



United States Department of the Interior

FISH AND WILDLIFE SERVICE

Ecological Services
3425 Miriam Avenue
Bismarck, North Dakota 58501

OCT 18 2011



RECEIVED

OCT 19 2011

PUBLIC SERVICE COMMISSION

Mr. Chris Taylor
Chief Development Officer
Element Power, Inc., North American Headquarters
421 SW Sixth Avenue, Suite 1000
Portland, Oregon 97201

Dear Mr. Taylor:

This is in regard to the planned development of the New Frontier Wind Project in McHenry County, North Dakota, by Element Power, Inc. 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).

Element Power representatives met with the U.S. Fish and Wildlife Service (Service), North Dakota Ecological Services representatives in Bismarck, North Dakota, on February 24, 2011, and August 24, 2011, to present the status and describe the nature of the planned development. On June 30, 2011, this office responded to Western Ecosystems Technology's, Inc. February 28, 2011, request for information on your behalf concerning the location of Service property interests, federally-listed resources, and any other resource that may be affected by the New Frontier Wind Project.

In addition to the request for information, Western Ecosystems Technology stated in their February 28th letter they were assisting Element Power with a Tier 2 analysis consistent with the Federal Advisory Committee recommendations. We advised against this approach in our June 30th response because we believe use of either the March 2010 Federal Advisory Committee Recommendations or the February 2011 U.S. Fish and Wildlife Service's draft Land-based Wind Energy Guidelines are inappropriate until such time as the guidelines are finalized. We therefore continue to recommend use of the 2003 guidelines. This is particularly important at the early stages of project development when evaluating and ranking potential development sites based upon the anticipated wildlife impact within a wind resource area (WRA). The 2003 guidelines offer an approved protocol developed by Federal, State, academic, and wind energy specialists to objectively evaluate and compare the risks to wildlife associated with each site under consideration by identifying reference sites with a maximum negative impact on wildlife resources within the WRA.

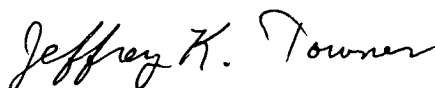
In addition, we advised Element Power of the legal requirement to avoid any unauthorized take of federally-listed threatened and endangered species and their habitats, bald and golden eagles, and migratory birds. If take of listed species and/or eagles is anticipated at the New Frontier Wind Project, we suggested you continue your participation with the Great Plains Wind Energy Programmatic Habitat Conservation Plan in order to apply for authorization for any anticipated take and incorporate the necessary measures to minimize the take of migratory birds and of bats.

Because there is no permit available to authorize the anticipated incidental take of migratory birds, the Service addresses any take through recommendations for prosecution on a discretionary basis. A decision as to whether to recommend prosecution is determined by the responsible party's history of working with the Service to avoid and minimize take of migratory birds. Thus, proactive effort towards avoiding and/or minimizing the unauthorized take of migratory birds is instrumental in the decision to prosecute pursuant to the MBTA. The unauthorized take of listed species, bald and golden eagles, and all migratory birds is subject to substantial penalties under the above Acts.

Element Power has chosen a project site for the New Frontier Wind Project without using the recommended approach contained in the 2003 guidelines and without prior coordination with the Service regarding survey purpose, methods, and/or intended use of the wildlife survey data. As a result, it is impossible to determine if an objective process was used in the site selection and if the wildlife surveys were used to inform the site selection in a manner that minimizes wildlife impacts.

Given the approach that Element Power has chosen, we can no longer offer you or your consultants additional staff time and effort in coordinating the development of the New Frontier Wind Project. You may contact Kevin Shelley of my staff or me with any questions you have about this letter at (701) 250-4402, or at the letterhead address.

Sincerely,



Jeffrey K. Towner
Field Supervisor
North Dakota Field Office

cc: Office of Law Enforcement, Bismarck
(Attn: R. Grosz)
North Dakota Public Service Commission, Bismarck, ND
North Dakota Game and Fish Department, Bismarck, ND
J. Clark Salyer Wetland Management District, Upham, ND
(Takala)
Western Ecosystems Technology, Inc., Bismarck, ND