



# Alert

Environmental Client Service Group

To: Our Clients and Friends

March 1, 2011

## U.S. Fish and Wildlife Service Issues Draft Guidelines for the Development of Wind Energy Projects

On February 18, 2011, the United States Fish & Wildlife Service (“FWS” or the “Service”) published a Notice of Availability for two draft guidance documents impacting land-based wind energy developers: (1) U.S. Fish and Wildlife Service Draft Land-Based Wind Energy Guidelines (“General Guidance”); and (2) Draft Eagle Conservation Plan Guidance (“Eagle Conservation Plan”) (collectively the General Guidance and Eagle Conservation Plan are referenced as the “Guidance Documents”). Although the framework provided by the FWS within the Guidance Documents may apply by analogy to all wildlife and plant species regulated by the Service, these Guidance Documents were drafted specifically to address a wind energy project’s potential impact upon avian wildlife. Furthermore, the Guidance Documents are intended to facilitate the Service’s compliance with the National Environmental Policy Act (“NEPA”), Endangered Species Act, Migratory Bird Treaty Act, and Bald and Golden Eagle Protection Act. At their core, the Guidance Documents provide guidelines that the FWS will use to evaluate a wind energy developer’s decisions on how to site, monitor, assess and research a developer’s selected location for a wind energy project and ultimately avoid, mitigate and compensate for impacts upon birds and/or, more specifically for bald and golden eagles, as addressed in the Eagle Conservation Plan. Although the Guidance Documents are purported to be “voluntary” or “non-binding recommendations,” wind energy developers should anticipate that the FWS is already considering many, if not all, aspects of the guidelines in their current decision-making with respect to new or existing projects seeking Service permits or approvals.

### Tiered Approach To Risk Assessment

The Guidance Documents, and in particular the General Guidance, are the culmination of a multi-year process that began in 2003 after the release for public comment of voluntary interim guidelines for land-based wind energy developers to avoid, minimize and compensate for the impacts on birds and their habitats resulting from wind energy projects. This process resulted in the appointment of a

This Client Alert is published for the clients and friends of Bryan Cave LLP. Information contained herein is not to be considered as legal advice. This Client Alert may be construed as an advertisement or solicitation. © 2011 Bryan Cave LLP. All Rights Reserved.

broadly-represented Wind Turbine Guidelines Federal Advisory Committee to develop recommendations, which were finalized on March 4, 2010.

The Guidance Documents offer a framework to evaluate the potential negative effects that wind energy development projects may pose to bird species or their habitats. The primary goal of this evaluation process is to avoid or minimize the potential taking of federally listed avian species, migratory birds and eagles. Under the Guidance Documents, information relating to the potential impact on birds and their habitats is to be gathered and assessed early in the project planning and development process and continually evaluated throughout the life of a project using an iterative learning process. The Guidance Documents have divided the risk evaluation process into pre- and post-construction tiers (e.g. Tiers 1 through 5 for the General Guidance) for assessing a wind energy project's impact on birds and their habitats. Through the iterative process, wind energy developers would initially evaluate the potential sites they are considering for development in relation to their impact on species and habitats with the goal of ultimately choosing a site that has a nominal potential impact. As a project progresses, the wind energy developer would perform pre-construction monitoring and assessments to confirm the appropriateness of a site selected, and later continue monitoring and assessing the impact of the project after the project is constructed. If the project has a greater negative impact on birds and their habitats than the initial assessments predicted, the wind energy developer might have to make operational modifications to mitigate the impact. These modifications potentially include replacement of particularly harmful turbines, alteration of blade cut-in speeds, and seasonal shutdowns of the facility. A vital aspect of any project for which the Guidance Documents apply is the identification of relevant avoidance, mitigation and compensation measures for any potential impact on birds and their habitats. Throughout this entire process, the FWS recommends that project developers coordinate early and closely with the Service.

By implementing the iterative evaluation process, the FWS believes that wind developers should be able to easily identify and eliminate sites that have the greatest negative impact upon birds and their habitats. For those sites where wind development is ideal and where a more than a modest impact on birds and their habitats may occur, implementing the requirements set forth in the Guidance Documents in a manner that strikes the right balance between protecting birds and maintaining the viability of the project may be challenging. Through the Guidance Documents, the FWS appears to have developed heightened requirements for project developers as compared to past requirements. In particular, the requirements for additional in-depth study and analysis of the direct and indirect effects of a wind energy project on species may be very cumbersome. Those requirements relate to, among other things, the footprint of bird habitat relative to that of the wind energy project, the frequency of affected species' appearances at the site, the potential adverse impacts to habitat integrity resulting from the wind energy project, and increased avoidance and mitigation measures. Moreover, the intensity and length of pre-construction study and analysis recommended by the FWS may require significantly more time and resource commitments in order to secure FWS approvals. The operational restrictions suggested could also be problematic, in that they may increase the cost of operation, or reduce the amount of energy the wind energy project operator can sell to utilities or regional transmission organizations. Indeed, the results of the analysis from earlier stages of development can have far-reaching effects on the sorts of operational modifications a wind energy developer might have to implement in the future. Collectively, the requirements set forth in the

Guidance Documents may cause significant financial uncertainty relating to the overall cost of a wind energy project and delay in implementation of the project. Wind energy developers should strategically consider how to effectively coordinate with the FWS in order to streamline the many ambiguous monitoring and assessment requirements discussed within the Guidance Documents.

### **Wind Energy Developers Should Provide Public Comments**

Because of the uncertainty introduced by the FWS by the Guidance Documents, we recommend that wind energy developers consider providing timely public comments on a number of aspects of the draft guidelines including the following categories:

- (1) The two to five year pre-construction monitoring and field assessments referenced by the FWS in the Guidance Documents and how those timeframes can be minimized or eliminated;
- (2) How the Guidance Documents may impact wind projects that have already received Service permits or licenses, including what may be required at the permit renewal stage;
- (3) The specific operational restrictions and construction recommendations suggested within the Guidance Documents to mitigate impacts on birds and minimize takings;
- (4) How the Guidance Documents have or have not incorporated the final recommendations made in the collaborative Federal Advisory Committee process;
- (5) The timing and extent of post-construction monitoring and assessments and specific examples on actual measures that have worked in the field;
- (6) The circumstances under which the FWS may modify already approved post-construction assessment, monitoring and reporting requirements;
- (7) When the FWS may require additional avoidance and/or mitigation measures;
- (8) How the FWS will incorporate information which has already been developed through assessment and monitoring of wind energy projects to avoid duplication for other new and existing projects; and
- (9) Specific guidelines on the circumstances in which the FWS is likely to recommend a particular operational modification to mitigate a specific harm.

### **Conclusion**

Wind energy developers should identify which new or existing projects in their portfolios may be impacted by the Guidance Documents and begin to develop strategies now to address the potential requirements. Although the FWS labels the requirements set forth in the Guidance Documents as voluntary or non-binding recommendations, it is likely that the Service is already relying upon and employing the framework discussed therein. Because of the scope and breadth of the Guidance Documents and the significant impact they may have on wind energy projects, providing timely public comment will be important in clarifying and understanding certain burdensome aspects of the proposed

guidelines. Wind energy developers and other stakeholders have until May 19, 2011 to submit public comments.

If you would like to discuss how this matter may affect your organization, please contact any of the following members of Bryan Cave's [Environmental Client Service Group](#):

Dale A. Guariglia  
(314) 259-2606  
[daguariglia@bryancave.com](mailto:daguariglia@bryancave.com)

J. Kevin Healy  
(212) 541-1078  
[jkhealy@bryancave.com](mailto:jkhealy@bryancave.com)

Philip E. Karmel  
(212) 541-2311  
[pekarmel@bryancave.com](mailto:pekarmel@bryancave.com)

Thor W. Ketzback  
(312) 602-5111  
[thor.ketzback@bryancave.com](mailto:thor.ketzback@bryancave.com)

Bryan E. Keyt  
(312) 602-5036  
[bryan.keyt@bryancave.com](mailto:bryan.keyt@bryancave.com)

Michael K. Ohm  
(312) 602-5032  
[michael.ohm@bryancave.com](mailto:michael.ohm@bryancave.com)

William W. Pearson  
(602) 364-7418  
[wwpearson@bryancave.com](mailto:wwpearson@bryancave.com)

Steven J. Poplawski  
(314) 259-2610  
[sjpoplawski@bryancave.com](mailto:sjpoplawski@bryancave.com)

Joan B. Sasine  
(404) 572-6647  
[joan.sasine@bryancave.com](mailto:joan.sasine@bryancave.com)

Gregory D. Trimarche  
(949) 223-7130  
[gregory.trimarche@bryancave.com](mailto:gregory.trimarche@bryancave.com)

Charles A. Zielinski  
(202) 508-6157  
[charles.zielinski@bryancave.com](mailto:charles.zielinski@bryancave.com)