

Injunctive Relief

Because the Court has found that the Beech Ridge Project will take Indiana bats, injunctive relief is appropriate under § 11 of the ESA. The question, then, is what form that injunctive relief should take. The ITP process is available to Defendants to insulate themselves from liability under the ESA and, while this Court cannot require them to apply for or obtain such a permit, it is the only way in which the Court will allow the Beech Ridge Project to continue.

The Court sees little need to preclude the completion of construction of those forty turbines already under construction, but does believe that any construction of additional turbines should not be commenced unless and until an ITP has been obtained. The simple reason for this is that the ITP process may find that some locations for wind turbines are entirely inappropriate, while others may be appropriate.

There is, by the same token, no reason to completely prohibit Defendants from operating wind turbines now under construction once they are completed. However, in light of the record developed before this Court, that operation can only occur during the periods of time when Indiana bats are in hibernation, i.e., from November 16 to March 31.

Outside this period, determining the timing and circumstances under which wind turbine operation can occur without danger of the take of an Indiana bat is beyond the competence of this Court, but is well within the competence of the FWS under the ITP process.

Accordingly, the Court will enjoin all operation of wind turbines presently under construction except during the winter period enumerated above. However, the Court invites the parties to confer with each other and return to the Court, if agreement can be reached, on the conditions under which the wind turbines now under construction would be allowed to operate, if at all, during any period of time outside of the hibernation period of Indiana bats.

XV. Conclusion

As noted at the outset, this is a case about bats, wind turbines, and two federal policies, one favoring the protection of endangered species, and the other encouraging development of renewable energy resources. Congress, in enacting the ESA, has unequivocally stated that endangered species must be afforded the highest priority, and the FWS long ago designated the Indiana bat as an endangered species. By the same token, Congress has strongly encouraged the development of clean, renewable energy, including wind energy.⁵³ It is uncontroverted that wind turbines kill or injure bats in large numbers, and the Court has concluded, in this case, that there is a virtual certainty that construction and operation of the Beech Ridge Project will take endangered Indiana bats in violation of Section 9 of the ESA.

The two vital federal policies at issue in this case are not necessarily in conflict. Indeed, the tragedy of this case is that Defendants disregarded not only repeated advice from the FWS but also failed to take advantage of a specific mechanism, the ITP process, established by federal law to allow their project to proceed in harmony with the goal of avoidance of harm to endangered species

Sadly, Defendants' environmental consultant, Russ Rommé, viewed formal communications from the FWS through rose-colored glasses and simply disregarded what he was told repeatedly. Indeed, the Court finds Rommé's testimony to be extremely

troubling. If the Court were to accept his testimony, it would have to reach one or both of two equally untenable conclusions.

First, Rommé's description of his communications with Johnson-Hughes is that she effectively countermanded important advice given to BHE by her supervisor, Chapman. The Court rejects Rommé's myopic view of the communications that he received from the FWS. Johnson-Hughes did not testify, and there were no written communications from her stating that Rommé could disregard vital portions of the letters received from Chapman. Indeed, in one of Rommé's numerous "contact reports" he documented a conversation with Johnson-Hughes on April 6, 2006, in which he acknowledged that the FWS had "focused on the critical nature of early screening of potential wind development sites." BHE Contact Report, Telephone Call Between Russ Rommé, BHE Env'tl., Inc., and Christy Johnson-Hughes, U.S. Fish and Wildlife Serv. (Apr. 6, 2006) (Defs.' Ex. 82). And, in a tragically prophetic comment, he attributed to the FWS a statement that "[t]here are indications wind developers are still not doing this work, and getting themselves [into] trouble because of it." *Id.*

While Rommé professed a belief that he could ignore Chapman's letters based upon Johnson-Hughes' allegedly contrary assurances, the lawyer for Defendants considered the March 7, 2006 letter from the FWS of sufficient importance that he filed a formal response to the letter with the WV PSC. In his response, Defendants' attorney acknowledged that FWS's recommendations included three years of seasonal vertical radar surveys, seasonal acoustic surveys, seasonal thermal imaging surveys, and surveys to detect Indiana bats and Virginia big-eared bats emerging from local caves during spring, as well as an additional two years of mist-netting surveys. Letter from Lee F. Feinberg, Spilman Thomas & Battle, PLLC, to Sandra Squire, Executive Secretary, W. Va. Pub. Serv. Comm'n, at 2 (Apr. 3, 2006) (Defs.' Ex. 79) (attaching Beech Ridge Energy's response to the March 7, 2006 letter from the FWS). The principal reason cited by Defendants' attorney for opposing these recommendations was the *financial burden* on Defendants and *delaying* construction of the project, not a disagreement as to the merits of the recommended actions. *Id.*

Had Rommé listened more carefully to what he was told repeatedly, Defendants would not be in the unfortunate situation in which they now find themselves. It is clear that Rommé adopted a "minimalist" approach to his responsibilities and that he "neither strained very hard nor looked very far" in his effort to find Indiana bats. *Montgomery County v. Leizman*, 303 A.2d 374, 380 (Md. 1973). Searching for bats near proposed wind turbine locations for one year instead of three,⁵⁴ looking in one season rather than three, and using only one method to detect bats was wholly inadequate to a fair assessment.

Second, acceptance of Rommé's testimony would lead one to conclude that there are serious personnel management issues within the FWS, including subordinates routinely countermanding instructions given by superiors. The Court is skeptical of his testimony, but to the extent that there is any truth to Rommé's characterizations of his conversations with Johnson-Hughes, the FWS should carefully review its procedures to be certain that subordinates do not undermine official communications. The only thing that is clear from the record is that the responses of the FWS to some of the communications from Defendants were relatively slow. *See, e.g.*, Letter from Thomas R. Chapman, Field Supervisor, U.S. Fish and Wildlife Serv., W. Va. Field Office, to Russ

Rommé, Director, BHE Envtl., Inc. (Mar. 7, 2006) (Pls.' Ex. 97) (stating that the March 7, 2006 letter was in response to a letter from Rommé dated July 7, 2005).

This Court has concluded that the only avenue available to Defendants to resolve the self-imposed plight in which they now find themselves is to do belatedly that which they should have done long ago: apply for an ITP. The Court does express the concern that any extraordinary delays by the FWS in the processing of a permit application would frustrate Congress' intent to encourage responsible wind turbine development. Assuming that Defendants now proceed to file an application for an ITP, the Court urges the FWS to act with reasonable promptness, but with necessary thoroughness, in acting upon that application.

The development of wind energy can and should be encouraged, but wind turbines must be good neighbors. Accordingly, the Court will, albeit reluctantly, grant injunctive relief as discussed above.⁵⁵

December 8, 2009 /s/

Date Roger W. Titus

United States District Judge