



United States Department of the Interior

FISH AND WILDLIFE SERVICE

Ecological Services
3425 Miriam Avenue
Bismarck, North Dakota 58501



DEC 13 2011

RECEIVED

DEC 15 2011

Mr. Chris Taylor
Chief Development Officer
Element Power
421 SW Sixth Avenue, Suite 1000
Portland, Oregon 97204

PUBLIC SERVICE COMMISSION

Re: New Frontier Wind Energy Project, U.S. Fish
and Wildlife Service Comment Letter to
Element Power dated October 18, 2011

Dear Mr. Taylor:

We received your letter of December 2, 2011, written in response to our letter of October 18, 2011. This letter is written to ensure that Element Power fully understands the U.S. Fish and Wildlife Service's (Service) position on your proposed New Frontier project. We will address the points you raised in the same order they appear in your letter. 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.), Bald and Golden Eagle Protection Act (BGEPA) (16 U.S.C. 668-668d, 54 Stat. 250), and the Endangered Species Act (ESA) (16 U.S.C. 1531 et seq.).

While we understand companies' need for confidentiality on a pending sale or purchase of a project, this has no bearing on compliance with the Federal wildlife laws we administer. At the February 24, 2011, meeting with Element Power, we requested that Element Power be completely transparent with us on all aspects of your proposed project, and that we would maintain confidentiality on any proprietary information identified as such by Element Power, within the limits of the Freedom Of Information Act. Also, we had contact with Mr. Barry Jennings regarding this proposed site as early as May 27, 2008. Our email of that date attached the *2003 Interim Guidelines on Avoiding and Minimizing Wildlife Impacts from Wind Turbines* (Interim Guidelines), a jpg of the whooping crane migration corridor, and considerations for wind energy development. The body of the email stated in part: "Please take a look at this information and contact me to set up a meeting. The earlier we can get together to talk about you[r] project the better." Element Power was aware, or should have been aware of the concerns and issues that we raised with the project developer, prior to purchasing the project or proceeding with wildlife surveys and plans.

Some terms you use; i.e. "due diligence", "fatal flaws", and "significant or unmanageable risks to wildlife" are apparently terms of your own choosing and definition, and judgments made using these terms are entirely those of Element Power, without any input requested or provided by the Service. These terms are meaningless in the context of compliance with the Federal wildlife laws we administer.

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Letter comments on proposed project

With respect to our recommendation to use the Interim Guidelines, as you know, their use is voluntary. The "March 2010 Federal Advisory Committee (FAC) guidelines" to which you refer are not guidelines. The Committee made recommendations to the Service; guidelines that could supersede the existing Interim Guidelines have not yet been issued by the Service. Thus, as of this date there are no new guidelines for wind energy development that supersede the existing Interim Guidelines.

In addition, arguably the most critical part of the FAC recommendations was contained in Tier 1, in which several potential sites are compared before a site selection is made. This is to be done in conjunction with, and full participation by, the Service. By Element Power's own admission, you determined to begin the portion of your project planning that you would share with the Service in Tier 2 of the recommendations.

Element Power has indicated that you do not wish to produce a project-specific Habitat Conservation Plan (HCP). Your December 2 letter indicated your intention to comply with appropriate portions of the Great Plains Wind Energy HCP (GPWE HCP) when it is finalized, and that your Avian and Bat Protection Plan (ABPP) incorporates many of the conservation measures you anticipate will be included in the final HCP. We feel obligated to inform Element Power that this course of action carries considerable legal risk for your company. First, since the GPWE HCP is still being developed, it is not credible for Element Power or anyone to anticipate what will be included in the final GPWE HCP. Second, the New Frontier project would only receive take authorization if you are able to comply with any conditions included with an incidental take permit (ITP) that might be issued under the HCP, and that would not violate any other Federal wildlife laws. Since your project would presumably be operational at that time, and there is no way of knowing what conditions will be included in any ITP, it is impossible to know at this time whether or not the New Frontier project would be given take authority. Thus, any take of federally-listed species not covered by an ITP would be unauthorized, and subject to all appropriate legal sanctions. Implementation of an ABPP, with or without the agreement of the Service, does not provide immunity from sanctions due to the unlawful take of federally-listed species under the ESA.

There is no authorization available for the unintentional take of any migratory bird. Implementation of an ABPP that has not been agreed to by the Service will also be weighed in any decision to refer a violation case for prosecution under the MBTA.

Therefore, Element Power is advised that the Service will consider any taking of a protected migratory bird, bald eagle, golden eagle, or federally-listed threatened or endangered species caused by construction and/or operation of the proposed New Frontier wind energy project to be a potential criminal violation of the Migratory Bird Treaty Act (16 U.S.C. 703 et seq.), Bald and Golden Eagle Protection Act (BGEPA) (16 U.S.C. 668-668d, 54 Stat. 250), and/or the Endangered Species Act (ESA) (16 U.S.C. 1531 et seq.).

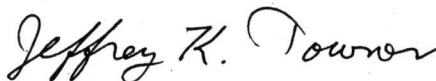
Your December 2 letter stated that you understand why the Service is no longer willing or able to dedicate additional staff to coordinate on this project, due to staffing constraints posed by the need to coordinate on other projects that are required to undergo a prescribed Section 7 or project-specific Section 10 process. We disagree with your assessment. Our October 18 letter

stated that the Service will no longer offer Element Power or your consultants additional staff time and effort on this project, **because of the approach that Element Power has chosen**. We can and do interact with a multitude of parties, including other wind power companies that are willing to work with us as equal partners in a transparent and substantive way.

Your letter also stated that your project is not required to engage in formal consultation with the Service as other projects may be. Again, we remind you that any take of federally-listed species not covered by an ITP would be unauthorized. Implementation of any ABPP, even if the intent is to include protection or mitigation for effects to federally-listed species, provides no legal immunity from unauthorized take. Only preparation of an acceptable HCP and issuance of an ITP can serve as legal take coverage for a project such as yours having no nexus to a Federal action.

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)
N. Dakota Public Service Commission, Bismarck
(Attn: J. Lein)
N. Dakota Game and Fish Department, Bismarck
(Attn: G. Link)