

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FRIENDS OF BLACKWATER)
501 Elizabeth Street, Room 3)
Charleston, West Virginia 25311,)
) Civ. No.
v.)
)
UNITED STATES DEPARTMENT OF THE)
INTERIOR)
1849 C Street, NW)
Washington, D.C. 20240,)
)
UNITED STATES FISH AND WILDLIFE)
SERVICE)
1849 C Street, NW)
Washington, D.C. 20240)
)
Defendants.)

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This is an action under the Freedom of Information Act, 5 U.S.C. § 552, et seq., as amended (“FOIA”), to obtain access to records in the possession of the Department of the Interior and the United States Fish and Wildlife Service (“FWS”) concerning wildlife injuries and deaths caused by wind power facilities, and the FWS’s enforcement of environmental laws with respect to wind power facilities. Plaintiffs seek access to this information to determine whether the FWS is upholding its responsibilities under various environmental laws – including the Migratory Bird Treaty Act, 16 U.S.C. §§ 703 et seq., the Bald and Golden Eagle Protection Act, 16 U.S.C. § 668, and the Endangered Species Act, 16 U.S.C. §§ 1531 et seq. – and to educate the public about the serious hazards that improperly sited and constructed wind power facilities pose for migratory birds, bats, and other of our nation’s treasured wildlife.

JURISDICTION

2. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B).

PARTIES

3. Plaintiff Friends of Blackwater is a non-profit organization dedicated to the protection of the West Virginia Highlands, the Blackwater River watershed, and the Blackwater Canyon in West Virginia. Friends of Blackwater is the requester of the information.

4. Defendant the Department of the Interior is the federal agency in possession and control of the information that was requested by Friends of Blackwater.

5. Defendant the Fish and Wildlife Service is a sub-agency of the Department of the Interior, and is in possession and control of the information that was requested by Friends of Blackwater.

STATUTORY FRAMEWORK AND FACTS GIVING RISE TO PLAINTIFF'S CAUSE OF ACTION

The Freedom Of Information Act

6. The FOIA requires agencies of the federal government, upon request, to release records to the public, unless the agency proves that the records fall within one of nine specific statutory exemptions. 5 U.S.C. § 552(b). If an exemption applies, the agency is required to disclose “any reasonably segregable portion of a record” not containing the exempt material. Id.

7. Upon receiving a FOIA request, an agency has twenty working days to respond. 5 U.S.C. § 552(a)(6)(A)(i). Although the agency may grant itself an extension of ten additional days in certain circumstances, FOIA does not permit an agency to delay responding indefinitely. Id. § 552(a)(6)(B)(i).

8. Under section 552(a)(6), a requestor may appeal an agency's failure to disclose requested records. 5 U.S.C. § 552(a)(6). An agency must make a determination on any such

appeal within twenty working days. Id. at § 552(a)(6)(A)(ii).

FACTS GIVING RISE TO PLAINTIFF'S CLAIMS FOR RELIEF

Wind Power Impacts on Wildlife

9. Since the advent of large-scale industrial wind power facilities in the United States in the early 1980's, the wind power industry's sky scraper-tall spinning "turbines" have killed and injured many thousands of migratory birds -- including hawks, eagles, owls, and numerous species of nationally and internationally treasured songbirds -- who get caught in the spinning blades or fly into the massive turbine towers. The Fish and Wildlife Service itself estimates that 40,000 or more birds are killed annually by existing wind turbines.

10. All of these birds are federally protected by the Migratory Bird Treaty Act, 16 U.S.C. §§ 703, et seq., which makes it unlawful to kill migratory birds "at any time, by any means or in any manner" without a permit from the FWS. The Bald and Golden Eagle Protection Act, 16 U.S.C. § 668, affords additional federal protection to eagles, and the Endangered Species Act, 16 U.S.C. §§ 1531 et seq. provides further protections to those bird species that are listed as threatened or endangered under the Act. The Fish and Wildlife Service is responsible for administering and enforcing all of these statutes.

11. Most of the early industrial wind power projects in the United States were built in the Western region of the country. For example, thousands of large wind turbines are in operation in the Altamont Pass region in Alameda and Contra Costa Counties in California -- an area that has one of the highest known densities of raptors in the world. Thousands of raptors and other protected migratory birds are killed by wind turbines each year in this region alone.

12. Recently, the wind power industry has been undergoing a dramatic expansion nationwide, developing and building large-scale wind power facilities in all wind-accessible

regions of the country, including in the mountainous and off-shore regions of the Eastern United States. For example, because of the typically strong winds in the Appalachian Mountains, a rapid proliferation of wind power projects is occurring along the entire length of that mountain chain, from Vermont down through Tennessee and Georgia. In Maryland, West Virginia, Virginia, and Pennsylvania alone the industry has plans to erect over 1200 enormous turbines, many rising to over 400 feet tall when their blades are upright. Approximately 130 industrial turbines are already spinning in the Appalachian ridges.

13. Because the strong winds found in areas such as the Appalachian mountains make the areas as attractive to migrating and foraging birds -- who use the drafts to aid them in their flight -- as they are to wind power companies, many of the new locations where the wind power industry plans to site its industrial wind power facilities serve as primary migratory corridors and foraging habitat for millions of migratory birds.

14. In addition to being placed directly in the path of migrating birds, the height of modern wind turbines, which can reach to over 400 feet tall, and their placement in areas such as the Appalachians that are prone to fog and overcast conditions, make them difficult for birds in flight to avoid. Federally-required lighting on the turbine towers also increases the danger the turbines pose to birds. As a result, birds are continuously suffering severe injuries and dying after colliding with the turbine towers and blades. And yet the industry has not undertaken adequate studies to determine whether there are locations where the wind plants may be sited that would be far less detrimental to migrating and foraging birds, or whether the use of smaller turbines would reduce the harm to wildlife.

15. Many thousands of bats also die annually after colliding with industrial wind turbines. In 2003, an estimated 4,000 or more bats were killed at a new industrial wind power

facility located on Backbone Mountain, in West Virginia, called the Mountaineer Wind Energy Center (the “Mountaineer facility”). This information is especially troubling because the region contains habitat for at least two species of bats listed as endangered under the ESA: the Virginia Big-Eared bat and the Indiana bat. Several other industrial wind power facilities are already permitted and set to be built this coming year in the immediate vicinity of the Mountaineer facility, one of which – the “Clipper” wind power project – will be built along the very same ridgetop on Backbone Mountain as the Mountaineer facility. Yet another wind power company – Synergics, Inc. – also has plans to build a large wind power facility on Backbone Mountain, and is currently proceeding through the state permitting process. However, the wind power companies building these new projects have not undertaken adequate studies to determine the impacts of their planned projects on birds and bats, and have not adequately analyzed whether alternate sites for constructing the facilities are feasible and would be less harmful to wildlife, or whether smaller turbines would be less harmful to wildlife.

16. In addition to the impacts industrial wind power facilities have on birds and bats who collide with the turbines, the construction of the turbines, access roads, electrical wires, and other supporting structures also results in the fragmentation of important ecosystems and habitat, including habitat used by endangered and threatened species. For example, a 200-turbine wind power project set to be built along the Allegheny Front in West Virginia (the “Nedpower” project) will be built in the habitat of the federally-endangered West Virginia Northern Flying squirrel. The project will require the clearing of a fourteen-mile long and one-mile wide swath of land along the mountain ridges.

17. Despite the well-established ongoing violations of the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act caused by industrial wind power projects, and the

likely violations of the Endangered Species Act, it appears that the FWS has never brought an enforcement action against a wind power company under any of these critically important conservation statutes.

18. Instead, in 2003, the Fish and Wildlife Service issued voluntary guidelines to wind power companies for “avoiding and minimizing” wildlife impacts from wind turbines. The guidelines provide a system for evaluating and ranking sites proposed for wind power development with regard to impacts on birds, bats, and other wildlife. If wind power companies were required to follow these guidelines, the result may be wind power projects that are not as harmful to wildlife as existing projects. However, projects that are already permitted, but not yet built – which includes several projects in the Appalachians -- are apparently exempted from these “guidelines,” which are unenforceable in any court. According to the FWS, even projects that are not yet planned or permitted by the local public service agency may still be exempted from the guidelines “where a site was leased for development prior to the availability of the Interim Guidelines.”

19. Further, because compliance with the guidelines is entirely voluntary and because the FWS has never announced any intention to bring any enforcement action against wind companies under the MBTA or other environmental statutes, wind power companies have little incentive to adhere to the guidelines. For example, a consultant for Synergics, Inc., which is seeking a state permit to build dozens of 400-foot industrial turbines along Backbone Mountain in Maryland (the same ridge where the Mountaineer facility exists and where the Clipper project is set to be built), stated that Synergics would not be fully complying with the FWS guidelines because, among other things, “until . . . validation of the guidelines has been done, it is difficult to determine how valuable the guidelines are.”

20. Numerous environmental groups, scientists, and concerned citizens around the country have been working to gather information and educate the public about the severe impacts industrial wind power projects can have on wildlife and other treasured natural resources, if not properly analyzed or sited. These groups include Friends of Blackwater, Citizens for Responsible Windpower, Friends of the Allegheny Front, Stewards of the Potomac Highlands, Potomac Valley Audubon Society, Friends of Appalachian Highlands, Friends of Backbone Mountain, Maryland Alliance for Greenway Improvements, Friends of Highland County, Kingdom Commons Group, Friends of the Smokey Hills, Protect Flint Hills, Tallgrass Ranchers, Friends of the Western Mountains, Sardinia Preservation Group, Advocates for Cherry Valley, Advocates for Prattsburg, North Country Coalition Against Windfarms, Green Berkshires, Inc., PROACT International, and Alliance to Protect Nantucket Sound. These groups have sent a letter to the Department of the Interior in support of Friends of Blackwater's FOIA request.

Friends of Blackwater's FOIA Request

21. By letter dated August 25, 2003, Friends of Blackwater submitted a FOIA request to the FWS to further ascertain the extent of these well-known impacts to wildlife from wind power projects, and to ascertain whether the FWS is upholding its responsibility to protect our nationally and internationally treasured wildlife resources.

22. Specifically, Friends of Blackwater requested the following records in possession of the Fish and Wildlife Service:

- (1) All records generated or obtained by the Fish and Wildlife Service related to any bird or bat mortality or injury at any and all wind power facilities in the United States;
- (2) All records related to any enforcement action the Fish and Wildlife Service has taken against the owner(s) or operator(s) of any wind power facility located anywhere in the United States, pursuant to the Migratory Bird Treaty Act, 16 U.S.C. § 703 et seq., the Endangered Species Act, 16 U.S.C. § 1531 et seq., or any other federal law;

- (3) All records related to any enforcement actions now being pursued against the owner(s) or operator(s) of any wind power facility located anywhere in the United States, pursuant to the Migratory Bird Treaty Act, 16 U.S.C. § 703 et seq., the Endangered Species Act, 16 U.S.C. § 1531 et seq., or any other federal law; and
- (4) All records related to the Fish and Wildlife Service's policies, guidelines, criteria, or plans with regard to initiating enforcement action against the owner(s) or operator(s) of any wind power facility located anywhere in the United States, pursuant to the Migratory Bird Treaty Act, 16 U.S.C. § 703 et seq., the Endangered Species Act, 16 U.S.C. § 1531 et seq., or any other federal law.

23. On or around October 17, 2003, Friends of Blackwater received a partial response to its FOIA request from the FWS Division of Migratory Bird Management ("DMBM"). The letter accompanying the response stated that the FWS FOIA officer had "canvassed the Service's Office of Law Enforcement, [the FWS] Region 1 (Pacific Coast) FOIA Officer, and this office [DMBM]," and indicated that the accompanying partial response was only on behalf of the DMBM.

24. The response from the DMBM contained several publications regarding avian impacts of wind turbines, the FWS Interim Guidance, and internal agency comments on the guidelines. The response contained very few policy-level documents, despite the growing public concern over wind power impacts on wildlife, and the fast pace with which the wind power industry is growing.

25. On or around April 7, 2004, Friends of Blackwater received the agency's second and final response to its FOIA request, this time from the FWS Office of Law Enforcement. The response contained documents related to closed investigations of wind power companies operating in the Altamont Pass Wind Resource Area, and agency memoranda related solely to Altamont Pass facilities.

26. The response from the Office of Law Enforcement did not contain any documents related to investigations or enforcement matters at any wind power facilities other than Altamont

facilities, even though numerous bird and bat kills have been documented at facilities in the Appalachian region.

27. Citing FOIA exemption 7(A), which applies solely to “records or information compiled for law enforcement purposes . . . to the extent that the production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings,” 5 U.S.C. § 552(b)(7)(A), the agency withheld all documents related to any pending investigations of wind power companies.

28. Further, citing FOIA exemption 6, which authorizes the withholding only of “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, 5 U.S.C. §§ 552(b)(6), and exemption 7(C), which applies to “records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy,” *id.* at § 552(b)(7)(C), the agency withheld “seventeen entire pages” and also deleted most, if not all, names from all of the documents the agency did produce.

29. By letter dated May 18, 2004, Friends of Blackwater filed an administrative appeal from the partial denial of its FOIA request. In its appeal letter, Friends of Blackwater noted that the FWS had both misapplied and failed to provide adequate justification for invoking the FOIA exemptions. With regard to exemption 7(A), Friends of Blackwater explained that the FWS had not provided any evidence that releasing the documents withheld pursuant to that exemption would “interfere with enforcement proceedings,” especially given that the agency has never brought an environmental enforcement action against a wind power owner or operator, and does not appear to have plans to do so.

30. With regard to using exemptions 6 and 7(C) to withhold seventeen entire pages as well as all names in all documents, Friends of Blackwater explained that the agency did not put forth any justification for why the withholding of all names was necessary to prevent an “unwarranted invasion of personal privacy,” 5 U.S.C. §§ 552(b)(6), (b)(7)(C), and at minimum had invoked those exemptions far too broadly. In addition, Friends of Blackwater noted that the agency had apparently made no effort to release “reasonably segregable” portions of the withheld seventeen pages. 5 U.S.C. § 552(b).

31. Finally, Friends of Blackwater explained that the FWS had clearly not undertaken an adequate search for responsive records, since based on the documents that were provided – which demonstrate significant concern from regional FWS offices over the severe impacts of wind power on wildlife and ongoing violations of the MBTA and other environmental laws by the wind industry -- it was clear there should have been numerous policy-level documents concerning wind power and enforcement of environmental laws against wind power companies. In fact, as Friends of Blackwater pointed out, the letter from the Division of Migratory Bird Management made clear that the FWS FOIA Officer had not even sought responsive records from the office of the Director of the FWS, or from other policy-level FWS offices, or any regional offices other than Region 1.

32. By letter dated June 25, 2004, the Department of Interior FOIA Appeals Officer informed Friends of Blackwater that its FOIA appeal was with the Office of the Solicitor for legal review, but that review would be delayed. The letter informed Friends of Blackwater that it was entitled to treat the delay as a denial of its FOIA request and that it was also entitled under the FOIA to seek judicial review. See also 5 U.S.C. §§ 552(a)(6)(A)(ii); 552(a)(4)(B).

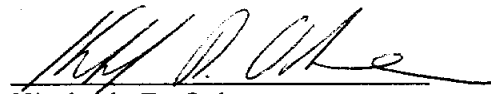
PLAINTIFF'S CLAIMS FOR RELIEF

33. There is no statutory basis for the defendants' failure to disclose the requested information and Friends of Blackwater has a right of access to this information under the FOIA.

WHEREFORE, plaintiff respectfully requests that this Court:

- (1) Declare that defendants have violated the FOIA by refusing to disclose the records requested by plaintiff;
- (2) Declare that defendants have violated the FOIA by not responding to plaintiff's FOIA appeal for more than the twenty day statutory deadline permitted for a response;
- (3) Order defendant to make the requested records immediately available to plaintiff;
- (4) Award plaintiff its costs and reasonable attorneys' fees in this action; and
- (5) Grant such other and further relief as the Court may deem just and proper.

Respectfully submitted,



Kimberly D. Ockene
(D.C. Bar No. 461191)



Eric R. Glitzenstein
(D.C. Bar No. 358287)

Meyer & Glitzenstein
1601 Connecticut Ave. N.W.
Suite 700
Washington, D.C. 20009
(202) 588-5206

Date: November 16, 2004