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

CALIFORNIA WIND ENERGY ASSOCIATION

ON REVISED STAFF DRAFT GUIDELINES

The California Wind Energy Association ("CalWEA") appreciates this opportunity to provide written comments on the April 2007 revised staff draft report, "California Guidelines for Reducing Impacts to Birds and Bats from Wind Energy Development" ("Revised Staff Draft"). The importance to wildlife of achieving the state's greenhouse-gas reduction goals makes it vitally important that these Guidelines not impose arbitrary or unnecessary review requirements on wind projects. Rather, the Guidelines should promote the appropriate level of review for each wind project – sometimes minimal, sometimes extensive -- depending on the characteristics of the site and project in question. These comments are aimed at assisting the Commission's Renewables Committee in achieving that end.

Included with this overview of our comments are our detailed comments within the Revised Staff Draft document, which, as requested by the Committee, propose specific text deletions and insertions. The substance of these text changes, if accepted, should be extended through additional edits to these same sections and should be carried over to other relevant parts of the document. We believe that substantial additional detailed discussion at a workshop is still warranted prior to issuing the next draft, based on our comments and other parties' comments that may be submitted on this draft.

Please note that, despite the extra three weeks of time provided for comment, CalWEA members (who are very busy with project developments) have not been able to thoroughly review these comments as submitted and we may therefore offer further or

refined comments at a later date. We also note that all of our concerns and proposals have been elaborated upon in previous comments.

I. General Comments

The Revised Staff Draft is a substantial improvement over the initial staff draft, in a number of ways, including:

a. its organization is dramatically improved,

b. one of the most problematic aspects of the first staff draft -- the project-specific Science Advisory Committee concept -- has been largely removed,

c. there is less infringement on the authority of the local lead agency,

d. there are fewer rigid statements about what studies and what data are appropriate for use in most all situations, despite a wide variety of site-specific circumstances,

e. similarly, there is greater recognition, compared to the last draft, that there are ways other than intensive field sampling -- for example, scientifically valid correlations -- to characterize and estimate impacts.

While we appreciate that significant improvements have been made, however, we must conclude again that this document's emphasis on a single prescribed course of study puts it at odds with the state's interest in soundly promoting clean energy to help avert the devastating environmental and human health impacts that we can expect from climate change. Whereas the first document was too far from a reasonable document to even attempt to edit it, though, it is possible to make an initial attempt to correct the problems in the Revised Staff Draft. Our attached edits seek to make such an attempt, but much work remains to be done beyond our editing.

II. Specific Comments

As an overview and a guide to the specific edits we have made in the attached document, we have sorted references to these edits within several topics of concern to us in the Revised Staff Draft. However, time and resource constraints limit the focus of our comments primarily to the first 35 pages (through Chapter 2) of the document. The substance of these comments, if accepted, should be reflected more extensively through

additional edits to these same sections and should be carried over to other relevant parts of the document.

Following are brief discussions of the areas of concern to us, along with references to the specific line numbers where we have proposed edits to address the concerns.

A. The Guidelines Should Guide Local Agencies to the Appropriate Level of Review for Each Project

The draft sets forth some "exceptions" to one standard "step-by-step" course of study, but these exceptions are too limited and narrow to guide each project to the course of study that is appropriate given the particular circumstances of its site and the existing information that may be available about that site. These circumstances – which may warrant a greater or lesser level of study than the standard, as applied to the particular issue of concern -- include differences in climate, topography, habitat, proximity to migration routes, bird and bat species present at the site, and existing, scientifically credible information that may already be available to inform decisions at the site. Different circumstances will appropriately lead to different levels of review, study methods, and time periods and durations of study.

The Revised Staff Draft advises the "consistent" application of the Guidelines. Because of the wide variety of circumstances that warrant different study methods, however, what should be "consistent" is not particular studies and methods used, but the *process* for considering which methods are appropriate at a given site. Consistency is also in order for any particular method once it is selected for use (e.g., sampling techniques).

And, yet, the document suggests that the particular methods recommended in the Step-by-Step approach must be followed in order to demonstrate a "good faith effort to develop … projects … consistent with the intent of local, state, and federal laws." (See Revised Staff Draft at lines 340-342). If the particular recommended methods are not followed – even if they are not necessary or appropriate in a given situation – the lead agency and project proponent could face an increased exposure to litigation. This is because a project proponent will be presumed NOT to have made a good faith effort to

comply with state and federal laws if he does not use the particular study methods set forth in the Guidelines. As we have noted before, the fact that these Guidelines are stamped "voluntary" is not meaningful because they carry the authoritative weight of the state.

For these reasons, the document's rigid prescriptions are a critical flaw in the document. They turn what could be helpful guidelines into a litigation opportunity for project opponents – who are more likely to be NIMBYs and real estate developers than avian advocates. The document should instead be based on principles and appropriate steps, which will greatly increase the "shelf life" of the document and greatly reduce the chance that it will impose costs with little benefit gained or, in some cases, result in too little or the wrong type of study.

To remedy this problem, and to illustrate a more reasonable process for determining what level of study is appropriate, we have developed a framework of three general categories suggesting different levels of review, along with a category where project development is not advised. (See table in Appendix 1 to these comments.) This framework draws out (for Category 3) an idea that seems to be implicit in the draft (see lines 760, 1346 and 3080): the notion that, where avian impacts can be predicted to fall within the low- to average-range of impacts for wind projects across the state and nation, the intensity and duration of required studies can be reduced. The framework also incorporates an idea we have previously proposed: that certain low-impact or well-studied project areas should be eligible for streamlined environmental review.

This framework is a beginning point only. Within each category, there would be a "decision tree" type of approach to guide each project to the type of studies and methods appropriate to the conditions at hand. We would be glad to assist the Commission in further developing this approach.

In addition to referencing the addition of our Table within the Revised Staff Draft, we made many additional edits to reflect the above approach, rather than the one-size-fits-all-with-limited-exceptions approach in the draft. Substantial further editing would, however, be necessary in combination with a discussion of a decision-tree approach.

Our edits addressing this topic can be found at lines 72, 97-104, 109, 162-167, 187-192, 199, 205-206, 227-228, 248-253, 291, 293-298 (adding proposed streamlined

review for low-impact areas), 338, 358-363, 380-381, 401-404, 410-411, 484 (and subsequent edits to that section), 664, 676, 747 (and subsequent edits to that section), and 779-783. Additionally, some of the edits referenced below also affect this topic area. (Further edits are also included in Chapters 3-5, but not as extensively as in the earlier sections.)

B. The Guidelines Should Recognize that Compliance with the Letter of Wildlife Laws is Not Possible, and Aim Studies at the Level of Information that is Needed to Inform Siting Decisions under CEQA

The document implies that "compliance" with wildlife laws is possible, and that lots of studies and mitigation can bring a project into compliance despite the fact that compliance is not possible with many of these laws because one bird kill is an inexcusable violation. In conflating CEQA and the rigid wildlife laws, this draft -- like the last one – attempts to turn the permitting process into an exercise of very extensive and expensive information gathering that will not be necessary or justified for every project, nor is it likely to significantly reduce avian mortality for most projects.

In exchange for imposing unnecessary levels of review, the document contains one sentence that suggests (lines 110-113) that developers might be shielded from state and federal prosecution if a wildlife law is inadvertently violated at some point over the project's lifetime. But the statement falls far short of a guarantee and, in any case, the state cannot give guarantees about federal enforcement. The document also includes overly broad statements about wildlife laws that are not supported by citations to any provision of law.

Because compliance with rigid wildlife laws is not possible, and because this document cannot offer protection from prosecution, the Guidelines should not prescribe particular courses of study because, as we noted above, a project proponent will be presumed not to have made a good faith effort to comply with state and federal laws if the proponent does not use the particular study methods described. Rather, the guidelines should emphasize the *information that is needed* in a given situation to understand risk *to the degree of specificity that is required to make siting decisions*.

While compliance with state and federal wildlife laws is an obvious concern to developers, the Guidelines should be consistent with, and focus primarily on, compliance

with the state law that governs the siting and permitting of wind projects along with local land use laws: CEQA. In describing how CEQA defines a significant biological impact, the Guidelines purport to quote the CEQA Guidelines [section 15065(a)(1)] but omit an important provision defining a significant impact as one which "substantially reduces the number or restricts the range of an endangered species." The fact is, CEQA does not necessarily consider the loss of a single individual of an endangered species to constitute a significant environmental impact. To be significant under CEQA, the impact must "substantially" reduce the number of a species.

Therefore, the primary objective in predicting impacts at a proposed development site is to determine whether the project will have a significant adverse impact on avian species. The initial focus in pre-permitting assessment should be to determine whether there is enough information to make that determination. The guidelines should address what kind of information is needed to make that determination including species presence, abundance and behavior in the Wind Resource Area (WRA).

If existing information and analysis clearly show that the project will not have a significant adverse impact on a species of concern, then further studies (e.g., more detailed field studies) to more precisely quantify abundance and flight behavior are not necessary. If existing information and analysis are inadequate to show that a project will not have a significant adverse impact on a species of concern, then more detailed field studies may be appropriate to fill in information gaps so that an impact determination can be made.

The edits that we propose in section II.A, above, remedy these problems in part, because they aim to guide each project to an appropriate level of study. These additional edits further address the problems relating to inappropriate prescriptions and references to wildlife laws.

See edits to lines 67, 106-107, 110-111, 157-158, 162-167, 234-235, 291, 302, 304, 310, 311, 313-317, 327, 342, 390-396, 411, 526, 527, 534, 550, 554, 560, 573, 575, 637, 784, 1126, and 1158. See also edits throughout Chapter 2.

C. The Draft Does Not Sufficiently Recognize The Variety Of Ways That Sufficient Credible Evidence About Impacts Can Be Gathered

In a number of places, the Revised Staff Draft is overly prescriptive about the specific methods that are "recommended" for use. (As we have said many times, whatever is "recommended" in these "voluntary" guidelines will become de facto requirements at the local level.) The final Guidelines should recognize that a variety of methods can be used to provide scientifically credible information on various issues of interest. For example:

- although the Step-by-Step approach recommends that bird use counts and acoustical monitoring be used to determine abundance, there are other methods that may be as or more appropriate at a given site (which is recognized in Chapter 3), and some of these studies may not be appropriate at all;

- there is no explicit recognition in the main text that scientifically valid correlations can be made for sites that are not "nearby" – even though, buried in Appendix H, data is presented that shows that using correlated use and mortality data from sites across the country is valid for raptors;

- there is no recognition that scientifically valid extrapolations can be made from seasonal data.[1]

It is very important that these Guidelines recognize the validity of correlation and extrapolation because the ability to use this sound and low-cost technique will increase as more and more comparable data is gathered and compiled across the state, as is envisioned in these Guidelines.

The guidelines should also recognize that certain information that is central to making determinations (e.g., migratory pathways, nesting, flight patterns, relative abundance, etc.) can be obtained from many possible sources: published studies, governmental databases, conservation groups and existing mortality surveys, as well as

[1] See, e.g., "Synthesis and Comparison of Baseline Avian and Bat Use, Raptor Nesting and Mortality Information from Proposed and Existing Wind Developments," prepared for the Bonneville Power Administration by WEST, Inc., December 2002. This document, while included in the References section, should be discussed in the Guidelines along with the correlation techniques it addresses.

site-specific field studies. These studies can range from simple site reconnaissance to detailed field studies, possibly including acoustical and radar studies.

These problems are addressed with our edits at the following line locations: 99, 377-379, 431, and 495.

D. Mitigation Should Apply Only to Significant Impacts

The guidelines should recognize that mitigation should apply only to significant impacts. Since some mortality will occur, applicants should not, for example, be required to mitigate for mortality to non-listed MBTA species whose populations will not be significantly affected by the predicted mortality.

Associated edits can be found at the following line locations (and some of those above): 133, 146, 194, and 195.

E. The Post-Construction Monitoring Requirements Are Excessive

In addition to two years of post-construction mortality monitoring (that is, carcass searches), the draft calls for two years of point counts and acoustical monitoring, which adds a huge additional cost with very little benefit.

These and other excessive study requirements are aimed in part at collecting data that will further the understanding of wind impacts on birds and bats. (See, e.g., Revised Staff Draft lines 189-192.) Of course, this is a laudable objective, but imposing costly study requirements on every project is not the appropriate way to obtain this information, nor is it necessary, and it will interfere with the achievement of California's clean energy goals. Instead, this information should be obtained through research at the state and national levels.

This problem is largely addressed through edits listed above, but we call out in particular edits at lines 676, 702, 739, and 747 along with other edits in that section.

F. The Guidelines Should Not Invite the Possibility of Open-Ended Mitigation and the Risk of Monitoring over the Life of a Project

If the Guidelines succeed in directing project developers and lead permitting agencies to the level of study that is appropriate for each site, it should be possible to predict non-significant avian mortality with a reasonable degree of accuracy, or to predict

any significant impacts along with well-defined avoidance and mitigation measures to be incorporated into the project permit. If, despite these reasonable efforts, open-ended mitigation and monitoring provisions are included in the permit, the associated open-ended risk will raise project financing costs or make financing untenable – especially given the already high cost of doing business in California generally.

For the same reason, any "triggers" for additional mitigation, if used at all, should be bounded by a range of possible anticipated impacts to provide developers with upfront certainty regarding project costs. Triggers should not be linked inflexibly to specific actions because that can prevent other means of effective remediation besides the prescribed remedy. Triggers also should not be linked to single events because such events can be one-time, freak occurrences.

Likewise, the adaptive management concept is still in its infancy for use in wind projects, and there are no guidelines or accepted methods for such an approach – which is by its nature open-ended -- for wind projects. Adaptive management for wind projects should therefore be discouraged at this time. I

In particular, the Guidelines should stay away from discussing seasonal shutdowns and turbine relocation as mitigation options. First, seasonal shutdowns have been implemented in just one area – the Altamont – and results regarding effectiveness are not yet in. Second, and more importantly, seasonal shutdowns are highly unlikely to be a feasible mitigation measure. The technique is being tried in the Altamont due to avian fatality levels that are higher than anywhere else in the nation and because energy production is relatively very low in the winter shutdown months, a condition that is fairly unique to that site. The commission should be mindful that even having shutdowns on the table as a potential mitigation option can upset project financing due to the extremely high risk exposure it places on a project. The whole point of the Guidelines is to ensure that projects are not located at sites where avian fatalities are so high that shutdowns would be warranted.

Therefore, all references to open-ended mitigation, monitoring, adaptive management, shutdowns, and unbounded "triggers" should be removed and replaced with text that encourages lead agencies to establish permit terms that provide certainty to developers regarding potential future mitigation and monitoring obligations. Edits

addressing these ends can be found at the following line locations: 351-353, 581, 576, and 635, and in other places referenced elsewhere.

G. Too Little Is Known About Bats to Warrant Extensive Studies and Mitigation

Apart from several listed species of bats, bats are not protected by state or federal laws in the same way as certain species of birds. Some bat species appear to be more susceptible to mortality than birds and other bat species, however little is known to explain this. Therefore, it is likely to be impossible to determine whether a particular wind project will significantly affect bat species until a great deal more research on factors contributing their susceptibility is conducted. Currently, there is no reasonable basis to suspect significant impacts on bat species that would justify mitigation. Wind projects should not be required to mitigate impacts to individual bats in such situations involving non-protected bat species especially if prudent and feasible measures to minimize impacts to other wildlife have been incorporated into site selection and design of a wind project.

Requiring extensive monitoring of bats at all sites to provide information for research purposes is a costly and ineffective substitute for properly designed research efforts. Therefore, the Commission should strike references to extensive bat monitoring and separately promote research into understanding bat populations, behavior and mortality, seeking industry contributions and participation as necessary.

See edits at lines 365-369, 461-465, and 743-744.

H. The Guidelines Should Allow for More Decommissioning Options

The Revised Staff Draft suggests that developers provide financial assurance that decommissioning will occur. However, this assurance can be provided by placing the obligation on property owners, as Kern County requires, which does not entail upfront financial commitments and enables the property owner and the developer to address the issue in their lease arrangement. Associated edits can be found at line 2311.

I. Science Advisory Committee

As stated in section I, we are pleased to see the concept of project-specific Science Advisory Committees eliminated from the Revised Staff Draft. CalWEA has indicated that there may be some merit in the development of a Statewide Science Advisory Committee. However, the role and make-up of such a committee requires considerable thought. As the concept of a statewide SAC is in its infancy, and is in any case unlikely to exist by the time the Guidelines are adopted, it is premature to reference a conceptual SAC in these initial Guidelines.

We therefore suggest striking all references to this entity. Discussions with all stakeholders around the concept should occur after these Guidelines are adopted. Related edits can be found at lines 780 and 1036.

J. The Guidelines Should Not Reference Discredited Reports

The Guidelines continue to reference the 2004 Smallwood-Thelander report despite the conclusions of three independent reviews conducted by the Commission (and three others by CalWEA) that the study is seriously flawed and its conclusions are not supported by the analysis.[2] By citing this study without caveat, the Commission is promoting the use of a study that its own reviewers have established as not credible.

If the reference on line 178 to Energy Commission "products to inform the siting of new wind projects" is solely to this report, or to other efforts that use this report as a foundation, the reference should be eliminated.

K. Additional Comments

Additional comments and edits relating to specific methods and permitting procedures are provided within the text. These comments and edits provide further explanation of why attempting to prescribe particular methods can be quite inappropriate. See comments at lines 415, 433-434, 442, 444, 453-454, 461, 484 (and subsequent edits to that section), 553, 565, 573, 575, 590, 591, 595, 601, 604, 608, 612, 613, 615, 617,

[2] See Energy Commission publication # CEC-500-2006-114, posted December 15, 2006, located at: http://www.energy.ca.gov/pier/final_project_reports/500-04-052.html.

619, 702, 709, 723, 739, and 743-744. Additional detailed edits can be found in Chapters 3-5.

We look forward to continuing to engage in this effort to ensure that the adopted product achieves the Commission's goal of promoting environmentally sound wind energy development in California.

Respectfully submitted,

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