

Green Efforts Gone Afowl?

By Reg P. Wydeven
July 6, 2014

One of my favorite viral internet videos features a young man releasing a mouse he had trapped in his home back into the wild. As the mouse scurries away, a hawk swoops down, scoops up the mouse and flies away to enjoy his meal. This just goes to show that sometimes our best efforts to help nature backfire.

Take Duke Energy Corp., for example. Last fall, the power company based in Charlotte, North Carolina, reached a \$1 million settlement with the U.S. Justice Department's Environment and Natural Resources Division. The government prosecuted Duke Energy over violations that occurred at two of the company's wind farms located in Wyoming.

The Obama administration has promoted renewable energy, including pollution-free wind power. Duke Energy furthered President Obama's clean energy aspirations by operating 15 wind farms across the country, including those in Wyoming. Unfortunately, Duke's efforts to be green were stained with red.

From 2009 to 2013, 149 birds were killed at the Wyoming wind farms, including 14 golden eagles. The remaining 135 birds were made up of hawks, blackbirds, wrens and sparrows. Because eagles look down while they fly searching for food, they often don't notice wind turbines until it's too late. At 300 feet tall with blades over 150 feet long, turbines are deadly for inattentive birds.

In addition to the fine, the settlement also requires Duke Energy to shut down turbines if eagles approach. The company also has to install new radar to detect eagles and report future bird deaths.

The Justice Department prosecuted Duke Energy under the Migratory Bird Treaty Act. While the Act has been used to prosecute oil and gas companies that killed eagles, Duke Energy is the first wind energy company to be prosecuted. Under federal law, it is a violation every time an eagle or other protected bird is killed unless the wind energy facility had obtained a permit. Only no such permits have ever been issued...until now.

Last month, the U.S. Fish and Wildlife Service granted the Shiloh IV Wind Project LLC the first ever permit for the company's California wind farm. The permit allows up to five golden eagles to be accidentally killed, harmed or disturbed over five years before Shiloh would be prosecuted.

While the permits have been available for five years, Shiloh is the first to receive one. The Fish and Wildlife Service introduced these permits to encourage investment in clean energy. Investors backed off, especially after the Duke Energy case, out of fear of prosecution.

While everyone is in favor of clean energy, the American Bird Conservancy is not a fan of turbines. The organization sued the Obama administration over the issuance of the permit, claiming the government did not do enough to protect the eagle population and the death of the birds outweighs the benefits of wind farming.

So the courts will have to decide if these new permits signal the winds of change or if President Obama's wind farm initiative is a dead duck.

This article originally appeared in the Appleton Post-Crescent newspaper and is reprinted with the permission of Gannett Co., Inc. © 2014 McCarty Law LLP. All rights reserved.