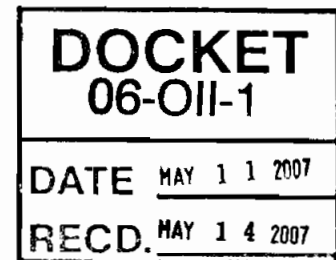


May 11, 2007

The Honorable Jackalyne Pfannensteil, Chair
The Honorable John L. Geesman, Commissioner
California Energy Commission
1516 Ninth Street
Sacramento, CA 95814



Re: Second Draft of California Wind Guidelines, CEC-700-2007-008-SD

Dear Commissioners:

We are writing, first and foremost, to thank you for your continuing leadership and commitment to advancing both wind power and wildlife protection in California. Our three organizations, representing nearly two million members, strongly support both goals and believe that the adoption of Guidelines will help to achieve them.

Your staff, the staff of the Department of Fish and Game, and consultants have done an excellent job with the Guidelines and we believe the Second Draft is much clearer and more helpful in most respects than the first. We have a few concerns and suggestions, described below, that will further clarify some of the guidance and options. We have discussed most of these issues with the wind industry and are committed to continue to work with the industry and implementing agencies to ensure the Guidelines' successful implementation.

We have also discussed the concept of establishing different tracks or tiers for compliance, but agree with the wind industry that it's too complicated an issue to tackle within the comment period. We've agreed to continue to discuss it and try to develop a joint recommendation that could be included in the Guidelines in the future.

1) Scientific Advisory Committee

We agreed that the First Draft of the Guidelines gave, or appeared to give, the Scientific Advisory Committee (SAC) too expansive a role, but an SAC is important for the successful implementation of

the Guidelines. The Guidelines themselves should clarify that the SAC will serve at least the following functions:

- Review controversial decisions or advice by local permitting agencies and/or wildlife agencies;
- Review statewide trends, monitoring analyses and cumulative impacts analyses;
- Monitor Guidelines implementation and effectiveness;
- Review and/or advise regional conservation planning frameworks, mitigation banks and other cross-jurisdictional tools for conservation and mitigation; and
- Communicate new information and lessons learned to permitting agencies on a regular basis.

As the First Draft noted, it will be critical to the SAC's credibility that its members be highly credentialed biologists and other experts, free from actual or apparent biases. Since the SAC will be advising permit applicants and permitting agencies (both local agencies and wildlife agencies), it would not be appropriate for its members to come from any of those entities and the Guidelines should be clear about that, as the First Draft was.

The importance of highly qualified, unbiased experts cannot be overstated. It will reflect on the credibility of the Guidelines themselves and affect how much confidence the public has in their implementation. It will also be important to appoint SAC members who will have sufficient time to devote to the committee, and will require compensating the members for their time and expenses.

2) Avoidance, Mitigation and Compensation

The Second Draft is not sufficiently clear about the priority that CEQA places on avoidance and minimization over mitigation and compensation. It is also not sufficiently clear about the importance of avoidance for species protected under strict liability statutes that allow no take, such as the Migratory Bird Treaty Act, Fully Protected Species, etc. These are all the more important to clarify because, in the case of wind power and birds/bats, the issue is primarily about actual take of species, not just loss of habitat. When habitat destruction can be offset by equivalent habitat restoration and protection elsewhere, mitigation is appropriate under CEQA. With direct take of protected species, equivalent mitigation is rarely if ever possible. With migratory, Fully Protected and other strict liability species, the Guidelines should be much more explicit about the requirement to avoid and minimize impacts.

The Guidelines should emphasize more strongly that avoidance and minimization are the most important steps to satisfy CEQA as well, and that mitigation and compensation should only be used as tools of last resort in the case of direct take. In addition, the Guidelines should clarify that financial compensation – absent an established mitigation bank or other conservation framework – is unlikely to truly or reasonably mitigate direct impacts to species. In order to use financial compensation as an accepted mitigation measure, the Guidelines should suggest that permitting agencies allow it only when it is part of a conservation plan, mitigation bank or other framework that ensures it will provide equivalent mitigation for the impacted species.

Similarly, some industry representatives have suggested that when avoidance and minimization measures are more successful than anticipated, developers should be given a “credit” for the additional avoidance. Designing and implementing a crediting system should only be done within the framework of a landscape level or regional conservation planning framework, such as a Natural Communities Conservation Plan (NCCP) or mitigation bank that provides consistent and biologically-based criteria for such credits.

3) Regional or Wind Resource Area-Wide Conservation Plans

Along with many wind industry representatives, we strongly urge you to include a section describing and encouraging the use of regional or landscape level conservation planning tools, such as Habitat Conservation Plans, Natural Communities Conservation Plans, Master Environmental Impact Reports (a model being developed in Kern County) and other tools that provide a framework for regional planning and conservation. Regional conservation plans are much more likely to protect wildlife, to address cumulative impacts, and to provide both certainty and flexibility for developers.

4) Adaptive Management

The Guidelines continue to be confusing, and sometimes misleading, on the role of adaptive management. Adaptive management can be a very useful tool for conservation, but only if used appropriately and understood clearly by all implementing and permitting agencies. The Guidelines state, incorrectly, that “Operations impact mitigation and adaptive management generally occur only if the level of fatalities at a project site was unanticipated when the project was permitted . . .” (Second Draft, page 15, emphasis added). In the case of wind power’s impacts on birds and bats, there is still a great deal of uncertainty about bird and bat use in different areas and at different times of the day or year, the likely level of impacts in many locations, and the effectiveness of various avoidance and minimization strategies. The National Research Council’s report, released just last week, underscores the level of uncertainty about many of these issues. (add citation) When permitting occurs with such a high level of uncertainty, adaptive management may be appropriate in the original permit itself because the effectiveness of avoidance and minimization measures is still speculative. The Guidelines should not say or imply that it is only appropriate after a finding that fatalities are higher than anticipated in the original permit.

We appreciate the wind industry’s desire for certainty and to cap its costs for environmental compliance. The various wildlife laws require equal certainty. The purpose of adaptive management is to provide certainty in the level of take or other impacts and to say that management will be adjusted to ensure that level is achieved. This tool is just as appropriate for new permits as for existing permits. It is not accurate to suggest that it is necessary to wait until the avoidance and minimization measures are shown to be inadequate before adaptive management measures should be adopted.

5) Experimental Mitigation Fund for Bats and Migratory Bird Species

We agree with the Second Draft (lines 1880 through 1883) that “Given the diversity and complexity of bat movements within the state and the uncertainty surrounding potential impacts of wind turbines on bat populations, pre - permitting studies are needed at all proposed

wind energy sites to investigate the presence of migratory or resident bats and to assess collision risk.”

In California, the same uncertainty surrounds the potential impacts of wind turbines on nocturnal migratory songbirds, especially the cumulative impacts. Only one nocturnal assessment of migratory songbirds on a wind resource area has been conducted in California, and that study was conducted twenty-five years ago (McCrary et al, 1983). There has been no on-site pre-construction studies nor nocturnal monitoring for migratory songbirds on a wind farm site on the Pacific Flyway in California, a unique migratory pathway that differs from the Eastern migratory pathway, nor are there any planned as of this date. This is particularly a concern in light of the 2007 report by the National Research Council of the National Academies **Environmental Impacts of Wind-Energy Projects** reported that “Among bird species, nocturnal, migrating passerines are the most common fatalities at wind-energy facilities.”

We agree with the industry that mitigation funds could be established for further nocturnal studies of bats in wind resource areas, but we would include migratory songbirds in those nocturnal studies and mitigation funds. While the behaviors of nocturnal mammals and migratory songbirds, and their reactions to wind turbines, might be different, many of the same study techniques are employed for both (radar, acoustic monitoring, etc), even if the protocol or timing may vary. Financially, the scope of studying a wind resource area for both migratory songbirds and bats is more feasible and productive when done together, and results might be standardized for both migratory songbirds and bats within varying topographical features of a wind resource area, and minimize the need for on-site studies in that wind resource area. We wholeheartedly support this approach.

We do not agree that on-site nocturnal surveys for bats (lines 1880 through 1883) and on-site nocturnal surveys for migratory songbirds (lines 1747 through 1766) can be suspended or withheld until the mitigation studies are fully funded, completed and a scientific risk analysis and monitoring program can be applied to all sites within the wind resource area.

Once again, we are very grateful for the attention you, your staff, DFG and others have put into these Guidelines. We look forward to continuing to work together with all stakeholders to implement the Guidelines and resolve these issues for the benefit of wind power and wildlife.

Sincerely,

/s/

Julia A. Levin
National Audubon Society

/s/

Kim Delfino
Defenders of Wildlife

/s/

Carl Zichella
Sierra Club

cc: The Honorable Ryan Broddrick, Director, Department of Fish and Game