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Project Finance Group Client Alert: Wind and Winged Wildlife: Increased Federal Oversight of Wind Energy

Federal oversight of wind energy's adverse impacts to birds, bats and other wildlife will increase due to two recent developments: the pending first programmatic take permit under the Bald and Golden Eagle Protection Act ("BGEPA") and the first criminal enforcement action for avian fatalities under the Migratory Bird Treaty Act ("MBTA"). Wind farms face a somewhat unique environmental challenge: a clean source of energy with a potential dirty impact to wildlife. Debate over the correct level of governmental enforcement and regulation will continue, but impacts to bald and golden eagles, migratory birds and other federally protected species play an increasingly significant role in the siting, construction and operation of wind projects. Going forward, wind projects will encounter an increased need for comprehensive due diligence and a critical assessment of a project's impact to birds so as to ward off potential future criminal enforcement. This Client Alert will highlight some of the likely new challenges that may arise to help place lenders in a better position to assess the risks related to wind projects and to provide developers with an overview of actions and measures to minimize or avoid potential criminal enforcement.

Since wind is a relatively new source of energy in the U.S. and has grown at a rapid pace, regulation of wildlife fatalities and injuries due to collisions with wind turbines and met towers is in somewhat uncharted water, unlike collisions with automobile, planes, utility wires, buildings and oil and gas pits. Considerable effort has been made by government, private industry and environmental groups to reduce adverse avian impacts. New voluntary federal guidelines have been issued, comprehensive pre-construction and post-operation studies have become more common and wind projects typically implement mitigation measures, such as siting turbines away from known nests and other high risk areas, creating habitat buffers and using radar, underground transmission lines and other methods to reduce the risk of collision. However, until the legal requirements become clear, developers bear a burden to determine what needs to be done to comply with the law even when a high priority is placed on minimizing any adverse wildlife impact.

FEDERAL BIRD PROTECTION LAWS

There are two federal laws that regulate the “take” of birds, the BGEPA, which regulates bald and golden eagles, and the MBTA, which regulates approximately 1,000 species of migratory birds.¹ Violations can lead to civil and criminal penalties and potential imprisonment for six months to two years per violation. Although felony prosecutions under the MBTA only apply to the actual or intended sale or barter of migratory birds and migratory bird parts, misdemeanor charges may be levied against any person that “takes” a migratory bird for any other reason. The BGEPA does not contain a distinction between felony and misdemeanor charges for first time offenders.

BGEPA defines “take” to include “pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, molest or disturb.” However, the definition of “take” under the MBTA is ambiguous, leading courts to disagree over whether the MBTA is limited to intentional takes or if it also includes incidental takes, which means a take that occurs as a result of, but is not the purpose of, an otherwise lawful activity. For instance, the Eighth and Ninth Circuits have limited “take” under the MBTA to hunting and related conduct, which would thereby exclude the wind industry from liability for avian fatalities. However, both the Second Circuit and Tenth Circuits have adopted strict liability interpretations of the MBTA holding various defendants accountable for avian fatalities, even if the “takes” were indirect and not willful.

THE FWS VOLUNTARY GUIDELINES

To lower the risk of takes due to the construction and operation of wind energy projects, the FWS adopted the Land Based Wind Energy Guidelines (“FWS Guidelines”) on March 23, 2012. The FWS Guidelines are voluntary, not regulations, and set forth five tiers of pre and post-construction studies that seek to evaluate and address potential negative impacts of wind energy projects on species of concern, including migratory birds, bats, and bald and golden eagles.

Additionally, on May 2, 2013, the FWS released the Eagle Conservation Plan Guidance Module 1--Land-based Wind Energy, Version 2 (“FWS Eagle Guidance”) which is designed as a supplement to the FWS Guidelines. Like the FWS Guidelines, the FWS Eagle Guidance is voluntary and lays out a staged approach to siting new wind projects. It also contains in-depth guidance relating specifically to the protection of bald and golden eagles and compliance with the BGEPA.

¹ The Endangered Species Act (“ESA”), which has a more established enforcement history, also regulates the “take” of endangered or threatened species including certain avian species. However, this Client Alert focuses only on the BGEPA and the MBTA.

FIRST BGEPA EAGLE TAKE PERMIT

Unlike the BGEPA, the MBTA does not provide for a permit allowing for the unintentional take of a migratory bird during otherwise lawful activities. In 2009, the FWS established new rules (50 CFR 22.26 and 22.27) which provide for the issuance of two types of five year incidental take permits under the BGEPA: individual and programmatic. Both permits authorize a take of bald and golden eagles when the take is associated with, but not the purpose of, an otherwise lawful activity. Individual take permits are issued for an isolated take that cannot be practicably avoided. Programmatic take permits are issued for instances of unavoidable take that may recur due to the nature of the take, such as the operation of a wind facility, even after the implementation of advanced conservation practices. This Client Alert focuses on the programmatic take permit, referred to herein, as the Eagle Take Permit.

To obtain an Eagle Take Permit, the project developer must (1) avoid and minimize take to the maximum extent achievable; (2) conduct adequate monitoring; (3) offset any remaining take through compensatory mitigation; and (4) ensure that the direct and indirect effects of the take are compatible with the preservation of bald and golden eagles. An Eagle Take Permit qualifies as a federal action and triggers the need for an environmental review under the National Environmental Policy Act ("NEPA").

On December 9, 2013, the FWS published a final rule in the Federal Register to extend the maximum term of the Eagle Take Permit to 30 years since the average life of a wind project extends beyond the existing five year term limit. The final rule will become effective on January 8, 2014. The FWS has not granted any Eagle Take Permits, even though about fifteen applications have been submitted since the FWS authorized issuance in 2009. However, the first Eagle Take Permit appears likely to be issued soon. In September 2013, the FWS released a draft environmental assessment for a five year Eagle Take Permit for the Shiloh IV Wind Project in Solano County, California. The Eagle Take Permit would allow the take of up to three eagles over the five year term of the permit. The public comment period ended on November 29, 2013 and the FWS can render its decision after December 29, 2013. Additionally, on December 4, 2013, the FWS published a notice of intent for a NEPA review for another Eagle Take Permit. The FWS's recent actions are sign that Eagle Take Permits may become necessary for wind projects with a potential adverse impact bald or golden eagles.

FIRST CRIMINAL ENFORCEMENT ACTION AGAINST THE WIND INDUSTRY UNDER THE MBTA OR THE BGEPA

On November 22, 2013, Duke Energy Renewables, Inc. entered into a plea agreement ("Duke Settlement") with the U.S. Department of Justice ("DOJ") after being charged with two class B misdemeanors under the MBTA for the death of 149 migratory birds

and 14 golden eagles at two wind facilities in Wyoming. Under the terms of the Duke Settlement, Duke will be placed on a five year probation and be required to pay \$1 million dollars in fines, obtain an Eagle Take Permit and implement a five year environmental compliance plan. The plan must include comprehensive mitigation measures to minimize further avian impacts at four of Duke's wind facilities, and could cost up to \$600,000 per year. The Duke Settlement did not contain a requirement to enjoin current or future operations of either project, even if future takes during the probationary period occur, as long as Duke remains in compliance with the terms of the Duke Settlement.

It is important to note that, as avian fatalities were discovered, Duke promptly reported them to the FWS, worked with the FWS to reduce future fatalities and implemented numerous mitigation measures including monitoring, radar, and curtailment. The Duke Settlement acknowledged this concerted effort and made clear that the fine was reduced and potential additional charges were dropped as a result. Nonetheless, such actions did not absolve Duke from liability because the mitigation measures voluntarily put in place prior to the MBTA conviction were not sufficient to overcome the fact that the projects were constructed in a high risk area despite preliminary studies showing that avian fatalities would likely occur.

WHAT LESSONS CAN BE LEARNED FROM THE DUKE SETTLEMENT?

The Duke Settlement offers several important lessons for the development of new projects. First, it is important to conduct extensive due diligence throughout the life of a project and to consult with the FWS starting at the earliest stages of development and continuing through operation as appropriate. However, simply conducting all recommended surveys and studies and consulting with the FWS is not sufficient. If adverse impacts to avian species are identified, it is the developer's responsibility to move the project to a new location or implement extensive mitigation measures to reduce the risk of avian fatalities. As demonstrated by the Duke Settlement, the FWS's recommendations need to be given high priority, especially with respect to siting in high risk areas. As aptly put by the DOJ in its November 22, 2013 press release announcing the Duke Settlement, "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."

Second, while following the FWS Guidelines and the FWS Eagle Guidance and implementing mitigation measures is by no means a "get out of jail free card," documented efforts to comply with the guidelines and communicate with the FWS will likely be taken into consideration by the FWS and the DOJ when determining whether

and to what extent it should bring an enforcement action should a violation of the BGEPA or the MBTA occur. Duke's good faith effort to reduce fatalities and documented coordination with the FWS did lead to reduced penalties and a decision by the FWS to limit enforcement to MBTA violations.

Third, the Duke Settlement demonstrates a strong likelihood of future enforcement against the wind industry which, until now, has not encountered enforcement under the BGEPA or the MBTA. Prior to the Duke Settlement, there were no criminal convictions of a wind developer for the unintentional take of a bird protected under the BGEPA or the MBTA. Currently, according to the Associated Press, the FWS is investigating bird deaths at over 18 wind projects, about a half a dozen of which have already been referred to the DOJ for potential enforcement although the specific projects were not publicly identified.

Fourth, adopting accepted industry specific mitigation measures may reduce the risk of enforcement. In a letter sent to U.S. Senators David Vitter and Lamar Alexander on the same day as the Duke Settlement, Elliot Williams, Deputy Assistant Attorney General of the DOJ, indicated that "[i]n determining whether to prosecute a [wind energy] company for its violations of the MBTA, both the [DOJ] and the FWS consider whether the company has knowingly failed to adopt industry specific practices to improve their compliance with the law." Such industry specific practices may include, among other things, compliance with the FWS Guidelines and the FWS Eagle Guidance.

In addition, while a limited number of cases have been brought against oil and gas companies, utility companies and pesticide manufacturers under the BGEPA or the MBTA, including at least six against oil and gas companies and two against utility companies from 2009-2013, to our knowledge, none have been brought against building developers, airlines, automobiles or cat owners, all of which have a much larger impact on avian species. For example, recent studies have estimated that there are over 900 million annual bird fatalities due to collisions with buildings, and over 6 million annual bird fatalities due to collisions with communication towers, whereas, according to the FWS's estimates, there are 440,000 annual bird fatalities due to collisions with wind turbines and met towers. Consequently, the Duke Settlement is not necessarily an indication of widespread enforcement against any and all violations of the BGEPA or the MBTA, but it is an important reminder to wind developers and lenders that a high level of attention must be placed on due diligence, the careful siting of turbines and the implementation of mitigation measures that would reduce the risk of a take under the BGEPA and the MBTA.

WHAT ACTIONS CAN REDUCE THE RISK OF ENFORCEMENT?

Since the law surrounding violations of the BGEPA and the MBTA against wind projects is still evolving, it is advisable for developers and lenders to err on the side of caution by preparing to avoid or minimize the risk of adversely impacting protected avian species. For developers, it is of crucial importance to conduct extensive surveys to identify the presence and potential impact to avian species and to communicate with the FWS and local wildlife agencies prior to the construction of wind projects. For lenders, it is advisable to contact legal counsel at the start of the financing process to determine the current status of the law, the level of risk for a particular project and the measures that the lender should request from the developer to minimize liability to the greatest extent possible. Each project is unique and there is no “one size fits all” approach to mitigation and avoidance of a violation of the BGEPA or the MBTA. The use of mitigation measures will vary depending on project location, design, risk of avian impact, and other factors, so it is advisable for developers to create a plan with input from the FWS to take into account the requirements that are specific to each project. However, below are some general recommendations for developers and lenders to consider during the process of developing and/or providing funding for a wind project.

Prior to Site Selection/Pre-Construction

- Initiate consultation with the FWS and state and local wildlife agencies
- Gather information from publicly available sources to assess the likelihood of avian impacts at potential project sites
- Site the project in previously developed areas, if possible, such as agricultural lands, to minimize impact to previously undisturbed habitat
- Conduct 1-2 years of avian, bat and wildlife studies
- Site turbines away from areas with identified high bird and bat concentrations and create buffer zones around sensitive habitat in the project area
- Provide training for construction and project personnel on how to avoid impacts to protected species during construction and operation
- Discuss the results of the pre-construction studies with the FWS and develop a strategy to mitigate any unavoidable adverse impacts

During Construction

- Continue to conduct studies and monitor impacts to protected species and maintain an ongoing dialogue with the FWS

- Implement recommended or voluntary mitigation measures
- Develop a Bird and Bat Conservation Strategy (“BBCS”) as outlined in the FWS Guidelines
- Prepare an Eagle Conservation Plan and apply for an Eagle Take Permit if bald or golden eagles are identified in the project area

Post-Construction/Operation

- Conduct several years of post-construction surveys and continue consultation with the FWS
- Monitor the site periodically for any avian or bat fatalities
- Immediately report any avian fatalities
- Work with the FWS and state and local wildlife agencies to implement additional mitigation measures to reduce the risk of future takes

LOOKING AHEAD

The effect of the Duke Settlement on enforcement against wind developers going forward is still unclear, although future enforcement against other wind developers appears increasingly likely and more action will be necessary to mitigate any adverse impact to avian wildlife. Whether this reflects the start of a long line of charges and what would trigger enforcement remains to be seen. It is certain, however, that the public and regulatory attention placed on wind energy’s impacts to birds, bats and other wildlife is rapidly increasing.

Enforcement may extend to solar developers as well. Recently, certain solar farms have also come under scrutiny for the potential impacts to birds caused by “solar flux,” a very high concentration of solar energy that results in intense heat. To date, no formal enforcement proceedings have been taken against any solar projects, but solar developers should also consider conducting avian studies, adopting mitigation measures and applying for an Eagle Take Permit to reduce the potential for take of protected species. Furthermore, this Client Alert focuses on a discussion of the BGEPA and the MBTA, but developers should also consider the impacts of a project to both avian and wildlife species protected under the ESA.

While this Client Alert is limited to a discussion of the implications of the recent developments under the BGEPA and the MBTA, Milbank is available to discuss a full range of questions related to the BGEPA, the MBTA and the ESA. Additionally, Milbank is well positioned to help clients keep abreast of this ever changing field of law and advise on how best and most cost effectively to reduce the risk of unintentional takes of protected species during the development of wind projects.

PROJECT FINANCE GROUP

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