

Meyer Glitzenstein & Crystal  
1601 Connecticut Avenue, N.W.  
Suite 700  
Washington, D.C. 20009-1056

Katherine A. Meyer  
Eric R. Glitzenstein  
Howard M. Crystal  
William S. Eubanks II  
Jessica Almy

Telephone (202) 588-5206  
Fax (202) 588-5049  
meyerglitz@meyerglitz.com

January 4, 2011

**By Certified Mail**

Highland New Wind Development LLC  
111 East Market Street  
P.O. Box 1287  
Harrisonburg, VA 22803

Rowan Gould, Acting Director  
United States Fish & Wildlife Service  
1849 C Street, N.W.  
Washington, DC 20240

Henry T. McBride, Jr.  
HNWD, Manager  
1583 Ridgedale Road  
Harrisonburg, VA 22801

Ken Salazar, Secretary  
United States Department of the Interior  
1849 C Street, N.W.  
Washington, DC 20240

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

The dual purpose of this letter is to supplement the sixty-day notice letter dated May 14, 2010 (Exhibit A) regarding Highland New Wind Development's ("HNWD") ongoing and future violations of the Endangered Species Act, 16 U.S.C. §§ 1531-1544, and to make a final attempt to collaboratively resolve this legal matter short of burdening the federal court system with potentially unnecessary litigation. This supplemental letter is written on behalf of Highlanders for Responsible Development, Rifle Ridge Farm, Rick Webb, Carol A. Peterson, and Richard A. Lambert, and it fully incorporates by reference the factual and legal allegations and claims discussed in the initial letter. At this time, we have received no response to the initial



letter from HNWD, its manager, or its counsel – despite our understanding that HNWD is proceeding with road construction and other work on the project site.<sup>1</sup>

As explained in the initial letter, the only way that HNWD can proceed in compliance with section 9 of the ESA, 16 U.S.C. § 1538(a)(1)(B), is to obtain an incidental take permit (“ITP”) before continuing its construction and operation activities. Indeed, an extensive ruling by a federal court in Animal Welfare Institute v. Beech Ridge Energy, 675 F. Supp. 2d 540 (D. Md. 2009) reached that precise conclusion – a ruling which we believe will be very persuasive if we pursue ESA litigation over this project. As outlined in our initial letter, the facts necessitating an ITP are actually even stronger here than they were at Beech Ridge, and that is strongly reinforced by conclusions from state wildlife biologists and independent bat experts that this project will almost certainly kill listed bats and thus that the project cannot proceed without an ITP. See May 14, 2010 Letter at 10-11.<sup>2</sup>

We understand that HNWD met with the Service on February 22, 2010 to discuss the possibility of obtaining an ITP – an approach strongly supported by the Service. However, since that time, it is our understanding that HNWD has not applied for an ITP, nor has it made any formal commitment to obtain an ITP prior to further construction. HNWD’s refusal to obtain such a permit before proceeding with site work not only flies in the face of section 9 of the ESA and the federal ruling in Beech Ridge, but it also fails to come to grips with the vast number of similarly-situated wind projects that have obtained or are obtaining ITP’s to ensure that listed species are not unlawfully killed and injured by their construction and operation activities. E.g., Receipt of ITP Application for Kaheawa Wind Power II, 75 Fed. Reg. 68821 (Nov. 9, 2010); Receipt of ITP Application for Shuteye Wind, LLC, 75 Fed. Reg. 48359 (Aug. 10, 2010); Receipt of ITP Application for Bluewater Wind, 75 Fed. Reg. 42698 (July 22, 2010); Receipt of ITP Application for Beech Ridge Wind Energy, 75 Fed. Reg. 42767 (July 22, 2010); Receipt of ITP Application for Radar Ridge Wind, 75 Fed. Reg. 30057 (May 28, 2010) ; Receipt of ITP Application for Buckeye Wind, 75 Fed. Reg. 29575 (May 26, 2010); Receipt of ITP Application for Bear River Ridge Wind Power, 74 Fed. Reg. 68073 (Dec. 22, 2009). Thus, if HNWD – in stark contrast to its fellow developers – continues to refuse to obtain the only permit available under the ESA to absolve it of section 9 liability, the parties to this letter, who seek to minimize

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<sup>1</sup> Because this letter merely provides supplemental information about ESA violations to which HNWD has already been notified in the May 14, 2010 letter, Plaintiffs are not required to satisfy any statutory waiting period and thus may file a lawsuit at any time regarding these violations pursuant to 16 U.S.C. § 1540(g).

<sup>2</sup> The U.S. Fish and Wildlife Service (“FWS” or “Service”) has also long maintained that there exist serious concerns with the project’s likely impacts to listed bats, and in particular have criticized the minimal surveys undertaken to calculate and mitigate those impacts. May 14, 2010 Letter at 8-10.

and mitigate impacts to listed bat species, will be left with little choice but to enforce the section 9 prohibitions against HNWD in a federal court setting.

Unfortunately, it appears that HNWD has begun to move forward with at least preliminary construction activities on the project site despite being put on notice of ongoing and future violations of the ESA by the May 14, 2010 letter. For example, it is our understanding – which is reflected in the attached maps (Exhibits B-D)<sup>3</sup> – that HNWD has engaged in substantial construction activities including grading and other land disturbance on at least three turbine sites; vast road clearing, building, and widening; and by securing bonds (i.e., committing financial resources) for additional environmentally damaging work that HNWD intends to undertake in the very near future. However, construction activities of this kind will have the effect of foreclosing potential siting and other project layout design alternatives, thereby adversely impacting listed wildlife and habitat used by such species. Such activities are expressly foreclosed by section 7(d) of the ESA, 16 U.S.C. § 1536(d), and cannot proceed until and unless an ITP is obtained by HNWD. Specifically, because this is a project subject to consultation due to the clear need for an ITP, 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.” Id.

As we explained in our initial letter, the principle espoused 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 conclude that certain turbine locations are inappropriate because of bat impacts and also that 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, consistent with section 7(d), HNWD must refrain from all construction activities until an ITP is obtained or else HNWD will be in patent violation of the ESA.

### **Conclusion**

The available evidence presented in the initial letter and in this supplemental letter demonstrates that the Highland wind project is reasonably certain to result in unauthorized takes of Indiana bats and/or 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 and/or a citizen suit brought by the parties to this letter, is to apply for an ITP from the

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<sup>3</sup> The attached maps (Exhibits B-D) are based on our current understanding of the project’s layout and construction activities to date. Please advise us if these maps do not accurately reflect HNWD’s actions to date.

FWS (just as many other developers have), and to refrain from construction activities that in any way foreclose or impact siting and other alternatives until an ITP is obtained.

Please do not hesitate to contact us if you wish to discuss this matter or have any questions concerning this letter. We remain interested in working cooperatively with HNWD to resolve these legal violations short of filing unnecessary litigation. However, if we do not hear from you in the near future, we will assume that you are not interested in a collaborative resolution and we will consider all available avenues, including litigation, to conserve endangered Indiana bats and Virginia big-eared bats in accordance with the requirements of the ESA.

Sincerely,



William S. Eubanks II  
Eric R. Glitzenstein

cc: Field Office Supervisor  
Virginia Field Office  
United States Fish and Wildlife Service  
6669 Short Lane  
Gloucester, VA 23061

John W. Flora  
Lenhart Obenshain  
90 North Main Street  
Harrisonburg, VA 22802