

Federal Laws Affecting Local Land Use Decision Making

"Each of us has a part to play in a new future that will benefit all of us. As we recover from this recession, the transition to clean energy has the potential to grow our economy and create millions of jobs -- but only if we accelerate that transition. Only if we seize the moment. And only if we rally together and act as one nation -- workers and entrepreneurs; scientists and citizens; the public and private sectors."

-President Obama, June 15, 2010

1. ELECTRIC TRANSMISSION AND DISTRIBUTION FACILITY SITING.

Traditionally, state and local land use authorities have had approval authority over the siting of proposed land uses. Historically, this authority included electric transmission and distribution facilities. However, the state and local process can take a very long time – sometimes 10 years or more. As it became clear that the nation’s transmission and distribution infrastructure is aged, inadequate and that new and rebuilt facilities are needed, Congress decided to adjust permitting authority to ensure responsive siting could be achieved. Accordingly, as a part of the Energy Policy Act of 2005, Congress included –SUBTITLE B: TRANSMISSION INFRASTRUCTURE MODERNIZATION Section 1221 which deals with siting of electricity transmission and distribution facilities. The American Recovery and Reinvestment Act of 2009 further provides for policy and fiscal support for the siting of new electric transmission and distribution facilities. The federal government now has its substantial money muscle where its mouth is. Many practitioners will see transmission infrastructure controversies erupt in their communities. Land use practitioners will have to be prepared to act quickly to assist clients whose interests are aligned in maintaining state and local control. Further ensuring a linkage between regional electric transmission planning and cost allocation so that needed transmission facilities actually are built, on June 17, 2010 FERC initiated rule making to change the terms of its Open Access Transmission Traffic (OATT) <http://www.ferc.gov/media/news-releases/2010/2010-2/06-17-10-E-9-factsheet.pdf>

Section 1221 of the Energy Policy Act of 2005 requires the Secretary of Energy to study and then designate “National Interest Transmission Corridors” (NITC) for siting new electric transmission facilities. These NITCs are areas where the secretary determines capacity is constrained and improved facilities are needed for interstate commerce. The designated NITC are based on the Department of Energy’s determinations of constraint -- those areas where enhanced transmission or distribution capacity is needed or will be needed over the planning horizon.

Under the Energy Policy Act of 2005, the state government maintains authority to issue land use permits for electrical transmission and distribution facilities. However, the federal government also supplied authority to FERC step in to issue construction permits if the state fails to do so within one year of an application for approval. The land use practitioner should be aware of the particular circumstances where FERC has authority to step in to issue land use permits.

Specifically under the Energy Policy Act of 2005, FERC is authorized to issue permits for construction or modification of electric transmission facilities in a national interest transmission corridor a state: (1) does not vest itself with siting authority, or (2) its siting authority does not consider interstate benefits, or (3) where the state has withheld approval for more than one year after the filing of an application or one year after the designation as a national interest electric transmission corridor, whichever is later, or (4) conditioned state approval of a permit such that the transmission facilities will offer “no significant reduction of transmission congestion.” In *Piedmont v. FERC*, 558 F.3rd 304 (2009), the Fourth Circuit invalidated and remanded FERC’s rulemaking that resulted in rules determining a state “withholds approval” if it denies requested permits. The Fourth Circuit explained that withholding approval means failing to act; it does not mean acting to deny requested transmission and distribution construction permits. In *Piedmont*, the Fourth Circuit made a further and interesting observation about federal preemption. The court reinforced that even though states traditionally had authority over land use, where Congress makes a specific grant of authority to a federal agency as is manifested in the Energy Policy Act of 2005, “we must interpret the statute to determine whether Congress has given [the agency] the power to act as it has, and we do so without any presumption one way or another.” (Citing *New York v. FERC*, 535 U.S. 1 (2002). *Id.*, 558 F.3d 312.

Per 42 USC 15926, the Departments of Energy, Defense, Agriculture, and Interior were required to identify energy corridors on federal lands within 2 years after the adoption of the Energy Policy Act. These energy corridors were to ensure pipelines for oil, gas and hydrogen were identified as well as transmission and distribution facilities for electricity transmission. To fulfill this responsibility, the BLM and Forest Service have issued a Programmatic EIS for “Energy Corridors” on BLM and forest service land in 11 western states. <http://www.corridoreis.anl.gov/>. The BLM has issued corresponding Records of Decision to amend various BLM Resource Area Management Plans for 11 Western States to support development of transmission facilities in these energy corridors. Similarly, the Forest Service has issued RODs that will support amendments to forest plans in 10 western states for siting transmission facilities in designated “energy corridors.”

In siting and developing power line corridors, adherence is expected to the Avian Power Line Interaction Committee (APLIC) Wind Turbine Guidelines Advisory Committee Recommendations: *Guidelines* Chapter Two: Summary & General Considerations Suggested Practices for Avian Protection on Power Lines (2006). These guidelines also apply to retrofitting existing facilities. Retrofits generally should employ shielded, separated or insulated electrical conductors that minimize electrocution risk to avian wildlife per the APLIC guidelines.

The point of interconnection of a wind project to the transmission system requires addressing the March 4, 2010 Wind Turbine Guidelines Advisory Committee Recommendations and Guidelines. Although not immediately effective, projects should address these Guidelines to the extent possible immediately. One good reason to do so is that adherence to the guidelines will be considered by the USFWS as evidence of “due care” in making enforcement decisions under the Migratory Bird Treaty Act (MBTA) and the Bald and Golden Eagle Protection Act (BGEPA). See *United States v. Moon Lake Elec. Ass’n*, 45 F. Supp. 2d 1070 (D. Co. 1999) (electrical association’s failure to install inexpensive mitigating devices resulted in criminal liability under MBTA and BGEPA for protected avian species mortality caused by project).

As to the technical effectiveness, the recommendations generally will become effective 24 months after the date USFWS publishes final guidelines. This phase in period will allow federal and state officials as well as project developers, their consultants an opportunity to understand the guidelines and adjust projects to them.

2. **Liquefied Natural Gas Facilities Siting**

In 2005, Congress amended the Natural Gas Act (NGA) to clarify FERC has authority for LNG terminal siting. Further, the Energy Policy Act 2005, Section 311(a)(1), granted FERC the “exclusive authority” over applications for the siting, construction, expansion, or operation of an LNG terminal. Section 311(d) reserves state rights under the Coastal Zone Management Act (CZMA). The CZMA authorizes states to adopt Coastal Management Plans (CMPs) which if approved by the federal NOAA bind federal authorities to make their decisions consistently with the CMP. In *AES Sparrows Point LNG, LLC v. Smith*, 527 F.3d 120 (4th Cir. 2008), Baltimore County, Maryland, amended local portions of the CMP creating onerous restrictions for LNG terminals in Chesapeake Bay. The county did not submit the amendment to NOAA or of course obtain NOAA’s approval of it. The Fourth Circuit determined therefore that FERC’s authority was exclusive and the county’s amendment was preempted.

3. **Federal Aviation Administration and Department of Defense Restrictions on Wind Facilities**

a. Department of Defense (DOD)

The Department of Defense and FAA have both issued guidelines that if followed avoids WEC related radar interference. See “Report to the Congressional Defense Committee Effect of Windmill Farms on Military Readiness” at

http://www1.eere.energy.gov/windandhydro/federalwindsiting/pdfs/dod_windfarms.pdf and the

“Obstruction Evaluation” federal FAA Website at:

<https://oeaaa.faa.gov/oeaaa/external/portal.jsp>; see also <http://www.its.blrdoc.gov/pub/ntia-rpt/08-454/>.

However, after issuance of its 2006 analysis, the DOD wrote its assurance to the public and wind developers alike that it will evaluate wind farms on a case by case basis, work cooperatively and not uniformly impose obstacles to wind farm siting.

http://www1.eere.energy.gov/windandhydro/federalwindsiting/pdfs/windmill_policy_letter_012907.pdf. Radar Impacts can, in almost all cases, be mitigated.

<http://www.its.blrdoc.gov/pub/ntia-rpt/08-454/>

A recent Oregon dust up, however, over an objection by the United States Air Force to a 300 MW Oregon wind farm that had otherwise received nearly all approvals and had entered into power purchase agreements and purchased turbines, demonstrates DOD concerns can pose a significant late comer hurdle in wind project siting. In the Shepherd’s Flat case, the Air Force responded to an FAA request for comment and objected to the proposed installation citing concerns with interference with its radar facility in a town 50 miles away. The Air Force’s objection led the FAA to issue a “Notice of Presumed Hazard” for the wind farm. . Specifically, the FAA determined that the wind farm was within the “line of sight” of the Air Force radar installation. Oregon’s Congressional delegation (Senator Wyden) weighed in and is quoted as stating: "If the Defense Department allows this project to go down the drain after years and years of development, the (wind farm) investors are going to walk," Wyden said. "We don't see why they should be able to come in at the last minute and put the kibosh on this program."

Two weeks after the Oregon Congressional delegation became involved, the Air Force withdrew its objections. The mitigation was that the Air Force would upgrade its radar facility. Modern radar facilities have far less problem with interference than do older installations. The radar installation at issue in the Oregon case was more than 50 years old. The Air Force’s agreement to install upgrades to that radar facility resolved the matter.

b. Federal Aviation Administration (FAA)

The FAA is responsible for structures that could adversely affect navigable airspace or communications/navigation technology for aviation – civilian or military. Under 49 U.S.C. § 44718(b)(1)(D) the FAA is required to determine the impact of structures exceeding 200 feet (or less depending on proximity) on planned airports as well as existing airports. Sometimes NOAA gets involved in the potential radar impacts of wind farm siting proposals. For more information see http://www.roc.noaa.gov/windfarm/how_ROC_analyses_proposals_user.asp.

Under [CFR Title 14 Part 77.13](#), the following construction or alterations are subject to FAA review:

- any construction or alteration exceeding 200 ft above ground level
- any construction or alteration:
 - within 20,000 ft of a public use or military airport which exceeds a 100:1 surface from any point on the runway of each airport with at least one runway more than 3,200 ft
 - within 10,000 ft of a public use or military airport which exceeds a 50:1 surface from any point on the runway of each airport with its longest runway no more than 3,200 ft
 - within 5,000 ft of a public use heliport which exceeds a 25:1 surface
- any highway, railroad or other traverse way whose prescribed adjusted height would exceed the above noted standards
- when requested by the FAA
- any construction or alteration located on a public use airport or heliport regardless of height or location

Once an application is filed, the affected FAA region performs a study and issues either a Determination of No Hazard to Air Navigation (DNH) which means the project may move forward or a Notice of Presumed Hazard (NPH) which means further review is required. If an NPH is issued, the FAA will perform an in depth study to evaluate the NPH and impacts on air operations. If the study confirms a proposal causes a hazard to navigation or radar, then the FAA will suggest changes to the project including its height. If the project developer is unwilling to

make the recommended adjustments, then the FAA issues a Determination of Hazard (DOH), which is appealable to FAA headquarters. In Washington D.C. if the applicant appeals and is unsuccessful in overturning the denial, then the last resort is to terminate the project or appeal to federal court.

A September 27, 2006 Department of Defense (DOD) report titled *The Effect of Windmill Farms on Military Readiness* identifies similar conflicts with air defense radar. These conflicts can extend for tens of miles from the radar facility due to atmospheric refraction). The DOD is committed to individually evaluating wind farm siting proposals and to work to find mitigation strategies that work for all concerned.

http://www1.eere.energy.gov/windandhydro/federalwindsiting/pdfs/windmill_policy_letter_012907.pdf

Interference with microwave transmissions is another form of Electrical Magnetic Interference that can pose a concern if, for example, public safety radio systems in an area use microwave-based technologies.

Identified potential adverse impacts can almost always be mitigated with siting adjustments. Therefore, the Notice of Presumed Hazard or Determination of Hazard may include suggested modifications that could resolve the hazard concern. These can include adjusting project height or setting back turbines of concern further from airport or affected facilities.

In *Clark County Nevada, v. Federal Aviation Administration*, 522 F.3d 437 (2008), Clark County had been working with the FAA to site a new airport for some years. At some point a wind developer applied for FAA permission to construct an 83 turbine wind farm on BLM land for turbines about 400 feet tall, approximately 10 miles from the proposed airport. The FAA determined that the proposed wind farm does not pose a hazard to navigation. Clark County sued the FAA for the FAA's determination (that the proposed wind farm would not obstruct a proposed airport or cause interference with radar). FAA argued the county's claim was not ripe because the BLM still had yet to approve the proposal among other things. The court easily

determined the case to be ripe determining that this was the only chance to challenge the FAA's determination and it was the FAA determination that is at issue. On the merits, the court noted that even though the APA review standard was whether the FAA's decision was arbitrary and capricious, the court remanded the FAA decision because "the only evidence in the record actually undermines the agency's ultimate conclusions."

4. **Federal Lands Policies**

For practitioners whose clients either seek or oppose permission to construct energy facilities on federal lands, understanding recent federal agency initiatives will be useful. The most important new development for land use practitioners are the new USFWS Wind Turbine Guidelines finalized on March 4, 2010.

The USFWS "Wind Turbine Guidelines Advisory Committee forwarded its final recommendations for wind turbine siting guidelines to the USFWS on March 4, 2010 and to the Department of Interior on April 13, 2010. These guidelines are discussed in detail in the next segment. Once adopted, they will generally be effective 24 months from the date the USFWS publishes the final guidelines.

Another important new development is that legislation is moving in Congress HR 3534 "Consolidated Land, Energy, and Aquatic Resources Act of 2010" (CLEAR) largely due to the Deepwater Horizon catastrophe. The bill is sponsored by Nick Rahall (D-WV). The last action on the bill as of the date of writing this paper was a hearing on June 30, 2010. The CLEAR bill would, among other things:

1. Establish a new federal agency called the Bureau of Energy Resource management (BERM) which will have responsibility for leases on federal land previously managed by the Bureau of Land Management (BLM), U.S. Forest Service (USFS) and the Minerals Management Service (MMS).
2. Establishes the Bureau of Safety and Environmental Enforcement (BSEE) to perform environmental and worker safety oversight and enforcement authority (including to cancel leases and disqualify operators in addition to other fines and penalties);
3. Requires BLM and USFS to establish BMPs for environmentally sound energy development and production, establishes financial assurance requirements for reclamation of energy sites; beefs up enforcement and oversight authority.

In February 2006, the Departments of Energy, Agriculture and Interior entered into a Memorandum of Understanding concerning right of way grants on federal lands for proposed and existing utility facilities. <http://www.fs.fed.us/specialuses/documents/MOU-feb2006.pdf>.

The Department of Interior also has authority under 40 CFR 1506.2 and 1508.5 to enter into Memorandum of Understanding contracts or “MOUs” with state governments regarding siting of alternative energy proposals on or adjacent to BLM land. One such MOU was finally established between the State of Oregon and the Department of Interior on February 4, 2009 for wind energy projects. For more information see http://www.blm.gov/or/energy/windenergy/files/wind_energy_MOU.pdf.

On March 11, 2009, Secretary of the Interior Salazar signed Executive Order 3285 manifesting the Department of Interior’s commitment to renewable energy and outlining strategies for streamlining and improving agency communication and regulatory oversight for the siting of renewable on public land administered by the Department of the Interior. In this regard, BLM is responsible for the administration of significant public land having important alternative energy potential. The BLM claims on its website that it “currently has 241 applications for wind projects and 199 applications for solar projects in various stages of processing.” (<http://recovery.doi.gov/press/bureaus/bureau-of-land-management/bureau-of-land-management-renewable-energy-authorization/>).

Regarding wind energy rights of way, BLM issued a Final Programmatic Environmental impact Statement (Wind PEIS) for BLM public land in 11 western states.¹ Generally, the Wind PEIS is designed to support the development of wind energy projects and amends 9 BLM public land management plans toward that end. The BLM determined that wind energy right of way grants were “major federal actions” and hence determined an EIS was required under NEPA. The Wind PEIS determines the environmental, cultural, social and economic impacts of wind energy development on BLM administered public land and evaluates alternatives to establish the best management approval to siting wind energy projects. The Wind PEIS determines the circumstances under which wind energy projects will or will not be allowed at a programmatic level. The Wind PEIS includes significant mitigation measures and BMPs for wind energy projects on BLM land. The PEIS concludes that wind energy projects on certain types of BLM land have an overall positive environmental, cultural, social and economic impact; and that potential adverse impacts can be adequately mitigated with best management practices and the complete avoidance of some areas, to make potential adverse impacts of wind energy projects negligible. A good summary of the Wind PEIS can be found at: http://windeis.anl.gov/documents/docs/IM_2009-043_BLMWindEnergyDevelopmentPolicy.pdf

¹ Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington and Wyoming

The complete Wind PEIS can be found at: <http://windeis.anl.gov/documents/fpeis/index.cfm>

On June 29, 2009, the Secretary of the Interior Salazar also announced a “fast track” initiative for solar facilities on federal lands. The press release states:

“President Obama’s comprehensive energy strategy calls for rapid development of renewable energy, especially on America’s public lands,” said Secretary Salazar. “This environmentally-sensitive plan will identify appropriate Interior-managed lands that have excellent solar energy potential and limited conflicts with wildlife, other natural resources or land users. The two dozen areas we are evaluating could generate nearly 100,000 megawatts of solar electricity. With coordinated environmental studies, good land-use planning and zoning and priority processing, we can accelerate responsible solar energy production that will help build a clean-energy economy for the 21st century.”
http://www.doi.gov/news/09_News_Releases/062909.html.

This projected 100,000 MW for solar facilities, powers about 29 million homes; the equivalent of 29% of the United States’ residential electrical consumption. The program will study 24 BLM tracts in 6 western states “Solar Energy Study Areas” to determine suitability for solar. A public lands solar energy systems siting PEIS, for land managed by the Department of the Interior is also in the works. The scoping period to end on September 14, 2009. For more information about the proposed solar PEIS *see* <http://solareis.anl.gov/>.

In order to take advantage of federal stimulus funds that will expire at the end of 2010, BLM announced it was fast tracking 14 solar, 7 wind and 7 transmission projects. These projects are expected to be completed and on-line by the end of 2010. For more information see: <http://www.blm.gov/wo/st/en/info/newsroom/2009/december/0.html>

The practitioner should keep in mind however that solar power projects’ are not immune from controversy. Solar energy proposals are meeting significant hurdles on public land. Problems include water supplies, air and light pollution and reflection. *See* New York Times web article “California: Park Service warns of solar power project’s impacts to Mojave Desert” regarding a dispute between the National park Service and the BLM regarding the BLM authorizing 63 large scale solar panels.

<http://www.climateark.org/shared/reader/welcome.aspx?linkid=125581>; *see also*

<http://www.eenews.net/public/Landletter/2009/04/23/1> ;

<http://www.eenews.net/public/Landletter/2009/07/09/1>. Senator Diane Feinstein has moved to block a solar energy proposal by proposing federal legislation putting 500,000 acres in the Mojave Desert off limits citing “aesthetic” and turtle habitat concerns.

<http://www.climateark.org/shared/reader/welcome.aspx?linkid=125581>. The Mojave solar project is also opposed by the Wildlands Conservancy.

This opposition to the Mojave Desert solar proposal has perplexed many: "If we cannot put solar power plants in the Mojave Desert, I don't know where the hell we can put it," Schwarzenegger said at Yale University.²

Nevertheless, part of the project near Hinkley, California is now on line and another portion is scheduled to be operational by 2013. The latter is the controversial "Abengoa Mojave Solar Power Plant Project" which had a major public hearing before the California Energy Commission (CEC) on June 28 and 29. A CEC decision had not been reached at the time of this paper. The existing site near Hinkley in the Mojave Desert is the world's largest solar power generation facility. <http://www.allamericanpatriots.com/48758864-interior-sec-salazar-gov-schwarzenegger-visit-worlds-largest-solar-plant> The staff assessments for the Abengoa project can be viewed at <http://www.energy.ca.gov/sitingcases/abengoa/index.html>

In October 2008, the federal Department of the Interior issued a "Programmatic Environmental Impact Statement" for geothermal energy proposals (GEO PEIS) and the implementing Record of Decision (ROD) was signed on December 17, 2008. See http://www.blm.gov/wo/st/en/prog/energy/geothermal/geothermal_nationwide.html.

The Geo PEIS estimates approximately 5,540 megawatts (MW) of new electric generation capacity being generated from an area of 11 Western States and Alaska by 2015 with the development of 111 new geothermal power plants on BLM land. The Geo PEIS also estimates an additional 6,600 MW from another 133 geothermal power plants on BLM land by 2025. The Geo PEIS and ROD resulted in the amendment of 114 BLM Resource Management Plans to authorize approximately 111 million acres of BLM land to be leased for Geothermal Resources. The Geo PEIS allows projects to move forward more swiftly because only site specific environmental impacts need be evaluated. Issues regarding cumulative environmental impacts and general Geothermal energy related impacts on federal land are addressed in the Geo PEIS and need not be addressed for individual projects on BLM land.

On July 14, 2009, the federal Department of the Interior announced \$9 million in geothermal energy leases on 334,842 acres of BLM lands in California, Nevada and Utah. According to the BLM:

"Geothermal resources, such as steam and hot water, are used directly to heat buildings and in greenhouses and aquaculture, and indirectly to generate electric

² http://www.huffingtonpost.com/2009/03/21/feinstein-seeks-to-block-_n_177646.html

power. Geothermal energy accounts for 17 percent of the electricity generated from renewable sources in the United States. Half of the nation's geothermal energy production occurs on federal land, much of it in California and Nevada, and 90 percent of the potential resources are located on public lands as well. Other states with geothermal potential include Colorado, Utah, Idaho, Oregon, Washington, Alaska, New Mexico, Arizona, Montana and Wyoming.

“The BLM presently manages 560 geothermal leases, with 58 leases in producing status generating about 1,275 megawatts of installed geothermal energy on public lands. Over the course of a year (2007) these BLM geothermal leases produced a total of 4,600 gigawatts of electrical power and provided alternative heat sources for direct-use commercial endeavors. These producing leases generate over \$12 million in federal royalties each year.”

Under federal law (43 CFR 3201.11) and the Geo PEIS, several BLM administered public lands are off limits to leasing. They are the following lands:

43 CFR 3201.11 Land Prohibited from Geothermal leasing:

- Wilderness Areas and Wilderness Study Areas
- National Recreation Areas
- Lands within the National Park System
- Areas where geothermal can significantly impact National Park System thermal features
- Fish hatcheries or wildlife management areas administered by the Secretary
- Indian trust or restricted lands outside the boundaries of Indian reservations
- The Island Park Geothermal Area
- Lands where the Secretary has determined that issuing the lease would cause unnecessary or undue degradation of public lands and resources.

Other Lands Closed to Leasing under the Geo PEIS:

- National Monuments
- Designated National Wild Rivers segments
- Areas previously withdrawn from fluid minerals development
- National Conservation Areas
- Other NLCS lands
- National Historic and Scenic Trails
- Designated National Scenic and Recreational Rivers

The Forest Service continues to evaluate proposals for right of way permission on a case by case basis. The Forest Service is, however, considering a PEIS for wind energy siting of land the Forest Service administers. See

http://www.fs.fed.us/recreation/permits/documents/federal_register_wind.pdf

The forest service actively promotes biomass renewable energy programs.

<http://www.usda.gov/wps/portal/!ut/p/s.7.0.A/7.0.1OB?contentidonly=true&contentid=2009/06/0206.xml>.

5. Federal Programs applicable to Private Land as well a Federal Land

As noted above, the USFWS “Wind Turbine Guidelines Advisory Committee”³ issued its final recommended guidelines on March 4, 2010 and the FWS forwarded them to the DOI Secretary, Mr. Salazar on April 13, 2010. The Guidelines and information concerning them can be found at

http://www.fws.gov/habitatconservation/windpower/wind_turbine_advisory_committee.html

These guidelines are expected to be adopted by the FWS to guide the development of wind power projects. The 2010 guidelines replace the May 2003 USFWS “Interim Guidance on Avoiding and Minimizing Wildlife Impacts from Wind Turbines.” These 2003 interim guidelines were developed without the input of the wind industry. The new guidelines were developed by consensus of a broad spectrum of stakeholders including the wind industry.

The charge of the Wind Turbine Guidelines Advisory Committee was to provide advice and recommendations to the Secretary of the interior regarding WEC siting guidelines that “avoid and minimizes impacts to wildlife and their habitat related to land-based wind energy facilities.” They have no direct relevance to off shore projects.

[http://www.fws.gov/habitatconservation/windpower/Subcommittee/Legal/Reports/Wind_Turbine_Advisory_Committee_Legal_Subcommittee_White_Paper_\(Final_As_Posted\).pdf](http://www.fws.gov/habitatconservation/windpower/Subcommittee/Legal/Reports/Wind_Turbine_Advisory_Committee_Legal_Subcommittee_White_Paper_(Final_As_Posted).pdf)

The final guidelines are quite detailed to achieve the stated objective. Generally, the guidelines are a voluntary roadmap of steps to identify risks to bird and bat populations and mitigation strategies to avoid significant harm. One good reason to adhere to the guidelines is that such observance will be considered by the USFWS as evidence of “due care” in making enforcement decisions under the Migratory Bird Treaty Act (MBTA) and the Bald and Golden Eagle Protection Act (BGEPA). See *United States v. Moon Lake Elec. Ass’n*, 45 F. Supp. 2d

³ The Wind Turbine Guidelines Advisory Committee of the Fish and Wildlife Service maintains a useful website at http://www.fws.gov/habitatconservation/windpower/wind_turbine_advisory_committee.html.

1070 (D. Co. 1999) (electrical association's failure to install inexpensive mitigating devices resulted in criminal liability under MBTA and BGEPA for protected avian species mortality caused by project).

The Guidelines suggest a "Tiered" approach to minimizing the impacts of wind development on wildlife – particularly birds and bats. The five "Tiers" are:

- Preliminary evaluation or screening of potential sites
- Site characterization;
- Field Studies to document site wildlife conditions and predict project impacts
- Post construction fatality studies
- Other post construction studies. *See* Guidelines p 8.
-

Depending on the data available at each "Tier" potential outcomes after analysis include:

- Project abandonment because of unacceptable risk
- Project proceeds through development process without further data collection
- "An action or combination of actions, such as project modification, mitigation, or specific post-construction monitoring, is indicated." Guidelines p 8-9.

The Guidelines suggest further work in the development of tools to assess "cumulative impacts" on wildlife populations from proposed wind energy development projects. While the lack of good tools to deal with cumulative impacts is acknowledged, an important footnote in the Guidelines (footnote 5) recommends reviewing the conclusions and suggestions for Oregon wind projects in the White paper entitled: "Oregon Columbia Ecoregion Wind Energy Siting and Permitting Guidelines dated September 29, 2008." This "White Paper" may be viewed at http://www.oregon.gov/ENERGY/RENEW/Wind/docs/OR_wind_siting_guidelines.pdf?ga=t

Also, on March 5, 2010 the BLM issued "Instruction Memorandum No 2010-071" (IM) which can be viewed at http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/national_instruction/2010/im2009-071.html

This IM applies to all BLM program areas: "Oil and Gas, Oil Shale, Geothermal, Wind, Solar, and Associated Rights-of-Way, Wildlife, Land Use Planning, National Environmental Policy Act." The IM supplements the BLM "2004 National Sage Grouse Habitat Conservation Strategy." This IM responds to the increasing concern regarding conflicts between energy exploration and development and survival of Sage Grouse. Sage Grouse is a ground dwelling bird that is highly dependent on sagebrush for cover and food. The bird's decline began as fire

suppression encouraged the growth of juniper trees in the 1800s. While juniper is a native species, its unchecked growth and spread is atypical. It now occupies land it never occupied before. Unfortunately for Sage Grouse, juniper out competes sagebrush. Once junipers become dense and mature, the understory grasses and shrubs like sagebrush die out and it becomes much more difficult and expensive to restore sagebrush. However, where juniper invasion first begins, an area will initially retain a large component of grasses and shrubs. Part of a strategy to restore Sage Grouse is juniper control. But this will not be enough. It is important to protect sagebrush from ground clearing and disturbances related to energy development projects as well.

Typically, Sage Grouse is found wherever there is sagebrush. Generally, the ranges of the bird are in the states of California, Colorado, Idaho, Montana, Nevada, North Dakota, Oregon, South Dakota, Utah, Washington and Wyoming.

On March 5, 2010 (the same day as the IM was promulgated) the USFWS announced that listing the Greater Sage Grouse as an endangered species was warranted but that the agency lacked the resources to initiate the listing.⁴ Consequently, Sage Grouse remain a “sensitive” species to be managed per the terms of the BLM “Special Status Species Policy” (BLM Manual 6840).

The IM is designed to “improve” the existing national Sage Grouse strategy in hopes of avoiding the continued need for an ESA listing and provide enhanced protections for projects within the ranges of the Gunnison Sage Grouse and the Greater Sage Grouse. Energy projects within “priority habitat” (habitat of the highest conservation value) will be significantly affected. For example, the IM specifies that transmission lines must be rerouted to avoid priority habitat; and for wind and solar energy development projects on BLM land requiring right of way applications, those applications will be screened to determine whether they are in priority habitat areas. If so, BLM will notify the applicant that the application may be denied or that conditions may be imposed to protect priority habitat as shown to be appropriate under a NEPA analysis.

The IM also flags that it is working with state fish and wildlife agencies to map high priority habitat in the Sage Grouse ranges. Once the high priority habitat is mapped, then state specific management actions “on a landscape level” are anticipated for within and outside of the identified high priority habitat to maintain sustainable Sage Grouse populations. Oregon is well into the mapping effort and has been relatively successful at protecting Sage Grouse. For example in 2009, Oregon Sage grouse populations were up. Background on the Oregon effort

⁴ On June 28, 2010 a variety of environmental groups sued the USFWS for delaying the listing.

can be found at

http://www.dfw.state.or.us/wildlife/sagegrouse/docs/Greater_Sage_Grouse_Candidate_Species_Backgrounder_3_11_10.pdf

The Oregon “Greater Sage-Grouse Conservation Assessment and Strategy” is out for public comment through August. It can be viewed at

http://www.dfw.state.or.us/wildlife/sagegrouse/docs/20100706_GRSGStrategy_final.pdf

Other useful information is at the Department of Energy website which is designed to pull various federal and state agency as well as private sector sources of information regarding wind siting together in one place. <http://www.windpoweringamerica.gov/siting.asp>.

6. Federal RPS/RES

Renewable Portfolio Standards (RPS) or Renewable Energy Standards (RES) adopted by states require a certain percentage of the energy purchased in the state to be from renewable energy sources. Obviously then, an RES puts pressure on state and local governments to approve proposed development of renewable projects. A May 2010 report by the National Renewable Energy Laboratory (NREL) explains that a strong RES combined with carbon emission caps would be a strong driver to generating new sources of renewable energy. The report can be viewed at the following link: <http://www.nrel.gov/docs/fy10osti/48258.pdf>

On the federal side, President Obama has made clear he wants to see a federal Renewable Portfolio Standard (RPS) of at least 25% renewable energy systems furnishing American energy needs by 2025. All of the major wind energy states have adopted an RPS and it is surprising that the federal government has not jumped on the RPS bandwagon given the magnitude of other federal commitments to renewables. Each year Congress struggles to introduce a federal RPS and each year nothing happens. Nevertheless, a federal RPS must always be considered as on the horizon. Once one is adopted, however, there will be questions about it interfaces with the scores of state RPS requirements.

To be sure, there are a number of bills pending in Congress regarding energy and renewables to achieve this RPS or some version of it. One bill that has passed the house and looks promising is the American Clean Energy and Security Act (ACES) of 2009. The ACES will set a federal 25% RPS, among other things. This and other bills are still pending. At this point, the best source of RPS requirements is the individual states.