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**STATE OF CALIFORNIA
ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION**

**Development of Statewide Guidelines for)
Reducing Wildlife Impacts from Wind)
Energy Development)**

**Docket No. 06-OII-1
“Developing Statewide
Avian Guidelines”**

**COMMENTS OF THE CLEAN ENERGY STATES ALLIANCE
ON DRAFT STATEWIDE GUIDELINES**

These comments are submitted on behalf of the Clean Energy State Alliance (CESA) (electronically and by mail). These comments address the merits of the draft Guidelines and respond to several of the questions identified in Agenda for the Workshop #4.

CESA is a non-profit, multi-state coalition of state clean energy funds and programs working together to develop and promote clean energy technologies. CESA seeks to identify and address barriers to the development and growth of viable renewable energy resources in the United States. The California Energy Commission is a member of CESA.

- **General Comments in Support of Draft Guidelines**

CESA strongly supports the general approach and the majority of the recommended protocols in the draft Guidance. A primary strength of the draft document is that it is designed to be flexible and allow developers and lead agencies to reach agreement on project-specific study and monitoring plans, and to develop mitigation measures, based on site sensitivity, availability of comparable studies, and adaptive management principles. CESA offers the following recommendations for consideration by CEC and California Department of Fish and Game (DFG).

- **Chapter 2 – Science Advisory Committee**

The Guidelines recommend the formation of a project-specific scientific advisory committee for each wind project as early as possible in the siting process. The committee’s responsibilities are to assist the lead agency in recommending siting and monitoring studies, evaluating project analyses, and recommending mitigation.

In our prior comments, CESA recommended the creation of an advisory committee with responsibilities as identified by the draft document. However, our concept envisions that such a committee would be composed not only of persons with scientific disciplines, but also include other disciplines, including experts and stakeholders with policy, wind technology, and regulatory backgrounds and experience. A more broadly-based committee then would have the ability to assist lead agencies in applying the science to the local, state, and federal legal and policy context governing wind energy and wildlife protection. The draft Guidelines, on the other

hand, state that the science advisory committee, as the name indicates, should focus *only* on scientific elements of the project with other topics of relevance covered in a separate forum.

CESA believes that an advisory group would be most useful to lead agencies if it was more inclusive of different disciplines, in addition to wildlife biology. And rather than establishing separate forums, the advisory committee model would be more efficient and relevant to the ultimate regulatory decision-making process if it integrated science, policy, and legal requirements into its recommendations on study and mitigation needs.

CESA also believes, as the Guidelines acknowledge on p.7, that it is not practical to expect developers to seek advice from a science advisory committee regarding initial site selection. The Guidelines should emphasize that a developer is not expected to assemble an advisory committee for site-screening and preliminary assessment, although a committee should be established as early in the pre-permitting process as is practical after a developer makes a final site selection.

- **Chapter 3 – Pre-Permitting Assessment**

The Guidelines should make a clear distinction between Chapter 3, which describes a number of pre-construction (baseline) sampling methods that may be useful, and Chapter 8, which describes the pre-construction methods that are likely to be required as standard protocols. That is, it should be emphasized that Chapter 3 provides an overview of the types of sampling that might be useful for baseline studies, but is not recommending that all of the protocols are required or appropriate. For example, the value of acoustic monitoring for birds is discredited.

CESA recommends that the document state something to the effect that,

The most appropriate protocols for a project depend on the particular location and the risk factors at that location. Only some of the protocols in Chapter 3 are likely to be suitable and an appropriate choice and level of effort. The protocols that are likely to be required are identified in Chapter 8 as Standard Pre-Permitting Monitoring Protocols.

Use of Radar. The Guidelines state that additional studies are needed before making recommendations for use of radar and acoustic monitoring techniques for nocturnal migrating birds (p.17). CESA agrees and recommends that the Guidelines state that the PIER research program will assess the merits, protocols, and relative value of radar and acoustic monitoring before requiring these methods to be employed by developers as standard studies. The Guidance also could be clearer in stating that radar and acoustic monitoring should *not* generally be required for monitoring unless there are high risk factors involved, such as concerns about species at risk. Finally, because radar is relatively expensive, CESA recommends that, if radar studies are recommended by a lead agency, the study cost is supported with public funding.

Bats. The Guidelines recommend at least one year of pre-permitting surveys by developers (p.20). However, because relatively little is known about the causes or population consequences of bat mortalities, and because many of the bat species involved do not have special protection status, it may be premature to establish standard study and monitoring recommendations that

place additional costs on wind developers, until it is determined that wind turbines in California are posing significant bat fatality rates. It may be better public policy, at this time, for CEC to use the PIER research program to determine: (a) if current modern wind farms in California are causing a bat fatality problem, (b) what pre-construction analysis is most effective at predicting impacts, and (c) what mitigation could be effective at reducing bat mortality. The PIER research then could be used to establish best methods and protocols for estimating impacts to bats, depending on the research findings.

Before-After-Control-Impact Study Design: Chapter 3 could be interpreted to indicate that a developer must use a BACI study design for pre-permitting assessments. The Guidelines should indicate, as Chapter 8 seems to suggest, that a BACI study design is not a standard pre-permitting requirement or protocol.

A BACI study design is an expensive, comprehensive, and statistically rigorous means to evaluate the effects of wind energy projects on wildlife in the area. While appropriate for general research to determine a wind project's impacts on bird behavior over an extended timeframe, it is not a practical or cost-effective tool to require individual project developers to use for standard pre-assessment, baseline studies. CESA is not aware that a BACI study design is being required by other states in the permitting process for specific wind projects or for other energy facilities. It also is difficult for project developers to identify good reference or control sites because of the unique geographic locations of wind projects and the challenge of securing access to such non-development sites.

- **Chapter 4 – Impact Analysis and Conformance with Laws**

CESA believes that the Guidance would be more effective if CEC/DFG made *specific recommendations* to lead agencies for how to use the voluntary guidelines to make regulatory decisions on the significance of potential impacts to avian resources under CEQA and ability to comply with state wildlife laws. Instead, as drafted, the Guidance states that the objective of the document is *not* to determine which bird and bat impacts are “significant” (p.22).

The voluntary Guidelines can best support the stated objective – “to encourage the development of wind energy in the state while minimizing impact to birds and bats” (p.E-1) – if a regulatory framework or “regulatory bargain” is recommended that increases the value of the Guidelines for developers and lead agencies alike in reaching regulatory decisions. As currently drafted, there is minimal incentive for developers to invest in and implement the recommended protocols because there is no certainty that doing so will result in compliance with CEQA and wildlife laws, and thereby reduce regulatory uncertainty and enforcement liability.

To address this regulatory/enforcement uncertainty, CESA suggests that the Guidelines provide strong recommendations that state and local agencies consider providing “safe harbor” or “no surprise” assurances to wind developers that implement the Guidelines provisions and that propose a compensatory mitigation plan (with thresholds that will trigger compensation for unexpected fatalities, as discussed on p.36) as part of the pre-permit conditions or development plan. For example, these assurances could essentially guarantee developers that the relevant

agencies (lead agency and DFG) will not require additional mitigation or operational changes, beyond the level agreed to in the pre-permit mitigation/compensation plan, and will not impose enforcement actions, unless extraordinary circumstances warrant the requirement of additional mitigation because of high fatality levels. And, if extraordinary circumstances occur, such additional mitigation will maintain the original permit terms to the maximum extent possible, and not involve the payment of additional compensation without the consent of the permittee. This type of “no surprise” policy is used today by the USFWS to meet the requirements of the federal Endangered Species Act.

In summary, CESA believes that the Guidelines should recommend how lead agencies could adopt mechanisms that ensure that the use of the Guidelines will satisfy the requirements of CEQA and state wildlife laws and avoid subsequent regulatory and enforcement uncertainty. There are many such mechanisms that could be designed to better integrate the Guidelines with regulatory decisions. The primary elements, however, would entail:

1. Modification of the CEQA Guidelines to provide that application of the *Statewide Guidelines for Reducing Wildlife Impacts* by a lead agency is legally and scientifically sufficient for the agency to assess the significance of the environmental impact on avian and bat species from a wind project, to seek feasible alternatives and to implement feasible impact avoidance, minimization, and mitigation measures that avoid or substantially reduce or minimize wildlife impacts to less than significant levels.
2. Issuance of a “safe harbor” assurance or “permit shield” by the relevant agencies that the use of the Guidelines by a wind developer for a wind project, and development of an approved mitigation/compensation plan to address unexpected fatalities, shall be considered compliance with all applicable requirements of CEQA and state wildlife protection laws.

Chapter 5 – Mitigation

The Guidelines correctly note that once a project is operating, it is difficult to modify operations. To address the limited choices for operational impact avoidance or minimization, the Guidelines also emphasize that it is important for pre-permit conditions to explicitly establish the range and triggers for compensation to avoid open-ended conditions.

To further this concept, CESA suggests that the Guidelines offer a specific recommendation for lead agencies for how to ensure pre-established compensation. The Guidelines could strongly recommend that agencies require developers to develop formal mitigation/compensation plans for pre-permitting review and approval. Once such a compensation plan is approved, it would provide clarity on the project owner’s obligations for mitigation implementation, internalize the financial obligations to wildlife protection, and provide the owner with some certainty about the financial exposure to future mitigation commitments. An avian protection or mitigation plan should include the following elements:

1. creation of an avian mortality reporting system for the project,
2. a mortality reduction plan, including any proposed operational changes to be considered if post-construction monitoring indicates unexpected mortality,
3. an avian enhancement plan to enhance avian populations or habitat in the local area if unexpected mortality occurs and all practicable operational changes have been made per the mortality reduction plan,
4. commitment to timely implementation of remedial measures,
5. consultation with appropriate agencies to report, identify, and remedy causes of mortality.

Chapter 7 – Operations Monitoring

The Guidelines recommend a two-year minimum duration of operations monitoring for both birds and bats. For bats, the Guidelines further recommend two years of acoustic monitoring as a standard, to occur every night during the two years.

CESA believes that the two-year duration is excessive as a standard requirement. Instead, CESA recommends a more incremental, ramp-up approach. Specifically, when risk of fatalities is considered likely, the Guidelines should recommend one year of monitoring at a fairly modest level of sampling and intensity. Then, a second year of monitoring may be required with an increased sample size and frequency if the first year's results indicate concern, based on input from DFG and/or a science advisory committee.

For bats, CESA also recommends one year of monitoring as an initial effort, with a modest level of intensity (weekly or biweekly at a random sample of turbines during the migration period), rather than every night for two years. Again, if the first year monitoring indicates significant bat fatalities, additional monitoring may be recommended by the science advisory committee and/or the DFG.

Thank you for considering these comments.

Respectfully submitted,



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