Exhibit A

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Re: Notice Of Violations Of The Endangered Species Act In Connection With Highland New Wind Development's Proposed Wind Power Project In Highland County, Virginia

On behalf of Highlanders for Responsible Development, the Animal Welfare Institute, Rifle Ridge Farm, Rick Webb, Carol A. Peterson, and Richard A. Lambert, we hereby provide notice, pursuant to section 11(g) of the Endangered Species Act, 16 U.S.C. § 1540(g), that

Highland New Wind Development's ("HNWD") installation and long-term operation of wind turbines in Highland County, Virginia will "take" federally endangered Indiana bats (*Myotis sodalis*) and/or Virginia big-eared bats (*Corynorhinus townsendii virginianus*) in violation of section 9 of the ESA. Id. § 1538(a)(1)(B).[1]

BACKGROUND

A. Endangered Species Act

Section 9 of the ESA prohibits any "person" from "taking" any member of an endangered species. 16 U.S.C. § 1538(a). The term "take" is defined broadly to include "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect." Id. § 1532(19). The U.S. Fish and Wildlife Service ("FWS" or "Service") has further defined "harass" to include "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, including breeding, feeding, or sheltering." 50 C.F.R. § 17.3. In addition, "harm" is defined to "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.[2]

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[1] This letter provides additional detail on ESA violations that the above-named entities have already been notified about in a letter from other concerned parties dated July 5, 2005. Notice of Intent to Sue (July 5, 2005); available at http://www.vawind.org/Assets/Docs/Woods_Rogers_070505.pdf. Based on our understanding of the ESA's citizen suit provision, a federal lawsuit may be filed at any time because more than sixty days have expired since that letter provided notice to the Secretary of Interior and alleged violators. See 16 U.S.C. § 1540(g)(2) (explaining that "[n]o action may be commenced . . . prior to sixty days after written notice of the violation has been given to the Secretary, and to any alleged violator"). Therefore, the parties will consider litigation in the event that the above-named entities do not immediately bring themselves into compliance with the ESA regarding anticipated takes of endangered species – an issue that, in our opinion, is settled in light of the Beech Ridge litigation. Infra at 12-13.

[2] The term "person" is defined broadly under the ESA, including within its ambit all municipal and State entities. 16 U.S.C. § 1532(13) (defining "person" to include "any officer, employee, agent, department, or instrumentality . . . of any State, municipality, or political subdivision of a State . . . [or] any State, municipality, or political subdivision of a State . . . ."). Instructed by Congress's broad ESA mandate, federal courts have long held governmental entities liable under section 9 of the ESA where those entities authorize a third party's conduct that results, or is likely to result, in takes of members of listed species. Strahan v. Coxe, 127 F.3d 155 (1st Cir. 1997); Defenders of Wildlife v. Admin'r, EPA, 882 F.2d 1294 (8th Cir. 1989); Animal Welfare Inst. v. Holsten, 541 F. Supp. 2d 1073 (D. Minn. 2008); United States v. Town of Plymouth, 6 F. Supp. 2d 81 (D. Mass. 1998); Loggerhead Turtle v. County Council of Volusia

Section 10 of the ESA provides a limited exception to the otherwise strict prohibition against the taking of an endangered species. Pursuant to section 10, the FWS may issue a permit allowing the taking of a listed species where such taking is "incidental to, and not the purpose of, carrying out of an otherwise lawful activity." 16 U.S.C. § 1539(a)(1)(B). An applicant seeking an "incidental take permit" ("ITP") under section 10 of the ESA must submit a detailed "conservation plan" describing, among other things: (1) the impacts of the proposed taking; (2) procedures the applicant will use to mitigate, monitor, and minimize such impacts; (3) an explanation of why there are no feasible alternatives to the proposed taking; and (4) information establishing that sufficient funding exists to implement the plan. Id. § 1539(a)(2)(A); 50 C.F.R. § 17.22. The FWS has published a step-by-step guide for landowners interested in developing a section 10 conservation plan, also known as a "habitat conservation plan" ("HCP"). See FWS & National Oceanic & Atmospheric Administration Fisheries Service, Habitat Conservation Planning Handbook (1996), available at http://www.fws.gov/endangered/hcp/hcpbook.html. Without an incidental take permit, anyone who undertakes activities that are likely to take members of listed species, or who authorizes such activities, 16 U.S.C. § 1538(g), may be subject to criminal and civil federal enforcement actions, as well as civil actions by citizens for declaratory and injunctive relief. See 16 U.S.C. § 1540.

B. The Indiana Bat

The Indiana bat, one of the most imperilled land mammals in the world, is a medium-sized bat, weighing approximately one fourth of an ounce, with an average body length of about two inches and an in-flight wingspan of eight to eleven inches. See FWS, Indiana Bat (*Myotis sodalis*) Draft Recovery Plan: First Revision at 15 (2007), available at http://www.mcrcc.osmre.gov/MCR/Resources/bats/pdf/IN%20BAT%20DRAFT%20PLAN%20apr07.pdf ("Indiana bat Recovery Plan"). It has dark brown to black fur, with generally darker fur on its back and lighter fur on its stomach, and it feeds on small, soft and hard-bodied insects. See id. at 50. Indiana bats hibernate in winter, generally in limestone caves and abandoned mines, which are referred to as hibernacula. Indiana bats are a very social species and tend to cluster together in large numbers during hibernation.

Indiana bats begin to travel to their hibernation caves in August. See Carol A. Peterson & Richard A. Lambert, The Potential Impacts of Wind Power Facilities on Rare and Endangered Bats at the Proposed Highland New Wind Project Site (Apr. 11, 2006), available at http://vawind.org/Assets/Docs/Comments/VHG_HNWD_041107.pdf ("Potential Impacts of Wind Power"). They engage in a swarming behavior at their hibernation sites, flying in and out of the hibernacula but roosting outside, and this behavior is accompanied by mating. Ovulation and fertilization of the egg do not actually occur, however, until the female has left the hibernation site, which occurs between late March and early April. During swarming, the

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County, 896 F. Supp. 1170 (M.D. Fla. 1995).

animals are very transitory and are known to travel long distances in search of foraging resources. Indiana bat Recovery Plan at 41. For example, one radiotag study found Indiana bats over nineteen miles from their cave during swarming. Id. Another radiotag study likewise found that during swarming, Indiana bats traveled as far as nineteen miles from the hibernaculum in a single night. Id. at 42.

Once they emerge from hibernation for the spring and summer, Indiana bats "can migrate hundreds of kilometers from their hibernacula." Id. at 44 (noting studies documenting the distances traveled by Indiana bats during migration, including a study finding that twelve female Indiana bats migrated an average of 296 miles, with a maximum migration of 357 miles); see also Potential Impacts of Wind Power at 5 (noting that Indiana bats have been found to migrate 330 miles); J.E. Gardner & E.A. Cook, Seasonal and Geographic Distribution and Quantification of Potential Summer Habitat 9-20 (2002) (noting that banded Indiana bats have been found 325 miles away from hibernacula). Female Indiana bats emerge from hibernation first, and "[o]nce en route to their summer destination, [they] move quickly across the landscape." Indiana bat Recovery Plan at 44. They are known to fly ten to sixty miles in one night, and one female has been tracked moving thirty-five miles in approximately eighty-five minutes. Id.

Males and females typically live apart from each other during the summer, with the females giving birth and forming maternity colonies in hollow trees or under the exfoliating bark of dead or dying trees where they raise their young. They also use such trees for roosting and foraging during migration from winter to summer roosting sites. Young bats are born in June or early July (only one young per female), and become independent from their mothers after approximately one to two months. Indiana bat Recovery Plan at 44-46.

During the summer, some male Indiana bats remain in the hibernacula vicinity, using trees and snags as day roosts from late spring to early fall. W. Mark Ford et al., Summer Roost-Tree Selection by a Male Indiana Bat on the Fernow Experimental Forest 1-2, USDA Forest Service Northeastern Research Station Research Note NE-378 (July 2002), available at http://www.fs.fed.us/ne/newtown_square/publications/research_notes/pdfs/2002/rnne378.pdf. Because roost trees provide important roosting and foraging locations, "protection of tree roosts and forested habitat around Indiana bat hibernacula in the Appalachians is important to safeguard males from direct mortality and/or harmful modification of their roosting and foraging habitat." Id. at 2.

The FWS listed the Indiana bat as endangered in 1967 under the predecessor to the current Endangered Species Act. 32 Fed. Reg. 4001 (March 11, 1967). The original Indiana Bat Recovery Plan was issued in 1976, and was updated in 1983 and 1999. In April 2007, the FWS circulated a First Revised Draft Recovery Plan for the Indiana bat. Indiana bat Recovery Plan. The primary threats currently faced by Indiana bats in their summer range include the conversion of forested land, tree harvesting, and the removal of dead trees, because wooded areas are essential for foraging, roosting, and breeding. Id.

Even after the Indiana bat was listed, its rangewide population declined precipitously. According to the FWS, "[e]ven with the discovery of many new, large hibernacula, the rangewide population estimate dropped approximately 57 percent from 1965 to 2001." Id. at 33. The 2007 rangewide population estimate was approximately 468,000 Indiana bats. FWS, Indiana bat Five-Year Review at 12, available at http://www.fws.gov/midwest/endangered/recovery/5yr_rev/pdf/INBA5Yr30Sept2009.pdf.[3]

Exacerbating the traditional threats to the species, the FWS has recognized new grave threats to the survival and recovery of the Indiana bat, including collisions with the wind-energy turbines that are being rapidly constructed in the Appalachians. As explained by the FWS in the most recent draft of the Indiana bat Recovery Plan, "wind turbines may present additional threats to the species; the full impact of th[is] factor[] will be realized with time." Indiana bat Recovery Plan at 113. Further, the Service has concluded,

> There is growing concern regarding the potential for [Indiana] bat kills given the rapid proliferation of wind farming and the large-scale mortality [of other bat species] that has occurred at some facilities. Limited knowledge of the migratory behavior of bats limits our ability to understand why bats are susceptible to striking wind turbines. Wind-energy developments, particularly near hibernacula or along potential migration routes where large numbers of Indiana bats could be impacted, should be evaluated as a potential threat.

Id. at 101 (emphasis added) (citation omitted).

In addition to direct collisions with wind turbines, recent scientific evidence confirms that wind projects also threaten Indiana bats by creating low-pressure zones near turbines that lead to a fatal condition called barotrauma. Erin F. Baerwald, et al., Barotrauma Is a Significant Cause of Bat Fatalities at Wind Turbines, Current Biology, Vol. 18, R695 (2008). "Barotrauma involves tissue damage to air-containing structures caused by rapid or excessive pressure change; pulmonary barotrauma is lung damage due to expansion of air in the lungs that is not accommodated by exhalation." Id. In that study, more than 90% of "bat fatalities involved internal hemorrhaging consistent with barotrauma," indicating a very serious threat to bats, including Indiana bats. Id. As the study's scientists note, "[e]ven if echolocation allows bats to detect and avoid [direct collisions with] turbine blades, they may be incapacitated or killed by

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[3] Indiana bats are found in many hibernacula throughout Virginia and West Virginia, including in Highland County and adjacent counties. Indeed, Hellhole Cave in neighboring Pendleton County, West Virginia – only 26 miles from the proposed Highland wind project – contains approximately 12,000 Indiana bats and has been designated by the Service as critical habitat for the species. In contrast to the generally declining rangewide population numbers, the combined Virginia and West Virginia population of Indiana bats has increased substantially from 4,600 in 1965 to 13,412 in 2005 – nearly a 200% increase. Indiana bat Recovery Plan at 26.

internal injuries caused by rapid pressure reductions they can not detect." Id. at R696. This new evidence broadens the scope of harm previously thought to be posed to bats, including Indiana bats, near wind turbines since deaths from collisions will be compounded by the deaths caused by low-pressure zones near turbines.

Moreover, Indiana bats are dying from White-Nose Syndrome ("WNS"). WNS has moved very quickly across the Indiana bat range, as evidenced by recent reports of WNS in both Virginia and West Virginia, including in hibernacula located in four of the five counties adjacent to Highland County, and reported but currently unconfirmed in Highland County. See FWS, White-Nose Syndrome Map (April 26, 2010), available at http://www.fws.gov/northeast/whitenose/maps/WNSMap04-26-10_CB-DS.jpg. WNS is a disorder that has recently killed more than a million hibernating bats. According to non-profit Bat Conservation International, this is "the most precipitous decline of North American wildlife in the past century." Bat Conservation International, WNS Fact Sheet, http://www.batcon.org/pdfs/whitenose/WNSFACTSSHEET_Mar15_2010.pdf. Further, FWS biologists have cautioned that, if WNS is not contained, "we're going to see extinctions of listed species, and some of species that are not even listed," see Tina Kelley, Bats Perish and No One Knows Why, N.Y. Times, Mar. 25, 2008, which has led to "concern[s] about the continuing viability of the Indiana bat population in the Northeast." FWS, White Nose Syndrome in Bats 2 (2008), available at http://www.fws.gov/northeast/pdf/white-nosefaqs.pdf ("White Nose Syndrome in Bats"). This unprecedented threat to Indiana and other bats means that eliminating and mitigating additive sources of mortality (for example, from wind energy projects) is of especially critical importance.

C. The Virginia Big-Eared Bat

Even more imperilled than the Indiana bat, the Virginia big-eared bat is a subspecies of the Townsend's big-eared bat (*Corynorhinus townsendii*). It is a medium-sized bat, four inches long and less than half an ounce in weight, with very large ears and long brown fur with pale brown underparts. See FWS, Recovery Plan for the Ozark big-eared bat and the Virginia big-eared bat at 3-4 (2007), available at http://www.fws.gov/ecos/ajax/docs/recovery_plan/840508.pdf ("VBEB Recovery Plan").

The Virginia big-eared bat resides in caves at elevations greater than 1500 feet throughout the year. Id. at 13. Colonies often have roosts in multiple caves and move among roosts even during cold weather. Virginia big-eared bats mate in the fall and winter, and then hibernate in caves, typically in areas dominated by oak-hickory or beech-maple-hemlock forests. Id. Ovulation and fertilization occur in late winter or spring. During the summer, male Virginia big-eared bats occupy caves both independently and in groups, while females gather in maternity caves and give birth to one pup each in May or June. Id. at 14-15. In mid-July pups begin to leave the cave at night to forage, and most bats leave the maternity caves by late September. Virginia big-eared bats have been documented migrating 40 miles between caves. Id. at 14. Virginia big-eared bats are known to forage mostly "along forested edges." Id.

Virginia big-eared bats "long have been restricted to relatively small areas, and are dependent on a few specific kinds of caves for hibernation and reproductive activity." Listing of Virginia and Ozark Big-Eared Bats as Endangered Species, and Critical Habitat Determination, 44 Fed. Reg. 69206, 69207 (Nov. 30, 1979). Indeed, the species is known to reside in only a small number of caves in Virginia, West Virginia, Kentucky, and North Carolina. In fact, more than half of the global population is found in West Virginia, with the largest known maternity colony and the largest hibernating concentration in the world found in that state near its border with Highland County. As the FWS has noted, "[t]he species has a limited range and is highly susceptible to changes in habitat." 44 Fed. Reg. at 69207.

The FWS listed the Virginia big-eared bat as endangered in 1979, and designated five caves in West Virginia as critical habitat at that time. 44 Fed. Reg. 69206. The Service completed a recovery plan for the Virginia big-eared bat and the Ozark big-eared bat in 1984. VBEB Recovery Plan. Virginia big-eared bats reside in five counties in West Virginia, as well as six counties in Virginia, including Highland County where HNWD proposes to build the Highland wind project. FWS Species Profile for Virginia big-eared bat, available at http://www.fws.gov/ecos/ajax/speciesProfile/profile/speciesProfile.action?spcode=A080; see also Virginia DGIF, Virginia big-eared bat Map, available at http://www.dgif.virginia.gov/wildlife/information/?s=050035.[4]

Current estimates of the Virginia big-eared bat population show less than 12,000 remaining individuals. FWS, Virginia big-eared bat 5-Year Review 7 (Summer 2008), available at http://www.fws.gov/ecos/ajax/docs/five_year_review/doc1963.pdf. The population decline is primarily attributed to human disturbance and habitat loss. However, the Service has expressed serious concerns about the effect of wind power on this species, concluding that foraging and migratory Virginia big-eared bats are "vulnerable to mortality at wind turbines," id. at 14, and further that "current regulatory mechanisms in regard to wind power production may not be adequate to protect VBEB populations." Id. at 13. In addition, White-Nose Syndrome is expected to also affect Virginia big-eared bats. Id. at 12; White Nose Syndrome in Bats at 2. Given that bat populations have declined as much as 97 percent in caves where the syndrome's presence has been confirmed, WNS could prove to be a particularly grave threat to this species,

[4] Although their rangewide population is much smaller than Indiana bats, the Virginia big-eared bat population is heavily concentrated around the proposed Highland wind project. For example, Hellhole Cave in Pendleton County, West Virginia – located 26 miles from the proposed Highland wind project site – contains more than 5,000 Virginia big-eared bats, or nearly half of the species' remaining population, and has been designated as critical habitat by the Service. In addition to the caves in West Virginia, members of the species use many Virginia caves that surround the project site, including caves as close as three miles from the project site, and at least eight caves within 20 miles where either cavers or VDGIF biologists have documented Virginia big-eared bats.

meaning that all additive sources of mortality, such as anticipated deaths from wind power, should be minimized to ensure the species' survival and recovery.

D. The Highland Wind Project

The proposed Highland wind project will consist of 19 industrial-size turbines, nearly 400 feet tall from the ground to the tip of the rotor in the upright position, along Tamarack Ridge and Red Oak Knob on Allegheny Mountain in Highland County, Virginia. North East Ecological Services, An Overview of the Current State of Knowledge of Bats with Specific Reference to the Potential Impacts of Wind Power at 2 (Jan. 10, 2006), available at http://www.vawind.org/Assets/Docs/NEES_Bat_Impacts_2006..pdf ("Bat Overview"). Tamarack Ridge is a ridgeline containing a treeless corridor surrounded by mature hardwood trees characteristic of Indiana bat roost trees. Id. Red Oak Knob is pastureland surrounded by mature trees, which could also serve as potential roost trees for listed bats. Id. Elevation of the site averages approximately 1,270 meters above mean sea level. Id.

In October 2003, the Service provided preliminary comments to the U.S. Department of Agricultural regarding potential impacts of the proposed project on federally listed species. Letter from Karen L. Mayne, Field Supervisor, FWS Virginia Field Office, to Laurette Tucker, USDA (Oct. 14, 2003), available at http://vawind.org/Assets/Docs/Comments/USFWS%20101403.pdf. In that letter, the FWS concluded that "the proposed project may affect species under the jurisdiction of the Service, including . . . endangered species." Id. at 1. Specifically, the Service recommended:

> [A] comprehensive list of birds and bats known to utilize the project area year-round and their numbers should be compiled. Conduct preconstruction field studies using a combination of radar, acoustic, direct field sampling and visual observation to compile this list. This list should also include nocturnal and diurnal migrants. Comprehensive studies need to be conducted year-round to determine effects of the project from direct displacement of feeding and resting areas, collision mortality, and disruption of migratory pathways.

Id. at 2. The Service indicated that both Indiana bats and Virginia big-eared bats "may occur in the project area," id. at 3, and then recommended consultants qualified to survey for presence of listed species on the project site. Id. at 3-4.

In September 2005, the Service sent a letter to HNWD regarding potential wildlife impacts of the Highland wind project. Letter from Karen L. Mayne, Field Supervisor, FWS Virginia Field Office, to Henry T. McBride, Jr., HNWD (Sept. 28, 2005), available at http://vawind.org/Assets/Docs/Comments/USFWS%20092805.pdf. Explaining that Indiana bats and Virginia big-eared bats "have been documented in Highland County and may occur in the project area," id. at 1, the Service noted multiple caves containing these species within at least 17 miles of the project site. Id. at 2. Data from nearby wind projects indicated that "there is a high

likelihood that bats will be adversely affected by wind turbines" at the proposed project site. Id. In light of the potential impact on listed species, the FWS informed HNWD about the incidental take permit process under section 10 of the ESA. Id. at 3-4. Because of the anticipated impact on listed bat species, the Service recommended a number of studies aimed at better understanding the extent of impacts posed by this project, including "remote sensing technology (radar, acoustic, and infrared) to collect data in various spatial (ridgetops and side slopes) and temporal scales (day and night, season to season, and year to year)." Id. at 3. In addition, the FWS also recommended supplemental "sampling protocols (e.g., visual observation and/or mist netting) . . . to ground truth the data for individual species." Id. at 3-4. Therefore, the Service explained its view that "we strongly recommend that a multi-year pre-construction study be conducted at the proposed project site in order to identify any risks to federally-protected species." Id. at 4-5.

HNWD undertook a single pre-construction survey, with consultant ABR, Inc. publishing its results in January 2006. ABR, Inc., A Radar and Visual Study of Nocturnal Bird and Bat Migration At the Proposed Highland New Wind Development Project (Jan. 2006), available at http://www.vawind.org/Assets/Docs/ABR_Radar_Study_2006.pdf. The study was a two-month study using radar technology and night-vision technology during the fall migration period for bats and birds. Id. at 1. Radar and visual data are not reliable for differentiating bats from birds, much less bat species from bat species. However, even in the absence of bat-specific data, the study obtained results of very high migratory passage rates, ranging from 3.4 to 24.7 migrants per turbine per day. Id. at 25-26; see also Graphs of Migrant Passage Rate Index, http://vawind.org/Assets/Pictures/migrant%20numbers%20by%20altitude.pdf.

Also in January 2006, consultant North East Ecological Survey ("NEES") prepared an overview of potential bat-related impacts of the proposed Highland wind project. Bat Overview. In that overview, NEES explained that nearly 90% of Indiana bat hibernacula located in Virginia were "relatively near the Project . . . [and] contained a total of 533 individuals." Id. at 5. In addition, NEES noted that many hibernacula in West Virginia are near the project site, including Hellhole Cave (with nearly 12,000 Indiana bats) approximately 26 miles from the site. Id. NEES also explained the concentration of Virginia big-eared bats in Highland and nearby counties (including a maternity colony only 13 miles east of the project site), and discussed that "clearing small forested areas at high elevations may attract" the species. Id. at 7. More than half of the known Virginia big-eared bat population is found in Highland County and bordering counties, and NEES determined that bats of this species are likely "migrating much longer distances than" previously suggested by studies. Id. at 9.

Nonetheless, relying in part on the assumption – now proven to be false – that "there has been no confirmed mortality of any endangered species at an operational wind farm," id. at 20, NEES ultimately concluded that, despite the risk of "peak bat mortality [during the fall migratory period]," id. at 17, and despite the fact that "[t]he Allegheny Front represents a region of significant migratory bat activity during the fall migration season," id., "it is unlikely that the Highland New Wind Project will have an adverse effect on any population of endangered

species." Id. at 20. However, at the same time, NEES conceded that "it remains possible that small numbers of bats forage on or near the project site," id., and provided no discussion about potential impacts to listed bat species during migration – the time when the highest bat mortality from wind turbines is known to occur.[5]

In February 2006, the Virginia Department of Game and Inland Fisheries ("VDGIF") – the state counterpart to the federal FWS – submitted detailed comments raising numerous concerns regarding the potential impacts of the Highland wind project on listed bat species. VDGIF, Recommendations for HNWD (Feb. 24, 2006), available at http://vawind.org/Assets/Docs/Comments/DGIF-022406.pdf. As to the radar study, VDGIF concluded that "[t]his is the highest turbine passage rate index . . . recorded in the east when compared to other surveys conducted using the same methodology . . . [and] support[s] our concerns that high fatality rates may occur at this site and underscore[s] the need for complete pre- and post-construction surveys." Id. at 6. Commenting on the bat overview compiled by NEES, VDGIF concluded that "[t]he Highland Project is well within the migratory distance of the major Virginia big-eared bat hibernacula as well as several minor hibernacula," id. at 10, and "there is a strong[] potential for high bat mortality, . . . [and] with the large numbers of Indiana and Virginia big-eared bats existing in the project area, there is a greater chance of take." Id. at 12. Because of these grave concerns, VDGIF "recommend[ed] consultation with the U.S. Fish and Wildlife Service concerning incidental take of federally listed or protected species." Id. at 20, 10.

In March 2006, the Service reiterated that "several concerns . . . remain for the project," Letter from Karen L. Mayne, Field Supervisor, FWS Virginia Field Office, to Henry T. McBride, Jr., HNWD at 1 (Mar. 7, 2006), available at http://vawind.org/Assets/Docs/Comments/USFWS%20030706.pdf, and noted its concurrence with the concerns identified by VDGIF in its February 2006 comments. Id. at 2. The FWS again described the incidental take permit process under section 10 of the ESA, explaining that such a permit is the only method for authorizing take where a federal nexus does not exist. Id. Based on VDGIF's comments, the Service concluded that the project "may affect" the two listed bat species in the area. Id. at 3. Finally, the FWS again recommended additional pre-construction surveys (acoustic, mist netting, etc.) to better understand the temporal and spatial use of the project site by listed bats. Id. at 4.

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[5] At least one Indiana bat death has in fact been confirmed at a wind project. See FWS, Press Release (Feb. 8, 2010), available at http://www.fws.gov/midwest/News/release.cfm?rid=177. In addition, an independent report by the Virginia Highlands Grotto of the National Speleological Society documented numerous discrepancies and omissions in NEES' January 2006 overview of potential risks to bats. Potential Impacts of Wind Power.

In September 2006, VDGIF submitted additional comments, yet again reiterating its position that HNWD not proceed unless and until it obtains an incidental take permit pursuant to section 10 of the ESA. VDGIF, Recommendations for HNWD (Sept. 20, 2006), available at http://vawind.org/Assets/Docs/Comments/DGIF-092006.pdf. VDGIF's continued insistence on an ITP, accompanied by an HCP, was based on the fact that "in our opinion, the evidence suggests a strong likelihood of take . . . [because of] [p]roximity of the project to the largest Indiana bat and Virginia big-eared bat colonies in the region." Id. at 3 (emphasis added).[6]

During the 2007 Virginia State Corporation Commission ("SCC") proceeding, two independent bat experts – Dr. Michael Gannon and Dr. Merlin Tuttle – raised serious concerns regarding bat impacts. Dr. Gannon's expert testimony was credited in recent federal litigation over the Beech Ridge wind project, and he was described by the court there as "a very credible and persuasive expert witness on bat biology, the Indiana bat, and acoustic analysis." Animal Welfare Inst. v. Beech Ridge Energy, 675 F. Supp. 2d 540, 565 (D. Md. 2009). Here, for example, Dr. Gannon concluded that "[t]he likelihood that some of these [listed] bats will be killed at this facility at some time is extremely high." Direct Testimony of Michael R. Gannon, at 10 (Sept. 1, 2006) (emphasis added), available at http://vawind.org/Assets/Docs/Comments/Highland-Citizens-090106-1.pdf. Further, Dr. Gannon concluded that, "[g]iven the testimony already before the SCC, there is a reasonable certainty that an endangered bat will be killed by this project if it is constructed." Direct Testimony of Michael R. Gannon, at 5 (June 19, 2007), available at http://vawind.org/Assets/Docs/Comments/Gannon-061907.pdf.

Nonetheless, on December 20, 2007, the SCC granted HNWD a certificate of public convenience and necessity to construct the Highland wind project. SCC Order (Dec. 20, 2007), Case No. PUE 2005-00101, available at http://vawind.org/Assets/Docs/SCC-Order-122007.pdf. Rather than requiring the company to obtain an ITP, the SCC simply required that a post-construction monitoring and adaptive management plan be developed in accordance with a proposal put forth by VDGIF.[7]

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[6] This is consistent with VDGIF's subsequent testimony via VDGIF biologist Rick Reynolds that "[w]e continue to strongly recommend that the applicant work with VDGIF and the USFWS to address incidental take through development of an HCP for the listed species that may be taken at the facility." Written Testimony of Rick Reynolds, at 5 (June 18, 2007), available at http://www.vawind.org/Assets/Docs/Comments/VDGIF-061807.pdf. Further, Mr. Reynolds explained that "implementation of an HCP or other protective strategy for listed species, upon approval by VDGIF [and the FWS], would establish the project operator's intent to protect these species, and possibly deter prosecution in the event of unauthorized take of listed species." Id. at 11.

[7] A similar certificate was denied by the West Virginia Public Service Commission for the proposed Liberty Gap wind project in Pendleton County, West Virginia – which would have

At this time, despite consistent recommendations by federal and state wildlife agencies and independent bat experts, HNWD has failed to conduct any bat-specific surveys to determine the spatial and temporal use of the project site by listed species. Moreover, HNWD has not heeded other recommendations for protecting the region's imperilled wildlife, including by failing to apply for an ITP pursuant to section 10 of the ESA. Nevertheless, based on its public statements, the company plans to begin construction of the facility in 2010.

E. Beech Ridge Litigation

In 2009, a coalition of environmentalists, concerned community members, and conservation organizations – including the Animal Welfare Institute that is a signatory to this letter – filed the nation's first federal lawsuit challenging a commercial wind project under the ESA for anticipated takes of endangered Indiana bats – many of which reside in the same hibernacula of concern here. Beech Ridge Energy, 675 F. Supp. 2d 540. That lawsuit challenged the Beech Ridge wind project in Greenbrier County, West Virginia – which is only one county removed from Highland County, Virginia.[8]

After trial, including testimony from Dr. Michael Gannon and other bat biologists, Judge Roger W. Titus of the U.S. District Court for the District of Maryland found that, "like death and taxes, there is a virtual certainty that Indiana bats will be harmed, wounded, or killed imminently by the Beech Ridge Project, in violation of § 9 of the ESA, during the spring, summer, and fall." Id. at 579. Because a section 9 violation was likely, the court enjoined construction of the

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been located approximately 10 miles from the Highland wind project – in part due to serious concerns regarding endangered bat species and the company's failure to obtain an ITP in a timely manner. PSC Final Order 34-36 (June 22, 2007), Case No. 05-1740. Many of the same federally listed bats implicated at the Liberty Gap project will likely migrate through and forage in or near the airspace of the Highland wind project. The FWS considered the Liberty Gap project (10 miles from the proposed Highland wind project) to be "a high risk site for impacts to federally-listed endangered and threatened species." Beech Ridge Energy, Defendants' Exhibit 87, at 2 (Attachment A) (emphasis added).

[8] Many of the Indiana bat hibernacula that created a virtually certain risk of take at the Beech Ridge facility are implicated with regard to the Highland wind project because of the species' documented migratory ability. Indeed, the cave of greatest concern which was singled out by plaintiffs' experts and the court – Hellhole Cave with approximately 12,000 Indiana bats and 5,000 Virginia big-eared bats – is much closer to the Highland wind project than to the Beech Ridge project. E.g., 675 F. Supp. 2d at 568. Moreover, it is the position of the FWS that the once-proposed Liberty Gap project – a mere 10 miles from the Highland wind project – has considerably higher risks than even those present at the Beech Ridge facility. See, e.g., Attachment A, at 2 (explaining that "Beech Ridge is considered a lower risk site compared to Liberty Gap").

majority of the turbines "unless and until" the company obtains an ITP, reasoning that "the ITP process may find that some locations for wind turbines are entirely inappropriate," consistent with section 7(d) of the ESA and its prohibition on irretrievable commitments of resources prior to the grant of an ITP. Id. at 581.[9]

In ruling that the ESA required that the company obtain an ITP before constructing and operating turbines in a manner that would kill endangered Indiana bats, the court recognized that two important federal policies – one protecting endangered species and the other favoring renewable energy – were in play. 675 F. Supp. 2d at 581. Nonetheless, the court was clear: "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." Id.

DISCUSSION

A. Federally Listed Species Will Be Taken By HNWD In Violation Of The ESA.

HNWD's proposed wind project, as currently planned, will almost certainly result in the incidental taking of endangered Indiana bats and Virginia big-eared bats – an action which has not been permitted by the FWS through the section 10 ITP process. Given the presence of multiple hibernacula within migratory distance of the project site including the most important Indiana bat and Virginia big-eared bat hibernaculum in the region (Hellhole Cave), the migratory distances of the listed species, the availability of potential roost trees and edge habitat on and surrounding the project site, the unprecedented numbers of bats killed at nearby wind facilities via turbine collisions and barotrauma, and the unusually high numbers of migratory birds and bats found in the fall 2005 radar study conducted by HNWD's consultant, it is inevitable that the Highland wind project will result in the incidental taking of Indiana bats and Virginia big-eared bats by killing, injuring, and/or wounding members of those species via turbine collision and barotrauma.[10]

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[9] The court permitted a subset of turbines, which had been previously constructed per an agreement between the parties, to begin operation prior to the grant of an ITP, but only under very restrictive conditions that would ensure that no listed bats could be killed by the project's limited operation. 675 F. Supp. 2d at 580-81. Subsequent to the court's ruling, the parties agreed on a modified layout for the project, which further reduced the potential for bat mortalities while Beech Ridge applies for an ITP.

[10] Although the SCC ordered some level of post-construction monitoring and adaptive management, those measures will not prevent takings of endangered bats. By their nature, "adaptive" management regimes are not triggered until a particular threshold is crossed, i.e., no

In addition, the construction and operation of the Highland wind project is likely to "harass" Indiana bats and Virginia big-eared bats, as that term is defined by the ESA's implementing regulations. 50 C.F.R. § 17.3 (defining harassment 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, including breeding, feeding, or sheltering"). The construction of large turbines, roads, transmission lines, and other invasive infrastructure, in conjunction with turbine site development and grading, will inevitably "disrupt," if not destroy, all of these essential behaviors for local endangered bats by significantly altering the natural ecosystem in which these species live.

Moreover, the project will also "harm" listed bats – another form of prohibited take under the ESA. See 50 C.F.R. 17.3 (defining harm as "significant habitat modification or degradation where it actually kills or injures wildlife"). Because the Highland wind project will necessarily require some level of adverse habitat modification in the form of tree cutting and clearing, see http://www.vawind.org/Assets/Docs/070909/Turbines_in_the_forest.jpg (illustrating forested turbine locations by aerial photography), it will "harm" endangered bats in two distinct ways. First, the cutting of potential roost trees during the time of year when listed bats are known to use roost trees across the landscape, i.e., March 15 through November 15, will likely harm bats using such trees for roosting and foraging activities because the felling of occupied trees will kill or injure those bats. Second, because the cutting of trees for turbine corridors and transmission line corridors will substantially increase the amount of edge habitat in close proximity to HNWD's soon-to-be operating wind turbines – habitat known to attract foraging Indiana bats and Virginia big-eared bats – such cutting activity will lure listed bats to the project site, increasing the likelihood for their mortality and/or injury as a result of operation.

The conclusion that listed bats will be taken by this project (via death, injury, wounding, harassment, and/or harm) is consistent with the recommendations of all independent biologists to review this project. The state and federal wildlife agencies have long expressed grave concerns with this project going forward in the absence of an ITP because of what they term "a strong likelihood of take," and Dr. Michael Gannon has testified that the likelihood of take here is "extremely high." Direct Testimony of Michael R. Gannon, at 10 (Sept. 1, 2006). Even as compared to the Beech Ridge project, where a federal judge found that takes were a "virtual certainty," the prediction of takes here is even stronger because of the high concentration of

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measure specific to Indiana and Virginia big-eared bat protection would be put into place until after unlawful take of those species has already occurred. Further, since post-construction monitoring here will only monitor a subset of turbines, and because search protocols often overlook a majority of dead bats, there is even more reason for HNWD to obtain an ITP which incorporates, and potentially strengthens, post-construction monitoring and adaptive management protocols before takes unlawfully occur. See Beech Ridge Energy, 675 F. Supp. 2d at 577-78 (finding that post-construction monitoring frequently fails to accurately find bat carcasses, particularly with respect to rare species).

endangered bats in the vicinity of the project – including Hellhole Cave (critical habitat for both listed species) only 26 miles from the Highland project site.

HNWD has done virtually nothing to present evidence suggesting that the predicted take of endangered species will not occur here. Rather than implementing the various surveys known to identify bats by species to determine temporal and spatial use of the project site (acoustic, mist netting, etc.), HNWD has refused to conduct such surveys and has instead relied merely on a single radar study that is insufficient for determining species use of the project site. Indeed, HNWD's failure to engage in any of the surveys recommended by the Service and VDGIF to determine the level of risk to listed bat species further compounds that risk posed to those species with takes almost certain to occur. This type of conduct was one of the primary reasons that the court found Beech Ridge Energy's bat surveys deficient: "Searching for bats near proposed wind turbine locations for one year instead of three, looking in one season rather than three, and using only one method to detect bats was wholly inadequate to a fair assessment." Beech Ridge Energy, 675 F. Supp. 2d at 582. Therefore, as agency and independent biologists have expressed, it is virtually certain that the Highland wind project will take endangered Indiana bats and Virginia big-eared bats, and HNWD's minimal survey efforts do not dispel that fact. Indeed, HNWD's efforts to date only highlight the minimalist approach adopted by the company with regard to endangered species.[11]

B. HNWD Can Only Lawfully Proceed By Obtaining An ITP From The Service Prior To Construction And Operation.

Just as the court held in the Beech Ridge litigation, construction and operation of turbines here may not proceed until and unless HNWD obtains an ITP from the Service – the legally mandated process for addressing whether and how the "takes" of endangered species can be minimized and mitigated. That is consistent with the longstanding position of the federal and state wildlife agencies, as well as independent biologists, who have strongly recommended that HNWD obtain an ITP prior to construction and operation.[12]

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[11] While the court found that Beech Ridge Energy and its consultants did not adequately survey for Indiana bats, it is important to note that the company there at least conducted some of the surveys recommended by the Service (mist netting). Here, not only did HNWD fail to even conduct mist netting and acoustic surveys (the two most effective species-specific surveys when performed in combination), but HNWD conducted no bat-specific surveys with the ability to differentiate between species.

[12] HNWD has made publicly inconsistent statements, first agreeing to obtain an ITP but only after construction and operation have commenced, and yet subsequently stating that no ITP would be obtained because one is not needed. In any event, not only is an ITP necessary here because of the exceedingly high level of risk to listed species, but it must be obtained before construction and operation commence in order to prevent further legal violations under section

Despite those recommendations, it appears that HNWD plans to move forward with construction activities. Since the only lawful course of action is for HNWD to obtain an ITP from the Service, this project is subject to the section 7 consultation process under the ESA. As a project subject to consultation, the ESA explicitly prohibits HNWD from "mak[ing] any irreversible or irretrievable commitment of resources . . . which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures." 16 U.S.C. § 1536(d). Thus, any construction activity, such as tree cutting, turbine site grading, or other habitat modification in the Indiana bat or the Virginia big-eared bat range, that in any way forecloses a potential wildlife avoidance or mitigation alternative for the Service to consider in rendering a final decision on the ITP, is a separate and distinct violation of the ESA.

The principle espoused by Congress in section 7(d) is the same reason that Judge Titus enjoined the majority of turbine construction and operation at the Beech Ridge wind facility, holding that the ITP process might find certain turbine locations inappropriate because of bat impacts and also that wildlife alternatives should not be foreclosed by premature construction and operation. Beech Ridge Energy, 675 F. Supp. 2d at 581; see also Fla. Key Deer v. Brown, 386 F. Supp. 2d 1281, 1293 (S.D. Fla. 2005) (explaining that section 7(d) "prevent[s] Federal agencies [and permit applicants] from steamrolling activities in order to secure completion of projects regardless of the impacts on endangered species"). Therefore, HNWD must refrain from all construction activities until and unless an ITP is obtained, including because, as indicated above, such activities are themselves likely to result in take through adverse habitat modification.

C. In Addition To HNWD, The Highland County Board Of Supervisors Is Liable Under The ESA For Authorizing Activity That Is Likely To Result In Takes.

As explained above in footnote 2, courts have long held municipal and other governmental entities liable for authorizing conduct that results, or is likely to result, in takes of members of endangered species. Here, the Highland wind project cannot be constructed and operated without first obtaining a building permit for turbine construction from the Highland County Board of Supervisors ("HCBOS") – meaning that the grant of such a permit authorizing HNWD's unlawful conduct to proceed in the absence of an ITP would be both a but-for and proximate cause of the unauthorized takings of endangered species. Particularly in light of the virtually certain risk of take with regard to the region's imperilled wildlife, the HCBOS should refrain from granting HNWD a building permit until and unless HNWD satisfies all obligations under the ESA by applying for, and obtaining, an ITP. Otherwise, by authorizing the unlawful takes of Indiana and Virginia big-eared bats, the HCBOS will be liable for the actions of HNWD that HCBOS permitted, i.e., the construction and operation of a commercial wind project and the consequent illegal conduct resulting from that project in the absence of an ITP.

7(d) of the ESA.

CONCLUSION

The available evidence demonstrates that the Highland wind project will almost certainly result in unauthorized takes of Indiana bats and Virginia big-eared bats. The only way for HNWD to ensure that it will not unlawfully take members of these species, and therefore avoid an enforcement action from the FWS, or a citizen suit brought by the above-named organizations and citizens, is to apply for an incidental take permit from the FWS pursuant to section 10 of the ESA. Similarly, the HCBOS can only avoid ESA liability by withholding its grant of a building permit until and unless HNWD obtains an ITP.

Please do not hesitate to contact us if you wish to discuss this matter or have any questions concerning this letter. If we do not hear from you, we will assume that no changes will be made and will consider all available avenues, including litigation, to conserve the endangered Indiana bat and Virginia big-eared bat in accordance with the requirements of the Endangered Species Act.

Sincerely,

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