

## **U.S. Fish and Wildlife Service Issues Final Land-Based Wind Energy Guidelines for Wildlife Protection**

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On March 23, 2012, the U.S. Department of the Interior's Fish and Wildlife Service ("FWS") released the "U.S. Fish and Wildlife Service Land-Based Wind Energy Guidelines." The new voluntary Guidelines provide a tiered, scientific process for addressing potential wildlife impacts during the various stages of land-based wind energy project development. The Guidelines take effect immediately, replacing the interim guidance that had been in place since 2003.

The Guidelines apply to all utility-scale, community-scale, and distributed land-based wind energy projects on private or public land and aim to assist developers in complying with the Endangered Species Act ("ESA"), the Migratory Bird Treaty Act ("MBTA"), and the Bald and Golden Eagle Protection Act ("BGEPA"). FWS has designed the Guidelines to address potential collisions with wind turbines, habitat loss and fragmentation, wildlife disturbances, and indirect effects. The Guidelines also identify best management practices for project sponsors to use during site development, construction, retrofitting, repowering, and decommissioning.

Although compliance with the Guidelines is voluntary, FWS will consider a developer's documented efforts to communicate with the government and adhere to the prescribed protocol if a violation of the MBTA or BGEPA occurs. Because FWS may enforce unlawful takings of protected species under those statutes on a strict liability basis, this consideration may offer an important measure of protection to wind energy developers.

The Guidelines reflect an iterative decision-making process for assessing potential adverse effects to species of concern and their habitats. Accordingly, the Guidelines include five separate Tiers, where subsequent Tiers refine and build upon issues raised and efforts undertaken in previous Tiers. At the completion of each Tier, project proponents must determine whether to continue with the project or whether additional information is needed to make that determination.

For the pre-construction Tiers (Tiers 1, 2, and 3), developers must identify, avoid, and minimize risks to species of concern.

Tier 1 involves preliminary site evaluations based on publicly available data obtained in consultation with FWS. Those evaluations include landscape-scale screening of all project sites under consideration early in the project conception process. Project proponents must assess possible project sites to identify the presence of protected species, important habitat areas, or migration routes. They also must determine whether applicable laws or conservation restrictions prohibit the planned site development and whether the proposed project may cause habitat fragmentation on the sites under consideration.

Tier 2 involves site characterization of the project sites deemed feasible in the Tier 1 review based on information available from public agencies, NGOs, and other publicly available sources. A qualified biologist must visit each site under consideration to confirm the presence or

absence of species of concern, the likelihood of habitat fragmentation associated with the project, the possibility of birds and bats using the site, and the potential for adverse impacts to protected species. If the evaluations indicate that the project likely will affect protected species, the proponent may be required to apply for an incidental take permit under the ESA or BGEPA and propose a habitat conservation plan or eagle conservation plan.

Tier 3 requires project proponents to conduct “quantitative and scientifically rigorous” field studies of the proposed project site. FWS intends for those studies to assess, among other things, the distribution, abundance, behavior, and use of the site by the species identified in the Tier 1 and Tier 2 evaluations. The studies may include acoustic monitoring and mist netting, and they may be required to be supported by data compiled over several seasons. In addition, Tier 3 studies must assess the potential degree of adverse impacts to protected species and their habitat, how those impacts may be mitigated, and whether to initiate project impact studies that will continue during and after construction of the project.

For the post-construction Tiers (Tiers 4 and 5), developers must assess whether actions taken in Tiers 1 through 3 to avoid and minimize impacts are achieving those goals and, when necessary, identify additional steps to compensate for impacts.

Tier 4 involves post-construction studies to verify the accuracy of pre-construction study predictions concerning direct and indirect impacts to protected species and their habitats. Studies under Part A of Tier 4 focus on species fatality monitoring to determine how the fatality rate of protected species at the project site compares to other nearby projects. Studies under Part B of Tier 4 assess direct and indirect impacts of habitat loss, degradation, and fragmentation; evaluate whether those impacts were expected based on the Tier 3 studies; and determine whether the impacts can be mitigated.

Tier 5 applies only when (a) actual project impacts are deemed to be significant or are greater than expected, (b) project mitigation has not been effective, or (c) project impacts likely will cause protected species populations to decline. FWS will require additional studies and action under Tier 5 tailored specifically to the conditions observed, but those requirements will vary project-by-project.

In issuing the Guidelines, FWS indicated that not every project will be subject to every Tier or every element of a given Tier. For example, FWS anticipates that many distributed or community developments may not need to follow the Guidelines beyond Tiers 1 and 2 because it believes such projects will not identify an action-level risk to protected species. FWS also anticipates that Tier 5 will not be necessary for most wind energy projects.

The Guidelines stress that developers should consult with FWS as early as possible in the development of a wind energy project. FWS states that early consultation will help developers avoid areas where development is precluded or where wildlife impacts are likely to be high and difficult or costly to remedy or mitigate at a later stage, thereby avoiding upper-Tier project reviews.

Finally, the Guidelines provide mitigation guidance for project developers. FWS will require mitigation for any project expected to cause a significant impact to a protected species. But developers may not simply resort to mitigation alone to address project impacts. The Guidelines allow for mitigation only if an expected impact is unavoidable and has been minimized to the extent possible. When mitigation is appropriate, it may include such measures as turbine siting and limiting turbine operation during certain months (e.g., migration periods). In addition, FWS may require compensatory mitigation for “replacement of project-induced losses of fish and wildlife resources.”

The Guidelines were developed in cooperation with the Wind Turbine Guidelines Advisory Committee.

For more information on the Guidelines or its implications for a specific project, please contact Parker Moore at (202) 789-6028, [pmoore@bdlaw.com](mailto:pmoore@bdlaw.com); Tim Sullivan at (410) 230-1355, [tsullivan@bdlaw.com](mailto:tsullivan@bdlaw.com); or Linda Tsang at (202) 789-6073, [ltsang@bdlaw.com](mailto:ltsang@bdlaw.com).