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Guilty Plea Entered in First Criminal Prosecution Under the Migratory Bird Treaty Act Against a Wind Farm

December 2, 2013 | Energy, Natural Resources & Utilities

On November 22, 2013, in the first wind farm-related criminal prosecution under the Migratory Bird Treaty Act (“MBTA”)¹, the owner of the Campbell Hill and Top of the World wind farms in Wyoming pleaded guilty to taking approximately 163 migratory birds—including 14 golden eagles—between 2009 and 2013. Pursuant to a plea agreement, the owner of the projects was sentenced to pay \$400,000 in fines, \$100,000 in restitution, \$500,000 for conservation activities, and was placed on probation for five years. The owner also must apply for a programmatic eagle take permit for each of the two subject wind farms, and implement a compliance plan to avoid and minimize bird fatalities at the two wind farms and at its two other Wyoming wind farms (Silver Sage and Happy Jack) at an annual estimated cost of \$600,000.

Golden eagles are not on the list of threatened or endangered species protected under the Endangered Species Act.² However, bald and golden eagles are protected under the Bald and Golden Eagle Protection Act (“BGEPA”)³ and the MBTA, which prohibit the “take”⁴ of bald or golden eagles without a permit.⁵ The BGEPA provides a “Class A” misdemeanor penalty for the first offense of taking a bald or golden eagle “knowingly” or “with wanton disregard for the consequences of [an] act;” second and subsequent violations are “Class E” felonies.⁶ The MBTA provides for a “Class B” misdemeanor penalty for the unpermitted taking of migratory birds.⁷ To date, no wind farm-related prosecution has been brought under the BEGPA.

In 2009, the US Fish and Wildlife Service (“USFWS”) promulgated new permit rules under the BGEPA for the take of bald and golden eagles associated with, but not for the purpose of, otherwise lawful activity.⁸ Under these regulations, the USFWS can issue permits authorizing individual instances of take when the take

cannot practically be avoided.⁹ The USFWS also can issue “programmatic” permits for instances of take that are “reoccurring, [are] not caused solely by indirect effects, and that occur over the long term or in a location or locations that cannot be specially identified.”¹⁰ See our June 19, 2013 Alert for additional information about BGEPA programmatic take permits, U.S. Fish and Wildlife Services Issues Eagle Conservation Plan Guidance for Wind Energy Projects. Currently, there is no means to acquire a programmatic permit under the MBTA.

To assist the wind energy industry in avoiding or minimizing the impact to birds and other wildlife, in 2003, the USFWS issued its *Interim Guidelines to Avoid and Minimize Wildlife Impacts from Wind Turbines*. In 2007, the USFWS began working with stakeholders on a replacement to the interim guidelines that culminated with the 2012 release of the USFWS’s *Land-Based Wind Energy Guidelines* (“WEG”).¹¹ In 2013, the USFWS supplemented the WEG with the release of its *Eagle Conservation Plan Guidance: Module 1 - Land-based Wind Energy, Version 2* (“ECPG”), which provides specific guidance for conserving bald and golden eagles in the course of siting, constructing, and operating wind energy facilities.¹² Compliance with the USFWS guidelines is voluntary, but the USFWS has explained that, if a violation occurs, it will consider documented efforts to follow the guidelines when deciding whether to bring an enforcement action.¹³

The Campbell Hill and Top of the World Wind Farms¹⁴

Planning for the Campbell Hill wind farm began in 2006. In August 2008, in accordance with the 2003 interim guidelines, the USFWS advised the owner of the project to conduct multiple years of pre-construction wildlife surveys. In December 2008, the USFWS informed the owner of the agency’s concern regarding the lack of data on bird use and the potential for high mortality at the Campbell Hill site, and recommended collecting data on normal bird movements prior to determining turbine locations. In December 2008, the owner issued the wildlife study for the Campbell Hill project, which was comprised of seven ground surveys conducted during the three-month period between September 2008 and November 2008, and noted the discovery of 29 raptor nests in or near the project area. In February 2009, the USFWS informed the owner that the agency continued to have concerns regarding avian impacts at the Campbell Hill site. Despite these concerns, the Campbell Hill wind farm began commercial operation in December of 2009.

Planning for the Top of the World wind farm began in 2007. In August 2009, the owner of the project shared the results of the wildlife baseline studies for the Top of the World site with the USFWS, which showed that golden eagles had the highest “exposure index” of avian species present in the area, and predicted 10 raptor takings per 100 MW per year. In November 2009, the USFWS notified the owner that the studies were inadequate to allow for well-informed turbine site selection. In March 2010, the USFWS informed the owner that the survey data provided to the agency for the full project site included only data collected from spring through fall of 2009, and reiterated its concern that the surveys might not be sufficient to determine how best to site the turbines to avoid or minimize the take of migratory birds, particularly eagles. In October 2010, the Top of the World wind farm began commercial operation of the project.

During the planning for the Campbell Hill and Top of the World wind farms, the owner of the projects micro-sited several turbine arrays and individual turbines in

response to sensitive wildlife areas. The owner also sited all wind turbines at least 1.0 miles from identified active raptor nests (except a single turbine at the Top of the World wind farm that is 0.91 mile from a golden eagle nest). Overhead transmission lines were sited at least 0.25 mile from identified raptor nests and constructed in accordance with the Suggested Practices of the Avian Power Line Interaction Committee for raptor protection, and most gathering lines were buried.

Subsequent to the commencement of commercial operation of the Campbell Hill and Top of the World wind farms, the owner of the projects conducted three years of post-construction monitoring (the third year of monitoring for the Top of the World wind farm is ongoing), and implemented an additional, internally-developed avian mortality reporting and tracking system. In addition, in 2011, the owner began to develop Avian and Bat Protection Plans, which were updated and converted to Bird and Bat Conservation Strategies (“BBCSs”) in accordance with the WEG. As part of the BBCSs, the owner initiated a proof-of-concept radar-assisted curtailment project at the Top of the World wind farm, at a cost of over \$750,000. Based on biologist observation, the owner also implemented daytime curtailment of several turbines at the Top of the World wind farm that are located in areas of higher eagle use.

Lessons Learned

Although compliance with the WEG is voluntary, this prosecution demonstrates the importance of adhering to USFWS guidelines throughout the planning, siting and development of new wind projects, in order to take advantage of USFWS prosecutorial discretion. The owner of the projects used the available information to avoid siting turbines and transmission lines in sensitive areas and followed applicable industry guidelines on the construction of transmission lines. In addition, as recommended by the WEG, the owner has conducted post-construction monitoring and implemented adaptive management plans to reduce avian impacts. However, because the owner did not conduct adequate pre-construction surveys, as advised by the USFWS, the USFWS concluded that “the takings of eagles and other migratory birds... were committed knowingly, in as much as the company knew from... pre-construction wildlife surveys that unauthorized avian fatalities would occur..., and failed to take all reasonable steps prior to operation necessary to avoid and minimize such takings.”¹⁵

[1] 16 U.S.C § 703, *et seq.*

[2] 16 U.S.C. § 1532, *et seq.*

[3] 16 U.S.C. § 668, *et seq.*

[4] “Take” is defined in the BGEPA to include “pursue, shoot at, poison, wound, kill, capture, trap, collect, molest or disturb,” and prohibits take of individuals and their parts, nests, or eggs. 16 U.S.C. § 668c. The US Fish and Wildlife Service has expanded this definition by regulation to include the term “destroy” to ensure that “take” includes destruction of eagle nests, and has further defined the term “disturb” as “to agitate or bother a bald or golden eagle to a degree that causes, or is likely to cause . . . injury to an eagle, a decrease in productivity, or nest abandonment.” 50 C.F.R. § 22.3. Under the MBTA, “take” means “to pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to pursue, hunt, shoot, wound, kill, trap, capture, or collect.” 50 C.F.R. § 10.12.

[5] 16 U.S.C. § 668; 16 U.S.C. § 703.

[6] 16 U.S.C. § 668.

[7] 16 U.S.C. § 707(a).

[8] 74 Fed. Reg. 46,836 (Sept. 11, 2009).

[9] 50 C.F.R. § 22.26(a)(1).

[10] 50 C.F.R. §§ 22.3, 22.26(a)(2).

[11] The WEG is available at http://www.fws.gov/windenergy/docs/WEG_final.pdf.

[12] The ECPG is available at

<http://www.fws.gov/windenergy/PDF/Eagle%20Conservation%20Plan%20GuidanceModule%201.pdf>.

[13] WEG at vii.

[14] The information regarding the Campbell Hill and Top of the World wind farms is taken from the Statement of Facts (“Statement of Facts”) included in the November 22, 2013 plea agreement.

[15] Statement of Facts at 11.

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