

**Climate Alert**

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## Ill Winds for Wind Development

### *Federal Court Halts Operation and Continued Development of W.V. Wind Farm Due to Potential Impacts on Endangered Indiana Bat*

On Tuesday, December 8, 2009, a U.S. District Court put a freeze on the development and operation of the Beech Ridge Wind Farm in Greenbrier County, West Virginia due to concerns over the impact of the project on the Indiana bat, a federally-listed endangered species.<sup>1</sup> The wind farm, which has forty turbines already under construction and would eventually include 122 turbines along a 23-mile ridgeline, is being developed by Beech Ridge Energy LLC a wholly-owned subsidiary of Chicago-based Invenergy Wind LLC.

Animal Welfare Institute, a Washington D.C.-based non-profit organization, along with Mountain Communities for Responsible Energy, a non-profit community organization formed specifically to address the development of wind projects in Greenbrier County, and David G. Cowan, a resident of Greenbrier County who lives near the Beech Ridge project, sued Beech Ridge Energy and Invenergy to stop the development and operation of the wind farm, alleging that the project would constitute a "taking" of the Indiana bat, a species which has been designated as endangered under the Endangered Species Act (the "ESA") since 1967.

#### ESA Prohibits Takings

The ESA prohibits any "taking" of listed species, and violators who intentionally take species are subject to significant criminal and civil penalties. The ESA defines "take" as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."<sup>2</sup> The U.S. Fish and Wildlife Service ("FWS"), the principal federal agency tasked with administration of the ESA, further refined this definition of "take" in its own regulations specifically defining the term "harass." The FWS definition of "harass" is "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering." It also defines the term "harm" to include "significant habitat degradation" that impairs "essential behavioral patterns."<sup>3</sup>

While takings are prohibited under the ESA, Section 10 of the ESA authorizes Incidental Take Permits as a safe harbor to those weighty penalties imposed by the ESA. Incidental Take Permits are available only

"if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity."<sup>4</sup>

#### Shifting Winds

Typically, takings of endangered species are punishable by fines, penalties and injunctive relief after the fact. In this case, the plaintiffs sought injunctive relief to prevent the developers from completing construction of the project. While acknowledging that it was addressing an issue of first impression in the Fourth Circuit, the court rejected the defendants' argument that plaintiffs could not seek injunctive relief solely for future harm or future takings of an endangered species that had not yet occurred.<sup>5</sup>

In a lengthy memorandum opinion, U.S. District Judge Roger W. Titus commented that "[r]esearch shows, and the parties agree, that wind energy facilities cause bat mortality and injuries through both turbine collisions and barotrauma."<sup>6</sup> Turning to the specific facts of this case, the court had to answer the question of whether the Indiana bat was even present at the Beech Ridge project location. The court concluded by a preponderance of the evidence, which included mist-net surveys, acoustic data, and expert testimony, that the Indiana bat is indeed present at the Beech Ridge wind farm location.<sup>7</sup> Specifically, the court found that the Indiana bat's hibernating locations, the physical characteristics of the site, and the acoustical recording of Indiana bat data confirmed their presence.

The court rejected defendants' arguments that the Indiana bat, even if present, would not be killed at the Beech Ridge location, including the argument that the Indiana bat does not fly at the height of the turbines and the argument that no Indiana bats had ever been confirmed as killed at any wind projects in the country.<sup>8</sup> The court found that other bat species had been killed at wind power projects, and there was nothing unique to the Indiana bat species that would make it less susceptible to mortality than other bats.<sup>9</sup> The court ultimately concluded that "[b]ased on the evidence in the record . . . like death and taxes, . . . there is a virtual certainty that Indiana bats will be harmed, wounded, or killed imminently by the Beech Ridge Project, in violation of § 9 of the ESA, during the spring, summer, and fall."<sup>10</sup>

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## Ill Winds for Wind Development (cont'd.)

In light of these findings, the court held that defendants Beech Ridge Energy and Invenergy were required to obtain an Incidental Take Permit for Indiana bats in accordance with the ESA and had failed to do so. As a result, the court halted the operation of any of Beech Ridge's forty existing turbines between April 1 and November 15, allowing those turbines to operate only during the winter months during which Indiana bats are in hibernation. The court further enjoined Beech Ridge Energy from constructing any additional turbines at the project site without first obtaining an Incidental Take Permit in accordance with Section 10 of the ESA.

### Forecast: Cloudy, with Less Wind?

While apparently recognizing the significant chilling effect its decision could have on the development of wind energy projects that are vital to the nation's push to expand renewable power generation, the court determined that Beech Ridge Energy disregarded repeated advice from the FWS regarding the potential impacts of the project on Indiana bats and need for an Incidental Take Permit. Thus, the court labeled Beech Ridge's resulting predicament as "self-imposed," and sent a clear warning shot to wind energy developers about the importance of thoroughly evaluating the impact of a proposed project on endangered species and heeding the recommendations of FWS and other resource agencies. Not only is there the risk of agency enforcement, but this case illustrates the power of the citizen suit provision of the ESA, which allows private parties to enforce the ESA and expressly allows a court to award "costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate."<sup>11</sup>

There is little doubt that both national and local opponents of wind energy development will be emboldened by the result in this case. The availability of litigation cost recovery under the ESA will help facilitate these newfound challenges. Perhaps most significant, however, is the court's decision to grant preemptive injunctive relief and put a stop to both the construction of additional turbines and the operation of existing turbines. The prospect of actually blocking the development or operation of a project, rather than penalizing the developer after the fact, is likely to encourage much wider use of the ESA's citizen suit provisions, particularly as an offensive tactic to block the construction of new wind projects.

As of this writing, Invenergy reportedly has declined to comment on whether it will appeal the ruling. If

some form of expedited review of the injunction were not obtained — and there is no clear procedure for expedited review of an injunction such as this in the federal court system — an appeal could take in excess of a year, and while it could result in the lifting of the injunction, the risk of taking an Indiana bat would remain, and the project would clearly be under significant and heightened scrutiny for such violations by both the FWS and the plaintiffs in this case. Meanwhile, Beech Ridge Energy may be able to obtain an Incidental Take Permit that would permit it to resume construction and operation within roughly the same time frame, and for roughly the cost as an appeal. Of course, Beech Ridge may decide to pursue an appeal and an Incidental Take Permit simultaneously. Whatever path it chooses will ultimately bear close watching by the wind energy industry.

### Endnotes

- 1 *Animal Welfare Institute, et al. v. Beech Ridge Energy LLC, et al.*, No. RWT 09cv1519 (D. Md. Dec. 8, 2009) (opinion noted herein as "AWI").
- 2 16 U.S.C. § 1532(19).
- 3 50 C.F.R. § 17.3.
- 4 16 U.S.C. § 1539(a)(1)(B).
- 5 *AWI*, at 34 (holding that "[p]rotecting against the threat of imminent future harm is clearly consistent with Congress' broad definition of the term 'take.'").
- 6 *Id.* at 10.
- 7 *Id.* at 61.
- 8 *Id.* at 63-64.
- 9 *Id.* at 64.
- 10 *Id.* at 67.
- 11 16 U.S.C. § 1540(g)(4).

### About the Authors

M. Benjamin Cowan is a partner in the Environmental Section of LLB&L. Mr. Cowan is the leader of the firm's Climate Change Practice Team, with an emphasis on wind farm development, carbon trading programs and the development of emissions credits and offset projects. His traditional environmental law practice covers regulatory compliance and permitting issues, civil and criminal enforcement defense, and real estate, corporate and energy transactional matters.

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