

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(SOUTHERN DIVISION)**

ANIMAL WELFARE INSTITUTE)
900 Pennsylvania Avenue SE)
Washington, DC 20003)

and)

MOUNTAIN COMMUNITIES FOR)
RESPONSIBLE ENERGY)
HC 68, Box 94)
Williamsburg, WV 24991)

and)

DAVID G. COWAN)
HC 68, Box 117)
Frankford, WV 24938)

Plaintiffs)

v.)

Civil Action No.:

BEECH RIDGE ENERGY LLC)
7564 Standish Place, Suite 123)
Rockville, MD 20855)
Montgomery County)

and)

INVENERGY WIND LLC)
7564 Standish Place, Suite 123)
Rockville, MD 20855)
Montgomery County)

Defendants.)

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

INTRODUCTION

1. This is a case under the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531-1544, against Maryland-based Beech Ridge Energy LLC (“Beech Ridge Energy”) and its parent corporation Invenergy Wind LLC (“Invenergy Wind”), regarding the likely killing, injury, and other forms of “take” of endangered Indiana bats in violation of the ESA. These unlawful “takes” are very likely to occur as a result of defendants’ intrusive installation and long-term operation of an extensive industrial wind power facility known as the Beech Ridge wind project (“Beech Ridge”) that is to be located on numerous ridgelines in Greenbrier County, West Virginia (“the project site”).

2. By moving forward with the Beech Ridge project without obtaining an Incidental Take Permit (“ITP”) pursuant to 16 U.S.C. § 1539(a)(1)(B), defendants will unlawfully “take” critically-imperiled Indiana bats in numerous ways, including killing, harming, wounding, and harassing members of the species, as those terms are defined by the ESA. 16 U.S.C. § 1532(19).

JURISDICTION AND VENUE

3. This Court has subject matter jurisdiction over this case pursuant to 16 U.S.C. § 1540(g) and 28 U.S.C. § 1331.

4. As required by the ESA, 16 U.S.C. § 1540(g), defendants and the Secretary of the Interior were provided with a sixty-day notice of violations of the ESA before this suit was filed, sent via certified mail on or around March 13, 2009. The March 13, 2009 notice letter fully incorporated by reference an earlier notice of violations that was sent via certified mail to defendants and the Interior Secretary on or around October 8, 2008.

5. This Court has personal jurisdiction over defendants because they are domiciled in, were served with process in, or maintain their principal place of business in Maryland.

6. Venue is properly vested in this Court pursuant to 28 U.S.C. § 1391(b)(1) and 28 U.S.C. § 1391(c) because all defendants reside in this district, and all defendants are subject to personal jurisdiction in this district.

7. Because both Beech Ridge Energy and Invenergy Wind reside in Montgomery County, Maryland, the proper divisional assignment is the Greenbelt (Southern) Division.

PARTIES

8. Plaintiff Animal Welfare Institute (“AWI”) is a non-profit animal protection organization, based in Washington, D.C. AWI has approximately 25,000 members and supporters throughout the United States, including individuals who enjoy observing Indiana bats and recreating in Indiana bat habitat in locations that include the vicinity of the Beech Ridge wind project. It brings this action on its own behalf and on behalf of its members, supporters, and board of directors.

9. AWI was intimately involved in the original passage of the ESA, spending significant resources passing the law and defending it since its promulgation. Today, the organization annually advocates for greater allocation of funds for ESA implementation through the Congressional appropriation process. Additionally, it routinely sends submissions to the federal government concerning various impacts to endangered and threatened species, and it submits comments in response to the government’s request for public comment concerning wildlife-related issues. AWI’s members and

supporters also routinely comment on various wildlife issues, including the need for species protection under the Endangered Species Act.

10. AWI publishes a newsletter, on a quarterly basis, which is disseminated to all of its members and supporters, and it operates a website with detailed information about the organization's activities. The newsletter and website report on animal welfare and wildlife-related issues, including legislative and regulatory matters affecting endangered and threatened species, and they also inform AWI's members and supporters about actions they can take to promote the protection and conservation of these animals. AWI's newsletter has specifically informed AWI's members and supporters about the adverse effects of poorly sited wind power projects on Indiana bats.

11. Defendants' taking of Indiana bats without permission from the United States Fish and Wildlife Service ("the Service" or "U.S. Fish and Wildlife Service") pursuant to the process created by section 10 of the ESA violates AWI's and its members' statutory rights to obtain the information generated by the section 10 process and to participate in that process. In particular, defendants' unlawful actions cause AWI and its members and supporters injury by depriving AWI of its ability to obtain and disseminate through its newsletter and website information regarding defendants' likely impacts to endangered Indiana bats.

12. Additionally, AWI brings this action on behalf of its members and supporters who are directly injured by the defendants' likely takes of Indiana bats. One or more AWI members frequently use the caves inhabited by Indiana bats near the project site and also recreate in Indiana bat habitat in the vicinity of the project site. These individuals derive educational, scientific, ecological, spiritual,

aesthetic, and recreational enjoyment from the Indiana bat and the region inhabited by this species. As such, they will necessarily be injured by any direct “takes” of Indiana bats by defendants or any indirect “takes” through Indiana bat habitat degradation caused by defendants.

13. Plaintiff Mountain Communities for Responsible Energy (“MCRE”) is a grassroots community organization that is headquartered in Williamsburg, West Virginia. For four years, the organization has been actively involved in educational and advocacy issues related to the negative impacts of wind power along Appalachian ridgelines. One issue to which MCRE has dedicated its limited resources is the protection of endangered species, such as the Indiana bat, because of the threats posed to these imperiled species by wind projects. Because Beech Ridge Energy has failed to comply with the ESA before moving forward with construction and operation of its industrial wind facility, MCRE has had to dedicate additional time and resources to gathering information on the Beech Ridge project and to participating in the public siting process for the project.

14. Plaintiff MCRE brings this action on its own behalf and also on behalf of its adversely affected members who live in and recreate in the areas where the Indiana bat is found. These members include individuals who use and enjoy the local ecosystem and the species within that ecosystem for recreational, scientific, spiritual, educational, aesthetic, and other purposes. These members also include community residents, such as farmers, living in close proximity to the project site who enjoy the natural benefits provided by the Indiana bat, including mosquito and insect control. Any adverse impact to Indiana bats necessarily impairs the ability of MCRE’s members to reap the benefits historically provided by Indiana bats, therefore injuring these members in economic and other ways.

15. The interests of MCRE and its members are harmed by Beech Ridge Energy's failure to obtain an ITP with regard to Indiana bats because this failure will almost certainly result in unlawful "takes" of Indiana bats, thus undermining the survival and recovery of this endangered species. Defendants' unlawful actions therefore injure MCRE and its members who derive educational, scientific, ecological, spiritual, aesthetic, and recreational enjoyment from the Indiana bat and the region inhabited by this species. Further, Beech Ridge Energy's failure to obtain an ITP requires MCRE to divert actual time and money towards ensuring that the statutorily entitled protections of the ESA are afforded to the Indiana bat – resources that would be spent elsewhere in the absence of defendants' unlawful behavior.

16. Plaintiff David G. Cowan resides in Greenbrier County, approximately five miles from the Beech Ridge project site. Mr. Cowan is a retired employee of the California State Lands Commission. Mr. Cowan is an avid caver, joining the National Speleological Society in or around 1971. Since that time, Mr. Cowan has been involved in both recreational and project caving activities in numerous locations. For example, in 1988, Mr. Cowan worked in the field with cave biologist Dr. Elizabeth Pierson to study the status of Townsend's big-eared bat in California to determine whether listing was appropriate under the ESA. In West Virginia, Mr. Cowan has regularly assisted Craig Stihler and others from the West Virginia Department of Natural Resources with cave surveys and bat counts. Mr. Cowan is currently the property manager and steward for the Lobelia Saltpeter Cave Preserve, which is located approximately seven miles from the nearest proposed wind turbine and has been a hibernaculum for a small group of Indiana bats as recently as the winter of 2008.

17. Additionally, Mr. Cowan has entered approximately 27 caves located within five miles of the project site, approximately 113 caves located five to ten miles from the project site, and approximately 41 caves located ten to twenty miles from the project site. Many of these caves serve as hibernacula for Indiana bats. As such, Mr. Cowan has seen Indiana bats on numerous occasions near the project site. Mr. Cowan plans to continue regularly caving in the local area and also plans to continue observing Indiana bats as part of his caving expeditions. Mr. Cowan derives educational, scientific, ecological, moral, aesthetic, and recreational enjoyment from Indiana bats and the caves inhabited by this species. Because of his longstanding interest in observing this species in the vicinity of the project, Mr. Cowan is injured by the Beech Ridge project, which will result in the unlawful taking of Indiana bats and the loss and degradation of Indiana bat habitat.

18. Defendant Beech Ridge Energy is a limited liability company organized under the laws of Delaware. Beech Ridge Energy maintains its principal place of business in Rockville, Maryland and, in its siting application to the West Virginia Public Service Commission, listed its address as being in Montgomery County. It is responsible for the unlawful acts described in this Complaint.

19. Defendant Invenergy Wind is a limited liability company organized under the laws of Delaware, and it maintains a principal place of business in Rockville, Maryland. Invenergy Wind wholly owns defendant Beech Ridge Energy as a subsidiary, and it is responsible for the unlawful acts described in this Complaint.

STATUTORY AND REGULATORY FRAMEWORK

20. In enacting the ESA, Congress declared that “the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of . . . wildlife . . . facing extinction.” 16 U.S.C. § 1531(a)(4). One of the stated purposes of the Act is “to provide a program for the conservation of . . . endangered species and threatened species.” Id. § 1531(b).

21. The ESA defines an “endangered species” as “any species which is in danger of extinction.” Id. § 1532(6). A “threatened species” is one that is likely to become endangered within the foreseeable future. Id. § 1532(20).

22. Section 9 of the ESA prohibits the “taking” of any endangered species. Id. § 1538(a). The Act defines the term “take” very broadly to include “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” Id. § 1532(19).

23. The term “harass” is defined as “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.” 50 C.F.R. § 17.3.

24. The term “harm” is defined as “an act which actually kills or injures wildlife, [which] . . . may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.” Id.

25. Section 10 of the ESA provides a limited exception to the otherwise strict prohibition against the “taking” of an endangered species, whereby an applicant can apply to the U.S. Fish and Wildlife Service for a permit authorizing a take if such taking is “incidental to, and not the purpose of, carrying out an otherwise lawful activity.” 16 U.S.C. § 1539(a)(1)(B).

26. The U.S. Fish and Wildlife Service may not issue an ITP unless certain safeguards for the species are satisfied by the applicant, including the submission of a detailed “conservation plan.” Id. § 1539(a)(2)(A). Additionally, an ITP may be issued only after an opportunity for public comment on the application and conservation plan, and after findings by the U.S. Fish and Wildlife Service that, among other things, the applicant will “minimize and mitigate the impacts of such taking” and “the taking will not appreciably reduce the likelihood of the survival and recovery of the species.” Id. § 1539(a)(2)(B).

FACTUAL AND PROCEDURAL BACKGROUND

A. The Indiana Bat

27. The Indiana bat (*Myotis sodalis*) is one of the most endangered land mammals in the world. In autumn of each year, Indiana bats travel to “hibernacula,” also known as caves, where they engage in a swarming behavior that is accompanied by mating. During swarming, the bats travel very long distances in search of foraging resources. During the winter months, the bats use the hibernacula to hibernate until spring. Once they emerge from hibernation in the spring, female Indiana bats migrate long distances of up to approximately 360 miles, often migrating over and across mountain ridgetops. During summer, males and females live apart, with the females forming maternity colonies in hollow

trees, giving birth, and raising their young while the males typically remain in the relative vicinity of hibernacula, using trees and snags as day roosts until autumn. Indiana bats frequently select ridgetops for spring and summer habitat because these areas provide an ideal setting for their foraging patterns. The current range of the Indiana bat includes West Virginia, Maryland, and other states in the eastern United States.

28. Indiana bats are invaluable members of their ecosystems, providing services such as pest and insect control. Scientists characterize the Indiana bat as a “keystone ecological species,” meaning that, much like a keystone that bears the majority of an archway’s weight, removal or disturbance of the Indiana bat would likely result in collapse or other severe damage to the local ecosystem.

29. The Service listed the Indiana bat as endangered in 1967 under the predecessor to the ESA. 32 Fed. Reg. 4001 (March 11, 1967). Even after the Indiana bat was listed, its population declined precipitously. Among the greatest threats traditionally posed to the species are conversion of forested land, tree harvesting, and the removal of dead trees, because wooded areas are essential for foraging, roosting, and breeding.

30. In recent years, the Service has acknowledged new and emerging threats to the Indiana bat’s survival, including a disease known as “White Nose Syndrome” and the proliferation of industrial wind power projects in bat habitat. White Nose Syndrome is a disease that has recently killed thousands of hibernating bats and poses a very serious risk to the recovery of Indiana bats. In addition, as both the Service and scientists have widely recognized, wind power poses a grave threat to Indiana bats because of the likelihood of death and injury to members of the species both in terms of turbine

collisions and “barotrauma” – a fatal condition caused by low-pressure zones near wind turbines where the lungs of bats hemorrhage and lead to almost instant death.

B. The Beech Ridge Wind Project

31. Defendant Beech Ridge Energy has received a siting certificate from the West Virginia Public Service Commission to construct up to 124 wind turbines, each 390 feet tall, along a twenty-three mile stretch of land on forested Allegheny Mountain ridgelines. Additionally, the long-term operation of the wind project will require intrusive equipment such as transmission lines, roads, and substations, and the project will necessarily require the clearing and thinning of forests. In fact, on information and belief, Beech Ridge Energy has already begun constructing numerous roads, clearing turbine sites, bringing in large construction vehicles, and placing buildings on the project site – despite the formal notice provided by plaintiffs to defendants that the project is taking place in Indiana bat habitat and that proceeding with construction and operation in the absence of a permit violates the ESA.

32. Beech Ridge Energy has not disclosed the expected lifespan of this wind project, but, on information and belief, the project will operate for no less than twenty years, which is the length of Beech Ridge Energy’s power purchase agreement with American Electric Power, and will very likely continue to operate after that agreement expires.

C. The Beech Ridge Wind Project’s Likely Impacts on Indiana Bats

33. Indiana bats are known to inhabit numerous hibernacula within ten miles of the project site, including a robust population in the Snedegar’s portion of the Friars Hole cave system approximately five miles from the project site. During the autumn swarming period, Indiana bats often

travel as far as twenty miles between swarming and roosting sites for foraging purposes to replenish energy reserves. In the spring, female Indiana bats migrate hundreds of miles to form maternity colonies, often passing over mountain ridgelines as they proceed to their destinations. During the spring and summer, males roost on trees in the vicinity of the hibernacula. It is known that Indiana bats prefer roosting and maternity colony sites on or near ridgetops – such as those on the Beech Ridge project site. In fact, the trees that, on information and belief, have already been cleared by Beech Ridge Energy at various turbine sites are likely to have been ideal trees for Indiana bat roosting and maternity colonies.

34. Due to the proximity of Indiana bats to the project site and the movement patterns of the species, the installation and long-term operation of more than one hundred 390-foot tall wind turbines is likely to result in deaths and injuries from turbine-bat collisions. Each death or injury amounts to a “take” under the ESA. 16 U.S.C. §§ 1538(a), 1532(19).

35. Additionally, the low-pressure zones that will be created by Beech Ridge Energy’s wind turbines, coupled with the proximity of Indiana bats to the project site, are very likely to result in additional deaths and injuries to members of this imperiled species due to barotrauma. Each death or injury of this kind is also a “take” under the ESA. 16 U.S.C. §§ 1538(a), 1532(19).

36. The Beech Ridge project will also likely “harass” endangered Indiana bats, which includes “an[y] 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.” 50 C.F.R. § 17.3. The construction of massive wind turbines and associated roads and other invasive infrastructure will inevitably “disrupt,” if not destroy,

all essential behaviors of the Indiana bat, including breeding, feeding, and sheltering in the local area. Further, the project's forest clearing activities are anticipated to attract Indiana bats to newly cleared corridors leading directly to turbines, significantly increasing the likelihood of bat mortality once the turbines are operating. Therefore, each of these activities amounts to "harassment" and is a "take" under the ESA. 16 U.S.C. §§ 1538(a), 1532(19); 50 C.F.R. § 17.3.

37. The Beech Ridge project will also likely "harm" Indiana bats, which "include[s] significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns." 50 C.F.R. § 17.3. Fragmentation, adverse modification, and degradation of the Indiana bat's habitat are inevitable results of Beech Ridge Energy's plans to install turbines, to remove approximately four hundred acres of forest, and to construct permanent forest clearings and corridors for transmission lines. Substantial habitat degradation of this kind will likely result in serious cumulative impacts such as the direct loss of interior habitat, interruption of travel corridors, Indiana bat displacement, and other severe behavioral effects, in addition to an expected increase in Indiana bat mortality due to their attraction to forest clearings and corridors that lead to wind turbines. Thus, each of these activities will "harm" Indiana bats and are unlawful "takes" under the ESA. 16 U.S.C. §§ 1538(a), 1532(19); 50 C.F.R. § 17.3. Indeed, it is likely that Indiana bats have already been harmed by Beech Ridge Energy's tree clearing activities on turbine sites, in addition to various road building and other construction projects, because these activities necessarily destroy ideal habitat of the kind that is used by Indiana bats as roost trees and maternity colonies.

38. Because of the “takes” discussed above that will occur during the lifespan of the Beech Ridge project, Beech Ridge Energy’s only lawful option for complying with the ESA is to obtain an incidental take permit pursuant to 16 U.S.C. § 1539(a)(1)(B), which would allow Beech Ridge to incidentally “take” Indiana bats with proper mitigation measures in place. By moving forward with construction and eventual operation without such a permit, Beech Ridge Energy is in patent violation of the ESA.

39. The U.S. Fish and Wildlife Service – the expert agency with regard to endangered species – has stated that, because “[t]he Indiana bat may use the project area for roosting and foraging between April 1 and November 15” and because “[t]he mountain ridges of West Virginia [such as those on the project site] may serve as corridors for bats migrating between their summer and winter habitat,” “the Service remains concerned that the proposed Beech Ridge wind power project may harm or kill federally-listed Indiana bats.” Additionally, “the Service is concerned about the cumulative impact of multiple wind power facilities on . . . bat species, especially given the mortality estimate provided by [Beech Ridge Energy’s consultant] and the fact that the anticipated project life for each facility is 25 to 30 years.”

40. Leading Indiana bat expert Dr. Michael Gannon testified before the West Virginia Public Service Commission about the Beech Ridge project, stating that “endangered species present in the area are likely to be affected by this site.”

41. Beech Ridge Energy has never applied for an ITP under section 10 of the ESA, nor has it ever adequately surveyed for Indiana bats on or near the project site. Beech Ridge Energy conducted

two brief mist net surveys that were inadequate to detect the presence of Indiana bats on the project site. According to the Fish and Wildlife Service, “[o]ne summer season of survey effort is likely not sufficient to determine species presence and the use of the project air space over time, particularly as seasonal weather patterns change. . . . Mist-netting, for example, by itself, and during one summer, is not robust in the case of wind energy projects in the opinion of the Service.” Moreover, Beech Ridge Energy conducted a limited cave survey in the vicinity of the project site, but avoided surveying the hibernaculum at which it would have been most likely to find Indiana bats that will use the project site. According to Dr. Gannon, these surveys are “wholly insufficient to be relied upon in making a determination of whether the proposed wind turbine project would have an impact on bats.”

PLAINTIFFS’ CLAIMS FOR RELIEF
Violations of the Endangered Species Act

42. As alleged above, defendants’ construction and operation of an industrial wind facility on its proposed siting location will very likely cause “takes” of Indiana bats in violation of ESA section 9, 16 U.S.C. § 1538(a)(1)(B), and the ESA’s implementing regulations.

43. Plaintiffs and members of the organizational plaintiffs are injured by defendants’ violations of the ESA, because these activities are impairing and will likely continue to impair the survival and recovery of the Indiana bat in the immediate vicinity of areas where plaintiffs engage in wildlife viewing for recreational, scientific, and aesthetic purposes, and where plaintiffs receive natural benefits from the Indiana bat’s presence. Hence, defendants’ activities will make it more difficult for plaintiffs and any organizational members to observe and enjoy this species, and to enjoy the benefits of

this species. In addition, defendants' taking of Indiana bats without obtaining an ITP deprives plaintiffs of information to which they are statutorily entitled under section 10 of the ESA.

PRAYERS FOR RELIEF

WHEREFORE, plaintiffs respectfully request that the Court enter an order:

- A. Declaring that defendants have violated and will violate the "take" prohibition of the ESA, 16 U.S.C. § 1538(a)(1)(B), with respect to the Indiana bat as part of their intrusive construction, forest clearing, and operation activities associated with their industrial wind facility;
- B. Enjoining defendants from violating the ESA with respect to the Indiana bat, unless and until defendants obtain permission to do so from the U.S. Fish and Wildlife Service pursuant to the procedural and substantive requirements of section 10 of the ESA;
- C. Awarding plaintiffs their reasonable attorneys' fees and costs for this action pursuant to the ESA, 16 U.S.C. § 1540; and
- D. Granting plaintiffs such other and further relief as may be just and proper.

Dated: June 10, 2009

Respectfully submitted,

/s/ William K. Meyer
William K. Meyer
(Federal Bar No. 01214)
Zuckerman Spaeder LLP
100 East Pratt Street, Suite 2440
Baltimore, MD 21202
(410) 332-1240
(410) 659-0436 (fax)
wmeyer@zuckerman.com

/s/ William S. Eubanks II
William S. Eubanks II
Pro hac vice (application pending)
Meyer Glitzenstein & Crystal
1601 Connecticut Avenue, NW
Suite 700
Washington, DC 20009
(202) 588-5206
(202) 588-5049 (fax)
beubanks@meyerglitz.com

/s/ Eric R. Glitzenstein
Eric R. Glitzenstein
Pro hac vice (application pending)
Meyer Glitzenstein & Crystal
1601 Connecticut Avenue, NW
Suite 700
Washington, DC 20009
(202) 588-5206
(202) 588-5049 (fax)
eglitzenstein@meyerglitz.com