

April 12, 2012

*Practice Group(s):**Environmental, Land
and Natural
Resources**Energy*

Update on the Status of Land-Based Wind Energy Guidelines

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The Fish and Wildlife Service (the “Service”) recently released the Final Land-Based Wind Energy Guidelines (the “Final Guidelines”)¹ to help developers and operators of wind facilities minimize impacts on wildlife, especially birds and bats. The Final Guidelines are consistent with the various draft Guidelines issued by the Service in 2011² in that they do not relieve any individual, company, or agency of the responsibility to comply with laws and regulations (e.g., Migratory Bird Treaty Act (MBTA), Endangered Species Act (ESA), and Bald and Golden Eagle Protection Act (BGEPA)). However, if developers voluntarily adhere to the Final Guidelines, communicate with the Service at key points, and contemporaneously document “reasonable justification” if they choose to reject the Service’s advice, the Final Guidelines cautiously offer that “if a violation occurs, the Service will consider a developer’s documented efforts to communicate with the Service and adhere to the Guidelines.” The Guidelines do not, however, include any firm commitment by the FWS to respond within a set time period, unlike the draft Guidelines which gave the Service’s field offices a strict 60-day deadline.

The Guidelines provide an opportunity to work with FWS on voluntary compliance strategies under a range of laws, including MBTA, BGEPA, and ESA.³ Voluntary strategies such as these demonstrate that no need exists for additional regulatory requirements under the MBTA or other laws, such as those proposed by the American Bird Conservancy.⁴ The Final Guidelines suggest that developers and operators develop a Bird and Bat Conservation Strategy (BBCS)—instead of an Avian and Bat Protection Plan (ABPP)—to document adherence to the Guidelines and communication with the Service.⁵

For the most part, the Final Guidelines retain the scope of the draft Guidelines, with a slight expansion of the scope of facilities and species covered. While the draft Guidelines referred primarily to utility-scale wind power facilities,⁶ the Final Guidelines put greater emphasis on use of the Guidelines at smaller projects, such as community-scale and distributed wind developments.⁷ Finally, the Final

¹ United States Fish & Wildlife Service, Land-Based Wind Energy Guidelines (2012).
<http://www.fws.gov/windenergy/guidance.html>.

² The Service issued draft Guidelines in February, July, and September 2011, that built on the final recommendations of the Wind Turbine Guidelines Advisory Committee (March 4, 2010),
<http://www.fws.gov/windenergy/guidance.html>.

³ See, e.g., *Newton County Wildlife Ass’n v. U.S. Forest Service*, 113 F.3d 110 (8th Cir. 1997); *United States v. Brigham Oil and Gas, L.P.*, 2012 WL 120055 (D.N.D. Jan. 17, 2012).

⁴ American Bird Conservancy, *Birds and Wind Farms: Solutions*,
http://www.abcbirds.org/abcprograms/policy/collisions/wind_farms.html.

⁵ The Service recommends that developers prepare BBCSs instead of ABPPs because the latter have been used most recently for transmission lines and less for other types of development.

⁶ “Utility-Scale” projects generally are larger than 20 MW in nameplate-generating capacity and sell electricity directly to utilities or into power markets on a wholesale basis.

⁷ “Community-Scale” projects generally produce between 1 megawatt (MW) and 20 MW in name-plate capacity that produce electricity for off-site use and are often partially or totally owned by members of a local community or

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Guidelines also require a little more from existing projects than the draft Guidelines, which required only use of the Guidelines “where feasible.” Instead, the Final Guidelines suggest that existing projects and not-yet-constructed projects proactively confer with the Service regarding how to adhere to the Final Guidelines.

The Final Guidelines keeps the five-tier framework for analysis: Tier 1 (Preliminary Site Evaluation), Tier 2 (Site Characterization), Tier 3 (Field Studies to Document Site Wildlife and Habitat and Predict Project Impacts), Tier 4 (Post-Construction Studies to Estimate Impacts), and Tier 5 (Other Post-Construction Studies). However, the Service standardized the inquiry in each tier to ask whether, based on the investigation conducted in that tier, the “probability of significant adverse impacts” is high, moderate, or low. This is important because the Service specifically reserves in the Final Guidelines the authority to determine whether an impact is “significant,” which it has redefined in the Final Guidelines:

‘[S]ignificance’ takes into account the duration, scope, and intensity of an impact. Impacts that are very brief or highly transitory, do not extend beyond the immediate small area where they occur, and are minor in their intensity are not likely to be significant. Conversely, those that persist for a relatively long time, encompass a large area or extend well beyond the immediate area where they occur, or have substantial consequences are almost certainly significant. A determination of significance may include cumulative impacts of other actions.

As recognized by the Final Guidelines these terms involve “unavoidable overlap” and “inherent ambiguity,” which will require the FWS to exercise its judgment and develop a consistent approach over time. Although the Final Guidelines still clearly state that the Guidelines generally leave decisions up to the developer, the Service’s ability to determine “significance” – combined with the requirement for “reasoned justification” for rejection of the Service’s advice – makes it unclear what practical effect adherence to the tiered framework would have where the developer and the Service disagree on science or the scale of predicted impacts.

The Final Guidelines mandate the duration and protocol for surveys in some tiers (e.g., Tier 3, where the Guidelines consolidate bird and bat survey information in a Technical Resources section) while providing more flexibility in other tiers (e.g., Tier 5, which prescribes no particular structure for research). The Final Guidelines do modify the minimum duration of post-construction monitoring (from 3 years to 2 years) at sites where Tier 3 studies indicate a high probability of significant adverse impacts. Instead, the Final Guidelines direct developers to shift their attention to exploring opportunities for mitigation unless there is variability in fatality counts that merits additional study.

The Final Guidelines also modify the outcomes available in the tiers. For example, if Tier 2 and Tier 3 investigations result in a determination that there is a high probability of “significant adverse impacts” but such impacts can be mitigated, the developer may proceed with the project by incorporating mitigation. (Previous drafts only offered abandonment in response to a finding of “high risk.”) Impacts to plant communities of concern are no longer part of the Tier 2 and Tier 4b decision frameworks and accordingly cannot result in project abandonment. (Confusingly, however, the Guidelines now define “plant communities of concern” and still require evaluation of the “risk of significant adverse impacts” to plant communities of concern and opportunities for mitigating such risk in Tier 2.)

have other demonstrated benefits in terms of retail power costs, economic development, or grid issues. “Distributed” wind projects involve “small and mid-size turbines between 1 kilowatt (KW) and 1 MW that are installed and produce electricity at the point of use to off-set all or a portion of on-site energy consumption.

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The Final Guidelines expand and revise the recommended best management practices for wind energy facilities in a variety of areas. For example, the Final Guidelines set forth circumstances in which overhead power lines may be acceptable; require the minimization of activities that attract prey or predators; expand the obligation to minimize lighting to a distance of one-half mile from turbines; recommend developing policies to slow the speed of vehicle travel to reduce collision risks; require the prompt removal of large animal carcasses; and direct that wildlife habitat enhancements should not be added to wind energy facilities.

One interesting feature of the Final Guidelines is the estimate of the resources anticipated to be required to comply with the guidelines, prepared pursuant to Office of Management and Budget (OMB) guidance implementing the Paperwork Reduction Act of 1995. The Service estimates that it will require 83 hours to comply with Tier 1 requirements; 375 hours for Tier 2; 2,880 for Tier 3; 2,550 hours for Tier 4; and 2,400 hours for Tier 5 requirements. While many industry observers may feel these estimates understate the resource commitments imposed, for a so-called “voluntary” program which provides no assurances that compliance will provide protection against penalties for incidental takes under the MBTA, the level of effort required is certainly extraordinary.

In sum, the Final Guidelines provide a road map for proposed and existing wind energy projects to follow to reduce risk of liability under the MBTA, BGEPA, and ESA. The Service appears to remain willing to consider voluntary approaches to addressing liability under these laws through development of Bird and Bat Conservation Strategies. The Service intends to issue updated guidelines under BGEPA in the near-term which may provide additional guidance for projects that may take bald or golden eagles. Project developers should carefully review these guidelines, and develop compliance strategies that balance legal concerns with economic considerations.

For more information regarding compliance strategies for proposed or operating wind energy projects, contact the authors below.

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