



# United States Department of the Interior



## FISH AND WILDLIFE SERVICE

Ecological Services  
3425 Miriam Avenue  
Bismarck, North Dakota 58501

OCT 5 2010

Mr. William F. McCarthy, Project Manager  
E3 Environmental, LLC  
817 Vandalia Street, Suite 100  
St. Paul, Minnesota 55114

EXHIBIT NO. Appendix 10

Re: Bear Paw Energy – Garden Creek Gas  
Plant, McKenzie County, North  
Dakota

Dear Mr. McCarthy:

This is in response to your letter dated August 16, 2010, concerning the development of a gas processing plant to be located in McKenzie County, North Dakota. The Garden Creek Gas Plant project is proposed by Bear Paw Energy, LLC (BPE) and would encompass approximately 80 acres.

We offer the following comments under the authority of and in accordance with the Migratory Bird Treaty Act (16 U.S.C. 703 et seq.) (MBTA), the Bald and Golden Eagle Protection Act (16 U.S.C. 668-668d, 54 Stat. 250) (BGEPA), and the Endangered Species Act (16 U.S.C. 1531 et seq.) (ESA).

### High Value Habitat Avoidance

As part of the National Wildlife Refuge System, the U.S. Fish and Wildlife Service (Service) administers fee title Refuge and Waterfowl Production Areas, as well as wetland and grassland easements, throughout North Dakota. A review of our county plat maps indicates no Service property interests are located near the project area.

The Migratory Bird Treaty Act prohibits the taking, killing, possession, and transportation, (among other actions) of migratory birds, their eggs, parts, and nests, except when specifically permitted by regulations. While the MBTA has no provision for allowing unauthorized take, the Service realizes that some birds may be killed during construction even if all known reasonable and effective measures to protect birds 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 avoid take of migratory birds, and by encouraging others to implement measures to avoid take of migratory birds. It is not possible to absolve individuals, companies, or

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agencies from liability even if they implement bird mortality avoidance or other similar protective measures. However, the Office of Law Enforcement focuses its resources on investigating and prosecuting individuals and companies that take migratory birds without identifying and implementing all reasonable, prudent, and effective measures to avoid that take. Federal agencies are encouraged to work closely with Service biologists to identify available protective measures when developing project plans and/or avian protection plans, and to implement those measures prior to/during construction or similar activities.

The BGEPA, prohibits anyone, without a permit issued by the Secretary of the Interior, from taking bald eagles, including their parts, nests, or eggs. The Act provides criminal and civil penalties for persons who take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import, at any time or any manner, any bald eagle ... [or any golden eagle], alive or dead, or any part, nest, or egg thereof. The Act defines take as pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, molest or disturb. "Disturb means to agitate or bother a bald or golden eagle to a degree that causes, or is likely to cause, based on the best scientific information available, 1) injury to an eagle, 2) a decrease in its productivity, by substantially interfering with normal breeding, feeding, or sheltering behavior, or 3) nest abandonment, by substantially interfering with normal breeding, feeding, or sheltering behavior." In addition to immediate impacts, this definition also covers impacts that result from human-induced alterations initiated around a previously used nest site during a time when eagles are not present, if, upon the eagles return, such alterations agitate or bother an eagle to a degree that injures an eagle or substantially interferes with normal breeding, feeding, or sheltering habits and causes, or is likely to cause, a loss of productivity or nest abandonment.

Your letter contains measures that BPE has committed to implementing regarding migratory birds, specifically:

BPE will initiate construction on or about September 1, 2010, and maintain an active construction site through plant commissioning and final restoration which is anticipated to occur approximately 18 months later. The proposed schedule would avoid the 2010 breeding season and migrants returning to the area would encounter an active construction site in the 2011 and 2012 breeding seasons, which would serve as a deterrent to breeding birds.

The Service believes that BPE's commitment to implement the aforementioned measures does demonstrate compliance with the MBTA.

### **Threatened and Endangered Species**

A list of federally endangered and threatened species that may be present within the proposed project's area of influence is enclosed. This list fulfills requirements of the Service under Section 7 of the ESA. This list remains valid for 90 days.

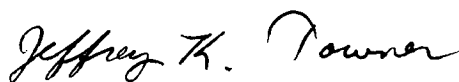
Potential habitat for the Sprague's pipit exists in Divide and Williams Counties. In 2010, the Sprague's pipit was determined to be a candidate species under the ESA. No legal requirement exists to protect candidate species; however, it is within the spirit of the ESA to consider these species as having significant value and worth protecting.

The Sprague's pipit is a species which both breeds and winters on the North American prairie. Their breeding range includes parts of Montana, North Dakota, South Dakota, and Minnesota in the United States. Sprague's pipits require grassland habitat for both breeding and wintering. They also require relatively large patches of prairie for nesting (estimated at between 170-776 acres). They avoid intrusive human features on the landscape, so the impact of a development can be much larger than the actual footprint of the feature. If Sprague's pipit habitat is present within the proposed project, and you intend to take precautions to avoid impacts to the pipit, please notify the Service for further coordination.

While the BPE and its consultants should perform their own determination of the potential impacts of the proposed project on federally listed species, from the information provided, the Service is not aware of federally listed species in the project area.

Thank you for the opportunity to comment on this project proposal. If additional information is required, please have your staff contact Heidi Riddle 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

Enclosure

FEDERAL THREATENED, ENDANGERED, AND CANDIDATE SPECIES  
AND DESIGNATED CRITICAL HABITAT FOUND IN  
MCKENZIE COUNTY, NORTH DAKOTA  
October 2010

**ENDANGERED SPECIES**

Birds

Interior least tern (*Sterna antillarum*): Nests along midstream sandbars of the Missouri and Yellowstone Rivers.

Whooping crane (*Grus Americana*): Aransas-Wood Buffalo Population (264 birds) occurs in North Dakota counties during spring and fall migration between breeding and wintering areas. Whooping cranes prefer to roost overnight in shallow open water wetland habitat with good visibility during migration stopovers.

Fish

Pallid sturgeon (*Scaphirhynchus albus*): Known only from the Missouri and Yellowstone Rivers. No reproduction has been documented in 15 years.

Mammals

Black-footed ferret (*Mustela nigripes*): Exclusively associated with prairie dog towns. No records of occurrence in recent years, although there is potential for reintroduction in the future.

Gray wolf (*Canis lupus*): Occasional visitor in North Dakota. Most frequently observed in the Turtle Mountains area.

**THREATENED SPECIES**

Birds

Piping plover (*Charadrius melodus*): Nests on midstream sandbars of the Missouri and Yellowstone Rivers and along shorelines of saline wetlands. More nest in North Dakota than any other state.

## **CANDIDATE SPECIES**

### Birds

Sprague's Pipit (Anthus spragueii): Nests in native and planted grassland. Prefers patches of grassland at least 72 acres (29 hectares).

### Invertebrates

Dakota skipper (Hesperia dacotae): Found in native prairie containing a high diversity of wildflowers and grasses. Habitat includes two prairie types: 1) low (wet) prairie dominated by bluestem grasses, wood lily, harebell, and smooth camas; 2) upland (dry) prairie on ridges and hillsides dominated by bluestem grasses, needlegrass, pale purple and upright coneflowers and blanketflower.

## **DESIGNATED CRITICAL HABITAT**

### Birds

Piping Plover - Lake Sakakawea - Critical habitat includes sparsely vegetated shoreline beaches, peninsulas, islands composed of sand, gravel, or shale, and their interface with the water bodies.