

Criminal Liability for Bird Deaths at Wind Farms? It's a Matter of Discretion

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As it is estimated that wind turbines kill hundreds of thousands of birds annually, wind farm developers and operators may be violating the Migratory Bird Treaty Act many times over each year. While the government is not yet bringing criminal cases for each of the thousands of migratory birds killed each year by wind farms, the government has already prosecuted one wind farm operator under the Migratory Bird Treaty Act and more prosecutions are only a matter of time.

The Migratory Bird Treaty Act, 16 U.S.C. § 701-12, prohibits the taking of a migratory bird and a misdemeanor conviction under the Act can impose penalties as high as \$15,000 and up to six months imprisonment. Although a wind farm developer or operator can be criminally liable for violations of the Migratory Bird Treaty Act, the government has not provided definitive rules as to when it will pursue a criminal action. This lack of clarity is of particular concern as the Migratory Bird Treaty Act does not have a clear scienter element, which some have suggested means it is a strict liability statute—a position endorsed by some courts. Accordingly, the criminal liability of a wind farm developer or operator is largely determined not by a court but by whether the government decides to pursue the issue in the first instance.

The closest the government has come to providing insight into its enforcement policy is the United States Fish and Wildlife Service's (FWS) Land-Based Wind Energy Guidelines. Released in March 2012, the voluntary Guidelines purport to provide a "structured, scientific process for addressing wildlife conservation concerns at all stages of land-based wind energy development." These Guidelines play a role in FWS' enforcement of the Migratory Bird Treaty Act. The FWS

Authors

Nick Peterson
Of Counsel
202.719.7466
npeterson@wiley.law

acknowledges that “it is not possible to absolve individuals or companies from [Migratory Bird Treaty Act] liability” but states that the FWS “focuses its resources on investigating and prosecuting those who take migratory birds without identifying and implementing reasonable and effective measures to avoid the take.” The FWS clarifies that it “will regard adherence to these Guidelines, including communication with the Service, as appropriate means of identifying and implementing reasonable and effective measures to avoid the take of species protected under the [Migratory Bird Treaty Act].”

While the FWS suggests that adherence to the Guidelines will act as a safe harbor for wind farm developers and operators, whether a developer or operator has adhered to the Guidelines is a decision made solely by the FWS. The Guidelines state that “the Chief of Law Enforcement or more senior official of the [FWS] will make any decision whether to refer for prosecution any alleged take of [a migratory bird], and will take such adherence [to the Guidelines] and communication fully in account when exercising discretion with respect to such potential referral.” Further, the FWS holds that it is the responsibility of a wind farm developer or operator to prove to the FWS that the developer or operator adhered to the Guidelines. However, if a FWS official determines that the wind farm developer or operator failed to adhere to the Guidelines, a wind farm developer or operator will have little recourse with respect to that decision.

As bird deaths are inevitable at many wind farms, wind farm developers and operators face the threat of criminal prosecution under the Migratory Bird Treaty Act. The vulnerability of wind farm developers and operators to prosecution became especially clear last year when Duke Energy Renewables Inc. pleaded guilty in federal district court to violating the Migratory Bird Treaty Act in connection with wind farms in Wyoming. The filings in the criminal case suggest that these charges originated from Duke Energy and the FWS' disagreement over the impact on bird deaths of these two wind farms. The government brought these charges against Duke Energy even though the company cooperated with the FWS investigation, had voluntarily reported bird deaths, and had already begun implementing measures to minimize bird deaths at its wind farms. Under a plea agreement with the government, Duke Energy agreed to pay fines, restitution and community service totaling \$1 million and be placed on probation for five years during which time the company must implement an environmental compliance plan. As this case demonstrates, a scientific or technical disagreement can eventually lead to criminal charges.

While the Duke Energy case is the first criminal case brought against a developer or operator of a wind farm, it does not appear to represent a one-time event. On March 26, FWS Director Dan Ashe testified before the U.S. House of Representatives' Committee on Natural Resources regarding, among other things, the FWS' enforcement of the Migratory Bird Treaty Act. At the hearing, Director Ashe reiterated that the FWS' current policy regarding enforcement of the Migratory Bird Treaty Act was to focus on voluntary compliance and pursue targets who did not follow industry best management practices. He went on to note that, as of the date of the hearing, there were 17 wind energy cases under investigation by the FWS and seven had been referred to the Department of Justice (DOJ) for further investigation and possible prosecution.

Now that DOJ has actually prosecuted a wind farm operator for alleged violations of the Migratory Bird Treaty Act, more prosecutions are sure to follow. As bird deaths are currently inevitable at some wind farms, no matter what mitigation or prevention measures are installed, convincing the government not to pursue charges

is likely the best, and may be the only, opportunity to avoid criminal penalties. While all prosecution decisions involve the exercise of government discretion, the strict liability nature of the Migratory Bird Treaty Act makes the government's charging decisions all the more important. Thus, it is critical to cooperate during an investigation and use the opportunity to present favorable facts and arguments to the government. Of course, developing a strong working relationship with the FWS in the first instance will help avoid an initial investigation.

The government's enforcement policy will become clearer as DOJ brings more Migratory Bird Treaty Act cases against wind farms. Regardless of the final dimensions of the government's enforcement policy, maintaining positive relationships with the FWS (and DOJ) will pay dividends if/when a wind farm kills migratory birds in violation of the Migratory Bird Treaty Act.