



United States Department of the Interior

FISH AND WILDLIFE SERVICE
Ecological Services
3425 Miriam Avenue
Bismarck, North Dakota 58501



RECEIVED

FEB 5 2010

FEB 08 2010

Ms. Jennifer Turnbow
Kadrmass, Lee and Jackson, Inc.
P.O. Box 1157
128 Soo Line Drive
Bismarck, North Dakota 58502-1157

PUBLIC SERVICE COMMISSION

Dear Ms. Turnbow:

This is in response to your December 4, 2009, memo and attached November 20, 2009, letter regarding the proposed enXco Development Corporation (eDC), Merricourt Wind Power Project in Dickey and McIntosh Counties, North Dakota. We have reviewed the Project Siting Avoidance and Minimization Measures document, and we offer the following comments under the authority of and in accordance with the Migratory Bird Treaty Act (MBTA) (16 U.S.C. 703 et seq.), the Bald and Golden Eagle Protection Act (BGEPA) (16 U.S.C. 668-668d, 54 Stat. 250), the Endangered Species Act (ESA) (16 U.S.C. 1531 et seq.), and the National Wildlife Refuge System Improvement Act of 1997 (Public Law 105-57). (In a June 17, 2009, letter, Kadrmass, Lee and Jackson, Inc. (KLJ) requested the U.S. Fish and Wildlife Service's (Service) views and comments on the proposed Merricourt Wind Power Project. The Service responded to KLJ's request with a letter dated July 8, 2009, that contained the Service's comments and recommendations on the subject project. Those previous comments are incorporated by reference.)

The November 20, 2009, letter states that the study area initially identified for the Merricourt Project was chosen based on its wind regime, the community interest in the area, and proximity to existing electrical transmission. The Service, in our July 8, 2009, letter, encouraged the project proponents to conduct a Potential Impact Index (PII) analysis on several possible development sites to assist in the selection of a wind power site that minimizes the potential impacts to wildlife resources. From the information provided, it appears that no alternative sites were considered for development, nor were potential impacts to wildlife and their habitats taken into account in the selection of the proposed wind power development site.

The November 20, 2009, letter states that eDC identified numerous Service easements administered by the Kulm Wetland Management District (WMD), and initiated discussions on those findings and potential conflicts of interest between eDC and the WMD. The Kulm WMD is part of the Service's Refuge Division and has responsibilities for the protection of Service fee title and easement property interests in their district. In this capacity, they provide information to project developers to avoid and minimize impacts to Service property interests. The Bismarck Ecological Services Office has the responsibility to ensure projects are developed in compliance with all of the environmental laws outlined above, and we serve as the coordinating body and

7
PU-08-932 Filed: 2/8/2010 Pages: 4
Letter Commenting on Merricourt Wind Power Project

United States Department of the Interior, Fish and Wildlife Service
Jeffrey Townner, Field Supervisor

principal point of contact for proposals that may impact fish and wildlife trust resources, regardless of the project proponent.

Your letter states that the exclusion and avoidance criteria outlined in the North Dakota Conversion Facility Siting Act were used as a basis for the Critical Issues Analysis study. Our office was not part of the initial discussions that were held prior to initiating the Critical Issues Analysis. According to Section 69-06-08-01 Energy Conversion Facility Siting Criteria, exclusion areas include, among other things, "areas critical to the life stages of threatened or endangered animal or plant species". The identification of these critical areas is a function of this office and, therefore, we should have been contacted prior to initiating the analysis. In fact, we consider the wetland stopover habitat in the project area as critical to the survival and recovery of the endangered whooping crane.

At the Interagency Coordination Meeting (ICM) held in Bismarck on June 11, 2009, the Service informed eDC of the potential for use of habitats found on the proposed project site by federally listed threatened and endangered species, and encouraged eDC to participate in the ongoing development of a wind energy industry Habitat Conservation Plan (HCP) for the whooping crane throughout its U.S. migration corridor. The risk of lethal take to whooping cranes from wind turbines is not known at this time, but the highest source of known mortality to fledged cranes is from striking power lines. If power lines will be constructed in association with this project, the Service recommends they be placed underground to avoid collision mortality. If underground construction is not feasible, install and maintain visual marking devices on all new power lines within one mile of potentially suitable whooping crane stopover habitat and an equal length of existing power line in the migration corridor within one mile of potentially suitable whooping crane habitat.

The best available information also indicates that whooping cranes avoid stopover habitat that is developed with wind energy appurtenances, particularly wind turbines. This avoidance may deny them the use of important habitat, and thus may result in an adverse effect in the form of harm by significant habitat modification. Your November 20, 2009, letter states that the studies conducted to date have not recorded the presence of any actual threatened or endangered species. The fact that a threatened or endangered species was not seen on the site during the survey period, particularly for a rare and migratory species, is not sufficient evidence to suggest that the species will not utilize the available habitat. Whooping cranes use migration stopover habitat opportunistically and may not use the same stopovers annually. Whooping cranes often stop wherever they happen to be late in the day when they find conditions no longer suitable for migration. This tendency can make for a very unpredictable pattern of stopover use, depending on daily weather conditions. The Service recommends that eDC identify and map all wetlands at the project site within ½ mile of all turbines for potentially suitable whooping crane stopover habitat, and analyze the potential effects to migrating whooping cranes from loss of use of this habitat for migration stopovers. With the available information, the Service believes that an adverse effect to whooping cranes is likely. Therefore, the Service recommends that eDC not commence project construction until they have applied for and receive an Incidental Take Permit (ITP), if needed, from the Service in accordance with Section 10(a)(1)(B) of the ESA, pursuant to a regional or project-specific HCP. Take of federally listed species without an ITP is a violation

of Section 9 of the ESA. Violations of the ESA can result in criminal penalties of up to one year in prison and fines of up to \$100,000 for individuals and \$200,000 for corporations. Your letter states that eDC has joined the AWEA Programmatic Habitat Conservation Plan as suggested by the Service; however, you also indicate that construction for this project is anticipated to begin in 2011 with a commercial operation date of December 31, 2011. With a projected 2013 completion date for the AWEA HCP, compliance with the ESA in the interim appears problematic. We recommend further discussions on this issue before proceeding with project plans.

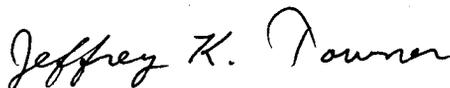
In our July 8, 2009, letter, we recommended that eDC, in concert with the Service, help to ensure that the proposed project proceed with as little impact to migratory birds as possible by, among other steps, developing an Avian and Bat Protection Plan (ABPP). That letter also outlined the Service policy related to compliance with the MBTA. According to the MBTA, a person, association, partnership, or corporation which violates the Act or its regulations is guilty of a misdemeanor and subject to a fine of up to \$15,000 and/or six months in prison

Your November 20, 2009, letter states that eDC is committed to coordinating efforts to minimize impacts to wildlife and sensitive habitat(s) with the Service, but your letter does not indicate which, if any, of the recommendations provided by the Service will be implemented prior to the commercial operation date of the project. Our recommendations, if followed, provide to the extent possible, assurances that the company is in compliance with the relevant federal wildlife laws during project construction and operation. We suggest eDC inform the intended owner/operator (Northern States Power) of their potential liability should the facility be built and operated without acknowledgement from the Service that the project is in compliance with the wildlife laws cited above.

The November 20, 2009, letter states that eDC commissioned several environmental studies including a bat and avian assessment, threatened and endangered species assessment, sensitive habitat assessment, and wetland delineations. The Service has not seen the results of these studies and, therefore, we can make no judgments as to their validity or offer any further recommendations based on the studies' conclusions.

Thank you for the opportunity to comment. If you require further information as project planning proceeds, please contact Terry Ellsworth of my staff, or contact me directly, at (701) 250-4481, or at the letterhead address.

Sincerely,



Jeffrey K. Towner
Field Supervisor
North Dakota Field Office

cc: Special Agent, LE, Bismarck
Project Leader, Kulm WMD
ND Public Service Commission, Bismarck
Director, ND Game & Fish Department, Bismarck
(Attn: M. McKenna)
Minnesota Public Utilities Commission, St. Paul
Xcel Energy (Northern States Power), Minneapolis