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California wind farm hoping to get first federal permit to protect birds

By Fiona Smith

California's successful push to boost wind energy in recent years has come at a cost - the turbines' spinning blades kill an unknown number of birds and bats, including golden eagles. And while it has long been illegal under federal law to kill eagles and migratory birds, until recently the government had not prosecuted a wind company for such deaths. That changed a few weeks ago when Duke Energy Renewables Inc. pleaded guilty to killing 14 eagles and 149 other migratory birds at two wind farms in Wyoming.



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Anne E. Mudge, a partner at Cox, Castle & Nicholson LLP in San Francisco, represents a California wind farm that submitted the first application to the U.S. Fish and Wildlife Service for a permit allowing it to kill a few golden eagles.

The North Carolina-based company agreed to pay \$1 million in fines and to spend about \$600,000 a year on steps to ward off bird and bat deaths at the two farms. They must also apply for a permit from the U.S. Fish and Wildlife Service that would set specific requirements to protect eagles. The permit would also protect the company from future prosecution if it kills any eagles.

Since the service first made these voluntary permits available in 2009, no company has gotten one, but one California wind farm is hoping to be the first. Anne E. Mudge, a San Francisco attorney who is working on the application for the Shiloh IV project in Solano County, said she expects more companies to follow suit in the wake of the Wyoming case.

"I think the service knew very well what it was doing," said Mudge, a partner with Cox, Castle & Nicholson LLP. The case "is likely to inspire more companies to come to the table and seek permits."

Under the Bald and Golden Eagle Protection Act and the Migratory Bird Treaty Act, it is illegal to harass or kill eagles and more than 1,000 other migratory birds. Faced with a rapidly expanding wind industry and under pressure to provide legal clarity on bird deaths, the wildlife service created the first ever so-called "take" permit scheme, which focuses only on eagles.

"If you don't want to pursue [a permit] and one is available, you're no longer doing everything you can to avoid and minimize impacts on birds," Mudge said. "If you're pursuing a 'take [permit]' under the Eagle Act and happen to [kill] birds despite your best efforts, you're unlikely to get prosecuted because you're doing the best you can."

In California, the U.S. Fish and Wildlife Service has five active investigations into bird deaths at wind farms and is in discussions with the Justice Department regarding a few of the cases, said Scott Flaherty, a Fish and Wildlife spokesman.

In Duke Energy's plea agreement, the government noted the company disregarded concerns from the wildlife service that the design of the two wind farms in the case could endanger large numbers of birds. The service has issued voluntary guidelines on the proper design of wind farms and it encourages developers to carefully site turbines to minimize bird deaths.

One of the big challenges is that once the turbines are up, there are few scientifically supported measures wind farms can take to avoid bird deaths short of shutting some down, Flaherty said.

"Renewable energy is here to stay and we want to ensure eagles and other birds are here to stay, and finding ways for both of those to coexist is our job," Flaherty said.

Wind power capacity in California alone has tripled since 2002, to 5,500 megawatts, according to the California Wind Energy Association. Less clear is exactly how many birds are killed by these wind farms, since reporting bird deaths is largely voluntary.

A recent study by the Smithsonian Conservation Biology Institute estimates up to 328,000 birds are killed each year by large-scale modern wind turbines around the country. Another recent study published in the Journal of Raptor Research counted 85 eagles killed by wind farms between 1997 and 2012 in 10 states including California. The study did not include the smaller aging wind turbines in the Altamont Pass, which killed 110 golden eagles between 2005 and 2011.

Feral cats, building collisions and pesticides pose even greater threats to birds than wind turbines, said Michael Hutchins, who leads the American Bird Conservancy's Bird Smart Wind Energy Campaign. Still, with the projected growth of wind power in the coming decades, the government needs to ensure projects are not built in areas with heavy bird populations, he added.

"We think we're being completely reasonable here. We're not saying 'No,' we're saying 'Let's do it right,'" Hutchins said. "The Obama administration is on a tear to produce renewable energy for good reason, but the problem is wind energy development is happening so rapidly, it's gotten out ahead of the science and regulatory framework."

In Shiloh IV's case, the wildlife service is considering giving project owner San Diego-based EDF Renewable Energy Inc. protection for killing up to five golden eagles over the five-year term of the permit. Mudge has been working on the permit since 2011 and said the cost of obtaining it is more than \$1 million. The wildlife service is expected to issue a final decision on it in early 2014.

"It's an unfortunate reality that there's going to be collisions between birds and wind turbines, and most wind companies do their very best to prevent that," Mudge said.

The service agreed to allow Shiloh IV be built while the permit application was in process so the company could meet federal tax deadlines crucial to the project's financing, Mudge said.

To make up for possible eagle deaths, the company is offering to retrofit power poles in Monterey County to stop eagles and other birds from being electrocuted. As any eagles are killed, the company would be required to take progressively stronger measures that could run into the millions of dollars, such as experimenting with audio and visual deterrents and radar tracking followed by turbine shutdown if eagles are in danger.

The permit process has been long and difficult largely because it is the first to get this far along in the application, Mudge said.

"It's always hard to be out in front," Mudge said. "There's been a lot of scrutiny."

Attorney Zachary R. Walton, who also advises wind energy companies on environmental permitting, said as more companies seek such permits it will become harder for other wind farms to avoid it. But the recent prosecution also puts pressure on the wildlife service, said Walton, a partner at SSL Law Firm LLP in San Francisco.

"If the service is going to bring prosecutions, they also have to demonstrate they can issue permits ... otherwise it puts the industry in an untenable position," Walton said.

Environmental groups have had a tepid response to the Shiloh IV effort, praising the company's willingness to go the extra mile to prevent bird deaths but also saying more needs to be done.

The wildlife service is taking a piecemeal approach to eagle conservation by ignoring the fact that it is next to 12 other wind farms that are not part of the permit requirements, wrote Audubon California, Natural Resources Defense Council and others in joint comments they submitted to the agency. The groups urged the agency to take "extreme caution" in crafting a permit as it would set a precedent.

California has suffered more harm to eagles from wind farms than anywhere in the country, and wind companies have a mixed record of protecting birds, said Garry George, renewable energy director for Audubon California.

"I think there's some very good developers that pride themselves in taking extra measures ... to reduce the amount of impacts they have on birds," George said. "There are others who might not care."

And while groups like Audubon welcomed the news of the criminal enforcement against Duke Energy Renewables, they had a strong reaction to news that followed a week later - that the wildlife service will increase the length of the eagle permit from five years to 30 years.

In a statement released last week, the National Audubon Society called the 30-year permit scheme a "blank check" for wind developers and said it has "no choice but to challenge this decision, and all options are on the table."

But moving from a five-year to a 30-year permit is crucial to wind developers seeking financing to build a project expected to operate for decades, said Walton.

"From the industry's perspective, you're not seeing an agency that's backing off in regulatory requirements in any regard and it ought to be helpful in issuing more permits and bringing more projects into the regulatory fold."

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