

U.S. FISH AND WILDLIFE SERVICE ISSUES FINAL LAND-BASED WIND ENERGY GUIDELINES

The U.S. Fish and Wildlife Service recently issued the final version of its Land-Based Wind Energy Guidelines. Compliance with the Guidelines is voluntary and will not absolve developers of liability for violations of relevant laws such as the Migratory Bird Treaty Act or Bald and Golden Eagle Protection Act. The Guidelines make clear, though, that FWS will focus its enforcement efforts on those wind energy projects that impermissibly “take” (as defined by statute) protected bird species without attempting to identify and implement effective, reasonable avoidance measures. According to FWS, wind energy developer compliance with the Guidelines, including communication with FWS, is an appropriate means of identifying and implementing reasonable, effective avoidance measures. With this announcement, FWS creates a strong incentive for wind energy developers to comply with the Guidelines because doing so will help shield developers from prosecution.

The Guidelines establish a five-tiered, iterative approach to identify and minimize impacts to “species of concern” and their habitats.

- Tier 1: In the first tier, developers complete a preliminary site evaluation to assess potential environmental risks at the landscape scale. The evaluation may be based on publicly available information and generally does not require site-specific studies.
- Tier 2: In tier two, developers complete site-specific characterization to further evaluate potential environmental risks. FWS recommends that tier two analyses include contact with relevant agencies and site visits by a wildlife biologist to evaluate current conditions.
- Tier 3: Tier three studies should focus on assessing the risk for the project to cause significant adverse impacts on species of concern, and on identifying potential mitigation measures to minimize those risks.
- Tier 4: Tier four focuses on implementation of studies aimed at assessing the accuracy of habitat impact and fatality risk predictions made in tier 3. The duration of tier four studies will be determined based on the outcome of studies completed in tiers one, two, and three.
- Tier 5: Tier five studies would only be required in the event that observed fatalities exceed predictions, if mitigation measures are found ineffective, or if the project’s estimated impacts are likely to lead to population declines in species of concern other than federally listed species.

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At this time, it is unclear exactly how this tiered, iterative approach will work in practice. Presumably, FWS will expect wind energy developers to make a good faith effort at satisfying the requirements of this process, given that compliance with the Guidelines will be a factor in FWS's exercise of prosecutorial discretion. Notably, with respect to eagles, this discretion will only apply if a project is not likely to result in take of eagles.

The Guidelines also include best management practices and explain FWS's approach to mitigation. Interestingly, the Guidelines introduce a new concept—Bird and Bat Conservation Strategies—to replace Avian and Bat Protection Plans for wind energy projects. A BBCS will be prepared by the developer and is intended to provide analysis, reasoning, and studies that support the conclusions reached in each tier. It may be developed over time as studies and analyses are completed for each tier, and need not be approved by FWS.

The Guidelines may be found [here](#).

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