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By Fax (w/o Attachments) and Mail

Dirk Kempthorne
Secretary
U.S. Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

H. Dale Hall
Director
U.S. Fish and Wildlife Service
1849 C Street, N.W.
Washington, D.C. 20240

Dear Secretary Kempthorne and Director Hall:

On behalf of the Center for Biological Diversity, Hawk Migration Association of North America, The Humane Society of the United States, Industrial Wind Action Group, D. Daniel Boone, Alliance to Protect Nantucket Sound, Chautauqua County Citizens for Responsible Wind Power, Friends of Blackwater Canyon, Green Berkshires, Inc., Juniata Valley Audubon, Maryland Conservation Council, Protect the Flint Hills, Ripley Hawk Watch, Save Our Allegheny Ridges, and the Wildlife Advocacy Project, we are writing to notify you that the recently announced membership of the Wind Turbine Guidelines Advisory Committee (“Committee”) violates the requirements of the Federal Advisory Committee Act, 5 U.S.C. App. II (“FACA”), that all chartered advisory committees must be “fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee,” and “will not be inappropriately influenced by . . . any special interest.” *Id.* at § 5(b).

Congress had several objectives in imposing these obligations on all advisory committees. In particular, Congress intended the “fairly balanced” requirement “to ensure that persons or groups directly affected by the work of a particular advisory committee would have some representation on the committee.” National Anti-Hunger Coalition v. Executive Comm. Of the President’s Private Sector Survey on Cost Control, 711 F.2d 1071, 1074 n. 2 (D.C. Cir. 1983) (citing S. Rep. No. 1098, 92d Cong., 2d Sess. 9 (1972)). In addition, Congress desired to “protect against the ‘danger of allowing special interest groups to exercise undue influence upon



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the Government through the[ir] dominance of advisory committees which deal with matters in which they have vested interests.” Public Citizen v. National Advisory Committee on Microbiological Criteria for Foods, 886 F.2d 419, 425 (D.C. Cir. 1989) (Friedman, J., concurring) (quoting H.R. Rep. No. 1017, 92d Cong., 2d Sess. 6 (1972) (“1972 House Report”)).

While the announced membership of the Committee (see Attachment A) contains individuals with impressive credentials and backgrounds, and this letter is certainly not intended to disparage any particular person who has been appointed to the Committee, the unavoidable fact remains that the Committee’s overall composition clearly violates FACA’s letter and purpose in several distinct albeit related ways. Moreover, this skewed composition will inevitably subvert the important work of the committee in the very manner that Congress sought to avoid when it enacted FACA’s safeguards.

First, although the declared function of the Committee is to “develop[] effective measures to avoid or minimize impacts to wildlife and their habitats related to land-based wind energy facilities,” 72 Fed. Reg. 11373 (March 13, 2007), there are gaping holes in the Committee’s expertise with regard to the gravest threats that wind turbines pose to “wildlife and their habitats.” See 41 C.F.R. § 105-54.204 (FACA implementing regulations defining “balance” to mean a “cross-section of interested persons and groups with professional or personal qualifications or experience to contribute to the functions and tasks to be performed”) (emphasis added).

In particular, the Committee contains no members possessing any research expertise or publication record regarding bats, let alone any members with direct knowledge or experience involving bat interactions with wind turbines. This is a glaring omission because, as has now been recognized in recent reports issued by the Government Accountability Office and the National Research Council of the National Academies (“NRC Report”), as well as in recent testimony before the House Natural Resources Committee, many thousands of bats have already been killed by wind turbines.

Moreover, projects presently being constructed and planned may well imperil entire bat populations, pose serious threats to bat species that are now federally listed as endangered or threatened, and compel the Fish and Wildlife Service (“FWS”) to address petitions to list many more such species in the future. Consequently, there is simply no sound legal, policy, or scientific justification to exclude bat experts from the Committee’s membership. As summarized by the NRC Report, “given a general region-wide decline in the populations of several species of bats in the eastern United States, the possibility of population effects, especially with increased numbers of turbines, is significant.” <http://www.VAwind.org/Assets/NRC/Summary.pdf>.¹

¹ The Fish and Wildlife Service (“FWS”) has estimated that the Nedpower Mount Storm Wind Project in West Virginia alone would kill approximately 9,500 bats a year, which is a “significant level of fatalities which local populations would have a difficult time sustaining,” “especially when the effects of Mount Storm are considered cumulatively along with the effects

Indeed, DOI's own employees have recognized the inexplicable dearth of bat expertise on the committee. A May 15, 2007 e-mail written by Dr. Albert Manville (the FWS's wind-wildlife national representative on the National Wind Coordinating Committee since 1997) has stated point-blank that "[w]e have no bat representation on the FACA committee, a major shortcoming." Attachment B (emphasis added). Similarly, in a recent e-mail exchange with Dr. Michael Gannon (a bat expert who teaches at Pennsylvania State University), Dave Stout (the FWS employee who is serving as the Designated Federal Officer) appeared to acknowledge that the Committee does indeed lack members with bat expertise, but suggested that this could be compensated for through the creation of a "technical subcommittee." See Attachment C ("A lot of the work for this committee will be done by technical subcommittees. One of these subcommittees will almost certainly address issues related to bats.").

That, however, is not an adequate response to the problem on either a legal or a practical level. As a legal matter, FACA provides that the Committee itself must be fairly balanced as to function and viewpoint; hence, DOI cannot compensate for an unlawfully balanced committee by holding out the promise of "technical subcommittees" that may (or may not) contain members who should have been appointed to the full Committee.

As a practical matter, DOI's own documents concerning the Committee make clear that subcommittee membership cannot substitute for service on the full Committee. In soliciting nominations for the Committee, DOI stated that, while the "Committee may establish workgroups and subcommittees as it and the Designated Federal Official deem necessary for the

of present and planned wind power projects along the Allegheny front." Attachment E. According to a recent analysis prepared by leading bat scientists and that was funded in part by the FWS, wind energy facilities slated just for the Mid-Atlantic Highlands may kill more than 100,000 bats per year by the year 2020, which "may be a substantial impact on both migratory and local bat populations." Kunz *et al.*, Ecological Impacts of wind energy development on bats: questions, research, needs, and hypotheses, 5 *Front. Ecol. Environ.* 319 (2007) (Attachment F) (emphasis added). Although there have been no confirmed kills of bats presently listed as endangered or threatened, monitoring efforts have been sporadic at best and many projects are being built in the habitats of such species; thus it is inevitable that listed species (such as the Indiana bat) will be adversely affected, and additional species will need to be considered for listing due to the adverse effects of poorly sited wind power projects in conjunction with other habitat impacts. *Id.* at 317 ("As research protocols for bats shift toward improved monitoring studies, more bat species are likely to be affected and greater measured fatality rates at wind energy facilities are expected."); see also Kuvlesky *et al.*, Wind Energy Development and Wildlife Conservation: Challenges and Opportunities, 71 *J. Wildlife Management* 2487, 2493 (2007) (Attachment G) ("[W]ind farms located in [the Lower Gulf Coast ("LGC")] could negatively impact both resident and migratory bat populations and, based on the results of the studies we cite in this paper, wind farms could result in significant bat fatalities . . . Additive mortality from wind turbine collisions could therefore represent a potentially serious threat to existing populations" of the Mexican free-tailed bat and the southern yellow bat.).

purposes of compiling information or conducting research,” such “subgroups may not be created, compile information, or conduct research without the direction of the Committee as a whole and must report to the full Committee.” Attachment D (emphasis added).

Accordingly, unless and until the Committee “as a whole” opts to direct a subcommittee to consider the critically important bat-related issues, there is no assurance that they will ever be addressed. And even if such direction does occur, the fact that the subcommittee “must report to the full Committee” (rather than directly to DOI) means that there is no assurance that the public will have meaningful access to the meetings and papers of the subcommittee. See National Anti-Hunger Coalition, 711 F.2d at 1075-76. For all of these reasons, it is vitally important that the Committee itself include members with the requisite expertise in actual and potential impacts of wind turbines on bats.²

The Committee likewise lacks the requisite expertise regarding bird impacts, especially with respect to effects on migratory birds using the Appalachian mountain ridges in the Eastern United States. Although dozens of planned wind projects are slated for this part of the country, and ornithologists are increasingly concerned about the cumulative long-term effects of such projects on migrating raptors, songbirds, and other species, none of the Committee members has any significant research, scientific, or regulatory experience with wind energy development and associated wildlife impacts resulting from land-based wind projects in the eastern U.S.³

The dearth of scientific expertise on species and habitats likely to be most adversely affected by the projected exponential expansion of wind power is especially troubling in light of

² DOI’s exclusion of bat experts is all the more unfathomable in view of the fact that leading bat researchers specifically advised DOI of their interest in serving on the Committee. See Attachment H (e-mails to DOI from Drs. Tom Kunz and Michael Gannon).

³ We note in this regard, as did Dr. Manville in his May 15, 2007 e-mail, that all of the Committee members who represent state wildlife agencies are from western states. See Attachment B (“We lack eastern representation from the States (huge issues w/bat mortality and potential raptor issues).”). This is of particular concern because, as discussed in the NRC Report, wildlife impacts in the eastern U.S. encompass not only collision mortality but also significant habitat impacts (e.g., forest destruction and fragmentation). See NRC Report at 132 (“Forest clearing resulting from road construction, transmission lines leading to the grid, and turbine placements represents perhaps the most significant potential change through habitat loss and fragmentation for forest-dependent species.”). Indeed, the only study that assessed the impacts to forest-nesting birds associated with a wind energy facility constructed in the eastern U.S. concluded that “[f]ragmentation of forests via wind turbine erection can impact [forest] interior nesting birds in a[n] adverse manner. The size and number of wind power developments in the future are also of concern with respect to habitat loss and fragmentation. This may become the primary ecological consideration in future wind power developments in these habitats.” <http://www.nrel.gov/docs/fy02osti/28591.pdf>.

the many individuals on the Committee who either expressly represent, or are clearly aligned with, the interests of the wind power industry. It is particularly troubling that DOI was able to make room for so many individuals whose principal interest and expertise is in the promotion of wind power, and yet DOI could find little or no such room for individuals with the necessary expertise in wildlife and wildlife habitat – which, once again, is supposed to be the focus of this particular Committee.

Second, even apart from the essential expertise that is clearly lacking with respect to the Committee’s ostensible function, the Committee’s composition violates FACA because it will be “inappropriately influenced” by a “special interest” within the meaning of section 5(b) of FACA. According to DOI’s membership announcement, nearly 1/3 of the Committee’s members – 7 of 22 members⁴ – directly represent “wind energy development interests,” including two attorneys with private law firms that earn income from representing wind power interests. Attachment A at 1.⁵

In addition, however, at least four of the other announced members have no particular expertise or experience in avoiding or minimizing wildlife impacts (the purported purpose of the Committee) but do have clear institutional interests in promoting and expanding wind power: (1) one member (Mark Sinclair) is an attorney with Clean Energy States Alliance, a project of Clean Energy Group, which “work[s] with public fund managers, private investors, business academics, and other energy consultants to provide information, advocacy and analysis to develop market opportunities for clean energy”⁶; (2) one member (Steven Lindenberg) is the Wind Energy Team Leader of the Department of Energy’s Office of Energy Efficiency and Renewable Energy, a federal office that actively promotes wind power expansion⁷; (3) one member (John Geesman) represents the California Energy Commission and is also the board chairman of a non-profit organization that “promotes all renewable energy options for the production of electricity . . .

⁴ Dave Stout is identified both as a “member” and as the “Committee’s designated federal officer.” Attachment A. Accordingly, it is unclear from the Committee’s description whether he will vote as a full member of the Committee, as well as oversee its compliance with FACA.

⁵ We understand that some of the individuals originally identified may have subsequently dropped off the Committee, but we are proceeding on the assumption that DOI intends to maintain the Committee’s overall representation as initially announced.

⁶ See <http://cleanenergystates.org/JointProjects/windsiting.html>. Contrary to the characterization of Mr. Sinclair in DOI’s announcement of the Committee’s membership, Mr. Sinclair does not “represent” a “government agency.” Attachment A. Rather, he squarely belongs in the “[r]epresenting wind energy development interests” category.

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See http://www1.eere.energy.gov/windandhydro/printable_versions/wind_contacts.html.

including . . . wind power”⁸; and (4) one member (Jeri Lawrence) works for the Blackfeet Tribe and is employed solely to promote and develop “large scale” renewable energy projects on tribal lands, including commercial scale wind energy development.⁹ Thus, at least half of the Committee’s members either directly represent the wind power industry or work in various professional capacities to promote or enhance that industry.¹⁰

The Committee, in short, is effectively controlled by the very industry whose impacts on wildlife and habitat the Committee is supposed to be objectively studying and mitigating. Where, as here, any Committee recommendation – no matter how essential to wildlife protection – can, in effect, be blocked by those representing and affiliated with the industry, the Committee is undoubtedly being “inappropriately influenced” by a “special interest,” 5 U.S.C. App. II § 5(b)(3). Indeed, this is precisely the kind of advisory committee composition that Congress sought to avoid in enacting FACA. Section 5(b)(3) is “designed to protect against ‘the danger of allowing special interest groups to exercise undue influence upon the Government through the[ir] dominance of advisory committees which deal with matters in which they have special interests.’” Public Citizen, 886 F.2d at 425 (Friedman, J.) (quoting 1971 House Report at 6); see also id. (“Viewed in its worst light, the federal advisory committee can be a convenient nesting place for special interests seeking to change and preserve a federal policy for their own ends. Such committees stacked with giants in their respective fields can overwhelm a federal decision maker, or at least make him wary of upsetting the status quo.”) (quoting 118 Cong. Rec. 30,276 (1972) (emphasis added).

That the wind power industry promotes itself as a “green” energy source does not exempt the Committee from FACA’s requirements, just as it does not mean that poorly sited wind power projects cannot have unacceptable impacts on the nation’s wildlife resources. Just as the oil industry would not be permitted to dominate a federal advisory committee established to evaluate the risks of oil spills, or the nuclear energy industry allowed to dominate a committee created to evaluate the risks of radiation from nuclear power plants, it is patently unlawful – and simply poor public policy – for DOI to establish a committee on wind power threats to wildlife that will

⁸ See <http://www.energy.ca.gov/commission/commissioners/geesman.html>.

⁹ See http://www.eere.energy.gov/tribalenergy/pdfs/0610review_50lawrence.pdf.

¹⁰ To compound the problem, DOI has hired a private “facilitator” for the Committee “who is representing industry.” Attachment B. In particular, the facilitator (Abby Arnold) is the “senior mediator” for the National Wind Coordinating Collaborative, an organization that is designed to support the development of a “commercial market for wind power,” and whose membership is also dominated by the wind power industry. See <http://www.nationalwind.org/about/default.htm>. It is unclear why a federal advisory committee needs a non-governmental “facilitator” or, if it does, why that role should be played by an individual who is already working for another organization that exists principally to promote the wind power industry.

effectively be controlled by the very industry whose adverse effects are being analyzed.

In sum, a Committee whose ostensible focus is wildlife impacts, and yet whose membership contains major gaps in important areas of wildlife-related expertise while being dominated by wind power proponents, advocates, and paid representatives, is a committee that is clearly not “fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee” and, by the same token, is “inappropriately influenced” by a “special interest.” 5 U.S.C. App. II § 5(b). Accordingly, we urge you to revise the composition of the Committee to bring it in line with FACA’s mandate and purpose, and to ensure that the Committee is well-positioned to actually develop meaningful wildlife-protective measures for the siting and construction of wind projects.

Because the Committee is scheduled to hold its first meeting at the end of February, we request that you respond to this letter by **February 11, 2008**, indicating whether you will make changes to the Committee’s composition to address the concerns set forth above. If we do not receive a response by then, we will assume that you intend to make no changes to the Committee’s membership and will proceed accordingly.

Thank you in advance for considering our concerns and we look forward to hearing from you.

Sincerely,



Eric R. Glitzenstein
Kimberly D. Ockene

cc: Representative Nick Rahall (by fax w/o attachments and mail)
Representative Alan Mollohan (by fax w/o attachments and mail)
David Longly Bernhardt, Solicitor, DOI (by electronic mail)
David Stout, FWS (by electronic mail)

**ATTACHMENTS FOR JANUARY 17, 2008 LETTER
TO
US DEPARTMENT OF INTERIOR
FROM
MEYER GLITZENSTEIN & CRYSTAL
REGARDING
WIND TURBINE GUIDELINES ADVISORY COMMITTEE**

Attachment A – USFWS Press Release announcing membership of Wind Turbine Guidelines Advisory Committee

<http://www.fws.gov/habitatconservation/windpower/Press%20Release%2010-26-07.pdf>

Attachment B – email - Albert Manville of USFWS to Jerome Ford of USFWS, May 15, 2007

<http://www.windaction.org/documents/13647>

Attachment C – email - Dave Stout of USFWS to Dr. Michael Gannon, Dec. 12, 2007

<http://www.windaction.org/documents/13648>

Attachment D – Charter for the Wind Turbine Guidelines Advisory Committee

http://www.fws.gov/habitatconservation/Advisory_Committee_Charter_3_20_07.pdf

Attachment E – USFWS-WV Field Office letter to NedPower [wind energy developer],
Sept. 15, 2004

<http://www.windaction.org/documents/13649>

Attachment F – Kunz et al. (2007) paper in Frontiers in Ecology and Environment

http://www.vawind.org/Assets/Docs/Wind_and_Bats_07.pdf

Attachment G – Kuvlesky, et al. (2007) paper in Journal of Wildlife Management

<http://www.windaction.org/documents/13646>

Attachment H – emails to Susan Goodwin from Drs. Tom Kunz and Michael Gannon
requesting membership on Wind Turbine Guidelines Advisory Committee

<http://www.windaction.org/documents/13650>