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Court Halts Construction and Limits Operation of Wind Project for Failure to Comply with Endangered Species Act



A federal court in Maryland halted construction of a wind farm project and limited the operation of nearly-completed wind turbines to the months of mid-November through March because the project failed to comply with the Endangered Species Act, the principal federal law designed to preserve biodiversity by protecting species that are listed as either "endangered species" or "threatened species." *Animal Welfare Institute v. Beech Ridge Energy, LLC*, Case No. RWT 09cv1519 (D. Md. Dec. 8, 2009).

Invenergy Wind LLC, the fifth largest wind developer in the US, and its wholly-owned subsidiary, Beech Ridge Energy LLC, are developing the Beech Ridge Energy Project in Greenbrier, West Virginia. The developers plan to construct and operate 122 wind turbines along 23 miles of Appalachian mountain ridgelines. If completed, the US\$300 million project would produce 186 megawatts of electricity, enough to provide the annual electricity needs of 50,000 West Virginia households.

Opponents of the Beech Ridge Energy project sued under the Endangered Species Act to stop the project, claiming that the endangered Indiana bat, which is present in Greenbrier County, would be harmed or killed by the operation of the wind turbines. The Endangered Species Act prohibits activities that "take" an endangered species, including activities that harass, harm, or kill an endangered species, unless the activities are authorized under an "incidental take permit."

The parties agreed that wind facilities, as a general matter, injure and kill bats through collision with the turbines and damage to the bat's lungs and eardrums caused by changes in external pressure resulting from the turbines, a phenomenon called "barotrauma." Invenergy claimed that the project would not "take" any endangered Indiana bats because the species is not present in the project location. Invenergy's environmental consultant conducted bat surveys of the project location during the summer, using nets to capture bats, identify their species, and release them. None of the bats captured in the nets were endangered Indiana bats. Invenergy's environmental consultants concluded that the project posed a low risk of harm to Indiana bats because the bats were unlikely to be present at the project location.

The plaintiffs countered that the project's environmental consultant failed to discover Indiana bats because it limited surveys to the summer months and did not analyze recordings of bat calls to determine whether Indiana bat calls were recorded in the area. In support of their position, the plaintiffs cited correspondence by the Fish and Wildlife Service, the federal

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agency principally responsible for implementing the Endangered Species Act, to Invenergy's consultant recommending the use of additional survey methods and additional net surveying for longer time periods and representing all seasons.

The trial court agreed with the plaintiffs. The court gave little weight to the findings of Invenergy's environmental consultant, citing the consultant's failure to comply with the Fish and Wildlife Service's repeated recommendations for additional preconstruction surveys and the use of acoustic detectors to record and analyze bat calls. The court stated that Invenergy's consultant "was determined from the start to receive regulatory approval for the Beech Ridge Project" and was, therefore, the least credible of the expert witnesses who gave testimony at trial. Slip op. at 45. Crediting the testimony of the plaintiffs' experts, the court found that Indiana bats are present at the project location during the spring, summer and fall, and that the bats fly at a height within the rotor swept area of the turbines at the project site. The court found that the Beech Ridge Energy Project was certain to harm, kill or wound Indiana bats, despite the fact that no Indiana bats had been confirmed to have been harmed or killed by the project: The court concluded that there is a virtual certainty that the Beech Ridge Project, in the language of the Endangered Species Act, "will take endangered Indiana bats in violation of Section 9 of the ESA." Slip op. at 71.

Having found that the project violates the Endangered Species Act, the court ordered Invenergy to halt construction of the wind turbines and limit operation of 40 nearly-completed turbines to the winter period, when Indiana bats hibernate. Slip op. at 70. The court did point out, however, that the project developers could apply for an "incidental take permit" from the Fish and Wildlife Service, which would insulate the developers from liability under the Endangered Species Act and allow the project to continue, albeit with modifications to minimize the potential for harm to Indiana bats.

The *Beech Ridge Energy* decision is the first case in which a court has found that a wind energy project violates the Endangered Species Act. Such projects have the potential for injuring and killing birds and bats, largely due to collisions with rotating turbines. The failure to comply with the Endangered Species Act can result in significant civil and criminal penalties and, as is evident from the *Beech Ridge Energy* decision, can bring a project to a halt.

The decision, however, does not sound the death knell for wind projects. To avoid project delays and liability under environmental laws such as the Endangered Species Act, project sponsors must now fully recognize that such laws will be applied to their projects and take steps to ensure that their projects comply with the law. As an initial matter, project sponsors can avoid these problems by engaging in a thorough preconstruction analysis of potential issues, locating the project in a proper area and working with government agencies such as the Fish and Wildlife Service to minimize the risk of harm to endangered species. Compliance with the Endangered Species Act requires developers, in consultation with government agencies, to determine what endangered and threatened species may be present in the project area, assess the potential for harm to those species, and identify steps the developer should take to reduce or eliminate the risk of harm. Developers should also be aware of the availability of incidental take permits as an option for complying with the Endangered Species Act. An application for an incidental take permit must include a habitat conservation plan that proposes steps to reduce or eliminate potential impacts on affected species.

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