

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

SAVE WESTERN MARYLAND *
P.O Box 81 *
Oakland, Maryland 21550 *

and *

MARYLAND CONSERVATION *
COUNCIL, INC. *
2304 South Road *
Baltimore, Maryland 21209 *

and *

AJAX EASTMAN *
112 East Lake Avenue *
Baltimore, MD 21212 *

and *

D. DANIEL BOONE *
8111 Chestnut Avenue *
Bowie, Maryland 20715-4532 *

Plaintiffs *

v. *

CONSTELLATION GREEN ENERGY, LLC *
750 East Pratt Street, 17th Floor *
Baltimore, Maryland 21202 *

and *

CONSTELLATION ENERGY GROUP, Inc. *
c/o The Corporation Trust Company *
Corporation Trust Center *
1209 Orange Street *
Wilmington, Delaware 19801 *

Defendants. _____

Civil Action No.:

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 Constellation Green Energy, LLC (“Constellation”) and its parent corporation Constellation Energy Group, Inc., (“Constellation Energy”) regarding the almost certain killing, injury and other forms of “take” of endangered Indiana bats in violation of the ESA. These unlawful “takes” are likely to occur as a result of defendants’ intrusive installation and long term operation of an industrial wind power facility known as the Constellation wind project (“the project”) located on the ridgeline of Backbone Mountain in Garrett County, Maryland (“the project site”).

2. By proceeding with the 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 about June 23, 2010.

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 the project is located in Garrett County, Maryland, proper divisional assignment is the Greenbelt (Southern) Division.

PARTIES

8. Plaintiff Save Western Maryland (“SWM”) is a grassroots community organization headquartered in Oakland, Maryland. Since March of 2010 the organization has been actively involved in educational and advocacy issues related to the preservation of Western Maryland’s rural and ecological heritage.

9. 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 SWM 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 SWM injury by depriving them of their ability to obtain and disseminate information regarding defendants’ likely impacts to endangered Indiana bats.

10. Additionally, SWM brings this action on behalf of their members and supporters who are directly injured by the defendants’ likely “takes” of Indiana bats. One or more SWM members frequently 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.

11. Plaintiff Maryland Conservation Council (“MCC”) promotes the protection of Maryland’s vast natural assets by bringing together like-minded organizations throughout the state. By coordinating effective citizen action and advocating constant monitoring at the state and local levels, MCC is a strong voice in support of environmental protection. Defendants’ taking of Indiana bats without permission from the Service pursuant to the process created by section 10 of the ESA violates MCC 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 MCC injury by depriving them of their ability to obtain and disseminate information regarding defendants’ likely impacts to endangered Indiana bats.

12. Plaintiff Ajax Eastman, a resident of Baltimore, Maryland, is a Vice President of the MCC. Eastman has been an Intervenor in the project since its inception. She has a lifelong dedication to preservation of the environment and derives educational, scientific, ecological, spiritual, aesthetic and recreational enjoyment from the Indiana bat and the region inhabited by this species and as such will be harmed by defendants’ direct or indirect “takes” by the defendants.

13. Plaintiff D. Daniel Boone, a resident of Bowie, Maryland, is the former endangered species coordinator of Maryland Department of Natural Resources (DNR)

and previously served as conservation chair for the Maryland Chapter of the Sierra Club. Boone is a wildlife biologist, lifetime conservationist, and visitor to Backbone Mountain. He is an expert on wind energy development's impacts on bats (and other wildlife). Boone derives educational, scientific, ecological, spiritual, aesthetic and recreational enjoyment from the Indiana bat and the region inhabited by this species and as such will be harmed by direct or indirect "takes" by the defendants. He derives educational, scientific, ecological, spiritual, aesthetic and recreational enjoyment from the Indiana bat and the region inhabited by this species and as such will be harmed by defendants' direct or indirect "takes" by the defendants. Boone has been an Intervenor in the project since its inception.

14. Defendant Constellation is a limited liability company organized under the laws of Maryland and it maintains a principal place of business in Baltimore, Maryland. Constellation acquired development and ownership rights (from Clipper Windpower, Inc. ("Clipper") and Criterion Power Partners, LLC ("Criterion")) in the project as of March 9, 2007. It is responsible for the unlawful acts described in this Complaint.

15. Defendant Constellation Energy is a corporation organized under the laws of Delaware and it maintains a principal place of business in Baltimore, Maryland. Constellation Energy wholly owns defendant Constellation as a subsidiary and it is responsible for the unlawful acts described in this Complaint.

STATUTORY AND REGULATORY FRAMEWORK

16. 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).

17. 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).

18. 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).

19. 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.

20. 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.

21. Section 10 of the ESA provides a limited exception to the otherwise strict prohibition against the “taking” of any 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, not the purpose of, carrying out an otherwise lawful activity.” 16 U.S.C. § 1539(a)(1)(B).

22. 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

24. The Indiana bat (*Myotis sodalis*) is one of the most endangered land mammals in the world. In the 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 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.

25. 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.

26. 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 the conversion of forested land, tree harvesting, and the removal of dead trees, because wooded areas are essential for foraging, roosting and breeding.

27. 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 passage through low-pressure zones created by movement of huge wind turbine blades in which the lungs of bats hemorrhage and lead to almost instant death.

B. The Constellation Wind Project

28. Criterion received a Certificate of Public Convenience and Necessity (CPCN) from the Maryland Public Service Commission (PSC) on March 26, 2003 which incorporated a number of conditions, including post-construction monitoring for bats. The CPCN expired before construction began and subsequently, the Maryland legislature enacted a statute, Md. PUC Code Ann. § 7-207, which created an exemption from the CPCN review process for land-based, electric generating facilities that would operate at a peak generating capacity of 70 megawatts. Criterion was given approval by the PSC under the newly-created law for construction and operation of 28 wind turbines, each 415 feet tall, along eight forested miles of Backbone Mountain. The project has required intrusive deforestation and earth moving to install transmission lines, roads, substations, pads, and staging areas. In fact, on information and belief defendants have completed construction and begun testing plant operation – 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.

29. Defendants have not disclosed the lifespan of this wind project but, on information and belief, the project will operate for no less than 20 years, which is the length of the power purchase agreement with Old Dominion Electric Cooperative, Inc, and will likely continue to operate after that agreement expires.

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

30. Indiana bats are known to inhabit numerous hibernacula within fifty miles of the project site, including a robust population in John Friend Cave near Sang Run in Garrett County approximately 12.9 miles from the project site. During the autumn

swarming period, Indiana bats often travel as far as 20 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 Constellation project site. In fact, the trees that, on information and belief, have already been cleared are likely to have been ideal trees for Indiana bat roosting and maternity colonies.

31. 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 28 industrial wind turbines is likely to result in deaths and injuries from turbine-bat collision. Each death or injury amounts to a “take” under the ESA. 16 U.S.C. §§ 1538(a), 1532(19).

32. Additionally, the low-pressure zones created by Constellation’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 amounts to a “take” under the ESA. 16 U.S.C. §§ 1538(a), 1532(19).

33. The Constellation 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.

34. The Constellation 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. section 17.3. Adverse modification and degradation of the Indiana bat's habitat are inevitable results of Constellation's installation of turbines, their removal of 47 acres of forest and construction of permanent forest clearings, access roads and corridors for transmission lines. Substantial habitat degradation of this kind will likely result in serious cumulative impacts such as 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 clearing 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 Constellation'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.

35. Because of the “takes” discussed above that have likely already occurred and will continue to occur during the lifespan of the Constellation project, Constellation’s only lawful option for complying with the ESA is to obtain an ITP pursuant to 16 U.S.C. § 1539(a)(1)(B), which would allow Constellation to incidentally take Indiana bats with proper mitigation measures in place. By moving forward without such a permit, Constellation is in violation of the ESA.

36. The U.S. Fish and Wildlife Service – the expert agency with regard to endangered species – has stated that “[the Constellation project] is within the summer habitat range of the federally endangered Indiana bat ... The Indiana bat could be impacted by construction activity that involves removing roost trees and maternity habitat.” Letter from FWS Field Supervisor Leopoldo Miranda Castro in response to attorney Thomas E. Holmberg, Baker Botts LLP, October 24, 2008.

37. Service correspondence pertaining to an adjacent wind facility likewise reveals a record of FWS recognition of threats to endangered bats. On September 17, 2003, Mary J. Ratnaswamy, Ph.D., then the Program Supervisor, Threatened and Endangered Species of the FWS Chesapeake Bay Field Office, in a letter of reply to the Synergics Energy Services, LLC consultant, Paul Kerlinger, regarding the threat posed to the Indiana bat by the Synergics project, only 6 miles to the south of the Constellation project:

A federally listed species that may occur within the proposed project area is the endangered Indiana bat. ... To determine the significance of the potential effects we recommend that two years of pre-construction monitoring of bats be conducted at this location using radar, acoustical studies, and other appropriate sampling techniques.

38. Constellation 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.

Constellation conducted acoustical surveys during construction and indeed detected the presence of Indiana bat calls resulting in a temporary halt to construction.

PLAINTIFFS' CLAIM FOR RELIEF
Violations of the Endangered Species Act

39. As alleged above, defendants' construction and operation of an industrial wind facility on their siting location will almost certainly 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.

40. 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.

Respectfully submitted,

/s/ Martin I. Moylan

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