

# Client Alert

March 2012

## U.S. Fish & Wildlife Service Issues New Voluntary Guidelines For Land-Based Wind Energy Facilities

On March 23, 2012, the U.S. Fish & Wildlife Service ("Service") released its final "Land-Based Wind Energy Guidelines" ("Guidelines"), designed to help wind energy project developers and operators avoid, minimize and mitigate potential adverse impacts to wildlife, particularly protected bird and bat species. The Guidelines, which were developed in cooperation with an advisory committee comprised of various stakeholders (including federal and state agencies, Native American tribes and representatives from the wind energy industry and conservation organizations), take effect immediately and replace interim guidelines issued by the Service in 2003.

The Guidelines are voluntary, but wind energy developers and operators that choose to follow them can secure the protection of a limited "safe harbor" from prosecution for incidental impacts in violation of the Migratory Bird Treaty Act ("MBTA") and the Bald and Golden Eagle Protection Act ("BGEPA"). Specifically, similar to the Service's approach under the 2003 interim guidelines, the Guidelines state that the Service "focuses its resources on investigating and prosecuting those who take migratory birds without identifying and implementing reasonable and effective measures to avoid the take," and that the Service will regard a developer's or operator's documented adherence to the Guidelines as appropriate means of identifying and implementing reasonable and effective avoidance measures. In short, the Service stated that it intends to exercise its enforcement discretion not to pursue enforcement action for impacts to migratory birds at a project whose developers and operators have followed the Guidelines in good faith. The Service is careful to note, however, that adherence to the Guidelines does not create a legal defense to liability under the MBTA or the BGEPA, and the Service retains its discretion to pursue enforcement in any case it deems appropriate.

Following the model recommended by the advisory committee, the Guidelines use a tiered approach for assessing project impacts consisting of three pre-construction categories of activities (Tiers 1–3) and two post-construction categories of activities (Tiers 4–5):

- Tier 1 – Preliminary site evaluation, including landscape-scale screening of possible project sites
- Tier 2 – Site characterization, including broad characterization of one or more potential project sites
- Tier 3 – Field studies to document site wildlife and habitat, and to predict project impacts
- Tier 4 – Post-construction studies to estimate impacts
- Tier 5 – Other post-construction studies and research (which are not expected to be necessary for most projects)

Not every tier, or every element within each tier, will be applicable to every project. Each tier builds on information and analysis from the preceding tiers and provides an opportunity for evaluation and decision making before moving to the next tier.

The Guidelines also include an extensive list of best management practices for project construction, operation, repowering and decommissioning.

In particular, industry participants should consider the following key issues in deciding whether and how to comply with the Guidelines:

- The Guidelines require extensive coordination with the Service from early stages of project development, including soliciting input from the Service on the development of survey protocols and sharing the results of field studies with the Service. It will not be enough for a developer to conduct the required evaluations on its own. (The Guidelines do provide, however, that consultation at the initial stages of development may be conducted confidentially to avoid premature public disclosure of sensitive business information.)
- The requirement to coordinate with the Service could lengthen project development times. The Service has committed to responding to inquiries or requests for consultation from developers or operators within 60 days, but it remains to be seen how responsive the Service will be in practice.
- Although developers and operators are not compelled to follow the Service's recommendations, any decision to reject a recommendation must be documented with a reasoned justification, and the failure to follow a recommendation could serve as the basis for a decision by the Service not to exercise enforcement discretion in favor of the project.
- The Guidelines do not relieve project developers or operators from permitting requirements under federal law, such as the Endangered Species Act. Moreover, the extensive pre-construction evaluations and agency coordination called for by the Guidelines could increase the chance that a project may be found likely to result in the take of a protected species and thus required to obtain a permit.
- In some cases, adherence to the Guidelines may require abandonment of a project site if initial site characterization or pre-construction field studies indicate a high potential for adverse impacts that cannot be adequately mitigated.
- The Guidelines apply to projects already under construction or operation insofar as the recommended activities still may be undertaken. For example, a facility that is presently under construction would need to conduct appropriate post-construction mortality surveys and habitat impact studies and report the results to the Service.

Copies of the Service's guidelines and corresponding fact sheet are available and on the Service's website, [click here](#).

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