

Roundtable Responses to Additional Audience Questions

Wind Energy Training Series: The Tiered Approach Broadcast Live May 22, 2013

During the live broadcast, roundtable participants fielded questions from the audience online. Below are answers written by the roundtable participants to questions that they did not have time to address during the broadcast. The members of the roundtable included: Christy Johnson-Hughes (U.S. Fish and Wildlife Service), Jim Lindsay (NextEra Energy Resources), Stu Webster (Iberdrola Renewables), Mary Connor (Edison Mission), and Taber Allison (American Wind Wildlife Institute).

1. If Bald or Golden Eagles have a defined risk to an installation via Tier 2 information and Tier 3 surveys, is there a defined threshold to initiate a "Take" permit?

Christy Johnson-Hughes: Wind project operators are not legally required to seek or obtain an eagle take permit. However, the take of an eagle without a permit is a violation of the Bald and Golden Eagle Protection Act (BGEPA), and could result in prosecution. The U.S. Fish and Wildlife Service (Service) does not use the term “threshold” in this context since risk is dependent on location and species and can vary from project to project. If eagles are identified as a species of concern in Tiers 1 and 2, then surveys and modeling should be conducted per the Eagle Conservation Plan Guidance. If the model outcome indicates the potential for take of an eagle, then the Service recommends that the developer apply for a programmatic eagle take permit. We talk more about this during the next Wind Energy Training broadcast on July 31.

2. How does USFWS get around the fact that migratory bird strikes (and mortality) are a direct violation of the Migratory Bird Treaty Act (MBTA)? Unlike the Endangered Species Act (ESA) and BGEPA, MBTA does not have a "take" permit.

Christy Johnson-Hughes, Mary Connor, Stu Webster: The MBTA does not have an incidental take permit similar to the ESA or BGEPA. The U.S. Fish and Wildlife Service (Service) addresses this by indicating in the Land-Based Wind Energy Guidelines (Guidelines) that if a developer or operator is adhering to the Guidelines, and communicating with the Service, then we will use our prosecutorial discretion. Many human activities take migratory birds. Wind companies can reduce their likelihood of being prosecuted under the MBTA by minimizing take through various measures such as micro-siting the turbines, following the Avian Power Line Interaction Committee

(APLIC) Guidelines, Best Management Practices, etc. This use of discretion by the Office of Law Enforcement is detailed in Chief's Directive CD-B53 *Enforcement of the Migratory Bird Treaty Act as it Relates to Industry and Agriculture*. (see attached)

3. What about private land project sites that have no federal nexus and no state oversight? How are eagles and other species protected when dependent upon self-reporting?

Christy Johnson-Hughes, Jim Lindsay, Stu Webster: Many projects are sited on private lands with no federal nexus. It is the responsibility of the developer and/or operator to comply with federal laws. This is where the voluntary nature of the Guidelines really kicks in. Regardless of where the project is located, compliance with ESA, BGEPA and MBTA is still required. The Guidelines facilitate a collaborative approach to developing a project that avoids and minimizes impacts to habitat and wildlife. It is increasingly common for local and state jurisdictions over wind energy development on private property to require coordination with state and federal wildlife agencies.

4. How is the predicted level of impact/risk from a Tier 3 survey evaluated (e.g., what is the predicted impact assessed against and how does do the predicted impacts influence the development process)?

Stu Webster, Taber Allison: While there is no known correlation between the predicted level of impact during pre-construction studies and estimated impact from post-construction studies, there is a reliable trend toward making a qualitative prediction of impact based on presence of species (e.g., frequency or density of species present) as well as relative impact based on prior studies from operating projects in similar landscapes. Predictions of impacts are typically "low", "medium", or "high" and Tier 4 studies are conducted to evaluate those predictions. In most cases survey results conform to predictions. Where Tier 4 surveys determine a higher than predicted level of impact, then additional effort by the owner/operator may be necessary to evaluate potential causes or to mitigate these impacts.

5. Is there any enforcement occurring at all?

Christy Johnson-Hughes: The Service is not able to comment on ongoing investigations.

6. Discuss where power purchase agreements fit in relation to environmental permitting. Once entered into power purchase agreement, does the company have the ability to adjust it based on environmental permitting requirements (e.g., facility layout)?

Mary Connor, Jim Lindsay, Stu Webster: The estimated costs associated with Tier 3, 4 and 5 studies are “built” into the overall project costs prior to construction. The power purchase agreements (PPAs) are not adjusted if additional studies are required.

Tiers 1 through 3 are pre-operational costs and a business risk for the project. Tier 4 (and where anticipated Tier 5) costs are built into the project pro forma for the life of the project. Environmental siting and permitting costs are independent of the PPA. The PPA can be a constraint on unforeseen post-construction Tier 5 and/or adaptive management strategies.

7. Are there similar guidelines in place for the oil and gas industry?

Christy Johnson-Hughes, Stu Webster: There are basic best management practices in place for oil and gas activities on federal lands (Bureau of Land Management) to reduce incident of wildlife impacts by those activities. However there is no comprehensive set of guidance that instructs on how to sample, measure, and estimate fatalities; no expectations are established of other industries to work collaboratively with state and federal wildlife agencies; nor is there a tiered approach for review of oil and gas activities, even though it could be adapted for such use. Some states use best management practices for review of projects on private lands that require a state or local permit. This is not practiced as consistently as on public lands.

8. Why would wind energy developers mitigate if it's not required?

Christy Johnson-Hughes, Mary Connor, Stu Webster: It is part of adhering to the Guidelines. Adhering includes avoiding, minimizing, and where appropriate, compensating for significant adverse impacts to species of concern. By following the Guidelines' tiered approach, the risk to wildlife is often reduced with proper siting and studies. Where mitigation for significant adverse impacts is required, the Guidelines provide a basis for structuring the mitigation plan.

9. Are the guidelines part and parcel of letting wind developers off the hook for impacts, or are developers legitimately using the guidelines to truly minimize impacts?

Christy Johnson-Hughes: The Guidelines were developed by the Service with advice and comment from various stakeholders including industry, state wildlife agencies, environmental conservation organizations, Tribes and other federal agencies. It is in everyone's best interest to use the Guidelines. Many companies are using the Guidelines to minimize impacts. Anecdotal evidence suggests that more companies are communicating with the Service now than before the Guidelines were published. The Service is developing a reporting mechanism to better track use of the Guidelines.

10. What is the most common number of pre-construction study years necessary to evaluate avian and bat exposure at high risk windpower sites?

Christy Johnson-Hughes: Pre-construction studies depend on the species of concern, the location of the project and the uncertainty of risk to the species. The Guidelines recommend at least one year of pre-construction surveys. More years of study may be needed if federally-listed species or eagles are present. The same may be true if the location poses a high risk to species of concern. Tiers 1 through 3 typically take from 2 to 3 years.

11. Understanding all projects start with location regardless of scale - does the Service recognize demonstrable differences between single wind turbine impacts upon species as opposed to utility scale?

Christy Johnson-Hughes: The Service does recognize that single turbines are less likely to pose a high risk to species of concern. A few small-scale studies performed on Service National Wildlife Refuge lands indicate a reduced likelihood of take of migratory birds and bats by single turbines. However, a single turbine did take a bald eagle at a Refuge. That is why risk assessments begin with location. However, most single turbines will not need to conduct the analyses recommended in Tiers 2 through 5.



United States Department of the Interior

FISH AND WILDLIFE SERVICE
Office of Law Enforcement



CD-B53

Date:

CHIEF'S DIRECTIVE

SUBJECT: Enforcement of the Migratory Bird Treaty Act as it Relates to Industry and Agriculture

PURPOSE: This directive provides guidance for special agents of the Office of Law Enforcement (OLE), U.S. Fish and Wildlife Service (Service) investigating possible violation of the Migratory Bird Treaty Act (MBTA) arising from the take of federally protected birds in connection with the actions and facilities of industry and agriculture.

BACKGROUND: The MBTA establishes a misdemeanor penalty for the take of protected avian species "by any means and in any manner." The MBTA covers many hundreds of avian species that are never subject to hunting and includes corporations as possible defendants. The Service is tasked with enforcing the MBTA and has long considered unpermitted takings of protected birds outside the hunting context, including takes associated with industrial facilities and agricultural activity, to be potential violations of the statute. Despite the MBTA's "strict liability" standard, the Service has long employed an unwritten policy of encouraging industry and agriculture to employ "best practices" aimed at minimizing and avoiding the unpermitted take of protected birds. Service agents refer for prosecution those takes that occur after the responsible party becomes aware of the condition or practice causing the take and fails to remediate it. This Directive provides formal guidance regarding this policy.

To promote compliance with the law, thus protecting migratory birds from take and to minimize the need for criminal enforcement actions, OLE will look for opportunities to foster relationships with, and provide guidance to, individuals, companies, and industries during the development and maintenance of their operational plans. OLE will partner with other Service divisions to accomplish this mission.

OLE recognizes that the take of some migratory birds may occur even when individuals and companies consult with the Service and others, comply with best management practices and follow Service recommendations. OLE will focus investigative efforts on bird take that is foreseeable, avoidable and/or proximately caused. Investigations will focus on individuals or companies that fail to utilize conservation measures or otherwise minimize negative impacts on migratory birds.

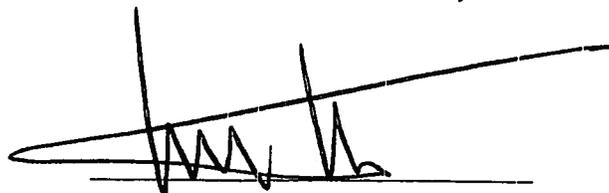
ACTION: OLE agents should review the guidance provided in this document when initiating an investigation involving possible take of migratory birds by industrial activities or agriculture.

GUIDANCE: The Service acknowledges that each investigation presents unique factual and evidentiary factors. Therefore, this guidance constitutes recommendations consistent with the general policy of providing notice, encouraging compliance and an opportunity to correct before charging, rather than a mandatory or complete list of procedures to be followed in each case. The recommendations below should be adjusted as necessary to comply with the overall policy. Situations may arise in which prosecution is justified even if steps other than those recommended here have been employed by the investigator.

When OLE receives information, directly or from other sources, of the possible take of migratory birds in a non-hunting setting (for example, by industry or agriculture) the following steps are recommended.

- Determine the species of bird(s) at issue and whether additional Federal statutes and regulations (Endangered Species Act, Bald and Golden Eagle Protection Act) may apply. Additionally, determine the severity of the take, how often birds are being taken (if possible) and whether the birds are species of conservation concern.
- Determine and document what contacts (whether written, electronic or oral) the individual or company may have had with Federal or other regulatory entities including but not limited to the Service, regarding migratory birds, particularly as to the location or activity at issue. Federal agencies like the Environmental Protection Agency, Army Corps of Engineers and Bureau of Land Management, or state agencies, may have issued relevant permits or guidance.
- Determine and obtain the state and local laws, regulations, permits or other authorizations, and best management practices (and the basis thereof) for the industrial or agricultural activities at issue. Assess whether the company is complying with applicable legal requirements (including permit conditions) and/or adhering to relevant best management practices.
- Coordinate with other Service divisions on present and future correspondence with the company as appropriate.
- Where possible, work with the company or individual and with other Service divisions to facilitate communication of appropriate guidance to help eliminate any future take of migratory birds by placing the company or individual on notice of the issue(s) relating to the take of migratory birds, unless such notice would compromise appropriate investigative techniques. Provide the company or individual the opportunity to take remedial action to halt and/or minimize the take. Document those communications and the relevant actions taken, or not taken, by the company or individual following notice.
- Work closely with the appropriate office of the Department of Justice, U.S. Attorney's Office and consult with, if needed, the Environmental Crimes Section of the Department of Justice.

These recommendations are intentionally general in nature. Development of a complete list of specific investigative steps or techniques is not possible due to the uniqueness of individual investigations and the broad range of industrial and agricultural activities that may be involved in the take of migratory birds.



Chief, Office of Law Enforcement