS’s jurisdiction—the Endangered Species Act, the Bald and Golden Eagle Protection Act, and the Migratory Bird Treaty Act—could all be enforced against wind farm developers that illegally kill endangered or protected birds and bats.⁸ However, even the threat of such litigation could potentially be enough to end wind energy development in the United States by making development too costly or too risky for investors.⁹ Under the Migratory Bird Treaty Act, for example, every knowing illegal taking of a migratory bird could lead to a \$250,000–\$500,000 fine and up to two years in prison.¹⁰

While conservation groups agree that protecting wildlife from the unnecessary danger posed by turbines is a significant concern, most agree that climate change poses a greater threat to wildlife and their habitat than do wind farms.¹¹ Stopping all wind development is not a viable solution to the problem. Fortunately there may be a middle ground.

Studies show that bird fatalities are extremely varied from wind farm to wind farm and even between turbines in the same site, with some turbines producing almost no fatalities and others killing hundreds.¹² The Altamont Pass in California is the site of one of the oldest wind farms in the United States and is also a migratory bird route and home to North America’s largest

population of Golden Eagles.¹³ It is estimated that every year 4,700 birds are killed by turbines at Altamont Pass, compared to less than a hundred at similarly sized wind farms sited with avian impacts in mind.¹⁴ This provides strong evidence that a wind farm’s impact on birds and bird habitats can be greatly mitigated through proper siting, design, and management.

Globally, avian mortality has typically not been part of wind farm impact assessments, but in 2003 the Council of Europe for the Bern Convention responded to this growing issue with recommendations and guidelines for including avian impact assessments in wind farm development proposals.¹⁵ Since then, wind farm planning in the EU has included avian impact assessments and a number of wind farms have been rejected due to their potential deleterious impact on birds and bird habitat.¹⁶ European conservation groups are also creating bird impact maps to help planners assess the potential impacts of specific wind projects on birds and bird habitat.¹⁷

The United States now needs mandatory federal regulations that provide clear wind farm siting guidelines that include bird impact assessments. Unfortunately, there are currently no mandatory federal guidelines, and few state or local guidelines, regulating turbine siting. However, in 2007 the FWS convened a Wind Turbine Guidelines Advisory Committee to develop recommendations regarding minimizing the impacts of wind farm development.¹⁸ In March 2009 the Committee came back with its recommendations which include conducting pre-development wildlife impact studies and avoiding locations identified as having a high potential risk to birds or bats, establishing non-disturbance bird and bat buffer zones, and not locating turbines between daily roosting, feeding, and nesting sites.¹⁹ The Committee’s recommendations are expected to become the basis of new federal turbine siting guidelines.²⁰ Such strategies will help reduce the building pressure between wind developers, conservation groups, and officials by giving them a common means of collaboration without resorting to legal actions that have the potential to significantly impede wind energy development in the United States.



Endnotes: Avoiding the Derailment of Wind Power Development
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ENDNOTES: AVOIDING DERAILMENT OF WIND POWER DEVELOPMENT *continued from page 20*

¹ John A. McKinsey, *Regulating Avian Impacts Under the Migratory Bird Treaty Act and Other Laws: the Wind Industry Collides With One of Its Own, the Environmental Protection Movement*, 28 Energy L. J. 71, 71 (2007).

² See Press Release, BirdLife International, Position Statement on Wind Farms and Birds (Dec. 9, 2005), available at http://www.ornithologiki.gr/gr/politiki/wind_birdlife.php.

³ See *Gone With the Wind: Impacts of Wind Turbines on Birds and Bats: Hearing Before the H. Subcomm. On Fisheries, Wildlife, and Oceans*, 110th Cong. (May 1, 2007) (testimony of Mike Daulton, National Audubon Society Director of Conservation Policy) [hereinafter Daulton], available at http://resourcescommittee.house.gov/images/Documents/20070501b/testimony_daulton.pdf (noting concern about the potential cumulative effects of poorly sited wind farms on bird populations).

⁴ See American Bird Conservancy, American Bird Conservancy's Wind Energy Policy, http://www.abcbirds.org/abcprograms/policy/wind/wind_policy.html

(last visited April 5, 2009) (describing avian mortality caused by collision with the wind turbine structure or electrocution on power lines).

⁵ Daulton, *supra* note 3.

⁶ See Press Release, Center for Biological Diversity, Lawsuit Seeks Redress for Massive Illegal Bird Kills as Altamont Pass, CA, Wind Farms (Jan. 12, 2004) available at http://www.biologicaldiversity.org/news/press_releases/bird-kills1-12-04.htm.

⁷ See Daulton, *supra* note 3 (asserting that the FWS “has not prosecuted a single case citing a violation of wildlife laws against a developer”).

⁸ See McKinsey, *supra* note 1, at 75-79.

⁹ See *id.* at 88-89.

¹⁰ *Id.* at 77.

¹¹ Cf. American Bird Conservancy, *supra* note 4 (detailing how global warming will cause “changes in the ranges of birds, disruption of migration timing

and synchrony with food resources”); Daulton, *supra* note 3 (calling global warming a “severe threat” to birds).

¹² Joris Everaert & Eckhart Kuijken, Industrial Wind Action Group, Wind Turbines and Birds in Flanders: Preliminary Summary of the Mortality Research Results (June 19, 2007), <http://www.windaction.org/documents/11725>.

¹³ Center for Biological Diversity, *supra* note 6.

¹⁴ Jennifer Bogo, *How the Deadliest Wind Farm Can Save the Birds: Green Machines*, POPULAR MECHANICS (Sept. 14, 2007), available at <http://www.popularmechanics.com/science/earth/4222351.html>.

¹⁵ 1979 Bern Convention on the Conservation of European Wildlife and Natural Habitats, 1992 Europ. T.S. No. 104, Recommendation No. 109 (2004), available at http://www.coe.int/t/dg4/cultureheritage/conventions/bern/Recommendations/Rec109_2004_en.pdf.

¹⁶ Press Release, Royal Society for the Protection of Birds, Save the Lewis Peatlands (Apr. 22, 2008), available at <http://www.rspb.org.uk/supporting/>

[campaigns/lewis/index.asp](http://www.rspb.org.uk/supporting/campaigns/lewis/index.asp); see also, e.g., Michael McCarthy, *Biggest Onshore Wind Farm Plan Rejected*, THE INDEPENDENT, Apr. 22, 2008, available at <http://www.independent.co.uk/environment/climate-change/biggest-onshore-wind-farm-plan-rejected-813320.html>.

¹⁷ Press Release, BirdLife International, Wind Farm “Whether Map” (Feb. 20, 2008) available at http://www.birdlife.org/news/news/2008/02/rspb_wind-farms.html.

¹⁸ U.S. DEP’T OF INT., WIND TURBINE GUIDELINES ADVISORY COMM. CHARTER (2007) available at http://www.fws.gov/habitatconservation/windpower/Commitee_Charter.pdf.

¹⁹ U.S. FWS, WIND TURBINE GUIDELINES ADVISORY COMM., PRE-DECISIONAL SECOND RELEASE DRAFT OF THE “ONE-TEXT” FROM THE WIND TURBINE COMM.’S SYNTHESIS WORKGROUP, 13-14 (2009), available at http://www.fws.gov/habitatconservation/windpower/Second_Release_Draft_One_Text_FAC_Briefing_3_13_09.pdf.

²⁰ *Id.* at 3.