

WYOMING GAME & FISH COMMISSION IGNORES CONCERNS OF LANDOWNERS

By Kara Brighton and Harriet M. Hageman

On April 23rd the Wyoming Game & Fish Commission (WGFC), in the face of a significant outcry from property owners, approved its “Wildlife Protection Recommendations for Wind Energy Development in Wyoming” (Wind Recommendations). Although the room was packed, the WGFC limited public comment to three hours, and refused to extend the comment period despite several requests that it do so. The Landowners in attendance expressed legitimate concerns about several problems with the Wind Recommendations, including infringement on private property rights, lack of landowner involvement, the Commission’s lack of authority, and the chilling effect on wind development in Wyoming. The substantial effort expended by those in attendance was for naught, with the WGFC being completely immune to the voice of the public and the opposition expressed. Such a response was surprising to say the least, especially considering the fact that this agency more than most relies heavily on private landowners for the success of its programs.

We simply do not have space in this column to address all of the concerns that have been raised regarding the WGFC’s Wind Recommendations. We will instead focus on a few of the legal and philosophical problems that are inherent in the Commission’s actions.

First, the WGFC has set forth a minimum of forty (40) “Best Management Practices” in Appendix A of the Wind Recommendations. One primary concern related to those so-called BMPs is the fact that the WGFC intends for them to be implemented on both public and private lands. Thus, while we typically see such BMPs in federal documents related to the use of federal lands, this is one of the first times that we have seen a State agency impose blanket restrictions on the use of private property. In short, by failing to distinguish between the applicability of the BMPs on public lands vs. private lands, the WGFC appears to be making a concerted effort to blur the line between the two.

Second, the presentation made by Game & Fish Department (WGFD) personnel prior to the public comment period left us wondering about what exactly the WGFC is trying to fix. They described the current statutory process for permitting of wind farms in Wyoming. Pursuant to the Industrial Siting Act, an application (which typically exceeds 500 pages) is filed by the project developer. Such applications address several statutory requirements, including “[t]he procedures proposed to avoid constituting a public nuisance, endangering the public health and safety, human or animal life, property, wildlife or plant life, or recreational facilities which may be adversely affected by the estimated emissions or discharges.” W.S. 35-12-109. Within ten days of receipt of the application, it is distributed to sixteen entities, including the WGFD, for “information and recommendations.” W.S. 35-12-110. The other Departments that have review authority under the Industrial Siting Act include Transportation, Health, Education, Agriculture, Environmental Quality, and Revenue, along with the Public Service Commission, the State Engineer, State Geologist, the University of Wyoming, and the Wyoming Business

Council. *Id.* All of the Departments listed in W.S. 35-12-110(b) must submit their recommendations on the application to the Industrial Siting Council (ISC) within sixty days. The WGFD personnel stated that the statutorily-defined process has been working well, and made no complaints as to their ability to make appropriate recommendations to the ISC within the sixty-day period allowed by statute. In short, the current statutory procedure established by the Legislature is working, and the WGFC's efforts to expand its roll in that process seems both unwarranted and outside of its authority.

Third, the "Applicability" Section of the Wind Recommendations states: "Project developers should consult with the WGFD at least two years prior to submitting permit applications so that appropriate studies can be conducted and site-specific recommendations can be developed. Failure to consult with WGFD early will result in delays making specific recommendations to other agencies with regulatory authority." Such a requirement is not only inconsistent with the role the WGFD has been delegated by the Wyoming Legislature and ISC, but amounts to a rolling two-year moratorium on any new wind development in the State. Such a "requirement" in fact violates the Industrial Siting Act and elevates the role of the WGFC and WGFD to a higher station than other State agencies and Departments. There is nothing in the Industrial Siting Act that allows the WGFC or WGFD to exempt themselves from the statutory sixty-day review and comment period quoted above. In short, there is simply no statutory basis for this power grab, or for the Commission to impose a two-year moratorium on wind development in the State.

Fourth, the WGFC has admitted that it did not comply with the Wyoming Regulatory Takings Act (Takings Act) when preparing the Wind Recommendations. The Takings Act requires the Wyoming Attorney General to "develop guidelines and a checklist to assist government agencies in the identification and evaluation of actions that have constitutional implications that may result in a taking." W.S. 9-5-303. "The agency shall use the guidelines and checklist prepared . . . to evaluate proposed administrative actions or regulations that may have constitutional implications." W.S. 9-5-304. The checklist contains ten criteria such as: "Does the action have an affect on private property?" "Does the action have a significant impact on the landowner's economic interest?" "Could the problem that has necessitated the action be addressed in a less restrictive manner?" The guideline states that if any one of the ten questions is answered "yes," the agency should consult legal counsel "for it is possible that the proposed action will be a taking." State of Wyoming Takings Guidelines and Checklist dated October, 1995, updated July 1, 2001, at 19. In short, by failing to perform the necessary "takings" review, the WGFC has not only ignored the landowners' legitimate concerns about private property rights, but has failed to comply with Wyoming law.

Finally, we have been asked by many people as to what can be done in response to the WGFC's adoption of the Wind Recommendations. We believe there are four primary ways to address this situation – politically, legislatively, legally and through landowner push-back. All four should be pursued simultaneously. We must elect a Governor in November that takes private property rights issues seriously. The new Governor must set a tone throughout State government that honors those principles by appointing Boards

and Commissions who share that philosophy and who respect landowners. We also believe that legislation will be proposed during the next Legislative session to strengthen Wyoming's takings statutes and to provide greater protections for private property rights. We are also currently considering all legal options. Finally, landowners must reconsider their involvement with the WGFD and consider whether it is appropriate to work cooperatively with a Commission that utterly disregards their opinions on such critical matters. Private lands provide the very best habitat in the State, a fact that should not be ignored by the agencies who are tasked with protecting our wildlife.

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