



United States Department of the Interior



FISH AND WILDLIFE SERVICE

Ecological Services
3425 Miriam Avenue
Bismarck, North Dakota 58501

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PUBLIC SERVICE COMMISSION

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

Re: Case No. PU-08-932, enXco
Development Corporation Merricourt Wind
Power Project, Siting Application

Dear Commissioners:

The U.S. Fish and Wildlife Service (Service) is submitting these comments for consideration by the North Dakota Public Service Commission (Commission) in regards to Case No. PU-08-932, the siting application for enXco Development Corporation's (enXco) proposed Merricourt Wind Power Project (Project). 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 Service is concerned that the proposed project could affect endangered whooping cranes indirectly through habitat modification and threatened piping plovers directly through collisions with turbines and/or guy wires on meteorological towers. In numerous meetings and correspondence, the Service has advised enXco and their consultants (Kadmas, Lee, and Jackson, Inc.) (KLJ) that a Habitat Conservation Plan (HCP) and an application for an Incidental Take Permit (ITP) should be prepared and submitted to the Service if they believe that the construction and/or operation of the proposed Project could result in take of listed species. During a June 11, 2009, Corps of Engineers' Interagency Coordination Meeting and in our July 8, 2009, letter, the Service informed enXco and their consultants of the potential for whooping cranes and/or piping plovers to be present in the proposed project area and the option of preparation of an HCP if incidental take was anticipated. Further, the Service encouraged enXco to participate in the Bi-Regional Whooping Crane and Lesser Prairie Chicken HCP effort that is underway to provide wind developers with protection from the prohibitions of Section 9 of the ESA for wind developments located within the whooping crane migration corridor. In our February 5, 2010, letter, the Service recommended that enXco not commence project construction until they had applied for and received an ITP, if needed, from the Service in accordance with Section 10(a)(1)(b) of the ESA. Finally, in a November 16, 2010, meeting the Service, reiterated that we believe that

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take of piping plovers due to turbine strikes is likely at some point in the life of the project, and that enXco should prepare a project specific HCP or get ESA coverage under the Bi-Regional HCP to cover them for any take.

The Service has recommended that enXco develop an Avian and Bat Protection Plan (ABPP) 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 enXco 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 enXco 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 Merricourt Wind Energy Project.

We wish to stress the importance of enXco 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 enXco implements the Service's recommendations will determine whether or not the Service can provide the Merricourt Wind Energy Project with our certification that the project is in compliance with the Federal wildlife laws that we administer. At this writing, enXco has not completed the actions the Service has recommended, and therefore

any take of migratory birds or threatened or endangered species that occurs is not exempted from the prohibitions against unauthorized take.

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,

A handwritten signature in black ink that reads "Jeffrey K. Towner". The signature is written in a cursive style with a large, prominent 'J' and 'T'.

Jeffrey K. Towner
Field Supervisor
North Dakota Field Office