


WINTHROP WEINSTINE
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April 12, 2011

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VIA E-MAIL AND U.S. MAIL

Ms. Ilona Jeffcoat-Sacco
Executive Secretary
North Dakota Public Service Commission
600 E. Boulevard Avenue, Dept. 408
Bismarck, ND 58505-0480

*RE: In the Matter of enXco Development Corporation Merricourt Wind Power Project –
Dickey and McIntosh Counties, North Dakota Siting Compatibility Application
ND PSC Case No. PU-08-932*

Dear Ms. Jeffcoat-Sacco:

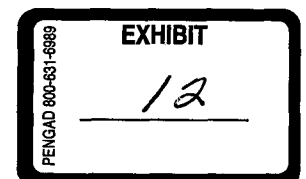
As the North Dakota Public Service Commission (“NDPSC”) is aware, on April 1, 2011, Northern States Power Company (“NSP”), a Minnesota Corporation and wholly-owned subsidiary of Xcel Energy purported to “cancel” the Merricourt Wind Power Project (“Project”) by filing a termination notice with enXco Development Corporation (“eDC”), seeking to terminate the purchase agreement between NSP and eDC regarding the Project. NSP has publicly stated that it took this step due to avian concerns. However, NSP’s termination notice also stated that it took this step, in part, due to the lack of a Certificate of Site Compatibility.

eDC vigorously disputes the termination notice it has received from NSP. eDC continues to seek a Certificate of Site Compatibility for the Project from the NDPSC, currently scheduled for further hearing on April 15, 2011. Receipt of a Certificate of Site Compatibility will resolve any alleged permitting issue, as eDC works to resolve its further disputes with NSP.

In addition, while NSP purports to rely on avian issues as part of its rationale for “cancelling” the Project, eDC continues to work actively on these issues and considers the required answers to have been provided to NSP. In this regard, please find the most recent correspondence from the United States Fish and Wildlife Service regarding this Project, attached, together with the April 6, 2011 Addendum to Biological Conditions and Effects Summary. eDC and the United States Fish and Wildlife Service continue their discussions on these matters and eDC will keep the NDPSC apprised of the status of those discussions.

96 **PU-08-932** Filed: 5/12/2011 Pages: 10
Exhibit 12

enXco Development Corporation



Ms. Ilona Jeffcoat-Sacco

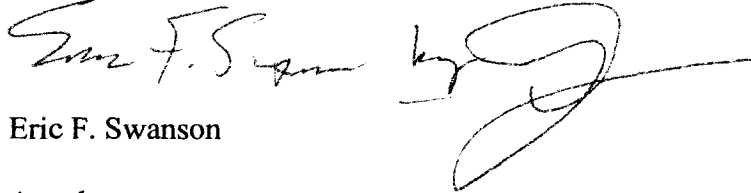
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Thank you for your attention to this matter and please do not hesitate to contact me if you have any questions regarding this matter. eDC looks forward to discussing the Merricourt Project in further detail at the April 15, 2011 hearing in Ellendale.

Very truly yours,

WINTHROP & WEINSTINE, P.A.

A handwritten signature in black ink, appearing to read "Eric F. Swanson", with a long horizontal flourish extending to the right.

Eric F. Swanson

Attachment

Cc: Jerry Lein
Chris Sternhagen
Service List

5924153v2

**Addendum to Biological Conditions and Effects Summary
Merricourt Wind Power Project
April 6, 2011**

I. Introduction

The purpose of this Addendum is to present avoidance, minimization, mitigation and research measures that are intended to reduce the potential lethal take of piping plovers from operations at the Merricourt Wind Power Project. The Addendum also contains proposed compensatory mitigation for impacts to whooping crane stopover habitat, operational constraints, and research on piping plover behavior and habitat use. enXco will work closely and collaboratively with USFWS and is committed to implementing all measures described herein. Additionally, this outline includes updated habitat compensation funding totals for the purpose of offsetting potential disruption of habitat use to whooping cranes and piping plovers.

The measures contained in this outline will function as the basis for a site specific Habitat Conservation Plan (HCP) and application for Incidental Take Permit (ITP) under Section 10 of the Endangered Species Act as well as an addendum to the *Merricourt Wind Power Project Biological Conditions and Effects Summary* (KL&J 2010) which analyzed the results of the field surveys, desktop assessments and other biological research efforts conducted to date, assessed potential impacts to listed species and other wildlife, and provided commitments to avoid, minimize, and mitigate potential impacts to the species considered at risk by the project. The final contents of an HCP may vary from this Addendum.

enXco believes, that although the likelihood of lethal take of piping plovers is low, that based on advice from the USFWS, adequate measures need to be taken to avoid and minimize to the maximum extent possible the potential for take, and that an HCP and application for ITP should be undertaken as soon as possible to ensure maximum protection for the species and to provide legal take authorization. On that basis, enXco has agreed to produce a project-specific HCP and application for an Incidental Take Permit (ITP) and ABPP (Avian and Bat Protection Plan). Prior to obtaining an ITP, enXco is proposing to implement the measures outlined below to reduce the potential for lethal take of piping plovers.

II. Background

The piping plover is a small plover that is 17–18 cm long, with a wingspread of 35.6–39.4 cm and weighs about 43–63 g. Sexes are similar in appearance and size (Elliott-Smith and Haig 2004). Plumage of adult birds is mostly a sandy color with a white underside. The head is mostly white with a narrow black band above the forehead and across the chest which is present during the breeding season. Juvenile plumage is acquired gradually over age (15–30 days) where feathers of crown and mantle are smoke gray, broadly tipped with pinkish buff, and no black bands on forehead and neck are present (Elliott-Smith and Haig 2004).

The piping plover was listed as endangered in the Great Lakes region and threatened everywhere else in the United States by the USFWS in 1985 via the Endangered Species Act (ESA). USFWS recognizes three separate breeding populations of piping plovers: Atlantic Coast (threatened), Great Lakes (endangered), and Northern Great Plains (threatened).

The Northern Great Plains breeding population (NGPBP) is the population that occurs within North Dakota. Piping plovers in this breeding population generally arrive in North Dakota in mid-to-late April through early May during spring migration and leave the state between mid-July and August, during fall

migration. (The entire population has typically reached its wintering grounds by early-September). Breeding and nesting activities in North Dakota occur between the spring and fall migration periods. Critical habitat was designated in 2002 for the Northern Great Plains breeding population, which includes prairie alkali wetlands and inland and reservoir lakes, totaling approximately 183,422 acres and portions of four rivers totaling approximately 1,207.5 river miles in MT, SD, ND, NE, and MN. The Nebraska portion of the critical habitat was vacated by the U.S. District Court on October 13, 2005 (USFWS 2009).

While there have been no confirmed fatalities at wind farm sites, piping plovers have been documented colliding with human made structures such as transmission lines. In addition, many species of birds, including passerines, are susceptible to turbine strikes, and it is reasonable to assume that piping plovers are similarly susceptible. Therefore, the following measures will be implemented at the Merricourt Wind Power Project to further reduce, and, ideally, completely eliminate the potential of fatality risk to piping plovers from the operating turbines. The process described is a series of decision points or steps that will be taken on an annual basis. Specifically, it outlines how species presence/absence at the site will be documented and what minimization and mitigation measures will be taken if there are breeding birds in proximity to the turbines, as well as turbine curtailment during periods of high risk to plovers as outlined below. This process is part of an overall effort to significantly reduce the potential for take at the Merricourt Wind Power Project. In addition, enXco will begin the process of producing a project-specific HCP, as well as an ABPP.

III. Measures to Identify Use of the Project Area by Piping Plovers

A. Step One: Where to Search

- 1) No critical habitat for piping plover has been designated within the wind farm project boundaries; the nearest turbine is approximately 2.1 miles away from designated critical habitat. This designated critical habitat, known as McIntosh 2, is located in the SW $\frac{1}{4}$ of Section 13, SE $\frac{1}{4}$ of Section 14, E $\frac{1}{2}$ of Section 23, and the W $\frac{1}{2}$ of Section 24, T130N, R68W. McIntosh 2 will be surveyed for piping plover nesting habitat and species presence each year.
- 2) All piping plover potential nesting habitat within 0.5 miles of turbines will be searched. Based on best available data on piping plover foraging characteristics, which suggests that piping plovers forage at or in close proximity to their nesting sites (Elliott-Smith and Haig 2004; Johnson et al 1997), a 0.5-mile search radius is expected to encompass the majority of the potential flight range from nesting areas to foraging areas.
 - a. Potential nesting habitat will be defined based on soil criteria (saline soils) and review of past aerial photographs, as outlined in the *Merricourt Wind Power Project Biological Conditions and Effects Summary* (KL&J 2010). At this time, potential nesting habitat has been identified in the NE $\frac{1}{4}$ of Section 12, T130N, R67W; the N $\frac{1}{2}$ of Section 23, T131N, R67W; and the NE $\frac{1}{4}$ of Section 27, T131N, R67W. Merricourt Wind Power Project will fully coordinate with the USFWS, North Dakota Field Office areas considered potential nesting habitat prior to the survey commencing.
 - b. If nesting birds are found in the areas described above, other wetlands/lakes within 0.5 miles of nesting areas will be searched for foraging birds based on flight path information collected during observation surveys.
- 3) During fall migration, all wetlands within 0.5 mile of turbines and with exposed sand/mud beaches greater than 3 m from vegetation to water will be surveyed for migrating piping plovers.
- 4) All biologists conducting piping plover survey work will obtain Section 10(A)(1)(B) permits from the Service, if needed, prior to starting the surveys.

- 5) All survey information will be shared with USFWS. If piping plovers are identified during any survey enXco will contact the NDFO immediately. If no piping plovers are identified during the surveys enXco will provide the NDFO with a written report outlining the survey efforts each month during the survey period.

B. Step Two: When to Search

- 1) Areas described in Step One will be searched every year after construction, regardless of water levels and habitat conditions as described below, until such time as an ITP is obtained.
- 2) Until such time as an ITP is obtained, three annual surveys will be conducted, one in late March, one in mid-April, and one in early-May in each area as defined above to document if there is potential habitat (e.g., bare, sparsely vegetated shoreline areas). If no habitat is present, no further surveys will be performed for that year. Multiple surveys to look for potential habitat are planned each year to account for changing habitat conditions when birds may be establishing nests or during re-nesting attempts. Based on historic information, nests are generally established from late April to mid June.
- 3) In years when potential habitat is present based on the March, April, or May habitat survey, surveys will be conducted three times per week within potential nesting habitat to determine presence/absence. All surveys will be done between April 15 (assuming habitat is documented prior to April 15) and June 15.
- 4) During the fall piping plover migration period (July 1–August 31), surveys will be made three times per week of the potential habitat by a biologist. Spring migration surveys are not planned due to the typical piping plover migration pattern in which they appear to fly directly from their wintering areas to summer breeding areas.
- 5) Operations personnel will be trained annually to identify piping plovers and instructed to watch for species presence/absence during routine operations and maintenance duties. If plovers are identified by operations personnel, they will immediately leave the area and notify the Merricourt Wind Power Project environmental staff or designated contact person, and the Field Supervisor, North Dakota Field Office, USFWS, so that actions discussed in Step Four can be implemented.
- 6) All survey information will be shared with USFWS.

C. Step Three: If Potential Habitat or Piping Plovers are Not Present. – Maintain annual search parameters as described above in future years.

IV. Measures to Minimize Potential Take of Piping Plovers.

During the above survey's nesting or migrant piping plovers will be observed from a vantage point without disturbing the plovers to document where birds are foraging, which direction they are flying, and flight height information.

- 1) The project will be curtailed for a maximum of 255,216MW-hours if species presence is confirmed during the above described surveys or incidental observation by maintenance personnel, as well as during the major migration periods described above until such time as an Incidental Take Permit is issued for the project. For practical consideration, based on the estimated annual production of the project, 255,216MW-hours are expected to be not less than 4,090 hours at full project curtailment. Curtailment may be applied for the entire wind

project or specific turbines, during periods when it will be most effective, such as the spring (April 10 – May 15) and fall (July – August 31) migration periods, periods when piping plover may use the project area for foraging or nesting, when piping plovers are known to be present in the area or a combination of the above. 255,216MW-hours represent the maximum, financially practicable amount of curtailment that could be implemented for minimization of potential, direct lethal take of piping plovers or other species of interest. Additionally project curtailment in excess of 255,216MW-hours would modify the scope of the project in a manner that is adverse to the projects stated purpose and therefore the project will not exceed the maximum, financially practicable amount of curtailment.

- 2) If piping plovers are detected, either through planned surveys or incidental observation by maintenance personnel, all project turbines will be curtailed immediately and enXco will contact the NDFO. Turbines will remain curtailed until subsequent surveys indicate that the species has left the Project Area and has not returned for a period of 24 consecutive hours. If during subsequent observational surveys it is determined that piping plovers have not utilized portions of the Project Area for a period of not less than 24 consecutive hours, turbines within these portions of the Project Area may be restarted. enXco will notify the NDFO prior to restarting any turbine operations.

V. Mitigation and Research to Implement in Conjunction with Measures to Minimize Take

In addition to avoidance measures proposed the Merricourt Wind Power Project will implement several habitat conservation, habitat management, and research measures that will benefit the local and overall piping plover population. The basis of these measures will also be included in the project-specific HCP that Merricourt will produce.

A. Habitat Conservation – As outlined in the *Merricourt Wind Power Project Biological Conditions and Effects Summary* (KL&J 2010), the total monetary value of affected wetlands would be provided by enXco to purchase fee simple property with wetlands and/or develop and acquire conservation easements of no less than 30 years (life expectancy of the project) on wetlands that may provide whooping crane and piping plover habitat. enXco's intent is not necessarily to provide acre-for-acre wetland mitigation; rather, the calculations below are used to establish an appropriate level of funding for conservation efforts, based on enXco's determination of the adverse effect caused to whooping cranes from the construction and operation of the Merricourt Wind Power Project. enXco intends to work with a third-party on habitat conservation efforts, in conjunction with the USFWS, to determine the most effective use for the habitat conservation funds. Since submittal of the Biological Conditions and Effects Summary to USFWS, the following revisions to the methodology for habitat compensation have been made:

- 1) Revisions of affected acres: Since the original assessment, revisions to the turbine layout have been made. Therefore, the quantification of potential whooping crane and piping plover habitat where use may be disrupted was reassessed. Based on this reassessment, approximately 1,710.64 acres of wetlands (potential whooping crane roosting habitat) and approximately 13.93 acres of potential piping plover nesting habitat occur within 0.5 miles of a wind turbine or associated access road.
- 2) Increased land value per acre: Land values for McIntosh County were originally used to determine the weighted average land value. However, this has been revised to be based on Dickey County land values for cropland and pastureland which has a higher land value. These values are based on land sales and USDA National Agricultural Statistics data (2010). ***Please refer to Table 1, Revised Weighted Average Land Value.***

- 3) Revised total value of affect wetlands: Based on conversations with USFWS (Terry Ellsworth), transmission lines were excluded as being classified as a previous disturbance. Additionally, township roads within 0.5 miles of a wetland, rather than 0.25 miles of a wetland, are considered to be a previous disturbance. This modified the land value calculations, as did the reassessment discussed in V.A(1). **Please refer to Table 2, Revised Total Value of Affected Wetlands.**

Table 1: Revised Weighted Average Land Value

Land Classification	Proportion of Project Area	Land Value/Acre	Percent of Project Area x Land Value/Acre
Cropland	33.8%	\$1,500.00	\$507.00
Pastureland	66.2%	\$800.00	\$529.60
Weighted Average Land value			\$1,036.60

Table 2: Revised Total Value of Affected Wetlands

Disturbance Level	Acres	% of Land Value	Land Value / Acre	Value of Affected Wetlands
No Disturbance	218.92	100%	\$1,036.60	\$226,932.47
One Disturbance	1,117.93	75%	\$777.45	\$869,134.68
Two Disturbances	373.79	50%	\$518.30	\$193,735.36
Three Disturbances	0.00	25%	\$259.15	\$0.00
TOTAL	1,710.64			\$1,289,802.51

B. ABPP and Habitat Conservation Plan (HCP) Proposed Schedule – enXco commits to submitting a draft ABPP to the NDFO. A HCP schedule will be submitted to the NDFO no later than April 15, 2011.

References

- Elliott-Smith, Elise and Susan M. Haig. 2004. Piping Plover (*Charadrius melodus*), The Birds of North America Online (A. Poole, Ed.). Ithaca: Cornell Lab of Ornithology; Retrieved from the Birds of North America Online: <http://bna.birds.cornell.edu/bna/species/002>
- Johnson, R.R., Adolf, S.L., and Higgins, K.F. 1997. Life history of the piping plover in the Northern Great Plains and Great Lakes Region.
- Kadmas, Lee & Jackson (KL&J). 2010. Merricourt Wind Power Project Biological Conditions and Effects Summary.
- U.S. Fish and Wildlife Service. 2009. Piping plover, 5-year review: Summary and evaluation. Prepared by the Northeast Region, Hadley, Massachusetts and the Midwest Region's East Lansing Field Office, Michigan.



United States Department of the Interior

FISH AND WILDLIFE SERVICE

Ecological Services
3425 Miriam Avenue
Bismarck, North Dakota 58501



APR 8 2011

Mr. Chris M. Sternhagen
Regional Development Manager
enXco
10 Second Street NE, Ste. 107
Minneapolis, Minnesota 55413

Dear Mr. Sternhagen:

The U.S. Fish and Wildlife Service (Service) has reviewed the finalized addendum to your Biological Conditions and Effects Summary (the "Addendum" attached to Chris Sternhagen's email of April 6th, 2011) which analyzed the results of the field surveys, desktop assessments and other biological research efforts conducted to date, assessed potential impacts to listed species and other wildlife, and provided commitments to avoid, minimize and mitigate potential impacts to the species considered at risk by the proposed Merricourt Project.

With respect to the Whooping Crane; assuming enXco or its successor in interest follows through on the commitments enXco has made in the Addendum, including the commitment to offset the loss of suitable habitat by funding suitable habitat acquisition through the North Dakota Natural Resource Trust or similar organization as provided for in the Addendum prior to the project's construction, we can conclude that your proposed measures reasonably compensate for the adverse effect on the species and that the impact of the Merricourt project is unlikely to rise to the level of take.

With respect to the piping plover and based on the project design as proposed, it is apparent that the project has avoided designated critical habitat for the species as previously recommended in our July 8, 2009, letter to Kadmas, Lee & Jackson. However, avoidance of this critical habitat alone does not address the possibility of direct, lethal take of piping plovers that may migrate through or forage within the project area. Acknowledging that many species of birds, including passerines, are susceptible to turbine strikes, it is reasonable to assume that piping plovers are similarly susceptible and we must err on the side of the species as is our obligation under the provisions of the Endangered Species Act ("ESA"). On that basis, we understand that enXco has agreed to produce a project-specific Habitat Conservation Plan ("HCP") and application for an Incidental Take Permit ("ITP") under Section 10 of the ESA as well as an Avian and Bat Protection Plan ("ABPP") and that enXco is proposing to implement curtailment measures as outlined in the Addendum to reduce and potentially eliminate the potential for lethal take of piping plovers until such time as an ITP can be obtained.

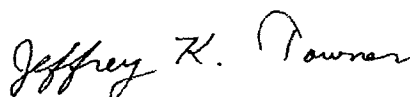
It is also our understanding based on our discussions, that provisions for Habitat Management and Research may be further developed and included in the HCP.

enXco has also committed to developing an Avian and Bat Protection Plan ("ABPP") for the Merricourt Wind Power Project. Producing and implementing an ABPP that is approved by the Service is one way that enXco can demonstrate they have taken reasonable measures to avoid and minimize take of migratory birds. The Service has received a draft ABPP for the Merricourt Wind Power Project which is currently under review.

We have reviewed the proposed curtailment measures and believe that if implemented as disclosed in the Addendum, they will reduce the likelihood of lethal take of piping plover. enXco should recognize, however, that any unauthorized take of federally-listed species is a violation of the ESA, and any unauthorized take of any migratory bird is a violation of the Migratory Bird Treaty Act (MBTA). Implementing an approved ABPP is one way of reducing the potential of prosecution under the MBTA.

Thank you for your cooperation. The North Dakota Field Office looks forward to continuing to work with you. Please call me or Terry Ellsworth of my staff with any questions at (701) 250-4402, or email me at Jeffrey_Towner@fws.gov.

Sincerely,

Handwritten signature of Jeffrey K. Towner in cursive script.

Jeffrey K. Towner
Field Supervisor
North Dakota Field Office