



## BREAKING NEWS - July 2009

### Bird Fatalities Cost Transmission Utility Millions

The courts recently prosecuted and heavily fined a major utility company for violation of a federal law protecting migratory birds. This precedent-setting case suggests it is now imperative for energy developers to understand not only the forthcoming Wind Turbine Guidelines profiled in a recent TOPICS, but also the potential cost of noncompliance with applicable wildlife laws.

Earlier this month, a utility giant pleaded guilty to 34 violations of the Migratory Bird Treaty Act (MBTA) and will pay over \$10 million in fines and restitution. The plea capped a two-year U.S. Fish and Wildlife Service (USFWS) investigation of electrocutions that killed eagles and other birds at transmission facilities in Wyoming. The USFWS found that the company failed to implement specific, readily available measures that make electrical lines safe for birds. The bulk of the utility's restitution costs will go toward retrofitting and modernizing their facilities for avian protection.

The USFWS is expanding its use of the MBTA to minimize bird mortality in the energy industry. In the past, enforcement of the MBTA has generally been selective and limited to willful or blatant violations. In recent comment letters on wind power projects, however, the USFWS has increasingly cited its responsibility under the MBTA to "proactively prevent the mortality of migratory birds whenever possible."



The MBTA is a very broad statute that makes it unlawful to kill or "take" migratory birds. Permits are granted for certain authorized takings (e.g., hunting), but not for "incidental" take (e.g., avian collisions with wind turbines and transmission lines). Moreover, the MBTA has been interpreted by the courts as a "strict liability" statute, meaning that no intent or prior knowledge is required to result in a violation. The MBTA thus poses a dilemma to energy developers by not providing a sure way of avoiding potential liability for unintentional bird mortality. Project developers and owners assume the burden of responsibility for implementing the most up-to-date recommendations to minimize mortality risk.

As demonstrated by the case in Wyoming, criminal prosecution under MBTA is possible if appropriate measures are not taken. Criminal penalties specified in the MBTA include fines of up to \$15,000 per violation, imprisonment for up to six months, or both. A bill introduced in the U.S. House of Representatives this spring would increase the per-violation penalties by three- or four-fold for "intentional and malicious" acts or omissions that result in the unpermitted taking of a migratory bird. As with the recent legal case, the bill is part of an overall pattern suggesting intensified efforts to minimize wildlife impacts.

The MBTA, along with other laws such as the Endangered Species Act and the Bald and Golden Eagle Protection Act, has important implications for energy development. The new Wind Turbine Guidelines may be voluntary, but the recent indicators of increased enforcement show that the guidelines will likely develop real teeth. Wind and transmission developers should consider following field survey protocols and other best practices outlined in the guidelines as part of their overall risk management strategy.

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