



Animal Welfare Institute

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May 28, 2013

BY ELECTRONIC MAIL

Regional Director

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U.S. Fish and Wildlife Service

Ecological Services

5600 American Blvd. West, Suite 990

Bloomington, MN 55437-1458

Re: Public Comments on Permit Application Number TE03502B (California Ridge Wind Energy, LLC). 78 Fed. Reg. 24768 (Friday, April 26, 2013), Docket # FWS-R3-ES-2013-N094, Notice of availability of permit applications, Request for comments.

Dear Sir or Madame:

On April 11, 2013, California Ridge Wind Energy LLC (CRWE)¹ submitted an application to the U.S. Fish and Wildlife Service (the Service) for a Section 10(a)(1)(A) Indiana Bat (*Myotis sodalis*) Enhancement of Survival Permit (Permit) pursuant to Section 10 of the Endangered Species Act (ESA), 16 U.S.C. §§1531 et seq. In response to the Service's request for public comments on that permit application (number TE03502B), the Animal Welfare Institute (AWI) timely submits this comment letter.

AWI is a nonprofit animal protection and conservation organization that was intimately involved with the original passage of the ESA and has spent significant resources defending the law since its promulgation to ensure proper implementation of the Act. In particular, AWI has raised national awareness regarding the significant adverse wildlife impacts of poorly sited and/or poorly planned industrial wind projects on federally listed species.² While AWI is very supportive of renewable energy development including wind energy projects, it recognizes that critical components of any energy project are proper project siting in light of biological/ecological considerations, as well as mitigation and minimization of risks to wildlife.

As will be discussed more thoroughly below, it would be legally and practically inappropriate for the Service to grant CRWE a scientific/enhancement permit ("enhancement permit") because such a result would undermine Congress's plain intent in creating two distinct permit mechanisms in section 10 with different levels of federal and public scrutiny. It would also create a dangerous precedent by reversing nearly forty years of FWS procedure and opening the door to

¹ Although the name of business listed on the permit application is California Ridge Wind Energy LLC (CRWE), CRWE is a wholly owned subsidiary of Invenergy.

² See, e.g., *Animal Welfare Inst. v. Beech Ridge Energy*, 675 F. Supp. 2d 540 (D. Md. 2009). Beech Ridge Wind Energy is also a subsidiary of Invenergy.

various industries to obtain a short-circuited permit without the necessary level of review mandated by Congress in the ESA. For these reasons, permit number TE03502B should be denied, and the FWS and the permit applicant should explore alternative means of addressing the taking of Indiana bats at the Project turbine locations in Illinois.

CRWE’s permit application does not fall within the enhancement permit criteria. CRWE should instead apply for an Incidental Take Permit (ITP).

The ESA prohibits each and every take of a member of an endangered species, 16 U.S.C. § 1538(a)(1)(B), and take of listed species can only be authorized in this situation by obtaining a section 10 permit from the Service because there exists no federal nexus under which to invoke section 7 authorization. Congress created two distinct mechanisms to allow limited takes of listed species in particular circumstances where jeopardy to the species will not result from the activity in question. The first mechanism is the enhancement permit, whereby the Service may grant a request for a permit where a listed species might be taken “for scientific purposes or to enhance the propagation or survival of the affected species . . .” 16 U.S.C. § 1539(a)(1)(A). These permits have historically been granted only to applicants seeking to conduct pure scientific inquiry for the benefit of the species, i.e., where the sole purpose of the activity is to gather empirical or other data that will be used to better protect the species as a whole and to enhance recovery efforts. Examples of activities that may require this type of permit include “abundance surveys, genetic research, relocations, capture and marking, and telemetric monitoring.”³

The second mechanism is the incidental take permit (“ITP”), whereby the Service may grant a request for a permit “if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.” 16 U.S.C. § 1539(a)(1)(B). These permits have historically been granted for pursuits where developers and private landowners wish to engage in an activity that, while not purposefully aimed at taking listed species, is likely to do so because of the nature of the activity at issue. Indeed, Congress made this point very clear in the legislative history for H.R. 6133 that amended the ESA to include the ITP permit mechanism, explaining that the ITP “addresses the concerns of private landowners who are faced with having otherwise lawful actions not requiring federal permits prevented by the section 9 prohibitions against taking.”⁴ Examples of activities that may require an ITP include “construction and/or development activities or in-stream or watershed activities that may impact listed species.”

Because of the very different nature of the activities permitted by each mechanism (pure scientific research vs. private landowner development resulting in incidental take), Congress created many safeguards with respect to ITPs that are not required for enhancement permits. For example, an ITP explicitly requires a detailed habitat conservation plan (“HCP”), that, among other things, must identify all likely impacts to the affected species, incorporate measures to minimize and mitigate any species impacts, consider alternatives, and include as enforceable permit conditions any other measures that the FWS deems appropriate under the circumstances.

³ See USFWS, *Endangered Species Permits: Choosing the Right Permit*, available at <http://www.fws.gov/midwest/endangered/permits/choosing.html> (last accessed 5/21/13).

⁴ H.R. Rep. No. 97-567, at 31 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2831 (emphasis added).

16 U.S.C. § 1539(a)(2)(A). Additionally, an ITP requires that the Service satisfy certain obligations, including that the FWS must ensure that any takes authorized under the ITP will not appreciably reduce the likelihood of the species' survival and recovery. *Id.* § 1539(a)(2)(B). Moreover, because of the significant environmental impacts typically implicated with an ITP, the Service must comply with its obligations under the National Environmental Policy Act (NEPA), which may include preparing an Environmental Impact Statement. 42 U.S.C. §§ 4321-4370. In contrast, however, enhancement permits have far less rigorous requirements (including, normally, no preparation of a NEPA document) because the presumption is that the purely scientific research undertaken pursuant to an enhancement permit will in fact minimize harm to the species during the research and the data gathered as part of the research will contribute to and enhance the species' ultimate recovery efforts.

Therefore, the proper permit mechanism for a particular activity depends on the *nature* of the activity. Where the activity is intended solely to advance the existing body of science and to *benefit* a listed species by enhancing its survival and recovery efforts, an enhancement permit is sensible and a quicker federal review is appropriate. However, in circumstances involving *private* landowners and activities that are likely to result in incidental takes of listed species, the only legally permissible mechanism is an ITP – and only if each of the defined criteria are satisfied (development and submission of an HCP, minimization of harm to the species, finding that takes will not reduce the species' survival and recovery efforts, NEPA documentation, etc.).

In this particular permit application number TE03502B, CRWE concedes that these efforts are not an attempt to obtain an Indiana bat for scientific specimen, but to “take up to two (2) male or female Indiana bats per year, commencing July 15, 2013 and ceasing on September 30, 2014” for the purpose of developing “turbine operational protocols.” *See* Permit Application sections (A)(1)(b) & (C)(1)(a)(ii). This statement signals that an ITP, not an enhancement permit, is the appropriate permit here because the developer is seeking coverage for the possible incidental take of Indiana bats. The ultimate activity proposed by CRWE is the operation of an industrial wind energy facility – precisely the type of development by a private landowner that will result and has resulted in incidental takes of Indiana bats, and thus is an activity that, by definition, requires an ITP before takes of listed species can lawfully occur. The Service appears to recognize this inconsistency, as it has prepared a draft Environmental Assessment (EA) for the enhancement permit, which is historically always done for ITPs, but not enhancement permits.

There are several legal, practical, and scientific flaws with the approach proposed by CRWE in its permit application. First, CRWE has conflated the purposes laid out in the ESA permitting criteria for enhancement and ITP permits in spite of the obvious nature of this permit application and the need for an ITP. Second, CRWE is essentially seeking an enhancement permit in order to obtain research for other ITP applications and test acoustic deterrents and biologically-based turbine operational protocols, which is not provided for within the parameters of the ESA. *See* Permit Application section (C)(1)(a)(ii). This is without any external verification from the independent scientific community that such scientific research is needed. Third, it is legally unjustifiable to seek an enhancement permit to “enhance” the survival and recovery of the species by obtaining data necessary to propagate additional wind turbine activities. The application does not even begin to articulate or support how this “research” will be conducted,

specifically, how the lethal take of Indiana bats in connection with such research will benefit Indiana bats in any location.

It is important to note that acoustic surveys (which present little to no risk of incidental take of listed bat species) are the precise type of pure research historically authorized by the Service via enhancement permits. AWI does not object to a limited enhancement permit (to the extent one is even needed for a non-invasive acoustic survey) restricted solely to pre-ITP acoustic monitoring on the project site to better inform a subsequent ITP and accompanying HCP. With respect to wind projects, only acoustic surveys and other pre-construction and pre-operation surveys/research have been authorized through enhancement permits to date.⁵ Because those activities present a far lower risk to listed bats species than does turbine operation (and because those pre-operation activities could in fact serve to enhance species recovery if survey data informs a developer's decision to abandon and/or modify its turbine configuration to protect bats), only wind energy research activities of that sort even remotely qualify for enhancement permit eligibility. However, the remainder of CRWE's proposed "study" – which is in effect little more than a thinly veiled attempt to maintain a certain level of turbine operation (and thus maintain profits for the private landowner despite likely ongoing incidental takes of listed species) until an ITP can be obtained from the Service – cannot be legally authorized via an enhancement permit due to, as discussed above, the distinctions in the different permit mechanisms.

An enhancement permit would fail to satisfy basic parameters for authorizing incidental take, therefore, the permit must be denied. Like any activity by a private landowner that is likely to incidentally take listed species, CRWE must obtain an ITP before it engages in any further takes of listed species. The proposed "research" on cut-in speeds should be conducted as an enforceable condition of the ITP/HCP (assuming the Service, and the public, determine as part of the ITP process that such research is needed here to mitigate risks to Indiana bats). As part and parcel of obtaining an ITP/HCP, CRWE should be required via an enforceable condition to conduct appropriate research on mitigation (including cut-in speed adjustment and curtailment during migration) *after* obtaining the ITP, which will inform the best adaptive management strategies going forward under the HCP. Moreover, that "research" can only be conducted, and the results used for adaptive management for this project as part of the HCP, after thorough vetting by the Service and the public at large during the ITP/HCP process and associated NEPA process. In addition to subverting other federal and public review processes as described in more detail below, an enhancement permit is particularly inappropriate here because it would circumvent the NEPA process. Indeed, the Service has already made an initial determination that the proposed activities in this permit warrant the preparation of an EA, indicating that we are dealing with a permit application associated with the ITP process and *not* an enhancement permit.

⁵ See Permit Application Number TE224720-1, 75 Fed. Reg. 9248, 9249-50 (Mar. 1. 2010) (requesting an enhancement permit for "surveys to document species' presence or absence in areas proposed for wind energy development, studies to document habitat use, collection of echolocation data and hair/tissue sampling for scientific research").

In addition, a federal judge has recognized that lethal take of a listed bat species by a wind project cannot go forward without an ITP and an accompanying HCP incorporating mandatory conditions aimed at reducing impacts to affected species, as required by section 10 of the ESA.⁶ This is consistent with the approach taken by all other wind energy developers, *and* the Service, in *every* circumstance in which a developer has sought authorization to take listed species as a result of turbine construction and/or operation.⁷ This is supported by the fact that the Service has never granted an enhancement permit for a wind developer – precisely because an ITP is the appropriate mechanism for wind turbine operations and any resulting incidental takes.

In addition, CRWE has not met its burden to establish that the proposed “research” to be conducted will contribute to the body of scientific research regarding wind power and bat mortality. The company also has not sought out any input from the independent scientific community to ensure that the “research” contains peer-reviewed and scientifically defensible methodologies and statistical analyses. CRWE claims that this research will build on the work initiated by non-profit Bat Conservation International in 2010 (Arnett et. al. 2011) to assess the possible use of auditory deterrent devices to reduce impacts of wind projects on bats wherever wind energy is deployed. However, the research initiated by Arnett at Bat Conservation International (BCI) was empirical research, distinguished from an attempt to generate wind energy. *See* Permit Application section (C)(1)(c). At bare minimum, a self-interested private landowner such as CRWE must provide some outside and independent assurances that the “research” will serve to enhance existing research, contribute to the recovery efforts of the affected species, and that any results of said research are the product of defensible methodologies that will produce peer-reviewed data that can be replicated elsewhere – the fundamental precepts of the scientific method.

In this circumstance, a self-interested developer is purporting to conduct research to test different cut-in speeds because there is an alleged need to conduct acoustic deterrent and wind turbine operational experiments. However, CRWE never provides any documentation, or even any mention, of a single independent bat biologist or other scientist who has ever stated that the work already being conducted by BCI at Casselman and other wind projects is not adequate for determining the proper cut-in speeds nationwide. Similarly, although CRWE allegedly proposes to test the cut-in speeds on Indiana bats, there is no discussion about how that differs from other cut-in research already being conducted by BCI and others on *myotis* species – many of which have very similar biological and physiological characteristics to Indiana bats (i.e., little brown bats, northern long-eared bats, etc.). In any case, because the enhancement permit application is solely based on non-peer-reviewed, non-independent, and conclusory statements by a self-interested developer and its paid consultant, the permit application plainly fails to pass the

⁶ *See Beech Ridge Energy*, 675 F. Supp. 2d 540, 581-83.

⁷ *See, e.g.*, Application for an Incidental Take Permit for the Kaheawa Pastures Wind Generation Facility, Ukumehame, Maui, Hawaii, 70 Fed. Reg. 57888 (Oct. 4, 2005); Issuance of an Incidental Take Permit to Shell Wind Energy for Construction and Operation of the Bear River Ridge Wind Power Project (Multiple Species Habitat Conservation Plan), Humboldt County, CA, 74 Fed. Reg. 68073 (Dec. 22, 2009); Notice of Intent To Prepare a Draft Environmental Impact Statement for a Proposed Habitat Conservation Plan and Incidental Take Permit to Buckeye Wind, 75 Fed. Reg. 29575 (May 26, 2010); Proposed Issuance of an Incidental Take Permit to Energy Northwest for Construction and Operation of the Radar Ridge Wind Project LLC, 75 Fed. Reg. 30057 (May 28, 2010).

statutory and scientific muster to qualify for an enhancement permit in its current form. Accordingly, the permit should be denied on that basis.

The permit applicant is essentially circumventing Congressional mandates of notice and public comment for ITPs. 16 U.S.C. § 1539(a)(2)(B) (requiring an “opportunity for public comment” on ITPs). To make matters worse, the permit applicant’s illegal and ill-conceived strategy is also an attempt to circumvent the typically much more extensive federal review of the project under section 10 the ESA, *id.* § 1539(a)(2)(A)-(B) (requiring the Secretary to issue an ITP only after certain conditions are met and after making certain findings), under section 7 of the ESA, *id.* § 1536 (requiring internal consultation within the FWS before an ITP can be granted), and under NEPA.⁸ Because enhancement permits do not contain the same extensive elements of public and federal scrutiny, such a circumvention of these well-established principles of federal oversight and public involvement is plainly inappropriate, and therefore the grant of an enhancement permit here would violate these fundamental principles of notice, comment, and participation in the permit decision. On that basis alone, the permit should be denied.

AWI maintains that an ITP/HCP would be far more legally and practically appropriate here. Rather than proceeding with a known risk and continuing to operate lethal turbines that threaten listed bats by purporting to conduct scientific research during the pendency of the ITP application, a much more consistent approach with the ESA would be to implement time-of-year and time-of-day restrictions to minimize risks to Indiana bats until an ITP is obtained. The Service has recognized the effectiveness of “timing restrictions” as mitigation measures.⁹ Moreover, a federal judge recently concurred with that approach in restricting wind turbine operation to daylight hours from April 1 to November 15 unless and until that developer obtains an ITP.¹⁰ Therefore, until CRWE obtains an ITP, similar operational restrictions should be implemented limiting operation to daylight hours from April 1 to November 15.

In addition, because the ITP/HCP will necessarily take time to complete and will allow for more extensive federal and public review of the ITP application and any underlying research which the developer will conduct as a condition of its ITP and accompanying HCP if and when an ITP is granted, the independent scientific community and other interested members of the public will have more opportunities to ensure that the research ultimately conducted will meaningfully contribute to the existing body of science. Moreover, it is imperative that such research ensures that the risk to Indiana bats at the CRWE project is adequately minimized and mitigated. Accordingly, CRWE should continue pursuing its ITP/HCP application and should adopt appropriate operational restrictions during the pendency of that application process. Its enhancement permit application, however, must be denied.

⁸ See http://www.fws.gov/midwest/endangered/permits/hcp/hcp_faqs.html; FWS & NMFS, Habitat Conservation Planning and Incidental Take Permit Processing (HCP Handbook) at 1-6, *available at* http://www.nmfs.noaa.gov/pr/pdfs/laws/hcp_handbook.pdf (indicating that an EIS or EA is generally appropriate for ITPs in contrast to categorical exclusions that generally apply to enhancement permits)

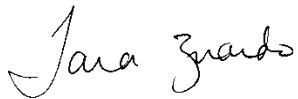
⁹ See FWS, HCP Handbook at 3-19.

¹⁰ *Beech Ridge Energy*, 675 F. Supp. 2d 540, 581.

In conclusion, because Congress never intended enhancement permits to authorize lethal incidental take of federally protected species by private landowners engaging in economic activities, and because the applicant does not remotely establish that the proposed research is scientifically necessary or defensible, permit application TE03502B must be denied. Indeed, issuing an "enhancement" permit on the flimsy and legally tenuous grounds proffered here would not only seriously dilute the meaning of enhancement, but would set a terrible precedent, not only for other wind power projects that could also assert that they too should conduct lethal "research" in any part of the country in which they happen to exist, but also for every other kind of commercial operation that wants permission to take a listed species. Accordingly, we urge the FWS to deny this application, and we encourage CRWE to submit an ITP/HCP application as expeditiously as practicable and to adopt operational constraints that will avoid the further take of listed bats until and unless an ITP is issued. Any other course of action will subvert the carefully crafted framework embodied in the ESA.

AWI appreciates the opportunity to submit this comment letter and to participate in this decision-making process. Should you have any questions, please contact me at tara@awionline.org or via telephone at 202-446-2148. In addition, please notify me of any future updates, correspondence, and any and all activity on this matter.

Sincerely,

A handwritten signature in cursive script that reads "Tara Zuardo".

Tara Zuardo
Wildlife Legal Associate