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VIA FACSIMILE & CERTIFIED MAIL - RETURN RECEIPT REQUESTED

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Highland County Building and Zoning
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Re: Conditional Use Permit dated July 14, 2005 for Highland New Wind Development

Dear Supervisors, Administrators and Attorney for Highland County, Virginia:

This firm continues to represent the interests of concerned citizens of Highland County ("Highland Citizens") with respect to Highland New Wind Development, LLC's ("HNWD") electrical generation wind plant in Highland County, Virginia (the "County").

A recent decision by the United States District Court in *Animal Welfare Institute et al v. Beech Ridge Energy, LLC et al.*, --F. Supp. 2d --, 2009 WL 4884520 (Md, Dec. 8, 2009), not only confirms Highland Citizens' position by clearly stating that a wind turbine project located near HNWD's proposed project cannot proceed unless and until the developer obtains an Incidental Take Permit ("ITP") under the Endangered Species Act, it also points out the pitfalls those who ignore this requirement face. It is important to note that the Court's decision in *Beech Ridge Energy, LLC* halting the project and requiring an ITP was the result of one endangered species, the Indiana bat. HNWD's project impacts the Indiana bat in an identical manner and it will impact three other protected species thereby increasing the need for action. We state once again that Highland County, under the rulings of the State Corporation Commission ("SCC"), its own Conditional Use Permit ("CUP") issued to HNWD, and the applicable laws, must require HNWD to obtain an ITP or face the consequences faced by the defendants in *Beech Ridge Energy, LLC*.

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We are providing a copy of the opinion to Melissa Dowd under separate cover. It is our belief that *Beech Ridge Energy, LLC*, answers fully any questions that may have existed whether Highland County has to enforce the Endangered Species Act ("ESA"). This opinion coupled with *Strahan v. Coxe*, 127 F.3d 155, 158, 163 (1st Cir. 1997) demonstrates that a government that does not enforce this act is subject to liability for its failure to enforce it.

We point out all Highland County has to do is require HNWD to obtain an ITP. This is not a draconian step or a burden on the County. Failure to act most certainly can lead to an enforcement action as was done in *Beech Ridge*. We set out here our reasoning as to why Highland County should act now.

Beech Ridge Energy, LLC Decision

In *Beech Ridge Energy, LLC*, the plaintiffs filed suit seeking an injunction to stop a wind turbine project in Greenbriar County, West Virginia from proceeding forward without an ITP to construct wind turbines along the ridgelines of the Appalachian mountains. At the time the suit was filed, foundations for 67 turbines had been poured, turbine deliveries had commenced and transmission lines were being installed. An additional 55 turbines were scheduled to be constructed at a later date. Much like HNWD's project, the Beech Ridge project had been through the permitting process in the West Virginia Public Service Commission ("PSC"). The PSC, like the SCC, had authorized the project despite the ESA concerns voiced by the Fish and Wildlife Service ("FWS").

The ESA concerns at Beech Ridge were focused exclusively on the endangered Indiana bat and whether the project would harm, harass or kill the bat. Prior to the filing of the citizens suit there was no evidence of an Indiana bat having been harmed at the site or at any wind turbine site. A threshold issue before the Court, therefore, was whether a citizen can bring a suit in cases where there had not been actual harm to the endangered species. After an extensive and thorough analysis of the ESA, the Court stated:

....Congress' intent when enacting the ESA was to protect and conserve threatened and endangered species, whatever the cost. Requiring that a listed species be harmed, wounded, killed or harassed before conferring jurisdiction would thwart the central goal of the Act.

Accordingly, the Court holds that the ESA's citizen suit provision allows actions alleging wholly future violations of the statute, where no past violation has occurred. The Court's holding is consistent with the text of the citizen suit provision, the legislative history, the purpose of the ESA as well as decisions from the Ninth Circuit squarely addressing the issue.

Id. at 34-35.

Having reached this threshold jurisdictional ruling, the Court then focused on the evidence that the plaintiff's needed to present in order to demonstrate a violation of the ESA. The Court held that a plaintiff must establish by a preponderance of the evidence that the

challenged activity is “reasonably certain to imminently harm, kill or wound the listed species.” *Id.* at 39.

The testimony at trial showed that the site was within the migratory distances of known Indiana bat hibernacula which can travel up to one hundred (100) miles during migration. Dr. Michael Gannon testified on behalf of the plaintiffs and was found by the Court to be a “very credible and persuasive expert witness on bat biology.” Dr. Gannon testified that the “Indiana bats are very likely to be killed and injured by the [Beech Ridge Project].” *Id.* at 66.

In holding that the plaintiffs had met their burden the Court expressly rejected the arguments of the developer many of which are the same arguments put forth by HNWD. The Court held that:

The Court finds that there is no reason why Indiana bats would not fly at a height of 137-389 feet above the ground, within the rotor swept area of the turbines at the Beech Ridge Project site. Plaintiffs have presented compelling evidence that Indiana bats behave no differently than other *Myotis* species that have been killed by wind turbines and Defendants have failed to rebut this fact. Furthermore, the Court is not surprised that no dead Indiana bat has yet been found at any wind project because few post mortality studies have been conducted, mortality searches are generally inefficient and Indiana bats are rare.

Id. at 66-67.

Finally, the Court in *Beech Ridge Energy, LLC* expressly rejected any attempt by the defendants to implement adaptive management techniques after the project was completed. These techniques were contained in the order from the PSC granting the operating permit. Beech Ridge Energy ignored letters from FWS and precatory instructions to obtain permits. *Id.* at 67-68. The Court awarded injunctive relief stating that “[t]he ITP process is available to the defendants to insulate them 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.” *Id.* at 70.

Beech Ridge Energy, LLC Impact on HNWD Project

The facts in *Beech Ridge Energy, LLC* are remarkably similar to those that the County faces with HNWD’s project. In light of the Court’s decision in *Beech Ridge Energy, LLC*, the law is clear and the County must act accordingly by prohibiting HNWD from proceeding without an ITP.

The projects are geographically in close proximity to one another, located on ridgelines in the Appalachians and are within the known migratory range of the Indiana bat. In addition to the Indiana bat, however, HNWD’s project is within the known range of other protected species such as the Virginia Big-Eared bat, Golden eagles and Bald eagles. The presence of these species in addition to the Indiana bat heightens the need for the County to follow the *Beech Ridge Energy*,

LLC course of action. Any injury or fatality to either the Indiana bat or the Virginia Big Eared bat without an ITP in place will result in a violation of the ESA. By simply requiring HNWD to engage in consultation with FWS and obtain an ITP prior to the construction of the turbines, the County would protect itself against any future enforcement actions or citizen suits.

Additionally, the Golden eagle and Bald eagle are protected by the Migratory Bird Treaty Act (“MBTA”) and any injury to them is a violation of the MBTA. While there is no ITP yet available under the MBTA, one is currently being developed by the FWS.

Moreover, both developers have ignored repeated warnings from FWS to obtain an ITP prior to construction. HNWD has received at least three formal communications from FWS advising it of its concerns relating to the ESA. Much like the developer in *Beech Ridge Energy, LLC*, HNWD has decided to ignore FWS. As the Court noted in *Beech Ridge Energy, LLC*, HNWD has ignored those warnings at its own risk.

Further, each project was permitted by the respective state authority despite the ESA concerns. The Court in *Beech Ridge Energy, LLC* was not deterred by the fact that the PSC had authorized the project. The ESA is a separate law with its own enforcement mechanisms. The fact that the SCC has permitted the HNWD project should not deter the County from taking the appropriate action here. Moreover, as in *Beech Ridge Energy, LLC*, the management techniques required by the SCC do not adequately address the underlying concerns of the ESA – to protect certain species from harm.

Finally, the same expert has testified at both locations that a take of the Indiana bat will occur. In the *Beech Ridge Energy, LLC* case, Dr. Gannon concluded that “Indiana bats are very likely to be killed and injured by the [Beech Ridge Project].” *Id.* at 66. The Court found Dr. Gannon to be “very credible” and persuasive. *Id.* Similarly Dr. Gannon has testified before the SCC in the HNWD matter that “[t]he likelihood that [Indiana bats] will be killed at this facility at some time is **extremely high.**” (Ex. 43 at 10)(emphasis added). Dr. Gannon further stated in his prefiled testimony during the remand proceedings before the SCC that there is a “reasonable certainty that an endangered bat will be killed by this project if it is constructed.” (Ex. 65 at 5). As in *Beech Ridge*, Dr. Gannon’s testimony is sufficient to meet the requisite evidentiary standard.

Conclusion

Our clients expect that the County will heed the clear and unequivocal message of *Beech Ridge Energy, LLC* and enforce the terms of its CUP prohibiting HNWD from proceeding until they have applied for an ITP. If they do not, then our clients will follow the example set by the plaintiffs in *Beech Ridge Energy, LLC* and seek an injunction under the ESA in the United States District Court for the Western District of Virginia, Harrisonburg Division. Unlike the case in *Beech Ridge*, however, the County will be a defendant in any citizen suit that is filed because it “allow[s] or authorize[s] acts that exact a taking and that, but for the permitting process, could not take place” then it may be liable under Section 9 of the ESA. *Strahan v. Coxe*, 127 F.3d 155, 158, 163 (1st Cir. 1997) (state agency caused takings of the endangered right whale because it licensed commercial fishing operations to use gillnets and lobster pots in specifically the manner

that is likely to result in violation of the ESA); *see also Loggerhead Turtle v. County Council of Volusia County*, 148 F.3d 1231, 1251-52 (holding that plaintiffs have standing to sue Volusia County for its refusal to ban beach driving and beachfront artificial lighting which likely would, through the actions of a third party, result in a taking of the endangered sea turtles).

The Highland County Board of Supervisors was sent a Notice of Intent to Sue letter on behalf of our clients in July, 2005, and follow up letters in 2007 reciting the foregoing language. The decision in *Beech Ridge Energy, LLC* further supports our client's firm position on these issues.

We submit that the only reasonable course at this point is to require HNWD to procure an Incidental Take Permit prior to construction.

Thank you for your consideration.

Very truly yours,

WOODS ROGERS PLC

James W. Jennings, Jr.