

## JUSTICE NEWS

### Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE

Friday, November 22, 2013

## **Utility Company Sentenced in Wyoming for Killing Protected Birds at Wind Projects**

Duke Energy Renewables Inc., a subsidiary of Duke Energy Corp., based in Charlotte, N.C., pleaded guilty in U.S. District Court in Wyoming today to violating the federal Migratory Bird Treaty Act (MBTA) in connection with the deaths of protected birds, including golden eagles, at two of the company's wind projects in Wyoming. This case represents the first ever criminal enforcement of the Migratory Bird Treaty Act for unpermitted avian takings at wind projects.

Under a plea agreement with the government, the company was sentenced to pay fines, restitution and community service totaling \$1 million and was placed on probation for five years, during which it must implement an environmental compliance plan aimed at preventing bird deaths at the company's four commercial wind projects in the state. The company is also required to apply for an Eagle Take Permit which, if granted, will provide a framework for minimizing and mitigating the deaths of golden eagles at the wind projects.

The charges stem from the discovery of 14 golden eagles and 149 other protected birds, including hawks, blackbirds, larks, wrens and sparrows by the company at its "Campbell Hill" and "Top of the World" wind projects in Converse County between 2009 and 2013. The two wind projects are comprised of 176 large wind turbines sited on private agricultural land.

According to the charges and other information presented in court, Duke Energy Renewables Inc. failed to make all reasonable efforts to build the projects in a way that would avoid the risk of avian deaths by collision with turbine blades, despite prior warnings about this issue from the U.S. Fish and Wildlife Service (USFWS). However, the company cooperated with the USFWS investigation and has already implemented measures aimed at minimizing avian deaths at the sites.

"This case represents the first criminal conviction under the Migratory Bird Treaty Act for unlawful avian takings at wind projects," said Robert G. Dreher, Acting Assistant Attorney General for the Justice Department's Environment and Natural Resources Division. "In this plea agreement, Duke Energy Renewables acknowledges that it constructed these wind projects in a manner it knew beforehand would likely result in avian deaths. To its credit, once the projects came on line and began causing avian deaths, Duke took steps to minimize the hazard, and with this plea agreement has committed to an extensive compliance plan to minimize bird deaths at its Wyoming facilities

and to devote resources to eagle preservation and rehabilitation efforts.”

“The Service works cooperatively with companies that make all reasonable efforts to avoid killing migratory birds during design, construction and operation of industrial facilities,” said William Woody, Assistant Director for Law Enforcement of the U.S. Fish and Wildlife Service. “But we will continue to investigate and refer for prosecution cases in which companies - in any sector, including the wind industry - fail to comply with the laws that protect the public’s wildlife resources.”

More than 1,000 species of birds, including bald and golden eagles, are protected under the Migratory Bird Treaty Act (MBTA). The MBTA, enacted in 1918, implements this country’s commitments under avian protection treaties with Great Britain (for Canada), Mexico, Japan and Russia. The MBTA provides a misdemeanor criminal sanction for the unpermitted taking of a listed species by any means and in any manner, regardless of fault. The maximum penalty for an unpermitted corporate taking under the MBTA is \$15,000 or twice the gross gain or loss resulting from the offense, and five years’ probation.

According to papers filed with the court, commercial wind power projects can cause the deaths of federally protected birds in four primary ways: collision with wind turbines, collision with associated meteorological towers, collision with, or electrocution by, associated electrical power facilities, and nest abandonment or behavior avoidance from habitat modification. Collision and electrocution risks from power lines (collisions and electrocutions) and guyed structures (collision) have been known to the utility and communication industries for decades, and specific methods of minimizing and avoiding the risks have been developed, in conjunction with the USFWS. The USFWS issued its first interim guidance about how wind project developers could avoid impacts to wildlife from wind turbines in 2003, and replaced these with a “tiered” approach outlined in the Land-Based Wind Energy Guidelines (2012 LBWEGs), developed with the wind industry starting in 2007 and released in final form by the USFWS on March 23, 2012. The Service also released Eagle Conservation Plan Guidance in April 2013 and strongly recommends that companies planning or operating wind power facilities in areas where eagles occur work with the agency to implement that guidance completely.

For wind projects, due diligence during the pre-construction stage—as described in the 2003 Interim Guidelines and tiers I through III in the 2012 LBWEGs—by surveying the wildlife present in the proposed project area, consulting with agency professionals, determining whether the risk to wildlife is too high to justify proceeding and, if not, carefully siting turbines so as to avoid and minimize the risk as much as possible, is critically important because, unlike electric distribution equipment and guyed towers, at the present time, 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. Other experimental measures to reduce prey, detect and deter avian proximity to turbines are being tested. In the western United States, golden eagles may be particularly susceptible to wind turbine blade collision by wind power facilities constructed in areas of high eagle use.

The \$400,000 fine imposed in the case will be directed to the federally-administered North American Wetlands Conservation Fund. The company will also pay \$100,000 in restitution to the State of Wyoming, and perform community service by making a \$160,000 payment to the congressionally-chartered National Fish and Wildlife Foundation, designated for projects aimed at preserving golden eagles and increasing the understanding of ways to minimize and monitor interactions between eagles and commercial wind power facilities, as well as enhance eagle rehabilitation and conservation efforts in Wyoming. Duke Energy Renewables is also required to contribute \$340,000 to a conservation fund for the purchase of land, or conservation easements on land, in Wyoming

containing high-use golden eagle habitat, which will be preserved and managed for the benefit of that species. The company must implement a migratory bird compliance plan containing specific measures to avoid and minimize golden eagle and other avian wildlife mortalities at company's four commercial wind projects in Wyoming.

According to papers filed with the court, Duke Energy Renewables will spend approximately \$600,000 per year implementing the compliance plan. Within 24 months, the company must also apply to the U.S. Fish and Wildlife Service for a Programmatic Eagle Take Permit at each of the two wind projects cited in the case.

The case was investigated by Special Agents of the U.S. Fish and Wildlife Service and prosecuted by Senior Counsel Robert S. Anderson of the Justice Department's Environmental Crimes Section of the Environment and Natural Resources Division and Assistant U.S. Attorney Jason Conder of the District of Wyoming.

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Environment and Natural Resources Division

*Updated September 15, 2014*