

**STATE OF MINNESOTA
BEFORE THE
PUBLIC UTILITIES COMMISSION**

Nancy Lange
Dan Lipschultz
Matthew Schuerger
John Tuma
Katie Sieben

Chair
Commissioner
Commissioner
Commissioner
Commissioner

**In the Matter of the Application of Freeborn
Wind Energy LLC for a Large Wind
Energy Conversion System Site Permit in
Freeborn County**

MPUC Docket No. IP-6946/WS-17-410;
OAH Docket No. 80-2500-34633

**MOTION TO EXCLUDE UNTIMELY
FILING OF FRANK KOHLASCH**

I. INTRODUCTION

Freeborn Wind Energy LLC (“Freeborn Wind”) respectfully requests that the Minnesota Public Utilities Commission (“Commission”) exclude the untimely filing made by Frank Kohlasch on September 11, 2018 (the “Kohlasch Letter”). As described in this Motion, depending on how the Commission views the Kohlasch Letter, it has the potential to be prejudicial to Freeborn Wind. To the extent the Commission reads the Kohlasch Letter as supportive of a special condition related to the MPCA Noise Standards in the Freeborn Wind site permit, Freeborn Wind will be prepared to address those issues at the agenda meeting on September 20, 2018. To the extent, however, that the Commission reads the Kohlasch Letter as an interpretive rule of general applicability related to the MPCA Noise Standards, it must be excluded because it is a rule issued without a proper rulemaking proceeding and would be prejudicial to Freeborn Wind.

This Motion is filed pursuant to Minn. R. 7829.0420. Given that the Kohlasch Letter was filed 9 days prior to the date this docket is scheduled for Commission decision on September 20, 2018, Freeborn Wind asks that the Commission vary the 14-day period for replies to this Motion

and allow the parties to address the matter orally on September 20, 2018.¹ There is good cause to vary this time period so that a decision regarding exclusion of this letter can be made before the Commission deliberates whether to grant a site permit for the Project. The prejudicial nature of this letter cannot be undone if it is later excluded only after deliberations on the site permit are complete.

II. PROCEDURAL HISTORY

On June 15, 2017, Freeborn Wind filed its Application with the Commission for the Project.²

On August 31, 2017, the Commission issued its Order Finding Application Complete and Varying Time Limits, referring the matter to the Office of Administrative Hearings (“OAH”) for a contested case proceeding and public hearing to be conducted by an Administrative Law Judge (“ALJ”); and addressing various other administrative matters.³ On September 6, 2017, the Commission issued an order correcting references to procedural rules.⁴

On December 5, 2017, the Department of Commerce Energy Environmental Review and Analysis (“DOC-EERA”) filed Comments and Recommendations on the issuance of a Draft Site Permit and a Preliminary Draft Site Permit.⁵

On December 22, 2017, Freeborn Wind filed the Direct Testimony of the following witnesses: Dan Litchfield,⁶ Mike Hankard,⁷ Dr. Mark Roberts,⁸ Dr. Jeff Ellenbogen,⁹ Andrea

¹ Minn. R. 7829.0410 (providing a 14-day period for replies to motions before the Commission) and Minn. R. 7829.1275 (authorizing the Commission to vary time periods for good cause shown).

² Ex. FR-1 (Application).

³ Order Finding Application Complete and Varying Time Limits (Aug. 31, 2017) (eDocket No. [20178-135140-01](#)).

⁴ Erratum Notice (Sept. 6, 2017) (eDocket No. [20179-135278-01](#)).

⁵ Ex. EERA-8 (Comments and Recommendations on a Preliminary Draft Site Permit).

⁶ Ex. FR-4 (Litchfield Direct).

⁷ Ex. FR-5 (Hankard Direct).

⁸ Ex. FR-6 (Roberts Direct).

⁹ Ex. FR-7 (Corrected Ellenbogen Direct).

Giampoli,¹⁰ Michael MaRous,¹¹ and Kevin Parzyck.¹² The Association of Freeborn County Landowners (“AFCL”) and KAAL-TV, LLC (“KAAL”) filed direct testimony on the same day.

On January 22, 2018, Freeborn Wind filed the Rebuttal Testimony of the following witnesses: Mr. Litchfield, Ms. Giampoli, Mr. MaRous, Dennis Jimeno, and Mr. Hankard.¹³ AFCL filed the Rebuttal Testimony of Dorene Hansen.¹⁴ KAAL filed the Rebuttal Testimony of David Harbert.¹⁵

On February 5, 2018, Freeborn Wind filed the Surrebuttal Testimony of Mr. Litchfield.¹⁶ Also on February 5, 2018, KAAL filed the Surrebuttal Testimony of Mr. Harbert and Stephen Lockwood.¹⁷

On February 7, 2018, DOC-EERA filed a comment letter dated October 4, 2017 from the Minnesota Pollution Control Agency (“MPCA”) relating solely to soil erosion.¹⁸ See Attachment A.

A public hearing was held in Albert Lea, Minnesota on February 20, 2018.

On February 21 and 22, 2018, an evidentiary hearing on the Application was held in Albert Lea, Minnesota. Commission Staff, DOC-EERA Staff, and representatives from Freeborn Wind, KAAL, and AFCL were present. The witnesses for MDNR and KAAL witness Mr. Stephen Lockwood appeared by phone on February 22, 2018.

¹⁰ Ex. FR-8 (Giampoli Direct).

¹¹ Ex. FR-9 (MaRous Direct).

¹² Ex. FR-10 (Parzyck Direct).

¹³ Ex. FR-11 (Litchfield Rebuttal); Ex. FR-15 (Giampoli Rebuttal); Ex. FR-14 (MaRous Rebuttal); Ex. FR-12 (Jimeno Rebuttal); Ex. FR-13 (Hankard Rebuttal).

¹⁴ Ex. AFCL-15 (Hansen Rebuttal).

¹⁵ Ex. KAAL-2 (Harbert Rebuttal).

¹⁶ Ex. FR-16 (Corrected Litchfield Surrebuttal).

¹⁷ Ex. KAAL-3 (Harbert Surrebuttal); Ex. KAAL-5 (Lockwood Surrebuttal).

¹⁸ DOC-EERA Comment - Letter from MPCA (Feb. 7, 2018) (eDocket No. [20182-139859-01](#)).

On March 1, 2018, Freeborn Wind filed the following exhibits pursuant to the ALJ's request at the evidentiary hearing on February 22, 2018: the work papers and supporting affidavit of Mr. Jimeno; tables showing combined modeled wind turbine noise and background noise and the supporting affidavit of Mr. Hankard; and the Freeborn Wind Easement Form and supporting affidavit of Mr. Litchfield.¹⁹

The public comment period closed on March 15, 2018.

The Administrative Law Judge's Report was filed on May 14, 2018. Freeborn Wind, KAAL, AFCL and EERA filed exceptions to the ALJ Report on June 8, 2018.

On September 11, 2018, Frank Kohlasch filed a letter, which is the subject of this Motion.

III. THE KOHLASCH LETTER OFFERS LIMITED DELIBERATIVE VALUE IN THIS PROCEEDING.

The Kohlasch Letter was filed on September 11, 2018, well outside of any established comment period. In fact, the letter was filed almost six months after the public comment period closed, over three months after the extended period for exceptions closed, and only nine days before the Commission is scheduled to consider the Freeborn Wind siting docket. MPCA did not provide a witness or testimony or otherwise actively participate in the contested case proceeding. The only other correspondence from MPCA was a short comment letter, dated October 4, 2017, addressing top soil erosion (see Attachment A). There have been no new facts or any procedural activity in this docket since exceptions were filed to the Administrative Law Judge's Report. It is entirely unclear what prompted Frank Kohlasch to file a letter on September 11, 2018. The letter was not marked as "late filed" nor did it include a statement explaining why the filing was

¹⁹ Ex. FR-17 (Jimeno Work Papers); Ex. FR-18 (Noise Tables); Ex. FR-19 (Freeborn Wind Easement Form).

untimely and why it should not be excluded by the Commission as required under Minn. R. 7829.0420, subp. 2.

When determining whether to exclude untimely filings, the Commission must determine if the value of the document to the Commission's deliberative process is outweighed by prejudice to a party, participant, or the public interest caused by the untimeliness.²⁰ Here, Freeborn Wind cautions that the Kohlasch Letter offers little, if any, value in the Commission's deliberative process, beyond the potential offer of a compromise specific to the noise-related conditions to be included in Freeborn Wind's site permit.

Based on some of the language in the Kohlasch Letter,²¹ Freeborn Wind anticipates parties will assert this letter interprets or clarifies the application of the MPCA Noise Standards and should be read as a statement of "general applicability and future effect".²² As the Commission is aware, however, an agency can only engage in rulemaking through a process approved under the Minnesota Administrative Procedures Act ("MAPA"). If statements in the Kohlasch Letter are intended to be an agency's statements of general applicability as to the application of the Noise Standards to all LWECS, they constitute "interpretive" rules issued without proper rulemaking, and any reliance on those statements as an authoritative interpretation of the noise standards by this Commission would be subject to reversal under Minn. Stat. § 14.69.

²⁰ Minn. R. 7829.0420, subp. 1B.

²¹ *See, e.g.*, Kohlasch Letter at 1 ("This letter is intended to help the Commission understand the MPCA's position regarding the application of the state noise standards to LWECS projects.") and at 2 ("[t]he Commission should apply the approach to siting permits, going forward.").

²² Minn. Stat. § 14.02, subd. 4.

An “interpretive rule” is a rule that interprets and explains an agency’s position on a statute or regulation.²³ Under Minnesota law, “interpretive rules,” like all other rules, must follow the MAPA to be valid.²⁴ When an agency attempts to promulgate an interpretive rule without following the rulemaking procedures of the MAPA, courts have enjoined the rule²⁵ and refused to enforce it.²⁶ Courts will invalidate an improperly promulgated rule regardless of whether or not the agency’s interpretation is correct.²⁷

Even if the Kohlasch Letter could be viewed as a “policy statement,” for the same reasons set out above, a “policy statement” has no legal effect.²⁸ Both the author and the timing of the issuance of this letter make it unreliable if offered for this purpose. Mr. Kohlasch is a program manager for the Air Assessment Section; he is not the MPCA Commissioner or the Deputy Commissioner.²⁹ Policy statements generally come from the agency as a body.

²³ See, e.g., *Minnesota–Dakotas Retail Hardware Ass’n v. State*, 279 N.W.2d 360, 364 (Minn.1979).

²⁴ See, e.g., *E.N. v. Special Sch. Dist. No. 1*, 603 N.W.2d 344, 349 (Minn. Ct. App. 1999) (“An agency interpretation that make[s] specific the law enforced or administered by the agency is an interpretive rule that is valid only if promulgated in accordance with the Minnesota Administrative Procedure Act.”) (citing *Application of Q Petroleum*, 498 N.W.2d 772, 780 (Minn.App.1993)).

²⁵ Ssee, e.g., *Sa-Ag, Inc. v. Minnesota Dep’t of Transp.*, 447 N.W.2d 1, 5 (Minn. Ct. App. 1989) (finding that because the statute was “subject to more than one interpretation” and the Department of Transportation clarified, that it had engaged in rulemaking without following the APA, and enjoining the enforcement of the rule)

²⁶ (see, e.g., *White Bear Lake Care Ctr., Inc. v. Minnesota Dep’t of Pub. Welfare*, 319 N.W.2d 7, 7 (Minn. 1982) (“We conclude that calculations made using the per diem method cannot be enforced because the per diem method is a rule which has not been promulgated in accordance with the Administrative Procedure Act.”)

²⁷ See *St. Otto’s Home v. Minnesota Dep’t of Human Servs.*, 437 N.W.2d 35, 44 (Minn. 1989) (finding that even though an interpretive rule may have been “supported by the purpose of the rule and the DHS’s intent” it was still invalid because it was improperly promulgated).

²⁸ See, e.g., § 21 Minn. Prac., Administrative Prac. & Proc. § 5.05.4 (2d ed.) (“[I]f an agency intends the regulated community to comply with a stated policy or if the agency intends to enforce it, the agency must utilize rulemaking procedures to announce it. Otherwise, the policy is of no legal effect.”); see also *Application of Peoples Nat. Gas Co.*, 389 N.W.2d 903, 906 (Minn. 1986) (“unlike a properly promulgated rule, [a] policy statement does not have the force and effect of law”).

²⁹ See Attachment B MPCA Org Chart.

Furthermore, when courts have given any weight to such policy statements, it has been because they were issued well in advance of any decision.³⁰ In *St. Otto's Home*, the Minnesota Supreme Court held that interpretive rule was invalid, even as a policy statement, because it was issued without proper rulemaking and without warning to the affected parties.³¹ In that case, the Department of Humans Services Commissioner offered a new, more restrictive interpretation of a rule and new mandatory requirements at the end of a contested case hearing. Here, as in *St. Otto's Home*, there was no warning of any kind, indicating that this letter should not be given even the minimal weight of a policy statement.

Thus, to the extent that the Commission accepts the untimely Kohlasch Letter in this docket, Freeborn Wind urges the Commission to limit its consideration to the final paragraph of the letter, and its stated support for the compromise language offered by DOC-EERA in its Exceptions filing. Freeborn Wind will be prepared to discuss whether such a compromise is reasonable as a special condition specific to the Freeborn Wind project based on the record developed in this proceeding.

IV. CONCLUSION

Freeborn Wind respectfully requests that the Commission consider the untimely Kohlasch Letter, if at all, for only the limited purposes of considering whether a special condition related to the MPCA Noise Standards is appropriate in this docket. To allow timely consideration of this Motion, Freeborn Wind also requests that the Commission vary the 14-day

³⁰ See, e.g., *St. Otto's Home v. Minnesota Dep't of Human Servs.*, 437 N.W.2d 35, 44 (Minn. 1989) (“Additionally, and perhaps most importantly, the policy statement in *Peoples Natural Gas* was issued at least a year before any of the action and all parties were aware of its contents. In the present case, there was no express warning or notice of the agency's intention to interpret the rule more restrictively or add a combined cost report requirement.”)

³¹ *Id.*

response period for this Motion and allow the parties to address it orally at the September 20, 2018 meeting.

Dated: September 17, 2018

Respectfully submitted,

/s/ Christina K. Brusven

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October 4, 2017

Richard Davis
Energy Facility Permitting
Department of Commerce
85 7th Place East, Suite 280
St. Paul, MN 55101-2198

Re: Freeborn Wind Farm
PUC Docket Number: WS-17-410

Dear Richard Davis:

Thank you for the opportunity to review and comment on the Freeborn Wind Farm project (Project), an 84 megawatt wind farm located in Freeborn County, Minnesota. Regarding matters for which the Minnesota Pollution Control Agency (MPCA) has regulatory responsibility and other interests, the MPCA staff has the following comments for your consideration.

Section 8.14 Soils

- The Site Permit Application does not adequately address how the Project will avoid adverse effects during construction that may contribute to the impairments of the Shell Rock River and Woodbury Creek. The Project proposer will need to comply with requirements for additional best management practices (BMPs) for special and impaired waters in Appendix A Part C of the National Pollutant Discharge Elimination System/State Disposal System (NPDES/SDS) Construction Stormwater Permit (CSW Permit).
- The Site Permit Application does not describe the amount of new impervious surfaces that will be created by the Project and how the effects of increased stormwater from the impervious surfaces will be mitigated. The site will need to comply with requirements for permanent stormwater management for new impervious surfaces that result in 1 acre or more as specified in Part III. D. of the CSW Permit.
- If the project will result in a total disturbance of 50 or more acres, the Stormwater Pollution Prevention Plan must be submitted for review by the MPCA 30 days prior to beginning construction.

Please be aware that this letter does not constitute approval by the MPCA of any or all elements of the Project for the purpose of pending or future permit action(s) by the MPCA. Ultimately, it is the responsibility of the Project proposer to secure any required permits and to comply with any requisite permit conditions. If you have any questions concerning our review of this project, please contact me by email at karen.kromar@state.mn.us or by telephone at 651-757-2508.

Sincerely,

A handwritten signature in black ink that reads 'Karen Kromar'.

Karen Kromar
Planner Principal
Environmental Review Unit
Resource Management and Assistance Division

KK:bt

cc: Dan Card, MPCA, St. Paul
Wayne Cords, MPCA, Mankato
Roberta Getman, MPCA, Rochester

Organizational Chart

August 2018

