THE WILDERNESS SOCIETY

Wind Energy Proposed Directives
Attention: Director, Lands Staff
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USDA Forest Service
1400 Independence Avenue, SW
Mailstop 1124
Washington, DC 20250
http://www.regulations.gov

facsimile 202-205-1604

January 23, 2008

Dear Forest Service,

These comments are submitted in response to the Federal Register Notice for the Wind Energy, Proposed Forest Service Directives. Federal Register, Volume 72, No. 184, pages 54233-54239, commensurate with the Notice of Extension of Public Comment for the Forest Service Proposed Wind Energy Directives. Federal Register, Volume 72, No. 227, pages 66130-66131. The Wilderness Society and the undersigned organizations have always had an interest in both the management of the National Forests and Grasslands, and in the rules, regulations and policies guiding said management. We welcome this opportunity to comment.

The generation of energy from renewable sources is very important to our nation's future, and we consider the formulation of policy and guidance for renewable energy use of national forest system (NFS) lands a positive step. However, the Forest Service should ensure that it develops policies that ensure renewable energy siting and generation are done right. The agency should be setting in place policies that reduce the potential for conflict and identify those lands most suitable for development. We have serious concerns about the approach being taken by the Forest Service, especially given how other federal land management agencies have handled this task. We also believe that a number of Forest Service "special areas" in addition to Wilderness areas should be off-limits to wind energy development. Our concerns are described in detail below.

An Environmental Impact Statement Is Required For These Proposed Directives

We believe the Forest Service has failed to follow proper procedure in proposing these directives without accompanying analysis under the National Environmental Policy Act (NEPA) in the form of a programmatic environmental impact statement (PEIS). The formulation of a wind energy program and attendant policies and procedures clearly fits the definition of a major federal action. Further, other federal land and water management agencies when faced with a similar task and answering to the same suite of federal laws chose to prepare programmatic EISs. The Forest Service has failed to present any information or analysis as to why it shouldn't have followed the same path.

Major Federal Action

This proposal meets the definition of major federal action, defined in part as:

> "Major Federal action" includes actions with effects that may be major and which are potentially subject to Federal control and responsibility
>
> (a) Actions include new and continuing activities, including projects and programs entirely or partly financed, regulated, or approved by Federal agencies; new or revised agency rules, regulations, plans, policies or procedures, and legislative proposals…
>
> (b) Federal actions tend to fall within one of the following categories:
>
> (1) Adoption of official policy, such as rules, regulations, and interpretations adopted pursuant to the Administrative Procedures Act….
>
> 40 CFR 1508.18

Clearly, the proposal at hand constitutes both new and revised agency rules. Council on Environmental Quality (CEQ) regulations further state,

> Environmental impact statements may be prepared, and are sometimes required, for broad Federal actions <u>such as the adoption of new agency programs or regulations</u> (§ 1508.18). Agencies shall prepare statements on broad actions so that they are relevant to policy and are timed to coincide with meaningful points in agency planning and decisionmaking.
>
> 40 CFR 1502.4(b); emphasis added

CEQ provides further direction in its 40 Questions:

> 24a. **Environmental Impact Statements on Policies, Plans or Programs.** When are EISs required on policies, plans or programs?
>
> A. An EIS must be prepared if an agency proposes to implement a specific policy, to adopt a plan for a group of related actions, or to implement a specific statutory program or executive directive. Section 1508.18. In addition, the adoption of official policy in the form of rules, regulations and interpretations pursuant to the Administrative Procedure Act, treaties, conventions, or other formal documents establishing governmental or agency policy which will substantially alter agency programs, could require an EIS. Section 1508.18. In all cases, the policy, plan, or program must have the potential for significantly affecting the quality of the human environment in order to require an EIS. It should be noted that a proposal "may exist in fact as well as by agency declaration that one exists." Section 1508.23.

The proposal at hand does have the potential to significantly affect the quality of the human environment and as such should be analyzed in an EIS. The proposed directives would introduce a whole new use to NFS lands, which in most cases will limit public access to public lands once permits are issued. The attendant infrastructure needed to utilize the power generated in the form of transmission lines, corridors and roads are also likely to have a significant effect. In addition, this use could have a significant effect on other uses of NFS lands, including other commercial activities.

The Forest Service in making its case that analysis under NEPA is not needed stated,

> Section 31.12, paragraph 2, of FSH 1909.15 (67 FR 54622, August 23, 2002) excludes from documentation in an environmental assessment or environmental impact statement ``rules, regulations, or policies to establish Service-wide administrative procedures, program processes, or instructions." The agency has concluded that the proposed special use and wildlife monitoring directives fall within this category of actions and that no extraordinary circumstances exist which would require preparation of an environmental assessment or environmental impact statement.
>
> Federal Register, Volume 72, No. 184, page 54238

The agency has used this same argument with a number of recent programs, plans and policies. In the case of the National Forest Management Act regulations the court has responded. The requirement for an EIS to analyze the effects of these proposed directives is provided by the recent decision in Citizens for Better Forestry v. U.S. Dept. of Agriculture, 481 F.Supp.2d 1059 (N.D. Cal., 2007).

The District Court stated:

> NEPA requires *some* type of procedural due diligence - even in cases involving broad, programmatic changes. … NEPA does indeed contemplate preparation of EAs and EISs in the case of programmatic rules and changes.
>
> Citizens for Better Forestry, 481 F.Supp.2d at 1085 (emphasis in original).

The agency claims that the lack of NEPA analysis at the programmatic scale will be addressed on a project-by-project basis. However, this deferral of analysis means that consideration of the cumulative impacts of the wind energy program will not be conducted. The Forest Service's approach is a textbook example of deferring consideration and attempting to minimize environmental consequences (and avoid preparation of a comprehensive EIS) by segmenting proposed and reasonably foreseeable development into smaller parts in violation of NEPA. As the Supreme Court has stated, where several proposals "will have cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, their environmental consequences must be considered together." Kleppe v. Sierra Club, 427 U.S. 390, 410 (U.S. 1976). "To permit noncomprehensive consideration of a project divisible into smaller parts, each of which taken alone does not have a significant impact but which taken as a whole has cumulative significant impact, would provide a clear loophole to NEPA." Scientists' Inst. for Pub. Information, Inc. v. AEC, 156 U.S. App. D.C. 395, 481 F.2d 1079, 1086 n.29, 1086-89 (D.C.Cir. 1973) (Holding that an EIS is required for an overall project where individual actions are related logically or geographically). "Segmentation of a large or cumulative project into smaller components in order to avoid designating the project a major federal action" violates NEPA. Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor, 619 F.2d 231, 240 (3d Cir. 1980). NEPA requires that cumulative effects analysis be conducted.

The courts' direction applies here as well; the broad programmatic change of introducing commercial use of NFS lands for wind energy facility development and power generation demands preparation of an EIS with complete cumulative effects analysis.

Other Agency Actions on Wind Energy Development

Two other land and water management agencies have recently dealt with the introduction of similar programs. Both the Bureau of Land Management (BLM) and the Minerals Management Service (MMS) have begun to analyze the effects of renewable energy development on the lands and waters over which they have jurisdiction. In both cases, each agency prepared a PEIS to guide and analyze agency policy on wind energy development.

Bureau of Land Management (BLM)

The BLM was quite clear about the need for an EIS, stating on its web site,

> Why the Wind Energy Development Programmatic EIS Is Needed
> ***The Wind Energy Development Programmatic EIS is required to maintain compliance with the National Environmental Policy Act of 1969, which specifies when EIS's must be prepared.***
>
> Federal laws and regulations require the federal government to evaluate the effects of its actions on the environment and to consider alternative courses of action. The National Environmental Policy Act of 1969 (NEPA) specifies when an environmental impact statement (EIS) must be prepared. NEPA requires that an EIS be prepared for **major federal actions** with potential for significant impact on the quality of the human environment. The BLM has determined that amending land use plans and the establishment of a Wind Energy Development Program would be major federal actions as defined by the NEPA, and, thus, the BLM has prepared an EIS.
>
> See http://windeis.anl.gov/eis/why/index.cfm (emphasis in original)

The agency also discussed the need for a programmatic EIS as follows,

> Why a Programmatic EIS Is Needed
> A Programmatic EIS evaluates the environmental impacts of broad agency actions, such as the setting of national policies or the development of programs. Because BLM's efforts to evaluate additional wind energy development on public lands include the amendment of BLM land use plans and establishment of a Wind Energy Development Program, a Programmatic EIS is appropriate.
>
> See http://windeis.anl.gov/eis/why/index.cfm

The Forest Service is also clearly undertaking a major federal action in establishing a wind energy development program.

Minerals Management Service (MMS)

The Minerals Management Service (MMS) of the Department of the Interior has also begun to examine the effects of authorizing alternative energy uses, including wind energy, of the Outer Continental Shelf. The agency states on its web site,

> The United States Department of the Interior, **Minerals Management Service** (MMS), has prepared a final programmatic EIS in support of the establishment of a program for authorizing **alternative energy and alternate use** (AEAU) activities on the **Outer**

> **Continental Shelf** (OCS), as authorized by Section 388 of the Energy Policy Act of 2005 (EPAct), and codified in subsection 8(p) of the Outer Continental Shelf Lands Act (OCSLA). The final programmatic EIS examines the potential **environmental effects** of the program on the OCS and identifies policies and best management practices that may be adopted for the program. Under the program, MMS has jurisdiction over AEAU projects on the OCS including, but not limited to: **offshore wind** energy, **wave** energy, **ocean current** energy, **offshore solar** energy, and **hydrogen generation**. MMS will also have jurisdiction over other projects that make **alternate use** of existing oil and natural gas platforms in Federal waters on the OCS.
> The programmatic EIS evaluates the issues associated with AEAU project development, including all foreseeable potential **monitoring, testing, commercial development, operations, and decommissioning activities** in Federal waters on the OCS.
>
> See http://www.ocsenergy.anl.gov/ (emphasis in original)

The Forest Service is also proposing procedures and policies to guide monitoring, testing, commercial development, operations, and decommissioning activities for wind energy development on all acres of the national forest system. The Forest Service, BLM and MMS are all legally required to comply with the same suite of laws in this case. Yet the Forest Service has not conducted environmental analysis of the effects of their wind energy program, not complied with the requirements of NEPA and failed to provide sufficient rationale for its failure to do so.

Wind energy projects should be treated the same as any other proposed use of federal lands, subject to thorough, programmatic and site-specific analysis, and public participation. All laws and regulations applicable to other projects on the federal lands must be complied with, including the National Environmental Policy Act (NEPA), the National Forest Management Act (NFMA), the Federal Land Policy and Management Act (FLPMA), the Endangered Species Act (ESA), the Migratory Bird Treaty Act (MBTA), the National Historic Preservation Act (NHPA) and other federal laws. The first steps in that compliance should be completion of a programmatic EIS and, as discussed below, formal consultation with the US Fish and Wildlife Service.

ESA Consultation with the US Fish and Wildlife Service (FWS) is Required

The Forest Service included a regulatory findings section in the Federal Register notice, but failed to mention (or comply with) one of its most common regulatory compliance categories: compliance with the Endangered Species Act (ESA).

Congress enacted the Endangered Species Act (ESA) as "a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." 16 U.S.C. § 1531(b). As the Supreme Court observed, the statute "afford[s] endangered species the highest of priorities." TVA v. Hill, 437 U.S. 153, 194 (1978). To achieve its objectives, Congress

directed FWS to list species that are “threatened” or “endangered,” as defined by the ESA. 16 U.S.C. § 1533; § 1532(6) & (20).

Once a species is listed, Section 7 of the ESA mandates that every federal agency “consult” with FWS when taking any action that "may affect" listed species. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a); Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv., 422 F.3d 782, 790 (9th Cir. 2005). The purpose of the Section 7 consultation process is to insure that no agency actions “jeopardize the continued existence” of a listed species. Id. To facilitate the consultation process, the “action agency” prepares a “biological assessment,” (BA) which identifies the listed species in the action area and evaluates the proposed action's effect on the species. Id. § 1536(c); 50 C.F.R. §§ 402.02, 402.12. Through a biological assessment, the agency determines whether formal or informal consultation is necessary. 50 C.F.R. § 402.13(a). When formal consultation is necessary, FWS prepares a “biological opinion” (BO) that determines whether the agency’s action will result in jeopardy to the species. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(g). If there is jeopardy, FWS sets for “reasonable and prudent alternatives” aimed at avoiding jeopardy. 16 U.S.C. § 1536(b)(3)(A). If there is no jeopardy, FWS identifies the reasonable and prudent mitigation measures. Id. § 1536(b)(4).

The ESA defines agency action broadly. 16 U.S.C. § 1536(a)(2); Lane County Audubon Soc’y v. Jamison, 958 F.2d 290, 294 (9th Cir. 1992). It includes “all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies.” 50 C.F.R. § 402.02 (emphasis added). Agency actions include those “actions directly or indirectly causing modifications to the land, water, or air.” Id. § 402.02. Setting direction to guide special use authorization of (a new) use of NFS lands constitutes agency action within the meaning of the ESA.

By setting this direction for special use authorization without taking steps to consider potential (cumulative and) adverse effects to protected species and to incorporate appropriate limitations on potential projects, the Forest Service is failing to comply with the mandates of the Endangered Species Act to ensure that its actions are “not likely to jeopardize the continued existence of any endangered or threatened species.” 16 U.S.C. § 1536(a)(2). In fact, authorization of wind energy facilities is likely to jeopardize the continued existing of many endangered or threatened species.

Moreover, all federal agencies are obligated to conserve listed species by "carrying out programs for the conservation of endangered species and threatened species." 16 U.S.C. § 1536(a)(1). Under the ESA, "conserve" is defined as recovering a species. Therefore, not only is the Forest Service obligated to not jeopardize the survival and recovery of listed species, but the agency is required to take steps within its purview to recover these species. 16 U.S.C. § 1532(3) (definition of "conserve").

The Forest Service must engage in the Section 7 consultation process directed by the ESA for endangered and threatened species prior to setting policy and direction for NFS lands. In order

to comply with the ESA, the Forest Service must prepare a biological assessment, engage in formal consultation with the U.S. Fish & Wildlife Service, and identify and incorporate appropriate alternatives and/or mitigation measures. *See*, 16 U.S.C. §§ 1536(c)(1) and 1536(a)(2); 50 C.F.R. §§ 402.12(k)(1) and 402.14(a). The agency also must carry out programs to conserve listed species in the action area. *See* 16 U.S.C. § 1536(a)(1).

The BLM and the MMS both prepared biological assessments for their wind energy programs, entered into formal consultation with the FWS and received biological opinions. The Forest Service must do the same.

Compliance with the National Historic Preservation Act (NHPA) is Required

Section 106 of the National Historic Preservation Act of 1966 ("NHPA") (16 U.S.C. §§ 470 et seq.) requires federal agencies to take into account the effects of their undertakings on historic properties. 36 CFR § 800.1. The definition of "undertaking" is as follows:

> undertaking means a **project, activity, or program** funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and **those requiring a Federal permit, license or approval**.
>
> 36 CFR § 800.16(y) (emphasis added).

The actions of the Forest Service in adding a new use to the NFS and setting direction for the Wind Energy Special Uses program certainly fit within this definition. In particular, the "Section 106" (16 U.S.C. § 470f) review process obligates the Forest Service to consider the effects of management actions on historic and cultural resources listed or eligible for inclusion under NHPA. Further, the NHPA stipulates that consultation among agency official(s) and other parties with an interest in the effects of the undertaking on historic properties commence at the earliest stages of planning. Clearly, Section 106 consultation must be conducted before the promulgation of these directives is complete.

To satisfy the Section 106 compliance requirement, the Responsible Agency Official must consult with the State Historic Preservation Officer(s) (SHPO), and appropriate Tribes and/or Tribal Historic Preservation Officer(s) (THPO). The Forest Service process for setting direction as currently being conducted also has the effect of denying SHPOs and THPOs their required right to consultation; special use authorization direction for wind energy development would be set in place before the required consultation process even began. This must be rectified. Additionally, Section 106 requires the Forest Service to give the Advisory Council on Historic Preservation (ACHP) an opportunity to comment before the Forest Service takes action. The ACHP criteria for Council involvement as defined in Appendix A to Part 800 (36 CFR § 800) make it almost certain the Council will choose to participate in consultation.

Beyond the NHPA compliance and consultation requirements, the Responsible Agency Official must consult with, invite, and offer opportunities for federally recognized Indian Tribes to collaborate and participate in the planning process. This is to satisfy the necessary Government-to-Government consultation with Tribes stipulated under Executive Order 13175.

Before proceeding with finalizing policy on wind energy development, the Forest Service must complete the Section 106 consultation process. The notice and comment function of this obligation is usually conducted concurrent with the notice and comment provisions of NEPA. As we recommend NEPA analysis elsewhere in these comments, Section 106 requirements could and should be fulfilled in a joint process.

Special Uses Authorization: Uses of National Forest System Land

A longstanding tenet of Forest Service policy on uses of national forest system lands has been that the agency does not compete with private industry and does not issue permits or allow uses that could be offered or take place on private lands. The Forest Service created a brochure to explain the special use authorization process to potential applicants that makes this clear:

> "The Agency's special-uses program authorizes uses on NFS lands that provide a benefit to the general public and protect public and natural resources values…The Forest Service carefully reviews each application to determine how the request affects the public's use of NFS land. Normally, NFS land is not made available if the overall needs of the individual or business can be met on nonfederal lands.
>
> Application Process:
> Your request must not require exclusive or perpetual use or occupancy.
>
> Alternatives:
> You must first consider using nonfederal land. Lower costs or fewer restrictions are not adequate reasons for use of NFS lands. Provide alternative locations for the proposal in your application."
>
> *"Obtaining a Special-Use Authorization with the Forest Service, The Application Process"*, U.S. Department of Agriculture, Forest Service (no date)

We are dismayed to see the Forest Service seemingly reversing this policy, particularly when private land development has many advantages over public land development. Private land development brings money to local landowners and adds more money to local economies in the form of taxes and local expenditures. Public access is not affected on private land and many of the environmental considerations are not at issue as well.

A clear and compelling purpose and need for any project needs to be made under NEPA at the start of the environmental analysis process. We will be interested to see how a compelling case can be made for the use of NFS lands over private lands for wind energy development. Please also explain the seeming change in this long-standing Forest Service special uses policy.

NEPA, Cumulative Effects and the Proposed Wind Energy Program

In ignoring the requirements of NEPA and failing to prepare a PEIS, the Forest Service has not analyzed or disclosed the effects of the cumulative impacts of numerous current Forest Service proposals in combination with the proposed wind energy program. The additive impact of these other agency proposals to the proposed wind energy program would serve to undermine the analysis of effects, the determination of significance under NEPA and the disclosure of said effects and significance to the public at both the programmatic and site-specific levels.

The proposed wind energy Handbook and Manual additions contain little in the way of specific NEPA requirements. However, the Forest Service has proposed significant changes to its responsibilities under NEPA to be codified in the Code of Federal Regulations. These changes (and their effects related to the wind energy program) include:

"Minor" Special Uses

Under proposed 36 CFR 220.6(e)(3), the approval, modification, and continuation of minor special uses using no more than five contiguous acres of land would qualify for a categorical exclusion (CE) from analysis under NEPA. In the case of wind energy development, NEPA analysis for Minimum Area Permits for site testing and feasibility would qualify for a CE. Given the new use (wind energy development) being introduced to NFS lands we don't believe this low level of analysis and public disclosure is warranted. However, under the proposed regulations it would be allowed.

Range of Alternatives

The proposed NEPA regulations state that EAs and EISs document alternatives but "no specific number of alternatives is required or prescribed." § 220.5(e) (re EISs); § 220.7(b)(2) (re EAs). Existing directives, on the other hand, provide that all environmental analyses: "[c]onsider a full range of reasonable alternatives. . ." (FSH 1909.15, Ch. 12.33); "develop and consider all reasonable alternatives…" (FSH 1909.15, Ch. 14); "develop other alternatives fully and impartially. Ensure that the range of alternatives does not prematurely foreclose options that might protect, restore, and enhance the environment." FSH 1909.15, Ch. 14.2. This change suggests the agency is moving towards a more limited approach to considering alternatives, which we believe could be impermissible under NEPA. In the case of wind energy development, it could allow the agency to examine only the proposed permit area and the no action alternative and ignore other reasonable alternatives.

Alternatives in EAs and the No Action Alternative

The proposed NEPA regulation § 220.7(2)(i), regarding EAs, states that "[w]hen there are no unresolved conflicts concerning alternative uses of available resources (NEPA section 102(2)(E)), the EA need only analyze the proposed action and proceed without consideration of additional alternatives." A great deal of discretion is given to the authorizing official to "consider" various effects (see below) in determining whether, where and how to grant wind energy permits and facility construction. We hope that we would not see this NEPA provision used unnecessarily in introducing this new use to the national forest system.

A Narrowing of the Definition of Reasonably Foreseeable Future Actions

The Forest Service is proposing to redefine the term "reasonably foreseeable future actions". The proposed definition reads, "[t]hose activities not yet undertaken, for which there are existing decisions, funding, or identified proposals." § 220.3. This definition is far too narrow to encompass the plain language meaning of reasonably foreseeable future actions. It could eliminate from consideration a host of activities on national forest system lands which are clearly reasonably foreseeable. First of all, the phrase "not yet undertaken" would seem to eliminate from evaluation those effects that have taken place in the past and will continue into the future. Continue grazing on an allotment and ongoing wind energy development are but two types of these activities. Secondly, actions such as illegal ORV incursions onto NFS lands and incursion of new types of wildlife and plants (especially invasives) into a previously unroaded area following road or transmission corridor construction are reasonably foreseeable future actions that will occur even in the absence of "existing decisions, funding, or identified proposals." These actions will have effects and must be evaluated.

The proposed language also suggests an improper focus on activities taking place primarily on NFS lands and fails to mention other agencies' actions or activities on private, state, tribal or other federal land, as set forth in the CEQ definition. The potential for ignoring activities on private lands is especially troubling given the miles of boundary line NFS lands share with private land and the increasing effects of private land use, such as primary and secondary housing developments and resort communities. Ignoring activities on adjacent state, other federal or tribal lands is also a problem as it may fail to identify potential sources of conflict or alternatively, potential opportunities to effectively develop and site wind energy facilities.

Conversion of Permits to Easements or Leases

Proposed 36 CFR 220.6(d)(10)(ii) proposes to allow conversion of existing special use authorizations to new types of special use authorizations without need of a project or case file or decision memo (or by extension, public notification). The example given is converting a permit to a lease or easement. Special use permits, leases and easements are all very different legal instruments. We do not believe they are interchangeable. In the case of wind energy facilities

this could allow the conversion of a 30-year wind energy facility permit to an easement or lease which often have longer time limits or are sometimes granted in perpetuity. This could set a dangerous precedent in permanently removing public access to NFS lands without any public notice. The Forest Service should stipulate that should this proposed regulation be enacted that it will not apply to wind energy facilities and permits.

Appropriate Siting for Wind Energy Facilities

When the Forest Service considers use of NFS lands for potential wind energy facility development Wilderness Areas should not be the only areas where testing and facility development are not allowed. The following areas should also be off-limits to wind energy development:

- Wilderness Study Areas (WSAs) and proposed Wilderness Areas (not just legislatively designated WSAs)
- National Recreation Areas (NRAs); National Conservation Areas (NCAs); and National Scenic Areas (NSAs)
- Research Natural Areas (RNAs) and candidate RNAs
- National Historic and National Scenic Trails
- National Register of Historic Places (NRHP) listed and eligible sites; important paleontological sites
- Native American sacred sites
- National Wild, Scenic, and Recreational Rivers, study rivers and segments, and eligible rivers and segments
- Roadless Areas
- TWS, et al "Mountain Treasures" areas identified on eastern national forests
- Statutorily protected areas such as the Legislated Land Use Designation II (LUD II) areas on the Tongass National Forest
- Threatened, endangered and sensitive species habitat, as well as critical cores and linkages for wildlife habitat, bird migration corridors and important foraging areas
- Citizen Proposed Wilderness Areas
- Other lands with wilderness characteristics

As proposed, the effects of wind energy development on many of the special land types listed above are to be "considered" but not prohibited. We believe this direction should be changed to make these areas off-limits.

Agency Discretion

The proposed Forest Service Handbook and Manual changes provide the authorizing official with a great deal of discretion in implementing wind energy development on NFS lands. The language proposed amounts to little more than guidance with little in the way of standards or strict requirements. Words such as "consider", (e.g. "Consider the effects of wind energy uses on public access via roads, trails and waterways. Proposed FSH 2709.11, Ch 72.31d.), unaccompanied by any other qualifying phrases set a low bar for compliance. If the authorizing official says that he or she considered any of the listed items, the extent of that consideration and its effects on the ultimate decision do not have to be described or disclosed. We have seen how the term "consider" is used by responsible officials in determining the level and quality of economic analysis at the project level on a number of forests and grasslands. The use of the phrase here gives us pause. More detailed direction to the field to flesh out the use of the term "consider" and requirements for disclosure of the steps and analysis taken in "considering" various aspects of the effects of proposals would be useful and might serve to allay our concerns.

Best Management Practices and Minimum Standards for Mitigation

The directives contain little if any language on best management practices (BMPs). The Forest Service should take a page from the BLM to address this issue. The BLM's Wind Energy Development Program and Associated Land Use Plan Amendments established policies and best management practices (BMPs) for the administration of wind energy development activities and established minimum requirements for mitigation measures. These apply uniformly to all future wind projects on BLM land and must be incorporated by project proponents in plans of development. The policies and BMPs of the Wind Energy Development Program provide a baseline set of stipulations, much like Forest Service standards; additional stipulations would be developed, as needed, to address site-specific issues and concerns, on the basis of relevant land use plan requirements, other BLM mitigation guidance, and mitigation measures identified and discussed in the BLM's PEIS. The Forest Service should also develop BMPs and standards as part of developing a PEIS on wind energy development.

Economic Analysis and Regulatory Certifications

FSH 2709.11, Ch 72.31c details community and tourism considerations that should be examined when screening wind energy special use proposals:

1. Where possible, and to the extent practicable, manage wind energy uses to protect community tourism values associated with natural scenery, recreation settings, wildlife viewing, fishing, and significant cultural resources.
2. Consider the effects of wind energy use on tourism values and communities including opportunities to enhance tourism.

The phrases "where possible, and to the extent practicable" and "consider" make these criteria closer to guidelines than standards. The extent to which these community values would be protected is unclear. In addition, FSH 2709.11 Ch 72.3 makes clear that "the direction on siting considerations (sec 72.31) applies only to screening of wind energy special use proposals, not to processing of wind energy special use applications (sec 73)." (emphasis added) The meaning of this section is unclear. The FSH section should be revised to more clearly explain what is meant by this sentence.

The Federal Register notice in its Regulatory Certifications / Regulatory Impact section, discloses the following:

> Moreover, the proposed directives have been considered in light of the Regulatory Flexibility Act (5 U.S.C. 602 et seq.). It has been determined that the proposed directives would not have a significant economic impact on a substantial number of small entities as defined by the act because the proposed directives would not impose record-keeping requirements on them; would not affect their competitive position in relation to large entities; and would not affect their cash flow, liquidity, or ability to remain in the market. The proposed directives would have no direct effect on small businesses. The proposed directives merely clarify existing requirements that apply to processing special use proposals and applications and issuing permits for wind energy uses.
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> Federal Register, Volume 72, No. 184, page 54238

We would like a copy of the determination and analysis for this finding. Please explain how the proposed directives would have no direct effect on small businesses. Secondly, we question the statement (also on page 54238 of the Federal Register Notice) that "the proposed directives merely clarify existing requirements that apply to processing special use proposals and applications and issuing permits for wind energy uses." Wind energy development is an entirely new use of NFS lands. A wind energy facility has never been built on any national forest or grassland. FSH 2709.11, Chapter 70 is an entirely new chapter in the FSH Special Uses Handbook written to address this new use of the national forest system. FSH 2609.13, Chapter 80 is an entirely new chapter in the FSH Wildlife Monitoring Handbook meant to address monitoring at wind energy sites. It is our understanding that the direction contained in this Federal Register notice was written to provide guidance previously lacking regarding wind energy facilities. How then can this be a clarification of existing requirements?

Monitoring and Permit Administration of Wind Energy Facilities

First of all, we believe every wind energy facility and permit (including minimum area permits) should require a monitoring plan. There shouldn't be any question as to whether a monitoring plan is needed or not. Wind energy development is a new use of NFS lands and as such little in the way of monitoring data exists. Wind energy facility monitoring data is also notoriously hard to obtain for wind energy facilities on private land. Therefore, the agency should take advantage of every opportunity to gain the valuable data that will allow it to accurately assess the impacts of wind energy development.

Secondly, any wind energy facility on public land is going to involve some loss of public value if for no other reason than loss of access once test towers and longer-term facilities are built. Companies will want to protect their assets, and security measures that limit access are highly likely. In order to receive some "return" on this loss of value, the permit holder should turn over all monitoring data to the Forest Service and the public, not just summarize the results for the agency on a yearly basis. The monitoring data provided will be useful to scientists and the academic community (and by extension the general public) in filling in the incomplete picture on the impacts of wind energy facility development.

Finally, permit operational requirements must be strengthened. Time deadlines need to be added to make these measures truly enforceable. For example, it does no good to stipulate that permit holders "completely repair, replace or remove inoperative wind turbines" (FSH 2709.11, Ch 77.4) if there are no time deadlines attached. As written, the permit holder could wait to comply with this measure until the 29th year of their permit and still be in compliance. The directives need to be reviewed to ensure all permit measures are enforceable.

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We are encouraged that the Forest Service has begun to address renewable energy uses on NFS lands. However, we are disappointed that the agency has ignored the requirements of NEPA and the ESA and failed to follow the example set by fellow federal agencies in analyzing the effects of this new use. The proposed wind energy program must also be analyzed in combination with other agency proposals, particularly with recent proposals to change Forest Service NEPA compliance requirements. Overall, the requirement for preparation of a PEIS for this proposed program should dictate the next agency steps. We look forward to continued discussion of this proposal.

Should you have any questions or need clarification on these comments, please contact Mary Krueger at the Wilderness Society at the number or address listed below. Signature verification is available for all the groups and individuals listed that follow. Thank you for your time and consideration.

Sincerely,

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