

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| AMERICAN BIRD CONSERVANCY |) |
| 1731 Connecticut Avenue, NW, 3rd Floor |) |
| Washington, DC 20009, |) |
| |) |
| Plaintiff, |) |
| |) |
| v. |) |
| |) |
| U.S. FISH AND WILDLIFE SERVICE |) |
| 1849 C Street, N.W. |) |
| Washington, DC 20240, |) |
| |) |
| BUREAU OF INDIAN AFFAIRS |) |
| 1849 C Street, N.W. |) |
| Washington, D.C. 20240, |) |
| |) |
| Defendants. |) |
| |) |

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, for declaratory and injunctive relief, seeking the release of agency records requested by plaintiff American Bird Conservancy (“ABC”) on April 5, 2011, October 14, 2011, and October 19, 2011 from the U.S. Fish and Wildlife Service (“FWS”). Having filed several FOIA requests more than eight months ago, and one request more than a year ago, ABC has tried to obtain the responsive records that will shed light on the government’s approach to monitoring and minimizing the effects of proposed and existing wind power facilities on migratory birds. To date, one request was referred to the Bureau of Indian Affairs (“BIA”) for a response, and defendants have refused to produce all of the records to which ABC is statutorily entitled, in violation of FOIA.

JURISDICTION

2. This Court has jurisdiction over this action and venue is proper in this district under 5 U.S.C. § 552(a)(4)(B).

PARTIES

3. American Bird Conservancy (“ABC”) is a 501(c)(3), not-for profit organization whose mission is to conserve native birds and their habitats throughout the Americas. ABC is the only U.S.-based group with a major focus on bird habitat conservation throughout North and South America. Founded in 1994, ABC works to reduce threats to birds from habitat destruction; from collisions with buildings, towers, and wind turbines; and from toxins such as hazardous pesticides and lead. ABC uses a variety of mechanisms to achieve these objectives including scientific research and analysis; advocating for bird conservation at the local, state, regional, and federal levels; forming bird conservation partnerships; and pressing for meaningful regulatory changes to address such threats effectively through various means.

4. ABC’s “Bird-Smart Wind Program” addresses the threats to birds and their habitats from wind energy development. ABC’s Wind Program works to eliminate threats to birds and conserve habitat through the implementation of principles that recognize that “bird-smart” wind energy is an important part of the solution to climate change. To reduce and redress bird mortality and habitat loss, bird-smart wind energy employs careful site-selection, operational and compensatory mitigation, and ongoing bird monitoring. A key element of ABC’s Bird-Smart Wind Principles is to work with FWS to establish appropriate mandatory federal standards for the siting, construction, and operation of wind facilities. ABC’s FOIA requests at issue here seek records concerning the government’s role in monitoring, minimizing, and mitigating bird deaths from the operation of wind power facilities.

5. ABC's experts have been extensively involved in studying and analyzing the impacts of wind energy on migratory and other birds. For example, in 2005, ABC submitted comments on FWS's Interim Guidance on Avoiding and Minimizing Impacts from Wind Energy. In 2007, ABC's former director of conservation advocacy, Dr. Michael Fry, testified before a Congressional subcommittee on the wildlife impacts of wind energy projects constructed in areas of high bird use. Most recently, ABC attended every public meeting of the Wind Turbines Guidelines Federal Advisory Committee and commented on draft federal guidelines and recommendations aimed at minimizing and mitigating the effects of wind power development on birds. ABC also submitted comments during federal regulatory processes applicable to wind energy projects, including the FWS Draft Eagle Conservation Plan Guidance, the Great Plains Wind Energy Habitat Conservation Plan, the Desert Renewable Energy Conservation Plan, and the Mid-Atlantic Regional Environmental Assessment for Wind Leasing Areas (Delaware, Maryland, New Jersey, Virginia). In addition, ABC has commented on individual wind projects, such as Kaheawa Wind II (Maui), Kawaihoa Wind (Oahu), West Butte Wind (Oregon), and Baryonyx (offshore Texas).

6. ABC submitted a petition for rulemaking to FWS on December 14, 2011, requesting the agency to promulgate regulations establishing a mandatory permitting system for siting, constructing, and operating wind energy projects and mitigating their impacts on migratory birds. This mandatory permitting system was not adopted and FWS currently uses voluntary Land-Based Wind Energy Guidelines.

7. FWS is a federal agency in control of records responsive to ABC's FOIA request.

8. BIA is a federal agency to which FWS referred one request "for a direct response" under FOIA.

**STATUTORY FRAMEWORK AND FACTS GIVING
RISE TO CAUSE OF ACTION**

THE FREEDOM OF INFORMATION ACT

9. “The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.” John Doe Agency v. John Doe Corp., 493 U.S. 146, 152 (1989) (citations omitted). FOIA was enacted to “permit access to official information long shielded unnecessarily from public view” by creating a “right to secure such information from possibly unwilling official hands.” EPA v. Mink, 410 U.S. 73, 80 (1973). “[D]isclosure, not secrecy, is the dominant objective of the Act.” John Doe, 493 U.S. at 152 (citation omitted).

10. Upon request, FOIA requires agencies of the federal government to conduct a reasonable search for requested records and release them to the public, unless one of nine specific statutory exemptions applies. 5 U.S.C. § 552(a)(3), (b).

11. Upon receiving a FOIA request, an agency has twenty working days to respond. Id. § 552(a)(6)(A). Although the agency may grant itself an extension of ten additional days in “unusual circumstances,” FOIA does not permit an agency to delay a response indefinitely. Id. § 552(a)(6)(B); 43 C.F.R. § 2.13. A requestor is deemed to have exhausted administrative remedies “if the agency fails to comply with the applicable time limit provisions” of FOIA. 5 U.S.C. § 552(a)(6)(C)(i). In that event, FOIA expressly authorizes the requester to invoke the jurisdiction of a federal court in ensuring the timely, comprehensive response to the request. Id. § 552(a)(4)(B).

12. Upon taking office, President Obama reaffirmed the importance of providing government records to the public under FOIA, echoing the words of Congress and the Supreme Court that “[a] democracy requires accountability, and accountability requires transparency” and

emphasizing that FOIA “should be administered with a clear presumption: In the face of doubt, openness prevails.” Memorandum from President Obama to the Heads of the Executive Departments and Agencies Regarding FOIA (Jan. 21, 2009).¹

FACTUAL BACKGROUND

1. Birds And The Operation Of Wind Power Facilities

13. ABC recognizes that the environmentally responsible development of renewable energy, and particularly wind power, may benefit society, particularly given its potential role in alleviating the effects of climate change on ecosystems. However, rapid development of the wind industry and proliferation of massive wind turbines also pose a serious threat to migratory birds and other wildlife, especially bats, particularly if wind power developers build huge turbines, associated power lines, and other infrastructure in ecologically sensitive locations and other areas where they are likely to kill large numbers of migratory birds or other wildlife, or destroy or otherwise disrupt their habitat.

14. Poorly sited wind energy projects can and do adversely impact migratory and other birds in several ways. First, birds, including eagles, hawks, and songbirds protected by the Migratory Bird Treaty Act (“MBTA”), 16 U.S.C. §§ 703-12, are routinely killed by collisions with wind turbines or related infrastructure such as power lines and electrical substations. Harm from wind projects to Birds of Conservation Concern, which are species not yet federally listed as endangered or threatened that have been officially designated by FWS as being the agency’s highest conservation priorities, is increasing. Second, wind energy facilities can harm birds through long-term habitat loss, alteration, degradation, and fragmentation. For example, in the Prairie Pothole Region of the United States, sometimes called “America’s duck factory,” a study

¹ Available at http://www.whitehouse.gov/the_press_office/FreedomofInformationAct/.

conducted jointly by FWS and Ducks Unlimited demonstrated a 10 to 40 percent reduction in the density of breeding ducks in wetlands near wind turbines compared to wetlands without wind turbines. Third, other aspects of wind energy development can have adverse impacts on bird species. For instance, utility-scale wind turbines have been demonstrated to produce noise that is within the decibel range associated with population density declines in some grassland and woodland birds. Additionally, “barrier effects,” i.e., increased energy use by birds in order to avoid wind energy facilities by flying around rather than through them, will be of growing concern as the size of wind facilities grows and as more and more migration pathways or regional use areas fill with wind turbines. Increased energy demands can negatively affect birds’ reproductive success.

15. Each wind energy project adds to the cumulative impacts of all the incremental actions already taking place in the birds’ environment, such as the destruction of habitat necessary for birds’ survival through conversion of undeveloped land to housing developments, agriculture, or other energy production. The sites selected for wind projects substantively affect how severe their cumulative impacts are.

16. At present, there are few mandatory federal procedures that wind power developers must follow when selecting a site for a facility, or constructing and operating wind power facilities on private lands, unless the facility may kill, harm, or otherwise “take” species protected by the Endangered Species Act (“ESA”). 16 U.S.C. §§ 1531-44. FWS, however, does have authority under the MBTA, 16 U.S.C. §§ 703-12, and the Bald and Golden Eagle Protection Act (“Eagle Act”), 16 U.S.C. §§ 668-668d, to prosecute the unauthorized take of birds protected by these statutes, which encompass the vast majority of bird species in the United States. Thus, wind power developers may communicate with FWS before and after construction about the

impacts that their facilities will have on birds protected by the MBTA and/or Eagle Act.

17. Some developers submit to FWS pre-construction studies of potential bird and bat impacts for proposed wind power facilities and post-construction bird and bat mortality data for completed facilities. Additionally, FWS may send letters or submit comments to state or other federal agencies concerning the bird and bat impacts of the facilities. All of these materials are crucial to ABC's efforts to monitor and evaluate the impacts of wind power on birds, as well as to evaluate how and to what degree FWS's voluntary Land-Based Wind Energy Guidelines are being implemented. Without these materials, the ability of ABC – and other non-profit, non-governmental conservation groups and concerned citizens – to advocate for bird-smart wind development is severely impaired.

2. ABC's April 5, 2011 FOIA Request

18. Seeking to understand the effects of wind power facilities in Kenedy County, Texas on birds and bats, ABC made a FOIA request on April 5, 2011 to Region 2 of the FWS. ABC requested "full copies of all documents related to mortality of birds and bats at wind farms in Kenedy County, Texas, including post-construction mortality data/studies; and U.S. Fish & Wildlife Service (FWS) internal and external correspondence about bird and bat mortality at wind farms in Kenedy County, Texas."

19. In a letter dated May 5, 2011, FWS acknowledged receipt of the FOIA request on April 7, 2011. FWS stated that it was taking a ten-working-day extension under the Department of the Interior's FOIA regulation, 43 C.F.R. § 2.13, and that the agency would produce responsive records on a rolling basis.

20. More than four months after the statutory deadline for responding to ABC's FOIA request had expired, ABC had still not received a single responsive record. On October 11, 2011, ABC wrote to FWS requesting production of responsive records on an expedited basis.

21. FWS then sent ABC an email on October 19, 2011 saying it hoped to respond by the end of the month. In a letter to ABC dated November 1, 2011, FWS acknowledged its delay in producing responsive records and produced 34 email messages and 14 attachments. FWS acknowledged that its production constituted only a "partial release," but stated that it intended to provide more on a rolling basis "with the goal of completing [the agency's response to the request] by February 24, 2012."

22. To date, ABC has not received any additional productions. More than one year has passed since the deadline expired for FWS to respond to ABC's request by producing all responsive, non-exempt records.

3. ABC's FOIA Requests Of October 14, 2011 And October 19, 2011

23. On October 14 and 19, 2011, ABC sent FOIA requests to several regional offices of FWS requesting records pertaining to specific proposed and constructed wind power facilities. ABC sought "pre-construction studies of potential bird and bat impacts for the proposed Projects, and post-construction bird and bat mortality data for the completed Projects; any correspondence between FWS and the concerned Project developer regarding bird and bat impacts of the Projects; and any letter or comments submitted by FWS to any other state or federal agency concerning the bird and bat impacts of the Projects."

24. While ABC received responsive records from some FWS regional offices, the agency failed to produce all non-exempt records responsive to ABC's requests to Region 2, Region 3, Region 4, Region 6, and Region 8, as described infra.

25. ABC's request to FWS Region 2 was dated October 14, 2011 and concerned the wildlife impacts of the completed Macho Springs Wind Project in Luna County, New Mexico, and the proposed Grapevine Canyon Wind Project in Coconino County, Arizona. By letter dated October 18, 2011, FWS acknowledged that it had received the request on October 14, 2011. FWS stated that it planned to take the ten-working-day regulatory extension, but did "not anticipate [FWS] will be able to complete [the] response within the extended 30-day timeframe (November 29, 2011)." Nonetheless, the agency stated it would "do [its] best to provide partial responses as quickly as information can be released." To date, ABC has not received any records responsive to its October 14, 2011 request to Region 2.

26. Also on October 14, 2011, ABC made a FOIA request for records concerning the proposed Goodhue Wind Project in Goodhue County, Minnesota, to FWS Region 3. By letter dated October 21, 2011, FWS acknowledged that it had received the request on October 18, 2011. FWS stated that it would advise ABC of the status of the agency's response within 20 workdays if a delay is anticipated. When no further response was forthcoming, ABC contacted FWS by letter on April 2, 2012 and by email on April 30, 2012. To date, ABC has not received any further response to its October 14, 2011 request to Region 3, nor any responsive records.

27. On October 19, 2011, ABC made a FOIA request to Region 4 for records pertaining to the Sugarland Wind Project in Palm Beach County, Florida. On October 21, 2011, FWS responded that it had received the request and that ABC "should receive a response on or before November 21, 2011." On December 16, 2011, FWS made a partial release by sending ABC some responsive records, but noted that "there are a substantial number of records related to this project," and that FWS was then "reviewing and organizing additional records for release." FWS promised that it would "provide these records to [ABC] as they bec[a]me

available.” To date, ABC has not received any other records responsive to its October 19, 2011 request to Region 4, and thus the production remains incomplete.

28. On October 14, 2011, ABC made a FOIA request to Region 6 for records pertaining to the Titan Wind/Rolling Thunder, Wessington Springs, and South Dakota Prairie Winds facilities in South Dakota; the proposed Merricourt Wind facility and the completed Edgeley/Kulm Wind Energy Center in North Dakota; and the proposed West Custer County-BP wind project in Nebraska. On October 27, 2011, FWS informed ABC that the agency had received the FOIA request on October 14, 2011 and stated that FWS would advise ABC of the status of the response within 20 workdays if a delay was anticipated. By letter dated December 29, 2011, FWS provided “a portion of documents responsive to [ABC’s] request” and stated that FWS would provide a determination on “the remaining documents.” Since then, ABC has not received any additional correspondence from Region 6 or the remaining documents responsive to its request.

29. ABC’s request to Region 8 was dated October 14, 2011. Specifically, ABC requested records pertaining to five wind power facilities in California and Nevada: the proposed Tule Wind project in McCain Valley, San Diego County, California; the proposed Bear River Ridge in Humboldt County, California; the completed Hatchet Ridge Wind Project in Shasta County, California; the proposed China Mountain Wind Project extending in Nevada and extending over Idaho; and the proposed Virginia Peak project in Washoe County, Nevada. ABC also requested responsive records relating to “any other wind energy projects in the Pah Rah Range in Nevada.” FWS received the request on October 17, 2011, and in response to a request from FWS, ABC narrowed the scope of the request that same day. Region 8 made several releases of responsive records, but in its cover letter to a January 30, 2012 production, FWS

noted that it had identified five records that appeared to be responsive that originated with the BIA and that it had referred those records to BIA “for a direct response.” To date, ABC has not received these five responsive records.

PLAINTIFF’S CLAIM FOR RELIEF

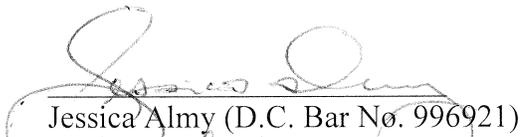
30. By failing to provide timely, comprehensive responses to ABC’s April 5, 2011, October 14, 2011, and October 19, 2011 FOIA requests, Defendants are violating FOIA. 5 U.S.C. § 552(a)(3)(A).

31. Plaintiff has a right to obtain the requested records.

Wherefore, Plaintiff respectfully requests that this Court:

1. declare Defendants in violation of FOIA;
2. order Defendants to release to Plaintiff all non-exempt records, and parts of records, responsive to ABC’s FOIA requests within 20 days;
3. award Plaintiff its costs and attorneys’ fees; and
4. award Plaintiff such other and further relief as the Court may deem just and proper.

Respectfully submitted,



Jessica Almy (D.C. Bar No. 996921)



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

Meyer Glitzenstein & Crystal
1601 Connecticut Ave., N.W., Suite 700
Washington, D.C. 20009
(202) 588-5206
Fax (202) 588-5049
jalmy@meyerglitz.com
eglitzenstein@meyerglitz.com

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