



# United States Department of the Interior



## FISH AND WILDLIFE SERVICE

North Dakota Ecological Services  
3425 Miriam Avenue  
Bismarck, North Dakota 58501

IN REPLY REFER TO:  
06E15000 Badger Wind  
Project, BBCS

June 27, 2022

Ms. Sarah Aftergood  
Director of Environmental Permitting  
Orsted  
812 San Antonio St., STE 500  
Austin, TX 78701

Dear Ms. Aftergood:

Thank you for the opportunity to provide comments on your Bird and Bat Conservation Strategy (BBCS) for the proposed Badger Wind Project (Project) in Logan and McIntosh Counties. We also sent a letter dated January 29, 2021, and have had meetings and email correspondence since we were first made aware of the project in 2020. The U.S. Fish and Wildlife Service (FWS) offers the following comments under the authority of and in accordance with the Migratory Bird Treaty Act (MBTA) (16 U.S.C. 703 *et seq.*), the Endangered Species Act (ESA) (16 U.S.C. 1531 *et seq.*), and the Bald and Golden Eagle Protection Act (BGEPA) (16 U.S.C. 668-668d, 54 Stat. 250).

A BBCS is a life-of-a-project framework for identifying and implementing actions to conserve birds and bats during wind energy project planning, construction, operation, maintenance, and decommissioning. A wind project BBCS should be updated regularly as new information, including monitoring of project impacts and technical advancements, becomes available, and should also inform the need to develop other bird and bat conservation plans, such as an Eagle Conservation Plan (2013 USFWS Eagle Conservation Plan Guidance) or Habitat Conservation Plan (Endangered Species Act, section 10(a)(1)(B)).

### Lighting and Marking

According to your BBCS, the Project is a 256.1-megawatt wind energy facility that comprises 79 potential wind turbine generator (WTG) locations, including 74 primary and 5 alternate locations. In addition to the WTGs, the Project will include a transmission line extending approximately 0.75 miles, approximately 30.3 miles of permanent access roads, an underground electric collection line totaling 75 miles, temporary staging areas totaling 90.2 acres, and approximately 2.1 acres for the substation. Total permanent impacts comprise approximately 92.3 acres and temporary construction impacts will total approximately 1,361.4 acres. Badger Wind has committed to designing the line consistent with Avian Power-Line Interaction Committee (APLIC) 2012 guidance, which will reduce electrocution risk at the site. Overhead power lines also present the threat of avian line strike mortality. Depending on final line design, the FWS may recommend marking of additional, existing, overhead lines to further offset the potential for avian line strike mortality.

Additionally, the BBCS states that the required FAA lights would be controlled with Aircraft Detection Lighting System (ADLS) and turned on only when the system's radar detects approaching aircraft. Lighting of ancillary facilities will be minimized and downward-facing lights and/or motion sensing lights will be installed "as practicable" to minimize attracting birds and bats. The FWS recommends that the BBCS be updated to provide the specific number of facilities that are lit/unlit once construction is complete. We may recommend additional monitoring at any lighted facilities to assess impacts to birds and bats.

#### Northern long-eared bat

On March 22, 2022, the FWS announced a proposal to reclassify the northern long-eared bat as endangered under the Endangered Species Act. Based on a thorough review of the species' status, we found the species, currently listed as threatened, is now facing extinction due to the range-wide impacts of white-nose syndrome and meets the definition of endangered under the act. Our assessment found that white-nose syndrome has spread to nearly 80 percent of the species' range and almost all of the U.S. range since it was listed as threatened in 2015. The U.S. District Court for the District of Columbia has ordered the FWS to complete a new final listing determination for the northern long-eared bat by November 2022 (Case 1:15-cv-00477, March 1, 2021). The proposed reclassification, if finalized, would remove the current 4(d) rule for the bat, as these rules may be applied only to threatened species. The BBCS currently refers to the 4(d) rule throughout the document. We recommend coordinating closely with the FWS if the species is uplisted to ensure compliance with the ESA as recommendations regarding avoidance of take may change.

Note that the FWS is currently working on a species status assessment (SSA) for the little brown bat. While we do not yet know the outcome of the assessment, we recommend considering impacts to these species during your post-construction monitoring and adaptive management.

#### Other federally listed species

As noted in our January 29, 2021, letter regarding the Project, the area contains habitat for endangered whooping cranes and threatened piping plovers and red knots. Badger Wind has determined that although the site is of low risk for take of these species, environmental conditions can change over time which could allow for their presence. We recommend assessing and documenting any habitat changes, i.e., increased shorelines at wetlands, whooping crane use, etc., over the life of the project in the BBCS, and addressing adaptive management measures in the event of increased use of habitat by federally listed species.

#### Migratory Birds

A number of avoidance, minimization, and mitigation measures are included in the BBCS to address impacts to migratory birds regarding electrocution, collision, habitat, tree removal and the inclusion of mindful construction practices, which the FWS commends. Note however, that the BBCS refers to several of these measures regarding nests, individuals and habitat "to the extent practical or feasible". Be advised that a FWS final rule in October 2021 revoked the previous regulation that limited the scope of take under the MBTA. The MBTA prohibits incidental take of migratory birds consistent with judicial precedent and long-standing agency practice prior to 2017. However, the FWS 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. Therefore we encourage Badger Wind to update the BBCS regularly as quantitative information is available.

As noted in the North Dakota Game and Fish (NDGF) May 27, 2022, letter to the Public Service Commission, not all impacts to grasslands and wetlands can be avoided with the current turbine layout. Badger Wind has had discussions with NDGF and FWS regarding how best to quantify and mitigate for impacts to grasslands that cannot be avoided or minimized. While specific impacts have not been quantified in the document, Badger Wind commits to address “voluntary offsets by implementing the model outlined in Shaffer et al. (2019).” The Shaffer et al. (2019) tool calculates displacement of breeding duck pairs and grassland birds. According to the BBCS, Badger Wind is currently actively pursuing a partnership with a locally existing body in North Dakota in order to best implement voluntary mitigation. We encourage Badger Wind to update the BBCS as quantitative information and implementation techniques are decided upon.

#### Eagles

Badger Wind has reached out to the FWS Region 6 Migratory Birds Division and will explore the need for an Eagle Conservation Plan (ECP) in support of an Eagle Incidental Take Permit (EITP). We will continue to work with you on this effort.

#### Adaptive Management

The Tier 4 monitoring program proposed in the BBCS was designed to evaluate risk conclusions along with an Adaptive Management Plan to respond to findings, if necessary. According to the BBCS, “if significant adverse impacts are found to have occurred, adaptive management measures may be used to develop new measures to avoid, minimize, and mitigate these impacts and to monitor the efficacy of these measures”. Depending on the findings of the post-construction monitoring, we may recommend additional measures and extended monitoring to adequately implement appropriate adaptive management.

#### Conclusion

The Service appreciates your coordination with us regarding federal trust fish and wildlife resources. Badger Wind commits to avoid, minimize, and mitigate for impacts to federal trust fish and wildlife resources. As indicated in the NDGF May 27, 2022, letter, it is important to affirm the agreed-upon acreages and impacts in the BBCS. We look forward to future updates and working with you and the NDGF regarding specifics. Should you have any questions regarding these comments, please have your staff contact Heidi Riddle of my staff at (701) 355-8545 or at the letterhead address, or contact me at (701) 355-8512.

Sincerely,

Drew Becker  
ND Ecological Services Office Supervisor

*cc:* NDGF, Greg Link, Bismarck, ND  
NDPSC, Steven Kahl, Bismarck, ND