

Administrative Court of First Instance of Toscana

Second Section

Has pronounced the following judgement

On the appeal number 1970 of 2011, joined Which has been filed by:

Associazione Italiana per il World Wild Fund for Nature- WWF; Associazione Verdi Ambiente e Società-V.A.S., Onlus Associazione Ornitologi dell'Emilia Romagna- As. OER, Onlus Associazione per la Protezione degli Uccelli Rapaci e dei loro ambienti- ALTURA, (...)

against

- The Region Toscana, the Regional Agency for the Protection of the Environment of Toscana (ARPAT), (...)
 - The Municipality of Zeri (...)
 - the Ministry for the Cultural Heritage and Activities, (...), the Superintendence of the Architectonic and the Landscape of Toscana, the Ministry of the Interior, the Italian Civil Aviation Authority,ENAV, (...)
 - the Local Authority n. 1. Toscana Nord (...)
 - the Province of Massa Carrara, (...)
 - the Mountain Community Lunigiana (...)
 - the Authority of the Basin of the Magra River (...)
 - the Conference of Services (...)of the Region of Toscana (...)
 - the Region of Emilia Romagna (...)
 - the Province of Parma (...)
 - the Municipality of Borgo Val di Taro (...)
 - the Municipality of Pontremoli (...)
 - the Municipality of Albareto
 - the Region of Liguria (...)
- the Ministry of the Defence, the Ministry for the Economic Development, the Local Health Authority (ASL 1)- Massa Carrara, Enel Distribuzione (S.p.A.), Conference of Service (...), Snam Rete Gas S.p.a.

in the regards of

the company Società Fabbrica Energie Rinnovabili Alternative- FERA S.r.l (...);

for the annulment

- of the decision of the Regional Government of Toscana n. 535 of 27/06/2011, published on the Regional Journal of Law on 13/07/2011, concerning the regional law 79/98, articles 14 and following- Proceeding of assessment of the environmental impact of a wind power plant project, "Vento di Zeri", in the Municipality of Zeri, submitted by FERA S.r.l.- Final Decision" by which the environmental compatibility of the project was confirmed and by which authorisations have been granted for the hydrogeological and landscape restrictions;
- of every other preliminary, preconditional, inherent, consequential, and/or otherwise connected act, known or unknown, any excluded, as well as any unknown decision and/or resolution of the Administrations concerned that involve the same subject and in particular:

- the decision of the Regional Government n. 356 of the 2nd April 2001, concerning the “Regional Environmental Impact Assessment procedure pursuant articles 14 and following of the regional law 79/98. Regional Government’s competence”;
 - of the favorable technical opinion, followed by prescriptions, expressed in the internal meeting to the Regional Offices, during the session on 29.04.2011.
 - of the minutes and any other act adopted by the Conference of Services in the meetings of 10.09.2010, 21.01,2011 and 24.05.2011;
 - if necessary, the minutes of the Conference of Services of 29.09.2010;
 - of the favorable opinion of the Mountain Community of Lunigiana, mentioned without reference in the minute of the Conference of Services on 10.06.2011;
 - of the favorable opinion of the Community of Zeri, mentioned without reference in the minute of the Conference of Services on 10.06.2011;
 - of the favorable opinion of the Landscape Commission of the Municipality of Zeri, mentioned without reference in the minute on 10.06.2011;
 - of the favorable opinion, including prescriptions, of the Superintendence of the Architectonic and the Landscape Heritage of Lucca, mentioned without reference in the minute of the Conference of Services on 10.06.2011;
 - the opinion of the Superintendence of the Architectural Heritage of Toscana by which it has been stated that the area where the wind power plant is installed is not to be considered of archaeological interest, opinion mentioned without reference in the minute of the Conference of Services of 10.06.2011;
 - of the favorable opinion of the River Magra Basin Authority, mentioned without reference in the minute of the Conference of Service of 10.06.2011;
 - of the favorable opinion and prescriptions of the internal Conference of the Regional Offices of 07.07.2010;
 - of the favorable opinion of the Province of Massa Carrara, mentioned without reference in the minute of the Conference of Services on 10.06.2011;
 - of the favorable opinion expressed by the Municipality of Zeri on 21.05.2010, in relation to the noise pollution;
- followed by motivated additional grounds filed on the 8th of June 2012:

for the annulment of the minute of the 4th session of the Conference of Services of 28.03.2012 on the authorisation for the construction and functioning of the wind power plant named “Vento di Zeri” in the Municipality of Zeri, Pontremoli, a work of undelayable and urgent character subject to a declaration of public utility and expropriative measure (7 aerogenerators for a total power of 10,5 MW);

- of the decision of the City Council of the Municipality of Zeri n. 4 of 21.03.2012 confirming the zoning variant to the Municipal Plan of Noise Classification;
- as well as the annulment of every preliminary, preconditional inherent consequent, and /or in any case connected act, known or unknown, any excluded, as well as any other unknown Administration’s decision and / or resolution concerning the same subject and in particular:
 - the final decision on the Environmental Impact Assessment of 04.07.2011
 - the minute of the First Conference of Services of 01.09.2011;
 - the minute of the Second Conference of Services of 19.12.2011;
 - the minute of the Third Conference of Services of 08.03.2012;
 - the minute of the technical meeting on 06.12.2011 called by the D.G. of the Presidency A.C. Sector Programmation Environmental Impact Assessment;
 - of the minute of the 2nd Technical Meeting of the Sector Environmental Impact Assessment on 31.01.2012;

-of the notes of the Ministry of the Interior- Provincial Fire Brigade Command of Massa Carrara of 26.08.2011, prot. n. 213589 of 07.12.2011 and of 08.'3.2012 and 16.03.2012;

- of the note of the Sector Environmental Impact Assessment of Toscana prot. n. 214900 of 06.09.2011;

- of the acts of the Superintendence of the Archeological Heritage of Toscana prot. n. 213064 of 25.08.2011, prot. n. 6149 of 06.04.2010 and prot. n. 9068 of 25.05.2011;

-of the note of 01.12.2011 of the Authority of the Interregional Basin of the Magra River;

-of the favorable opinion of the Mountain Community of Lunigiana of 24.11.2011;

-of the notes of the Command I. Reg. Area AM prot. n. 272501 of 02.11.2011 and n. 291829 of 21.11.2011;

-of the notes of the National Civil Aviation Authority;

-of the notes of the National Electricity Transmission System Operator;

-of the notes of the Ministry of the Cultural Heritage and Activities prot. n. 17964 of 16.11.2011, n. 19625 of 14.12.2011, of 09.03.2012 and favorable opinion of the 31.01.2012;

-of the notes of Sector Environmental Impact Assessment of the Region of Toscana prot. n. 294046 of 23.11.2011;

-of the note of the Superintendence of 28.03.2012 which confirms the note prot. n. 6149 of 06.04.201 and subsequent integration prot. n. 6068 of 25.05.2011;

-of the note of the Ministry of the Economic Development prot. n. 23272 of 16.12.2011;

-of the note of the company SNAM Rete Gas s.p.a. prot. BERT/SSMA 13.2011 of 07/09/2011;

- of the note of the Municipality of Pontremoli of 31.08.2011;

- of the opinion of the Superintendence for the Architectural and Landscape, Historical , Artistic and Ethno-anthropological Heritage for the provinces of Lucca and Massa Carrara of 31.01.2012 prot. n. 1593 of 19.01.2012;

- of the opinion of the Regional Agency for the Protection of the Environment (ARPAT) prot. n. 67450 of 11.10.2011;

-of the minute of the technical meeting of the Sector Environmental Assessment of the Region of Toscana held on 31.01.2012;

-of the fax note on 07.03.2012 of the Union of the Mountain Municipalities of Lunigiana;

-of the note of the Ministry of the Cultural Heritage and Activities on 21.03.2012;

-of the notes prot. n. 87735 of 29.12.2011 and prot. n.19142 of 16.03.2012 of the Regional Agency for the Protection of the Environment (ARPAT);

-of the note prot. n. 27240 of 27.12.2011 of Local Health Unit (USL) n. 1 of Massa Carrara;

-the decision of the City Council of Zeri n. 35 of 15. 06.2011;

-the note of the Regional Directorate for the Cultural and Landscape Heritage of Toscana on 10.06.2011 and prot. n. 10096 on 15.06.2011;

-the note of SBAT on 13.03.2009, prot. n. 4460;

- the note of SBAT on 06.04.2010, prot. n. 6149;

-the note of SBAT on 25.05.2011, prot. n. 9068;

- the note of SBAT on 28.05.2011, prot. n. 14114;

-the note of SBAT on 15.12.2011, prot. n. 20087;

-the opinion of person in Charge of the Urbanistic Service of the Municipality of Zeri on 21.03.2012;

and with an act containing additional grounds, filed on 14.08.2012:

for the annulment, after its suspension, of the Decree prot. n. 2202 on 24.05.2012 signed by the Executive in Charge of the General Directorate of the Local , Environmental , and the Mobility Policies of the Region of Toscana, concerning the regional law 39/2005 Legislative Decree 387/2003.

The authorisation for the wind power plant's construction and activity of a power of 10.5 MWe, named "Parco Eolico Vento di Zeri" in the Municipalities of Zeri and Pontremoli (MS) – Proponent F.E.R.A. S.r.l.;

of any other preliminary, preconditional, inherent, consequent and/or connected act, known or unknown, any excluded, as well as any unknown decision of the concerned Administrations or resolution on the same subject;

and with act containing additional grounds filed on 28 February 2013;

of the act signed by the Executive in Charge of the Technical Civi Office of Massa Carrara of the Region of Toscana, prot. n. 26395, on 28.01.2013, concerning: the authorisation at the beginning of the works of construction of the wind farm " Vento di Zeri", issued according to article 94 of the Presidential Decree 6 June 2011, n. 380;

- of the decision of the Responsible of the Sector Environmental Impact Assessment – Public works of strategic interest of the Region of Toscana, prot. n. 16604 on 23.11.2012, known during this month of February and about "resolutions concerning the company's "Società Fera" request of 8.11.2012" modifying the wind farm project "Vento di Zeri";

-Seen the appeal, the additional grounds and the related annexes;

-Seen the acts on the basis of which the Region Toscana, the Company "Società Fabbrica Energie Rinnovabili Alternative – Fera S.r.l.", the Municipality of Zeri, the Ministry of Cultural Heritage and Activities; the Superintendence for the Archeological Heritage of Toscana, the Superintendence for the Architectural and Landscape Heritage of Toscana, the Local Authority n.1 of Northern Toscana, the Regional Agency for the Protection of the Environment (ARPA) of Toscana, the Ministry of the Interior, the National Civil Aviation Authority and the ENAV;

Seen the defense's briefs;

Seen all other documents of the dispute;

The reporting judge of the public hearing of 29 May 2013 is (...) heard the defence of the parties as it has been stated in the minute;

(...)

FACT

On the 21st of November 2008 the FERA S.r.l. company submitted to the Region Toscana the project for the construction of a wind farm for the production of electric energy, named "Vento di Zeri", in order to subject it to the procedure of environmental impact assessment pursuant art. 14 of the Regional Law n. 79/1998.

The project involves the construction of seven areas of aerogenerators each one of them having a electric power of 1.5 MW for a total of 10,5 MW installed on a concrete base.

Each aerogenerator comprises a rotor formed by blades of a diameter from 77 to 92 meters. Overall, the maximum height of the aerogenerator reaches 126 meters (80 meters of the tower plus 46 meters of the blade) and is installed on a cement base of the dimensions of 25 x 40 m. The aerogenerators will be placed on the Mountain Colombo's ridge – Mountain Pianella on the Appennine of the Region of Toscana and Emilia Romagna, spreading along a length of about 1800 m.

The wind farm includes also the the laying of a cable duct at a depth of about 1 meter and for a lenght of 9 km; a distribution transformer and the adjustment of the existing roads and as well as the construction of new roads within the plant.

As it is stated in the minute of the Conference of Services of the 10 June 2011, the construction of the plant will determine the transformation of a total of 5329 squared meters of the woods. Against this project, the environmental organizations file an appeal and demand the annullment alledging:

1.the violation and misapplication of article 61 of the law n. 289/2002 in relation to a breach of articles 4 and 14 of the legislative decree n. 165/ 2001, of article 37 of the legislative decree n. 150/2009, in relation to the violation of articles 2 and 3 of the regional law n. 26 of 2000.

Violation and misapplication of art. 70, paragraph 6, of Legislative Decree n. 165/2001. Violation of art. 1 of the law n. 241/1990. Violation of article 97 of the Constitution and of the principles of impartiality, the principle of good performance, publicity and transparency of the administration. Violation of the fundamental principle of functional distinction between general political activity and managerial activity. Violation of the principles of a fair trial. Abuse of power for lack of preconditions and motivation, or intrinsic or extrinsic inconsistencies and manifest illegitimacy; misrepresentation; incompetence.

2. Violation and misapplication of article 61 of the law n. 289/2002, in relation to the violation of articles 4 and 14 of the legislative decree n. 165/2001, of article 37 of the legislative decree n. 150/2009, in relation to a breach of articles 2 and 3 of the regional law n. 26 of 2000.

Violation and misapplication of article 70, paragraph 6, of the legislative decree n. 165/2001. Violation of article 1 of the law 241/ 1990. Violation of article 97 of the Constitution and the principles of impartiality, good performance, publicity and transparency of the administration. Violation of the fundamental principle of functional distinction between general political activity and managerial activity. Violation of the principles of a fair trial. Abuse of power for lack of preconditions and motivation, for the intrinsic and extrinsic inconsistency and manifest illegitimacy. Misrepresentation. Incompetence.

3.Violation and misapplication of article 26, paragraph 5 of the legislative decree n. 152/2006 due to the breach of article 3 of the law n. 241/1990. Excess of power for lack of preconditions; of investigation and motivation. Illegitimacy and manifest irrationalities. Vagueness. Misrepresentation. Misuse of power.

4. Violation and misapplication of art. 17 of the regional law n. 79/98 due to the breach of article 88 of l. reg. n. 1/2005. Abuse of power for lack of preconditions; of investigation; and of motivation. Misrepresentation. Misuse of power.

5.Violation and misapplication of art. 18 of the regional law n. 79/98 and of article 26, of the legislative decree n. 152/2006 in relation to the breach of article 142, letter d) and g), f legislative decree 42/2006 and in relation to the breach of article 3 of the law 241/1990. Abuse of power for irrationality, illegitimacy and manifest inconsistency. Misuse of power.

6.Violation and misapplication of article 18 of the regional law n. 79/98 and article 3 quater of legislative decree n. 156/2006 due to the breach of article 9 of the Directive 2009/147/CE. Violation of the precautionary principle. Abuse of power for lack of investigation, vagueness, irrationality and uncertainty. Misrepresentation. Misuse of power. Abuse of power for lack of preconditions, of investigation and motivation. Abuse of power for manifest irrationality, illegitimacy and inconsistency. Misuse of power.

7.Violation and misapplication of article 18 of the l. reg. n. 79/98 and of the DPCM 14 November 1998. Violation and misapplication of article 18 of the regional law n. 79/98 due to the breach of the Noise Plan of the Municipality of Zeri. Violation of art. 32 of the Constitution. Violation of the precautionary principle. Abuse of power for lack of prerequisites, of investigation and of motivation and of intrinsic inconsistency. Misuse of power.

8.Violation and misapplication of article 18 of the regional law n. 79/98 and of article 26 of the legislative decree 152/2006 in relation to a breach of article 3 quater of the same decree and of article 15 of the regional law n. 51/1999 and in addition the Implementing Regulation. Violation of article 32 of the Constitution. Violation of the precautionary principle. Abuse of power for lack of preconditions, of investigation and of motivation. Misuse of power.

9. Violation and misapplication of articles 17 and 18 of the regional law n. 79/98 and of article 26 of the legislative decree in relation to a breach of article 94 of the same decree and of articles 14 and following of the law 241/1990. Violation and misapplication of the decree 11 December 1993, 1775 in relation a breach of article 3 of the law 241/1990. Violation of article 32 of the Constitution. Violation of the precautionary principle. Abuse of power for lack of preconditions, investigation and motivation. Manifest illogicity and irrationality.

10. Violation and misapplication of article 18 of the regional law 79/98 and of article 26, legislative decree n. 152/2006 in relation to the breach of articles 25,26 and 142, lett. m) legislative decree 42/2006 and the breach of article 3 of te law 241/1990. Abuse of power for lack of preconditions, of investigation, and motivation. Manifest illogicity and irrationality. Misuse of power. Lack of competence.

11. Violation and misapplication of article 26 of the legislative decree n. 152/2006 in relation to a breach of the decree n. 3267 of 1923 and of article 3 of the law 241/1990. Violation of article 32 of the Constitution. Abuse of power for lack of preconditions, investigation and motivation. Manifest illogicity and irrationality. Misuse of power. Lack of competence.

12. Violation and misapplication of article 26 of the legislative decree n. 152/2006 in relation to the breach of article 3 quater and 26 of the same decree and of article 3 of the law 241/1990. Violation of the principle of sustainable development and of the precautionary principle. Abuse of power for lack of preconditions, investigation, and motivation. Abuse of power for manifest inconsistency and illogicity.

The Region of Toscana, the company Società Fabbrica Energie Rinnovabili Alternative- Fera S.r.l., Municipality of Zeri, Ministry for the Cultural Heritage and Activities, the Superintendence for the Architectural and Landscape Heritage of Toscana, the Local Authority n. 1 North Toscana, the Regional Environmental Protection Agency (ARPA) – Toscana, the Ministry of the Interior, the National Civil Aviation Agency and of ENAV have joined the proceedings opposing to the acceptance of the appeal.

After the appeal had been filed the appellant associations acknowledged that the 4th session of the Conference of Services on 28 March, 2013, had been concluded with the authorization of the wind farm in accordance with the legislative decree of 28 December 2003, n. 387. And this, irregardless of the region Emilia Romagna's denial and the circumstance that the participating administrations had increased the number, already significant, of the prescriptions that the respondent company had to follow and the necessary restrictions functional for the release of a single authorisation, including the approval of a zoning variant ad hoc of the Noise Plan of the Municipality of Zeri.

The appeal has been filed against these above mentioned acts on the additional grounds submitted on the 8th June 2012 alleging:

1. illegitimacy intrinsic and derived of the acts challenged with the appeal n. 1970/2011
2. violation and misapplication of article 12 of the legislative decree n. 387/2003 also in relation to a breach of the European Directives "Habitat" and "Birds". Violation of the principles of fair trial and loyal collaboration. Abuse of power for lack of preconditions and investigation and motivation, as well as intrinsic and extrinsic inconsistency. Misuse of power.
3. Violation and misapplication of article 12 of the legislative decree n. 387/2003 in relation to a breach of articles 14 and following articles of law 241/1990 and of article 3 of the same law.

Violation of article 120 of the Constitution and of the principle of loyal collaboration. Abuse of power for lack of investigation and motivation and intrinsic and extrinsic inconsistency. Misuse of power and other.

4. Violation and misapplication of article 12 of the legislative decree 387/3003 in relation to a breach of article 142 letter m) of the legislative decree n. 42/2004. Violation of article 9 of the Constitution; Violation of article 97 of the Constitution also in relation to art. 1 of law n. 241/1990. Abuse of power for lack of investigation and motivation, as well as manifest illogicity and irrationality. Violation of the principle of proportionality. Misuse of power.

5. Violation and misrepresentation of article 12 of the legislative decree n. 387/2003 i in relation to the breach of the principle of sustainable development. Abuse of power for lack of preconditions, investigation, and motivation as well as manifest illogicity and irrationality. Violation of the principle of proportionality. Misuse of power.

6. Violation and misrepresentation of article 12 of the legislative decree n. 387/2003 in relation to a breach of articles 26 and following of the legislative decree n. 152/2006. Violation of the the precautionary principle. Abuse of power for manifest illogicity and irrationality as well as intrinsic and extrinsic inconsistency. Uncertainty. Misuse of power.

With decree n. 2202 of 24 May 2012 the General Directorate of the Local, Environmental and Mobility Policies for the Region of Toscana the decisions adopted by the above mentioned Conference of Services were confirmed by the proceeding Administration.

This act was contested under the following additional grounds submitted on 14th of September 2012:

-intrinsic and derived illegitimacy of the act challenged with the appeal on 25.10.2011 and with the additional grounds on 25.05.2012.

Subsequently, the appellants came to know of the decision of 28.01.2013 by which the Director of the Technical Civil Office of Massa Carrara of the Region Toscana has released to the FERA S.r.l., pursuant to article 94 of the Presidential Decree of 6 June 2001, n. 380, the authorization to start the works for the construction of the wind farm.

On 23 November 2012 the Director of the Sector Environmental Impact Assessment of the Region has subsequently released another decision excluding the necessity of subjecting to a new Environmental Impact Assessment the zoning variant proposed by the respondent since this variant “ was not going to cause significant damage to the environment”.

The above-mentioned acts have been appealed when additional grounds were submitted on 28 February 2013 asking for the suspension of the act, alleging:

1. the intrinsic and derived illegitimacy of the challenged acts with appeal submitted on 25.01.2011 and the additional grounds filed on 25.05.2011 and 08.08.2012.
2. Violation and misapplication of article 94 of the Presidential Decree n. 380/2001 and of article 105 bis of the regional law n. 1/2005. Abuse of power for total lack of preconditions, of investigation and of motivation as well as manifest illogicity and irrationality.
3. Violation and misapplication of article 43, paragraph 2 letter a) of the regional law 10/2010. Abuse of power for lack of investigation and motivation and for inconsistency, intrinsic and extrinsic illogicity and irrationality.

The request of the act's suspension has been rejected with decision n. 172 on 23 March 2013.

On the appeal against this decision the Court of Second Instance has granted the suspension of the act recognizing the existence of a serious and relevant damage.

(...)

The appeal with additional grounds filed on 28 of February 2013 is declared in part irreceivable, in part it is rejected because unfounded.

The judicial fees are beared by the unsuccessful party and are liquidated in the amount stated below.

for these reasons

The Regional Administrative Court of Toscana (Second Section):

- has declared the lack of passive legitimacy of the Local Authority's (ATO) of the North of Toscana
- has declared irreceivable and inadmissible the appeal with additional grounds filed on 14 of September 2012;
- has declared unprocessable the original appeal and the additional grounds filed on the 8th of June 2012;
- has declared irreceivable and has in part rejected as unfounded the additional grounds filed on the 28 february 2013.

The Court sentences the appellant to pay the judicial fees in favor of the counterparties that joined the proceeding and that are liquidated in the amount of 3.000,00 euros IVA and CPA.

(...)

This has been decided in Firenze (...) on 29 of May 2013 (...)

DEPOSIT OF THE JUDGEMENT AT THE SECRETARY

ON THE 16/09/2013

THE SECRETARY