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## RENEWABLE ENERGY

### WIND POWER

Wind energy opponents have recently started to challenge federal approvals of wind energy projects, alleging that such approvals violate federal migratory bird protection statutes because the projects will almost inevitably harm migratory birds. In these cases, the author says the courts appear to be coalescing around a rejection of the novel claim that federal agencies granting regulatory approvals to wind power projects are required to obtain a permit under the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act. Nevertheless, operational wind power projects must comply with the MBTA and BGEPA or risk enforcement action by the U.S. Fish and Wildlife Service. The USFWS Land-Based Wind Energy Guidelines and 30-year permits under the BGEPA are important tools for managing risks associated with “take” of migratory birds.

## The Application of Migratory Bird Protection Statutes to Wind Power Projects

By GORDON SMITH

**W**ind energy opponents recently have begun to challenge federal approvals of wind energy projects on the basis that such approvals violate the Migratory Bird Treaty Act (MBTA) because the projects will almost inevitably harm migratory birds. The body of case law interpreting these challenges is small and rapidly developing. In addition, the U.S. Fish and Wildlife Service (USFWS) recently enforced the MBTA against a wind power project for the first time, creating

a potential source of uncertainty for wind power developers.

Under the MBTA it is “unlawful at any time, by any means or in any manner,” to harm or kill a protected migratory bird unless specifically allowed by regulation.<sup>1</sup> The list of birds protected under the MBTA includes nearly every type of bird native to the United

<sup>1</sup> 16 U.S.C. § 703.

States.<sup>2</sup> Because the prohibitions under the MBTA are worded so broadly, and there is no current mechanism for a wind power project to obtain an incidental take permit under the MBTA, wind power projects will almost inevitably “violate” the MBTA under a literal reading of the statute. Wind power developers (as well as other entities engaged in otherwise lawful business that may incidentally harm migratory birds) rely on the prosecutorial discretion of USFWS to avoid the MBTA’s potentially hefty criminal and civil penalties.

However, the USFWS has developed detailed Land-Based Wind Energy Guidelines and Eagle Conservation Plan Guidance. Compliance with these guidelines is deemed by USFWS to be an effective method of minimizing harm to migratory birds. In addition, some federal courts have held that the MBTA does not prohibit harm to birds that is incidental to otherwise lawful activity.

Take of a migratory bird in violation of the MBTA is a misdemeanor crime punishable by a fine of up to \$15,000 and six months imprisonment.<sup>3</sup> The MBTA was enacted in 1918 to implement a treaty between the United States and Canada intended to protect migratory birds. The statute was enacted to address a decline in migratory bird populations attributed to the hunting, killing and sale of birds to meet the demands of ladies’ hat fashions at the time.<sup>4</sup>

## Statutory Challenges to Wind Projects

There are only a handful of cases in which plaintiffs have raised the novel claim that it is a violation of the MBTA for a federal agency to authorize a wind power project because the project will almost inevitably result in the take of migratory birds. In the five cases that have been decided so far, courts have ruled against wind power opponents and found that federal agencies do not violate the MBTA by authorizing wind energy projects without first obtaining take permits from USFWS.<sup>5</sup>

**Cape Wind.** The most high profile of these cases is *Public Employees for Environmental Responsibility v. Beaudreu*, which is part of the decade-long chain of litigation brought by opponents of the Cape Wind project proposed for construction off the Massachusetts coast. The U.S. District Court for the District of Columbia granted summary judgment in favor of the Bureau of Ocean Energy Management (BOEM) and developer Cape Wind Associates on plaintiffs’ claim that BOEM violated the MBTA by approving the Cape Wind project, even though it was acknowledged that the project, once operational, was likely or even assured to result in take of protected migratory birds. The court stopped short of finding that the MBTA would never apply to an agency

acting in a regulatory capacity, as in this case with BOEM approving the activity of a third party that would result in take of birds protected by the MBTA. Rather, the court found that there was not a sufficiently reasonable certainty that take under the MBTA would occur because the project has yet to be built, stating: “Even if the taking of migratory birds takes place at some point in the future, it is clear that no such taking has yet occurred and is not imminent at this point because construction of the Cape Wind project has not begun and the wind turbine generators that might take migratory birds are not operational.”<sup>6</sup>

There also has been a trio of MBTA cases decided in the Southern District of California, where courts have ruled against wind power opponents’ claims that federal agencies violated the MBTA by authorizing wind energy projects without first obtaining take permits from the USFWS.

**Tule Wind.** The court in *Protect Our Communities Foundation v. Jewell* granted summary judgment in favor of the Bureau of Land Management and Tule Wind LLC, a subsidiary of Iberdrola Renewables. Tule Wind is a 62-turbine project to be located on BLM land in Southern California. Plaintiffs claimed, among other things, that the BLM violated the MBTA and Bald and Golden Eagle Protection Act (BGEPA) by not obtaining permits under those statutes prior to authorizing the development of Tule Wind. The court denied plaintiffs’ MBTA and BGEPA claims, holding that, “Federal agencies are not required to obtain a permit prior to acting in a regulatory capacity to authorize activity, such as development of a wind energy facility, that may incidentally harm protected birds.”<sup>7</sup>

In *Protect Our Communities Foundation v. Chu*, the court rejected the same MBTA and BGEPA claims brought against the U.S. Department of Energy and Energia Sierra Juarez U.S. Transmission (ESJ), an entity planning to construct a transmission line spanning the U.S.-Mexico border intended to connect a proposed wind power facility in Baja, Mexico to the U.S. grid.<sup>8</sup>

In *Protect Our Communities Foundation v. Salazar*, a federal district court held that project opponents failed to demonstrate that a permit was required under the MBTA when the federal BLM approved a 112-turbine wind power project on public land in Southern California. The court noted that the Ninth Circuit has interpreted take under the MBTA to be “limited to conduct engaged in by hunters and poachers” and that the activity at issue “does not involve the intentional killing of birds by the BLM but involves the construction of a wind energy-generating facility.” The court also noted that the BLM had analyzed pre-construction bird surveys to choose a site with minimal risk to migratory birds and that the project had created an avian and bat protection protocol in consultation with USFWS that was consistent with USFWS wind power siting guidelines. These measures led the court to hold that “the BLM’s decision to issue the [project approval] without

<sup>2</sup> 50 C.F.R. § 10.13.

<sup>3</sup> 16 U.S.C. § 707.

<sup>4</sup> Meredith Blaydes Lilley and Jeremy Firestone, *Wind Power, Wildlife and the Migratory Bird Treaty Act: A Way Forward*, 38 *Envtl. L.* 1167, 1177-79 (2008).

<sup>5</sup> *Friends of the Boundary Mountains v. U.S. Army Corps of Eng’rs*, No. 12-357 (D. Me. April 23, 2014) (magistrate judge’s recommended decision); *Protect Our Cmty. Found. v. Jewell*, No. 13-575, (S.D. Cal. 2014); *Protect Our Cmty. Found. v. Chu*, No. 12-3062, 2014 BL 88150 (S.D. Cal. 2014); *Pub. Employees for Env’tl. Responsibility v. Beaudreu*, No. 10-1067, 2014 BL 72404 (D.D.C. 2014); *Protect Our Cmty. Found. v. Salazar*, No. 12-2211, 2013 BL 308320 (S.D. Cal. 2013).

<sup>6</sup> *Pub. Employees for Env’tl. Responsibility v. Beaudreu*, No. 10-1067, 2014 BL 72404 (D.D.C., 2014). See also (51 DEN A-10, 3/17/14).

<sup>7</sup> *Protect Our Cmty. Found. v. Jewell*, No. 13-575, (S.D. Cal. 2014).

<sup>8</sup> *Protect Our Cmty. Found. v. Chu*, No. 12-3062, 2014 BL 88150 (S.D. Cal. 2014).

obtaining a [MBTA] permit was not arbitrary, capricious or without observance of procedure required by law."<sup>9</sup>

**Sisk Mountain Project.** In the most recent case to come out, *Friends of the Boundary Mountains v. U.S. Army Corps of Engineers*, a U.S. District Court in Maine issued a decision denying all claims in a suit brought by opponents of TransCanada's Sisk Mountain wind power project. Plaintiff Friends of the Boundary Mountains had challenged the U.S. Army Corps of Engineers' issuance of the project's Clean Water Act Section 404 permit, claiming, among other things, that the permit issuance violated the MBTA and BGEPA because the project was likely to result in take under those statutes.<sup>10</sup> With respect to the MBTA, the court found that, "Given the attenuated relationship between the Corps' permitting process and any potential harm to migratory birds, not surprisingly, Plaintiff does not offer any persuasive precedent to support its attempt for private-party enforcement of the MBTA."<sup>11</sup> The court also found that the other federal district court decisions persuasively supported "the conclusion that a take permit was not required prior to the Corps' issuance of the Section 404 permit, both in relation to the MBTA take permits and [BGEPA] take permits."<sup>12</sup> The magistrate judge went even further to state that because the MBTA and BGEPA do not contain citizen suit provisions, the plaintiff could not pursue independent claims against the Corps under those statutes, which are administered by the USFWS and not by the Corps.<sup>13</sup>

In addition, another case, *Protect Our Lakes v. U.S. Army Corps of Engineers*, is pending in U.S. District Court in Maine. Plaintiffs in this case are challenging the Section 404 permit the Corps issued to First Wind's Oakfield wind power project in northern Maine on the basis that the permit issuance was in violation of the MBTA.<sup>14</sup> *Protect Our Lakes* is in the early stages of litigation, with the administrative permitting record filed by the Army Corps in mid-April. (The author represents TransCanada and First Wind in the last two cases.)

This constellation of recent cases coming out of district courts in the First, Ninth and D.C. Circuits suggests that the proposition that federal agencies can violate the MBTA or BGEPA by merely authorizing the activities of third parties is unlikely to gain much traction in the court system. The *Protect our Communities Foundation v. Salazar* ruling has been appealed to the U. S. Court of Appeals for the Ninth Circuit and the Cape Wind ruling has been appealed to the U.S. Court of Appeals for the D.C. Circuit.

## Enforcement of MBTA and BGEPA Against Wind Power Projects

Of perhaps greater concern to wind power developers is the potential for operating projects to cause unin-

tentional takes of species protected under the MBTA and BGEPA. On Nov. 7, 2013, the Department of Justice and Duke Energy Renewables filed a plea agreement with the U.S. District Court in Wyoming, resolving charges brought under the MBTA for the death of 163 migratory birds, including 14 golden eagles, at two wind power projects in Converse County, Wyo.<sup>15</sup> One of the projects caused 105 migratory bird deaths, including 11 golden eagle deaths, within the first year of commercial operation.<sup>16</sup> Under the agreement, Duke Energy is required to pay fines totaling \$1 million, obtain a programmatic eagle take permit under BGEPA, and implement a migratory bird compliance plan expected to cost \$600,000 annually that includes curtailment, experimental conservation practices and mitigation payments for eagle deaths.<sup>17</sup> At a maximum fine of \$15,000 per violation under MBTA, Duke was exposed to nearly \$2.5 million in penalties for the 163 stipulated migratory bird deaths.

The Duke case is the first case in which MBTA has been enforced against a wind power project.<sup>18</sup> The Duke projects at issue were the Campbell Hill Wind Energy Facility consisting of 66 1.5-MW General Electric turbines and the Top of the World Wind Energy Facility consisting of 66 1.5-MW General Electric turbines and 44 2.3-MW Siemens turbines.<sup>19</sup>

Neither project required any federal approvals, and therefore the projects did not require USFWS sign-off prior to operation. Even so, parties involved in the projects voluntarily consulted with USFWS during the development process and voluntarily reported migratory bird deaths to USFWS after operations commenced.<sup>20</sup> The Top of the World project in particular raised USFWS concerns. Preconstruction surveys predicted 20 raptor deaths per year, with golden eagles facing the highest risk of any birds in the area. In addition, a recently active golden eagle nest was located half a mile from the nearest proposed turbine and a quarter mile from a proposed transmission line. USFWS had informed Duke that the surveys it had conducted were insufficient to determine appropriate turbine siting to minimize take of migratory birds.<sup>21</sup> Within the first year of commercial operations in October 2010, the Top of the World project had reported to USFWS the death of 105 migratory birds, including 11 golden eagles.<sup>22</sup>

Wyoming is located in the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit, which has extended the scope of the MBTA to include incidental take resulting from activities other than hunting and poaching.<sup>23</sup> Other circuits, notably the U.S. Courts of Appeal

<sup>15</sup> *United States v. Duke Energy Renewables, Inc.*, No. 13-cr-00268 (D. Wyo. 2013), Plea Agreement (ECF #2).

<sup>16</sup> *Id.* at 22.

<sup>17</sup> *Id.* at 7-10.

<sup>18</sup> Press Release, U.S. Department of Justice, Utility Company Sentenced in Wyoming for Killing Protected Birds at Wind Power Project (Nov. 22, 2013), available at <http://www.justice.gov/opa/pr/2013/November/13-enrd-1253.html>. See also (227 DEN A-14, 11/25/13).

<sup>19</sup> *United States v. Duke Energy Renewables, Inc.*, No. 13-cr-00268 (D. Wyo. 2013), Plea Agreement (ECF #2) at 18-20.

<sup>20</sup> *Id.* at 18-22.

<sup>21</sup> *Id.* at 21.

<sup>22</sup> *Id.* at 22.

<sup>23</sup> See *United States v. Apollo Energies, Inc.*, 611 F.3d 679, 686; 70 ERC 2057, 2010 BL 148250 (10th Cir. 2010) (rejecting argument by oil drilling company subject to enforcement ac-

<sup>9</sup> *Protect Our Cmty's Found. v. Salazar*, No. 12-2211, 2013 BL 308320 (S.D. Cal. 2013).

<sup>10</sup> *Friends of the Boundary Mountains v. U.S. Army Corps of Eng'rs*, No. 12-357 (D. Me., April 23, 2014) (magistrate judge's recommended decision)

<sup>11</sup> *Id.* at 12.

<sup>12</sup> *Id.* at n.6.

<sup>13</sup> *Id.* at 11-15.

<sup>14</sup> *Protect Our Lakes v. U.S. Army Corps of Engineers*, No. 13-cv-00402 (D. Me. filed Oct. 29, 2013).

for the Eighth and Ninth Circuits, have held that the MBTA only applies to hunting and other activities specifically intended to kill birds.<sup>24</sup> Had the Duke projects in question been located in one of these jurisdictions, the outcome of the government's enforcement action may have been different, as Duke would have had more incentive to litigate the proposed fines. In any case, the fact that 14 golden eagles were among the migratory birds killed means that the government could have gone after the projects under the BGEPA as well. Although the government did not say so explicitly, it appears that the Duke projects were deemed to be inconsistent with USFWS wind power siting guidelines.

On March 26, the U.S. House of Representatives Committee on Natural Resources held a full committee oversight hearing at which Dan Ashe, director of USFWS, was subpoenaed to testify regarding "the Obama Administration's approach for enforcing wildlife laws, including the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act as it relates to U.S. energy producers, and the Administration's failure to fully respond to repeated requests from the Committee for documents."<sup>25</sup> The purpose of the hearing and the committee's two-year-long inquiry into the issue is to determine whether the USFWS, at the request of the Obama Administration, has been giving wind power projects a pass while enforcing wildlife laws more stringently against other industries, such as oil and gas producers.<sup>26</sup> At the hearing, Director Ashe informed the com-

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tion that the MBTA does not apply to activities beyond purposeful hunting or possession of migratory birds); *United States v. Moon Lake Electric Ass'n*, 45 F. Supp. 2d 1070 (D. Colo. 1999) (denying motion to dismiss prosecution of electrical co-operative in death of migratory birds where birds had perched on co-op's legally installed electrical infrastructure but co-op had failed to install inexpensive protective equipment).

<sup>24</sup> See *United States v. Brigham Oil and Gas, L.P.*, 840 F. Supp. 2d 1202, 1211, 2012 BL 17964 (D.N.D. 2012) (holding that Eighth Circuit precedent excludes commercially useful activity such as timber harvesting and oil development from the scope of MBTA prohibitions); *Protect Our Communities Found. v. Salazar*, No. 12-2211, 2013 BL 308320 (S.D. Cal. 2013) (stating that the Ninth Circuit has interpreted take under the MBTA to be "limited to conduct engaged in by hunters and poachers").

<sup>25</sup> Press Release, U.S. House of Representatives Committee on Natural Resources, Committee to Examine Obama Administration's Approach for Enforcing Wildlife Laws and Impacts on U.S. Energy (March 10, 2014), available at <http://naturalresources.house.gov/news/documentsingle.aspx?DocumentID=372448>. See also (59 DEN A-16, 3/27/14).

<sup>26</sup> Opening Statement of Chairman Doc Hastings, U.S. House of Representatives Committee on Natural Resources, Hearing on "Collision Course: Oversight of the Obama Administration's Enforcement Approach for America's Wildlife Laws and its Impact on Domestic Energy (March 26, 2014), available at <http://naturalresources.house.gov/uploadedfiles/hastingsopeningstatement3-26-14.pdf>. See also (59 DEN A-16, 3/27/14).

mittee that USFWS "pursues potential violations of the MBTA and [BGEPA] regardless of the industry, individual or agency at issue. There is no preferential application of the statutes to the wind energy industry compared to traditional energy development." Ashe also noted that USFWS is currently investigating 17 wind power projects and has referred seven cases to the Department of Justice for further investigation and potential prosecution for violations of the MBTA, BGEPA, or the Endangered Species Act.<sup>27</sup>

## Looking Ahead

The courts appear to be coalescing around a rejection of the novel claim that federal agencies granting regulatory approvals to wind power projects are required to obtain a permit under the MBTA or BGEPA. Nevertheless, operational wind power projects must comply with the MBTA and BGEPA or risk enforcement action by the USFWS. If a project adheres to the USFWS Land-Based Wind Energy Guidelines and its supplement, the wind energy-specific USFWS Eagle Conservation Plan Guidance, enforcement action by USFWS appears unlikely. In addition, as of January 2014, the BGEPA contains a mechanism to obtain a 30-year incidental take permit. Creation of an analogous regulatory permitting provision under the MBTA, although unlikely to occur, would go a long way toward harmonizing the MBTA with the more modern BGEPA and Endangered Species Act.

In any case, another and possibly bigger issue going forward for wind power projects may be the October 2013 proposed listing of the northern long-eared bat, which is found in 39 states and Canada from the Atlantic Coast to eastern British Columbia, as endangered under the ESA. A final decision on listing will be made within 12 months of the proposal, at which point, if the species is listed as endangered, wind power projects within the northern long-eared bat's range will need to obtain an incidental take permit or risk liability under the ESA.

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*The opinions expressed here do not represent those of Bloomberg BNA, which welcomes other points of view.*

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<sup>27</sup> Testimony of Dan Ashe, Director of U.S. Fish and Wildlife Service, Department of the Interior, Before the U.S. House of Representatives Committee on Natural Resources, Hearing on "Collision Course: Oversight of the Obama Administration's Enforcement Approach for America's Wildlife Laws and its Impact on Domestic Energy (March 26, 2014), available at [http://www.doi.gov/ocl/hearings/113/wildlifelawdomesticenergy\\_032614.cfm](http://www.doi.gov/ocl/hearings/113/wildlifelawdomesticenergy_032614.cfm).