

## **EXHIBIT E: PUBLIC DRAINAGE SYSTEM PROTECTION AGREEMENT**

This Public Drainage System Protection Agreement (the “Drainage Agreement”) is entered into by and between Freeborn Wind Energy LLC, a Delaware limited liability company (“Developer”) and Freeborn County, Minnesota (“County”), as a part of that certain Development Agreement entered into by the Parties on 1<sup>st</sup> of March, 2019 (the “Development Agreement”). Capitalized terms not otherwise defined herein shall have the meaning given them in the Development Agreement.

### **RECITALS**

- A. The Developer desires to construct the Project described in the Development Agreement in Freeborn County, Minnesota.
- B. The County and the Developer wish to incorporate into the Development Agreement this Drainage Agreement, for the protection of the public drainage system, all in accordance with the terms and conditions set forth herein. The provisions of this Drainage Agreement shall be governed by Minnesota law, specifically Minnesota Statutes 103D and/or 103E.
- C. In connection with the development and construction of the Project, it may be necessary for the Developer to:
  - i. transport heavy equipment and materials over Public Drainage Systems located in the Project Area;
  - ii. make certain modifications and improvements (both temporary and permanent) to such Public Drainage Systems to allow access road constructions or such equipment and materials to pass over existing Public Drainage Systems; and
  - iii. place Collection and Transmission Systems for the Project adjacent to or under certain Public Drainage Systems identified within Appendix E-1 of this Drainage Agreement for the purposes of carrying electrical current or data from the Project to the Project substation.

## **DRAINAGE AGREEMENT**

In consideration of mutual promises of the Parties contained herein and in the Development Agreement, and intending to be legally bound hereby, the Parties hereby agree as follows:

### **1. Repair of Damaged or Adversely Affected Public Drainage Systems.**

- 1.1 Obligation to Repair Public Drainage System. If Public Drainage Systems are damaged by the Developer Parties, the Public Drainage Systems will be restored by Developer to their Pre-existing Condition. For the purposes of this Drainage Agreement, “Pre-existing Condition” shall mean the flow capacity existing immediately prior to Developer commencing construction of the Project. If Public Drainage Systems on or adjacent to the Project construction area are adversely affected by the Project, the Developer will take such actions as are reasonably necessary to ensure the proper functioning of the Public Drainage Systems, including the relocation, reconfiguration, and replacement of the existing tile lines and waterways. Developer’s obligations under this Drainage Agreement, including, without limitation, inspection and repair of County drainage systems, shall be at Developer’s sole cost and expense. The County Drainage Inspector may elect to negotiate a fair monetary settlement with the Developer for the repair, relocation, reconfiguration, and/or replacement of the damaged Public Drainage System to be performed by the County.
  
- 1.2 Identification of Public Drainage System. Prior to the construction of the Project, the Developer shall identify all Public Drainage System tile lines and open ditches and determine design elevations from the Plans and Specifications on file with the County Auditor and/or by on-site inspections and shall, at least thirty (30) days prior to the start of construction of the Project, report such findings of anticipated conflicts or crossings, including crane paths, to the County Drainage Inspector. All identified public ditch systems and tile lines will be flagged, by the Developer, prior to construction, to alert construction crews to the possible need for tile line protection, repairs, intake repairs, side inlet repairs, etc. The County shall provide all Plans and Specifications on file within sixty (60) days of receipt of a written request by Developer.
  
- 1.3 Access Roads. Thirty (30) days prior to the start of construction on the Project, the Developer shall provide access road locations and alignments to the County which will identify all intersecting points of the Public Drainage System and access roads and provide this information to the County.

The Developer shall be responsible for the following:

- a. the replacement of all Public Drainage Tile within the access road construction limits prior to the commencement of construction of the access road. The tile shall be replaced with an equivalent diameter of dual wall plastic or better pipe. Tile shall be replaced two feet beyond edge of gravel access road. Inspection tees of equivalent diameter pipe shall be placed on

each side of the road crossing at the 2-foot transition point back to existing tile;

- b. the relocation of all Public Drainage Tile that runs parallel to and under an access road to a location outside of the construction limits of the access road;
- c. the notification of the County Drainage Inspector immediately upon completion of surveying and staking of an access road but not later than one week prior to the commencement of the construction of said access road;
- d. the placement of tile line in accordance with Section 2502 Mn/DOT 2018 Standard Specifications for Construction; and
- e. the restoration to pre-construction conditions and drainage patterns.

- 1.4 Collector Lines. Thirty (30) days prior to the start of construction on the Project, the Developer will provide a collector line system map, with line depths, to the County and the Developer will identify all intersecting points of the Public Drainage System and collector lines and provide this information to the County. The Developer will notify the County Drainage Inspector at least two (2) days prior to placement of collector lines.

The Developer shall meet the following requirements:

- a. all collector lines shall be installed at least five (5) foot below Public Drainage Tile unless a conflict, then a shallower depth could be allowed after approval of the County Drainage Inspector;
- b. all Public Drainage Tile that exists at or above the collector line depth will be repaired or replaced by the Developer unless collector line is directionally bored;
- c. any Public Drainage Tile that exists more than one (1) foot below proposed collector line depth will not be required to be replaced;
- d. any collector lines that intersect (i) Public Drainage Tile that are 15” in diameter or larger; (ii) Public Roadways and (iii) Roadway Ditches shall be directional bored;
- e. any collector lines that intersect a Public Drainage Ditch shall be directional bored at least 5 feet below the documented flowline of the Public Drainage Ditch; and
- f. any Public Drainage Tile located within ten feet (measured perpendicular to centerline) of each side of the collector lines will be replaced at Developer's expense regardless of whether actual damage was observed.

- 1.5 Protection of Existing Bridges or Structures. The Developer shall, at their own expense, hire a qualified structural engineer designated by the County Engineer to structurally assess all existing bridges or structures on public drainage ditch

crossings to be used by the Developer and provide documentation to the satisfaction of the County Engineer of acceptable fortification and use of said bridges or structures.

- 1.6 Public Ditch Access Road Crossings. The Developer shall, at their own expense, hire a qualified civil engineer approved by the County Engineer to hydraulically and structurally assess any new temporary or new permanent bridges or structures on public drainage ditch crossings and provide documentation to the satisfaction of the County Engineer of acceptable structural integrity and conveyance of flow. Any such structure shall be properly rip rapped and slopes stabilized to prevent erosion and the Developer shall be responsible for any ditch cleaning required by construction and/or washouts.
- a. The outlet end of pipe must be rip-rapped with Class III material (as defined in the MN/DOT 2018 Standard Specifications), up to the point where crossing will be dug out in the event of high water.
  - b. The height of rip-rap to be determined by Developer's Storm Water Pollution Prevention Plan and shared with the County Drainage Inspector at time of construction.
  - c. The culverts shall be placed at the correct flow line of ditch grade.
  - d. The culverts may be metal or concrete; plastic will not be used.
  - e. The crossing side slopes shall have a minimum slope of 1:2 (1' vertical to 2' horizontal) unless otherwise agreed to by Developer and the County Drainage Inspector.
  - f. Any damage to any portion of the Ditch by the placement of a crossing shall be promptly repaired.
  - g. All material used for construction shall be removed from the property after a ditch crossing is removed.
  - h. All slopes shall be reconstructed to match the slopes existing prior to construction, reseeded, and protected with erosion blankets.
- 1.7 Identification and Marking of Tile Damages. Any Public Drainage Tile, including intakes, culverts, etc., which are damaged, cut or revoked during construction of the Project will be geo-tagged and distinctly marked, by the Developer, by placing a highly visible flag in any excavation spoil banks directly opposite such tiles. This marker shall not be removed until the tile has been permanently repaired and such repairs have been approved and accepted by the County Drainage Inspector.
- 1.8 Conveyance of Flow. If water is not flowing through a damaged tile or is impeded, the tile will be immediately and temporarily repaired until such time that permanent repairs can be made, and in no event shall such temporary repair occur longer than 24 hours after the damage. Any exposed tile line will be

screened or otherwise protected to prevent the entry of foreign material, small animals, etc., into the tile line until permanent repairs are completed.

- 1.9 Examination of Damaged Tiles. Before completing permanent tile repairs, all tile lines will be examined by suitable means on both sides of the trench for their entire length within any work area to check for tile that might have been damaged by the construction equipment. If tile lines are found to be damaged, they must be repaired to their Pre-existing Condition and receive approval from the County Drainage Inspector before covering. The County Drainage Inspector shall inspect such repairs within 24 hours of notification by Developer that repair has been completed.
- 1.10 Permanent Tile Repair Completion. All permanent tile line repairs must be made within fourteen (14) calendar days following completion of construction on or across any Public Drainage System, taking into account weather and soil conditions. Such repairs shall be subject to the reasonable approval of the County Drainage Inspector.
- 1.11 Materials for Repair. All tiles will be repaired with materials of the same or better quality as that which was damaged and shall have the same drainage capacity as that which was originally in place.
- 1.12 Support of Tile Repair. Where tile lines are severed or damaged by the Project construction, three-sided steel channel iron, angle iron, full-rounded slotted pipe or half pipe will be used to support the repaired tile lines.
  - a. The support member will be of sufficient strength to support a 10 ton point load on the surface directly above the repaired tile line.
  - b. The support member will extend a minimum of 3 feet into the previously undisturbed soil on both sides of the trench and will manner that will prevent it from overturning. If the tile repairs involve clay tile, the support member will extend to the first tile joint beyond the minimum 4 foot distance.
  - c. Within the trench, 1½ inch wash gravel, 4 inch crushed stone, sandbags, or bags of concrete will be backfilled under all tile lines to provide a positive support to the tile lines. Concrete blocks are also acceptable forms of support.
  - d. In no instance will the grade of the Public Drainage System Ditch or tile be changed from pre-construction to post-construction.
- 1.13 Replacement of Public Tiles. All Public Drainage Tiles under roads that are damaged from the roadway being utilized by construction traffic shall be replaced by the Developer at the end of the project in a manner reasonably acceptable to the County Drainage Inspector. Paved roadways shall have the tiles bored under the roadway. No open cut shall be permitted. Should the tile within the right of way require replacement, inlets shall be placed over the tile line on both sides of

the Roadway Ditches to allow for future monitoring of the tile flow and to help determine the location of the tile line.

- 1.14 County to Enforce for Drainage Authority. For purposes of the Development Agreement and this Drainage Agreement (the “Agreements”), Developer and the Drainage Authority have agreed that the County Engineer shall have the authority to enforce the Agreements as they relate to the Public Drainage Systems identified pursuant to this Drainage Agreement, as may be amended from time to time. Any disputes between the Developer and County Engineer as to items requiring restoration or repair of Public Drainage Systems shall be resolved by an independent engineer as set forth in Articles 7.1 and 7.2 of the Development Agreement.

## **2. Installation of Additional Tile Lines.**

- 2.1 Continuation of Drainage. The Developer shall be responsible for installing such additional drainage tile and other drainage measures as are necessary to properly drain wet areas on the permanent and temporary crossings caused by the construction and/or existence of the Project access roadways or cabling within Public Road Right-of-Ways and within the Right-of-Way of Public Drainage Systems, whether open ditch or tile. For the purpose of this paragraph, for a period of five (5) years following the date of the Certificate of Completion, it is presumed that any wet areas located in the permanent and temporary easements are caused by the construction and/or existence of the Project unless the Developer can prove that the construction and/or existence of the Project is not the cause of the wet areas.

## **3. Compaction, Rutting and Soil Restoration.**

- 3.1 Compaction, Rutting and Soil Restoration. Compaction will be alleviated on all Public Drainage System Right-of-Way traversed by the construction equipment. Right-of-Way that has been compacted will be plowed with three passes of a v-ripper or chisel plow at least eighteen (18) inches deep. In areas where topsoil has been segregated, the Developer will first plow the subsoil with three passes of a v-ripper or chisel plow at least twelve (12) inches deep before replacing the segregated topsoil.

Any crane path crossing the Right-of-Way of the Public Drainage System shall utilize moveable crane mats.

The Developer will restore all rutted land to as near as practical to its pre-construction condition on Public Drainage System Rights-of-Way.

All disturbed areas shall be reseeded and restored to original conditions. If there is any dispute between the Developer and County Drainage Inspector as to what areas need to be ripped or chiseled, the depth of which compacted areas should be

ripped or chiseled, or whether the necessary reseeded and restoration to original condition has occurred, Developer shall engage an independent engineer consistent with Articles 7.1 or 7.2 of the Development Agreement, as applicable.

#### **4. Determination of Construction-Related Damages to Public Drainage System.**

4.1 Construction Related Damages. For a period of five (5) years following date of the Certificate of Completion, it will be presumed that any damage, failure, wet areas, tile breakage or other problems with a Public Drainage System identified in Appendix E-1 beyond normal, expected ordinary problems, was caused by the construction or activities involved with the construction. Unless the Developer can prove that damages to a Public Drainage System were not caused by the construction and/or the activities involving the construction, the Developer shall repair the Public Drainage System, to the reasonable satisfaction of the County Drainage Inspector.

#### **5. Expense Reimbursement to Public Drainage System.**

5.1 Reimbursement. The County Ditch Inspector or a representative of the County Ditch Inspector shall conduct on-site inspections of all damaged and repaired public drainage and tile systems. The Developer will reimburse the County for the reasonable cost of the personnel necessary to do the above inspections. The rates for such inspections are provided in Appendix E-2.

#### **6. General Provisions.**

6.1 Cooperation. The Parties agree to communicate and cooperate in good faith concerning the safe implementation of the Project and work together to prevent or correct any hazardous road conditions that may be created by the Project.

6.2 Amendment or Waiver. No waiver and no modification or amendment of any provision of this Drainage Agreement shall be effective unless specifically made in writing and duly agreed to by the Parties. Waiver by any Party of any breach or failure to comply with any provision or term of this Drainage Agreement by another party shall not be construed as, or constitute, a continuing waiver, or a waiver of any breach of, or failure to comply with, any other provision of this Drainage Agreement.

6.3 Governing Law. This Drainage Agreement shall be governed by and interpreted in accordance with the laws of the State of Minnesota without reference to choice of law principles thereof. For the purpose of resolving any dispute with respect to this Drainage Agreement, each party agrees to non-exclusive personal jurisdiction and venue in Freeborn County, Minnesota.

6.4 Severability. If any provisions of this Drainage Agreement are determined to be unenforceable, invalid or excessive by a court of competent jurisdiction, this

Drainage Agreement can thereafter be modified in accordance with Article 6.2 of this Drainage Agreement, to implement the intent of the Developer and County to the maximum extent allowable under law and the remainder of this Drainage Agreement shall remain unaffected and in full force and effect.

- 6.5 Security. The Developer's obligations regarding security for performance of its obligations under this Drainage Agreement shall be governed by Article 11 of the Development Agreement. The County's obligations regarding reduction, use and return of the security given by Developer also shall be governed by the provisions of Article 11 of the Development Agreement.
- 6.6 Events of Default and Remedies. The Parties' obligations and conduct relating to default, notice and remedies shall be governed by Article 12 of the Development Agreement.

*[Signatures follow on the next page.]*

**IN WITNESS WHEREOF**, the County and the Developer have caused this Drainage Agreement to be duly executed.

**FREEBORN WIND ENERGY LLC**

By: \_\_\_\_\_

Date: \_\_\_\_\_

**FREEBORN COUNTY**

By: \_\_\_\_\_  
Christopher N. Shoff, Chairperson

Date: \_\_\_\_\_

**ATTEST**

And: \_\_\_\_\_  
Thomas E. Jensen, County Administrator

Date: \_\_\_\_\_

**RECOMMENDED FOR**

By: \_\_\_\_\_  
Susan G. Miller, County Engineer

Date: \_\_\_\_\_

**APPROVAL AS TO FORM AND EXECUTION**

By: \_\_\_\_\_  
David Walker, County Attorney

Date: \_\_\_\_\_

**EXHIBIT E: PUBLIC DRAINAGE SYSTEM PROTECTION AGREEMENT**

**APPENDIX E-1  
ANTICIPATED CONFLICTS  
with  
PUBLIC DRAINAGE SYSTEM**

**SEE ATTACHED**

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**APPENDIX E-2  
REIMBURSEMENT RATE FOR INSPECTIONS**

Actual time incurred doing inspections by County Drainage Inspector or his designated inspector shall be reimbursed at a rate of \$55/hour plus mileage on County vehicle, invoiced monthly.