



2011

Bats and Breezes Take on Federal Policy: The Windy Effects of Animal Welfare Institute v. Beech Ridge Energy LLC

Kirsten S. Balzer

Follow this and additional works at: <https://digitalcommons.law.villanova.edu/elj>



Part of the [Environmental Law Commons](#)

Recommended Citation

Kirsten S. Balzer, *Bats and Breezes Take on Federal Policy: The Windy Effects of Animal Welfare Institute v. Beech Ridge Energy LLC*, 22 Vill. Envtl. L.J. 225 (2011).

Available at: <https://digitalcommons.law.villanova.edu/elj/vol22/iss2/3>

This Casenote is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Environmental Law Journal by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.

2011]

BATS AND BREEZES TAKE ON FEDERAL POLICY:
THE WINDY EFFECTS OF ANIMAL WELFARE
INSTITUTE V. BEECH RIDGE ENERGY LLC

I. INTRODUCTION

“Nothing is more priceless and more worthy of preservation than the rich array of animal life with which our country has been blessed.”¹

On December 28, 1973, President Richard Nixon spoke these words while signing the Endangered Species Act of 1973 (ESA).² President Nixon expressed the importance of granting the federal government authority to protect plants and animals from threats of harm and extinction.³ The preservation and conservation of threatened species endures as a prominent federal policy today.⁴ President Barack Obama recently reiterated the continued importance of protecting threatened and endangered species, as well as the value of interagency cooperation regarding all actions potentially affecting such species.⁵

The ESA is the primary legislative tool with which Congress addresses the increasing threats to various fish, wildlife, and plant species.⁶ While endangered and threatened species protection

1. President Richard Nixon, *Statement on Signing the Endangered Species Act of 1973*, THE AMERICAN PRESIDENCY PROJECT (Dec. 28, 1973), <http://www.presidency.ucsb.edu/ws/index.php?pid=4090> (transcribing President Nixon’s statement when signing Endangered Species Act of 1973).

2. *Id.* (describing circumstances of President Nixon’s statement when signing Endangered Species Act of 1973); Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (2006).

3. *See* Nixon, *supra* note 1 (stating, “this legislation provides the Federal Government with needed authority to protect an irreplaceable part of our national heritage-threatened wildlife.”).

4. *See* Memorandum on the Endangered Species Act, 74 Fed. Reg. 9753 (Mar. 3, 2009) (evidencing ESA’s continued importance). President Barack Obama described the ESA as “one of the Nation’s profound commitments” and reiterated the importance of “interagency consultation to ensure the application of scientific and technical expertise to decisions that may affect threatened or endangered species.” *Id.*

5. *See generally id.* (stressing importance of ESA and interagency cooperation when agency’s action might affect protected species).

6. *See* Endangered Species Act § 1531(b) (explaining purpose of ESA). According to its drafters, the ESA was intended “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties.” *Id.*

remains a prominent federal policy, it is often overshadowed by issues more visible to the general public, such as the effects of climate change and ever-increasing energy demands.⁷ As heat waves plague the country, increasingly intense hurricanes pound the shorelines, and rising sea levels threaten coastal towns, the nation takes greater notice of climate change.⁸ Americans also increasingly feel the repercussions of increased energy demands on oil prices, escalating electricity bills, and growing agricultural production costs.⁹

Federal policies addressing climate change target the nation's growing energy demands.¹⁰ A direct relationship exists between certain human activities and greenhouse gas emissions, the underlying cause of climate change.¹¹ Therefore, government regulation of climate change focuses on measuring, reducing, and monitoring greenhouse gas emissions from various human activities.¹² Presi-

7. Compare Memorandum on the Endangered Species Act, 74 Fed. Reg. at 9753 (evidencing current importance of ESA), with *Reliable, Affordable, and Environmentally Sound Energy for America's Future*, NAT'L ENERGY POLICY DEV. GROUP, 2.1-2.12 (May 2001), http://www.netl.doe.gov/publications/press/2001/nep/national_energy_policy.pdf [hereinafter *Reliable, Affordable, and Environmentally Sound Energy*] (explaining visibility of energy crisis to general public), and *Climate Change Indicators in the United States*, EPA, 4-7 (Apr. 2010), http://www.epa.gov/climatechange/indicators/pdfs/ClimateIndicators_full.pdf [hereinafter *Climate Change Indicators*] (summarizing climate change indicators).

8. See generally *Climate Change Indicators*, *supra* note 7, at 4-7 (providing cogent analysis of significant indicators of climate change in United States).

9. See generally *Reliable, Affordable, and Environmentally Sound Energy*, *supra* note 7, at 2.1-2.12 (explaining various forms in which energy crisis is visible to general public).

10. See generally *U.S. Domestic Response to Climate Change: Key Elements of a Prospective Program*, PEW CENTER ON CLIMATE CHANGE, http://www.pewclimate.org/docUploads/policy_inbrief_1.pdf (last visited Mar. 1, 2011) (describing United States' focus on reducing greenhouse gas emissions in response to climate change). In order to reduce climate change, greenhouse gas emissions must be restricted. *Id.* Methods of reducing greenhouse gas emissions include increasing energy efficiency and developing renewable energy sources such as biofuels, wind, hydrogen, and solar technologies. *Id.* at 4.

11. See generally *Climate Change Indicators*, *supra* note 7, at 9-18 (exploring relationship between human activities and greenhouse gas emissions). Greenhouse gases are found in the atmosphere, with some naturally formed and others the result of human activities. *Id.* Once emitted into the atmosphere, greenhouse gases can potentially alter the Earth's climate when unbalanced. *Id.* at 18. Human activities contributing to the influx of greenhouse gases in the atmosphere include burning fossil fuels (oil, natural gas, and coal), solid waste, trees, and wood products; the production and transport of coal, natural gas, and oil; and industrial activities. *Id.* at 9. Thus, in order to reduce the effects of climate change, regulation of greenhouse gas emissions is imperative. *Id.*

12. See *Climate Change Science Facts*, EPA, 1-2 (Apr. 2010), http://www.epa.gov/climatechange/downloads/Climate_Change_Science_Facts.pdf (describing causes of climate change); see also *Climate Change Indicators*, *supra* note 7, at 9 (exploring historical U.S. greenhouse gas emission rates); see also *Energy & Environment*, THE

dent Obama recently signed an Executive Order setting measurable greenhouse gas reduction targets for federal agencies, exemplifying the federal government's dedication to addressing these important issues.¹³ The Order instituted these reduction targets in an effort to reduce greenhouse gas pollution and build a "clean energy" economy.¹⁴

The federal government has devoted tremendous efforts to develop clean, renewable energy sources as a means to reduce greenhouse gas emissions and facilitate the nation's ability to meet its increasing energy demands.¹⁵ The government's efforts simultaneously reduce the deleterious effects of greenhouse gas emissions on climate change.¹⁶ Clean energy sources, such as wind, solar, and biofuels, benefit the environment and society due to their low emissions and ability to produce energy at a substantially lower cost than fossil fuels.¹⁷ Wind energy, one of the most widely available and economically competitive renewable energy sources, has notably experienced a surge in implementation over the past few years.¹⁸

WHITE HOUSE, <http://www.whitehouse.gov/issues/energy-and-environment> (last visited Mar. 1, 2011) [hereinafter *Energy & Environment*] (enumerating regulatory actions taken to reduce greenhouse emissions).

13. Exec. Order No. 13,514, 74 Fed. Reg. 52,117 (Oct. 5, 2009) (pledging to reduce greenhouse gas emissions).

14. *See id.* (explaining that the federal government must lead by example "[i]n order to create a clean energy economy that will increase our Nation's prosperity, promote energy security, protect the interests of taxpayers, and safeguard the health of our environment").

15. *Cf.* Gautam Naik, *Energy Push Spurs Shift in U.S. Science*, WALL ST. J., Nov. 25, 2009, <http://online.wsj.com/article/SB125910876247663245.html#articleTabs%3Darticle> (describing use of 18% increase in federal funding in fiscal year 2009 to develop new electricity sources, build more efficient cars, and address climate change); *see generally* Tina R. Goel, Note, *Finding the Balance: Harmonizing Renewable Energy with Wildlife Conservation*, 10 SUSTAINABLE DEV. L. & POL'Y 42, 42 (2010) (discussing current importance of renewable energy sources).

16. *See Energy & Environment*, *supra* note 12 (explaining how renewable energy use enables United States to control dependence on foreign oil and reduce greenhouse gas pollution contributing to climate change).

17. *See generally Renewable Energy 2000: Issues and Trends*, ENERGY INFO. ADMIN., OFFICE OF COAL, NUCLEAR, ELECTRIC & ALTERNATIVE FUELS, U.S. DEP'T OF ENERGY, 73 (Feb. 2001), <http://tonto.eia.doe.gov/ftproot/renewables/06282000.pdf> (explaining basis for increased interest in wind energy).

18. *Id.* at 89 (discussing changing use of wind power); *see also Building a New Energy Future with Wind Power*, U.S. DEP'T OF ENERGY, 1 (May 2010), http://www1.eere.energy.gov/windandhydro/pdfs/eere_wind_water.pdf (describing recent trends in wind power). In 2009, wind power represented 40% of all new U.S. electric generation capacity. *Id.* The Department of Energy forecasts, however, that wind energy will produce 20% of all U.S. electricity by 2030. *See generally 20% Wind Energy by 2030: Increasing Wind Energy's Contribution to U.S. Electricity Supply*, U.S. DEP'T. OF ENERGY (July 2008), <http://www1.eere.energy.gov/windandhydro/pdfs/41869.pdf> (offering forecast of wind energy production by 2030).

While reducing greenhouse gas emissions requires research and development of alternative energy sources, officials must administer these efforts in accord with existing federal policies, including the ESA.¹⁹ Media outlets and environmentalists often scrutinize wind energy projects for their possible ill effects on animals and habitats.²⁰ Transportation of equipment, clearing of project sites, and operation of wind turbines all have the potential to injure protected animals and surrounding habitats.²¹ Nonetheless, the protection of threatened and endangered species and their habitats will not hinder wind energy's development as an alternative energy source, so long as these two federal objectives operate in concert.²²

The U.S. District Court for the District of Maryland recently reiterated that federal policies in this arena must operate in unison.²³ In *Animal Welfare Institute v. Beech Ridge Energy LLC (Beech Ridge Energy)*,²⁴ the district court concluded that the Beech Ridge Project, a wind energy project, was reasonably certain to "take" Indiana bats in violation of the ESA's take prohibition.²⁵ The court addressed two crucial issues of first impression for the Fourth Circuit.²⁶ First, the court determined whether the ESA's citizen suit provision permitted an individual to institute a lawsuit based entirely on a future ESA violation.²⁷ Second, the court addressed a challenger's burden of proof to establish a "taking" of a protected species under section 9 of the ESA.²⁸ Regarding the second issue, the court speculated that the requisite degree of certainty was merely an issue of "academic interest"; however, the issue is profoundly vital to the proper adjudication of take violations.²⁹ Both

19. See generally Goel, *supra* note 15, at 42 (discussing importance of renewable energy production compliance with federal environmental laws).

20. See *id.* (explaining criticisms of wind energy developments).

21. See *id.* (detailing concerns resulting from development of wind energy despite fewer adverse environmental effects than fossil fuels).

22. See Amy J. Wildermuth, *Is Environmental Law a Barrier to Emerging Alternative Energy Sources?*, 46 IDAHO L. REV. 509, 534-35 (2010) (describing ability of renewable energy sources to work in conjunction with existing federal policies).

23. *Animal Welfare Inst. v. Beech Ridge Energy LLC*, 675 F. Supp. 2d 540, 583 (D. Md. 2009) (explaining wind energy facilities must "be good neighbors").

24. 675 F. Supp. 2d 540 (D. Md. 2009).

25. See *id.* at 579-80 (stating holding of case).

26. See *id.* at 560-64 (explaining issues of first impression for Fourth Circuit).

27. See *id.* at 561 (identifying justiciability of wholly future ESA violation as issue of first impression for Fourth Circuit).

28. *Id.* at 561-64 (identifying requisite degree of certainty under ESA as issue of first impression for Fourth Circuit).

29. See *Beech Ridge Energy*, 675 F. Supp. 2d at 564 n.31 (admitting that "[u]ltimately, the question of the applicable degree of certainty may be only of

issues are imperative to a court's ability to comprehensively apply the ESA's take provision to existing and future wind energy facilities located in close proximity to endangered species' habitats.³⁰

This Note examines the district court's rationale in *Beech Ridge Energy*, the impact of the holding on the currently inconsistent judicial interpretations of the ESA, as well as the subsequent impact of the case on future clean energy efforts.³¹ Part II provides a detailed summary of the facts of *Beech Ridge Energy*.³² Part III then analyzes the relevant ESA text in conjunction with prior court decisions interpreting this language.³³ Next, Part IV examines the rationale employed by the District Court for the District of Maryland to reach its holding.³⁴ Thereafter, Part V evaluates the court's rationale in light of the specific applicable statutory provisions and prior court decisions.³⁵ Finally, Part VI considers the impact, both favorable and unfavorable, of *Beech Ridge Energy* on future interpretations of the ESA and clean, renewable energy initiatives.³⁶

II. FACTS

In *Beech Ridge Energy*, the District Court for the District of Maryland determined whether the plaintiffs sufficiently demonstrated that the construction and operation of a wind energy project by the defendants would take Indiana bats in violation of the ESA.³⁷ Indi-

academic interest"); but see Paul Boudreaux, Comment, *Understanding 'Take' in the Endangered Species Act*, 34 ARIZ. ST. L.J. 733, 739 (2002) (detailing various standards of proof applied by courts and importance of these standards).

30. For a discussion of the impact of various standards of proof, see *infra* notes 231-41 and accompanying text.

31. For a narrative analysis of *Animal Welfare Inst. v. Beech Ridge Energy LLC*, see *infra* notes 128-65 and accompanying text. For a critical analysis of the holding in this case, see *infra* notes 166-210 and accompanying text.

32. For a discussion of the relevant facts of *Beech Ridge Energy*, see *infra* notes 37-67 and accompanying text.

33. For a discussion of background material pertaining to the Endangered Species Act and relevant court decisions, see *infra* notes 68-127 and accompanying text.

34. For a narrative analysis of the court's opinion in *Beech Ridge Energy*, see *infra* notes 128-65 and accompanying text.

35. For a critical analysis of the district court's holding in *Beech Ridge Energy*, see *infra* notes 166-210 and accompanying text.

36. For a discussion of the impact of the district court's holding, see *infra* notes 211-49 and accompanying text.

37. *Animal Welfare Inst. v. Beech Ridge Energy LLC*, 675 F. Supp. 2d 540, 564 (D. Md. 2009) (describing issues involved). As plaintiffs, Animal Welfare Institute consisted of two non-profit organizations and an individual. *Id.* at 542. As defendants, Beech Ridge Energy consisted of Invenergy Wind LLC, the fifth largest wind developer in the United States, and its wholly owned subsidiary, Beech Ridge Energy. *Id.* at 548.

ana bats were first listed as an endangered species in 1967,³⁸ when the estimated Indiana bat population was twice as large as it is today.³⁹ These small, social bats are most commonly found throughout the Midwest region of the United States, as well as along the Appalachian Mountains, where they roost during the summer months in maternity colonies and migrate to caves or abandoned mines during the winter months to hibernate.⁴⁰

In 2005, Beech Ridge Energy sought to construct and operate the Beech Ridge Project in Greenbrier County, West Virginia.⁴¹ The Beech Ridge Project is a wind farm facility consisting of 122 wind turbines along twenty-three miles of the Appalachian Mountain ridgeline.⁴² The Animal Welfare Institute initiated the foregoing litigation in 2009 based on an allegation that the construction and operation of the Beech Ridge Project would violate the ESA by taking Indiana bats.⁴³ Thus, the Animal Welfare Institute sought declaratory and injunctive relief to enjoin the construction and operation of the Beech Ridge Project.⁴⁴ As the challenger, the Animal Welfare Institute bore the burden of proving that the Beech Ridge Project happened to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such

38. Notice of Public Hearing Regarding Wilderness Study, 32 Fed. Reg. 4001-01 (Mar. 11, 1967) (listing Indiana bat as endangered species).

39. See Andy King, *2009 Rangewide Population Estimate for the Indiana Bat (Myotis sodalis) by USFWS Region*, FWS, 1 (Apr. 23, 2010), <http://www.fws.gov/midwest/endangered/mammals/inba/pdf/2009inbaRangewidePopApril2010.pdf> (estimating 2009 Indiana bat population at 387,835); see also *Indiana Bat (Myotis sodalis)*, FWS, <http://www.fws.gov/midwest/Endangered/mammals/inba/index.html> (last visited Mar. 2, 2011) (explaining that current population of Indiana bats is less than half as many as when initially listed as endangered).

40. *Indiana Bat (Myotis sodalis)*, FWS, <http://www.fws.gov/midwest/Endangered/mammals/inba/index.html> (last visited Mar. 2, 2011) (explaining behavioral patterns of Indiana bats); see also *Myotis sodalis: Distribution*, NATURESERVE EXPLORER, <http://www.natureserve.org/explorer/servlet/NatureServe?searchName=Myotis+sodalis> (last visited Mar. 2, 2011) (depicting geographical distribution of Indiana bats).

41. See generally *Beech Ridge Energy*, 675 F. Supp. 2d at 548 (describing location of Beech Ridge Energy).

42. See generally *id.* (explaining details of Beech Ridge Project). Beech Ridge Energy planned to construct the Beech Ridge Project in two phases: the first phase consisted of sixty-seven turbines and the second phase consisted of fifty-five turbines. *Id.* The entire project was estimated to cost over \$300 million and was designed to produce electricity equivalent to the amount that 50,000 West Virginia households consume in a typical year. *Id.* at 548-49.

43. See *id.* at 542 (describing Animal Welfare Institute’s lawsuit against Beech Ridge Energy).

44. See *id.* (identifying relief sought).

conduct.”⁴⁵ The court, therefore, focused on two primary issues in *Beech Ridge Energy*: first, the presence of Indiana bats at the Beech Ridge Project site; and, second, whether the Beech Ridge Project was reasonably certain to take Indiana bats in violation of section 9 of the ESA.⁴⁶

Beech Ridge Energy hired an environmental consultant, BHE Environmental (BHE), in 2005 to establish the viability of the Beech Ridge Project’s physical location.⁴⁷ BHE was thereafter responsible for consulting with the appropriate regulatory agencies to ensure the project complied with all applicable regulations.⁴⁸ BHE consulted the U.S. Fish and Wildlife Service (FWS) office in West Virginia regarding Beech Ridge Energy’s intent to utilize a mist-net survey to ascertain the presence of protected species, specifically the Indiana bat, at the desired site.⁴⁹ The FWS recognized the proposed survey as “a reasonable level of effort,” but warned BHE that the proposed survey would only determine the presence of bats in the summer months.⁵⁰

BHE conducted a mist-net survey over a four-day period in July 2005, and captured a number of bats—none of which were Indiana bats.⁵¹ Based on the mist-net survey results and various post-construction mortality surveys, BHE drafted a Chiropteran Risk Assessment indicating Indiana bats might be present at the Beech Ridge Project site, and estimating the wind energy facility would cause 6,746 annual bat deaths.⁵² In response, both the FWS and the West

45. Endangered Species Act of 1973, 16 U.S.C. § 1538(a)(1)(B) (2006) (prohibiting taking protected species); Endangered Species Act § 1532(19) (defining take).

46. *Beech Ridge Energy*, 675 F. Supp. 2d at 564 (indicating case’s central issues).

47. *See id.* at 549 (describing role of BHE). Beech Ridge Energy hired BHE in order to assess the potential risks the Beech Ridge Project might pose to bats. *Id.* BHE project manager, Russ Rommé, acted as the primary consultant between the FWS and Beech Ridge Energy. *Id.*

48. *Id.* (describing BHE’s responsibilities).

49. *Id.* (discussing dialogue between BHE and FWS). Mist-net surveys use a tightly woven net hoisted near likely bat habitats to capture, identify, and release bats that become entangled in the net. *Id.* at 549 n.9.

50. *Id.* (discussing FWS’s response to proposed mist-net survey).

51. *Beech Ridge Energy*, 675 F. Supp. 2d at 549-50 (describing first mist-net survey). The July mist-net survey was conducted “during full moon or near full moon conditions” and evaluated fifteen potential turbine locations. *Id.* The survey captured seventy-eight bats, none of which were Indiana bats, but several bats escaped from the mist net prior to identification. *Id.* at 550. The bats captured and identified included post-lactating females and juveniles of the same species as Indiana bats. *Id.*

52. *Id.* at 550 (explaining BHE’s conclusions in Chiropteran Risk Assessment). BHE submitted its conclusions regarding the risks posed to bats in a draft Chiropteran Risk Assessment to the FWS and the West Virginia Department of

Virginia Department of Natural Resources warned BHE and Beech Ridge Energy of their conclusions' limited nature and, thus, urged that further surveys were necessary.⁵³

The FWS sent the first of three formal letters to the BHE project manager in March 2006, reiterating its concerns about the limited scope of the mist-net survey, the presence of Indiana bats, and the potential harm the Beech Ridge Project might inflict upon the Indiana bat population.⁵⁴ Consequently, in June 2006, BHE conducted a second mist-net survey but again captured no Indiana bats.⁵⁵ BHE submitted a final Chiropteran Risk Assessment prior to the completion of the second mist-net survey, concluding that, due to the improbable presence of Indiana bats at the Beech Ridge Project site, the wind energy facility posed a low risk of harm to Indiana bats.⁵⁶ The FWS sent a second formal letter to the BHE project manager in response, which expressed its continued concerns and again recommended further, more prolonged studies.⁵⁷

On August 28, 2006, the West Virginia Public Service Commission concluded that the evidence corroborated the absence of Indiana bats near the proposed wind energy facility and, thus, reluctantly issued the necessary certification for the construction and operation of the Beech Ridge Project.⁵⁸ The FWS sent its final

Natural Resources. *Id.* BHE based its conclusions on the mist-net survey results and post-construction mortality studies that were conducted at another West Virginia wind energy facility. *Id.* at 547, 550. BHE recognized the possibility that Indiana bats were present at the Beech Ridge Project site and the related possibility of injury from the turbines. *Id.* at 550.

53. *See id.* at 550-51 (detailing conference call between BHE, Beech Ridge Energy, FWS, and West Virginia Department of Natural Resources). The regulatory agencies believed the mist-net surveys were adequate for the summer months and thus determined that clearing land for the turbines would not affect Indiana bat maternity colonies. *Id.* at 551. The agencies remained concerned, however, regarding the impact of the project on migrating and swarming Indiana bats. *Id.* BHE further conducted surveys of caves within the Beech Ridge Project site in March 2006, but found no Indiana Bats. *Id.*

54. *Id.* at 551 (describing first formal FWS letter sent to BHE). FWS recommended further surveys prior to construction of the Beech Ridge Project, multi-year studies, and use of various technologies. *Id.*

55. *Id.* at 552-53 (describing second mist-net survey). The second mist-net survey did not heed any FWS recommendations regarding surveying during the fall months. *Id.*

56. *Beech Ridge Energy*, 675 F. Supp. 2d at 553 (describing final Chiropteran Risk Assessment). The final Chiropteran Risk Assessment assumed no Indiana bats would be identified in the second mist-net survey. *Id.*

57. *See id.* at 554 (detailing second formal FWS letter to BHE).

58. *See id.* (describing conclusions of West Virginia Public Service Commission). The West Virginia Public Service Commission issued the certification based on the initial mist-net survey capturing no Indiana bats, testimony of a Beech Ridge Energy witness regarding Indiana bat behavior, and the lack of historic hi-

formal letter to the BHE project manager on July 31, 2007, emphasizing its continued concerns regarding the Beech Ridge Project's potential adverse impact on Indiana bats and the insufficiency of BHE's analysis and data.⁵⁹ Additionally, the FWS noted the availability of the incidental take permit (ITP), which would authorize the Beech Ridge Project's taking of a protected species if it were "incidental to, and not the purpose of, the carrying out of an otherwise lawful activity."⁶⁰ After a four-year endeavor to construct and operate a wind energy facility in Greenbrier County, West Virginia, Beech Ridge Energy obtained final authorization to construct the Beech Ridge Project on February 13, 2009, and commenced construction of the wind turbine project without an ITP.⁶¹

The Animal Welfare Institute sought to halt the construction and operation of the Beech Ridge Project by seeking an injunction based on an allegation that the project would violate the ESA's take provision.⁶² The District Court for the District of Maryland initially focused on the justiciability of the claim, which was based entirely on a future ESA violation, and the burden of proof required to demonstrate a taking.⁶³ The court then determined whether the Beech Ridge Project violated ESA section 9.⁶⁴ The court held that the ESA did in fact protect endangered species from wholly future violations; therefore, Beech Ridge Energy could be in violation of the take provision without a showing of a past or current viola-

bernacula near the wind turbines. *Id.* The certification contained numerous preconstruction and post-construction conditions, but permitted Beech Ridge Energy to construct 124 wind turbines. *Id.* at 554-55. The West Virginia Public Service Commission declined to reconsider the issuance of the certificate, which the plaintiff challenged up to the West Virginia Supreme Court of Appeals. *Id.* The court affirmed the issuance of the certificate. *Id.* at 556.

59. *See id.* at 556 (describing final formal FWS letter). The FWS confirmed its prior concerns that "one summer season of mist-netting surveys is likely insufficient to determine species presence." *Id.*

60. *Id.* at 554 (describing availability of ITP); *see also* Endangered Species Act of 1973, 16 U.S.C. § 1539(1)(B) (2006) (providing ITP provision). At the time of trial, Beech Ridge Energy had not applied for an incidental take permit. *Beech Ridge Energy*, 675 F. Supp. 2d at 557 (describing lack of ITP application).

61. *See Beech Ridge Energy*, 675 F. Supp. 2d at 557 (describing status of Beech Ridge Project at time of trial). The West Virginia Public Service Commission enabled Beech Ridge Energy to commence construction after determining it had satisfied all conditions. *Id.* By the start of trial, Beech Ridge Energy had already begun the construction of sixty-seven turbines as part of the first phase of Beech Ridge Project. *Id.*

62. *See id.* at 542 (describing basis of lawsuit).

63. *See id.* at 560-64 (explaining court's rationale). For a further discussion of the district court's analysis, *see infra* notes 128-65.

64. *See Beech Ridge Energy*, 675 F. Supp. 2d at 576-80 (determining whether Beech Ridge Energy violated ESA section 9). For a further discussion of the likelihood that the Beech Ridge Project would take Indiana bats, *see infra* notes 162-65.

tion.⁶⁵ The court also held that a plaintiff must demonstrate a violation of the take provision by a preponderance of the evidence, meaning the activity in question must be reasonably certain to imminently take a protected species.⁶⁶ The Animal Welfare Institute successfully met its burden, and the court accordingly issued an injunction against Beech Ridge Energy.⁶⁷

III. BACKGROUND

A. The Cornerstone of Federal Regulation to Protect Endangered and Threatened Species - The Endangered Species Act of 1973

The ESA, heralded as “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation,” provides the vital framework that protects threatened and endangered species, as well as their habitats, from injurious human conduct.⁶⁸ The ESA recognizes the “aesthetic, ecological, educational, historical, recreational and scientific value” of threatened species to the United States and purports to conserve endangered and threatened species for future generations.⁶⁹ Species are listed as endangered or threatened under the ESA based on the level of threat the species faces, and they subsequently receive protection from prohibited human conduct.⁷⁰ Government agencies must consult with the FWS and the U.S. National Oceanic and Atmos-

65. See *Beech Ridge Energy*, 675 F. Supp. 2d at 560-61 (describing holding on wholly future ESA violation issue). For a further discussion of the justiciability of wholly future take claim, see *infra* notes 135-47.

66. See *Beech Ridge Energy*, 675 F. Supp. 2d at 561-64 (describing holding on requisite degree of certainty issue). For a further discussion of the district court's determination that reasonable certainty of imminent harm is sufficient, see *infra* notes 148-61.

67. See *Beech Ridge Energy*, 675 F. Supp. 2d at 564, 580 (holding injunction appropriate to enjoin all operations of wind turbines at Beech Ridge Project).

68. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978) (describing significance of ESA); see also Sabrina C. C. Fedel, *A Cause of Action for “Taking” of Wildlife Under the Endangered Species Act of 1973 (ESA)*, 13 CAUSES OF ACTION 2D 273, § 2 (2010) (providing general overview of ESA).

69. Endangered Species Act of 1973, 16 U.S.C. § 1531 (2006) (explaining findings, purpose, and policy supporting ESA's promulgation).

70. *Id.* § 1533 (describing governmental process of listing species as endangered or threatened to ensure protection); see also *Listing a Species as Threatened or Endangered*, FWS, 1-2 (July 2009), <http://www.fws.gov/endangered/esa-library/pdf/listing.pdf> (describing prerequisites and process for listing species as threatened or endangered). Endangered species are defined as “any species which is in danger of extinction through all or a significant portion of its range.” Endangered Species Act § 1532(6). Threatened species, meanwhile, are defined as “any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” *Id.* § 1532(20).

pheric Administration (NOAA) Fisheries Service to ensure that any activities they authorize, fund, or carry out are not likely to harm any protected species or damage their habitats.⁷¹ While the FWS and NOAA are primarily responsible for ESA enforcement, the ESA citizen suit provision also grants enforcement authority to individuals via private rights of action.⁷²

B. Citizens Empowered to Defend and Safeguard Protected Species

The Clean Air Act of 1970 contained the first citizen suit provision in any environmental statute, which became the exemplary citizen suit provision for subsequent environmental regulations, including the Clean Water Act (CWA) and the ESA.⁷³ Environmental citizen suit provisions empower citizens to commence an action in order to remedy a violation of the underlying regulation.⁷⁴ These provisions encourage enforcement of environmental regulations and can potentially compel statutorily-mandated agency action.⁷⁵ The Supreme Court scrutinized the CWA's citizen suit provision in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc. (Gwaltney)*⁷⁶ and held the provision did not confer jurisdiction

71. See generally *Summary of the Endangered Species Act*, EPA, <http://www.epa.gov/lawsregs/laws/esa.html> (last visited Mar. 3, 2011) (describing ESA basics); see also *Listing and Critical Habitat: Overview*, FWS, <http://www.fws.gov/endangered/what-we-do/listing-overview.html> (last visited Mar. 3, 2011) (explaining process of including species on List of Endangered and Threatened Species).

72. See Endangered Species Act § 1540(g) (stating ESA citizen suit provision).

73. See generally Charles N. Nauen, *Citizen Environmental Lawsuits After Gwaltney: The Thrill of Victory or the Agony of Defeat?*, 15 WM. MITCHELL L. REV. 327, 327-38 (1989) (detailing origin of citizen suit provisions). The citizen suit provision within the Clean Air Act (CAA) provides that "any person may commence a civil action on his own behalf . . . against any person . . . who is alleged to have violated . . . or to be in violation [of this Act]." Clean Air Act (CAA), 42 U.S.C. § 7604(a) (2006) (providing cause of action to individuals). The Clean Water Act (CWA) similarly provides that "any citizen may commence a civil action on his own behalf against any person . . . who is alleged to be in violation of [this Act]." Clean Water Act, 33 U.S.C. § 1365(a) (2006) (offering citizen suit provision). Likewise, the Endangered Species Act provides that "any person may commence a civil suit on his own behalf to enjoin any person . . . who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof." Endangered Species Act § 1540(g) (laying out citizen suit provision).

74. See Nauen, *supra* note 73, at 328-32 (describing effect of citizen suit provisions).

75. See *id.* (listing various impacts of citizen suits); see also Robert B. June, Comment, *The Structure of Standing Requirements for Citizen Suits and the Scope of Congressional Power*, 24 ENVTL. L. 761, 762 (1994) (explaining basic purpose of citizen suit provisions).

76. 484 U.S. 49, 54 (1987).

to courts over claims alleging wholly past violations.⁷⁷ On remand, the Fourth Circuit interpreted the Supreme Court's holding to recognize the justiciability of continuous or intermittent CWA violations.⁷⁸

The ESA incorporates a similar citizen suit provision that authorizes citizens to commence an action to remedy ESA violations.⁷⁹ Most often, successful citizen suits result in an injunction against the unlawful conduct.⁸⁰ Section 11 of the ESA provides that "any person may commence a civil suit on his own behalf. . . to enjoin any person. . . who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof."⁸¹ Similar to the Fourth Circuit's holding on remand in *Gwaltney*, the Ninth Circuit recognized that a citizen suit alleging a prohibited taking of a protected species does not require a past injury to the species.⁸² In *Forest Conservation Council v. Rosboro Lumber Co. (Rosboro)*,⁸³ the circuit court held that an injury occurring at some point – past, present, or future – was sufficient to establish a cause of action so long as the plaintiff proved future injury with the requisite degree of certainty.⁸⁴

The Supreme Court addressed the ESA in *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon (Sweet Home)*⁸⁵ soon after the *Rosboro* decision.⁸⁶ The thrust of the Court's decision surrounded a facial challenge to the legitimacy of the FWS redefinition of "harm" to include habitat modification.⁸⁷ The Supreme Court held, "the Government cannot enforce the §9 prohibition until an animal has actually been killed or injured."⁸⁸ Thereafter,

77. See *id.* at 64 (concluding CAA bars citizen suits for wholly past violations).

78. See *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.*, 844 F.2d 170, 172 (4th Cir. 1988) (interpreting Supreme Court's holding on remand).

79. Endangered Species Act of 1973, 16 U.S.C. § 1540(g) (2006) (providing ESA citizen suit provision).

80. *Id.* (describing citizen suit remedies).

81. *Id.* (quoting ESA citizen suit provision).

82. Compare *Chesapeake Bay Found.*, 844 F.2d at 172 (recognizing justiciability of continuous or intermittent CWA violations), with *Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781, 784 (9th Cir. 1995) (holding no past injury required by section 9).

83. 50 F.3d 781 (9th Cir. 1995).

84. *Id.* at 784 (describing Ninth Circuit's holding regarding requisite degree of certainty).

85. 515 U.S. 687 (1995).

86. *Id.* at 698 (addressing re-definition of harm).

87. See *id.* at 692 (describing plaintiffs' challenge to statutory validity of Secretary of Interior's harm definition including habitat modification).

88. *Id.* at 702-03 (explaining required proof of section 9 violation). The Court compared section 9 of the ESA, the take provision, to section 5 of the ESA,

in *Marbled Murrelet v. Babbitt (Marbled Murrelet)*,⁸⁹ the Ninth Circuit clarified that *Sweet Home* had no effect on its prior determination in *Rosboro*, namely that actual death or injury to an endangered species was not required, and a “reasonably certain threat of future harm is sufficient.”⁹⁰

After the Supreme Court’s decision in *Sweet Home*, the First Circuit confirmed its prior decisions in *Strahan v. Linnon (Strahan)*⁹¹ and reiterated the bar against citizen suits without a showing of actual harm.⁹² In earlier decisions, the First Circuit relied specifically on the ESA definition of harm and other circuit cases to support its conclusion that injunctive relief is only proper after the plaintiff demonstrates that the activity, if continued, will actually injure the protected species.⁹³ According to the First Circuit, a citizen suit alleging an ESA violation is not justiciable until an actual injury occurs.⁹⁴ Consequently, a circuit split exists regarding the justiciability of claims based entirely on future ESA violations.⁹⁵

C. No Taking Protected Species

Section 9 of the ESA, the take provision, is a major source of litigation because it prohibits all actions affecting a taking of a protected species.⁹⁶ The ESA makes it “unlawful for any person subject to the jurisdiction of the United States to. . . take any such species within the United States.”⁹⁷ Prohibited takings are further defined

the land acquisition provision. *Id.* Section 5 provided for the protection of a habitat before a seller’s activity harms a protected species. *Id.* In contrast, section 9 could not be enforced until an animal has actually been injured or killed. *Id.*

89. 83 F.3d 1060 (9th Cir. 1996).

90. *Id.* at 1068 (holding *Sweet Home* did not overrule prior findings that reasonably certain threat of future harm is sufficient to support permanent injunction).

91. No. 97-1787, 1998 U.S. App. LEXIS 16314 (1st Cir. July 16, 1998).

92. *See id.* at *13 n.6 (holding that “even a significant risk of harm” to endangered species is insufficient).

93. *See id.* (citing *Am. Bald Eagle v. Bhatti*, 9 F.3d 163 (1st Cir. 1993) (holding plaintiff must show actual harm to endangered species). The precedent on which the First Circuit relied, *American Bald Eagle*, repudiated the availability of injunctive relief for a conjectural harm to a species based on the language of the ESA, the definition of harm, and guidance provided by the FWS. *Am. Bald Eagle*, 9 F.3d at 165-66 (defining harm).

94. *See Strahan*, No. 97-1787, 1998 U.S. App. LEXIS 16314, at *13 n.6 (clarifying First Circuit’s adherence to showing of actual harm).

95. For a discussion of the circuit split regarding the justiciability of future ESA violation claims, see *supra* notes 83-94 and accompanying text.

96. *See generally* Boudreaux, *supra* note 29, at 735-36 (explaining importance of ESA section 9).

97. Endangered Species Act of 1973, 16 U.S.C. § 1538(a)(1)(B) (2006) (offering ESA take provision).

by Congress as actions that “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”⁹⁸ Congress intentionally defined section 9 broadly in order to encompass any possible way in which a person could take a protected species.⁹⁹ Thus, courts interpret the parameters of the take provision by applying precedential decisions and any guidance provided by pertinent regulations.¹⁰⁰

In 1982, Congress instituted an exception to section 9 and, in doing so, authorized the Secretary of the Interior to issue permits that sanction the taking of a protected species when it is incidental to other lawful activities.¹⁰¹ The Secretary of the Interior retains discretion to grant or deny an ITP based on an applicant’s submitted habitat conservation plan.¹⁰² If an ITP is granted, the recipient is exempt from liability for any taking of a protected species resulting from the specific conduct exempted by the permit.¹⁰³

D. Clarifying “Harm” to Protected Species

“Harm” is the broadest term included in section 9, and therefore significant litigation has determined what activities are prohibited based on the harm inflicted on a protected species.¹⁰⁴ In 1981, the FWS recognized the lack of clarity regarding the take provision’s definition of harm and whether habitat modification was included.¹⁰⁵ The FWS thus redefined harm to include “an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures

98. *Id.* § 1532(19) (defining take).

99. *See Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 698 n.11 (1995) (describing broad purpose of ESA).

100. *See generally* Boudreaux, *supra* note 29, at 739 (explaining how lack of common law consensus leads to more statutory interpretation).

101. Endangered Species Act § 1539(a)(1)(B) (permitting incidental take permit exception). “The Secretary may permit . . . any taking otherwise prohibited . . . if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.” *Id.*

102. *See id.* § 1539(a) (outlining Interior Secretary’s authority to issue ITPs).

103. *See id.* (providing authority for Secretary to issue ITPs); *see also* Fedel, *supra* note 68, at § 8 (describing ITP process and conditions for mandatory ITP revocation). Incidental take permits can authorize a single act, a series of acts, or a number of activities that result in an otherwise unlawful take. Fedel, *supra* note 68, at § 8. The FWS is required to revoke an ITP in the event the applicant fails to comply with the permit’s requisite terms and conditions. *Id.*

104. *See* Alicia M. Griffin, *Beyond “Harm”: Abandoning the Actual Injury Standard for Certain Prohibited Takings Under the Endangered Species Act by Giving Independent Meaning to “Harassment,”* 52 VAND. L. REV. 1831, 1840-41 (1999) (describing breadth of harm under ESA).

105. *See id.* (explaining potentially differing interpretations of harm, which prompted redefinition of harm).

wildlife. . . .¹⁰⁶ Due to the lack of specific guidance, courts have diverged on the burden of proof required under the take provision.¹⁰⁷

In *Sweet Home*, the Supreme Court considered a facial challenge to the FWS's definition of harm as including "significant habitat modification or degradation where it actually kills or injures wildlife."¹⁰⁸ The Supreme Court upheld the constitutionality of including habitat modification or degradation in the definition of harm.¹⁰⁹ Just as the Court did not specifically address the justiciability of an entirely future ESA violation, the Court similarly did not specifically address the required burden of proof for a taking.¹¹⁰

Prior to the Supreme Court's decision in *Sweet Home*, the First Circuit addressed the degree of certainty required by the ESA to establish a taking in *American Bald Eagle v. Bhatti* (*American Bald Eagle*).¹¹¹ The court stated that, in order for a plaintiff to enjoin a controlled deer hunt based on an alleged harm to protected bald eagles, the plaintiff must show actual harm rather than a merely potential harm.¹¹² The First Circuit found the plaintiff's evidence insufficient to demonstrate that the deer hunt actually harmed the bald eagles because the evidence merely demonstrated a potential harm.¹¹³ The First Circuit has since maintained a high burden of proof to establish a taking of a protected species.¹¹⁴

Shortly after the First Circuit decided *American Bald Eagle*,¹¹⁵ the Ninth Circuit distinctively interpreted the ESA to require a

106. 50 C.F.R. § 17.3 (2009) (defining harm).

107. For an analysis of the differing judicial interpretations of the degree of certainty required under ESA section 9, see *infra* notes 108-26 and accompanying text.

108. *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 690 (1995) (considering facial challenge to FWS's definition of harm).

109. *See id.* at 708 (upholding constitutionality of harm definition including habitat modification).

110. *See id.* at 687 (declining to specifically address burden of proof for take); *see generally* Boudreaux, *supra* note 29, at 741-43 (explaining limited nature of *Sweet Home*).

111. *Am. Bald Eagle v. Bhatti*, 9 F.3d 163, 166 (1st Cir. 1993) (addressing proper standard to demonstrate section 9 violation).

112. *See id.* at 165-66 (holding injunctive relief appropriate only when plaintiff shows activity actually harmed protected species).

113. *See id.* at 166 (finding plaintiff failed to show hunt caused actual harm to bald eagles).

114. *See, e.g., Strahan v. Linnon*, No. 97-1787, 1998 U.S. App. LEXIS 16314 (1st Cir. July 16, 1998) (stressing insufficiency of both risk of harm and substantial risk).

115. *See Am. Bald Eagle*, 9 F.3d at 164 (explaining First Circuit's holding).

240 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXII: p. 225

lower burden of proof.¹¹⁶ In *National Wildlife Federation v. Burlington Northern Railroad, Inc. (Burlington Northern)*,¹¹⁷ the circuit court required the injury to be “sufficiently likely” to occur in the future, but not speculative.¹¹⁸ The Ninth Circuit, however, slightly altered the *Burlington Northern* sufficiently likely standard of certainty in subsequent cases.¹¹⁹

The Ninth Circuit again addressed the requisite degree of certainty to establish an ESA violation in *Rosboro* and required the plaintiffs to demonstrate the activity at issue was “reasonably certain to injure” the protected species.¹²⁰ At issue in *Rosboro* was a citizen suit seeking to enjoin a timber company from harvesting lumber in the habitat of a threatened species, claiming the harvest would violate section 9.¹²¹ The court interpreted the ESA to permit citizen suits seeking an injunction “against an imminent threat of harm” to a protected species and did not require past injury to a protected species.¹²² Accordingly, so long as a plaintiff demonstrates that an activity poses an imminent threat of harm to a protected species, the activity can be enjoined under an ESA section 9 claim in the Ninth Circuit.¹²³

The First and Ninth Circuits are at odds regarding the degree of certainty required to establish a section 9 violation.¹²⁴ This lack of consensus has led circuit and district courts to require varying degrees of certainty before a prohibited taking can be established.¹²⁵ The Ninth Circuit consistently requires a challenged activity to pose an imminent threat of harm, whereas the First Circuit

116. *Nat'l Wildlife Fed'n v. Burlington N. R.R., Inc.*, 23 F.3d 1508, 1511 (9th Cir. 1994) (holding plaintiff must prove future violation is reasonably likely).

117. 23 F.3d 1508 (9th Cir. 1994).

118. *See id.* at 1512 n.8 (explaining that court requires plaintiff to demonstrate future injury is “sufficiently likely,” more than mere speculation).

119. *Compare id.* (holding plaintiff must prove future injury is “sufficiently likely”), with *Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781, 784 (9th Cir. 1995) (requiring plaintiff to demonstrate activity is “reasonably certain to injure” protected animal), and *Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1064 (9th Cir. 1996) (holding that *Sweet Home* did not overrule *Rosboro* and showing of “reasonably imminent threat of future harm” is sufficient).

120. *Rosboro Lumber Co.*, 50 F.3d at 784 (requiring that plaintiff demonstrate activity is “reasonably certain to injure” protected animal).

121. *See id.* at 782 (narrating facts).

122. *Id.* at 784 (describing requisite proof).

123. *Id.* (concluding that evidence of logging company’s significant impairment of Swartz Creek owl’s essential behavior patterns was sufficient to demonstrate reasonable certainty of injury).

124. For an analysis of the differing degrees of certainty standards, see *supra* notes 108-23 and accompanying text.

125. *See Boudreaux, supra* note 29, at 767 (describing effect of ambiguous interpretation on courts); *see also Griffin, supra* note 104, at 1840-52 (describing

requires a challenged activity to actually, previously, or currently harm a protected species.¹²⁶ While the Supreme Court addressed section 9 in *Sweet Home*, it did not address the requisite degree of certainty.¹²⁷

IV. NARRATIVE ANALYSIS

“This is a case about bats, wind turbines, and two federal policies, one favoring protection of endangered species and the other encouraging development of renewable energy resources.”¹²⁸ The District Court for the District of Maryland emphasized the importance of the ESA as a broad protection of endangered and threatened species, and recognized section 9 as the “cornerstone” of the ESA.¹²⁹ Despite the court’s reverence for the ESA, it nonetheless also acknowledged the significance of developing clean, renewable energy.¹³⁰

In *Beech Ridge Energy*, the district court determined that the Animal Welfare Institute sufficiently demonstrated the presence of Indiana bats at the Beech Ridge Project site.¹³¹ The court held that injunctive relief was appropriate against Beech Ridge Energy if its conduct constituted a section 9 violation.¹³² The court interpreted the ESA based on the text, legislative history, implementing regulations, and case law.¹³³ Ultimately, the court issued an injunction against Beech Ridge Energy after determining the proffered evi-

various avenues courts have taken when trying to analyze this seemingly “simple, unambiguous” ESA provision).

126. For a further discussion and breakdown of the differences between the First and Ninth Circuits, see *supra* notes 108-23 and accompanying text.

127. See generally *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687 (1995) (analyzing ESA section 9, but not addressing requisite degree of certainty of take); see generally Boudreaux, *supra* note 29, at 743 (explaining limited nature of *Sweet Home*).

128. *Animal Welfare Inst. v. Beech Ridge Energy LLC*, 675 F. Supp. 2d 540, 542 (D. Md. 2009) (laying out general scope of litigation at hand).

129. See *id.* at 543-45 (explaining ESA’s purpose and broad scope).

130. See *id.* at 581 (stating wind energy development should be promoted, albeit in conjunction with ESA).

131. See *id.* at 575-76 (finding physical characteristics elucidated presence of Indiana bats at Beech Ridge Project site even though some factors made their presence less likely).

132. See *id.* at 580-81 (concluding injunction was appropriate if Beech Ridge Project would take Indiana bats, thus only issue remaining was appropriate form of relief).

133. See *Beech Ridge Energy*, 675 F. Supp. 2d at 545 (explaining factors guiding court to “carefully scrutinize” its analysis).

dence substantiated the conclusion that the Beech Ridge Project would unlawfully take Indiana bats.¹³⁴

A. Justiciability of the Animal Welfare Institute's Future Take Claim

The district court interpreted the ESA citizen suit provision to permit claims of future ESA violations, an issue of first impression in the Fourth Circuit.¹³⁵ Initially, the court acknowledged that a "superficial reading" of the citizen suit provision might support Beech Ridge Energy's argument due to the use of present tense within the provision.¹³⁶ Beech Ridge Energy unsuccessfully attempted to persuade the court that the citizen suit provision barred wholly future ESA violations because they lacked any past, current, or continuing taking.¹³⁷ Nonetheless, the court quickly discredited Beech Ridge Energy's analysis by distinguishing the cases on which they relied from the facts at issue.¹³⁸

The court instead preferred to conduct its own scrutiny of the ESA.¹³⁹ The citizen suit provision specifically provides for an injunction to remedy an ESA violation, which the court explained is designed to effectively prevent future conduct.¹⁴⁰ Moreover, a 1973 report by the U.S. House of Representatives clarifies that citizen suit actions are generally available to obtain injunctive relief for "violations or potential violations of the Act."¹⁴¹

The district court also relied on congressional intent to substantiate the justiciability of claims alleging wholly future ESA violations.¹⁴² Section 9 broadly prohibits any individual from taking any endangered or threatened species, and Congress further defined

134. *See id.* at 580 (describing court's decision to issue injunction against Beech Ridge Energy).

135. *See id.* at 560-61 (concluding ESA citizen suit allows claims of wholly future violations).

136. *Id.* at 560 (noting defendants' argument that citizen suit provision does not grant court jurisdiction over allegations of wholly future violations is supported by superficial reading of ESA text).

137. *See id.* at 560 (describing Beech Ridge Energy's argument).

138. *See Beech Ridge Energy*, 675 F. Supp. 2d at 561 (observing that defendant relied on *Gwaltney* and *American Canoe Association v. Murphy*, both of which involved Clean Water Act and failed to address wholly future violations).

139. *See id.* at 561 (describing court's preference to analyze ESA).

140. *See id.* at 560-61 (identifying purpose of injunctions as preventing future actions, and rejecting notion that past action is required).

141. *Id.* (citing H.R. REP. NO. 93-412 (1973)) (utilizing House report to substantiate injunction as relief for "violations or potential violations").

142. *See id.* at 561 (relying on U.S. Senate's confirmation of definition and application of take).

take to include “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or to attempt to engage in any such conduct.”¹⁴³ The district court inferred that the inclusion of an “attempt” to perform any of the prohibited actions signified Congress’s intent to include claims of future takings under section 9.¹⁴⁴

Finally, the court postulated that the purpose of the ESA would be frustrated if claims alleging wholly future violations were precluded under the citizen suit provision.¹⁴⁵ If courts were restricted to adjudicating citizen suits on alleged taking violations only after an endangered species was affected, the ESA would no longer prophylactically safeguard the protected species from harm or death.¹⁴⁶ Based on the aforementioned logic, the District Court for the District of Maryland found citizen suits alleging wholly future ESA violations to be justiciable.¹⁴⁷

B. Just How Sure Must the Court Be?

Neither the Supreme Court nor the Fourth Circuit previously explored the degree of certainty required to establish a section 9 violation under the ESA.¹⁴⁸ The Animal Welfare Institute insisted the ESA required it to demonstrate that a taking is more likely than not, whereas Beech Ridge Energy maintained that the Animal Welfare Institute must prove the wind farm is certain to take a protected species.¹⁴⁹ The district court recognized the absence of both a designated degree of certainty and a consensus among courts, and therefore turned to the FWS regulations and other circuit court decisions for guidance.¹⁵⁰

143. Endangered Species Act of 1973, 16 U.S.C. §§ 1532(19), 1538(a)(1)(B) (2006) (stating ESA take provision and defining take).

144. *See* Endangered Species Act § 1532(19) (relying on text of definition to infer forward-looking intent); *see also* *Beech Ridge Energy*, 675 F. Supp. 2d at 561 (using Senate report to confirm broad scope of take provision).

145. *See* *Beech Ridge Energy*, 675 F. Supp. 2d at 561 (analyzing Beech Ridge Energy’s claim in light of purpose of ESA).

146. *Id.* at 560-61 (discussing deleterious effects of contrary holding).

147. *See id.* at 561 (concluding that citizen suit provision permits claims of wholly future ESA violations without past violation).

148. *See id.* (noting lack of guidance from Supreme Court and Fourth Circuit regarding requisite degree of certainty).

149. *See id.* (describing both parties’ arguments). Animal Welfare Institute argued that “ordinary principles of tort causation” should apply, and thus it need only demonstrate that a take is more likely than not. *Id.* Beech Ridge Energy, however, argued that Animal Welfare Institute must prove that the Beech Ridge Project is “certain to harm, kill, or wound Indiana bats.” *Id.*

150. *See* *Beech Ridge Energy*, 675 F. Supp. 2d at 562-64 (utilizing regulations implementing ESA to reach conclusion).

The court began its evaluation presuming the requisite degree of certainty for any harm was higher than “merely likely,” with which both the Animal Welfare Institute and Beech Ridge Energy agreed.¹⁵¹ The precise degree of certainty required, according to the court, hinged on the use of “actually” in the FWS definition of harm: “an act which *actually* kills or injures wildlife.”¹⁵² The court relied on the FWS regulation’s explanatory comments in support of its conclusion that actually requires a higher degree of certainty than merely likely.¹⁵³ The comments succinctly clarified that an alleged harm could not be speculative, and section 9 purports to “avoid injury to protected wildlife due to significant habitat modification, while at the same time precluding a taking where no actual injury is shown.”¹⁵⁴

The district court looked to prior cases for further guidance.¹⁵⁵ The court conceded that the Supreme Court’s *Sweet Home* decision supported the notion that a mere likelihood of harm is insufficient because the take provision requires a non-speculative, actual injury.¹⁵⁶ Nonetheless, the district court also recognized, albeit in a footnote, the limited nature of the *Sweet Home* decision because the requisite degree of certainty to establish a taking was not directly at

151. See *id.* at 562 (noting that comparison of harass definition with harm definition yields conclusion that harm must be more than merely likely). Compare 50 C.F.R. § 17.3 (2009) (defining “harass” as “an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it”), with 50 C.F.R. § 17.3 (2009) (defining harm as “an act which actually kills or injures wildlife”). Both Animal Welfare Institute and Beech Ridge Energy agreed the FWS regulations demand a higher requisite degree of certainty for an alleged harm, as opposed to an allegation based on the definition of harass. *Beech Ridge Energy*, 675 F. Supp. 2d at 561 n.26, 562. This conclusion was based on the variance between the use of “likelihood” in the definition of harass and the use of “actually” in the definition of harm. *Id.* Thus, the court concluded the use of “actually” denoted that a plaintiff must prove a harm is “more than merely ‘likely’ to occur.” *Id.*

152. *Beech Ridge Energy*, 675 F. Supp. 2d at 562 (emphasis added) (explaining significance of “actually” in definition). For a further explanation of the importance of “actually” in definitions, see *supra* note 151.

153. Endangered and Threatened Wildlife and Plants; Final Redefinition of “Harm,” 46 Fed. Reg. 54748-01 (Nov. 4, 1981) (describing harm redefinition as necessary “to make it clear that an actual injury to a listed species must be found for there to be taking under section 9”).

154. *Id.* (describing requirement of actual harm); see also *Beech Ridge Energy*, 675 F. Supp. 2d at 562 (noting harm cannot be speculative).

155. For a further discussion of the court’s reliance on prior cases, see *infra* notes 156-61 and accompanying text.

156. See *Beech Ridge Energy*, 675 F. Supp. 2d at 562 (interpreting *Sweet Home* to require “actual” injury). For an explanation of the *Sweet Home* decision, see *supra* notes 85-87, 108-10 and accompanying text.

issue in that case.¹⁵⁷ The *Sweet Home* holding was therefore inconclusive on the issue.¹⁵⁸

Regarding the divergent First and Ninth Circuit judgments concerning the degree of certainty required to establish a section 9 violation, the court distinguished the varying standards and declared that it “agrees with the standard adopted in *Marbled Murrelet*.”¹⁵⁹ The court rationalized the *Marbled Murrelet* standard—requiring a reasonable certainty of imminent harm to a protected species—as consistent with the purpose of the ESA, its legislative history, the implementing regulations, and the Supreme Court’s holding in *Sweet Home*.¹⁶⁰ In conclusion, the district court announced that the Animal Welfare Institute must prove the Beech Ridge Project was “reasonably certain to imminently harm, kill, or wound the listed species.”¹⁶¹

C. Indiana Bat Presence at Beech Ridge Project

Based on the evidence and testimony presented at trial, the district court concluded with “virtual certainty” that Indiana bats were present at the Beech Ridge Project site.¹⁶² Beech Ridge Energy attempted to use expert testimony to persuade the court that, despite the presence of Indiana bats, the wind turbines would not take the protected species due to the height of the wind turbines

157. See *Beech Ridge Energy*, 675 F. Supp. 2d at 562 n.27 (describing lack of particularly relevant guidance from *Sweet Home*).

158. See *id.* (noting inconclusiveness of *Sweet Home* opinion on present litigation).

159. For an analysis of the First and Ninth Circuits’ standards, see *supra* notes 112-22 and accompanying text. See, e.g., *Am. Bald Eagle v. Bhatti*, 9 F.3d 163, 165-66 (1st Cir. 1993) (holding that speculative risk of harm is insufficient and actual harm must be proved to establish taking under ESA). But see, e.g., *Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1068 (9th Cir. 1996) (holding reasonable certainty of imminent harm to endangered species was sufficient), and *Defenders of Wildlife v. Bernal*, 204 F.3d 920, 925 (9th Cir. 2000) (holding plaintiff must prove activity would harm or would more likely than not harass endangered species).

160. See *Beech Ridge Energy*, 675 F. Supp. 2d at 563 (citing *Marbled Murrelet* standard). For a thorough analysis of the court’s reliance on the legislative history, see *supra* notes 151-59 and accompanying text.

161. *Beech Ridge Energy*, 675 F. Supp. 2d at 563 (stating district court’s conclusion).

162. See *id.* at 575 (finding Indiana bat’s presence at Beech Ridge Project site during spring, summer, and fall as virtually certain). The court weighed all evidence presented and identified three factors as determinative to holding that Indiana bats were present at the Beech Ridge Energy site: first, the close proximity of Indiana Bat hibernation locations to the site; second, the physical characteristics of the site increased the likelihood of Indian bats being present; and third, acoustical data confirmed the presence of Indiana bats to a virtual certainty. *Id.* at 575-76.

246 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXII: p. 225

and the lack of evidence proving wind turbines kill Indiana bats.¹⁶³ Nonetheless, the court found the Animal Welfare Institute's experts more credible and therefore relied on their testimony regarding the physical characteristics surrounding the Beech Ridge Project.¹⁶⁴ The district court reluctantly issued injunctive relief in favor of the Animal Welfare Institute after unavoidably concluding that "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."¹⁶⁵

V. CRITICAL ANALYSIS

Although the District Court for the District of Maryland properly issued an injunction against Beech Ridge Energy, the decision expands the body of case law that applies various rationales and standards to prove an ESA section 9 violation.¹⁶⁶ Regardless of which standard the court adopted, inherent discrepancies remain between the comprehensive purpose of the ESA and the FWS's definition of harm.¹⁶⁷ In the midst of the conflict over the justiciability

163. See *id.* at 576-77 (expounding upon Beech Ridge Energy's arguments that Indiana bats do not fly at height of turbine blades and that no Indiana bats have been confirmed dead at any wind power project in United States). Expanding research capabilities surrounding bats has shown that bats can fly a kilometer or more above the ground, into the range of the wind turbine blades, and the height at which Indiana bats forage for food is unrelated to the height at which Indiana bats migrate. *Id.* at 577. Wind turbine projects across the country have reported killed bats, and Indiana bats are no more capable of avoiding death from wind turbines than any other bat species. *Id.* at 577-78.

164. See *id.* at 564-67, 579 (discussing expert witnesses' credentials). The court accepted Animal Welfare Institute's expert witness' arguments over Beech Ridge Energy's contentions. *Id.* at 567. The court found no evidence to suggest that Indiana bats would not fly at the height of the wind turbines. *Id.* at 578. Additionally, Animal Welfare Institute sufficiently persuaded the court that Indiana bats do not behave differently than other bat species and, thus, they confront the same risk of any bat species to be harmed or killed by wind turbines. *Id.* at 578-79. Finally, the lack of concrete evidence confirming a deceased Indiana bat at any wind turbine project across the nation merely illustrates the few, and often inefficient, post-mortality studies, as well as the true nature of the Indiana bat as an endangered species. *Id.* at 579.

165. *Id.* at 579, 581, 583 (issuing injunction to enjoin operation of all wind turbines under construction, except during winter months, but allowing for completion of construction of wind turbines already begun). The district court reasoned that the incidental take permit process under the ESA was available and urged Beech Ridge Energy to apply for an ITP, as was suggested on numerous occasions by the FWS prior to litigation. *Id.*

166. For a thorough analysis of the case law applying varying standards, see *supra* notes 82-95, 108-26 and accompanying text.

167. For a discussion of the inherent discrepancies between the ESA's purpose and FWS's definition of harm, see *infra* notes 174-80, 196-98 and accompanying text.

of future ESA violations and the degree of certainty required to establish section 9 violations, the government continues to promote clean, renewable energy and wind energy continues to flourish.¹⁶⁸ This case underscores the importance of two prominent federal policies working in concert.¹⁶⁹

A. Lack of Specificity of ESA's Definition of Take

Section 9 of the ESA forbids any person from taking any endangered species, which is further defined to include "harass, harm. . . wound, kill. . . or to attempt to engage in any such conduct."¹⁷⁰ Even with the auxiliary guidance of FWS regulations on the specific actions encompassed by each descriptive word within the take prohibition, courts across the nation continue to reach divergent holdings.¹⁷¹ In fact, the judicial system has yet to reach a consensus on the redressability of claims alleging entirely future ESA violations.¹⁷²

B. The District Court's Failure to Distinguish Between Divergent Rationales Concerning Wholly Future Violations of ESA

As discussed in Part III, Congress passed the ESA to protect endangered and threatened species, as well as their habitats, from harm.¹⁷³ Congress intended the ESA to eventually reverse the damage inflicted upon endangered and threatened species, "whatever the cost," and provide expansive protection by prohibiting "every conceivable way a person can take or attempt to take any [endangered or threatened] species."¹⁷⁴ The fundamental nature of the ESA citizen suit provision provides individuals with the legal means, in the form of injunctive relief, to enjoin conduct unlawfully effect-

168. For an examination of the United States' renewable energy initiatives, see *infra* notes 10-22 and accompanying text.

169. See *Animal Welfare Inst. v. Beech Ridge Energy LLC*, 675 F. Supp. 2d 540, 583 (D. Md. 2009) (describing importance of developing wind energy as well as importance of wind energy being "good neighbors").

170. Endangered Species Act of 1973, 16 U.S.C. §§ 1538(a)(1)(B), 1532(19) (2006) (prohibiting any taking of protected species and defining what actions constitute taking).

171. For a discussion of the lack of judicial consensus despite guidance provided by FWS regulations, see *supra* notes 82-95, 108-26 and accompanying text.

172. For an examination of the lack of consensus regarding redressability, see *supra* notes 82-95, 108-26 and accompanying text.

173. For a discussion of the ESA's purpose and significance, see *supra* notes 68-72 and accompanying text.

174. Griffin, *supra* note 104, at 1853-54 (detailing ESA's history).

ing a taking of a protected species.¹⁷⁵ Generally, injunctive relief is available when the court or jury deems it appropriate to halt particular conduct, most often before the harm in question occurs.¹⁷⁶

Issuing injunctions in this manner is seemingly at odds with the Supreme Court's 1995 decision in *Sweet Home*.¹⁷⁷ The Court explained that "the Government cannot enforce the § 9 prohibition until an animal has actually been killed or injured."¹⁷⁸ A literal reading of the Court's statement mandates that a protected animal must incur actual injury prior to the enjoinder of the activity under section 9.¹⁷⁹ While the Court's decision focused mainly on habitat modification, the Court also referred to section 9 prohibitions as a whole rather than confining its language to habitat modification as a subsection of section 9.¹⁸⁰ The Supreme Court's holding is in accord with the FWS definition of harm as "an act which actually kills or injures wildlife."¹⁸¹ The Ninth Circuit and District Court for the District of Maryland, however, suggest the Court's decision is inconsistent with the broad purpose of the ESA and injunctive relief.¹⁸²

Perhaps due to this underlying conflict between *Sweet Home* and the ESA's purpose, the Ninth Circuit announced in *Marbled*

175. See Endangered Species Act of 1973, 16 U.S.C. § 1540(g)(1)(A) (2006) (offering citizen suits as means to enforce ESA).

176. *Id.* (providing availability of injunctive relief).

177. See Boudreaux, *supra* note 29, at 751 (discussing impact of *Sweet Home* on availability of citizen take claims under ESA). Compare Endangered Species Act § 1530(g)(1)(A) (stating ESA citizen suit provision), with *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 702-03 (1995) (explaining government cannot enforce ESA section 9 without proof of actual harm).

178. *Sweet Home*, 515 U.S. at 702-03 (explicating Supreme Court's holding); see also Boudreaux, *supra* note 29, at 751 (discussing *Sweet Home*'s impact on timing of citizen suit alleging ESA take violation). One commentator has suggested that the Supreme Court did not foresee the necessity of injunctions prior to a take, at least with regard to habitat modification. Boudreaux, *supra* note 29, at 751.

179. *Sweet Home*, 515 U.S. at 702-03 (explaining section 9 cannot be enforced until protected animal is actually killed or injured).

180. See *id.* (discussing respondent's challenge to FWS regulation as facial rather than as applied challenge).

181. Compare 50 C.F.R. § 17.3 (2009) (providing definition of harm), with *Sweet Home*, 515 U.S. at 702-03 (1995) (noting that government cannot enforce ESA section 9 without proof of actual harm).

182. Compare 50 C.F.R. § 17.3 (2009) (offering definition of harm), with Endangered Species Act of 1973, 16 U.S.C. § 1531(b) (2006) (stating purpose of ESA is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of endangered species and threatened species"), and *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978) (describing ESA as "most comprehensive legislation for the preservation of endangered species ever enacted by any nation"), and *Sweet Home*, 515 U.S. at 698 (describing ESA's broad purpose of protecting against any activities inflicting prohibited harms).

Murrelet its decision to uphold its prior decisions and continue to recognize the justiciability of wholly future ESA violation claims with no required showing of actual harm.¹⁸³ When the issue of future ESA violations was presented to the First Circuit in *American Bald Eagle*, the circuit court interpreted the FWS regulations to bar claims of wholly future ESA violations and required the claimant to demonstrate that a protected species is actually killed or injured.¹⁸⁴ The First Circuit confirmed its interpretation of the ESA and the requirement of actual harm in *Strahan*, denying injunctive relief based solely upon a risk of harm to an endangered species.¹⁸⁵

Accordingly, when *Beech Ridge Energy* reached the District Court for the District of Maryland, the First and Ninth Circuits differed regarding the availability of the ESA citizen suit provision for claims alleging solely future violations.¹⁸⁶ The district court endorsed the Ninth Circuit's rationale, choosing to permit such claims because doing so was consistent with the purpose of injunctive relief and Congress's intent to prohibit any attempt to take an endangered species.¹⁸⁷ The *Beech Ridge Energy* opinion clearly characterized the objectives of injunctive relief, the purpose of the ESA, the congressional intent, and the definition of the take prohibition as consistent with the holding.¹⁸⁸ Yet, the court failed to mention both the

183. See *Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1065 (9th Cir. 1996) (explaining *Sweet Home* did not require Supreme Court to address "whether a showing of threat of future harm is sufficient for an injunction"). The Ninth Circuit distinguished *Sweet Home* as a facial challenge to the definition of harm, with any interpretation from *Sweet Home* requiring past injury as dictum. *Id.* Additionally, the Ninth Circuit interpreted *Sweet Home* as approving a reading of the ESA whereby the statute prevents activity that will cause future harm. *Id.* at 1066. For an explanation of the underlying conflict between the *Sweet Home* decision and the ESA's purpose, see *supra* notes 178-82.

184. See *Am. Bald Eagle v. Bhatti*, 9 F.3d 163, 165-66 (1st Cir. 1993) (interpreting FWS regulatory definition of harm). The First Circuit refused to adopt a numerical standard to determine harm, reasoning that any numerical standard would be an arbitrary number. *Id.* at 165. Rather, the court relied on the FWS's harm definition and the accompanying commentary to require a showing of actual harm. *Id.*

185. See *Strahan v. Linnon*, No. 97-1787, 1998 U.S. App. LEXIS 16314, at *13 (1st Cir. July 16, 1998) (announcing First Circuit always required plaintiff show actual harm to endangered species).

186. For a discussion of the lack of consensus on the justiciability of wholly future ESA violations, see *supra* notes 82-95 and accompanying text.

187. See *Animal Welfare Inst. v. Beech Ridge Energy LLC*, 675 F. Supp. 2d 540, 583 (D. Md. 2009) (agreeing with Ninth Circuit standard enunciated in *Marbled Murrelet*).

188. See *id.* at 560-61 (explaining Ninth Circuit decisions are consistent with text of citizen suit provision, legislative history, and purpose of ESA). Compare Endangered and Threatened Wildlife and Plants; Final Redefinition of "Harm," 46 Fed. Reg. 54748 (Nov. 4, 1981) (explaining redefinition of harm means "any action, including habitat modification, which actually kills or injures wildlife"), with

250 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXII: p. 225

First Circuit's converse approach as well as the Supreme Court's opinion in *Sweet Home*.¹⁸⁹

Regardless of which rationale the district court adopted, the ESA's purpose, the nature of injunctions, and the intentional broad scope of the take provision were bound to clash with the FWS regulations' explicit definition of harm and the guidance of *Sweet Home*.¹⁹⁰ Until the issue is resolved either through congressional or judicial action, courts will continue to reach divergent interpretations.

C. Leading the District Court Down a Windy Road: Conflict Between Congressional Intent and Agency Regulations

The ESA provides a statutory cause of action that often yields claims seeking injunctive relief to abate an action allegedly in violation of the statute.¹⁹¹ Claims alleging a violation of the take provision frequently depend on a judge or jury to weigh the submitted evidence and determine the likelihood of a violation.¹⁹² The plaintiff's burden of proof therefore drastically impacts the verdict.¹⁹³ The District Court for the District of Maryland endeavored to determine the degree of certainty with which the Animal Welfare Institute was required to prove the Beech Ridge Project would take Indiana bats.¹⁹⁴ Despite the lack of Supreme Court or Fourth Circuit guidance, the ESA, FWS regulations, and First and Ninth Cir-

Marbled Murrelet, 83 F.3d at 1065 (observing that *Sweet Home* did not require Supreme Court to address "whether a showing of threat of future harm is sufficient for an injunction"). The stated purpose of the ESA is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of endangered species and threatened species." Endangered Species Act of 1973, 16 U.S.C. § 1531(b) (2006) (offering statutory goals).

189. See *Beech Ridge Energy*, 675 F. Supp. 2d at 560-61 (failing to analyze First Circuit guidance regarding wholly future ESA violations).

190. For a discussion of the inherent discrepancies between the ESA's purpose, nature of injunctions, broad scope of the take provision, FWS regulations, and *Sweet Home* decision, see *supra* notes 174-80 and accompanying text.

191. See generally Boudreaux, *supra* note 29, at 763-64 (explaining types of ESA claims).

192. *Id.* at 764 (explaining how different burdens of proof potentially result in different outcomes).

193. See generally *id.* (describing burden of proof's significance and how varying burdens can drastically alter litigation).

194. See *Animal Welfare Inst. v. Beech Ridge Energy LLC*, 675 F. Supp. 2d 540, 561 (D. Md. 2009) (noting that requisite degree of certainty under section 9 was issue of first impression for Fourth Circuit).

cuits each shed light on the requisite degree of certainty, though the guidance is often divergent and convoluted.¹⁹⁵

The FWS redefined harm in 1981 to include “an act which actually kills or injures wildlife,” effectively diminishing the scope of prohibited conduct.¹⁹⁶ A strict reading of the text alone tends to support the conclusion that a plaintiff must absolutely prove actual death or injury to a protected species, rather than a hypothetical or potential future risk of harm.¹⁹⁷ Logically, this rationale also suggests that courts may not issue injunctions until the plaintiff sufficiently demonstrates how the particular conduct is inflicting harm.¹⁹⁸

Conversely, the historical breadth of the ESA as a means to protect endangered and threatened species at “whatever the cost” supports a finding that a plaintiff need only establish a lesser degree of certainty than actual harm.¹⁹⁹ This dichotomy is precisely where the First and Ninth Circuits split—the First Circuit adopting the former conclusion, the Ninth Circuit adopting the latter—when *Beech Ridge Energy* was decided.²⁰⁰ The District Court for the District of Maryland was bound to make a definitive determination to adopt either the First Circuit’s standard of showing actual harm or the Ninth Circuit’s standard of establishing a reasonable certainty of imminent harm.²⁰¹

Had the district court adopted the First Circuit’s rationale and required the Animal Welfare Institute to prove that the Beech Ridge Project actually killed or injured Indiana bats, the district court could not have enjoined the construction and eventual operation of the wind energy project until Indiana bats were actually

195. For a thorough analysis of the lack of judicial consensus regarding a plaintiff’s burden of proof under section 9, see *supra* notes 107-16 and accompanying text.

196. 50 C.F.R. § 17.3 (2009) (redefining harm).

197. *Id.* (providing text of harm redefinition); see generally Griffin, *supra* note 104, at 1858 (confirming that FWS’s 1981 definition of harm rejected significant risk of harm standard).

198. See, e.g., *Am. Bald Eagle v. Bhatti*, 9 F.3d 163, 165-66 (1st Cir. 1993) (relying on FWS definition of harm and holding injunctive relief available only after plaintiffs show conduct “has actually harmed the species or if continued will actually, as opposed to potentially, cause harm to the species”).

199. See Griffin, *supra* note 104, at 1853-57 (explaining how congressional intent supports standard lower than actual harm). For a discussion of the ESA’s broad purpose, see *supra* notes 68-72 and accompanying text.

200. For an analysis of courts’ application of the various standards, see *supra* notes 82-95, 108-26 and accompanying text.

201. See generally *Animal Welfare Inst. v. Beech Ridge Energy LLC*, 675 F. Supp. 2d 540, 563 (D. Md. 2009) (discussing First and Ninth Circuits’ standards).

252 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXII: p. 225

harmed.²⁰² This result would have been congruent with the FWS's regulatory requirement of actual harm.²⁰³ Such a result would have blatantly disregarded the district court's determination that the Beech Ridge Project posed a significant threat to Indiana bats, however.²⁰⁴ Moreover, this result would have neglected to comprehend the role of the FWS's regulatory definition in the broader context of the ESA.²⁰⁵

The district court instead adopted the Ninth Circuit's standard and found injunctive relief appropriate because the Animal Welfare Institute sufficiently established that the Beech Ridge Project was reasonably certain to imminently harm Indiana bats.²⁰⁶ This standard more adequately effectuates the purpose and goals of the ESA, and also recognizes that harm cannot be merely speculative.²⁰⁷ The district court focused much of its explanation on why the chosen degree of certainty was higher than a mere likelihood of harm rather than explaining why actual harm was not required.²⁰⁸ The court also neglected to justify the chosen degree of certainty required to establish an ESA section 9 claim in light of the FWS's regulatory requirement of actual harm.²⁰⁹ Regardless of the chosen standard, the court was bound to contradict either the FWS's requirement of the conduct actually killing or injuring a protected species or the expansive scope of the ESA.²¹⁰

202. See generally Griffin, *supra* note 104, at 1857-60 (explaining significant risk of harm does not result in harm). For a discussion of the First Circuit's rationale, see *supra* notes 91-94 and accompanying text.

203. 50 C.F.R. § 17.3 (2009) (defining harm as "an act which actually kills or injures wildlife"); see also Griffin, *supra* note 104, at 1851-52 (identifying Supreme Court interpretation of actual harm standard as congruent with regulations).

204. Compare *Beech Ridge Energy*, 675 F. Supp. 2d at 576 (concluding that presence of Indiana bats at site was virtual certainty, but unable to determine with absolute certainty due to lack of exacting evidence), with 50 C.F.R. § 17.3 (2009) (defining harm as "an act which actually kills or injures wildlife").

205. For a discussion of the ESA's purpose, see *supra* notes 68-71, 95-104 and accompanying text.

206. *Beech Ridge Energy*, 675 F. Supp. 2d at 563-64, 576 (adopting Ninth Circuit burden of proof standard).

207. See generally Griffin, *supra* note 104, at 1858-60 (explaining that significant risk of harm standard comports with congressional intent more effectively than actual harm requirement, but fails to satisfy regulatory requirement of actual harm). For a description of the burden of proof standard adopted by the Ninth Circuit, see *supra* notes 114-22 and accompanying text.

208. See *Beech Ridge Energy*, 675 F. Supp. 2d at 562-64 (noting that, given history of regulatory definition, standard must be greater than merely likely).

209. See *id.* (declining to analyze plaintiff's burden of proof in light of FWS regulations).

210. For an analysis of the conflicting judicial ESA interpretations, see *supra* notes 191-209 and accompanying text.

VI. IMPACT

Climate change is a substantial and material concern that increasingly affects individuals, suburban communities, cities, farmers, and businesses across the United States.²¹¹ Improved technology and a growing wealth of evidence suggest a tangible correlation between certain human activities and climate change.²¹² The United States has thus endeavored to reduce greenhouse gas emissions by devoting significant funds and resources to the development of clean, renewable energy.²¹³ The federal government's response to climate change is valiant and monumental, but any action must be cognizant of longstanding federal policies and initiatives.²¹⁴ No single federal policy should dictate the outcome of future initiatives; rather, all federal policies and initiatives must function in concert.²¹⁵

Wind energy development is often criticized and impeded due to the danger wind turbines pose to avian and bat populations.²¹⁶ When animals affected by wind energy projects are identified as an endangered or threatened species under the ESA, wind energy development can be further encumbered.²¹⁷ It is crucial, therefore, that developers conduct thorough analyses of potential impacts on protected species and discuss their findings with both state and federal authorities.²¹⁸

Beech Ridge Energy exemplifies the significance of conducting thorough analyses of potential wind energy facilities and communicating with regulatory officials.²¹⁹ Had *Beech Ridge Energy* heeded the FWS's warnings regarding the insufficiency of its mist-net

211. See generally *Climate Change Indicators*, *supra* note 7, at 4-7 (examining significant climate change indicators in United States).

212. See generally *id.* (detailing relationship between human activities and climate change).

213. For a discussion of the United States' efforts to promote clean, renewable energy, see *supra* notes 10-18 and accompanying text.

214. See generally Goel, *supra* note 15, at 42 (discussing importance of renewable energy production's compliance with federal environmental laws).

215. See generally *id.* (asserting that energy growth cannot trump adherence to existing environmental laws).

216. See generally *id.* (describing various criticisms of wind energy facilities).

217. See generally Wildermuth, *supra* note 22, at 534-35 (noting importance and ability of renewable energy sources to work in conjunction with existing federal policies).

218. See generally Goel, *supra* note 15, at 42 (discussing importance of reviewing impacts on endangered species, which can greatly hinder clean, renewable energy developments if not done properly).

219. See, e.g., *Animal Welfare Inst. v. Beech Ridge Energy LLC*, 675 F. Supp. 2d 540, 581-82 (D. Md. 2009) (describing detrimental effect of *Beech Ridge Energy's* failure to heed FWS's advice or apply for ITP, and identifying it as "tragedy").

surveys or applied for an ITP, it could have avoided the costs of litigation.²²⁰ The ITP is an exception to the section 9 prohibition against any taking of a protected species and recognizes instances in which a taking is unavoidable.²²¹ The ITP process is an avenue by which clean, renewable energy development may continue in conjunction with important federal policies protecting endangered and threatened species.²²² Unfortunately for Beech Ridge Energy, its failure to heed the FWS's recommendations resulted in substantial delays and litigation costs.²²³

Further, once wind energy developers perceive a protected species' potential presence in the vicinity of their facility, they must determine whether the project remains financially viable.²²⁴ Possible future litigation coupled with more in-depth analysis, reporting, and monitoring might persuade the developer to seek a less-costly alternative location.²²⁵ In order to resolutely make this determination, a wind energy developer should review controlling law in the applicable jurisdiction because these precedents could dramatically influence the choice between forging ahead or selecting a more suitable location.²²⁶ Yet, the lack of a consensus among courts interpreting the ESA may prevent developers from making a competent decision, especially in jurisdictions outside the First or Ninth

220. *See id.* at 582 (positing that, if FWS recommendations were followed, Beech Ridge Energy "would not be in the unfortunate situation in which they now find themselves").

221. For an examination of the availability of incidental take permits, see *supra* notes 101-03 and accompanying text.

222. Endangered Species Act of 1973, 16 U.S.C. § 1539(a)(1)(B) (2006) (providing Interior Secretary with authority to issue ITPs); *see generally* Goel, *supra* note 15, at 42 (identifying ITPs as means for wind energy developers to gain access to locations that would otherwise result in take).

223. *Beech Ridge Energy*, 675 F. Supp. 2d at 582 (explaining consequences of Beech Ridge Energy neglecting FWS's recommendations). Beech Ridge Energy rationalized its disregard of the FWS's advice through the "financial burden" and "delaying construction" of the project that would ensue if the advice had been followed. *Id.* Yet, its failure to heed FWS recommendations ultimately inhibited Beech Ridge Energy even further. *Id.*

224. *See generally* Goel, *supra* note 15, at 42 (describing importance of conducting thorough impact analysis on endangered species prior to commencing construction or operation of projects).

225. *See generally* Wildermuth, *supra* note 22, at 518-19 (describing effects of listing species as endangered or threatened).

226. *Cf.* Griffin, *supra* note 104, at 1852-60 (explaining drastic differences between judicial interpretations of ESA).

Circuits.²²⁷ *Beech Ridge Energy* elucidates one path the Fourth Circuit might follow.²²⁸

Without a judicial consensus discerning whether an individual can commence a suit for an entirely future ESA violation, wind energy developers are left uncertain regarding when they might face litigation.²²⁹ The uncertainty of a court's willingness and ability to adjudicate wholly future ESA violations may also require wind energy developers to expend resources in their defense when, in fact, the lawsuit is frivolous and untimely.²³⁰ Moreover, without agreement among courts on the required proof for a prohibited taking, developers must speculate about how much evidence is necessary to prove the presence of an endangered species and rebut a challenger.²³¹ The District Court for the District of Maryland suggested that the requisite degree of certainty issue was merely of academic interest.²³² In reality, the degree of certainty required to establish a section 9 violation could drastically alter the amount of resources wind farm developers must devote to pre-construction research.²³³

Jurisdictions that impose a lower burden of proof on challengers, such as the District Court for the District of Maryland, enable challengers to enjoin wind energy facilities with less-precise evidence.²³⁴ Overall, this approach might result in an increased number of lawsuits; wind energy developers devoting more resources to endangered species research; greater use of ITPs; greater incurrance of legal fees; and more stringent conditions imposed on the

227. See Boudreaux, *supra* note 29, at 764, 767 (necessitating court justification for applicable burden of proof in take claims, and describing effect of different burdens on outcomes of litigated take claims).

228. *Beech Ridge Energy*, 675 F. Supp. 2d at 560-61 (describing issues addressed by district court as issues of first impression for Fourth Circuit).

229. For an analysis of the conflicting judicial interpretations regarding claims alleging wholly future ESA violations, see *supra* notes 82-96 and accompanying text.

230. See generally Boudreaux, *supra* note 29, at 750-56 (explaining effect of varying interpretations on justiciability of wholly future claims).

231. See Boudreaux, *supra* note 29, at 763 (describing standard of proof issue as most significant variable in ESA litigation and identifying effect of varying evidentiary standards).

232. See *Beech Ridge Energy*, 675 F. Supp. 2d at 564 n.31 (describing requisite degree of certainty as perhaps merely issue of "academic interest").

233. For an explanation of how differing degrees of certainty required to prove take affect wind farm developers' efforts, see *infra* notes 234-41 and accompanying text.

234. See generally Boudreaux, *supra* note 29, at 764 (describing higher likelihood of plaintiff victories with take claims in jurisdictions imposing low burden of proof on plaintiff).

256 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XXII: p. 225

operation of the wind energy facility.²³⁵ Ultimately, requiring a lower burden of proof to establish a section 9 claim may convince a developer in a particular jurisdiction to select an alternate location.²³⁶

In contrast, jurisdictions imposing a higher burden of proof on challengers, such as the First Circuit, limit challengers to successfully enjoining wind energy facilities only when they offer the most exacting evidence.²³⁷ In these jurisdictions, wind energy developers are not nearly as burdened by the additional expenditures as in a jurisdiction with a lower burden of proof.²³⁸ Nonetheless, even though developers may not incur additional litigation expenses, they must remain cognizant of, and comply with, all ESA requirements regarding any present endangered or threatened species.²³⁹ The potential consequences imposed by either type of jurisdiction on a wind energy developer are burdensome.²⁴⁰ When the controlling law is obscure or not yet determined, however, the consequences are compounded.²⁴¹

The district court's decision in *Beech Ridge Energy* does not rectify the conflicting First and Ninth Circuit's ESA interpretations.²⁴² Rather, the District Court for the District of Maryland clarified its conformity with the Ninth Circuit.²⁴³ The court recognized the jus-

235. See Boudreaux, *supra* note 29, at 764-68 (evaluating effects of lower burden of proof for take violations); see also generally *Court Halts Construction and Limits Operation of Wind Project for Failure to Comply with Endangered Species Act*, WHITE & CASE (Dec. 2009), http://www.whitecase.com/files/Publication/e878f214-8fb8-4555-97b8-f79cb25fd207/Presentation/PublicationAttachment/4d6463f4-08ee-4d03-9a6f-013f690dc2fc/alert_EIPF_Wind_v2.pdf (describing various requirements for wind farm developers choosing to develop in locations where protected species may be present).

236. See generally Goel, *supra* note 15, at 42 (explaining how additional analysis and research requirements could prove too burdensome for wind farm developers).

237. Boudreaux, *supra* note 29, at 764 (describing how higher burden of proof demands more exacting evidence from plaintiffs before obtaining injunctions against wind farm developers).

238. See Boudreaux, *supra* note 29, at 764-68 (examining effects of higher burden of proof for take violations).

239. See generally Goel, *supra* note 15, at 42 (emphasizing high cost of progress for wind energy without thorough detection and review of impact on protected species).

240. For a discussion of the consequences of varying burdens of proof, see *supra* notes 230-39 and accompanying text.

241. See generally Boudreaux, *supra* note 29, at 762-63 (representing standard of proof issue as most significant variable in ESA take litigation).

242. *Animal Welfare Inst. v. Beech Ridge Energy LLC*, 675 F. Supp. 2d 540, 561-63 (D. Md. 2009) (adopting Ninth Circuit's standard for both wholly future ESA violations and requisite burden of proof).

243. *Id.* at 563-64 (adopting Ninth Circuit's reasonable certainty standard).

tiability of claims alleging wholly future ESA violations and required the Animal Welfare Institute to prove the Beech Ridge Project was reasonably certain to imminently harm Indiana bats.²⁴⁴ While the court's rationale contains certain flaws, the decision provides guidance to future wind energy developers within the court's jurisdiction on these consequential determinations.²⁴⁵

Beech Ridge Energy epitomizes the strategic capability of two federal policies to work in concert and concurrently achieve two equally important goals.²⁴⁶ In fact, the parties involved in the case eventually reached a settlement which approved a limited number of wind turbines for operation and afforded greater protection to Indiana bats through restrictions on the turbines' operation.²⁴⁷ The settlement agreement was contingent upon Beech Ridge Energy applying for an ITP and the FWS is currently deciding whether to grant or deny the permit.²⁴⁸ Ultimately, *Beech Ridge Energy* just may set the standard for how future wind energy projects must address the protection of Indiana bats and similarly endangered species.²⁴⁹

*Kirsten S. Balzer**

244. For an analysis of the district court's rationale, see *supra* notes 128-65 and accompanying text.

245. See *Beech Ridge Energy*, 675 F. Supp. 2d at 560-61 (explaining how both considerations were issues of first impression for Fourth Circuit).

246. See *id.* at 581 (describing thrust of case). "The two vital federal policies at issue in this case are not necessarily in conflict The development of wind energy can and should be encouraged, but wind turbines must be good neighbors." *Id.* at 581, 583.

247. See Stipulation at 1-7 *Animal Welfare Inst. v. Beech Ridge Energy LLC*, 675 F. Supp. 2d 540 (D. Md. 2009) (No. 09-1519 (RWT)), available at <http://www.windaction.org/documents/25382>. Animal Welfare Institute and Beech Ridge Energy stipulated to the following key points: the Beech Ridge Project would abandon thirty one turbine locations nearest the Indiana bat hibernacula; Beech Ridge Energy committed to obtaining an ITP and habitat conservation plan; turbines would operate on a restricted schedule until the ITP is granted; searches would be performed regularly for killed bats; and Beech Ridge Energy rescinded its appeals rights to the Fourth Circuit. *Id.*

248. See *id.* (illustrating conditions upon which parties agreed).

249. See *Beech Ridge Wind Project Settlement Agreement*, INDUS. WIND ACTION GROUP (Jan. 26, 2010), <http://www.windaction.org/documents/25382> (expressing that many believe "this project will set the bar for how wind companies must operate with regard to bats and other wildlife in the eastern U.S.").

* J.D. Candidate, 2012, Villanova University School of Law; B.S., 2006, Cornell University.

