



# United States Department of the Interior



## FISH AND WILDLIFE SERVICE

Ecological Services  
3425 Miriam Avenue  
Bismarck, North Dakota 58501

DEC 21 2011

Ms. Anna-Marie Griger, AICP  
Tetra Tech, EC Inc.  
7800 Shoal Creek Boulevard, Suite 253 East  
Austin, Texas 78757

Re: Application to North Dakota Public  
Service Commission for Certificate of  
Site Compatibility for Oliver III Wind  
Energy Center in Morton County,  
North Dakota

Dear Ms. Griger:

This is in response to your September 19, 2011, letter, regarding NextEra Energy Resources, LLC (NextEra), proposed Oliver III Wind Energy Center in Morton County, North Dakota. Tetra Tech, EC Inc. (Tetra Tech) is requesting assistance from the U.S. Fish and Wildlife Service (Service), North Dakota Ecological Services Office, with regard to identifying concerns or issues that would influence a decision by your client NextEra regarding the use of the land in the proposed project area, as well as applicable permits that may be required from the Service. Our comments are not confined to an investigation of property, but also address NextEra's need to be in compliance with all relevant Federal wildlife laws.

This office responded to Tetra Tech's September 11, 2009, request for environmental information regarding a proposed 6-mile long transmission line that would serve NextEra's Oliver Expansion III, IV, and V projects in Morton and Oliver Counties, by letter dated October 20, 2009. In addition, we provided comments by letter dated June 23, 2010, to the North Dakota Public Service Commission (PSC) related to NextEra's application for waiver of procedures and time schedules, a corridor certificate, and a route permit to authorize construction of 11 miles of 230kV electric transmission line and associated facilities in Oliver and Morton Counties, North Dakota. 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).

Among the comments we offered in our October 20, 2009, letter, was a recommendation that the transmission line project and the Oliver Expansion projects be evaluated together. We also

recommended that NextEra contact the Service, at their earliest opportunity, to discuss the details of their Oliver County Expansion Projects.

In our June 23, 2010, comments to the PSC we expressed our concern that NextEra had modified their transmission line project without coordinating with our office and had not contacted our office to discuss their plans for the Oliver County Expansion of their wind energy projects. As of the date of this letter, we have not been contacted by NextEra or Tetra Tech regarding the plans for the proposed Oliver County Expansion Projects.

As stated in our letter of October 20, 2009, the Service recommends that all wind project developers follow the Service Guidelines to Avoid and Minimize Wildlife Impacts from Wind Turbines (interim voluntary guidelines). The interim voluntary guidelines recommend evaluating potential development sites within wind resource areas (WRA), and identifying a reference site with a maximum negative impact on wildlife within a WRA, in order to put risks of developing specific sites within WRAs into perspective. To our knowledge, neither this approach nor any other approach for comparing impacts at several sites was followed in selecting the site for the Oliver III Wind Energy Center.

In addition, we advised of the requirement to avoid the unauthorized take of federally-listed threatened and endangered species, bald and golden eagles, and migratory birds, and of the process available to NextEra to obtain authorization for take of listed species and/or eagles, if take is likely to occur, and to minimize the take of migratory birds and their active nests, and of bats. There is no permit available authorizing unintentional take of migratory birds; unauthorized take is addressed through recommendations for prosecution on a discretionary basis. A decision as to whether to recommend prosecution is determined by the party's history of working with the Service to avoid and minimize take of migratory birds. Unauthorized take of listed species, bald and golden eagles, and all migratory birds is subject to substantial penalties under the above Acts.

NextEra has chosen the proposed Oliver III project site without using the recommended approach contained in the interim voluntary guidelines, and without prior coordination with the Service. NextEra also chose to have consultants conduct wildlife surveys in 2008, which have been conducted without coordination or input from the Service on the appropriateness or intended use of those surveys. Although NextEra is participating in the Great Plains Wind Energy Habitat Conservation Plan (HCP), it appears that NextEra is moving forward with planning and construction of the Oliver III project prior to completion of the HCP process, and authorization, if needed, for incidental take under Section 10 of the ESA.

Based on the lack of coordination with our office, in the Service's opinion, NextEra cannot demonstrate that the Oliver III Wind Energy Center meets two of the criteria required by the PSC, i.e.; "Will the location, construction, and operation of the proposed facilities produce minimal adverse effects on the environment and upon the welfare of the citizens of North Dakota?", and "Are the proposed facilities compatible with the environmental preservation and the efficient use of resources?"

This office has an ever-increasing workload and many competing priorities. Since NextEra and Tetra Tech have chosen not to coordinate your plans with the Service in a way that takes full account of impacts to wildlife, this office will not invest additional staff time and effort in advising you on the Oliver III Wind Energy Center. Be advised that any unauthorized take pursuant to the wildlife laws we implement is subject to civil and/or criminal penalties. Tetra Tech and NextEra are 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 Oliver III Wind Energy Center to be a potential criminal violation of the MBTA, BGEPA, and/or the ESA.

You may contact Terry Ellsworth of my staff with any questions you have about this letter at telephone (701) 250-4402, or at the letterhead address.

Sincerely,



Jeffrey K. Towner  
Field Supervisor  
North Dakota Field Office

cc: Special Agent, Office of Law Enforcement, Bismarck  
North Dakota Public Service Commission, Bismarck  
Director, North Dakota Game and Fish Department, Bismarck  
(Attn: G. Link)  
NextEra Energy Resources, Round Rock, TX  
(Attn: A. Wynn)