



United States Department of the Interior



FISH AND WILDLIFE SERVICE

3817 Luker Road
Cortland, NY 13045

July 11, 2011

Mr. Michael Speerschneider
EverPower Wind Holdings, Inc.
44 East 30th Street, 10th Floor
New York, NY 10016

Dear Mr. Speerschneider:

This letter is in regards to the proposed Allegany Wind Project located in the Town of Allegany, Cattaraugus County, New York. In the fall of 2010, the U.S. Fish and Wildlife Service (Service) finalized regulations pertaining to the protection of eagles under the Bald and Golden Eagle Protection Act (BGEPA). Since that time, the Service has been coordinating with wind energy project sponsors to inform them of the new regulatory requirements. On March 9, 2011, a conference call was held between EverPower Wind Holdings, Inc. (EverPower), the sponsor of the Allegany Wind Project, representatives from Stantec, Inc., and the Service to discuss the proposed project and the BGEPA. This letter provides recommendations and a summary of our meeting. The Service understands that EverPower has recently completed the project's Final Environmental Impact Statement (FEIS). The comments below are provided pursuant to the BGEPA (16 U.S.C. 668-668d) and the Migratory Bird Treaty Act (MBTA) (40 Stat. 755; 16 U.S.C. 703-712).

The Service reviewed the reports submitted by EverPower, including the Fall 2007 and Spring 2008 Bird and Bat Migration Survey Report and the 2007 Breeding Bird Survey at the Proposed Allegany Wind Project (updated January 2010), which we received February 14, 2011. These reports included acoustic surveys, nocturnal radar surveys, breeding bird surveys, and diurnal raptor surveys. During the conference call, we discussed the siting of the proposed wind development project and the potential for incidental take of bald eagles (*Haliaeetus leucocephalus*) or golden eagles (*Aquila chrysaetos*) as a result of the turbine blades striking eagles during migration, or as they pass through the project area on their way to foraging or roosting sites.

We also discussed the BGEPA regulations, finalized in November 2009, and the Draft Eagle Conservation Plan Guidance, dated January 2011, which provide guidance on assessing risk to bald eagles at wind project development sites. Allegany Wind, LLC, (a subsidiary of EverPower) provided bald eagle nest locations and results from diurnal raptor surveys conducted

within the project area. The data provided in the reports concluded that the risk of incidental take is low; however, the most recent data provided by the New York State Department of Environmental Conservation (NYSDEC) shows greater eagle use of the habitat surrounding the project. Bald eagles are known to be actively nesting in the vicinity of the project, with three confirmed nests approximately 3-4 miles from the project site, and expanding eagle use of upland areas in the vicinity of the project. The NYSDEC's Natural Heritage Program data shows an additional four eagle nests on the Allegheny River near Salamanca, suggesting that eagle populations in the vicinity of the project area may increase over the life of the project. We recommend that EverPower confirm the presence and current year's breeding status of these eagle nests in order to accurately assess the collision risk for bald eagles at this site. Transient golden eagles have been identified in the area during migration and may be at a higher level of risk as indicated by the documented mortality of golden eagles at wind projects in the western United States. In addition, the literature suggests that migrating eagles may be more susceptible to injury at wind developments due to encountering unfamiliar obstacles on the landscape, and use of topographical features during flight.

Based on the evaluation criteria within the Service's Draft Eagle Conservation Plan Guidance (Guidance), the Service believes that the risk of take to eagles is moderate, and recommends that EverPower apply for a take permit to protect them from liability under BGEPA. The Guidance determines projects to be moderate risk if there is a risk of ongoing take of eagles, but this risk can be minimized. Characteristics of the Allegheny Wind Project that indicate moderate risk are the presence of important eagle use areas within 10 miles of the project footprint, including at least three bald eagle nests. In addition, important eagle wintering areas are located in the vicinity of the project area. For projects in this category, an Eagle Conservation Plan (ECP) should be prepared in order to avoid and minimize impacts to bald and golden eagles to the extent that remaining take is unavoidable. We recommend following the Guidance in order to facilitate meeting the regulatory requirements for a programmatic permit.

Migratory birds, such as waterfowl, passerines, and raptors are Federal trust resources and are protected by provisions of the MBTA. The Service is the primary Federal agency responsible for administering and enforcing the MBTA. This Act prohibits the taking, killing, possession, transportation, and importation of migratory birds, their eggs, parts, and nests except when specifically authorized by the Service. The word "take" is defined as "to pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to pursue, hunt, shoot, wound, kill, trap, capture, or collect." The unauthorized taking of birds is legally considered a "take" under the MBTA and is a violation of the law. Neither the MBTA nor its implementing regulations, 50 CFR Part 21, provide for permitting of "incidental take" of migratory birds that may be killed or injured by wind projects. However, we recognize that some birds may be killed at structures such as wind turbines even if all reasonable measures to avoid it are implemented. Depending on the circumstances, the Service's Office of Law Enforcement may exercise enforcement discretion. The Service focuses on those individuals, companies, or agencies that take migratory birds with disregard for their actions and the law, including when conservation measures have been developed but are not properly implemented. EverPower is encouraged to work closely with Service biologists to identify available protective measures through the development of an Avian and Bat Protection Plan (ABPP) or ECP and to implement those measures prior to construction. The Service's Interim Guidance on avoiding and minimizing wildlife impacts from wind turbines

(May 2003) can also provide recommendations towards avoiding and minimizing impacts to wildlife and their habitats.

The Allegheny Wind Project is located adjacent to an Important Bird Area (IBA) and other important habitat for migratory birds and wildlife in New York. The Allegheny Forest Tract IBA is located in Cattaraugus and Chautauqua Counties and was initially designated for 11 species at risk. Currently, the Allegheny Forest Tract IBA supports a high percentage of the State's population of bald eagles and cerulean warblers, and contains important forest cover, which includes: sugar maple, oak, deciduous wetland, evergreen northern hardwood, and successional hardwoods. This site includes the Allegheny State Park and extensive surrounding forested land (Comprehensive Wildlife Conservation Strategy for New York September of 2005). The Allegheny Wind Project is located within approximately 5% of the 78,917 ha designated as the IBA, with the remainder of the project adjacent to the IBA. There are several at risk species known to occur within the IBA and the New York State Breeding Bird Atlas (BBA) has documented several species of concern within a 5-mile radius of the project area. Allegheny State Park, Allegheny Reservoir, and the Allegheny River provide nesting, roosting, and foraging habitat for wintering and nesting populations of bald eagles. Avoiding and minimizing impacts to this important habitat for migratory birds will be important as this project moves forward.

In conclusion, the Service strongly recommends that EverPower submit a permit application requesting a take permit for bald eagles based on the moderate risk of the project. As part of your permit application, we recommend that you submit an ECP or an ABPP that includes the recommended components of an ECP, with updated data (2011) to provide the information required to make a permit decision.

The Service will continue to provide technical assistance to EverPower, if needed. If you have any questions, please contact Sandra Doran at the New York Field Office at 607-753-9334 or Sarah Nystrom of the Regional Office at 413-253-8592.

Sincerely,



David A. Stilwell
Field Supervisor

cc: Stantec, Inc., Topsham, ME (T. Chadwell)
Seneca Nation, Irving, NY
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