



# Municipal Law News

December 2013

## WIND TURBINE COMPANY HEAVILY FINED FOR KILLING BIRDS AT WIND FARM IN WYOMING

-Ronald D. Richards

A large wind turbine company (Duke Energy Renewables Inc.) recently pleaded guilty in federal court in Wyoming to violating a federal law that protects migratory birds (the Migratory Bird Treaty Act (Bird Act)) in connection with the deaths of more than 160 protected birds, including golden eagles, at the Company's wind projects in Wyoming. It is believed this case represents the first ever criminal enforcement of the Bird Act for unpermitted bird killings at a wind farm.

The Bird Act was enacted in 1918 and implements the United States' commitments under bird protection treaties with Great Britain, Mexico, Japan, and Russia. In general, the Bird Act prohibits committing various acts toward specifically listed migratory birds. Penalties can go up to \$15,000 and five years' probation. The Bird Act protects many species of birds – including birds commonly found in Michigan (such as some swans, robins, owls, ducks, cardinals, hawks, eagles, sandpipers, orioles and blackbirds).

The federal criminal case involving Duke Energy began after the Company voluntarily reported discovery of some migrant birds near its wind towers between 2009 and 2013. The Company's wind projects consist of more than 150 large wind turbines on private land. In building its wind projects, the Company put several turbines more than one mile and overhead transmission lines more than ¼ mile away from active bird nests it discovered during pre-construction wildlife surveys; and installed diverters on guy wires to help birds avoid the wires.

After the self-reporting of the bird deaths, the federal government started a criminal case against the Company, alleging that its killing of the birds violated the Bird Act. According to the charges and

other information presented in court, the Company failed to make all reasonable efforts to build the projects in a way that would avoid the risk of bird deaths by colliding with turbine blades despite prior warnings about that issue from the U.S. Fish and Wildlife Service. The company quickly pleaded guilty to the allegations and entered into a plea agreement.

Under the plea agreement,

- The Company pleaded guilty to the charges as alleged.
- The Company admitted that the following statements are true:
  - “[c]ommercial wind power projects can cause the deaths of federally protected birds in 4 primary ways:” colliding with wind turbines; colliding with associated towers; colliding with or getting electrocuted by power facilities; and nest abandonment from habitat modification;
  - “[c]ollision and electrocution risks from power lines have been known to the utility and communications industries for decades, and specific methods of minimizing and avoiding the risks have been developed . . . .”;
  - “[t]he risks associated with wind turbine impacts are less well understood”;
  - “[d]ue diligence during the pre-construction stage in surveying the wildlife present in the proposed project area . . . is critically important for wind projects because . . . no post-construction remedies, except ‘curtailment (i.e., shut down), have been developed that can ‘render safe’ a wind turbine placed in a location of high avian collision risk”.

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- The Company knew from pre-construction wildlife surveys that unauthorized bird deaths would likely occur as a result of its construction and operation of the projects, and failed to take all reasonable steps before operation needed to avoid and minimize those deaths.
- The Company was fined \$400,000 for its criminal conduct. The fine is to be given to a wetlands conservation entity.
- The Company must pay \$100,000 in restitution to be deposited in a fund under the control of the Wyoming Game & Fish Department.
- The Company must perform community service by paying \$160,000 to a non-profit dedicated to conserving fish, wildlife, and plants; pay \$10,000 to a similar entity to be used to enhance eagle rehabilitation and conservation programs in Wyoming; and pay \$340,000 to purchase land to preserve golden eagles.
- The Company must apply for an "eagle take permit."
- The Company was put on 5 years of probation with these specific conditions: (a) the company must implement a migratory bird compliance plan with the help of the United States Forest & Wildlife Service to avoid and minimize golden eagle and other

bird deaths at the company's four wind projects in Wyoming (it's expected that the cost to implement this plan will be about \$600,000 per year); (b) the company must develop an eagle conservation plan for two of its Wyoming wind projects.

In response to the plea agreement, the American Wind Energy Association (a national lobbying group representing the wind energy industry) issued a statement that said, in part, that "[n]o form of energy generation, or human activity for that matter, is completely free of impacts and wind energy is no exception." The statement also pointed to a March 2009 study from the New York State Energy Research and Development Authority on various energy forms' impacts on wildlife. That study found that, overall, "non-renewable electricity generation sources, such as coal and oil, pose higher risks to wildlife than renewable electricity generation sources, such as water and wind."

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