

## **Appendix F Programmatic Agreement**

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# **PROGRAMMATIC AGREEMENT (PA)**

among

**The U.S. Fish and Wildlife Service (USFWS),  
The Indiana State Historic Preservation Office (SHPO), and  
Fowler Ridge Wind Farm LLC, Fowler Ridge II Wind Farm LLC, Fowler Ridge III Wind  
Farm LLC and Fowler Ridge IV Wind Farm LLC (Fowler Ridge)**

regarding

**Construction of the Fowler Ridge Wind Farm Phase IV Project (FRWF Phase IV)  
to be located in Benton County, Indiana**

and

**Mitigation for Take of Indiana Bats at Fowler Ridge Wind Farm Phases I through IV  
(FRWF Phases I through IV)  
to be implemented anywhere in Indiana**

**WHEREAS**, issuance of an Incidental Take Permit (ITP) by USFWS to Fowler Ridge for incidental take of Indiana bats during operation of FRWF Phases I through IV triggers review under Section 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. § 470 *et seq.*, § 470f, and its implementing regulations “Protection of Historic Properties” (36 CFR Part 800) and;

**WHEREAS**, USFWS has determined that construction of the proposed FRWF Phase IV project, to be located in Benton County, and implementation of Indiana bat mitigation, to be implemented anywhere within Indiana, may potentially cause an adverse effect on historic properties and;

**WHEREAS**, the proposed FRWF Phase IV project will include construction of up to 94 turbines for a total capacity of 150.4 MW (construction scheduled to begin 2014), and construction of a generation tie-in line, a substation, an operations and maintenance (O&M) building (should it be needed) access roads, and collection and communications lines and:

**WHEREAS**, mitigation required of Fowler Ridge to compensate for the impact of taking Indiana bats during operation of FRWF Phases I through IV, as described in the HCP and required pursuant to the ITP, will include constructing a gate near the entrance of Wyandotte Cave (Crawford County, Indiana) and planting native trees on up to 240 acres adjacent to Indiana bat maternity colonies primarily within the same Indiana 8-digit Hydrologic Unit Code (HUC) watershed as Fowler Ridge Wind Farm Phases I through IV and;

**WHEREAS**, USFWS has determined the direct Area of Potential Effects (APE) for the undertaking will include the FRWF Phase IV project area including up to 94 turbine locations, access roads and buried interconnect lines, construction staging areas, tie-in lines, an O&M building, and the substation location; and Indiana bat mitigation sites including Wyandotte Cave and sites selected by Fowler Ridge and approved by the USFWS within a 2.5 mile radius circle around known maternity colonies in Indiana, and;

**WHEREAS**, it is agreed among the signatories that adverse effects to above ground historic resources in the indirect APE will not occur as a result of the FRWF Phase IV project or the Indiana bat mitigation and;

**WHEREAS**, USFWS is phasing identification and evaluation of historic properties and application of the criteria of effects in accordance with 36 CFR Part 800.4(b)(2) and 36 CFR Part 800.5(a)(3), respectively, because final siting of project infrastructure and Indiana bat mitigation is not complete and;

**WHEREAS**, in accordance with 36 CFR Part 800.14(b)(1)(ii), execution of a Programmatic Agreement (PA) is appropriate because effects on historic properties cannot be fully determined prior to USFWS issuance of the ITP to Fowler Ridge; and

**WHEREAS**, Fowler Ridge has agreed to complete its stipulations, listed below, regarding the identification, evaluation of eligibility and assessment of effects on archaeological resources within the direct APE as elaborated below, as a condition of receiving the ITP and;

**WHEREAS**, the terms used in this PA are defined in 36 CFR Part 800.16;

**NOW, THEREFORE**, USFWS, SHPO and Fowler Ridge agree that the above-referenced construction and mitigation will be implemented in accordance with the following stipulations in order to take into account the effect of said undertakings on historic properties.

## **STIPULATIONS**

USFWS will ensure that the following stipulations are carried out:

### **I. CONDITIONS**

- A.** USFWS will ensure that the terms of this PA within its control are implemented prior to the start of construction of FRWF Phase IV and prior to the start of implementation of any Indiana bat mitigation. Construction of FRWF Phase IV and implementation of Indiana bat mitigation (gating of Wyandotte Cave) may begin in 2014.
- B.** USFWS will ensure that the Indiana Department of Natural Resources (IDNR) implements Section 106 coordination prior to allowing FRWF to construct the gate at the IDNR-owned Wyandotte Cave, as stated in a commitment letter from IDNR to USFWS (attached).

### **II. PROFESSIONAL STANDARDS**

- A.** The studies and work required under the terms of this PA will be carried out by or under the direct supervision of a professional, hired and paid by FRWF, who, at a minimum,

meets the U.S. Secretary of the Interior's *Professional Qualifications Standards* (48 FR 44716, September 29, 1983) in archeology or architectural history, as appropriate.

- B. Studies of traditional resources that are of cultural and religious significance to the Consulting Tribes will be carried out by or under the direct supervision of a person, hired and paid by Fowler Ridge, acceptable to USFWS in consultation with the appropriate Consulting Tribes, and acceptable to SHPO.

### III. IDENTIFICATION AND TREATMENT

#### A. Mitigation of Effects to Above Ground Historic Resources

Previously, Fowler Ridge commissioned a desktop review of above ground historic resources in the FRWF Phase IV direct APE. The desktop review found no National Register of Historic Places (NRHP) listed historic resources within the footprint of the 94 FRWF Phase IV turbines; therefore, none would be directly affected by the project. A total of 73 resources which are listed in SHAARD as "Notable" (i.e., potentially eligible for the NRHP), or "Outstanding" (i.e., considered eligible for the NRHP) are located within the indirect APE, within one mile of a FRWF Phase IV turbine. Additionally, three resources located within the town of Fowler are actually listed on the NRHP. In a letter dated September 17, 2012, USFWS found that construction of FRWF Phase IV would have no adverse effect on these 76 structures due to their location within the town and their current rating status in SHAARD. SHPO, in a letter dated October 18, 2012, concurred with this finding. Therefore, no mitigation is required for above ground resources within the indirect APE.

#### B. Identification and Mitigation Efforts for Archaeological Resources

1. Prior to the initiation of any construction or mitigation activities that could potentially disturb or damage archaeological resources, Fowler Ridge shall carry out archaeological investigations in accordance with the provisions of IC 14-21-1, 312 IAC 21, 312 IAC 22, and the most current Guidebook for Indiana Historic Sites and Structures Inventory- Archaeological Sites and in accordance with the methodology set forth in this PA. USFWS shall ensure that all scopes of work for archaeological identification and evaluation produced by Fowler Ridge include a plan for the treatment of human remains and funerary objects that might be encountered.
  - a. Phase I Archaeological Survey. USFWS shall ensure that a Phase I Scope of Work will be developed by Fowler Ridge in consultation with SHPO. Phase I work will be designed to provide information regarding the significance of all identified archaeological sites to the NRHP. This work will be done in consultation with SHPO and all deliverables will be submitted by USFWS to SHPO for review and comment.

- 1) If USFWS determines and SHPO concurs that a “site is not eligible” for the NRHP, then no further investigations of that site will be conducted.
  - 2) If USFWS determines and SHPO concurs that a site with indeterminable eligibility can and will be avoided, which would be the preferred option, then no further investigation of that site will be conducted, unless avoidance no longer becomes feasible.
- b. Phase II Archaeological Testing. If all parties agree that the “eligibility of a site is indeterminable” and avoidance is not feasible, USFWS shall ensure that a Phase II Research Design will be developed by Fowler Ridge in consultation with SHPO. This document will be consistent with SHPO guidelines. Phase II work will be designed to provide information regarding the significance of an archaeological site as “site is not eligible” or “site is eligible” to the NRHP. This work will be done in consultation with SHPO and all deliverables will be submitted by USFWS to SHPO for review and comment.
- 1) If USFWS determines and SHPO concurs that a “site is not eligible” for the NRHP, then no further investigations of that site will be conducted.
  - 2) If USFWS determines but SHPO will not concur regarding eligibility, all appropriate information regarding the site will be submitted by USFWS to the Keeper of the National Register, National Park Service, for review. The Keeper’s determination of eligibility will be final.
  - 3) If USFWS determines and SHPO concurs that an eligible site can and will be avoided, which would be the preferred option, then no further investigation of that site will be conducted, unless avoidance no longer becomes feasible.
- c. Application of Criteria of Adverse Effects. If USFWS determines and SHPO concurs that the “site is eligible”, but through discussions with Fowler Ridge, USFWS determines avoidance is not a feasible alternative, then USFWS will consult with SHPO to apply the criteria of adverse effects. This work will be completed in consultation with SHPO guidelines and all deliverables will be submitted by the USFWS to SHPO for review and comment.
- 1) If following the application of the criteria of adverse effects, USFWS determines and SHPO concurs that FRWF Phase IV and the mitigation will have “no effect” or “no adverse effect” on an eligible site then no further investigations of that site will be conducted.
  - 2) If USFWS determines and SHPO concurs that FRWF Phase IV and/or the mitigation will have an “adverse effect” on an eligible site, but the construction and/or mitigation project is subsequently redesigned by Fowler Ridge to avoid

adverse effects, then the finding would be changed to “no effect”. USFWS shall provide written documentation demonstrating avoidance for SHPO concurrence.

- 3) If redesign of the construction and/or mitigation project by Fowler Ridge still determines that avoidance is not feasible, the scope of the adverse effect will be reassessed.
- d. Phase III Archaeological Data Recovery. If all parties agree that FRWF Phase IV and/or mitigation will have an “adverse effect” on an eligible site and avoidance is not a feasible option, then USFWS will consult with SHPO to identify measures to minimize and mitigate the adverse effect to the site. USFWS shall ensure that a Treatment (Data Recovery) Plan will be developed by Fowler Ridge in consultation with SHPO as an amendment to this PA. The plan will be consistent with SHPO guidelines and all deliverables will be submitted by USFWS to SHPO for review and comment.

Following SHPO review and concurrence of proposed Phase III deliverables, no further investigations of that site will be conducted, unless an unanticipated post-review discovery is made.

- e. Post-review discoveries. In the event of any unanticipated discoveries of archaeological sites, unmarked cemeteries, or human remains and associated funerary objects during the implementation of FRWF Phase IV and/or mitigation, all activities will be suspended in the area of discovery. Fowler Ridge will contact USFWS and SHPO within 48 business hours of the discovery, via telephone at the following numbers: For USFWS, Regional Historic Preservation Officer James Myster at 612-713-5439 and Forest Clark, NEPA Project Manager at 812-334-4261 ext. 206, and for SHPO, XXXX at XXX-XXX-XXXX. If the discovery is of human remains, local law enforcement will be contacted as well.

In consultation with SHPO, USFWS shall ensure that, if necessary, a qualified archaeologist, hired and paid by Fowler Ridge, will visit and assess the discovery, anticipated to be within 72 hours of the initial notification, or as soon as practicable. Based upon that verbal or written assessment and through consultation, USFWS and SHPO shall agree upon the appropriate treatment of the discovery prior to resumption of construction activities in the area of discovery. If human remains are determined to be of Native American origin, SHPO, in consultation with USFWS, shall comply with IC 14-21-1, IC 14-21-2, IC 23-14. FRWF affirms that all human remains will be avoided by direct construction impacts where feasible.

If the construction contractor for Fowler Ridge believes that a discovery contains human remains and the discovery is not on federal lands, USFWS and Fowler

Ridge will notify the Indiana Department of Natural Resources - Division of Historic Preservation and Archaeology within two (2) days pursuant to IC 14-21-1-27. Prior to the start of construction and mitigation, Fowler Ridge will remind its contractor, in writing, that finding unknown sites and/or human remains are still possible even if the project has been cleared and outline to them the process of inadvertent discovery notification as described above.

### **C. Curation**

Fowler Ridge will return all artifacts and materials recovered through implementation of the terms of this PA to the respective private landowner, unless Fowler Ridge has obtained signed gift agreements deeding artifacts and materials to the state of Indiana. Fowler Ridge will request the landowners to donate the cultural material whenever possible and appropriate.

If Fowler Ridge obtains signed gift agreements from private landowners deeding artifacts and recovered materials to the state of Indiana, then Fowler Ridge will submit such artifacts, materials or records for permanent curation at a repository that meets federal standards under 36 CFR 79.

### **D. Dispute Resolution**

Should any signatory to this PA object in writing at any time to any actions proposed or the manner in which the terms of this PA are implemented, USFWS, within the limits of its authority, will consult with such party to resolve the objection. If USFWS determines that the objection cannot be resolved, that agency will:

- 1) Forward all documentation relevant to the dispute, including the resolution proposed by USFWS, to the Advisory Council on Historic Preservation (ACHP). ACHP will provide USFWS with its advice, pursuant to 36 CFR Part 800.2(b)(2), on the resolution of the objection within thirty (30) days of receiving adequate documentation. Prior to reaching a final decision on the dispute, USFWS will prepare a written response that takes into account any timely advice or comments from the ACHP, signatories and consulting parties regarding the dispute, and provide a copy of this written response. USFWS will then proceed according to its final decision.
- 2) Any ACHP comments provided in response to such a request will be taken into account in accordance with 36 CFR 800.7(c)(4).
- 3) If ACHP does not provide its advice regarding the dispute within thirty (30) days, USFWS may make a final decision and proceed accordingly. Prior to reaching a final decision, USFWS will prepare a written response that takes into account any

timely comments regarding the dispute from the signatories and consulting parties to the PA and provide them and ACHP with a copy of the written response.

The responsibilities of USFWS to carry out all other actions subject to the terms of this PA that are not the subject of the dispute remain unchanged.

If at any time during the implementation of the measures stipulated in this PA an objection should be raised by the public, USFWS will notify the signatories to this PA and consult with the objecting party to seek resolution. If USFWS determines that the objection cannot be resolved, it will decide if the objection is of such magnitude to seek the advice or comment of ACHP (as described above).

#### **E. Reporting**

Should there be an interruption of activity associated with the construction and/or mitigation for any significant length of time, Fowler Ridge will provide to the signatories, at the minimum every six (6) months, a project status letter regarding the completion of work associated with the above stipulations.

### **IV. TERMS OF AGREEMENT**

- A.** The term of this PA will be 22 years from the date of execution by the last signatory, unless the parties agree to extend its term. If its stipulations have not been carried out, and prior to work continuing on the proposed FRWF Phase IV project and/or mitigation, USFWS, SHPO or Fowler Ridge, as appropriate, will either (a) execute another agreement pursuant to 36 CFR 800.6, or (b) request, take into account, and respond to the comments of ACHP under 36 CFR 800.7.
- B.** Six (6) months prior to the PA's expiration date, USFWS will notify the other signatories of the impending expiration. USFWS, SHPO or Fowler Ridge as appropriate, may consult with the other signatories to reconsider the terms of the PA and amend it in accordance with Stipulation V. USFWS, SHPO or Fowler Ridge as appropriate, will notify the parties as to the course to be pursued.

### **V. AMENDMENT**

- A.** Any party to this PA may withdraw from it by providing thirty (30) days' notice to the other parties, provided that the parties will consult during the period prior to withdrawal to seek agreement on amendments or other actions that would avoid withdrawal.
- B.** Upon termination of the PA, and prior to work continuing, construction will cease on the proposed project and/or mitigation, until either (a) USFWS executes an agreement pursuant to 36 CFR 800.6, or (b) requests, takes into account, and responds to the

comments of ACHP under 36 CFR 800.7. USFWS will notify the signatories and consulting parties as to the course of action it will pursue.

## VI. NOTICES

Any notice permitted or required by this PA shall be in writing, delivered personally to the persons listed below, or shall be deemed given five (5) days after deposit in the United States Mail, certified and postage prepaid, return receipt requested and addressed as follows, or at such other address as any party may from time to time specify to the other party in writing. Notices may be delivered by facsimile or other electronic means, provided that they are also delivered personally or by certified mail, and such electronic notices shall thereafter be deemed effective upon receipt. Notices shall be transmitted so that they are received within the specified deadlines.

**Fowler Ridge:** Blayne Gunderman, BP Wind Energy, 700 Louisiana St., 32nd Floor, Houston, TX 77002, Fax: (713) 354-2120, blayne.gunderman@bp.com

**USFWS:** Forest Clark, Bloomington Field Office, 620 South Walker Street, Bloomington, IN 47403, 812-334-4273 (fax), forest\_clark@fws.gov.

**SHPO:** **Insert Contact Information**

**EXECUTION** of this PA by USFWS, SHPO, and Fowler Ridge, and implementation of its terms evidences that USFWS has taken into account the effects of this undertaking on historic properties and afforded ACHP a reasonable opportunity to comment.

Signatories

U.S. FISH AND WILDLIFE SERVICE

By \_\_\_\_\_ Date \_\_\_\_\_  
Tom Melius, Midwest Regional Director

INDIANA STATE HISTORIC PRESERVATION OFFICE

By \_\_\_\_\_ Date \_\_\_\_\_  
[Insert Name and Title]

FOWLER RIDGE WIND FARM

By \_\_\_\_\_ Date \_\_\_\_\_  
Larry Folks, Senior Vice President



February 28, 2013

Mrs. Blayne Gunderman  
Environmental Manager  
BP Wind Energy NA, Inc.  
700 Louisiana St, 33<sup>rd</sup> Floor  
Houston, Texas 77002  
(713)299-3100

Mr. Scott Pruitt  
Field Supervisor  
U.S. Fish and Wildlife Service  
Ecological Services Field Office  
620 S. Walker Street  
Bloomington, Indiana 47403  
(812)334-4261 Ext. 1214

Dear Mrs. Gunderman and Mr. Pruitt:

The purpose of this letter is to address the proposed gating project and subsequent monitoring activities at Wyandotte Cave. Wyandotte Cave is a state owned property and occurs within the O'Bannon Woods State Park located in Crawford County. The Indiana Department of Natural Resources (IDNR) has conducted various monitoring activities at the cave over the past several decades.

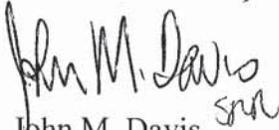
As a requirement of their Habitat Conservation Plan (HCP), the Fowler Ridge Wind Farm (FRWF) proposes to remove and replace the current gate at Wyandotte Cave in order to protect Indiana bats (*Myotis sodalis*) that are currently hibernating in an area of the cave that is outside of the current gate. The IDNR will have final approval authority concerning the location and design of the new gate and will provide Section 106 coordination for the gate construction. This gating project is being implemented to mitigate for the incidental take of Indiana bats as a result of the operation of the FRWF. In addition to the mitigation actions, the HCP requires monitoring be completed to ensure success of those mitigation actions.

This letter serves as confirmation that the IDNR will continue to conduct monitoring activities at Wyandotte Cave and will provide all necessary information to FRWF to ensure compliance with their HCP. Monitoring activities to be done include: 1) weekly checking of the gate by O'Bannon Woods State Park personnel to ensure the gate is intact and has not been damaged or breached; 2) installation and maintenance of dataloggers, and downloading of data collected by the dataloggers (i.e. temperature, humidity, air flow inside the cave); and 3) installation and

maintenance of speloggers, and downloading of data collected by the speloggers (i.e. human visitation occurrences). A summary report of monitoring activities will be provided annually for 12 years following installation on the new gate and will include: data from speloggers and dataloggers, digital photographs of the gate and cave entrance, and any management recommendations. To ensure that any required management actions can be taken prior to the upcoming hibernation period, the winter habitat mitigation report will be submitted to FRWF annually by June 30. In the event the IDNR cannot continue these monitoring activities, the IDNR will work with FRWF to ensure subsequent monitoring under the HCP is performed by qualified personnel using approved protocols.

Please contact Scott Johnson via phone (812-334-1137) or email ([sjohnson@dnr.IN.gov](mailto:sjohnson@dnr.IN.gov)) with any questions or concerns.

Sincerely,

A handwritten signature in black ink that reads "John M. Davis" with a stylized flourish at the end.

John M. Davis  
Deputy Director  
Dept. of Natural Resources  
402 W. Washington St. Rm W256  
Indianapolis, Indiana 46204