

Court Halts Construction and Limits Operation of Wind Energy Project to Protect the Endangered Indiana Bat

On December 8, 2009, a federal district court in Maryland issued a significant decision in *Animal Welfare Institute v. Beech Ridge Energy, LLC*, 8:09-cv-01519, Dist. MD, enjoining the construction and operation of a wind energy project in West Virginia based upon a conclusion that the project would take endangered Indiana Bats in violation of Section 9 of the Endangered Species Act (“ESA”).

This case signals that the controversy surrounding bats, and potentially migratory birds, is likely to continue as the prominence of wind energy continues to grow. Further, the court’s focus on the interaction between the developer and the U.S. Fish and Wildlife Service (“FWS”), and the adequacy of monitoring and bat presence surveys underscores the importance of well-developed and pro-active ESA compliance strategies for the development and operation of wind projects.

BACKGROUND

The ESA broadly prohibits actions that are likely to result in a “take” of a threatened or endangered species, absent a Section 10 incidental take permit or other authorization. 16 U.S.C. § 1538(a)(1)(B). The ESA defines the term “take” as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19).

In *Beech Ridge*, the Animal Welfare Institute and other environmental groups brought an ESA citizen suit against Beech Ridge Energy, LLC, a wind project developer in West Virginia. The Beech Ridge Energy Project consists of 122 turbines, over 300 acres of land along 23 miles of Appalachian mountain ridgelines and is anticipated to provide 186 megawatts of electricity.

Indiana Bat populations had been identified in close proximity to the Beech Ridge Energy Project during their spring and fall swarming behaviors and throughout summer months. Based upon this, the FWS had recommended several years of preconstruction surveys including mist net surveys, acoustical, radar and thermal imaging techniques for Indiana Bats. These recommendations, however, were not adopted by the West Virginia Public Service Commission (“PSC”) in its issuance of a siting certificate for the project. Rather, based on pre-construction surveys that did not detect the presence of Indiana Bats at the project site, the PSC allowed the project to begin construction and required the developer to work with an advisory committee regarding adoption of post-construction bat mortality and adaptive management studies.

THE MARYLAND DISTRICT COURT'S DECISION

The Maryland federal district court enjoined construction of new turbines as well as all operation of completed turbines during non-winter months based on its conclusion that there was a “reasonable certainty” that Indiana Bats would be killed by the project in violation of Section 9 of the ESA.

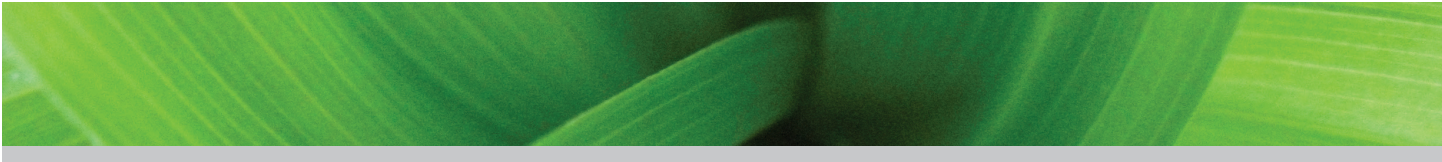
In its decision, the court first addressed the legal standard for a Section 9 take claim. The court concluded, relying upon Ninth Circuit precedent, that to succeed with an ESA Section 9 take claim, “a plaintiff must establish, by a preponderance of evidence that the challenged activity is reasonably certain to imminently harm, kill, or wound the listed species.”¹ In adopting this standard, the court rejected the Defendants’ argument that such harm was prospective in nature and not absolutely certain. The court found an “absolutely certain” standard rather than a “reasonably certain” standard would “frustrate the purpose of the ESA to protect endangered species before they are injured, and would inappropriately raise the evidentiary standard above a preponderance of the evidence.”

The court then concluded that Indiana Bats were present at the project. The court reached this conclusion even though the Defendants’ pre-construction site surveys for bats had not located Indiana Bats at the site. The court based its conclusion on expert testimony as well as evidence of close proximity of caves occupied by the Indiana Bat, the physical characteristics of the project site, the acoustic data, and the behavioral traits of Indiana Bats.

The court then concluded that Indiana Bats were likely to be taken at the project. The court found that it was “uncontroverted” that “wind turbines kill bats, and do so in large numbers.” This, supported by the Plaintiffs’ experts’ opinions, led the court to conclude with reasonable certainty that Indiana Bats would be killed by the project through either turbine collisions or barotraumas during the spring, summer and fall. The court concluded that such a take would violate Section 9 of the ESA, as the Defendants never applied for nor obtained an incidental take permit.

The court recognized that the construction and operation of the project could proceed if project operators obtain an incidental take permit from FWS. Under Section 10 of the ESA, a party can take a listed species if it has received, and complied with the terms and conditions of, an incidental take permit. The FWS (or National Marine Fisheries Service for certain ESA listed species) can issue an incidental take permit if the contemplated taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity. To apply for a permit, the party must submit a description of the activity sought to be authorized, the species sought to be covered by the permit, and a habitat conservation plan. The habitat conservation plan must describe the likely impact of the taking, the measures the applicant will employ to minimize or mitigate any such impact, and any procedures for resolving problems posed by unforeseen circumstances.

¹ See *Marbled Murrelet v. Pacific Lumber Co.*, 83 F.3d 1060, 1068 (9th Cir. 1996); *Defenders of Wildlife v. Bernal*, 204 F.3d 920, 925 (9th Cir. 1998).



IMPLICATIONS

This decision reflects the potential trend towards additional enforcement actions against wind and other renewable projects under the ESA and other environmental statutes, including the Bald Eagle and Golden Eagle Protection Act and the Migratory Bird Treaty Act. The *Beech Ridge* case also is likely to cause wind energy developers to examine, perhaps more so than in the past, the monitoring, evidence and studies describing a project's potential impact on federally listed threatened and endangered species, considering the potential financial, legal and timing repercussions that quickly manifest when ESA enforcement and permitting matters arise.

Finally, coupled with the ongoing discussion as to the effect of wind project developments on potentially endangered sage grouse populations, this decision may further increase the focus and debate on the interaction between the Obama Administration's goal of expanding use of renewable energy and its responsibilities to implement and enforce existing environmental laws.

FOR ADDITIONAL INFORMATION

If you would like more information on this case, please contact Matthew Love, Sam Kalen or Joseph Nelson or any other member of the firm's Environmental practice at (202) 298-1800.

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