

Suggested Edits and Additional Comments to U.S. Fish & Wildlife Service
Land-Based Wind Energy Guidelines

Supplementing our Comments in our letter and the Comments in our other two Enclosures addressing specific issues highlighted by the U.S. Fish and Wildlife Service (hereinafter “USFWS” or “the Service”) request for public comment on *Draft Land-Based Wind Energy Guidelines*, as published in the *Federal Register* on February 18, 2011 in FR Doc. 2011-3699 (76 Fed. Reg. 9590), Black Swamp Bird Observatory (BSBO), offers the following suggested edits and additional comments to certain sentences, paragraphs, and chapters of the Guidelines.

Executive Summary, p.1

Revise the first paragraph to read as follows (*new text italicized*):

The mission of the U.S. Fish and Wildlife Service is working with others to conserve, protect and enhance fish, wildlife, plants and their habitats for the continuing benefit of the American people. As part of this, we are charged with implementing statutes including Endangered Species Act, Migratory Bird Treaty Act, and Bald and Golden Eagle Protection Act. *Many of the requirements of these statutes fulfill our Nation’s legal obligations under various international and bilateral conventions for the conservation of migratory birds and their habitats that the United States has ratified because of the critical ecological and economic value of migratory birds.* These draft Land-based Wind Energy Guidelines (draft Guidelines) are intended to promote compliance with these and other relevant wildlife laws and statutes. They call for scientifically rigorous surveys, “**monitoring**,” assessment, and research designs proportionate to the “**risk**” to “**affected species.**” The Service encourages project proponents to use the process described in these voluntary draft Guidelines to address risks to fish and wildlife resources. The Service intends that these draft Guidelines, when used in concert with the appropriate regulatory tools, will be the best practical approach for conservation of species of “**Federal trust responsibility.**”

Rationale: We believe that users of these Guidelines should be reminded or informed that many of the relevant wildlife statutes and regulations – in particular, the Migratory Bird Treaty Act – stem from international legal commitments. As a result, all actions or decisions related to these Guidelines also must be consistent with our laws and regulations for a greater purpose – so the U.S. can meet its international duties and maintain its credibility and leadership status in the international community.

If the Guidelines are to truly fulfill our Nation’s obligations under international agreements by supplementing existing U.S. laws established to avoid and minimize negative effects to fish, wildlife, and their habitats resulting from construction, operation and maintenance of land-based, wind energy facilities, then the Guidelines, once finalized, must be regulatory and not voluntary on all lands, public and private.

Enclosure (3) of Black Swamp Bird Observatory Comments on Wind Energy Guidelines

Universal application of the Guidelines to all wind energy projects, on all of our Nation's lands, will minimize, if not eliminate, irreversible miscalculations that will negatively affect Protected Species and other wildlife. The Service has the legal mandate and the trust responsibility to maintain and enhance migratory bird populations and habitats for the continued enjoyment of the American public. The Service is authorized by more than 25 primary conventions, treaties, and laws, many of which have authorities that extend beyond the borders of the United States, to ensure the conservation of more than 800 species of migratory birds.

We urge the Service and the Department to make the Guidelines mandatory as soon as possible. Recognizing that the administrative process of notice and comment rulemaking to make all of the Guidelines regulatory on all lands, public and private, would require much more time, effort, and consideration by USFWS and interested stakeholders, we encourage the Service and the Department to take the necessary steps now to make the Guidelines mandatory, as soon as possible, for wind facility development on all Federal lands, and at a minimum, immediately make all of the Guidelines regulatory for all Department of Interior jurisdictional lands where commercial and/or mid-size wind projects are being/might be constructed (e.g., National Wildlife Refuges, Bureau of Land Management, and National Park Service lands). Requiring the use of the standards of due care set forth in the Guidelines on all Federal lands would be consistent with Executive Order 13186 of January 10, 2001 (Responsibilities of Federal Agencies to Protect Migratory Birds).

Executive Summary, p.1

Between the second and third paragraphs, add the following new paragraph:

“In order for the Guidelines to create a level playing field for all wind energy projects and a consistent application of the relevant laws and regulations for migratory birds and wildlife, it is imperative for the standards in the Guidelines to be promulgated as federal regulations. However, until the Service implements the Guidelines as regulations, promulgating the Guidelines as regulatory interpretive guidance is an essential action to be taken in order to help relevant stakeholders achieve the right balance of expanding wind energy production and maintaining and protecting the Nation's wildlife and their habitats.”

Rationale: As mentioned in Enclosure (2), we generally concur with the substitution of the Committee's Legal White Paper with the inclusion of a discussion of the Service's legal authorities and statutes. One important point brought out in the Committee's Legal White Paper, however, should be worth further discussion in the Guidelines. In section II.C.2 of the Legal White Paper (Committee Recommendations, Appendix B, p. B14), the Committee provides a reasonable interpretation of Section 704 of the MBTA that the Service does not mention, let alone address, in the discussion of legal authorities and statutes in the Guidelines. We appreciate the efforts of the Committee and the Service and all interested stakeholders who have contributed to the development of the Guidelines over the years. In order for the Guidelines to create a level playing field for all wind energy projects and a consistent application of the relevant laws and

Enclosure (3) of Black Swamp Bird Observatory Comments on Wind Energy Guidelines

regulations for migratory birds and wildlife, it is imperative for the standards in the Guidelines to be promulgated as federal regulations.

We think the Service has the legal authority under the MBTA to issue regulations now. As the Service itself noted in the not too distant past, “Sections 704 and 712(2) of 16 U.S.C. provide [USFWS] with broad authority to promulgate regulations allowing for the take of migratory birds when compatible with the terms of the migratory bird treaties.” Migratory Bird Permits; Take of Migratory Birds by the Armed Forces, 72 Fed. Reg. 8931 (Feb. 28, 2007). If the Service is not comfortable issuing regulations regarding incidental takes by wind turbines under its broad grant of legal authority in 16 U.S.C. Sections 704 or 712, we recommend that the Service and Department expedite its request for a more specific authorization from Congress so that all of the Department of Interior’s agencies can keep pace with the Administration’s goal of increasing the Nation’s use of renewable energy.

If it has been the position of the Service that it does not hold adequate authority to issue regulations establishing a new permit to allow for the incidental taking of migratory birds at wind energy developments under certain conditions, we suggest the Service take this opportunity to document this position in the Guidelines as an additional reason for the voluntary nature of these standards. When approaching Congress for more specific authority, this clear agency position set forth in the Guidelines should help to emphasize the regulatory gaps that are hindering efforts to fully develop more successful renewable energy projects (as well as our Nation’s ability to fully comply with international treaties and conventions that we have ratified for the conservation of migratory birds).

Executive Summary, p. 2

Revise the third full paragraph, by emphasizing key text with **bold** type, as follows:

The Service urges voluntary adherence to the draft Guidelines and communication with the Service when planning and operating a facility. **The Service will regard such voluntary adherence and communications as evidence of due care with respect to avoiding, minimizing, and mitigating adverse impacts to species protected under the MBTA and BGEPA**, and will take such adherence and communication fully into account when exercising its discretion with respect to any potential referral for prosecution related to the death of or injury to any such species.

Rationale: The Guidelines should spell out in no uncertain terms that the unauthorized “taking” of just ONE protected bird – even if unintentional – can be a criminal violation. Making the Guidelines apply to any type of wind energy project will make it more clear to everyone that their well intended actions – including partnerships with wind energy developers – could unfortunately lead to heavy fines and possible jail time if their wind turbines kill or harm birds. We suggest rewording the Guidelines in certain parts like the passage above to re-emphasize the importance of working with the Service and interested stakeholders well before installing a wind turbine on one’s property. Repeating and placing in bold type the **benefits of following the**

Enclosure (3) of Black Swamp Bird Observatory Comments on Wind Energy Guidelines

Guidelines would help to increase the chances to prevent environmental hazards and reduce liability risks for responsible wind project owners and operators.

Under the Migratory Bird Treaty Act, a person, association, partnership, or corporation who kills one migratory bird can become liable for a misdemeanor which could lead to a sentence of up to six months in a federal prison as well as criminal fines of up to \$15,000 per bird. Criminal liability can result regardless of fault, negligence, specific intent or awareness of the legal protections for the bird. Absent a permit, criminal liability under the MBTA can apply even if persons, associations, or business interests only engage in activities that might reasonably result in the death of a bird, even if they did not have any specific intent to harm it.

In criminal law, due diligence or due care is the only available defense to a crime that is one of strict liability. Once a criminal act is proven, the defendant must prove beyond a reasonable doubt that the defendant did everything possible to prevent the act from happening; it is not enough that the defendant took the normal standard of care in their industry – the defendant must show that they took every reasonable precaution. Gary M. Lawrence, *Due Diligence in Business Transactions*, Law Journal Seminars Press; Lslf edition (1994).

Executive Summary, p. 2

We have the following comments about the Service Wind Energy website mentioned for the first time in the final full paragraph of this page:

If USFWS is committed to providing the necessary resources to continuously update the Service Wind Energy website, even long after the Guidelines have been finalized and implemented, we fully support this initiative. Along these lines, we encourage the Service to coordinate with other federal agencies periodically so that references and links to the Service's Guidelines and latest information to support the Guidelines are updated as soon as possible. One reason for this concern: the USFWS Policy summary within other Federal agency policies and regulations on the Department of Energy's Federal Wind Siting Information Center website is extremely out of date. <http://www1.eere.energy.gov/windandhydro/federalwindsiting/policies_regulations.html> ("The U.S. Fish and Wildlife Service established a Wind Turbine Siting Working Group in 2002 to develop a set of comprehensive national guidelines for siting and constructing wind energy facilities. The purpose of the guidelines is to help protect wildlife resources, streamline the site selection and design process, and to assist in avoiding post-construction environmental concerns."). All of the opportunities to work with the Service to develop wind energy projects that minimize adverse effects to birds and other wildlife and their habitats may be missed by wind energy developers who make their initial contacts with an agency other than the Service if the federal government's information is not consistent.

We also suggest that the Service be consistent in these Guidelines when referencing its Wind Energy website. The Guidelines use different names for this website throughout the Guidelines.

Enclosure (3) of Black Swamp Bird Observatory Comments on Wind Energy Guidelines

While on the topic of the Service Wind Energy website, we would like to comment on appearance of unfair or undue influence over the agency's decision making process. The Service's decision to provide a link on a government website to the AENews Network makes one wonder if the Administration's policies and goals for renewable energy are unduly influencing the Congressional mandates for the Service to protect wildlife and their habitats. The AENews Network seems to provide a one-sided "debate" of all the benefits of wind energy but offers little to no balanced set of views to the problems and challenges with respect to birds, bats, and other wildlife and their habitats. If nothing else, the AENews Network – "a comprehensive set of online resources designed to raise public awareness and encourage debate about renewable energy technologies" – provides a forum that seems better suited for the Department of Energy than the Service. If the Service's Wind Energy website is to be used as a collection of information to supplement the Guidelines, it must present balanced, peer reviewed information.

Introduction, p. 3

Revise the first sentence of the second paragraph by removing the underlining of the word "voluntary."

Rationale: We object to the underlining used to emphasize the voluntary nature of these Guidelines. We recognize that the Service may be in an awkward position of implementing a set of voluntary standards that on their own may not be enforceable but highlighting the term "voluntary" without highlighting the benefits or incentives of following the Guidelines seems to signal a message to the wind power industry that USFWS does not have the authority to enforce anything in these Guidelines. We recommend the exact opposite approach: emphasizing the benefits or incentives for using the Guidelines as one clear and consistent way of showing that reasonably prudent evaluations and steps were taken to avoid or minimize incidental takes.

While the Guidelines are voluntary, USFWS states in the draft document that it will consider adherence and regular communication with USFWS as "evidence of due care with respect to avoiding, minimizing, and mitigating adverse impacts to species protected by the MBTA and BGEPA, and will take such adherence and communication fully into account when exercising its discretion with respect to any potential referral for prosecution related to death of or injury to any such species." In other words, those who choose not to follow voluntary Guidelines will do so at their own risk.

Introduction, p. 6

Revise the second full paragraph to appear as follows:

A benefit of following the approach recommended in these draft Guidelines is that in the event of later adverse environmental effects, the developer will be able to demonstrate that it adhered to these draft Guidelines, communicated with Service,

Enclosure (3) of Black Swamp Bird Observatory Comments on Wind Energy Guidelines

and considered the advice of the Service in project siting, construction and operation (see Authorities Under the Law below).

Rationale: The Guidelines should spell out in no uncertain terms that the unauthorized “taking” of just ONE protected bird – even if unintentional – can be a criminal violation. Making the Guidelines apply to any type of wind energy project will make it more clear to everyone that their well intended actions – including partnerships with wind energy developers – could unfortunately lead to heavy fines and possible jail time if their wind turbines kill or harm birds. We suggest rewording the Guidelines in certain parts like the passage above to re-emphasize the importance of working with the Service and interested stakeholders well before installing a wind turbine on one’s property. Repeating and placing in bold type the **benefits of following the Guidelines** would help to increase the chances to prevent environmental hazards and reduce liability risks for responsible wind project owners and operators.

Introduction, p. 12

Amend the second sentence of section C (Relationship to Other Guidelines) to read as follows (*new text italicized*):

“The Service intends that these draft Guidelines, when used in concert with the appropriate regulatory tools, will be the best practical approach for conservation of species of **Federal trust responsibility** *until future regulations determined to be necessary are implemented to address adverse effects from projects such as renewable energy facilities.*”

Rationale: We recommend increasing the emphasis on the fact that these Guidelines are part of a regulatory regime that provides a regulatory interpretation of a means of compliance with Service regulatory statutes. The Service should also make it very clear that if the approach envisioned by the Guidelines is not successful, regulations will have to be expedited in order to comply with relevant domestic and international laws and regulations.

Introduction, p. 13

In the third paragraph of Section C.1 (under the heading “*Consideration of draft Guidelines in MBTA and BGEPA Enforcement*”) use bold type for the term “**evidence of due care.**”

Rationale: We recommend defining the term “evidence of due care” to further highlight that while these Guidelines may be voluntary, a decision to not follow the Guidelines does not remove the obligation to comply with applicable federal laws, statutes, or regulations and does not relieve the burden to show how due care was exercised to avoid, minimize, and mitigate adverse effects to species protected under the MBTA and BGEPA.

Enclosure (3) of Black Swamp Bird Observatory Comments on Wind Energy Guidelines

Introduction, p. 15

We offer the following comment about Section C.4 (Federal projects):

USFWS should do more than make the Service available to assist other federal agencies and project proponents in integrating these Guidelines into the project design. The Service and the Department should coordinate more closely now with the Department of Energy and other federal agencies so the most current information about pre-construction evaluations to protect birds, bats, and other wildlife and their habitats is being referenced by those who are making their initial and primary contacts with other Federal agencies.

Rationale: Developers who are working first with other Federal agencies, such as the Department of Energy, may not be fully aware of the Service's Guidelines, and may take preliminary, difficult to reverse, actions by relying on other agency programmatic information, guidance, and regulations that may not be adequate or updated to address the issues considered in the Service's Guidelines. We are concerned that it will be very politically challenging to "uproot" a developer's planning and investment, and certainly any preliminary construction of a wind energy project, if actions are taken in connection with U.S. Government tax credits, subsidies, or other incentives. We believe this is another reason for promulgating binding regulations that would be incorporated into any future development plans. However, if the Service issues these Guidelines as voluntary standards, then it is extremely important for the Service and the Department to broadly disseminate the Guidelines so all stakeholders quickly become familiar with them, other agencies are including them in other government programs, and irresponsible developers cannot argue in good faith that took the actions they did because they were not aware of the Guidelines. *See also* BSBO Comments at p. 3 of this enclosure ("Executive Summary, p. 2") regarding the Department of Energy's Federal Wind Siting Information Center website that, when summarizing related policies and regulations for USFWS, still refers only to the 2002 Wind Turbine Siting Working Group.

Introduction, p. 15

In the second paragraph of Section D (Introduction to the Tiered Approach), we offer the following comments:

We would prefer to see the Service use many of the principles suggested by Defenders of Wildlife in their "Smart from the Start" approach for renewable energy projects or an approach that incorporated maps showing areas where wind energy development would pose a high risk to wildlife (e.g., Ohio's Avian Concern Zones) and therefore it would be very reasonable, and probably not wise from a business standpoint to invest time and monetary resources into even considering such a site. *See also* Kiesecker JM, Evans JS, Fargione J, Doherty K, Foresman KR, et al., *Win-Win for Wind and Wildlife: A Vision to Facilitate Sustainable Development*, PLoS ONE (www.plosone.org), Volume 6, Issue 4, p. e17566 (6 April 2011) ("the identification of large areas of disturbed lands that are suitable for wind energy development and the targeting of wind energy and transmission line construction in these areas offer the potential to dramatically reduce the wildlife impacts associated with increased wind energy generation.").

Enclosure (3) of Black Swamp Bird Observatory Comments on Wind Energy Guidelines

If such a “Smart from the Start” or “Avian Concern Zones” approach is not incorporated into the Guidelines, then we find many of the statements in this paragraph to be even more essential to the success of the approach taken by the Guidelines. In other words, if any of the following paragraph of Section D is revised, protection of high value sites could be eroded considerably:

Duration and intensity of “**monitoring**” and assessment and research plans should be tailored to the unique characteristics of each site and the corresponding potential for adverse effects to resources as determined through the tiered approach. In particular, the risk of adverse effects to resources tends to be a function of site location as well as the size of the project. A small project in a sensitive location may pose greater risk to resources than a larger site in a less sensitive location, and would therefore require more pre- and post-construction surveys, monitoring, and research than the larger site. This is why the tiered approach begins with an examination of the potential location of the project, not the size of the project.

Introduction, p. 16

We offer the following comments about the sentence on p. 16 (italicized here) which follows the list of three possible outcomes based on the analysis of information gathered (“*If data are insufficient during pre-construction tier assessments, the project proponent should collect additional data before starting construction.*”):

This particular guideline is essential to the success of the Guidelines, especially in or near migratory stopover habitats where no other wildlife regulations or permitting or NEPA-like environmental analysis would be required.

Rationale: Well before serious consideration of a possible project site, wind energy developers must talk with the Service, State wildlife agencies and interested organizations to make sure they are not relying on inaccurate, irrelevant, inadequate, or outdated information. We are very concerned that in the rush to develop wind energy in our country, irreversible decisions that will harm birds, wildlife and their habitats will be made after relying on insufficient data. For example, while some research has been done on the effects of wind turbines on migratory birds, most of these studies have been conducted in areas where birds are in active migration, flying at heights above the reach of the turbines. The impacts of turbines at or near stopover habitat have never been adequately studied. Stopover habitat changes that equation because birds are dropping in and taking off in these areas. In other words, just because an airplane’s cruising altitude may be 30,000 feet, no one would ever think to put wind turbines at the beginning or end of airport runways. Also, many of the birds traveling to and from migratory stopover habitats are arriving and departing before dawn or at or after dusk, when visibility is poor and obstacles present the greatest threat. Misplaced turbines at even one small stop along the migration route of millions of birds could lead to rapid declines in the populations of many species of songbirds, eagles, hawks, and other wildlife.

Enclosure (3) of Black Swamp Bird Observatory Comments on Wind Energy Guidelines

Introduction, p. 19

We offer the following comments to Section D.2 (Application of the Tiered Approach and Risk Assessment):

We share the Service's concern about limited data being used to make long-term assumptions on the effects of wind energy facilities on birds and other wildlife. Well before serious consideration of a possible project site, wind energy developers must talk with the Service, State wildlife agencies and interested organizations to make sure they are not relying on inaccurate, irrelevant, inadequate, or outdated information. We also agree that when uncertainty exists, the burden of proof must fall on those taking the actions having the risk of causing negative effects to species or habitats.

Rationale: As more companies and individuals develop and use wind energy in the U.S., unless strong pre-construction evaluation standards are in place, irreversible decisions that will harm birds, wildlife and their habitats will be made after relying on insufficient data. As mentioned, some research has been done on the effects of wind turbines on migratory birds but most of these studies have been conducted in areas where birds are in active migration, flying at heights above the reach of the turbines. The impacts of turbines at or near stopover habitat have never been adequately studied. Misplaced turbines at even one small stop along the migration route of millions of birds could lead to rapid declines in the populations of many species of songbirds, eagles, hawks, and other wildlife.

Chapter One (The Tiered Approach for Fish and Wildlife Assessment and Siting Decisions)

We have the following comment regarding the introductory paragraph on p. 23, particularly the second sentence (“Additional sections outlining BMPs during site construction, “**retrofitting**,” “**repowering**,” and decommissioning phases of a project are included in Appendix D and on the Service's Wind Web site.”):

A better explanation of how Best Management Practices (BMPs) interface with the Tiered Approach is absolutely necessary.

Rationale: Any ambiguity in the Guidelines will set the stage for contentious litigation or fatally flawed enforcement cases – not to mention unnecessary takes of birds, bats, and wildlife by less than responsible wind energy developers. Because the BMPs are in a stand-alone document (Appendix B [not D]), one could interpret that Appendix B is the most important document to follow in the Guidelines. The Service should make it clear that following only the BMPs and nothing else in the entire set of Guidelines would be risky business because following only the BMPs would almost never be enough to show evidence of due diligence or due care. In other words, if a take occurs, developers must be able to show that they did everything possible to prevent the act from happening and that they took every reasonable precaution (i.e., completely followed the Guidelines or took many similar actions to address all of the issues and actions discussed in the Guidelines).

Enclosure (3) of Black Swamp Bird Observatory Comments on Wind Energy Guidelines

Revise the third paragraph on page 23 to read as follows (*new text italicized*):

The decision to proceed to the next tier is made by the developer in coordination with the Service. The decision is based on whether all questions identified in the tier have been adequately answered and using methods appropriate for the site selected and the risk posed to affected species and their habitats. Answers indicating little or no risk for all questions in a tier may lead the developer to conclude that the tiered approach may end at a particular tier. Developers are encouraged to coordinate with the Service prior to the decision to end the process at that tier. *Decisions to not follow coordinated pre-construction evaluations may become the single most important piece of evidence to support prosecutions of persons, associations, partnerships, or corporations who did not take reasonable steps to avoid killing or harming of migratory birds as the burden of proof that the decisions and actions taken were not harmful to species or habitat will be solely on the developer(s).*

Rationale: The Guidelines offer a regulatory interpretation of ways to comply with the spirit and intent of the MBTA. If developers decide to not coordinate decisions with the Service, the same federal agency charged with carrying out the MBTA, then those developers have decided to accept the risk that in the event of an unintentional taking, the Service might consider any alternative pre-construction actions to have been reasonably adequate to avoid killing or harming migratory birds and their habitats.

Chapter Two (Tier 2)

Revise paragraph A.2.b on page 28 to read as follows (*new text italicized*):

The developer should contact federal, state, tribal, and local agencies that have jurisdiction or management authority over the project or relevant scientific information about the potentially affected resources. In addition, because conservation organizations and local groups are often valuable sources of relevant local environmental information, it is recommended that developers contact conservation organizations, even if confidentiality concerns preclude the developer from identifying specific project location information at this stage. These contacts also provide an opportunity to identify other potential issues and data not already known. *Maintaining open lines of communication with the Service will help to ensure that all relevant stakeholders are identified and involved early in the process.*

Rationale: Many conservation organizations, like Black Swamp Bird Observatory, do have valuable sources of locally relevant environmental information. By continually communicating with the Service, the developer would give the Service the chance to involve any and all relevant stakeholders in a regional or local area of consideration. Doing so earlier in the pre-construction process provides an opportunity to foster relationships of trust and collaboration, which will yield better decisions for wind energy development and for birds, wildlife and their habitats.

Enclosure (3) of Black Swamp Bird Observatory Comments on Wind Energy Guidelines

Chapter Three (Tier Three)

We offer the following comments regarding Section A.2.a (General Recommendations for Pre-construction Monitoring) at pages 33 and 34:

- We recommend detailed literature searches and assessments of site information be started in Tier 2.
- We assume that rapid assessments would only be used after Tier 1 and Tier 2 evaluations and discussions with the Service have determined that the project area is one of low risk to birds, bats, and other wildlife and their habitat. Nonetheless, we recommend that the Guidelines include a better explanation of what is meant by Rapid Assessment Methodology, especially if it involves the BMPs.
- Risk Assessment should begin during Tier 2 and continue in Tier 3.

Rationale:

- Starting detailed literature searches and assessments of site information in Tier 2 would make the most efficient use of time and money before investing too much in an area that is determined to be of high risk to birds and other wildlife and their habitat.
- Rapid Assessment Methodology may make things easier for the developer and perhaps the Service but it has the potential to make the “playing field” extremely unlevel. Using a Rapid Assessment Methodology (RAM) may have the unintended effect of watering down the standards of due care set forth in the Guidelines. Inconsistent decisions of when it is appropriate to use a RAM will benefit some developers to the detriment of others – and to the detriment of birds, bats, and other wildlife and their habitat. If Rapid Assessment Methodology leads to something like “only follow the Best Management Practices,” then an unfortunate loophole to the Guidelines exists. The Service should make it clear that following only the BMPs and nothing else in the entire set of Guidelines would be risky business because following only the BMPs would almost never be enough to show evidence of due care or due diligence, even under an agreed upon Rapid Assessment Methodology. In other words, if a take occurs, developers must be able to show that they did everything possible to prevent the act from happening and that they took every reasonable precaution (i.e., completely followed the Guidelines or took many similar actions to address all of the issues and actions discussed in the Guidelines).
- Detailed literature searches and reviews of existing data could begin during Tier 2 and assessments of available site information and new data could continue at Tier 3.

Enclosure (3) of Black Swamp Bird Observatory Comments on Wind Energy Guidelines

Revise Section A.2.b (Assessing Effects to Species) at page 34 to read as follows (*new text italicized*):

Federal, state, local, and tribal agencies often require specific protocols be followed when protected species may be present in an area of influence. It should be noted, however, that for many protected species, there are no specific survey protocols, or only assumptions that the generalized protocols are sufficient. When such established protocols are not available, or not applicable, the developer will communicate with federal or state natural resource agencies or other credible experts on project-specific conditions, and design studies that collect sufficient data to answer Tier 3 questions. In general, surveys *must* sample the potential sites and applicable area of influence during seasons when species are most likely present. Often, methods and protocols will include an estimate of relative abundance. Presence/absence surveys should be done following a probabilistic sampling protocol to allow statistical extrapolation to the area and time of interest, *unless the entire area is surveyed*.

Rationale: If samples are not conducted at the right time, the developer and the Service will never have an accurate risk assessment. E.g., if one were to sample the Lake Erie Marsh Region in January or February, one may never properly account for federally endangered species such as Kirtland's Warbler and Piping Plover.

Appendix A: Glossary

Revise the definition of “**Take**” at page A6 to read as follows (*new text italicized*):

The Migratory Bird Treaty Act (MBTA) (16 U.S.C. 703-712), prohibits the taking of any migratory bird or any part, nest, or egg, except as permitted by regulation. In 1972, the scope of the Act was expanded to cover bald eagles and other raptors. Implementing regulations define “take” under the MBTA as “pursue, hunt, shoot, wound, kill, trap, capture, possess, or collect *or attempt to pursue, hunt, shoot, wound, kill, trap, capture, or collect.*”

Rationale: The definition in the draft Guidelines omitted the “attempt” elements of the offense. See 50 CFR §10.12.
