

WHEREAS, on February 16, 2012, the Court entered a second Modification of Stipulation (“2012 Modification”), requested jointly by the parties, which substituted a new Paragraph 2 of the Stipulation; and

WHEREAS, the parties believe that the circumstances and other factors in place at the time of the 2012 Modification continue in effect and justify extension of the 2012 Modification of the Stipulation, in its entirety;

THEREFORE, the parties hereby stipulate as follows, subject to the approval and entry of an Order by the Court, that Paragraph 2 of the Stipulation will be replaced with the following Paragraph 2:

2. Pending receipt of an ITP, Defendants may operate the 40 turbines the construction of which was permitted by the December 8, 2009 Mem. Op. and Order, the 17 turbines authorized in Paragraph 3 of this Stipulation, and the 10 turbines authorized in Paragraph 4 of this Stipulation, during both the daylight and nighttime hours of the Indiana bat hibernation period (*i.e.*, from November 16 to March 31 of each year). From April 1 to November 15 of each year, the turbines may operate during daylight hours (*i.e.*, between one-quarter hour after sunrise and one-half hour before sunset, utilizing an agreed-upon published source for such times). From April 1 to November 15, 2013, the turbines may operate during nighttime hours, with cut-in speeds of 6.9 meters per second (*i.e.*, between one-half hour prior to sunset until one-quarter hour after sunrise). At all times of the year, and during all hours of the day and night, Defendants will feather turbine blades so there is only minimal rotation (<2 rpm) at winds below cut-in speeds. Defendants will engage in the following adaptive management regime to monitor Project operations from April 1 to November 15, 2013:

a. Defendants will retain a qualified biologist to search all operating turbines every two days for bat carcasses. Before commencing with the new operation scheme, carcass searches, or carcass removal trials, Defendants will provide Plaintiffs with the names and affiliations of all qualified biologists that Defendants plan to involve in carcass searches and/or the carcass removal trials, so that Plaintiffs can timely raise any concerns they might have with specific individuals before such activities commence.

b. Defendants will conduct a carcass removal study prior to April 1, 2012, or as soon as weather permits, to determine carcass removal rates in the Project area. Defendants will adjust the search interval period if FWS determines it is necessary to do so in order to ensure that a sufficient opportunity exists to detect Indiana bat take.

c. Defendants will conduct removal trials throughout the April 1 through November 15, 2013, intensive monitoring period to monitor carcass removal rates, and

Defendants will adjust the search interval if necessary to ensure that there is a sufficient opportunity to detect Indiana bat take.

d. Defendants will share results from carcass removal trials with FWS and Plaintiffs, and discuss with FWS any proposed adjustments to search intervals if FWS determines that more protective measures, such as a shortened search interval, are necessary.

e. Defendants will provide FWS and Plaintiffs with monthly monitoring reports from April 1 through November 15, 2013, identifying the approximate date, location, time, and species of any bat mortality occurring during the preceding month. The first monitoring report will be due on May 15, 2013, for the period of April 1 through April 30, with subsequent reports due on the 15th of each month for the preceding month.

f. Defendants will notify FWS and Plaintiffs within 24 hours of suspected identification of any endangered or threatened species injury or fatality.

g. All carcasses of the *myotis* genus will be preserved using industry protocols and provided to a qualified bat biologist at FWS or the West Virginia Division of Natural Resources (“WVDNR”) for independent identification.

h. If, under the process outlined in Paragraph 2(g), FWS or WVDNR determines that an ESA-listed species has been killed or otherwise taken due to project operation, Defendants will cease all nighttime turbine operations from one-half hour prior to sunset until one-quarter hour after sunrise during the period of April 1 to November 15, 2013, until an ITP is issued.

i. Defendants will provide weekly reports to Plaintiffs verifying that all turbines operating during nighttime hours from April 1 to November 15, 2013 are operating at a cut-in speed of at least 6.9 meters per second.

j. Within thirty (30) days from the entry of a modified stipulation by the Court consistent with the terms identified above, Defendants will contribute \$10,000 to Bat Conservation International, Inc. (“BCI”) for the purpose of conducting scientific research to facilitate an increased understanding of White Nose Syndrome (“WNS”) and its impacts on bat species.

i. If Defendants have not received a final ITP by May 15, 2013, Defendants will contribute an additional \$5,000 to BCI by June 15, 2013 for the purpose of conducting scientific research to facilitate an increased understanding of WNS and its impacts on bat species.

ii. If Defendants have not received a final ITP by July 1, 2013, Defendants will contribute an additional \$5,000 to BCI by August 1, 2013, for the

purpose of conducting scientific research to facilitate an increased understanding of WNS and its impacts on bat species.

Upon issuance of a final ITP, Defendants will implement the terms and conditions of the ITP and HCP, including operational requirements and monitoring protocols.

Respectfully submitted,

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Attorneys for Plaintiffs

So Ordered:



U.S. District Judge

Dated this 14~~th~~ day of March, 2013