



United States Department of the Interior

FISH AND WILDLIFE SERVICE

Ecological Services
3425 Miriam Avenue
Bismarck, North Dakota 58501



DEC 15 2010

RECEIVED

DEC 15 2010

North Dakota Public Service Commission
600 East Boulevard, Dept. 408
Bismarck, North Dakota 58505

PUBLIC SERVICE COMMISSION

Dear Commissioners:

The U.S. Fish and Wildlife Service (Service) previously provided oral testimony on the Border Winds Energy Project (Border Winds) to the North Dakota Public Service Commission (Commission) during the November 3, 2009, Public Hearing for the project. These comments are in response to updated project information provided to the Service in a September 29, 2010, letter from Westwood Professional Services (Westwood) on behalf of Sequoia Energy U.S., Inc. (Sequoia). The updated project is for a 150 megawatt (MW) project located entirely in Rolette County, including 66 wind turbines, each with a capacity of 2.4-MW and associated infrastructure (ie. access roads, collection lines, substation, and O&M facility). 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.), 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).

The updated information on the proposed Border Winds project indicates that Sequoia has taken steps to reduce potential project impacts on wildlife resources during their project planning process. The Border Winds project as currently proposed has reduced the project footprint from 122 square miles to 52.5 square miles, is located within previously disturbed cropland, will avoid wetland impacts, includes only minor impacts to native prairie from improvement of existing roads, will remove potential migratory bird nesting habitat that would be disturbed by project construction prior to the nesting season, which extends from February 1 to July 15, and will install electrical collection lines underground. The minor project impact to native prairie due to the improvement of an existing road should not affect the Dakota skipper or Sprague's pipit, both of which are candidate species under the ESA. The Service believes that Westwood's assessment is reasonable that adverse effects to whooping cranes are considered unlikely to occur due to the fact that the proposed project will be located outside of the whooping crane migration corridor that includes 95 percent of the confirmed whooping crane sightings in North Dakota and since all electric collection lines will be installed underground. However, from the Service's perspective, the following outstanding issues should be resolved prior to project construction.

The information we received indicated that the proposed Border Winds project included two turbines on Service wetland easement lands and two additional locations where electrical cables

cross Service wetland conservation easement lands. Our coordination with Neil Powers, Wetland District Manager, J. Clark Salyer National Wildlife Refuge, indicates that there are additional Border Winds project features that are proposed to be constructed on Service conservation easement lands. Mr. Powers provided Westwood with information related to the easement lands potentially affected by the proposed project in a letter dated October 13, 2010. The Service recommends that Border Winds coordinate the final proposed location of project facilities (turbines, cabling, and roads) with the J. Clark Salyer Wetland Management District once they have been staked in the field, but prior to project construction, to ensure that project facilities are properly sited to avoid all impacts to wetlands protected by Service easements.

The Service has recommended that Border Winds conduct post-construction wildlife mortality monitoring studies. Sequoia has stated that they are considering conducting some monitoring at Border Winds; however, they believe that private studies of single projects contribute relatively little information toward answering questions about the effects of site selection, layout, turbine design, operation, and habitat alteration on avian mortality. The Service views post-construction monitoring as a valid means to assess the risk to wildlife from wind power facilities with the purpose of eliminating or reducing that risk, and to inform decisions on future wind facility development. In order to accomplish this purpose, it is essential to quantify both the use of a site (pre-construction surveys) as well as the mortality (post-construction monitoring) associated with that use. The information gathered can then be used to compare fatality rates among wind facilities with similar characteristics to determine patterns and broader landscape relationships. Wind energy developers and agencies can use this information to guide future wind facility siting decisions with a view to avoid placing wind facilities in areas with a high risk of wildlife mortality and habitat modification. (This is not to discount the value of scientifically-designed research efforts, which may be attempting to answer different questions than those of project-specific monitoring programs.) Therefore, we have reiterated our recommendation that Border Winds conduct post-construction mortality monitoring studies. We also recommended that the study protocols and reporting requirements for these studies be coordinated with the Service's North Dakota Field Office.

Sequoia has stated to us that they are currently reviewing how an Avian and Bat Protection Plan (ABPP) would fit into their overall operation plan. While the design of the proposed project can reduce the impact of project construction on wildlife, the Service has strongly recommended to Sequoia that a project specific ABPP be developed to address potential project operational impacts to birds and bats. Some of the things that the Service looks for in an ABPP are typically a statement of company policy confirming the company's commitment to work cooperatively towards the protection of migratory birds and bats; identification of the process under which the company will obtain and comply with all necessary permits, including, but not limited to, nest relocation, temporary possession, depredation, salvage/disposal, and scientific collection; discussion of the company's plan for monitoring and reporting all incidents of avian or bat injury or mortality; a commitment to make all reasonable efforts to construct and modify infrastructure to reduce the incidence of avian and bat mortality; a mechanism to review existing practices, ensuring quality control and allowing for adaptive management; and a plan for providing adequate training for all appropriate utility personnel. A robust ABPP reporting system, that includes

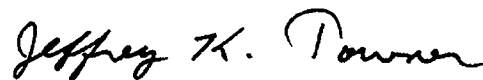
annual reports to the Service, is important to help pinpoint areas of concern by tracking both the specific locations where mortalities may be occurring, as well as the extent of such mortalities and the remedial actions taken/planned to address identified problem areas

The Service has informed Sequoia of the following policy on prosecutorial discretion with respect to take of migratory birds. The MBTA prohibits the taking, killing, possession, transportation, and importation of migratory birds, their eggs, parts, and nests, except when specifically authorized by the Department of the Interior. While the MBTA has no provision for allowing unauthorized take, the Service realizes that some birds may be killed by wind power facilities even if all reasonable measures to protect them are used. The Service's Office of Law Enforcement carries out its mission to protect migratory birds through investigations and enforcement, as well as by fostering relationships with individuals, companies, and industries that have taken effective steps to minimize their impacts on migratory birds, and by encouraging others to enact such programs. It is not possible to absolve individuals, companies, or agencies from liability even if they implement avian mortality avoidance or similar conservation measures. However, the Office of Law Enforcement focuses its resources on investigating and prosecuting individuals and companies that take migratory birds without regard for their actions or without following measures to avoid take. Without a formal ABPP that has been fully coordinated with the Service, we believe that Sequoia has not taken all reasonable measures available to them to minimize the potential impacts to migratory birds and bats from the construction and operation of the Border Winds project.

We wish to stress the importance of Sequoia implementing the recommendations provided by the Service, and of coordinating in a substantive and ongoing way with this office as their project planning proceeds. The way in which Sequoia implements the Service's recommendations will determine whether or not the Service can provide the Border Winds project with our certification that the project is in compliance with the federal wildlife laws that administer.

Thank you for the opportunity to comment on the proposed Project. If you require further information, please contact Terry Ellsworth of my staff, or me, at (701) 250-4481, or at the letterhead address.

Sincerely,



Jeffrey K. Towner
Field Supervisor
North Dakota Field Office

cc: Refuge Manager, J. Clark Salyer NWR
(Attn: N. Powers)
Sequoia Energy U.S., Inc., Killarney, MB
(Attn: I. Witherspoon)