

Client Alert

Current Issues Relevant to Our Clients

November 27, 2013

The Department of Justice Criminally Charges Wind Farm Owner with Bird Deaths

On November 22, 2013, Duke Energy Renewables, Inc. (“Duke Renewables”), a subsidiary of Duke Energy Corp., plead guilty to criminal charges for violating the Migratory Bird Treaty Act (“MBTA”) in connection with the deaths of protected birds at its “Campbell Hill” and “Top of the World” wind farm projects in Converse County, Wyoming. According to the Department of Justice (“DOJ”), this case represents the first criminal enforcement of the MBTA for unpermitted avian takings at a wind project.

Pursuant to the terms of a plea agreement, Duke Renewables was ordered to pay fines, restitution and penalties totaling \$1,000,000 and was placed on probation for five years. During this probationary period, Duke Renewables must implement an environmental compliance plan (including “informed curtailment”) aimed at preventing bird deaths at four of the company’s commercial wind projects in Wyoming. Duke Renewables must also apply for an Eagle Take Permit with the U.S. Fish and Wildlife Service (“USFWS”). Implementation of the compliance plan is expected to cost up to \$600,000 annually and any take permit is expected to contain additional measures to prevent eagle deaths. In exchange, the DOJ agreed not to prosecute Duke Renewables for migratory bird deaths that occur after the date of the agreement so long as the company adheres to its compliance plan.

In its criminal filing, the DOJ alleged that Duke Renewables constructed the Campbell Hill and Top of the World wind projects in a manner that it knew would likely result in avian deaths despite prior warnings from the USFWS. Even though Duke Renewables attempted to work with the USFWS to avoid avian deaths once the projects came on-line, the DOJ alleged that the projects still resulted in the “unlawful taking” of approximately 58 (Campbell Hill) and 105 (Top of the World) migratory bird species, including golden eagles, American kestrel, ferruginous hawks, northern harriers and black-billed magpies. The alleged violations took place between December 1, 2009 and October 10, 2013.

Commercial wind projects can cause the deaths of birds in a number of ways, including collision with wind turbines,

collision with meteorological towers, electrocution by electrical power facilities or through habitat modification. The MBTA makes it unlawful, except as permitted by regulation, to pursue, hunt, take, capture, kill or attempt to take, capture or kill any migratory bird. 16 U.S.C. §703.

The USFWS has indicated that it will continue to investigate these types of cases and refer them for enforcement.

For More Information

To discuss any topic covered in this alert, please contact Kristin Parker at kparker@chapman.com or (312) 845-3481 or visit us online at chapman.com.

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