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US Fish & Wildlife Service Issues Final Wind Energy Guidelines

Highlights

On March 23, 2012, the United States Department of Interior's Fish & Wildlife Service (the "Service") issued final Land-Based Wind Energy Guidelines (the "Guidelines"). These non-binding Guidelines set out the wildlife impact studies and procedures for determining appropriate mitigation measures that onshore wind energy developers should undertake before and after a project's construction. The impacts to wildlife the Guidelines address include collisions with wind turbines, loss of habitat, fragmentation of large habitat blocks, wildlife displacement and behavioral changes, and indirect effects on wildlife such as the introduction of invasive plants. The Guidelines present a tiered approach to guide project developers through the Guidelines' inquiries and mitigation measures. They are intended to apply to all utility-scale, community-scale and distributed land-based wind energy projects on private or public land. The Guidelines can be found at http://www.fws.gov/windenergy/docs/WEG_final.pdf.

The issuance of the Guidelines completes a five-year process that includes input from public and private stakeholders and comments to draft guidelines the Service issued in February 2011. The Guidelines, which take effect immediately, replace voluntary interim guidelines issued in 2003.

Complying with the Guidelines will assist developers in avoiding violations of the principal federal statutes protecting wildlife and their habitats—the Migratory Bird Treaty Act ("MBTA"), Bald and Golden Eagle Protection Act ("BGEPA") and Endangered Species Act ("ESA"). In general, these species protection laws impose strict liability, making it unlawful to "take" or harm migratory birds, bald and golden eagles and other species that have been listed by the Service. Violation of these laws can result in civil and criminal penalties as well as an injunction affecting project operation or construction. The ESA and BGEPA provide for an exception for activities authorized under an incidental take permit ("ITP"). Although compliance with the Guidelines is voluntary, in deciding whether to refer a violation of the MBTA or, for certain sites, the BGEPA for enforcement, the Service states that it will consider a project's documented efforts to comply with the Guidelines. But this "soft comfort" does not expressly apply to the ESA. Nor does it prevent the Service from exercising its enforcement authority where there has been a violation of a federal species protection law, a right the Guidelines expressly reserve. And, developers should assume that if they fail to follow the Guidelines and project operation results in a violation of one of the species protection laws, then the Service will treat that failure as a negative factor in recommending enforcement. Moreover, the Guidelines do not eliminate the need for an incidental take permit under the ESA or the BGEPA, or for the preparation of a Habitat



Richard Horsch
Partner, New York
+ 1 212 819 8866
rhorsch@whitecase.com

Arthur Scavone
Partner, New York
+ 1 212 819 8710
ascavone@whitecase.com

Douglas Halsey
Partner, Miami
+ 1 305 995 5268
dhalsey@whitecase.com

Neal McAliley
Partner, Miami
+ 1 305 995 5255
nmcailley@whitecase.com

Jason Webber
Partner, New York
+ 1 212 819 8230
jwebber@whitecase.com

Seth Kerschner
Associate, New York
+ 1 212 819 8630
skerschner@whitecase.com

New York

White & Case LLP
1155 Avenue of the Americas
New York, NY 10036
United States
+ 1 212 819 8200

Miami

White & Case LLP
Southeast Financial Center
200 South Biscayne Boulevard
Suite 4900
Miami, Florida 33131-2352
United States
+ 1 305 371 2700

Conservation Plan (“HCP”) under the ESA or an Eagle Conservation Plan (“ECP”) under the BGEPA. Instead, the procedures are designed to provide developers with information to determine whether an ITP should be obtained or prepared.

The Guidelines’ Tiered Approach

The Service describes the Guidelines’ tiered approach as “an iterative decision-making process for collecting information in increasing detail.” Each of the five tiers refines the information from, and builds on, the findings of and measures undertaken during, the previous tiers. After the completion of each tier, developers are to decide whether to abandon or proceed with the project or, to assist in making that decision, collect additional information. Tiers 1, 2 and 3 are “pre-construction tiers,” during which developers identify, avoid and minimize impacts to wildlife and their habitats in selecting and developing a site. The Service notes that for many wind projects there will be no need to follow the Guidelines beyond Tiers 1 or 2, because in many cases the Tier 1 and Tier 2 inquiry will identify no risk.

During Tiers 4 and 5, the “post-construction tiers,” developers assess the effectiveness of their actions taken in the earlier tiers (including actions to mitigate effects on species of concern) and, if necessary, take additional steps to address risks. Tier 5 studies, triggered when actual impacts are significant and greater than those predicted, are expected to be necessary only in rare circumstances.

The Service encourages developers to consult with them early and often throughout the process, stressing: “the most important thing a developer can do is to consult with the Service as early as possible in the development of a wind energy project.”

The Guidelines apply to existing projects as well as new projects. Existing projects are to apply the portions of the Guidelines that are relevant to the current phase of the particular project. For example, the Service recommends that developers of currently operating projects confer with the Service regarding the appropriate period for fatality monitoring under Tier 4 and, depending on the results of those Tier 4 studies, consider undertaking Tier 5 studies and mitigation measures.

The Guidelines also include best management practices for site development, construction, retrofitting, repowering and decommissioning. The Service plans to offer a training course on the Guidelines within the next six months.

Tier 1: Preliminary Site Evaluation

The first tier requires the broad screening of the landscapes of all sites under consideration at the early stage of project conception to assess generally whether species of concern, critical areas of wildlife congregation or migration pathways may be present, whether development is precluded by law or by the presence of conservation restrictions, and whether the proposed wind project may result in habitat fragmentation. In conducting Tier 1 investigations, developers are encouraged to use publicly available information in addition to data obtained in consultation with the applicable Service Field Office.

Tier 2: Site Characterization

The second tier becomes relevant when developers have narrowed their consideration to specific sites. Like Tier 1, Tier 2 is intended to further assist in identifying potential sites that are appropriate for development and eliminating those that are not. The Tier 2 site characterization relies on information and materials available from governmental agencies, nongovernmental organizations and other publicly available sources that may be relevant to the potential sites. It also requires at least one site visit to a prospective site by a knowledgeable biologist to “groundtruth” the available information. The Tier 2 site characterization should consider (i) the presence of species of concern or plant communities of concern, (ii) whether development is precluded by law or by the presence of conservation areas, (iii) whether site development could result in habitat fragmentation, (iv) whether (and which) species of birds and bats are likely to use the site, and (v) whether there is a potential for adverse impacts to species of concern.

It is during Tier 2 that developers may realize that endangered or threatened species or eagles are likely to be affected by the project and that, should that site be selected, an application for an ITP under the ESA or BGEPA or the preparation of an HCP/ECP may be necessary.

Although many wind projects will not need to follow the Guidelines beyond Tiers 1 or 2, the Service notes that the most likely outcome of the Tier 2 inquiry is that an answer to one or more of the questions for consideration will be inconclusive and that developers will then proceed to Tier 3.

Tier 3: Field Studies to Document Site Wildlife and Habitat and Predict Project Impacts

The third tier requires developers to conduct “quantitative and scientifically rigorous studies to assess potential risks.” These quantitative assessments examine whether species of concern are present at the proposed site, assess the potential for habitat fragmentation, and determine the distribution, abundance, behavior and use of the site by species identified during Tiers 1 or 2. The studies and analytic tools to be used during Tier 3 include acoustic monitoring (ultrasonic sound detection) to detect the presence of endangered or otherwise rare bat species, either alone or in combination with mist-netting, a procedure designed to capture bats for species identification. These studies may be required to cover more than one season. The Guidelines set out separate protocols for analyzing the potential for habitat fragmentation and for determining the distribution, relative abundance, behavior and site use of species of concern.

Tier 3 also assesses (i) the risks of adverse impacts by the proposed project to individual, and local populations of, species of concern and their habitats, (ii) how those impacts can be mitigated and (iii) whether studies that would continue after construction should be initiated during Tier 3.

Tier 4: Post-Construction Studies to Determine Actual Impacts

During Tier 4, the first post-construction stage, studies are to be undertaken to assess whether predictions made prior to construction concerning fatalities and impacts to species of concern and their habitats were correct.

Tier 4 is divided into two subparts—Part A focuses on determining species fatalities; Part B focuses on assessing impacts from habitat loss, degradation and fragmentation. “Fatality monitoring” under Part A—typically searching for bird and bat carcasses beneath turbines to estimate the number and species composition of fatalities—determines the fatality rates for birds, bats and other species of concern within the project boundaries and as compared to those of similarly situated projects. Whether and what actions should be taken to reduce fatalities must also be considered. Part B—assessing direct and indirect impacts of habitat loss, degradation and fragmentation—examines whether adverse impacts predicted in Tier 3 from loss, degradation or fragmentation of habitat occurred and, if so, whether the impacts can be mitigated.

Tier 5: Other Post-Construction Studies

Tier 5 addresses other post-construction studies. Tier 5 actions are expected to be warranted only in rare circumstances, such as when (i) fatalities observed during Tier 4 studies exceed the fatalities expected and are deemed to have a significant adverse impact on local population, (ii) mitigation measures adopted during an earlier stage were not effective or (iii) impacts from the project are likely to lead to population declines in species of concern. Because Tier 5 studies will be highly variable and unique to the circumstances of an individual project, the Guidelines do not provide specific guidance on all potential approaches. Instead, the Guidelines provide examples of project-specific case studies relevant to addressing Tier 5 concerns.

Mitigation

Under the Guidelines, when a significant impact to a species of concern is expected, mitigation is required. The Guidelines define mitigation as “avoiding or minimizing significant adverse impacts and, when appropriate, compensating for unavoidable significant adverse impacts.” The Service emphasizes that project planners should first avoid and secondarily minimize potential adverse impacts. Mitigation efforts may include, among other actions, siting the project or individual turbines in a location that will avoid or minimize impacts, curtailing project operations during certain months or curtailing the operation of individual turbines when a species of concern is migrating through the project area. The Guidelines encourage the use of bird diverters that electric utilities have developed and used over the years to prevent injury to birds from electric transmission lines.

Where impacts are unavoidable, compensatory mitigation—defined as “replacement of project-induced losses of fish and wildlife resources”—may be required.

Changes From the Draft Guidelines

Some requirements that were included in the February 2011 draft guidelines and may have been burdensome for project developers do not appear in the final Guidelines. For example, habitat degradation, plant communities and the required communication with relevant agencies were removed from consideration in Tier 1. These topics are now addressed primarily in Tier 2. The draft recommended coordination with private conservation groups at the Tier 1 stage. That recommendation now appears in Tier 2.

Potentially burdensome monitoring requirements have also been pared back. The draft recommended a minimum of three years of pre-construction study under Tier 3, while the Guidelines now provide that the “duration and intensity of studies needed should be determined through communication with the Service.” Unlike the draft guidelines, which recommended a minimum of two years of post-construction monitoring, the final Guidelines are less prescriptive, providing that the duration of monitoring should be based on “outcomes of Tier 3 and Tier 4 studies and analysis of comparable Tier 4 data from other projects.” While the draft guidelines required consideration of the impact of noise on wildlife, the final Guidelines have largely omitted noise considerations in Tiers 3 and 4.

Conclusion

The Service views the Guidelines as striking a balance between the increased demand for wind power and the required protection of species of concern. Many of the Guidelines’ recommendations formalize best practices that many responsible developers have already been following, especially after the 2009 *Beech Ridge* decision enjoining further construction of a West Virginia wind project and limiting the operation of constructed wind turbines because the court deemed it likely that the project would result in a “take” under the ESA. *Animal Welfare Institute v. Beech Ridge Energy, LLC*, 675 F. Supp. 2d 540 (D. Md. 2009).¹ By providing qualified soft comfort to developers who comply with the Guidelines, the Service no doubt hopes to provide greater certainty to wind project developers—developers can build a wind project and not be so afraid of having it shut down because of the unanticipated presence of protected species.

The Guidelines are also of importance to wind project lenders and investors. Lenders and investors should confirm a project’s compliance with the Guidelines and, if mitigation measures have been adopted, should understand what, if any, effect those measures could have on the project’s operation or cost.

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¹ See our December 2009 Client Alert: “Court Halts Construction and Limits Operation of Wind Project for Failure to Comply with Endangered Species Act.” http://www.whitecase.com/alerts_12152009_1/